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RESOLVING THE ETHICAL CHALLENGES OF IRREGULAR WAR

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ABSTRACT

After more than ten years of war, the United States military is still trying to come to grips with the practical and ethical demands of combating irregular adversaries. This discussion will examine and attempt to resolve those ethical challenges, especially as they relate to confrontation with non-state actors. These ethical difficulties often arise because of a systemic misapplication of traditional military ethics to non-traditional ethical problems.

From a practical perspective, military ethical decision-making entails balancing risk between missions, Soldiers, and civilians. In the traditional view, Soldiers are obligated to accept risk when undertaking legitimate missions. They may displace as much risk as possible on enemy combatants; however, what they cannot displace belongs to them. In the course of conducting operations, they may further place noncombatants at risk of foreseen, but unintentional harms as long as they conform to the principles of discrimination and proportionality.

The differences between irregular and regular war disrupt this balance. Where regular adversaries fight apart from civilians, irregular adversaries are integrated into and indistinguishable from them. Where regular wars are fought to impose a political will, irregular wars are fought to establish and strengthen political order.

As the ends of war shift from imposing will to preserving order, the ethics of war
shift as well. Obligations to accomplish mission become permissions, permissions to protect the force become obligations, and prohibitions against targeting noncombatants become permissions as the presence of a political order provides space to seek alternatives to placing risk on the mission, Soldiers, or noncombatants. Failure to understand this shift has resulted in absurd situations where Soldiers are sometimes prohibited from attacking adversary combatants but permitted to kill innocent noncombatants who are citizens of countries with whom the US is not at war.

Avoiding such situations involves understanding that preserving order entails a relationship between combatants and the communities in which they operate that not only includes allied members of those communities but adversaries as well. Understanding the complexity of those relationships will be critical to understanding the norms associated with balancing risk and applying the principles of proportionality and discrimination when combating irregular adversaries.
The research and writing of this thesis is dedicated to my family, for their sacrifice and support,

Many thanks,
Charles A. Pfaff
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Introduction: Moral Uncertainty in an Era of Persistent Conflict

The United States military is coming to grips with the fact that the days of fighting a discrete enemy over well-defined objectives in an intense but relatively short-lived confrontation has yielded to an “era of persistent conflict” characterized by uncertainty and complexity not only regarding how to fight, but also who to fight. However, while there may be increasing clarity regarding the most effective ways to win such conflicts, there is still a great deal of ethical confusion.

A number of examples well illustrate this point. In late 2009, a Marine patrol in Afghanistan was denied permission to engage an apparent insurgent group emplacing roadside bombs. In mid-2010 a non-commissioned officer in contact with the enemy was prohibited from employing smoke and illumination rounds—which are not intended to create casualties—for fear that falling debris from the rounds might harm civilians. After an improvised explosive device (IED) wounded three Soldiers \(^1\) on patrol, a unit from the 82d Airborne had to rely on Afghan security forces to respond to the attack. While the Afghan forces did detain suspected insurgents, the corrupt and inefficient nature of the Afghan court system left many Soldiers skeptical justice would be done.

In each of these examples, Soldiers and Marines not only objected to accepting a disproportionate amount of risk relative to the enemy, they objected to restrictions on attacking the enemy because that impedes victory. Impeding victory prolongs the war, increasing risk not only to themselves, but to noncombatants as well. The result is a normative mess. While the tension between killing the enemy, force protection, and noncombatant immunity have been an enduring feature of ethical decision making in war,
changes in the way the US fights wars have called how it has resolved those tensions in the past into question.

The reason for the confusion is that one of the major assumptions of contemporary military ethics – the practical separability of civilians and civilian activity from war fighting—does not apply in irregular warfare. Where regular wars are fought between peoples, irregular wars are fought “amongst” peoples. Where regular wars are won by destroying the enemy’s army, irregular wars are won by getting the enemy and their supporters to change their minds. This fact suggests that ethical restrictions, which attempt to ignore or isolate civil society from military operations, will undermine mission success, prolong the war, and lead to more suffering. The way out of this mess is developing an ethic that accounts for the central role civilians play on the “irregular” battlefield.

Consequently, as the US “way of war” changes, so must its ethics of war. To show how it must change I will first discuss the moral considerations that enable and constrain war-fighting and then how irregular war affects their application. This effect will raise specific challenges to current norms governing the violability of state sovereignty and territory, targeted killings and assassination, and operations directed at civilians and civilian populations.

Terms of Reference

Over the last several years, there has been a great deal of debate on how to characterize the conflicts in which the United States currently finds itself. As a result, finding the right label for the kind of unconventional conflicts discussed here is difficult, as the literature is rarely consistent.
The term “unconventional” is unsatisfying because as these sorts of conflicts proliferate, they become the convention. But few other terms seem to fare much better. For some time, most scholars and practitioners used the term “asymmetric warfare” in place of unconventional to better capture what made these sorts of conflicts different. However, the use of asymmetric raised objections from a number of other scholars and practitioners who were concerned that it did not sufficiently distinguish between conventional asymmetries, where one side simply brings more fire power to the field than the other and the “unconventional” threats the United States faces today, which use unexpected means to strike at vulnerable points. Rupert Smith, author of *Utility of Force*, for example, views the term “asymmetric” as simplistic and prefers “war amongst the peoples,” noting that the salient difference between the kinds of conflicts people tend to view as regular and irregular involves the centrality of the civilian population to the war’s outcome.4

T.X. Hammes, author of *The Sling and the Stone*, believes that wars characterized by the use of asymmetric means such as terrorism and insurgency are best described as *fourth generation war*. He argues that there have been “generations” of warfare where subsequent generations represent a “Kuhnian” paradigm shift in war’s ends, means, and adversaries. In this view, first generation warfare focused on destroying the enemy’s “close” forces; second generation warfare employed firepower to destroy enemy forces in range; and third generation warfare employed maneuver to strike at enemy command and control as well as logistic capabilities. Fourth generation warfare, however, changed the focus of war from the enemy’s military capability to the will of the people. To win fourth generation wars, one does not need to destroy the enemy’s armies, but must rather change
the minds of enemy policy makers.\textsuperscript{5} In this sense, Hammes is very much in line with Smith’s view.

With the shift in ends associated with fourth generation war also comes a shift in means. At this point where attempts to label these sorts of conflicts enter into a sort of Wittgenstinian language game where the objects of this discussion have a family resemblance without a clear definition to unite them. There are a number of ways to change the minds of policy makers without resorting to violence or any other sorts of means normally associated with war fighting. For example, diplomatic and economic means can be used to change policy maker’s minds, but if we equate these means with war, then they would reasonably warrant a military response. Warranting such a response, however, seems to defeat the purpose of such means, since they are employed as an alternative to the violence of war, not a continuation of it.

It is this difficulty in distinguishing between war and conflict that is the problem with views like Smith’s and Hammes’. Because they do not offer a principled way of distinguishing between international conflict and war, they seem to entail that all international conflict is war. This imprecision makes ethical analysis difficult, if not impossible. If all confrontations entail war, then a violent response to non-violent means will often seem justifiable.

Violence, however, remains central to most definitions of war. The British strategist Colin Gray argues that whatever war is, it is comprised by “more or less, but always to some degree, organized violence motivated by political considerations.”\textsuperscript{6} It is this service to policy, he argues, that distinguishes war from other sorts of violence, such as recreational and criminal.\textsuperscript{7} In his view, this “nature” of war stays constant. What does
change is its “character,” which describes the specific ends and means associated with a particular style of fighting. As he states, “(i)f you believe that different wars are examples of different types of political and social behavior, you invite serious error in understanding the continuities amidst the more or less obvious changes over time and in different contexts.”

Instead, he argues, from the strategists’ perspective, most wars are variants of what one would term “regular” or “irregular,” where regular and irregular are distinguished by the choices distinctive security communities make regarding how they will compete and, when necessary, fight. For example, by relying on formations of troops, armor, and aircraft the US military has adopted a concept of regular war that favors confronting and destroying the enemy in open battle. This point, of course, suggests that what is regular for one community may be irregular from the point of view of another. To eliminate the confusion such relativism may cause for this analysis, I will argue from the point of view of the US security community and those communities who respond to security concerns more or less the same way the US does.

By adopting this viewpoint, I will end up adopting the viewpoint of the arguably stronger side. As Qiao Liang and Wang Xiangsui, the authors of the influential Unrestricted Warfare, noted, writing in the aftermath of the 1991 Gulf War, it would be suicide for any state to take on the US’s conventional forces. This fact, they note, motivated a number of state and non-state actors to look at irregular means to confront the American military. However, in taking up the view of the stronger side, I do not intend to take up the view that the stronger side is bound by tighter restrictions on proportionality and discrimination than the weaker side.
Such views are typically justified in the same way one would justify weaker kids defending themselves against a bully using means that one might otherwise consider unfair. The view of the weaker side as presumptively just is further reinforced by the idea that because it will bear a greater cost relative to the stronger side, the sense of injustice driving them to fight has greater weight.\(^{12}\) However, as recent experience has shown us, while the weaker side may feel an intense sense of injustice it can be their sense of justice that is distorted. Islamic fundamentalist members of al Qaeda and the Taliban may feel that the elected governments of Iraq and Afghanistan are unjust, but the alternatives they propose are horrific in comparison.

I am going to set aside such *jus ad bellum* concerns and simply point out that if the stronger side is the bully, then it should not be fighting in the first place. This point does not mean that Soldiers fighting for a cause they believe unjust should not abide by the rules of warfare – they should. However, if they really believe their cause is unjust, then they should really not be fighting in the first place. All things being equal, it is usually good to minimize the harms one does commit. However if one should not commit those harms in the first place it is nonsensical to then discuss what would count as minimal harms. So for the purposes of this discussion, unless otherwise noted, I will assume the justice of the stronger side’s cause.

As the stronger side, the US security community has seemed to adopt a view of irregular war that Joint Publication 1-02 defines irregular warfare as:

A violent struggle among state and non-state actors for legitimacy and influence over the relevant population(s). Irregular warfare favors indirect and asymmetric approaches, though it may employ the full range of military and other capacities, in order to erode an adversary’s power, influence, and will.\(^{13}\)
Interestingly, this same publication does not have a definition of regular war. It does describe conventional forces as those that do not employ nuclear, biological or chemical weapons and which are not special operations forces; however, by describing these forces in terms of what they are not US doctrine leaves open the question what they are. By leaving this question open, this doctrine introduces an ambiguity regarding conventional forces that creates challenges to their employment. Conventional forces may be like the proverbial hammer, but if one does not know what a nail looks like, it will be difficult to be sure one is using the hammer correctly.

This mismatch is symptomatic of the conceptual failure that has led to ethical difficulties like the ones described above: conventional forces play by conventional rules but these are not the rules of the game they are playing when they are combating irregular adversaries.\textsuperscript{14} Just as there is a right way to use a hammer, there is a right way to use military forces, both from a practical and moral viewpoint. This point does not mean that conventional forces cannot ethically or effectively be used against irregular adversaries. It just means that when they are used against such adversaries what they are doing is different from what they are doing when they are used against regular adversaries. As the French philosopher Jean Jacques Rousseau observed:

\begin{quote}
War then is a relation, not between man and man, but between State and State, and individuals are enemies only accidently, not as men, nor even as citizens, but as Soldiers; not as members of their country, but as its defenders. Finally, States can have for enemies only other States, and not men; for between things disparate in nature there can be no real relation.\textsuperscript{15}
\end{quote}

Rousseau makes an important point here. Wars between states are different than wars between states and non-state actors. This point does not mean that there cannot be violence between states and non-state actors; however, if we want to call it war, it is war in a different sense than war between states. This difference arises because fighting over
sovereignty, which typically states do, is different from fighting for sovereignty, which is typically the aim of irregular adversaries. So Rousseau overstates his point at the end: there can be real relations between disparate things; however, the rules that apply to relations between like things are not the rules that apply to relations between disparate things.

So for the purpose of this discussion, I will further refine the definition of irregular warfare to include only those non-state actors that challenge an existing state order for legitimacy. Such actors include insurgents, terrorists, militias, and criminal organizations that “challenge the authority of states, challenge the rule of law, (and) use violence in unconventional, asymmetrical, and indiscriminate operations to achieve their aims.” Such groups, of course, may receive support from other states (proxy wars are paradigmatic of irregular conflict); however, what distinguishes irregular conflict is the aims. As long as such groups challenge the state’s sovereignty and monopoly on the use of force, they are irregular adversaries and fighting them is a form of irregular warfare.

This additional refinement then gives us a notion of regular warfare that entails regular adversaries, who are principally state actors, fighting to impose sovereignty over another state’s territory by employing forces that are in principle separable from the civilian population. It further gives us a notion of irregular warfare that irregular adversaries, who are principally non-state actors, are fighting to challenge a state’s sovereignty by employing forces that, for the most part, are integrated with or are at least indistinguishable from the civilian population.
**Moral Foundations**

By taking their oath and assuming their role, Soldiers have made a *prima facie* moral commitment to uphold human dignity, including the basic rights to life and liberty. This commitment entitles Soldiers to use force and obligates them to take risks to defend those rights. In the context of state power, this defense entails the establishment of just and stable domestic and international orders.

The rights of noncombatants, however, further require Soldiers to observe the limits of proportionality and discrimination when employing that force. The imperative to accomplish missions, however, places limits on how much risk Soldiers are required to take when observing those restrictions. Soldiers are not required to take so much risk that the mission will fail or that they will not be able to carry on the war effort. For that reason, the foreseen, but unintended killing of civilians and destruction of their property may be permitted.

This ethical framework yields three competing moral imperatives of war: 1) accomplish missions; 2) protect the force; and 3) minimize harm to noncombatants. In this context, accomplishing missions is closely associated with military necessity, understood here as those acts necessary to compelling submission of the opposing forces. This imperative naturally comes into tension with protecting the force and minimizing harm to noncombatants because compelling the submission of enemy forces requires Soldiers to take risks. Force protection requires Soldiers to look for ways to reduce that risk; however, the requirement to minimize harm to noncombatants entails, as I will discuss in detail later, that there are limits to how much risk they can displace and still accomplish the mission.

So Soldiers are forced to constantly make tradeoffs on who will bear the risks
associated with war fighting. In regular warfare, Soldiers try to place the most risk on enemy combatants while avoiding as much risk to themselves and noncombatants as is compatible with accomplishing their missions and the other restrictions noted above. Had they been playing by the rules of regular warfare, the Soldiers and Marines in the above examples would have been permitted to fire on the insurgents, call in smoke and illumination rounds, and detain and restrict the movement of villagers without consideration of any local legal, political, and social considerations.

This balance works because in regular wars civilians and civilian activity are, for the most part, *practically separable* from war fighting. In regular wars, armies win by annihilating or attriting other armies who are typically easily distinguished from the civilian population. The ontology of this way of war is fairly straightforward: the actors are either friends or enemies; actions in war entail either resistance or surrender; and the end-state of war is either victory or defeat. It is certainly true that enemies may fight to a draw, but such a state of affairs is not stable and entails only a cessation of hostilities until one side is ready to fight again. The state of war itself continues until the enemy relationship has transformed into one of peaceful competition or one or both sides have ceased resisting the other’s will.

Of course, practical inseparability, as I use it here, is not simply about degrees of cooperation between adversary combatants and civilians. It may be true that in irregular wars civilians assist, aid, or otherwise enable the enemy war effort. However, this is true in regular war as well. For something to be practically inseparable in this context thus entails having no other function but to fight wars. In irregular war, though, the loyalties, attitudes, and quality of life of the people do not simply impact the outcome of a conflict:
they determine it.\textsuperscript{17} Thus, civilians are not simply part of the battlefield; they \emph{are} the battlefield. In such a context, it is arguable then how separable from the functions of war fighting civilians really can be.

So where the objectives of regular war are often expressed in terms of units destroyed, terrain controlled and territory seized, the objectives of irregular war are best expressed in terms of the strength of government institutions and the willingness of the people—including the enemy—to cooperate with realizing one side’s goals and objectives. In this way, irregular wars broaden the means and ends of war modifying its ontology: friend and enemy are joined by collaborators, supporters, and sympathizers; resistance and surrender are joined by acceptance and rejection; and victory and defeat are replaced by success and failure. Additionally, such conflicts are not zero-sum. If one can achieve one’s interests by benefiting the enemy, or some sub-group within the enemy’s community, then there will be occasions when one should do so.

These differences between regular and irregular warfare will entail differences in the ethics that govern both. For the purposes of this discussion, I will refer to the ethics of regular warfare as the “traditional view,” largely identified with Just War Theory, especially as articulated in its secular version by Michael Walzer. Typically, this view is characterized by \textit{jus ad bellum} principles that emphasize violations to state sovereignty and territorial integrity and \textit{jus in bello} principles that emphasize noncombatant immunity and the moral equality of combatants.\textsuperscript{18} In response, I will argue for a non-traditional view that calls many of these principles into question.
Risk, Ethics, and Irregular Warfare

The shift in emphasis from armies to populations poses a difficult moral problem for combatants. Soldiers are morally obligated to conduct operations to defeat the enemy. That is what I mean by the imperative to accomplish missions. When they cannot displace the risk associated with those operations onto enemy combatants, they have to assume it themselves. This point does not mean Soldiers have to undertake every mission or may not consider risk to themselves when considering what missions to undertake. However it does mean that they cannot stay on their bases waiting for the enemy combatants to present themselves. At some point they have to fight and when they do they will still have to make decisions about where to place risk.

When enemy capability becomes integrated to the point of logical inseparability from civilians and civil society, however, a conflict arises between obligations to accomplish missions and obligations to avoid harm to noncombatants. If enemy capability is identified with noncombatants, then it is effectively off-limits for Soldiers to attack. When enemy capability is off-limits to attack, victory tends to be elusive and risk to Soldiers tends to be high. In such cases, the pressure to loosen restrictions on noncombatant immunity increases.

It has been this dynamic that has led to many of the conundrums associated with combating irregular adversaries. In order to minimize risk to noncombatants, the US military has sometimes adopted a policy of “radical noncombatant immunity” that resulted in the absurd situations described above. Further, in order to minimize risk to combatants, the US has sometimes adopted an equally radical policy of force protection that prohibited Soldiers from exposing themselves to risk. In fact, a reluctance to leave their heavily fortified bases prior to the “surge” in 2006 has often been cited as a reason
for the difficulties the US had in controlling the violence in Iraq. Risk aversion has also been associated with the failure of peacekeeping efforts in the Balkans in the 1990s. Another obvious example of risk-free warfare has been the employment of unmanned drones that use precision munitions to kill insurgents and terrorists. Though the destruction they cause is limited, they still have led to a number of noncombatant deaths. What is particularly troubling about these deaths, however, is not that they may not be proportional, but they often occur in countries with which the US is not at war.

The point here is not that minimizing risk of harm to combatants and noncombatants is wrong. Rather the point is that by pursuing dual policies of radical force protection and radical noncombatant immunity, US military leaders have created situations where Soldiers sometimes cannot place risk on adversary combatants nor take risks to prevent harms to noncombatants. Of course, these are not formal policies. However, as these examples show, in practice, US forces still wrestle with how to balance risk to themselves, the mission, and the populations in which they operate.

Resolving the tension described above requires understanding how the nature of the opponent can constrain and enable permissions to commit harms. In regular war, permissions associated with accepting and displacing risk are enabled by the presence of the “enemy,” understood in a particular sense –namely, a collective that has the capability, will, and intent to represent an existential threat to one’s own collective. In such contexts, establishing the kind of civil order that enables both international and domestic stability requires the destruction of the enemy’s forces.

Once that enemy is destroyed, however, the point of military operations is to support the establishment of a friendly (or at least not hostile) central government and the
institutions necessary to maintain political stability. The killing of civilians and the destruction of their property—even if unintended—obviously undermines this process. This point alone suggests that Soldiers may be morally compelled to accept more risk to themselves than in regular wars. The nature of the conflict makes it difficult, if not impossible, to place that risk directly on the enemy and it is morally, as well as practically, self-defeating to place this risk on civilians.

There are, however, ways to mitigate combatant risks that may be morally obligated. The idea that irregular wars are won by imposing, maintaining, and strengthening a particular civil order, rather than simply destroying it, suggests the character of such operations will incorporate many of the traits of domestic law enforcement. Where Soldiers in regular wars seek to use the most force permissible, police enforcing the law seek to use the least possible. Where Soldiers must minimize noncombatant casualties, police must not only avoid them, but also act proactively to prevent them. However, police are also permitted to limit the risk they expose themselves to when trying to maintain that order. The reason for this is largely due to the fact as long as that order persists, there are alternatives to using force.

_Fighting irregular adversaries:_ Thus the ethics of irregular warfare I will articulate will incorporate the insights and practices of both war fighting and law-enforcement that respects the rights and obligations of Soldiers and civilians in a way that supports the establishment of a just international and domestic order.

The shift in emphasis from destroying a political order to strengthening it entails a shift from killing enemies to building cooperative relationships. This shift does not mean combatants may not use lethal or coercive force to facilitate these relationships; however,
irregular warfare entails multiple allied and adversarial relationships that each represents different liabilities to risk and harm for both the combatant and noncombatant.

Further, the emphasis on order also entails an emphasis on fairness in order to make sense of the risks and harms combatants must take and must commit. A just political order relies on just social institutions. Just social institutions, as John Rawls famously argued, rely on their ability to fairly distribute the social goods a society relies on to thrive. This point, in fact, suggests what is often missing from an ethic of combating irregular adversaries: a sense of fairness that allows one to resolve, even violently resolve, the differences that drive the sides apart, while still setting conditions for bringing these same sides together.

**Conclusion**

The discussion that will follow will attempt to articulate a way that Soldiers may conceive of their roles in uncertain and complex environments that further allows them to fairly balance all of their ethical obligations. The application of ethical standards associated with regular wars in irregular contexts have placed Soldiers in often absurd positions where they end up showing greater concern for the enemy than for those they are there to defend. This absurdity has created a great deal of pressure to abandon these restrictions altogether. Abandoning these restrictions, however, is not only immoral; it is also unnecessary. It is possible to combat irregular threats justly and effectively.

Here practical and moral concerns converge. Combating irregular threats require the US military to develop a number of new capabilities, organizations, and doctrines in order to counter the range of threats this way of war represents. But this point also suggests that when developing these new capabilities, one is also obligated to seek
alternatives to practices that make a fetish of tactical victories, protecting Soldiers, or avoiding civilian casualties. Successful ethical reasoning, just like successful practical reasoning, entails balancing competing demands, not ignoring them.
Chapter One: Moral Foundations

The Challenge

The central problem of military ethics is determining when states may ethically resort to war and what obligations, permissions, and prohibitions exist when doing so. Traditionally, most theories of just war permit the resort to force when a state is confronted with an “act of aggression,” which these theories typically describe as a violation of a state’s right to political sovereignty and territorial integrity. In response to such an act of aggression, combatants may kill or detain enemy combatants as well as destroy certain equipment, facilities, and infrastructure directly associated with the enemy’s ability to fight. To do that ethically, they must balance the demands associated with military necessity and force protection with minimizing harm to noncombatants. That balance requires combatants to use proportional force and discriminate between combatant and noncombatant targets.

Combating irregular threats, however, poses a number of challenges to this traditional view. Terrorists and insurgents are rarely capable, at least at the outset of hostilities, of violating sovereignty or occupying territory. So according to this “traditional view” of just war, it would never be permissible to employ military force against such threats. But recent events have shown that irregular adversaries can pose a significant threat to a state’s citizens and its interests, to which a military force is the only effective response. In some cases, of course, terrorists transform into insurgents and insurgents into more regular forces that may at some point manage to occupy and control territory. But even then it is not clear what permissions and restrictions the state has in
combating those insurgents, since the civilians within that territory, and most often the insurgents as well, are still citizens of that state.

The other challenge posed by irregular threats lies in how they blur the distinction between combatants and noncombatants. Traditional *jus in bello* norms require Soldiers to discriminate between civilian and military targets when using force. This makes sense when the enemy’s ability to wage war is largely distinguishable and separable from the larger civil society. But irregular adversaries are often *indistinguishable* from civil society, making the employment of military force problematic. In such environments, these just war norms only tell Soldiers what they may not do, not what they may. Given the harm irregular threats can represent and the state’s obligation to protect its citizens, Soldiers must still do *something*.

In fact, traditional approaches to military ethics, especially as they are represented in just war thinking, often confuse matters when they describe what Soldiers should or should not do when confronted with irregular threats. For example, in the context of counter-insurgency operations in Iraq and Afghanistan, just war thinking has permitted collateral damage that has undermined the civil order those military operations are intended to impose. At the same time these norms have prohibited Soldiers from killing or detaining the enemy who threatens that order in the first place. These counter-intuitive outcomes suggest that these approaches need to be revised in light of the demands of combating irregular adversaries.

The difficulty with the traditional view is not that it is wrong. Rather, because it does not recognize the central role civilians and civil society play in determining the outcome of irregular conflicts, it risks exposing Soldiers to moral and physical harms to
which they are not liable. Confronting irregular threats does not change the fact that Soldiers must kill the enemy, protect the force, and minimize non-combatant casualties. Nor does it change the requirement to account for military necessity, proportionality, and discrimination when pursuing such threats. What does change is how these competing demands are balanced.

In this chapter I will lay out a moral framework from which to address the challenges of combating irregular threats. I will begin by briefly articulating the traditional view and then showing, by means of examples, how this view places Soldiers combating irregular adversaries in counter-intuitive positions as they try to balance competing obligations of mission accomplishment, force protection, and avoiding harm to noncombatants along with the constraints of military necessity, proportionality and discrimination. In subsequent chapters, I will apply this framework to the specific challenges of combating irregular threats.

**Traditional Views of Just War**

In what I will refer to as the “traditional view,” the right of states to make war begins with the idea that individuals have certain basic rights, most notably the rights to life and liberty, where the right to life is generally understood as the right not to be killed unjustly and the right to liberty is understood as the right to choose how one maximizes available social opportunities. In exercising these rights, people have an additional right to form groups to provide space to create and take advantage of those social opportunities and direct resources for their protection. These groups are typically referred to as “states,” which comprise the social, political, and legal institutions through which these rights are exercised. Of course, states are not necessarily the only sort of collective that
may have rights, but to the extent a group has the rights to sovereignty and territory, and the institutions necessary to develop and implement the policies necessary to exercise that sovereignty, then for the purpose of just war thinking, these collectives are best thought of as states.

To the extent the state does defend the rights of its citizens it also possesses rights of its own, namely, the rights of political sovereignty and territorial integrity. In the traditional view, political sovereignty is understood as the right of a people to self-government and territorial integrity is understood as the right to space in which to do that governing.  

In this view, the right to political sovereignty entails the right to territorial integrity, which simply recognizes that in order to exercise sovereignty, people need somewhere to live. However, not only do people require space; they require resources as well. Thus, along with space, territorial integrity also entails a right to the resources within that territory. It is worth noting that a people’s right to space and resources is not unlimited. For example, a state may lack a resource necessary for its economy, but that does not mean it has a commensurate right to seize that resource from a neighbor.

In this view, the state’s collective rights to sovereignty and territory are the embodiment of the individual citizen’s rights to life and liberty. When an adversary threatens to violate those rights, a state has a just cause to go to war. How these rights are justified and related is well reviewed in the literature and I do not intend to describe that in more detail than I have already done. The point here, however, is that in investing the state with these rights, citizens submit themselves to the order the state requires to receive the kind of protection only the state can provide. This Lockean sort of arrangement, where citizens give up the right to punish those who unjustly interfere with their
freedoms to the state, is, as Eric Patterson notes, the “fundamental social contract—security for acquiescence to authority.”

As the German sociologist Max Weber famously noted, to fulfill the social contract, states must have a monopoly on the use of force. By accepting the monopoly on force, the sovereign takes on the responsibility of maintaining social order, which includes ensuring members of the society do not take unjust advantage of one another and are also kept free from unjust external interference. It is this obligation of the state to protect civilian lives and social order that not only permits, but can also obligate the state to employ force when those lives and that order are threatened.

In fact, Patterson notes that early conceptions of just war theories presumed the obligation of the state was to maintain the sort of order on which society depends. Of course, military force is not the only kind of force available to the state. Law enforcement agencies are also empowered to use force under certain circumstances to fulfill the state’s obligation. While I will say more about how the ethics of force differ between military and law enforcement later, the point here is that because the state is obligated to protect its citizens, and to the extent the resort to military force is the best alternative to providing that protection, then the state has a prima facie obligation to use it.

Even when the resort to military force is justified, it does not follow that any use of military force is justified. As I will discuss in the following section, there should be and are ethical restraints on the use of military force. However, the traditional view of these restrictions sometimes prevents the state from meeting the demands of combating irregular threats and should be reconsidered. Fulfilling one obligation at the expense of another is both immoral and, as I will argue, unnecessary.
Combating Irregular Threats: Challenges to the Traditional View

Contrary to Patton’s famous remark that war is about making the other fellow die for his country, from the Soldier’s perspective war is about many things. To win battles Soldiers must accomplish missions and to do that they often must kill the enemy. However, they also must protect their comrades and minimize the harm they do to noncombatants. Thus, in the context of fighting wars, military ethics entails balancing three often-competing imperatives: 1) mission accomplishment; 2) force protection; and 3) noncombatant immunity.

The obligation to accomplish missions is directly related to the obligation of the state to protect its citizens and requires Soldiers to undertake actions in their defense. This same obligation requires commanders to preserve the lives of their Soldiers, who are themselves citizens of the state, even when they require those Soldiers to take risks. Because the rights Soldiers are defending are universal, they apply to all persons and thus Soldiers are restricted in the kind of harms they may commit in their defense. These restrictions, referred to as proportionality and discrimination, require Soldiers to limit the amount of force they employ, even at greater risk to themselves, and to avoid targeting noncombatants.

It is easy to see how difficult it can be to balance these imperatives. To accomplish missions, Soldiers must take risks that come into tension with their own rights to life as well as the practical need to preserve combat power. To mitigate those risks, Soldiers employ weapons and tactics that minimize their exposure to enemy fire. Minimizing this exposure, however, can place mission accomplishment at risk. To mitigate that risk, Soldiers employ greater force to maximize the destruction on the
enemy. This greater force entails less discrimination and thus places risk on noncombatants.

Consequently, military ethical decision-making is essentially an exercise in deciding where to accept risk. Accomplishing missions places risk on Soldiers and noncombatants; protecting the force places risk on mission accomplishment and noncombatants; and minimizing harm places risk on mission accomplishment and force protection. Where balance of risk lies depends on the ends military force is intended to achieve. What those ends are depend on the character of the adversary faced.

Figure 1: Balancing Risks and Moral Obligations

In conventional conflicts, as I will discuss later, the ends of military force is to destroy enemy combat capability. To do so, Soldiers accept as much risk as necessary to destroy or neutralize enemy forces. They may be required to accept more risk to minimize harm to noncombatants, but they are not required to take so much risk the mission will fail or they will not be able to carry on the fight.\textsuperscript{12}

The ends and adversaries associated with irregular conflict, however, pose special challenges to ethical decision-making. The conventional balance works because
combatants are, in principle, at least, distinguishable from noncombatants. But irregular adversaries usually are not. Further, difficulties in discriminating between civilian and military targets in irregular conflicts are not simply a result of the adversary’s ability to hide among civilian populations. The means of irregular warfare are also often indistinguishable from civil society. The jihadist magazine, *Inspire*, for example, which seeks to legitimate al Qaeda’s cause and motivate followers to action, is just as much a weapon of war in this context as the suicide belt.

Irregular warfare complicates the conventional relationship because it places emphasis on populations rather than military forces and capabilities. In doing so, it expands the ends and means of war requiring Soldiers to not only defend the state, but impose civil order as well. These complications fundamentally change the character of warfare and require Soldiers to rethink where they may accept and place risk when balancing the ethical demands of their profession.

**Winning, Accomplishing Missions, and Military Necessity**

Military ethics begins with the instrumental imperative to win and winning requires Soldiers to undertake actions that achieve objectives that collectively lead to victory. The logic is fairly simple. If one’s cause is just, one maximizes the good by achieving it. Thus, actions that lead to victory or avoid defeat in pursuit of a just cause are not just permissible; rather, they are obligatory.¹³

Of course, it is often the case that more than one course of action could contribute to victory. In such situations, commanders generally will prefer the course of action that inflicts the most damage to the enemy’s combat capability and involves the least possible expenditure of friendly forces’ time, life, and money. Such actions shorten the war and
preserve their own ability to wage it. To the extent such actions are in fact necessary to compel the submission of the enemy; they are justified by military necessity.\textsuperscript{14}

Judgments about military necessity are therefore judgments about what sorts of things contribute enemy combat power and the best means to destroy them. So, rather than judgments about probability and risk, these are more judgments about what sorts of persons and things are liable to be targeted.\textsuperscript{15} What makes them liable to be targeted is that they are somehow essential to the enemy’s capability to wage war.

While military necessity is generally viewed as a justification to kill, it also imposes a restriction on Soldiers to refrain from any killing that does not contribute to victory. Thus military necessity also entails a prohibition against excessive or gratuitous harm.\textsuperscript{16} As long as the use of force serves a military purpose, military necessity is not concerned with the value of the military objective relative to collateral harms caused. So this restriction is not as burdensome as the principle of proportionality; however, given the history of wanton destruction in war, it does impose an important moral burden on war fighters.

Sometimes, of course, it is difficult to know in advance whether a particular action will have the desired effect and is therefore necessary. For example, in Iraq, some US commanders pursued a policy where they detained military-aged males in areas where insurgent activity was high in order to deprive the insurgents of recruits. Though disruptive to civil life and a violation of the individuals’ right to liberty, advocates justified the policy because they thought it necessary to rapidly end the growing insurgency. In fact, however, the policy generated animosity toward US forces and
sympathy for the insurgent cause. The result was more recruits, increased resources, and greater freedom of movement for insurgent forces.  

As this early experience in combating insurgents in Iraq shows, making good judgments about necessity depends on having an understanding of war that accurately accounts for what sorts of persons, things, and activities are involved in war fighting. In the traditional view, Soldiers, as well as their equipment and facilities, are set apart from the peaceful aspects of civil society so that the state may make war. But in irregular warfare, the elements of civil society are essential elements of the enemy’s combat power. While I will discuss the role of civil society in warfare in the next chapter, the point here is that as civil society becomes more difficult to distinguish from those sorts of things necessary to war fighting, this traditional view of military ethics gets confounded. Consider the following example:

In late 2009, a higher headquarters denied a Marine patrol permission to attack an apparent insurgent group emplacing roadside bombs in Afghanistan. The evidence that the Afghans at work on the road-side were insurgents seemed overwhelming: the location was ideal for an attack; the Marines observed that the Afghans possessed wire and canisters and other paraphernalia associated with improvised explosive devices (IEDs); and a recent radio intercept indicated such activity in the area. But the insurgents were digging in an area close to civilian populations and the only way the Marines had available to intervene--machine guns and helicopters—would have almost certainly killed civilians as well. In fact, it was likely that even if the men who appeared to be planting an IED were insurgents, their deaths would have been portrayed as innocent civilians doing routine work. For all those reasons and likely some others, the Marines’ higher
headquarters refused permission to engage. Frustrated, the lieutenant in charge angrily exclaimed, “I thought we were going to play by big boy rules.”

Had they been playing by the traditional rules, the Marines would have been permitted to fire on the insurgents, even if it meant risking noncombatant casualties, without consideration of any local legal, political, and social concerns. They would have been justified by virtue of the fact that killing the enemy is generally accepted as the only way to win the war. However, when combating irregular threats, it is not always true that killing enemy combatants is the surest path to victory. An assessment done by the International Security Assistance Forces (ISAF) in Afghanistan, for example, stated that there is a kind of ‘insurgent math’ where the death of one insurgent can result in an increase of insurgent activity as family, friends, and relations are recruited to the insurgent cause to avenge his death.

Further, it is usually true when combating irregular threats that killing noncombatants is the surest way to lose. This consideration is one that traditional views of military ethics do not take into account. Strategic bombing operations, such as those conducted against Dresden and Tokyo may have increased civilian resolve to resist, but because of their indirect relationship to combat power, this increased resolve did not appreciably affect the outcome of the war.

In combating irregular threats, however, such casualties can have a profound, negative effect on one’s ability to defeat the enemy. For example, Afghan president Hamid Karzai, responding to public outcry over civilian casualties, has repeatedly called for ISAF forces to curtail operations and eliminate such casualties altogether. Despite the fact that US strikes against insurgent positions are often proportional and discriminate
and because insurgents are largely indistinguishable from the civilian population, insurgents are often able to portray their casualties as civilian casualties. Additionally, insurgents are able to exploit tolerance for non-combatant casualties to attribute the civilian casualties *they* cause as a result of Coalition operations. The result has been civilian outrage and calls by Karzai’s government to constrain US operations. This outrage, in fact, contributed to implementation of the rules of engagement that restricted the lieutenant in the example above from engaging the enemy.  

It is important to note, however, that the relationship between civilian casualties and battlefield success is not as straightforward as Karzai’s reaction seems to indicate. In fact, in 2009 civilian casualties resulting from Coalition forces actions decreased dramatically while casualties resulting from Taliban increased. During this same time period, however, Taliban control over Afghan territory increased. But while the reasons for this dynamic are complex, it is also true that the Taliban experienced sufficient backlash from these deaths that, as a result, they published a set of rules that included not only minimizing civilian casualties but protecting civilian lives and property as well. So, while the Taliban continue to kill civilians, this killing more reflects the central role civilians place in winning irregular conflicts than it does an absence of restraint. As I will discuss in the next chapter, in irregular warfare what matters is not numbers of noncombatants killed. What matters is who is killed, who killed them, and why.  

Thus, as a practical matter, military necessity can be especially difficult to discern in irregular environments. The moral assumption behind the lieutenant’s objection above was that failure to engage the insurgents would jeopardize victory. But even if he were able to engage the insurgents without endangering civilians it is not clear that such
engagement would bring victory closer. As I will argue later, there is nothing wrong in the context of combating irregular adversaries with killing the enemy. But since even enemy deaths must be justified by military necessity, there is a moral burden on the soldier to determine whether any particular killing indeed contributes to victory. If it does not, then it is gratuitous and therefore unjustified.25

Proportionality:

It is a feature of any utilitarian ethic that the harm done must be proportional to the good achieved. This point applies to both the ends and means of war.26 When deciding to resort to military force, governments must consider whether the act of aggression warrants the destruction their response will cause; when fighting, Soldiers must avoid committing harms in excess of the relative benefit of the military objectives attained.

Proportionality is a principle that is simple to articulate but difficult to apply. Most of these difficulties arise because calculating proportionality sometimes requires one to predict future outcomes and weigh incommensurate goods. These difficulties are compounded when combating irregular threats because of the central role civilians can play in determining the conflict’s outcome. Because civilians and civil society are not directly related to destroying the enemy’s capability to fight, the traditional view of proportionality requires the harm done to civilians and civil society to count against decisions to go to war and limit the means one may employ when fighting. But when combating irregular threats, civilians play a much more direct role in determining the enemy’s capability to fight and this fact affects what one may reasonably count as a harm or a good.
Proportionality and War’s Ends: While I do not intend to offer a full account of *jus ad bellum* for combating irregular adversaries, it is worth discussing the importance of proportionality regarding the ends of force in order to better understand calculations of proportionality regarding the means of force. This point follows from the fact that no matter how limited collateral harm is, if the use of force that led to those casualties serves an unjust cause, then that force can never be truly proportional. While I have assumed the justice of the stronger side’s cause, I have not assumed that the stronger side can wage the war justly. For example, had Britain only been able to respond to the Argentinian occupation of the Falkland Islands by means of relatively indiscriminate strategic bombing of major Argentinian population centers then we would likely judge those means disproportionate to the objective they were intended to realize. The point here is simply that a just cause does not entail a just resort to war if the means employed are inherently disproportionate to ends the resort to war is intended to achieve.

So when considering the resort to war, governments must ensure that its cost is proportionate to the act of aggression experienced. This is a fairly intuitive point intended to ensure wars, even just ones, are not fought over trivial ends.27 Recall, for example, former President George W. Bush’s putative justification for the war against Iraq the fact that Saddam had once organized an assassination attempt against his father, former President George H.W. Bush. Had that really been a reason to go to war against Iraq in 2003—and I am not arguing that it was—we might consider the sacrifice the thousands killed in the fighting have made as having been in vain. Personal revenge is not a just cause.28
So, when calculating proportionality, one must consider what goods count in favor of the resort to force, what harms count against it, and how these goods and harms weigh against each other. While what is practically relevant to calculations of proportionality depend on the specific issue, a theory of proportionality should entail a view on what counts as morally relevant goods and harms. Thomas Hurka, for example, notes that it is often said that government spending on the military to finance World War II brought the US out of the depression. But it hardly seems reasonable that an improved economy should count as a relevant benefit when going to war. On the other hand, one may note that as a result of that war, Japan and Germany embraced democracy and developed into free, productive societies. But even though regime change for its own sake violates just cause, it seems such an outcome should count toward the decision to go to war. Similarly, while imposing a particular order may not count towards proportionality, preserving a relatively just one does. I will discuss what counts as a just order in more detail in chapter three.

Further, when considering relevant harms and goods, Hurka argues that one needs to distinguish between sufficient and contributing causes. Sufficient causes are those that fulfill the just cause condition associated with responding to an act of aggression. Contributing causes do not fulfill the just cause condition, but are themselves causes of justice, which, given a sufficient cause, may be considered. Thus, while regime change in Germany may not have justified war, replacing that unjust regime with a just one may be considered when calculating if the war is proportional. The importance of contributing causes is that they can, in principle, make just causes that are not
proportional in themselves to become so given their effects on other goods such as human rights and national security.\textsuperscript{32}

Further, when calculating proportionality, one must measure it in the context of the alternatives. The “base-line” alternative, as Hurka notes, is “do nothing.”\textsuperscript{33} However, one may only consider that base-line if there are no other alternatives available. It would be insufficient to conclude that the resort to force was proportional just because it was better than the “do-nothing-base-line” if there were less costly, but equally effective alternatives, such as sanctions or diplomatic initiatives.

Finally, it is important to note that, like military necessity, proportionality is a forward-looking criterion. The harm committed by an act of aggression has already happened and committing additional harm in retaliation simply adds to the harm already caused. Thus committing additional harms would never be proportional if it were simply justified by the prior harm. To be justified, the force used would be measured against the expected future harm of allowing the aggressive act to go unanswered.\textsuperscript{34} It would also have to be measured in terms of any future good, such as a stable political order, the resort to force was intended to achieve. These points do not entail that the past harm does not figure into the calculation. Responding effectively to acts of aggression has a deterrent effect on future acts of aggression, so counts in favor of responding with force.\textsuperscript{35}

Because proportionality is a forward-looking criterion, it suffers from problems associated with predicting the future. For example, if Hurka is right and changing an unjust regime counts as a good when calculating \textit{jus ad bellum} proportionality, then replacing Saddam’s regime with a democratic government to promote the spread of
democracy among the authoritarian regimes in the Middle East—a rationale that the Bush Administration did offer as a justification for the 2003 invasion of Iraq—should have also counted as a contributing cause when determining whether the war met the conditions of proportionality.

Now, one can imagine that this consideration tipped the balance of the calculation in favor of going to war. Further, as things turned out, one may plausibly argue that not only did democracy not spread; the kind of democracy that has taken hold in Iraq has impeded the formation of a new government and fueled sectarian violence. Further, as the competing sides fear electoral losses will place their constituencies at risk, they have resorted to violence to ensure a democratically elected government does not have the monopoly on the use of force.

Given this outcome, it seems to be an open question whether one should review the decision to go to war and determine it unjust. If one does, it is not clear on what basis one would make such a determination. For example, one may plausibly argue that promoting democracy, at least in the context of Iraq, was not a good and thus should not have counted in favor of the war. However, if we make that argument, then we would undermine any argument that counts establishing a just political order as a good for any future conflict. It may be the case that establishing democratic regimes in Japan and Germany ended up being a good, but if we cannot count on it being a good in every conflict, then it seems arbitrary to apply it when making the decision to go to war.

One could also argue that the administration did not adequately assess the implication of replacing Saddam’s regime. It may be that democracy promotion is a good, but in the case of Iraq, it seems obvious that the administration did not adequately
assess the costs relative to achieving that good. In a utilitarian ethic, no goods are absolute, thus there is no inconsistency in saying that democracy development in Japan and Germany was a relative good, but in Iraq it was not.

The difficulty here, however, is that this judgment is not final. For example, the enormous cost of the US’s 2003 invasion of Iraq has seemed to create little benefit, much less justice. Thus one may plausibly argue that the war failed the proportionality test. But it is also possible that at some point in the future it may turn out that Iraq becomes the same kind of productive democracy that Japan and Germany did after World War II. If the 2003 invasion were a necessary cause for this result, it would seem we would have to change our judgment regarding the war. The problem, then, for the application of proportionality is that we can never be certain about any particular judgment since, at some future date, more good may come of it.

A further difficulty arises when considering the asymmetry that often characterizes adversaries in irregular conflicts. Consider, for example, two adversaries, where one is very advanced and can employ very precise munitions and the other can only employ cruder, much less precise weaponry. Assuming that both adversaries attack similar targets with roughly the same military benefits it seems clear that the more advanced adversary’s actions will always be more proportionate than the less advanced adversary. This point does not entail that the weaker adversary’s means are disproportionate. However, we can easily imagine a situation where the weaker side’s means do not cross the proportionality threshold while the stronger adversary’s means does.
If one judges the stronger actor’s means to be proportionate and the weaker actor’s to be disproportionate, we would have to judge the weaker actor unjust for resorting to war, thus in effect denying the weaker actor the right to defend itself against the stronger while upholding the stronger’s right to defend itself against the weaker. One could argue that all this conclusion points to is that adversaries have a moral burden to develop and employ the most precise means possible. But since the capability to develop such weapons is often directly related to the adversaries’ relative wealth, one is in effect requiring the weaker to meet a higher standard of proportionality than the stronger. This outcome seems unjust as it would allow the stronger a rationale to take advantage of the weaker party whenever interests conflict.36

This point entails two absurd outcomes: either we say the weaker side should not fight because it does not have sufficiently discriminate means or we say the stronger should not fight unless the weaker side can employ sufficiently discriminate means. This outcome is, of course, nonsense and simply underscores why the relative strengths of the two sides should not figure when deciding to resort to force. What this point does entail, however, is that both sides should take into account the overall destruction caused by the resort to force when deciding how to respond to a particular aggressive act. If the resort to force, even very precise force, entails unleashing a cycle of indiscriminate violence as insurgents retaliate against pro-government, but otherwise innocent, civilians, then that violence counts against the legitimacy of the resort to force.

The point of this discussion is two-fold. First, the establishment of a just political order is not a sufficient cause for war. However, when a just political order is challenged, and war is the only possible response, then the justice of that order not only counts
towards the resort to force, it becomes the measure against which we judge specific applications of force. It becomes this measure because applications of force that undermine this order also undermine that order as a contributing cause and threaten to make the resort to force itself unjust, at least by the standard of proportionality.

Second, decision-makers need to consider not only the means they have available, but also the outcome of those means on the adversary’s response. It is nonsensical to prohibit the stronger side to resort to war simply because the weaker side has less discriminate means. However, it is not always the worst thing that can happen to a people that an unjust regime takes control. For example, the anemic U.N. intervention in Bosnia in the 1990s actually had the affect of accelerating Bosnian-Serbian efforts to exterminate the Muslim population. By corralling Muslims into poorly defended safe-areas like Srebrenica, U.N. forces made it easier for Bosnian-Serbs to find—and kill—those people.\textsuperscript{37} The point here is not that the possibility of retaliation and retribution against the innocent should prevent the stronger side from acting. The point is, however, that the stronger side should not act unless it is prepared to deal with and mitigate weaker side excess.

\textit{Proportionality and War’s Means:} Regarding the means employed in war, proportionality calculations apply only to necessary military operations.\textsuperscript{38} As noted above, military necessity sets apart those persons and things that are liable to attack from those that are not and thus establishes what harms count as gratuitous and unnecessary. Thus attacks against enemy personnel, equipment, and facilities that are liable to be targeted count as goods rather than harms, since their destruction entails progress towards victory.\textsuperscript{39}
Traditionally, the harms associated with *jus in bello* proportionality are the suffering and death of enemy civilians. Since they do not directly impact the enemy’s ability to fight, harming them is in excess to the good realized by the attack. Whether or not that harm is excessive depends on the number of civilians harmed and the nature of the harm as well as the significance of the military objective. However, as I will discuss in more detail later, determining if a particular act is proportional is not as simple as calculating the number of enemy noncombatant deaths against the number of friendly lives saved.

Before one can calculate proportionality, one must develop an account of relevant goods and harms for *jus in bello* proportionality. The sufficient cause for *jus in bello* is fulfilled if a particular action meets the conditions of military necessity. Here again, the logic is simple. Military necessity already designates the category of persons and things that may be attacked. Since successfully attacking those persons and things makes victory more likely, that designation alone is a sufficient cause to conduct the attack. Contributing causes may also count as goods that weigh in favor of a particular course of action, but just as in *jus ad bellum* proportionality, not every benefit can count as a good.

For example, Soldiers with more of the right kind of combat experience are generally better able to achieve objectives at the least cost in lives than those with less. But while that experience is a good, it should not count as morally relevant when calculating proportionality for a particular action in combat. Otherwise the action could become its own justification. Going to war for the sake of getting better at war is hardly justifiable. On the other hand, the Marine lieutenant discussed above may have plausibly argued that killing the insurgents would have had a deterrent effect on their local support.
Even though deterring local support is not a reason to risk the harms of noncombatant casualties, it can count as a good when considering whether or not to engage the insurgents, if a sufficient cause is present.

Here also, one must consider the proportionality of actions in combat in the context of available alternatives. As before, the base-line alternative is to do nothing. For example, had the Marine lieutenant determined that number of noncombatants killed would be disproportionate to the number of insurgents killed, then proportionality would require that he not act, since not acting was more proportional than acting in this case.

As noted above, determining proportionality by weighing the number of civilians killed against the number of insurgents killed is not the best way to calculate proportionality. Even in the traditional view, the relevant good is the destruction of enemy combat capability, which is itself a complicated calculation. For example, the death of one civilian while attacking two Soldiers on leave would obviously be disproportionate since the Soldiers do not represent an immediate threat.

Thus, what matters when making such calculations is the relative value of the combatant to the enemy’s combat capabilities. In conventional conflicts, this means one should not only take into account the number of enemy troops involved, but also their equipment, their position on the battlefield, and the role they play in the fighting. A tank with a crew of four can have a greater relative value than a 40-man Infantry platoon depending on conditions and thus warrant risking greater collateral damage despite the fewer number of Soldiers killed.

Because enemy and friendly capability in irregular conflicts draws heavily on civilians and civil society, such calculations are much more complicated. In Iraq, for
example, many insurgent attacks were motivated by money rather than allegiance to the insurgent cause. In many cases, insurgent leaders were able to increase their level of activity simply by paying locals to plant a bomb or engage in some act of sabotage. Often, such individuals were only hired a few times and represented, by themselves, a small part of overall enemy capability.

The ability to mobilize the local population, however, depended on financiers and organizers who could raise and move funds in order to pay local fighters. Since enemy capability in irregular environments derives its strength from its network and that network’s ability to raise, receive, and channel funds to sponsor insurgent activity. In such networks, this strength is found in the key leaders who perform these functions.

Thus, the calculations of proportionality associated with killing the insurgent who plants the bomb, for example, and the key leader or financier are going to be different, the latter permitting significantly more harm than the former. This point suggests that all things being equal, in certain circumstances one may tolerate more collateral damage when killing an insurgent leader in his home than killing several insurgents planting a bomb.

Probably the most significant difficulty facing proportionality is the natural pressure the exigencies of combat place on restrictions justified by proportionality. As Walzer notes, proportionality is a sliding scale where the greater the good achieved, the greater the harms tolerated. This point means that as victory becomes more elusive or defeat more imminent, Soldiers may commit greater harms. Under such pressure, ultimately, almost any action may be justified. In the application of proportionality, as Walzer notes, “(i)t would be difficult to condemn Soldiers for anything they did in the
course of a battle or a war that they honestly believed, and had good reason to believe, was necessary, important, or simply useful in determining the outcome.”

This dynamic can place Soldiers in counterintuitive positions. When one side is winning, there will be less toleration of noncombatant casualties, while for the losing side there will be more. The winning side will be required to be increasingly precise and the losing side will be permitted to be increasingly less precise. To the extent there is a correlation between imprecision and winning, such a dynamic can prolong the conflict leading to greater total harm of the war. Michael Gross makes a similar point. Given two asymmetric adversaries, both could argue that their particular circumstances warrant expanding the scope of proportionality. The weaker side, for example, could argue that its cruder weapons systems allow it more collateral damage; the stronger side could argue that the fact the weaker sides nests its operations in civilian areas also allow it more collateral damage.

This is not a devastating criticism. At one level all it tells us is that to the extent a side can afford greater precision it should do so. This seems to be a valid conclusion. Further, simply requiring greater precision does not entail one abandon means that will bring a speedy end to the war. It simply implies that when justifying those means one may consider the harm done by prolonging the conflict. But what these criticisms do show is that proportionality does not exhaust our intuitions regarding the war convention.

**Discrimination and Noncombatant Immunity**

Because the restraint of proportionality only rules out certain acts, not certain kinds of acts, there is additional moral ‘pressure’ to further restrain the use of force.
These additional restraints come in the form of requirements on Soldiers to discriminate among the kinds of targets they engage as well as the kinds of weapons they employ. In the traditional view, the moral justification for these restraints begins with the principle that it is morally wrong to harm innocents. While there are many ways to argue this point, for these purposes I will note that one justification ties neatly into the concept of individual rights discussed earlier. There is something morally significant about persons that must be respected—even in war. Thus, because people have a right to life and liberty, these rights should not be violated or constrained unless the person has done something to make them liable to such treatment.

In the context of war, one is liable to be harmed to the extent one is agent, or causally, responsible for the acts of violence associated with war fighting. I will discuss agent responsibility and moral responsibility and their impact on liability to attack in more detail in Chapter Four; however, if agent responsibility is sufficient to entail liability, then determinants of moral responsibility associated with guilt or innocence will play little to no role. It is not hard to see why. Many combatants are innocent of any act of aggression and some civilians are guilty of it. So what matters is one’s relationship to the act of war fighting. In fact, combatants who have surrendered or are wounded and not capable of fighting no longer represent a threat and are thus immune from harm. Likewise, some civilians, for example, munitions workers, are subject to harm, because their activity is causally associated with the weapons combatants use to wage war and is thus practically inseparable from warfighting.

It is this notion of practical inseparability from war fighting that allows us to distinguish between military and civilian as well as combatant and non-combatant. To be
practically inseparable from war fighting, someone or something must have no other function than a war fighting function. For example, enemy Soldiers are legitimate targets because the function of a Soldier is to wage war. Farms and hospitals, even when they are used to feed and heal enemy forces, are not. The reason they are not is that these facilities and the people who operate them are engaged in activities required even when there is no war. Thus, argues Walzer, the relevant distinction to make is not between what contributes to the war effort and what does not, but rather what an enemy soldier needs to fight and what he needs to live. Since the latter is required by combatants and noncombatants alike, it cannot be assimilated into the class of things associated with war-fighting and thus should not be targeted.46

So, regarding things, this notion of separability prohibits targeting many “dual-use” equipment and facilities that have a civilian use, even when members of the military are using them. In fact, on this basis, Walzer criticized the US destruction of Iraqi economic infrastructure, such as power stations, during the first Gulf War in 1991 because these facilities were practically separable. The reason, he argues, that these facilities should have remained immune from targeting is that they were needed equally as much by combatants and noncombatants alike. By targeting them US forces effectively targeted Iraqi society in a way that went beyond the specific requirements of achieving legitimate military objectives.

Walzer is careful to point out, however, that just because something has a non-military use does not mean it is always immune. It is possible to militarize otherwise non-military equipment and facilities in a way that makes them legitimate targets. For example, it would not be wrong to bomb certain bridges to prevent military supplies from
reaching their destination. The reason it would not be wrong is that it can be the case that bridges, especially bridges in combat zones, are not necessary to the survival and everyday activity of civilians in the way they can be for combatants.\textsuperscript{47}

Regarding people, the idea that agent responsibility is sufficient to make someone liable to attack can exclude those persons who are morally responsible for the crime of war, as long as they are not actively participating in the hostilities. Combatants may kill each other because they are the direct cause of the threat they each face. Combatants, however, may not kill noncombatants even if those noncombatants actively supported an act of aggression that caused the war. By supporting such an act of aggression, such noncombatants are arguably morally responsible for the war. However, to the extent they are not involved in the killing associated with war fighting, they are immune from attack.

Thus, what protects civilians in conventional warfare is not whether they are complicit in the crime of war or whether they represent a particular threat. It simply is the case that the population of non-threatening, non-complicit individuals is found in the civilian population, not the military one. Because noncombatants are immune from attack Soldiers must not only avoid targeting them, they must always choose the course of action that minimizes their risk of harm. It does not follow from this requirement, however, that Soldiers must take extra risks in order to minimize such casualties. The Israeli philosopher Asa Kasher, in fact, argues the opposite. Because Soldiers are citizens of the state, the state retains its obligation to protect their lives as well. This obligation, he argues, does not extend to enemy noncombatants.\textsuperscript{48}
The difficulty with this view is that it ignores the responsibilities Soldiers incur by virtue of assuming their role. Because Soldiers receive training, equipment, and other resources to reduce their risk when fighting, they are obligated to accept risk to preserve friendly noncombatants’ lives. Since it is the case that enemy and friendly noncombatants enjoy the same right to life, it follows that Soldiers must accept some additional risk to preserve enemy noncombatant lives as well.49

But this risk is not unlimited. As noted earlier, military necessity entails an obligation on the part of Soldiers to attack enemy targets in order to win the war. It also entails doing so with the least risk possible to themselves so that they may continue to fight. As Walzer notes, the “limits of risk are fixed, then, roughly at that point where any further risk taking would almost certainly doom the military venture or make it so costly it could not be repeated.”50 The imperative of mission accomplishment entails a requirement to preserve the force, thus limits the requirement of Soldiers to take so much risk they would fail to accomplish missions or not be able to embark on future missions.51

So Kasher is right, that the state does have an obligation to preserve Soldiers’ lives and it fulfills that obligation by ensuring they are as well equipped as they can be for the fight. He is also right that, in general, friendly combatants—at least in the traditional view—do not have a responsibility to protect enemy civilians. But he is wrong to say that friendly combatants have no responsibilities towards enemy noncombatants. To the extent they are in a position to do so, they should take additional risks to avoid harming them.
The difficulty for applying the principle of discrimination in irregular conflicts is the reliance of irregular adversaries on civilian and civilian institutions to wage war. As retired British general Rupert Smith noted in *The Utility of Force*, in such conflicts, the loyalties, attitudes, and quality of life of the people do not simply impact the outcome they determine it.\(^5^2\) While I will take this point up later in Chapter Four, the following example illustrates the difficulty of applying the traditional view of discrimination in irregular conflicts:

After assuming control of Coalition forces in Afghanistan, LTG Stanley McChrystal adopted a new set of rules of engagement that instructed troops not to risk collateral damage, even if it meant sometimes not killing or detaining insurgents. As he stated, “it's better to let a few insurgents escape than alienate the Afghan public by inflicting civilian casualties.”\(^5^3\) Shortly after the new rules went into effect, a Marine Corps company commander, viewing images sent from an unmanned aerial vehicle, spotted four men planting what appeared to be an improvised explosive device (IED). He considered calling in an air strike, but when he noticed children playing nearby, he decided otherwise. Nonetheless, he had to do something: a convoy of US Marines was going to pass by in a few hours. He continued to monitor the insurgents and when the children appeared to wander away decided to call in the strike. No sooner had he done that, the children wandered back into the strike zone. The children continued to play, but never allowed themselves to get too far away from the insurgents. The captain concluded the insurgents were using them as shields and called off the strike.\(^5^4\)

Had the children not been present, the strike would likely have been permitted under the new ROE. But since they were, after 45 minutes, the captain decided not to
attack the insurgents. Rather, the higher headquarters sent an ordnance disposal unit to
the site to clear the IED before the convoy came through.

As one Marine on the scene reportedly stated, "We have to separate the insurgents
from the people," he said. "If we just bomb the hell out of everything, we'll have a hard
time doing that." With this point in mind, an event that would have been resolved under a
conventional ROE in a few minutes, instead took 45, and the insurgent got away.  

The importance of separating insurgents from the civilian population lies in their
dependence on that population for shelter, food, medical assistance, finances, and other
types of support. This relationship entails collaboration on the part of some, if not all
of that population, though it does not follow that this support is given willingly. Hamas,
for example, routinely places rocket and mortar positions near schools, residences, and
other civilian sites to exploit the resulting collateral damage as well as forcibly moves
civilians into areas where the Israelis were expected to attack for the same reasons. 

Willing or not, this relationship draws the civilian population into the class of
things that are practically inseparable from war-fighting, making them necessary, if not
legitimate, targets of war. What makes them necessary targets is the fact that the
militarily weaker side could not fight without their support and the militarily stronger
side cannot win if they do not undermine the weaker side’s effort and build support of
their own. This fact will have profound implications for an ethic for combating irregular
threats.

Protecting the Force

Though considerations of military necessity take into account the risk to Soldiers
represented by any particular course of action, it is still in tension with that risk.
the enemy and winning the war requires Soldiers to place themselves in harm’s way. This, of course, is largely what Soldiers are for, but it does not follow from that fact that the state’s obligation to protect its citizens stops when a citizen becomes a soldier.

Thus, while military necessity obligates Soldiers to take risks, a broader view of military ethics must also consider the obligations commanders, as agents of the state, have to preserve their Soldiers’ lives and well-being. Such measures have both utilitarian and deontic aspects to their justification. From the perspective of military necessity, commanders are obligated to preserve their forces so they may continue the fight. From a deontic perspective, these Soldiers are human beings with their own rights to life and liberty.\textsuperscript{58}

From a utilitarian perspective, the obligation to accomplish missions coupled with the obvious fact that the more combat capability one has the more likely one will be successful, it follows then that one has an obligation to preserve that capability, which obviously includes Soldiers’ lives. This is especially true in attrition-style warfare where you win by destroying the enemy faster than he can destroy your forces.

In general, this is where the traditional view ends. It might be enough to say that military necessity provides sufficient justification to protect Soldiers’ lives and that nothing more needs to be said. As noted several times above, the practical needs of war always give commanders reasons to preserve, if not privilege, the lives of their Soldiers over the lives of noncombatants. While considerations of proportionality and discrimination may not always permit them to do so, it does not seem commanders need much encouragement—or ethical argument—to be motivated to carefully guard their Soldiers’ lives.
Even Walzer argues there is nothing more that needs to be said. In his view, to gain the right to kill, Soldiers give up their right to life. Because they have given up their right to life, their deaths are not unjust. Since all combatants give their rights up in this way, they are moral equals and no combatant—just or unjust—does anything wrong by killing another combatant. This view, however, leads to a number of counterintuitive conclusions. First, it suggests that the deaths of Soldiers fighting a just cause are somehow themselves just. But it would be odd to say, for example, that a German soldier in World War II justly killed a French soldier, since by taking up arms, the French soldier had forfeited his right to life. Doing so would suggest that someone can forfeit one’s rights by virtue of responding to the unjust act of another. On that basis alone it seems reasonable to reject Walzer’s position.

Of course, it can be the case that both sides’ causes are equally unjust in which case combatants would be moral equals. However, if the justice of the combatant depends on the justice of the cause, then where there is a moral asymmetry regarding those causes, the killing done by unjust combatants will be unjust, regardless of the restraints they observe. This point will have important implications later when we discuss liability to harm. However, for current purposes, it is sufficient to note that just combatants retain their right to life, which, as I will also discuss later, further entails obligations on the state to protect those lives.

Second, it treats Soldiers as mere means, which is aptly illustrated in Stanley Kubrik’s movie, Paths to Glory. In the film, French generals order a large-scale attack against an impregnable German fortress. Predictably, the attack fails. But rather than take responsibility for giving bad orders, the generals prosecute selected troops for cowardice
and have them executed. If military necessity was the only justification for preserving Soldiers’ lives, then the French generals did nothing wrong. As long as they believed the fortress was a legitimate military target and as long as they believed these random executions would motivate increased élan for the next attack, they might plausibly argue their actions were, in fact, obligated.

However, as noted above, the state’s obligation to its citizens does not stop when they become Soldiers. Lieutenant General (ret) James Dubik arguing against Walzer’s view claims that Soldiers, like friendly and enemy noncombatants, retain their rights to life and liberty, even in war. He argues that if the rights Soldiers are defending are indeed natural rights, it is morally wrong to force them to give them up. He points out that while some Soldiers certainly choose to fight, it is the enemy’s aggressive act that places them in circumstances where they are compelled to make that choice. Because the enemy has coerced them onto the battlefield, they do not give up their right to life.61 This point is echoed by Kasher who argues a “combatant is a citizen in uniform … (whose) life is as precious as the life of anyone else.”62 The state may be justified in putting their lives at risk because of its obligation to protect all citizens, but the obligation to protect them remains.

This is not to say that commanders who order Soldiers to take tough objectives have done anything wrong, even if the effort fails. Nor does this point suggest that commanders who make errors in practical judgment regarding military operations have done anything ethically wrong. A commander may diligently plan and resource an operation and it still may fail. What this point does suggest is that commanders should recognize that not every military benefit warrants sacrificing Soldiers’ lives.
It is beyond the scope of the current discussion to establish what those benefits are, but it does suggest that commanders, at a minimum, should apply proportionality when considering the cost in Soldiers’ lives to achieving a military objective as the loss of their lives is a harm. This point expands on the traditional view, which only requires commanders to consider the harms done to enemy noncombatants when determining whether an attack is ethically permissible. In the view I have argued here, they would also be required to consider the loss in friendly combatants, beyond the requirements of military necessity.

This non-traditional view has important implications for combating irregular threats. Current counterinsurgency (COIN) doctrine holds that harms to noncombatants empower the enemy and as noted earlier, commanders have specified in the ROE a general prohibition against noncombatant casualties. This prohibition, however, has yielded some counterintuitive results. Consider the following example:

In 2010, a noncommissioned officer (NCO) serving in Afghanistan expressed frustration over restrictions on employing combat power. According to the NCO, while receiving mortar fire during an overnight mission, his unit called for a 155mm howitzer illumination round to be fired to reveal the enemy's location. The request was rejected "on the grounds that it may cause collateral damage." What frustrated the NCO was that illumination rounds typically do not cause collateral harm to noncombatants. The only thing that comes down from an illumination round is a canister, and hitting someone is about as likely as being struck by lightning.63

It would be natural, given these circumstances, for the NCO to feel betrayed by his command. The extreme disparity in risk the command was willing to place on the
soldier to prevent it from falling on noncombatants not only caused the mission to fail, it suggested to the soldier that his life was less valuable.

This point, of course, is not a direct criticism of the ROE itself, but rather how it has been occasionally applied. The demands of the irregular combat environment demonstrate the need to pay attention to noncombatant casualties. As I will discuss later, the central role noncombatants play significantly complicates decisions commanders have to make when deciding what risks Soldiers should be subjected to. The point of the preceding discussion was simply to argue that when fighting wars, the lives of Soldiers matter beyond the simple needs of military necessity and thus affect how commanders should balance risk when resolving the competing demands of military necessity and minimizing harm.

Conclusion

I have argued that the traditional view balances the competing demands of military necessity, minimizing harm, and force protection by requiring Soldiers to take risks to defend the state and additional risks to avoid harms to noncombatants. It limits these risks by not requiring Soldiers to risk mission failure or their ability to continue the fight.

This balance works because in the regular wars where this ethic largely evolved, civilians and civilian activity are, for the most part, practically separable from war-fighting. In such conflicts one wins by annihilating or attriting other armies who are typically easily distinguished from the civilian population. Thus, in the regular “way of war,” for the most part, civilian activity is largely irrelevant to winning (or losing), thus
civilians are immune from attack. In irregular warfare, this same civilian activity is central to its outcome.

And it is this central role that civilians play that has generated much of the ethical confusion experienced in these conflicts. Recall the Marine lieutenant’s desire to play by “big boy rules.” What is notable about that disagreement is that it is not a disagreement simply about ethics. Rather, it is also a disagreement about what sorts of acts work and which ones do not. More importantly for this discussion, this disagreement is embedded in a larger disagreement about the nature of war and how that nature should inform conduct in war. Thus it is not so much a practical disagreement as it is a philosophical one. This example well illustrates how failure to align one’s philosophy of war with one’s normative practices in war makes it difficult to be reasonably confident in one’s judgments regarding those practices. Thus for any moral philosophy of war, there must also be a corresponding philosophy of war that sets the terms for the construction of the ethics of war. Describing such a philosophy of war will be the subject of the next chapter.
Chapter Two: Risk and Irregular Warfare

Prologue: Soldiers at Risk

In the previous chapter, I articulated the implications of combating irregular adversaries for traditional views of military ethics. By shifting emphasis from military forces to the population as the determinant of victory, civilians and civil society are no longer practically separable from the adversary’s ability to wage war. However, since traditional military ethics requires military forces to avoid targeting enemy civilians, it would seem that strict adherence to the norms of conventional military ethics significantly undermines one’s chances for victory. “Playing by the rules,” in the context of irregular warfare, is equivalent to “tying one hand behind one’s back.”

So, had the Army sergeant and the Marine Corps lieutenant mentioned in the previous chapter been playing by the traditional rules, the sergeant would have received supporting fire and the Marines would have been permitted to fire on the insurgents, even if both courses of action meant risking noncombatant casualties. As long as they did not target noncombatants and used just the amount of force necessary to break contact and kill the insurgents planting the IEDs, their request for additional fire-power would be within the scope of traditional military ethics. In fact, this emphasis on preventing collateral damage in many of the counter-insurgent fights in Afghanistan and Iraq has drawn a great deal of criticism precisely because of the excessive risk Soldiers are often called upon to bear.¹

To understand how confused things are, consider the following example: in September 2009, a unit of approximately 100 Afghan Soldiers and a dozen Marine Corps and Army advisors responded to a request for assistance by elders from the remote
village of Ganjigal. As the unit approached the village, approximately 60 jihadists from Pakistan opened fire. Apparently, the village elders were cooperating with the insurgents and had taken advantage of Coalition Forces’ desire to “win hearts and minds” to lure them into a trap. In fact, more than one participant in the battle reported seeing women and children shuttle ammunition to the attacking insurgents.

During this battle, where Marine Corporal Dakota Myer earned the Medal of Honor, Army Captain Will Swenson, also an advisor, called for artillery support but was denied it by his headquarters for fear of collateral damage. They eventually received some helicopter support, which allowed Myer and Sergeant Juan Rodriguez-Chavez to move back into the kill-zone and retrieve the bodies of their slain comrades. The battle resulted in 13 dead, 22 wounded, two Medal of Honor recommendations, two Navy Crosses, two investigations of dereliction of duty, and three letters of severe reprimand. Most of those investigations and reprimands were for officers of the higher headquarters, some of whom refused to provide fire support. While the investigations did find acts of negligence, they did not specifically address the impact of the restrictive rules of engagement, which prohibited risking collateral damage, that the officers cited as the reason they turned the request down.

While Corporal Myer’s and his companions’ heroism is unquestioned, the confused milieu of a hearts and minds strategy, restrictive ROE, and complicit villagers makes it difficult to make sense of how much risk the unit should have been expected to take and how much risk should have been transferred to noncombatants in the form of fire support that may have allowed the unit to break contact in time to save the lives of those who were killed.
Introduction: Soldiers and Risk

Soldiers, of course, are called on to bear risk in service to the country. In fact, bearing that risk is an important part of the Soldier’s identity. In 2000, Don Snider, John Nagl, and I wrote a monograph on Army professionalism that argued this point, noting that, in part, risk-taking is an inherent and essential part of what it means to be a Soldier.\(^4\)

Written in the context of “radical” force protection policies in place during peacekeeping operations in the Balkans, we argued that such policies not only undermined Soldier effectiveness, they were also immoral. Forcing the choice between undertaking missions and accepting personal risk forced Soldiers to place that risk elsewhere: either on noncombatants or on the mission. Radical force protection policies forced them to place it on the mission, which they did not undertake if there was the possibility of harm to themselves. This situation effectively turned Soldiers into technicians and bureaucrats—a situation just as absurd as the excessive risk taking described above.

What we did not fully discuss in that paper was the central role decisions about risk play in military ethical decision-making. Traditional military ethics accepts that Soldiers have a reasonable interest in taking the least risk possible when conducting operations. However, that interest does not entail any additional obligations on anyone’s part to ensure that risk is minimized. The imperative of military necessity obligates Soldiers to accomplish missions. This obligation consequently entitles commanders to place Soldiers at as much risk as necessary to do so. Since, as discussed in chapter one, military necessity further requires commanders to win wars, it does permit them to reduce Soldier risk at the point of mission failure or capability to conduct future missions.\(^5\)

Here, obviously, Soldier and Commander interests overlap. Soldiers are permitted to reduce their own risk because their lives matter. Commanders are permitted to reduce
Soldier risk because the mission matters. However, the former follows from a permission while the latter follows from an obligation. Thus, when Soldiers’ permissions to reduce risk conflict with military necessity, they are obligated to assume that risk.

So when permission to reduce risk conflicts with the requirements of military necessity, Soldiers are obligated to take the additional risk required to accomplish that mission. However, by limiting the risk Soldiers must assume, military necessity then enables Soldiers to displace that risk onto noncombatants, as long as they observe the constraints of proportionality and discrimination. Thus, since the limits of risks are identified with the mission, the traditional view treats justified measures to preserve Soldiers’ lives more as concessions to military necessity and not an obligation itself.

By conflating preserving Soldiers’ lives with military necessity the traditional view of military ethics sets up a false dilemma where one must choose between noncombatant lives, which have value, and Soldiers’ lives, which do not, at least not apart from military necessity. It is no wonder that many Soldiers see ethical decision making in war-time as the application of abstract principles, divorced from the realities of fighting and winning those wars. This abstraction is especially apparent in irregular warfare, where the separability of civilian and military targets that underpins the traditional view, blurs.

The traditional view requires Soldiers always to subordinate their lives to accomplishing the mission and avoiding harm to noncombatants (friendly or enemy) when choosing where to transfer risk. This dynamic denies Soldiers their right to life and absolves the state of its obligations to protect all its citizens. In the context of irregular warfare, where civilians and civil society are increasingly inseparable from war fighting,
this subordination forces Soldiers to assume all the risk since transferring it to civilians is co-extensive with transferring it to the mission. Resolving the absurdity requires reframing the problem. Rather than conceiving military ethical decisions as the application of discrimination and proportionality to meet to meet obligations toward enemy civilians, the central question of military ethics is better described as decisions about the correct placement of risk: combatants, noncombatants, or the mission.

The Traditional View: Military Necessity and Proportionality

Even though military necessity requires Soldiers to accept the risks, even the risk of death, it would also appear to permit combatants wide latitude in mitigating those risks. Military necessity requires Soldiers only to choose courses of action that maximize the chances for victory and minimize the chances of defeat. Since preservation of Soldiers’ lives is obviously closely linked to an army’s ability to wage war, military necessity would seem to permit Soldiers to transfer almost all the risk of war fighting to the enemy—including enemy civilians. This permission, of course, would only hold if transferring risk to civilians were the best way to achieve the military objective. However, given the obvious and close correlation between preserving combat power and battlefield success, it would be difficult to question the judgment of a commander who chose the least risky course of action on the basis of military necessity.

It is important to note that military necessity would also require Soldiers to transfer additional risk to themselves if that were the best way to accomplish the mission at hand. In fact, many examples of current counter-insurgency (COIN) doctrine require very little—if any—transfer of risk to noncombatants for fear of undermining efforts to win “hearts and minds.”

In regard to risk, military necessity requires only that the
commander take into account operational considerations that maximize the chances of mission success or minimize the chances of mission failure. What it does not require is that he take into account combatant or non-combatant lives beyond how they influence those operational considerations. Thus military necessity permits significant transfer of risk to enemy noncombatants.

It is worth noting, however, that it does not permit the total transfer of risk. Proportionality requires Soldiers to limit the harm to civilians and civilian infrastructure they cause relative to the value of the military objective. The value of the military objective is measured against its contribution to the moral objective of war: to establish a better state of peace than the *status quo ante bellum.* Thus indiscriminate (or even insufficiently discriminate) acts would be usually be unjustified because the harm they cause undermines the chance for a stable peace.

Because the proportionality requirement restrains the amount of force Soldiers are permitted to use, it entails Soldiers must take additional measures to limit the transfer of risk to noncombatants. To the extent those measures to limit risk impede mission accomplishment, that entails Soldiers are obligated to assume that risk themselves. Generally speaking, Soldiers will prefer to use weapons that maximize the distance between them and the target in order to lower their exposure to enemy fire. The greater the distance, the less certain friendly forces can be regarding specific locations of enemy troops. Therefore, greater force, usually in the form aerial or artillery bombardment, is required to destroy those enemy forces. Advanced surveillance equipment such as satellites or unmanned aerial vehicles can overcome some of this uncertainty. Further, precision-guided munitions can limit to some extent the amount of force required.
However, as combat from Iraq to Afghanistan to Gaza has shown, these weapons cannot resolve uncertainty to the same degree that boots on the ground can. Thus given the requirement to restrain force, combatants may have to expose themselves to greater risk in order effectively attack the enemy objective.

Still, this level of risk is fairly low and military necessity permits the transference of a great deal of risk to noncombatants. Given the difficulty in placing a specific value on a particular objective or the cost to noncombatant lives in advance of the operation, Soldiers in all but extreme cases can reasonably argue that as long as they observed some restraint and took some risk, they met the conditions specified by military necessary and proportionality.

**The Traditional View: Discrimination and Noncombatant Immunity**

The traditional view also requires Soldiers to discriminate between legitimate and illegitimate targets when employing force. This requirement also typically draws its justification from the state’s obligation to protect its citizens from harm. As discussed in the previous chapter, most traditional views of military ethics define war in terms of some violation of a state’s political sovereignty or territorial integrity, which derive their value to the extent their preservation secures the rights of citizens to life and liberty. Because these rights are universal, they apply equally to friendly and enemy noncombatants and restrict the kind of harms Soldiers may commit. This restriction, referred to as noncombatant immunity, requires Soldiers to intend not to harm noncombatants when employing force against otherwise legitimate military targets.

Discrimination does not, however, directly entail a requirement to assume additional risk beyond what is required to accomplish the mission. What requires Soldiers
to assume such additional risk are those instances where efforts to discriminate will be imperfect and that no matter how precise combatants try to be, noncombatants will be harmed. In those instances, Soldiers must take additional measures to mitigate the risk to noncombatants, even if that means assuming additional risks themselves.

To illustrate this point, Walzer cites as an example the efforts of a Soldier in WWI whose mission was to clear cellars of enemy combatants in a recently seized rural area. In doing so, he took the additional measure of shouting out a warning in order to give noncombatants the opportunity to identify themselves and thus avoid harm. Walzer’s point here is that it is insufficient not to intend to harm noncombatants; rather, one must intend not to harm noncombatants.\(^{12}\) This double intention is required to ensure the demands of discrimination are met. Had the Soldier simply not intended to harm noncombatants, then he would have been under no obligation to provide a warning. However, simply throwing grenades down cellar doors hardly seems like an act of discrimination, whatever he might have intended. Thus, even though giving such a warning would give enemy Soldiers time to react and place him at greater risk, he was obligated to offer it anyway. David Luban underscores Walzer’s double intention requirement this way:

> Knowing that an attack will hit both military and civilian objects, the soldier must take care to intend only to hit the military target, not the civilians. That seems like an absurd and dishonest mental game. How do you avoid war crimes? Close your eyes, take a deep breath, concentrate hard, and refocus your intentions. Then go ahead and do what you were going to do anyway.\(^{13}\)

To avoid absurdity and dishonesty one must take action to discriminate, even if that requires additional risk. Of course, as noted above, that risk is still limited by the fact combatants are not obligated to conduct operations in a way they will knowingly fail or
not be able to continue the fight. Still, even this limitation will not resolve the absurdity
the excessive risk taking described by the NCO and Marine lieutenant above.

**Difficulty for the Traditional View**

Given the traditional view, it is not hard to see why the NCO’s and Marine
lieutenant’s higher headquarters withheld supporting fires and smoke as well as the
permission to attack the insurgents planting IEDs. It would also be hard to fault the
higher headquarters for denying Corporal Myer supporting fires.¹⁴ Military necessity
demands concern for the mission. The application of proportionality and discrimination,
however, demand concern for noncombatants. While commanders are expected to
conserve Soldiers’ lives as a matter of military necessity, the demands of irregular
warfare – where support of the local population is critical to mission accomplishment—
place almost all the risk associated with conducting operations onto the soldier.

The difficulty for the traditional view is that when choosing where to transfer
risk—mission, enemy civilians, or themselves—combatants must always choose to
transfer risk to themselves, except when the mission itself is at stake. By placing friendly
combatants lowest in priority in terms of risk avoidance, one effectively denies them the
right to life. By denying them the right to life, they are denied the protection of the state
they are defending. This view is explicitly held by Walzer who notes:

> The immediate problem is that soldiers who do the fighting … lose the rights they are supposedly defending. They gain war rights as combatants and potential prisoners, but they can now be attacked and killed at will by the enemy. Simply by fighting … they have lost their rights to life and liberty … and they have lost it, even though, unlike aggressors states, they have committed no crime.¹⁵

Israeli philosopher Asa Kasher has famously challenged this feature of the
traditional view. In an article co-written in 2005 with then Major General Amos Yadlin,
Kasher remarked: “the duty to minimize casualties among combatants during combat is last on the list of priorities … we reject such a conception because it is immoral.”\(^{16}\) The authors argued that the state’s obligation to protect its citizens from harm—which justifies the use of force in the first place—extends also to Soldiers. While recognizing that Soldiers do assume risks friendly civilians do not, he noted, “(a) combatant is a citizen in uniform … (whose) life is as precious as the life of anyone else.”\(^{17}\) The state may be justified in putting his life at risk because of its obligation to defend all citizens, but the obligation to protect the soldier to the extent commensurate with his duties does not go away.

Further, the authors argue that the state has no such obligation to protect enemy noncombatants, especially if it means assuming additional risk on the part of friendly combatants. While they agree that enemy noncombatants may not be directly targeted, they argue it is immoral to ask friendly combatants to take additional risks to protect those civilians outside the state’s effective control. This restriction follows from the fact that the social contract forbids the state from jeopardizing the lives of its citizens unless it serves the defense of other citizens.\(^{18}\) In their formulation, minimizing injury to the friendly noncombatants is a higher moral priority to a military than minimizing casualties to its own troops. However, force protection is a higher priority than minimizing casualties to enemy noncombatants not under the military’s control.\(^{19}\)

This view was apparently influential in shaping the way the Israeli Defense Forces (IDF) conducted operations in Gaza in 2009. According to press reports, Israeli Soldiers were told to “protect themselves first, civilians second.”\(^{20}\) According to one report, if they “are told to reach an objective, they first call in artillery or airpower and
use tank fire.” Such tactics minimized the risk to Soldiers, but also limited their ability to discriminate among targets, which typically increases the risk to noncombatants. Given that hundreds of Gazans reportedly died in the conflict, it seems that these practices did represent a significant transfer of risk to the noncombatants, which would have only been permitted under the traditional view had the IDF taken whatever measures they could to discriminate up to the point of mission failure.

The difficulty with Kasher and Yadlin’s view is that it privileges nationality (or at least residence) when determining where the burden of risk should lie. They argue that what determines the state’s obligation to protect—or at least avoid harm—is whether the state has effective control over the territory in which the combat operations are taking place. If the state has effective control, then it is has sovereignty over that territory. If the state claims that right to sovereignty, then it must respect the rights to life and liberty that justify that claim to sovereignty in the first place. Respecting those rights includes exercising that sovereignty to protect them, which is the fundamental feature of the social contract. Where the state does not have sovereignty, then it has no obligation to protect.

To illustrate why the absence of sovereignty does not entail the absence of the obligation to avoid harm, Walzer and Avishai Margalit describe a situation where Lebanese Hezbollah (LH) forces capture an Israeli kibuttz. They describe four different scenarios where the IDF is confronted with liberating the kibuttz. In one scenario LH is holding Israeli citizens hostage and using them as human shields. In this case, under Kasher and Yadlin’s model, preserving the lives of IDF personnel would come second to preserving the lives of the civilians thus limiting the amount of risk the IDF could transfer to either the mission or to enemy noncombatants.
In the next scenario, there are a number of “well-wishing volunteers”—supportive pro-Israeli non-nationals. Though not the Israeli citizens that these volunteers support and though not in territory effectively under government control, Walzer and Margalit argue that it seems intuitive that their nationality should not weigh against them when Soldiers determine where the burden of risk should lie. They should assume the same additional risk they would provide the Israeli citizens the volunteers support.

They then alter the scenario and rather than hostages, the kibbutz is populated by anti-Israeli protestors from abroad. Here the only thing that distinguishes this population from the previous population is their attitude towards Israel. However, this discriminating criteria would not be applied to the population of Israeli citizens. Had the Israeli citizens in the first scenario been supporters of LH rather than hostages, the obligation to take extra risks would still be in place. In Kasher and Yadlin’s view, it would not matter if the Israeli citizens in the kibbutz supported the LH who had taken over; the Soldiers’ obligation to protect them would still hold.

The next scenario involves Lebanese citizens who were bussed in to act as human shields. In this case, they do not support the LH or Israel. They just simply want to return to their lives in Lebanon. Here again, the only thing that distinguishes this population from the ones for which additional risk would be obligated is their nationality.

In the first case, which matches the rules the IDF already play by – Soldiers assume additional risk in order to protect friendly civilian lives. In the second example, it seems counter-intuitive to argue these pro-Israeli supporters enjoy less consideration than the Israelis under similar circumstances. If neither nationality nor military presence under effective control affect decisions about risk in the first two examples, then it is not clear
why they should in the latter two, since these cases are differentiated only by attitude toward Israel. As Walzer and Margolit note:

> By wearing a uniform, you take on yourself a risk that is borne only by those who have been trained to injure others (and to protect themselves). You should not shift this risk onto those who lack the capacity to injure; whether they are brothers or others. The moral justification for this requirement lies in the idea that violence is evil, and that we should limit the scope of violence as much as possible. As a soldier, you are asked to take an extra risk for the sake of limiting the scope of war.\(^{24}\)

Here we have a clash of intuitions. Walzer and Margalit are right: liability to attack depends on the threat one represents, not one’s nationality or residence. But Kasher is also right: Soldiers do have a right to life and an expectation that the state will take measures to protect them as well.

So, while the imperative to accomplish missions obligates Soldiers to take risks, a broader view of military ethics must also consider the obligation the state has to preserve their Soldiers’ lives and well-being. The traditional view cannot accommodate both these intuitions. Thus we must either continue to require Soldiers to bear all the risks of war fighting or revise the traditional view.

**Irregular Warfare and Risk**

In the kinds of conventional wars that gave rise to the rules associated with the traditional view, the risk is largely manageable. As noted before, Soldiers are not required to assume so much risk that the mission fails or that they would not be able to continue the fight. This limitation provides commanders sufficient latitude to balance mission requirement and Soldiers’ lives because it gives them somewhere else to displace the risk associated with a particular operation. While they are not permitted to directly target noncombatants, they can construct the operation to take advantage of long-range fires and
other protective measures, even if that means some noncombatants will knowingly be harmed.

Further, as Walzer and Margalit note, one important feature that distinguishes combatants from noncombatants is the capacity to harm and avoid harm. Their point is that Soldiers are provided with weapons, equipment, medical support, and training that not only improves their chances of defeating enemy forces, it also improves their ability to survive on the battlefield. Since noncombatants do not share this advantage, it is not fair for Soldiers to displace the risk those advantages were supposed to mitigate onto noncombatants.

This advantage, however, is offset, at least to a degree, on the irregular battlefield where the presence of civilians makes the combatant-noncombatant distinction difficult to apply. It is not simply that support of local populations is critical to winning irregular wars; rather, it is that the population represents a contribution to enemy capability. The fact that irregular adversaries can hide among the population while at the same time easily distinguishing and targeting counter-insurgent forces, suggests that the presence of civilians has a direct and positive impact on the enemy’s ability to fight. This asymmetric ability to distinguish one’s foe not only offsets the advantages associated with soldiering, it ties that offset to the presence of civilians on the battlefield.

Additionally, when civilians actively support the insurgent cause, that connection to enemy capability is further strengthened. Thus in irregular warfare, civilians’ contribution to the enemy’s ability to wage war is not easily separated. However, because of the close association between the support of the local population and victory,
displacing that risk onto noncombatants in irregular warfare often places the mission at risk.\textsuperscript{25}  

It is this close connection between enemy capability and the presence of civilians coupled with the requirements of the traditional view that places Soldiers in the absurd positions described above. To avoid such absurdities, what is required is a view of military ethics that permits commanders to displace risk on something other than Soldiers while at the same time upholding the principles of proportionality and discrimination as articulated above.

Because civilians and civil society are closely linked with the enemy’s ability to fight, it makes sense that some of the risk associated with that fight should be transferred to them, at least when the choice is transferring it all to friendly combatants. However, arguing that civilians should bear risk because of their central role in determining enemy combat capability does not necessarily entail greater permissions for Soldiers to conduct operations in such a way civilians would be harmed. Kasher and Yadlin are right, the state has an obligation to protect all its citizens, including Soldiers. But Walzer and Margalit are also right: the state should not implement such protection in a way that violates the rights of noncombatants: friendly or enemy.

Thus, the question when determining where the burden of risk should lie is: how would we handle that threat if it manifested within our own populations? Looking at military ethical situations this way requires us to reframe the problem from the simple application of rules associated with military necessity, proportionality, and discrimination to balancing risk in a way that respects the rights of combatants and noncombatants alike.
Resolving the Moral Problem: Enemies and Criminals

When enemy combatants and civilians are difficult to separate in the manner described above, it is often because there is some sort of political order that supports the activities associated with civil society. In conventional combat zones that order is typically suspended as combatants wrestle over who controls that particular piece of land. However, insurgencies usually take place in the context of a larger social and political order to which the insurgents either object or exploit and which counter-insurgent forces are presumably trying to defend. In fact, these sorts of irregular conflicts are not so much about destroying a particular order, but gaining control over it.

This point suggests that we have to reconsider what sort of adversary irregular adversaries are. Rather than an existential threat to the state, they are an existential threat to the political order the citizens of the state rely on to carry out their daily lives in relative security. This distinction is important. In the kinds of conflicts represented by Iraq, Afghanistan, and Gaza the immediate threat is not to the state but to its citizens. However, the traditional view rests on the idea that war is only justified in the face of an act of aggression defined as a violation of political sovereignty and territorial integrity. That kind of aggression, however, is not what Soldiers typically confront in irregular warfare. In these conflicts their aim is to maintain a particular order, not destroy it.

Over time this could of course change. And when it does, the sort of ethics reflected in the traditional view would be appropriate. However to the extent irregular adversaries represent a threat to individual rights but not the corresponding state’s rights, they are then best conceived of as criminal. While they do not directly threaten those state’s rights, their threat to individual rights still places a burden on the state to protect them.
In 2001, I argued in the monograph *Peacekeeping and the Just War Tradition*, that the distinction between war fighting and law enforcement was essential to understanding Soldiers’ ethical obligations in irregular conflicts. This distinction is well-captured in the actions of a joint police-military patrol undertaken during the 1992 Los Angeles riots, where Marines and police responded to a domestic disturbance. When they arrived at the apartment where the disturbance occurred, the police knocked on the door and announced themselves. The response was a shotgun blast through the door that fortunately missed the officers. As the police readied to enter the room, they yelled to the Marines, “Cover me!” In response, the Marines fired approximately 200 rounds through the door. Fortunately, no one was injured.

Though both military and law enforcement organizations instruct their forces to always use the least force necessary, this example shows they have very different conceptions of what necessity entails. In the police view, it would be better to develop the situation and ascertain whether there were nonviolent ways to resolve it. As far as the Marines were concerned, any degree of proportional force that eliminated the threat would be appropriate, even if it put civilians at some risk. As John Kleinig notes in *The Ethics of Policing*:

> Although this model has room for the use of nonnegotiable force, its instrumental or subservient character is emphasized. The use of coercion to enforce the law or settle disputes is not appropriate just because police are socially recognized repositories of coercive power or because they have coercive power at their disposal, but because in their peacekeeping role such means have become necessary.

The different reactions are due to the way each perceives and is trained to deal with threats. To the police, the threat is a criminal they must apprehend in order to minimize disruption to society. Since the use of violence represents a further disruption
of the peace, police are always looking to use the least force possible. But Soldiers are trained to defeat enemies, who must be killed—or at least captured—if there is to be peace. They are always looking to use the most force permissible. 

These different conceptions of the threat provide Soldiers with different contexts for the use of force they can employ to meet their obligations to the mission, noncombatants, and themselves. By understanding that there is more than one context in which to apply military force, we reframe the problem. Rather than simply asking what the rules permit, one should ask how do these rules apply given the relevant concept of necessity. In this view, military necessity, proportionality and discrimination still matter but their application changes depending on whether the most force permissible or the least force possible applies. When that context changes, it is not the rules that change, simply where the burden of risk lies. Further, this view allows us to recognize that force protection is itself a moral obligation that commanders must consider when determining that burden of risk.
Figure 2: Lethal Force, Risk, and the Political Order. This graph illustrates the fact that the greater lethal force employed, typically the more disruptive to the political order. This fact entails that there is an inverse relationship between the strength of the political order and noncombatant liability to risk. This point further entails, as shown by the intersection of the two curves, at some point the political order is strong enough that foreseen harms, even if unintended, are no longer permissible. At that point, combatants are obligated to employ the least force possible to uphold the political order.\textsuperscript{31}

This view is very similar to the concept of “minimal force” as articulated by British counterinsurgency doctrine. In the British view, “no more force may be used than is necessary to achieve a legal aim.” The doctrine further makes a distinction between riot and insurrection, where in the former, Soldiers could only use that force necessary to restore law and order and in the latter “any degrees of force necessary,” to eliminate the challenge the insurrection represented to the Crown’s authority. However, by failing to distinguish between the most force permissible and the least force possible, this doctrine did not always provide sufficient guidance to ethically resolve decisions about the use of force.\textsuperscript{32}
For example, believing he was faced with an insurrection, British General Reginald Dyer ordered his troops to fire into a crowd of approximately 10,000 protesting Indians at Amristar in 1919, killing 379 and wounding over one thousand. While a subsequent investigation found that he had used “more force than necessary” the investigation missed the point. What the investigation faulted him on was mischaracterizing a riot as an insurrection. However, had British doctrine included a concept of “least force possible,” Dyer’s men would have been further required to limit the harm they caused, especially after they identified the protestors as unarmed, even if the efforts of the protestors counted as an insurrection.³³

My point here is not that it is sometimes permissible to fire into an unarmed crowd—it is not. Rather, my point is that the use of force is only justified to avoid some other harm. So whether a protesting crowd is better described as an insurrection or a riot is irrelevant. What matters is the harm that crowd represents and what is the least force possible to avoid that harm. Perhaps British soldiers would have been permitted to shoot at certain protestors who threatened others with violence; however, failing that threat such shootings would have been impermissible.

Revising the Traditional View

The following are revisions to military necessity, proportionality, discrimination, and force protection suggested by this analysis.

Proportionality

When calculating proportionality, Soldiers fighting wars are required to weigh the value of the military objective and the harm done to achieve it against establishing a better state of peace following the cessation of hostilities. Soldiers combating irregular
adversaries, on the other hand, are obligated to weigh their actions against the
requirements to maintain, if not strengthen, the current order. This point means that
Soldiers must not only consider the consequences of the violence they may employ, but
also of non-violent actions that nonetheless disrupt the peace, such as mass detentions or
excessive restrictions on movement.

**Discrimination and Non-combatant Immunity**

When discriminating against legitimate and illegitimate targets, Soldiers fighting
wars must intend not to harm noncombatants. However, as long as they take legitimate
actions intended to limit that harm, they are still permitted to act, even if they know some
civilians may be harmed. Soldiers combatting irregular adversaries, however, must
further intend not to place innocent civilians at risk. This point does not suggest that
police are never permitted to undertake actions where civilians may be harmed. For
example, they may undertake a high-speed car chase even though there is always the
chance that they may lose control of the car and inadvertently harm a civilian. The
difference here is that the harm is not only unintended, it is unforeseen.

Additionally, as Kasher and Yadlin would have to argue, as Soldiers gain more
control over the ground they occupy, they take on the obligation to protect civilians from
harm in the same way police do. This latter condition assumes that Soldiers can act as
police in the given area of operations. Clearly, Hamas’s control over Gaza prohibited the
IDF from doing that. In such cases, Soldiers may engage the adversary under the enemy
model, but only in order to establish a law enforcement capability as rapidly as possible.
Force Protection

This analysis suggests that protecting the force is a moral obligation commanders have to their Soldiers by virtue of their right to life. Thus, noted earlier, Soldiers fighting enemies are obligated to take risks to minimize harm to noncombatants, though these risks would be limited by both the requirements of force protection and mission accomplishment.

This obligation to accept risk also holds in irregular conflicts. However, when fighting irregular adversaries, Soldiers are limited in how much risk they can transfer to noncombatants by the requirement to preserve the peace. This point does not suggest that Soldiers are obligated to go on suicide missions. It does mean if the choice is to forego harming civilians or undertaking a particular course of action, Soldiers must choose to forego that course of action. This point does not suggest that they must forego achieving their objective; just that they must find another way to do it. Police, for example, would let a criminal, even a violent one, escape before firing into a crowd of civilians. They would not, however, stop their pursuit of that criminal nor their efforts to prevent future criminal acts.35

Conclusion

By viewing military ethical decision-making through the lens of balancing risk as opposed to simply applying rules, we can resolve the conundrum created by the application of the traditional view in non-standard combat environments. Further, we can do so and still respect the basic rights the traditional view attempts to uphold.

In resolving the conundrum, it is important to be clear that it does not follow from this analysis that noncombatant casualties are never permitted when fighting irregular warfare. What follows is that when determining how best to accomplish military
objectives Soldiers must always prefer those actions that avoid risk to noncombatants. This preference is required to uphold the civil order Soldiers are trying to defend. When they cannot avoid that risk, they are permitted to act, but must take extra measures to limit that risk to noncombatants, just as in regular warfare they must take extra measures to limit harm.

In this view, then, the NCO should have received accurately placed smoke to allow him to break contact. The chance of harm from a smoke round is so limited that it is reasonable to argue that any risk, much less harm, is unforeseen. The Marine Corps lieutenant would probably not have been permitted to engage the insurgents planting the IEDs with machine gun fire and helicopter gunships just as police would not be permitted to fire into a crowd, even if they knew that would prevent a violent crime.

What he should have the option to do is kill or detain the insurgents if he can do so without placing civilians at risk. Additionally, he should also have the option to avoid running convoys where the IED is planted until it could be safely dismantled. Just because he is not permitted to place risk on noncombatants does not mean his Marines have to accept that risk as well. He should be permitted to reconceive the mission so that the ultimate end—strengthening the order represented by the Afghan government—is achieved.

It also seems intuitive that Captain Swenson should have received supporting fires to break contact even if the harm to civilians was foreseen, especially given their apparent complicity in the attack. This exposure to harm would not be justified as an act of retribution, but by cooperating actively with the insurgents they represent a direct threat to those friendly combatants.
It should be easy to see at this point that moral decision-making on the irregular battlefield is much more complex than the bi-furcated enemy-criminal distinction described above can account for. While this framework is a useful starting point for getting at the more complex set of obligations present in irregular warfare, it does not sufficiently account for the variety of roles actors on that battlefield can play or the norms associated with those roles. Noncombatants may be coerced or unwitting. It could also be the case that only a small, non-representative number of civilians may be involved in supporting the insurgents and the rest actually supportive. Treating such a population as an enemy will only reinforce that identity. However, as the examples above illustrate, treating them as criminals will not only put Soldiers at greater risk, it will often prohibit them from effectively engaging enemy forces.

Norms associated with irregular warfare are not just about friends and enemies or even enemies and criminals. Thus what is needed is an account of the norms of irregular warfare that covers more than just friends, enemies, and criminals. Further, it needs to cover more than just a set of rules guiding each other’s behavior. Rather it needs to describe how we make claims on one another’s conduct that give all parties involved reasons they all should accept to govern their behavior. Doing so will give us a much more nuanced view of where the burden of risk should lie and resolve some of the absurdities inherent in the traditional view.
Chapter Three: Enemies, Adversaries, and the Obligation to Accept Risk

*Introduction: Roles and Liability*

In the last section I argued that military ethical decisions are best conceived of as decisions about where to place risk: the combatant, the noncombatant or the mission. This is not to say that considerations of proportionality and discrimination do not apply in irregular warfare; however, how they apply differs because permissions associated with risk differ. Where there is a civil order worth preserving, combatants must employ the least force possible rather than the most force permissible, as is the case in regular wars. So if decisions about risk determine the ethical course of action regarding the use of force, the next questions to ask are: 1) how much risk are combatants obligated to accept and 2) how much and what kinds of harms may combatants commit in order to mitigate that risk. In this chapter, I will take up the first question.

In the traditional view, the obligation to accept risks is determined by the role one plays. According to role morality, to the extent someone has consented to play a particular role, she has consented to the obligations, permissions, as well as liabilities associated with that role. Soldiers, *qua* combatants, are obligated to accept the risks associated with destroying the enemy forces, while noncombatants, even enemy noncombatants, are not. Further, this liability to risk is unlimited. Soldiers are obligated to risk physical harm, even death, if necessary to defeat an enemy. The logic behind this obligation is relatively straightforward: the enemy represents an existential threat to the society Soldiers are charged with defending, so their liability is in turn existential.
Combating irregular adversaries poses a number of difficulties for this view. Irregular combatants do not typically entail an existential threat. Successfully defeating irregular adversaries does not requiring killing them as much as it requires bringing them into a cooperative relationship with the political order Soldiers are trying to establish and maintain. Thus in irregular warfare, Soldiers are not only required to take risks to combat adversaries, they are also required to take risks to strengthen the political order. However, the limited threat described by irregular adversaries suggests that the risks Soldiers must take will be limited as well. The limited liability will still entail an obligation to risk harm, but unlike in regular warfare, it will not entail an obligation to accept harm.

The Problem of Liability

At the outset, it is important to be clear that there is a difference between liability to attack and liability to risk being attacked. To be liable to attack one must have done something that permits someone to override her presumptive right not to be harmed. I will discuss this sort of liability in the next chapter. To be liable to risk simply means that one should accept at least the risk rather than let someone else be harmed. Parents, for example, are probably obligated to accept at least some risk in most cases if the alternative is harm to their child.

Arguing about the sorts of risks Soldiers must take, much less arguing that there may be limits to that risk that can be displaced to the mission or to noncombatants may, at first, seem counterintuitive. Risk taking seems to be an essential part of soldiering, so it makes sense to say Soldiers must take at least enough risk to achieve the ends associated with soldiering. But the harms committed by unjust combatants are by definition unjust and this fact poses a problem for a role-morality justification of liability of risk for
Soldiers: it is unjust to put someone in a position to be harmed unjustly. It is not clear then on what basis the state can obligate persons to suffer an unjust harm. Doing so would seem clearly to be treating them merely as a means.

Of course, it is a feature of role-morality that role-based norms can override conflicting norms, especially when that conflict threatens the integrity of the role. For example, surgeons are permitted to cut persons with knives in their efforts to heal them. If they were not permitted to do so, we would not be able to have surgeons, since cutting bodies open is an essential part of the role they play. So, for it to be just to put a Soldier in a position to suffer an unjust harm, suffering that unjust harm—or at least risking it—has to be essential to soldiering in a way that failing to take that risk would entail a failure to soldier.

Surgeons are permitted, of course, to cut into bodies because it is good for the body that they do so. Similarly, Soldiers are permitted to take risks because it is good that the state be defended. But permissions are not the same as obligations. Military ethics is about making choices about where to place risk, so it is reasonable to ask why should Soldiers should accept risk when they can adopt equipment and tactics that more effectively place that risk elsewhere.

Thus while we can draw a direct line between the good Soldiers serve and the moral permissions to accept risk, we leave the Soldier with a number of choices that seem to conflict with other aspects of the role, such as the requirement to accomplish missions and minimize harms to noncombatants. So to obligate risk in a way that addresses those concerns, we have to have an account of soldiering that requires fighting enemies, since it is the act of fighting that places them at risk in the first place. Setting aside, for the
moment, whether there may competing accounts of soldiering that do not involve fighting enemies, we can say that if fighting enemies is a moral good, and fighting enemies entails risks, then it stands to reason that risk taking is a moral good required by the role Soldiers play.

Having established that Soldiers are obligated to take risks, it remains to be established what those risks are. It seems reasonable to say that if the threat to the state is existential, then so is the liability to risk. So if an enemy represents an existential threat, understood here as a grave threat to one’s society and its way of life, Soldiers must risk their lives to defeat them. While I will discuss in more detail what counts as existential, my point here is that while unlimited liability is not logically inconsistent with the role of Soldier, it needs to be explained, because we sometimes apply the term “enemy” imprecisely. When we do, we confuse our obligations and permissions.

In the traditional view, the enemy is defined by the threat it poses to another state’s political sovereignty and territorial integrity. This conception of enemy, however, does not help us understand our liabilities with many of our current foes, even those we may fight by conventional means. Al Qaeda does not intend to occupy US territory; their attacks are more intended to change US policies towards other Arab governments in a way that serves al Qaeda goals. Further, Hizballah and Hamas attack Israeli territory, but they do not seem able to occupy it. Yet we want to call these entities enemies, which would then enable the obligations for unlimited liability entitled by the traditional view. As previously discussed it is the norms associated with the traditional view that have created the absurd situations in which Soldiers often find themselves.
Resolving these absurdities requires more clarity and precision in understanding what enemies are so we can better determine the norms associated with fighting them. Since the presence of an enemy entails a relationship and since relationships inform our moral obligations, we will get this greater clarity and precision by examining how relationships can inform the sorts of obligations we may have. Drawing on resources from pragmatic philosophy of language, I will show how norms are determined by the normative space that arises out of the variety and complexity of the communication conceptually available in a particular relationship. My point here is philosophical, though, not practical. I am not concerned whether, in a given relationship, one can communicate. Rather my point is what we mean by “enemy” entails limitations on the kind of norms we can hold and be held to when in such a relationship. Those limits describe a zero-sum game where there is no possibility of cooperation.

While this view is compatible with most political theories of the enemy, this more philosophical view helps us account why, for example, Nazi Germany was an enemy in a way that al Qaeda and Hizballah are not. Further, and more importantly, it helps account for why norms associated with combating al Qaeda and Hizballah are different from the norms associated with fighting Nazi Germany. The reason these norms are different is that communication is more complex. The reason these communications are more complex is that in the irregular environment there is an underlying social order that provides greater normative space, defined as the structure that emerges out of social interactions where persons attempt to influence other persons’ behavior,\textsuperscript{2} that expands the variety and complexity of the kinds of things we can call upon others to do. Thus this
order expands the possibilities for the kinds of relationships available and these different relationships expand the kinds of norms will further associated with accepting risk.

**Role Morality and Liability to Risk.**

That the roles we play can determine our obligations to specific persons is fairly intuitive. For example, most people will accept that parents have obligations to their children that they do not have to other children. Similarly, even the traditional view of military ethics acknowledges that combatants do not have the same obligations to protect enemy civilians that they have towards friendly ones. However, to say parents do not have the same obligations toward other parents’ children is not to say they have no obligations. For example, parents may not have an obligation to promote another child’s welfare, but they may not place that other child at risk when seeing to their own child’s concerns. Furthermore, they may not place that other child at risk in order to avoid harm to their own children, even if that other child’s parent is the source of that harm. This same logic roughly captures the justification for non-combatant immunity: as long as civilians are not a direct threat to combatants, they are immune from harm.

**Roles, Risk, and Defending the State: A Basis for Risk Liability.**

Before I can establish obligations for Soldiers to accept risk, I first have to establish the basis upon which the state can place any of its citizens’ lives at risk. As discussed previously, the social contract entails the state has an obligation to defend its citizens. This fact, however, does not entail that any particular individual has an obligation to defend the state. It is not hard to imagine that while most, if not all, citizens may wish to be defended, and may even be willing to do certain things in its defense, some citizens may not wish to kill or accept the risks associated with killing. Setting
aside whether such free riding is permissible, my point here is that when the state compels its citizens to kill on its behalf, it undermines their will and fails to treat them as autonomous, self-ruling agents. By undermining their autonomy in this way, the state commits a moral wrong.

The state’s obligation to defend its citizens, however, does create moral permission for certain citizens to participate in that defense. By taking on this responsibility, citizens take on the role of Soldier, where role is understood as a “collection of rights and duties associated with a status.” Intuitively, those rights and duties would include, at a minimum, the permission to kill and the obligation to take risks when doing so. However, it is a common feature of role morality that the demands of the role sometimes come into conflict with the demands of common morality, as would seem to be the case when it comes to soldiering. While common morality may permit persons to accept risk, it would not permit persons to compel others to take risks.

The moral difficulty Soldiers face arises from the fact that in defending their right to life, they threaten that right of others. When that threat is directed at the attacker, we commonly accept a moral asymmetry, where the defender is permitted to kill the attacker, because it is the only way to stop the act of aggression. The attacker can always choose not to attack. Of course, the defender can choose not to defend and there may be circumstances where he may be obligated to do so. But what he cannot choose is not to be attacked. So to the extent the defense impermissible do not exist, the autonomy of the attacker, at least in this idealized sense, is preserved at the expense of the defender. This asymmetry, in fact, is what distinguishes just from unjust combatants.
Therefore, the defender has permissions to kill the attacker does not have. In this sense, the role specific obligations of Soldiers to kill seem to arise from rather than conflict with the demands of common morality. To the extent that killing entails risk taking, then risk taking would also be permitted. But permissions are not the same as obligations.

In their role as defender, just combatants have done nothing to warrant harm; whereas in their role as attacker, unjust combatants have. This additional asymmetry poses a further difficulty regarding combatant liability to accept risk. If the analysis in chapter one was correct, and Soldiers do not lose their right to life simply by becoming Soldiers, then the harms committed against them, all things being equal, would be unjust. Just combatants are not liable to attack by unjust combatants. It may be their role to expose themselves to risk to prevent the harm the unjust combatants represent; Walzer, Margalit, Kasher and Yadlin would all agree. However, if the harm done to them is unjust, then we need an account of how adopting a particular role can obligate them to suffer such harm. Since obligating someone to suffer an unjust harm without her consent would seem to conflict with common morality, all things being equal, compelling someone to suffer injustice seems very much like using them merely as a means.

Liability typically rests on some form of consent. For example, by consenting to accept the role of Soldier, one accepts the risks, as well as the benefits, associated with that role. Consent, in fact, as Arthur Isak Applbaum notes, is a “very potent permitter” for actions that without that consent would be wrong. Consent enables these presumptive wrongs because we presume that others know what is in their best interest. Thus if they consent to taking a particular risk, then we are respecting their will if we allow them to do
so. This point, of course, assumes the Soldiers’ will was not overridden by coercion or deceit. If it were, we would have to find another justification for obligating the risks associated with war. There is of course a lot more to say about how consent can entail a liability to suffer harm—which is different than liability to accept risk—which I will take up in the next chapter.

For now, however, I am simply concerned with determining how consent to playing a role can entail any obligation to suffer an unjust harm. Because consent removes the presumptive wrong associated with harms, one cannot, for example, consent to being murdered, coerced, or deceived. The fact of consent means the harm, whatever it was, was not an unjust harm. Consent, therefore, defeats the presumptive wrong of the harmful act in question. This point does not mean that Soldiers cannot be murdered, coerced or deceived. In fact, as our analysis in chapter two suggests, these are the harms committed by the unjust combatant. However, what it does mean is that as long as they have consented to the role, the state does nothing wrong placing them in harm’s way. It does not matter what their preferences are at the time. By consenting to the role, they take on the obligation of the state to protect its citizens; to the extent that protection entails risks, then they are obligated to take them.

This view of Soldier’s consent, however, just begs the question whether soldiering actually does entail taking risks. One may plausibly argue, for example, that while fulfilling the state’s obligation may entail fighting, fighting does not entail risk-taking. In fact, the defense acquisition ideal is to develop weapon systems that eliminate all risk to friendly combatants—hence the increasing reliance on drones that eliminate the need for Soldiers to expose themselves to enemy fire. This is an important point. To the
extent harm to just combatants is unjust, then it seems reasonable that they may avoid or displace that risk as much as possible, at least as long as doing so does not create a further injustice.

Stipulating that just combatants are free to avoid or displace risk as long as they create no further injustice, of course, does not get us very far. The defense acquisition system has yet to reach its ideal of no-risk warfare. So Soldiers are still required at least in some instances to expose themselves to the enemy in order to defeat him. In doing so, they may be permitted to avoid certain risks if by doing so they do not fail in a legitimate mission or displace it on to innocents. Further, this analysis so far suggests they would be free to displace as much risk as possible onto unjust combatants, since harm to them, by definition, is not unjust. However, whatever risk is left over, for the most part, belongs to them. So this ability to displace risk does not entirely avoid the problem of unjust risk.

There is one additional concern to deal with before we can establish that soldiering entails risk taking. In addition to the conceptual gap between fighting and risk taking, there is a further gap, albeit a small one, between soldiering and fighting. Given the important role of consent in enabling the state to obligate Soldiers to place themselves in harm’s way, then consenting to soldiering will have to entail being placed in harm’s way. However, it is not clear that is necessarily the case. There is a difference between volunteering to be a Soldier and volunteering to go to war.

This difference arises because one may plausibly argue that the purpose of standing armies is not to fight wars, but to act as a deterrent to war. Of course, this is the stated purpose of most armies in democratic countries. However, Soldiers’ experience in a peacetime army is one of preparing to fight. They may know at the intellectual level
that war, in general, is an evil to be avoided, but the extraordinary effort they undergo to
perfect their war fighting techniques naturally creates a disposition to want to put those
techniques into practice. Thus at the psychological level, it is easy for the individual
Soldier to conflate preparing to fight with fighting—especially after ten years of actual
fighting—and consider the latter his purpose.

This is an important, if subtle, distinction. If the latter is the Soldier’s purpose,
then we risk creating a warmongering class who do not see their role properly fulfilled
unless they fight. Plato, in fact, recognized this concern as he articulated the qualities of
the guardians. He noted it is not always natural to reconcile the aggressive and protective
dispositions, noting that the true guardian must be gentle as well as high-spirited and wise
enough to know when aggression is warranted. The alternative is savagery.13

So if wanting war is wrong, then it cannot be the case that morally justified
soldiering entails war fighting. If we accept this point, then it would be possible to
differentiate consent to soldiering and consent to fighting. Thus if consent to soldiering
does not entail fighting, then it does not entail risk taking, beyond those risks necessary
for training. The point here is not that in the face of an act of aggression, professional
Soldiers should not fight. They should. It is just that fighting in this case is coerced.
However, it is not coerced by the state, it is coerced by the enemy. Having failed in the
mission of deterrence, the Soldier may now find himself in harm’s way. However, it is
wrong in this case to say the state placed him there. By virtue of his role, he is the state:
there are no other institutions that would stand in the way of the enemy.

However, being placed in harm’s way does not entail obligations to take risk. The
difference I am noting here is one between obligated and supererogatory acts. To say
Soldiers may be placed in harm’s way but not obligated to take risks is simply to say that the risks they do take are above the call of duty rather than conforming to it. This point is actually consistent with current views of the military. The public often treats members of the military as heroes simply by virtue of their membership. Additionally, within the military it is common practice to award medals to those who have taken risks in the course of war fighting. There is, of course, nothing wrong with these practices, but they do point to a notion of military service and its associated risks as beyond obligation.

The difficulty with this account of the obligation to accept risk is that it conflicts with the obligation to accomplish missions, as described in chapter two. We can certainly imagine a military where commanders no longer struggle with sending Soldiers to their deaths, since the Soldiers do not have to go. We can imagine instead that whenever there is a mission that involves risk, commanders draw a line on the ground and ask those willing to take that risk to step over it. If none are willing, then the mission does not occur. Such a view would conflict with elements of the US Army’s Warrior Ethos, which requires Soldiers to put the mission first, never accept defeat, and never quit. However, as long as enough Soldiers enough of the time determined that the risks were worth it, then such a view might work as a matter of practice. Such a practice would of course accommodate respect for Soldier’s autonomy; however, it is not clear that such a practice would entail an effective military.

Setting aside that last concern, there is a deeper problem with this view. Where those Soldiers do not see that the risks are worth it, commanders, of course, would be prohibited in requiring them to take risks. This prohibition, in fact, became a matter of policy during operations in the Balkans in the 1990s, though in this case, it was US
political and military leadership that determined the risks were not worth the cause. Following a policy of “radical force protection,” commanders were required to forego missions if the alternative was to expose Soldiers to any significant risk of harm (beyond the possibility of accidents). I do not mean to suggest that there is anything wrong—even from a role perspective—in reducing risks to Soldiers. I do mean to point out that the logical conclusion of a policy of “radical force protection” creates a nonsensical situation where Soldiers are no longer fighters, but bureaucrats and technicians whose responsibility is to competently employ the tools of violence as long as none of them get hurt. In such a military, mission accomplishment is no longer a prima facie moral obligation. As noted above, there may be a time where technological advances allow us to achieve risk-free war. Until that time, however, the choice between mission accomplishment and risk remains.

Reconciling Roles, Risk, and Mission Accomplishment

If we are to retain mission accomplishment—or perhaps better put—the requirement to accomplish those missions that fulfill the obligation of the state to defend its citizens, we have to reconcile two competing intuitions: 1) Soldiers have a right to life and 2) Soldiers are obligated to risk that life to accomplish missions. I have already established that the risk just combatants experience is coerced, as a function of an enemy act of aggression. This point entails that their deaths are unjust; however, it further entails the responsibility for that injustice belongs to the enemy, not the state. Further, I have established that as agents of the state Soldiers do have a role-based obligation to fight the enemy, though I have not yet resolved whether risks taken in the course of that fight are obligated or supererogatory. All I have established so far is that there is a necessary
connection between an obligation to accept risk and the obligation to accomplish missions. This necessary connection entails Soldiers must make a choice regarding whether to accept risk or not, but it does not entail what that choice should be.

This last concern is an important one. As previously noted, Soldiers may not displace risk if by doing so they create further injustice. Typically, that means Soldiers must accept additional risk if the alternative is indiscriminate or disproportionate harm to noncombatants. However, if placing just combatants at risk is a moral wrong, then that risk, as well as any associated harms, would count in proportionality calculations. By counting in proportionality calculations, they would give greater weight to courses of action that prioritized just combatant lives over that of noncombatants, even friendly noncombatants. Recall, for example, Walzer’s scenario of IDF forces having to free a kibbutz filled with Israeli citizens taken hostage by Hizballah. While his point was to show that any risks these forces should take to minimize that risk to Israeli citizens should also be taken to minimize risks to Palestinian civilians in similar situations, the example still begs the question, why take any risks at all? If either Soldiers or civilians are not obligated to take risks, then it is not clear that Soldiers are required to prioritize any noncombatant lives over their own. Their actions must still be proportional and discriminate, but as long as they are, they may harm noncombatants.

I will take up noncombatant liability to harm up in the next chapter. However, this outcome seems to conflict with some of our strongly held intuitions regarding what the role of Soldier entails, namely that in fighting enemies, the burden of risk falls to them rather than the citizens they are supposed to protect. To reconcile this conflict, we have to establish role-based obligations that fulfill the requirements of common morality rather
than compete with them. In this way, we will be able to say that rather than conflicting with common morality, this role-based obligation arises from it.

**Role-based Obligations to Accept Risk**

Philosopher David Luban argues that if one can draw a direct line from the moral good that a particular social institution serves to a particular act, that act can be justified by virtue of the role it is intended to fulfill. Thus, if the institution serves a moral good, a particular role is critical to the functioning of that institution, a particular obligation is necessary to fulfilling that role, and a particular act is justified by virtue of that obligation, then that act is morally justified.\(^{16}\) Thus if the defense of the state is a moral good, the military, as an institution, is necessary to realizing that good, the role of Soldier is necessary to the functioning of the military, and if the obligation to accept risk is essential to fulfilling the role of Soldiers, then the obligation to perform that act is morally justified.

One difficulty with this formulation, as Luban notes, is that all it requires is that each link meet a minimum threshold in order to justify the following link.\(^{17}\) For example we can imagine that there are two people, one who needs to deliver humanitarian aid to a stricken village and another who is conducting some sort of scientific research near that same village. Both require the cooperation of a corrupt local who demands a bribe in order to provide the transportation assets they need to get to the village and fulfill their professional obligations. In both cases we can draw a direct link between the good each serves, the role they play, the obligation they are under by virtue of that role, and the act they are considering: providing the bribe. Setting aside whether giving a bribe can ever be justified, given that lives are at stake in one case and scientific research on the other,
we can see that there is a greater weight, to employ a mathematical metaphor, to the former argument rather than the latter.

The point here is that the collective relative “weight” of each link matters when justifying a particular act by virtue of a professional obligation. Thus rather than considering each link separately, one must consider the totality of the links in order to determine if the act is in fact justified. 18 So when the demands of common morality conflict with acts justified by virtue of role-based obligations, not only must there be a link back to common morality—feeding starving people and scientific knowledge are good—there must also be a cumulative weight to the justifications associated with each link in the chain that contributes to the overall justification of the act. 19

It is not difficult to see how such a framework would inform an obligation to accept risk. In the idealized, traditional view of military ethics, all legitimate missions are undertaken to achieve victory, understood as the destruction of military forces that compels the surrender of the enemy, thus removing the threat to political sovereignty and territorial integrity the enemy represents. Since there is a direct line from those states’ rights to those citizens’ rights, the cumulative weight of the justification of every legitimate mission would entail an obligation to accept risk that would not fall to friendly noncombatants who are not part of the institution, in this case the military, invested with the role to defend. Since, as discussed in chapter two, noncombatants are moral equals, this framework would suggest that Soldiers would additionally be obligated to accept risk on behalf of enemy noncombatants. I will discuss this last point in detail in the next chapter.
In this way, we can reconcile the concerns we had earlier. The act of aggression coerces the Soldier on the battlefield. However, the reason it coerces him on the battlefield is because of the role, as Soldier, that he plays. In that role, he is an agent of the state fulfilling its obligation under the social contract. Under that contract, he is obligated to conduct operations that lead to the defeat of the enemy. While he may prioritize his life over that of enemy combatants, he may not prioritize his life over noncombatants, who by definition, have not also been vested with this role.

However, consider the following example: village elders contact a nearby US Army unit asking for generators to provide much needed electricity to the town. Sensing an opportunity to win hearts and minds, the battalion commander sends a company to the village with the generators. As they approach the village, they come under fire. Given that this is a legitimate mission, with a direct link to conditions necessary to declare victory, are we to assume that the Soldiers must assume risk and continue into the village to deliver the generators? While they may be permitted to abandon the humanitarian aspects of the mission, are they now obligated to fight and kill the enemy, or are they permitted to disengage and try to occupy the village in more favorable conditions? If they conclude that the villagers collaborated with the enemy in setting up this ambush, are they then permitted to displace even more risk on the villagers and employ imprecise indirect fire in order to break contact?

Something similar to the situation described above happened to Corporal Dakota Myers’ unit, where they were duped by collaborating village leaders into walking into a Taliban ambush. And, as noted in the last chapter, the unit was denied indirect fire support for fear of civilian casualties. In fact, other units in the area refused to participate
when called upon to assist in continuing the attack on the village. The legitimacy of those refusals has been questioned in subsequent investigations. The confusion arises because while there may be a general obligation to accept risk, there may not be an obligation to accept just any risk. What is needed is a way to account for the cumulative weight of the various justifications that join the defense of the state to any particular act associated with its defense. Just as it is probably not justified to bribe an official to collect a few extra samples of some particular flora or fauna, not every risk Soldiers may be required to take may not be justified as well, even if it is necessary to accomplish a legitimate mission.

**The Enemy, Existential Threats, and Liability to Accept Risk**

Aristotle argued that for an act of bravery to be truly courageous – that is morally worthwhile – one not only had to overcome one’s fears to act, one’s reason for acting had to be for the right kind of end. Running into a burning building to save a child is courageous; however, running into a burning building to save an ordinary piece of furniture—all things being equal—is not. This same point is true regarding decisions about risk. What risks one should accept or displace depend on the ends one is trying to achieve. In the context of war fighting those ends are defined by the kind of harm one’s adversary represents.

Up to this point I have only established that Soldiers are obligated to accept risk. I have not established what those risks are. If role responsibilities are in part determined by how the moral goods associated with that role are weighted, then it follows that not all threats, and thus not all risks, are created equal. I have previously stipulated that existential threats entail unlimited liability to risk. While that may sound logical—preventing the “death” of society should entail risking the death of its defenders—I have
not shown why that is the case. Society’s death is at best a metaphor for what commonly
is at stake in most wars. There is, however, a difference between a society and the
political order that enforces the social contract and distributes social goods.

Further, while “society’s death” may entail unlimited liability, I have not
described what unlimited liability entails. As mentioned in chapter two, the moral
imperative of victory limits Soldiers risks. They may have to risk their lives, but they do
not have to risk failure. To the extent their lives are required for success, they may not
have to risk them. Since it is conceivable that Soldiers may sometimes have to choose
between failure and displacing risk on noncombatants, this point would seem to
undermine our previous analysis. However, there is a difference between risking harms
and suffering harms. Up to this point, I have expressed Soldiers’ obligations in terms of
risking harm. But unlimited liability entails they may be called upon to suffer harms as
well. This point, in fact, is what differentiates the role of Soldiers from other agents of the
state, such as law-enforcement officials, who are also charged with protecting citizens:
*Soldiers must be willing to give up their lives, others may be obligated only to risk it.* So
while there may be cases where combatants may displace risk onto noncombatants, there
are no cases where they can displace harms.\(^{21}\)

However, while unlimited liability may differentiate soldiering from other sorts of
roles, our analysis so far suggests that not every circumstance warrants this sort of
liability. If the weight of the good involved informs the obligation, then not every good
that Soldiers pursue will entail accepting the harms associated with achieving it. In the
next sections, I will discuss what those circumstances are that entail the requirement to
accept harm versus those where Soldiers are only required to accept the risk of harm.
What I will show is the ends associated with the use of force matter and that only certain ends—namely combating enemies, which entails a very particular threat—entail this obligation.

**Existential Threats, Enemies, and Unlimited Liability**

In the traditional view, the enemy is an existential threat who attempts to exert political control over another state’s territory. It is, in fact, this attempt to politically control territory that constitutes the act of aggression and is the existential threat. If the state can no longer exert control over its territory, it has, in effect, died. Of course, that “death,” may be confined to only some of its territory, but for the citizens of that territory, the risk is still existential.

This sense of existential, however, is limited. Not all threats to sovereignty and territory entail threats to society or even social order. For example, US operations in Iraq obviously violated Iraqi sovereignty and territory; however, it would be a stretch to say it threatened Iraqi society. Further, while these operations initially violated sovereignty and territory, that sovereignty and territory were restored, as an intended part of those operations. So it is more accurate to say that US operations threatened the political order represented by Saddam’s regime, than that it threatened Iraqi society or even the Iraqi state, since both have persisted. While the removal of Saddam’s regime set conditions for continued bloodshed as insurgent elements fought for power in post-Saddam Iraq, even these forces did not want to destroy Iraqi society or eliminate the Iraqi state, they wanted to control it.

I do not intend to address the justice of Operation IRAQI FREEDOM. Nor do I intend to develop an account of *jus ad bellum*: my focus remains permission regarding
the use of force. My point here is to illustrate the difference between the society, the
state, and the political order that impacts what we mean by existential threat.

While the existence of the state does not entail the existence of a society, the state
is the manifestation of that society that executes the social contract. As such, it is both
obligated and obligating. As already discussed, it, through its agents, has moral
responsibilities to the members of that state and is the source of obligations to citizens to
fulfill their part of the contract. Thus the state, as the guarantor of the social contract, is
the entity whose existence reasonably authorizes unlimited liability. This is because the
institutions associated with it are essential to critical values such as political
independence and communal liberty that set necessary conditions for society’s well
being. In fact, as Walzer notes, “the survival and freedom of political communities—
whose members share a way of life, developed by their ancestors, to be passed on to their
children—are the highest values of international society.”

So when survival of the state is at stake, the state is authorized to oblige
unlimited risk on the part of Soldiers. However, it also entails that threats to the political
order do not necessarily entail threats to these communal values. For example, while they
have threatened the political order to some degree, there is a difference between a bank
robber, the mafia, al Qaeda, and Nazi Germany. In the next sections, I will discuss how
these differences entail different liabilities for risk.

Existential Threats and Relationships. Up to now, however, I have only stipulated
that the enemies entail existential threats. I have defined them, in a sense, but I have not
described why they are existential or, more importantly, why such a threat requires such
risks. It may be the case that an act of aggression brings two political communities into
the enemy relationship; however, that act tells us nothing about the circumstances that prompted the act of aggression in the first place. If, as Clausewitz famously observed, war is politics by other means, then we have to understand why the conflict did not get resolved by political means in order to understand what the enemy relationship entails.23 This point is especially important if we accept the view of the German philosopher Carl Schmitt, who argued that the enemy relationship represents the absence of even the possibility of cooperation. All conflicts with the enemy are zero-sum and as a result have the potential for war.24

The puzzle this account of the enemy confronts us with is that if the relationship entails the absence of cooperation, then we have to account for how it arose from a prior state of cooperation. Obviously, for any given conflict we can give a political accounting for the interests in conflict. But such an analysis will only tell us what the enemy wants, not what he is.

Relationships and the Enemy

In order to understand better what the enemy is, and more importantly for our future discussion, what he is not, I will articulate a theory of relationships that describes how third-personal, agent-neutral obligations associated with proportionality and discrimination can entail second-personal, agent-specific obligations owed to others by virtue of the relationships described by the roles Soldiers and those others play. In doing so, I am trying to make a simple point: our relationships inform our moral obligations. They provide the normative space where we move from “thou shall not kill” to “I should not kill you.”25
For example, the obligations I have to my children arise because they are my children. That relationship constrains and enables moral permissions that do not apply outside that relationship. Further, as Luban notes, “If we try to imagine someone with a disposition to view the morality of all her actions from the very abstract standpoint of their underlying policies, without so much as thinking about their contingent features, we are not going to find the results attractive … She is cut off from the immediate affections and tensions that are the source of the moral life. She is not a moral model: she is a moral prig.”

So, if relationships are important to understanding our obligations and permissions relative to others, we need to understand how we can obligate others and they can obligate us when in such relationships. For the purposes of this discussion, I will draw on insights from the pragmatic philosophy of language as it relates to second personal engagement. Such an approach focuses on the role communications play not just in describing a relationship, but in determining the norms such a relationship entails. I do not intend this account to be exhaustive or exclusive. It simply is intended to illustrate why the enemy relationship constrains the options and thus the obligations we have when confronting them. Doing so will allow us more precision in describing these relationships beyond using vague terms like “act of aggression.” Conversely, I will use this same account to show why, in the absence of the enemy relationship, there are fewer constraints and thus greater options and obligations. As such, this account is intended to assist in transitioning from the traditional frame of reference to the non-traditional one.

To begin, I will stipulate a very simple account of what a relationship entails. For person A to be in a relationship with person B, A must be in a position to call upon B to
PHI, where PHI represents some action. Here, a call is understood as a form of communication “that calls others to take up a specific normative status.” Calls, of course, can take a number of forms including: imperatives, requests, entreaties, advisories, invitations, and so on. From this very basic definition, we can see that the greater variety and complexity of calls available to persons in a relationship, the more varied and complex the norms they can, at least as a practical matter, hold each other to.

The idea that communication is not only what grounds our social relationships but also informs the rules associated with those relationships, is also argued by sociologist Erving Goffman, who describes social interactions in terms of face, where “face” is the “the positive social value a person effectively claims for himself by the line others assume he has taken during a particular contact.” According to Goffman, the ability to show face depends on an already existing social space. Just as greater variety and complexity of calls greater space for communicating, the greater variety and complexity for showing face entails greater space for social interactions. So just as a successful call depends on a successful uptake of that call by its intended recipient, which then binds that caller and recipient to norms associated with the call, successful social interactions depend on a willingness to conform to rules of conduct associated with that face. However, as Goffman notes, those acts associated with showing face are subject to rules and any act that can be subject to a rule is an act of communication.

Again, my point here is simple. Whether we characterize social interactions in terms of calls or face, the quality of those relationships is to a large part a function of the quality of communication available to those in a particular relationship. Further, by quality I do not simply mean a degree of affability. One can have a complex relationship
and not like a person. Rather, quality here is better described in terms of complexity. The more complex the calls, or the meaning of the intended message, the more complex the norms individuals can hold each other to.

In these terms, what distinguishes the enemy relationship, then, is the limited communications (in the sense I have described) available. What I will show is that communications among enemies is not only limited to imperatives, but to one imperative: surrender. I do not mean to commit the “imperative fallacy” by privileging the imperative as the call by which we impose normative requirements on others. However, imperatives are the means by which we obligate others to act a certain way and compelling the enemy to act a certain way is exactly the purpose of war in the first place.

The input of an imperative is the order to PHI, which then obligates the target of the imperative to PHI.\textsuperscript{31} It is important to note that for an imperative to be successful, the target of the imperative has to act because he understands he has been obligated by the originator of the imperative to do so. For example, a sergeant may order a Soldier to do twenty push-ups. But if the Soldier were planning to do push-ups anyway, we would not count the fact of his doing the push-ups as successful uptake of the imperative uttered by the sergeant. So, obeying an imperative requires not only that I do the act ordered, but also that I take myself as duty-bound to do that act. It also requires that I take myself as owing that action to the originator of the imperative.\textsuperscript{32}

Of course, there are a number of ways an imperative, like other calls, can fail. The originator of the imperative may have improperly communicated it or the target may not have been in a position to uptake it. Even if the target had been in a position to uptake it, he may have rejected the originator’s authority to issue the imperative. Finally, he might
have accepted the originator’s authority, but still decided to act defiantly and refuse the obligation.\textsuperscript{33}

\textit{The Enemy Relationship}

To illustrate this dynamic, take the following example: in 1389, Ottoman Turks defeated Serbian Prince Lazar in the Battle of Kosovo, resulting in the downfall of the Serbian empire and hundreds of years of Ottoman rule. As time passed, Serbs constructed a narrative of this event that placed Lazar as a Christ-figure who was betrayed by a fellow Serb as the reason for this defeat.\textsuperscript{34} After the death of Tito in 1980, Serbian nationalists employed this narrative to build Serbian opposition to autonomy for Albanian-dominated Kosovo. A pivotal moment occurred in 1987 during a speech near the battle site by then mid-level party official Slobodan Milosevic, who successfully employed this narrative to mobilize ethnic Serbians, who are also Orthodox Christians, against Muslims. The protest ended with the crowd throwing rocks at the ethnic Albanian police.\textsuperscript{35}

Two years later, on the 600\textsuperscript{th} anniversary of the battle, a reported one to two million Serbs had gathered to pray before the relics of Lazar. There, Milosevic again invoked the Battle of Kosovo narrative, likening it to battles that were “yet to come.”\textsuperscript{36} Aided by Serbian nationalists who managed to place Muslims—whether ethnic Albanian or Slav—in the role of Ottoman and betrayer and the Serbs in the role of Lazar, Milosevic and others were able to converge history, myth, and politics to plunge the former Yugoslavia into years of vicious ethnic conflict\textsuperscript{37}

This is, admittedly, a sketchy and inadequate account of these events. But what is instructive is how such a narrative was successfully employed to bring two collectives not just into conflict, not just into armed conflict, but into the kind of conflict where both
parties sought the existential negation of the other. This violence occurred even though the ‘facts’ of the Lazar narrative, at least as portrayed by Milosovic, were largely false and most of the recent Muslim-Christian history in the Balkans was characterized not just by peace, but also by cooperation. Nonetheless, the repeated employment of this narrative was able to play a decisive role in turning these groups from being fellow-Yugoslavs into vicious enemies by calling on Serbians to unite against Muslims in a way that gradually limited the kind of calls each group could make to the other.\textsuperscript{38}

What is also interesting about this narrative is that it moved two communities with which cooperation was possible into a situation where cooperation was impossible. Each moved from becoming more or less cooperative partners within a single community to becoming perceived as the existential threat of the other. What is surprising about this transition is that there does not seem anything necessary about it. As Michael Ignatieff notes in \textit{The Warrior’s Honor: Ethnic War and the Modern Conscience}, the ethnic and religious differences that drove the former Yugoslavia’s ethnic and religious groups to conflict were not \textit{obviously} more important than the commonalities they shared. In fact, he notes, the religious differences (Orthodox Christian vs Muslim) that characterized the conflict were largely eroded by fifty-years of secular, Communist rule that weakened the power of Church and Mosque as well as by economic modernization that made these groups increasingly dependent on each other.\textsuperscript{39}

Nor are such concerns limited to the Balkans. As J. Glenn Gray, writing in the aftermath of World War II, notes, “reasonable men” can still hold an image of the enemy “as an essentially decent man,” who though misguided, is a “a human being like yourself,
the victim of forces above him over which he has no control.” If true, then it remains to be explained why ‘reasonable men’ would think killing each other is a good idea.

Part of that explanation, at least, arises from the fact the process of making enemies, as the Balkans example illustrates, is the narrowing of kinds of norm-entailing communications the call represents. As the calls available are narrowed to the one, the enemy relationship, as Schmitt also observed, becomes the most extreme relationship humans may have. Enemies are others who may be killed because they represent the existential negation of one’s own community’s way of life. As noted before, all competition with the enemy is a zero-sum game: any gain for the enemy represents a loss for one’s own community. Because competition with enemies is a zero-sum game, the only things left to do is win or get them to stop playing.

It is important to note that enemies, in this sense, cannot exist within civil society. In civil society, laws and the power of the sovereign to enforce them, preclude existential threats to the state. A casual review of a large city newspaper, of course, will show that there are certainly times when the sovereign fails to prevent citizens’ deaths at the hands of others; however, as I will discuss later, these are crimes, not wars. As Schmitt said, “An enemy exists only when, at least potentially, one fighting collectivity of people confronts a similar collectivity. The enemy is solely the public enemy.”

Further, as the fact of fragile and failing states indicates, indigenous threats may arise within a state. As noted before, however, there is a difference between threats to a political order and threats to the state. Previously, however, we were only able to characterize that difference in terms of threats to political sovereignty and territorial integrity. Unfortunately, those criteria are not terribly precise, especially when
determining liability to risk. There may be a difference between criminals, organized crime, and enemies. However, as the events unfolding in Mexico indicate, it is not entirely clear what that difference is. Any crime disrupts the civil and political order on which a society depends for the production and distribution of material and social goods. But at some point, that disruption can become so severe that it threatens the state’s monopoly on the use of force and thus its ability enforce its political sovereignty and territorial integrity. For example, since September 2006, 47,515 persons have died as a result of drug cartel activity. This number far exceeds not only the number of persons killed in terrorist attacks of September 11th, 2001 it also exceed the total numbers of persons killed in the wars in Iraq and Afghanistan since.

The point here is that the level of violence does not help us distinguish enemies from criminals. The capability and willingness to disrupt the political order to the extent political sovereignty and territorial integrity are threatened are necessary but not sufficient conditions. Sufficiency is attained, however, when that relationship is further characterized by the inability to communicate beyond the imperative to surrender. It is beyond the scope of this discussion to determine whether drug cartels are, or can be, enemies. This analysis, however, does open up the possibility.

Because the enemy represents the class of persons with whom cooperation is impossible, there is not sufficient space to further obligate, request, or entreat. In fact, the call to surrender is so central to communication between enemies, that the war convention establishes formal procedures so combatants may make and receive such calls. In doing so, the war convention establishes making the call to surrender probably the only place where enemies at war cooperate to facilitate communication. In
accordance with these procedures, under a white flag enemy Soldiers may cross each other’s lines, deliver their messages, and return unharmed back to their own.\textsuperscript{45}

The call to surrender is the attempt to obligate the enemy to submit to one’s will and cease those activities that threaten one’s community. It is important to note that the call to surrender does not entail a transformation of the enemy relationship. An enemy who has surrendered may still retain the will, if not the capability, to commit acts of aggression in the future. This point underscores the limits of the enemy relationship in effecting its own transformation. Once in that relationship, the conceptual resources simply are not there to turn enemies into friends. This point is not to say that enemies cannot become friends, but it takes one side to recognize the possibility of cooperation and create space for it by entreating the other as something other than the enemy.

When the enemy chooses to defy the call to surrender, one’s options are generally limited. Since cooperation is conceptually impossible, one’s only alternative is to destroy their capability to resist, where that capability is generally found in their military forces. If war, as Clausewitz argues, is the act of imposing one’s will on the enemy, that is generally best accomplished by destroying their forces faster than they can destroy yours.\textsuperscript{46} You will not have transformed the relationship, but you will have imposed your will. Of course, in practice, an enemy can just choose to quit fighting. But if they choose to quit defying, then they are no longer enemies. If they choose to quit fighting but remain defiant, then you may have a cease-fire, but you have not really ended the war and you certainly have not transformed the relationship. Neither really impacts the ethics of war fighting.
It further follows from this analysis of the enemy relationship, that in the presence of an enemy there is no obligation to transform the relationship into one that is more cooperative. As Rawls has observed, enemies should fight in a way that sets conditions for future peace, but the enemy relationship entails that these conditions are secondary to winning.\textsuperscript{47} To underscore this point, consider Walzer’s doctrine of Supreme Emergency, which he employs to justify setting aside the rules of war in order to prevent catastrophic defeat.\textsuperscript{48} When defeat by the enemy is grave and imminent, it does not matter if such means will make a future peace more difficult, because unless one employs such means there will be no future just peace to have.

The presence of an enemy adds a great deal of weight to justifying the kind of risks Soldiers must accept in order to fulfill their role as Soldiers. Enemy aggression represents an existential harm forced on the state by virtue of the enemy’s act of aggression. The impossibility of cooperation entails limited normative space within which to engage and thus few options to avoid the harms associated with that aggression. Because so much is at stake, with so few alternatives, most harms can be justified in pursuing their defeat, especially those harms that limit the risk to just combatants.

**Enemies, Adversaries, and Irregular War**

In the context of combating irregular adversaries, however, a political and civil order exists, so there is greater possibility of cooperation and thus a greater potential for different kinds of relationships that will entail different kinds of norms. To the extent that order is worth defending, then actions taken by its defenders that undermine it are not only irrational, they are immoral.
In the presence of a political order, even if a weak one, there are increased possibilities for cooperation. This increase arises, because this order provides a structure that also open up the kinds of calls the various groups can make upon each other, increasing the kinds of norms they may hold each other to. Consider again the example of Dakota Myer’s unit. The fact that village elders could plausibly call upon International Security Force Afghanistan (ISAF) Soldiers to embark on a humanitarian mission implies a much more complex and robust normative space than the one implied by the traditional view of the enemy.

If the purpose of fighting wars is to establish a just peace, then once established, the purpose of continued military operations is to maintain and strengthen it. As I have earlier noted, a just peace entails not simply a cessation of hostilities, but the presence of just institutions capable of sustaining that peace. In this sense, we have to understand peace in the way Walzer described: the security of those institutions and values that define one’s society. Given this analysis, we can say a state of order exists when: 1) The enemy is defeated or transformed into a non-existential threat to either one’s state or to the imposition of a just host-nation government; 2) There exist institutions necessary for enforcing the rule of law, including police, courts, and prisons; and 3) These institutions must be credible, where citizens in general are willing to rely on these institutions to resolve disputes, rather than resort to violence. 49

Further, the possibility of cooperation, being essential to this order, entails a possibility to transform relationships from uncooperative to cooperative and thus a responsibility to at least attempt to do so. In fact, the reason the humanitarian mission described above seemed appealing was because it was seen as an opportunity to “win
hearts and minds,” thus encouraging increased cooperation among the population of that village. This responsibility to privilege actions that promote cooperation over noncooperation does not entail that cooperation cannot be coerced. Governments, of course, are permitted to coerce citizens into following the law. The point though is that successfully coercing citizens in a way that preserves the political order will require more than just the imperative to surrender. Governments cannot treat citizens, even ones in rebellion, as enemies and maintain their legitimacy as governments.

Of course, even in the context of a just political order, imperatives still drive much of the interaction between the various actors. The reason for this is that the laws that define this order are themselves imperatives. Thus, in this context, the purpose of military operations is not to kill the enemy, but also to communicate those imperatives to establish and strengthen that order. Killing may be required, but is not as central to the function of the military as it is when combating enemies. This feature further distinguishes regular from irregular conflict. Since these imperatives take the form of laws rather than simply the imperative to surrender, military force must be directed at enforcing those laws or establishing the conditions under which those laws can be enforced. As I will discuss later, this fact will constrain and enable the sort of actions military forces may undertake in ways that will further distinguish an ethics of combating irregular adversaries from the traditional view.

Further, the increased normative space opens up additional claims one can employ as one attempts to transform relationships. To make these claims, one must restructure one’s current normative relationships in order to make space for additional calls that can communicate the added norms. One conducts this restructuring by entreating the subject
to permit one to make claims one is not already permitted to make. The entreaty takes the form of A calling B to sue for B’s power to grant new power over B to A. For example, Kukla and Lance cite Bonasera’s entreaty to be Don Corleone’s “friend” in the movie, The Godfather, so that he may ask a favor at Corleone’s daughter’s wedding. In so doing, he attempts to change his status so that he can then be in a position to make claims that would otherwise not be available to him. However, when successful, the entreaty allows the caller to make calls she was not able to before: requests, orders, invitations, and so on.

Bonasera’s challenge to gain favors from the Don is not too different from the challenges associated with successfully combating irregular adversaries. Soldiers must enter communities where they have no prior relationships and then build them to the point that they are themselves a source of order (and thus a part of) that community. Doing so requires eliminating adversaries. However, it also requires transforming the relationship with the populace so that both sides may make claims on the other. These claims will entail additional risks Soldiers must take in order to prevent it from being displaced to members of those communities.

Of course, one can only entreat someone who is in a position to have the power to grant the entreaty. This point suggests that different persons, groups, and communities will have different powers to grant and that point suggests that rather than simply friend and enemy, the irregular battlefield will contain multiple categories of actors to whom combatants will owe various obligations. As Lance notes, there is a “bootstrapping” quality to entreaties. One cannot enable a new normative standing unless there was
previously a potential for that standing to exist. What determines that potential is the social context in which the entreaty is made.54

There are likely many ways to categorize the kinds of actors on the irregular battlefield. This possibility of cooperation suggests, however, that opponents in irregular wars are qualitatively different than those found in regular wars. For that reason, I will refer to those opponents as “adversaries,” rather than “enemies” in order to highlight the non-existential, potentially cooperative nature of such threats.

Since the possibility of cooperation is the defining characteristic of the irregular battlefield, it makes sense to employ it as a way of getting at the different actors and the obligations owed them. I do not mean to suggest cooperation is the sole criterion by which to get at this analysis, but by examining the irregular battlefield through the lens of cooperation, we will be in a better position to discern nuances in Soldiers’ obligations to accept risk than if we simply relied on the clumsy traditional view categories of friend and enemy.

We also have to be clear about what we mean by cooperation. In the context of irregular conflict, cooperation entails that an individual or group is responsive to imperatives associated with the rule of law in the context of an existing political order, as described above. This definition is, of course, minimalist in that it sets a fairly low bar for what constitutes the kind of order worth defending. Maximally, those individuals and groups would be responsive to a wide variety of calls, like requests and offers of advice, that contribute to the well-being of society. However, irregular conflicts typically take place in fragile and failing states, where what is at stake is the authority to issue such
imperatives. Until that question is settled, space for those additional calls is rarely available.

On the other hand, we have to be careful not to judge as non-cooperative all actions and activities that fall outside this admittedly narrow definition. For example, a storeowner who unwittingly sells food to an insurgent may be said to cooperate with the insurgent, but this sort of cooperation is clearly different than if he passed intelligence about the locations and movements of adversary forces. For the purposes of this analysis, I will differentiate cooperation in terms of practical separability, necessity, and activeness.

Activities that are practically inseparable have no other purpose but to enable the adversary to achieve his objectives. Activities that are necessary may not be lethal, but they are causally necessary in that if they did not occur, the harm associated with the enemy activity would also not occur. Finally, I distinguish between active and passive contributions to enemy operations, where active contributions are acts of commission and passive contributions are acts of omission. In general the more inseparable, necessary, and active the contribution, the more risk combatants must accept in order to address the particular adversary. Conversely, the more cooperative with one’s own cause, the more risks combatants should accept on their behalf.

Allies, Adversaries, and the Obligations to Accept Risk

The increased possibility of cooperation and the expanded normative space that increase entails also identifies multiple sorts of actors who may be considered adversaries, but not necessarily enemies. To the extent they are not enemies, then permissions associated with engaging enemies may not be available for engaging those
other actors. Further, there may be additional obligations entailed by the relationships the adversaries describe. Since what drives this relationship is the possibility (versus the actuality) of cooperation, I have broken these categories of actors down in the following way: friends, adversaries, collaborators, supporters, and sympathizers.

Allies
To the extent individuals or groups are cooperative with the political order combatants are defending, then those combatants do have an obligation to accept risk on their behalf. This requirement to accept risk, in fact, motivates the operations combatants undertake to eliminate irregular adversaries. Of course, just as with adversaries, elements of the population cooperate to varying degrees. However to the extent elements of the population meet the minimal criteria for cooperation – responsive to imperatives associated with the rule of law—combatants have an obligation to protect them. This is another point where regular and irregular warfare differ. Combatants’ association with the imposition of order (as opposed to mere will) binds them to the communities they operate in ways that do not occur in more regular conflicts.

Armed Adversaries
I use the term “armed adversary” here to distinguish those persons who employ lethal force from the non-combatant adversary activity I will describe below. Since such forces do not represent the same kind of existential threat enemies do, I have chosen to use the word “adversary” to capture that qualitative difference and differentiate their activity form that of enemies. Certainly, irregular adversaries can become existential threats, in which case I would argue they are then best conceived of as an enemy in the sense described earlier.
However, even when they do not represent an existential threat to a society, they do represent an existential threat to members within that society as well as to the political order on which that society depends. Their activities, qua armed adversaries, represent the most inseparable, necessary, and active connection to the threat to the order just combatants are defending. Thus combating them carries the greatest weight relative to Soldiers’ professional obligations to accept risk.

While this risk entails risking their lives, it is not unlimited in the same sense it is when fighting enemies. To the extent armed adversaries do not represent an existential threat, Soldiers would be permitted to displace some risk to mission accomplishment. What they would not be able to do is displace so much risk to mission accomplishment that they would not be able to establish or maintain the conditions for civil order. Recall, for example, the situation the Marines and police faced in Los Angeles described in the last chapter. While the Marines may not have been justified in firing into the building, neither the police nor Marines, as enforcers of order, were entitled to just walked away. Doing so would have likely enabled if not encouraged further disturbances. However, the perpetrator in this case did not represent an existential threat, the police and Marines did have time to develop the situation and seek less risky means to resolve it. So, just as combatants are required to use the least force possible and still preserve that order, they are permitted to take the least risk as well.

What differentiates the kinds of risks combatants should accept in fighting enemies versus fighting irregular adversaries is the difference between undertaking actions in which one reasonably knows one will be harmed and actions where one merely risks that harm. Combatants fighting enemies are obligated to undertake actions where
they know they will be harmed; combatants fighting armed adversaries are obligated only
to put themselves at risk of that harm. If they can find ways to reduce the risk of that
harm in ways that do not threaten the civil order, they are permitted to do so.

By differentiating the requirement to accept harm from the requirement to accept
risk of harm, we can get out of the absurd situations described previously. Recall the non-
commissioned officer who was denied smoke in order to break contact or Marines
conducting the humanitarian mission who were denied indirect fire to suppress Taliban
forces shooting at them. These examples seem absurd because in them we are requiring
combatants to accept more harm, not just the risk of harm, in fighting a non-existential
threat than even the traditional view would normally require when fighting an existential
one. To the extent those fires were necessary to break contact, they were likely justified,
assuming proportionality and discrimination were upheld. However, they would not be
justified in order to destroy the enemy if they were going to place civilians at risk.
Combatants would need to find another way, and perhaps another time, in order to
engage those enemy forces. I will take up in the next chapter those conditions under
which combatants may further reduce their risk by displacing it onto adversaries and
innocents.

Collaborators

Collaborators are “non-combatant” adversaries who do not engage in lethal
operations but do provide active and necessary support to armed adversary activities,
such critical intelligence, weapons and ammunition. Because of the active and necessary
connection to the harm armed adversaries represent, combatants should accept risk to
prevent collaborators from providing this support. As is the case with armed adversaries,
they cannot simply “walk away” from collaborator activity. However, because this support is non-lethal, combatants would not be required to place their lives at risk to prevent collaborator activity.

For example, imagine that friendly intelligence sources have identified a collaborator in a local village. Further, this intelligence indicates that the armed adversaries with whom the individual collaborates frequently remain in the village, so that any effort to detain him would likely be met with lethal force. While it may make sense to attack the armed adversaries in that village, the presence of the collaborator would not require it. The reason the presence of the collaborator would not require such risks is because his activities, independent of the armed adversaries’ activities, do not threaten the political order. Thus, the friendly combatants would be permitted to take less risky options to deal with the collaboration, even if it meant it might go on a while longer. For example, they may contact local authorities to deal with the collaborator or conduct patrolling and counter-intelligence operations in order to minimize the opportunities for that collaboration, but to the extent such operations entail risking lethal harm, they are permitted to find less risky alternatives.

It is important to point out that under conditions of war, even irregular war, there will always be a level of risk associated with most activities, even just staying on base. So in determining what levels of risk it would be reasonable to expect of just combatants, there is a sense in which it is relative to the context in which they are operating. Just going on a patrol, for example, can expose troops to improvised explosive devices or sniper fire, for example, depending on the area they are operating in. The point here is that as the harm the adversary represents diminishes, so do the requirements to take risk.
So just as permissions associated with the use of lethal force more resemble permissions
associated with law-enforcement, so will the risks combatants will be expected to take.

When considered in the context of law-enforcement this restriction on risk is more
intuitive. As McMahan notes, a police officer would have an obligation to risk harm if it
meant preventing that same or greater harm to an innocent victim. In fact, most codes of
police ethics preclude the use of force unless the officer or someone else is also at risk.
The United Nations “Code of Conduct for Law Enforcement” further limits the use of
force to only that which is proportional. While I will discuss what counts as
proportional force in the next chapter, absent the threat of physical harm, there is little
moral justification to commit physical harm. When there is no threat of physical harm,
police officers have the option to do something else that still leads to prevention of a
crime or the apprehension of a suspect. The point here is that choice, as I have already
mentioned, is a key consideration when determining what the morally appropriate course
of action is. It does not simply matter what we are permitted to do, it matters what our
options are.

Supporters

Supporters are the “warm sea” Mao said were necessary for all successful
insurgencies. They are differentiated from collaborators in that while their support is
active, like collaborators, it is not necessary to the harms armed adversaries would
commit. For example, where collaborators provide lethal aid, supporters may provide
shelter or food. What differentiates their support is that it is two steps removed from the
harms armed adversaries commit. Their presence creates a permissive environment for
armed adversary operations; however, without those operations they would represent no
threat. Further, supporters may occupy an ambiguous position in the civil order and may cooperate at some level as well. A supporter—and the same will be true for sympathizers—may participate in aspects of the local order even as he seeks to disrupt it.

Because supporter activity only entails a non-lethal, non-necessary connection to the harms just combatants seek to prevent, they are not required to risk physical harm to prevent that activity. They may, in fact, “walk away” from supporter activity in favor of less risky, and less lethal, options. However, because supporters do occupy this ambiguous position within the civil order, combatants may be required to accept risks to preserve that cooperation. For example, given the importance of elections to resolving certain irregular conflicts, just combatants would be obligated to take risks to secure those elections, even in areas where adversary supporters would be the primary beneficiary. The reason they would be obligated to accept this risk is because voting in the election is a form of cooperation and reflects the successful uptake of a legitimate call for cooperation. Given the increased normative space that call represents, just combatants would be obligated to take risks to preserve it.

Sympathizers

Sympathizers are also part of the “warm sea.” Like supporters, their activities are not necessary to the harms committed by armed adversaries; however, unlike supporters their support is not active. Their activity represents the least amount of cooperation one could lend to the adversary cause without being indistinguishable from neutral. Further, just like supporters, they may otherwise be participating in that order as valued members of the community. Sympathizers are analogous to Log Cabin Republicans who were happy about the repeal of the “Don’t Ask, Don’t Tell,” policy despite the boost it gave to
Democrats. In this case, they wanted the Democrats to win on that particular policy, but refrained from activities that would enable increased Democratic Party influence. The same is the case with sympathizers: they may not actively participate in adversary operations, but their sympathy for the adversary cause enables the support and collaboration required to support it. The crime of the sympathizer is a crime of omission.

Sympathizers pose, as we will see again in the next chapter, a special problem for combatants. To the extent they do participate in the civil order, combatants may have some obligation to protect them in the same way they would friendly noncombatants. However, it is clear they incur no additional risk to engage them.

These categories, of course, overlap onto each other hierarchically. Armed adversaries are collaborators, supporters, and sympathizers. Collaborators are also supporters and sympathizers. Supporters are also sympathizers. So whatever permissions and restrictions pertain to those at the lower end of the hierarchy pertain to those above it as well.

![Diagram of Adversarial Relationships]

Figure 3: Adversarial Relationships
Conclusion

Combatants can be coerced onto the battlefield by an act of aggression and that coercion, coupled with the role they have consented to, can entail the obligation to accept harm when confronting enemies. When confronting adversaries, that liability may be limited to accepting risk rather than harm; however, this confrontation entails the additional obligation to accept risk to preserve the order, not just confront the adversary.

Just as in the traditional view, the moral requirements associated with combating irregular adversaries also obligate combatants to undertake missions in order to defeat the threat. To do that, they must expose themselves to the adversary, who is often difficult to find, precisely because of the presence of collaborators, supporters, and sympathizers. Because of the role these groups can play in promoting the adversary cause and enabling his victory, there is incredible pressure to bring them into the group of persons who may legitimately be targeted in war.

What remains to be discussed is what obligations and permissions just combatants must observe regarding the various enemy and adversary categories when conducting operations. The traditional view only permits combatants to target other combatants. However, as this analysis suggests there are other kinds of actors who should be targeted as well if we are going to take the requirement to win seriously. I will take this subject up in the next chapter.
Chapter Four: Combatants, Noncombatants and Permission to Displace Risk

Introduction: Roles and Permissions to Harm

In the previous chapter, I argued that while combatants are obligated to accept risk, the amount of risk they are required to accept depended on their relationship to the individual or individuals who would have to be engaged in order successfully to accomplish missions and resolve the conflict. Additionally, in the context of irregular warfare, I argued that there is a requirement to transform these relationships to ones that are sufficiently cooperative that the conditions for a sustained, just society are realized. Thus relationships play a unique role in determining when combatants should prioritize risk to themselves, noncombatants or the mission.

Permissions to kill or otherwise harm a person entail some sort of liability on the part of that person that legitimizes the violation of their right not to be harmed. In the traditional view, one incurs such liability when one takes part in activities that are practically inseparable from warfare. Thus combatants and those civilians involved in certain military-related activities may be killed or otherwise harmed. The reason these persons are liable to attack is that they represent the direct threat to each other whose death is justified by virtue of the right to self-defense. If someone attacks you, your right to self-defense enables your permission to use force to avoid the harm associated with that attack, even if it means killing the assailant. Since other harms associated with war fighting, like deceit or coercion, are lesser harms than death by implication they are permitted as well.
However, there are a number of difficulties associated with this view that have important implications for determining the norms associated with combating irregular adversaries. The inseparability of civilian activity from adversary capability, the diversity of relationships as well as the requirement to transform them means that we have to consider whether lethal force is always appropriate against adversaries and whether noncombatants should be immune from any harm, including those associated with deceit and coercion. Answering these questions will require us to examine closely the norms associated with liability and responsibility in order to determine the norms associated with discrimination and proportionality when combating irregular adversaries.

Regarding displacing risk onto enemy combatants, philosopher Jeff McMahan has argued against Walzer’s view that membership in a particular class, even the class of combatants, entails liability to attack. Rather, he argues that liability entails culpability and culpability is determined only by those actions for which one can be held morally responsible. The consequence of this view is to restrict the kinds of combatants who may be harmed while expanding the kinds of noncombatants who also may be harmed. While this view has interesting implications for traditional military ethics, it does provide a framework around which one can determine norms associated with the more complex relationships described by the irregular battlefield.

However, just as on the regular battlefield, friendly combatants on the irregular battlefield will also harm, or at least risk harm to, those who are not otherwise liable. In fact, the proximity of armed adversaries and civilians often make it difficult to discriminate between those who are and those who are not liable to attack. This difficulty is not only a practical matter, but a conceptual one as well. Not only is it difficult to
always tell who counts as an adversary, it is even more difficult to tell what sort of response adversary actions warrant, since typically we assign responses based on membership in a particular category. However, if McMahan is right, then adversary actions must play a role as well when determining that response. Further, the requirement to transform relationships will also require those responses to be crafted in a way that expands the normative space available for friendly – adversary interaction.

These requirements would seem to call for the kind of law-enforcement approach I articulated in chapter two, since such an approach would entail the use of force only when the adversaries’ liability was obvious and would prefer methods that rely on the minimal use of force to ensure only those liable were harmed. Unlike law-enforcement, however, there typically is not the same sort of social contract that exists between police officials and the members of the community they protect and Soldiers and the foreign-national communities in which they conduct operations. Thus, the law-enforcement analogy breaks down relatively quickly, especially when irregular adversaries employ means not typically available to criminals. Irregular adversaries may not be existential threats to the state, but they are often existential threats to combatants. Therefore, what will be needed to balance the requirements of liability and cooperation while still providing a clear moral path to victory is an approach that accounts for fairness in adversarial relations.

**Risks and Harms**

When discussing fairness in adversarial relationships, it is important to be clear about what sorts of harms are at stake. In the traditional view, that harm is typically restricted to physical harm. As noted in chapter one, norms associated with the traditional
view are a function of preserving individual rights to life, which then constrain the kinds of lethal force one may employ as well as the conditions in which one may employ them. But even in regular conflicts, that is not the only kind of harm combatants may commit. As Seth Lazar observes, “Combatants in war inflict untold devastation. They lay waste to the environment, destroy cultural heritage, wound, maim, and kill.” However, combatants do not simply commit physical harms; they also deceive, coerce, and otherwise exploit persons in ways that would clearly be morally wrong in other contexts. In this chapter I will discuss permissions and obligations associated not only with lethal force, but also with the sort of harmful, non-lethal actions Lazar describes.

As noted in the previous chapter, there is a moral difference between placing persons at risk of harm and harming them that is sometimes lost in the traditional view. In this view, the permission to engage in courses of action where noncombatants may knowingly, but unintentionally, be harmed obviously entails activities that place noncombatants at risk. Further, these same activities are what make combatants liable to attack in the first place. This conflation of liability and permission arises because combatants may harm enemy noncombatants in the course of harming enemy combatants. The former is only legitimate when it is an unintended side effect of the latter. So combatants are already liable to attack prior to placing noncombatants at risk, much less harming them.

There are, however, many instances where placing someone at risk does not entail liability to attack. Consider, for example, the fact that drivers routinely and unintentionally hit pedestrians in the course of driving. Given that the practice of driving places pedestrians at risk, if risk were sufficient to justify the use of defensive force, then
any driver would be liable to attack by any pedestrian who felt threatened. Clearly such a situation would be absurd. But it is worth noting that the fact that drivers do represent such a risk does allow for certain coercive measures, such as speed limits and stop signs that reduce that risk. By analogy, it may be impermissible in certain circumstances to kill certain persons, even armed adversaries, despite their contributions to adversary capabilities. It may be permissible, however, to coerce them in ways that limit the risk to friendly combatants.

As noted in chapter two, essential to understanding what those circumstances are is the idea that there is a moral asymmetry between just and unjust combatants that can enable certain permissions for just combatants that are denied unjust combatants. In this next section I will discuss those circumstances and call into question whether unjust combatants have an unlimited liability to harm or the risk of harm. What I will argue is that while self-defense is a sufficient justification for the risks and harms associated with the traditional view, it is insufficient to justify harm or the risk of harm to adversaries. Rather, just combatants will have to appeal to the principle of fairness in order to generate the permissions necessary to successfully balance the competing demands of mission accomplishment, non-combatant immunity, and force protection when combating irregular adversaries.

**Displacing Risks onto Enemy and Adversary Combatants**

As noted in previous chapters, the traditional view requires that justified killing in war must be assimilated into the concept of self-defense. For this killing to be assimilated into the concept of self-defense there must be a forced-choice, where failure to kill the attacker would entail a failure to defend oneself. The reason self-defense requires this
choice is because if one can avoid harm without utilizing lethal force, one does not need to kill in self-defense.\(^6\) As noted above, it is one thing to use lethal force to avoid harm; it is another thing entirely to use such force to avoid risk. The former avoids a violation of one’s right to life; however, the latter risks the unjust violation of others’ right to life by expanding to the point of absurdity the kinds of situations where lethal force would be permitted. As noted above, driving, for example, entails risks to other drivers and pedestrians, but we would hardly conclude drivers are liable to attack even when they engage in driving behavior that increases that risk, such as excessive speed.\(^7\)

Thus an appeal to self-defense must entail an imminent harm. By “imminent,” I simply mean that the harm has manifested itself to the point where one is forced to choose between acting to avoid the harm or be harmed. The point is that while defensive force is not justified to avoid some future, possible harm, one does not have to wait to be harmed to justly use defensive force. Obviously, if one is being shot at, one may shoot back. This concept of imminence, however, would also permit combatants to kill enemy combatants during active hostilities, even if they were not a threat at the time. The fact the state of hostilities exists entails an imminent threat.

However, even the presence of an imminent harm is not sufficient to justify just any use of lethal force. Consider, for example, a pedestrian walking down a narrow road. As she turns a corner a car is headed her way at a high speed and will surely hit her. For the sake of the example, suppose she can prevent this unjustified harm by pushing a fellow pedestrian into the path of the car, killing the driver, or stepping out of the way. All things being equal, she should step out of the way. Assuming that the fellow pedestrian is not responsible for the threat the pedestrian faced, she had done nothing to
warrant being harmed. While the harm done to the first pedestrian would be unjustified, so would the harm done to the second. Morally speaking, it makes no sense to trade one unjustifiable harm for another. So it is not sufficient that killing in self-defense avoids some unjustifiable harm to you; it must also avoid unjustifiable harms to others.

The situation may be less clear with the driver. Whatever his intent, it is his actions that have created the situation that threatens the pedestrian’s life. He placed the car in motion and chose the route, speed, and timing of the trip. By doing so, he is agent-responsible for his actions, where agent-responsibility is understood as “A is agent responsible for his action or omission x when he voluntarily chose to x, and he met the criteria for rational agency when choosing to x.”

Agent responsibility, however, only entails causal responsibility, not moral responsibility. All it requires is that one chose to act under conditions where one was reasonably in control of one’s own thoughts and movements. If one were under some sort of mind control or one’s body was used as a projectile his movements would be someone else’s actions, not his own. But under this conception of agent responsibility, it does not matter what the agent intends; it matters only that the agent intended to perform those actions to be agent-responsible. The driver in the example above may have not intended to harm the pedestrian, but he did intend to drive and it was the driving that led to the harm to the pedestrian.

I will address shortly whether agent-responsibility is sufficient to justify liability to attack, but even if it is sufficient, such responsibility is not sufficient to justify attacking the driver as long as there is an alternative to doing so. By stepping out of the way the pedestrian avoids the unjustified harm to herself, limits the overall amount of
harm done, and leaves open other ways of dealing with the driver’s intent that would otherwise no longer be available. This last consideration will be important to understanding one’s obligations when confronting irregular adversaries, especially in light of the requirement to transform adversarial relationships. Such transformation is a moral requirement that can only be enabled by increasing the scope of communication beyond simple imperatives like “surrender!” or “stop the car!” Thus, choosing actions that avoid killing even armed adversaries may be morally required if it sets conditions for increased communication and thus cooperation.

However, we can easily imagine that the pedestrian has no option to avoid harm other than to kill the driver. To the extent that the driver intends to harm the pedestrian, then it would seem reasonable to permit the pedestrian to use lethal force to prevent that harm. It would be reasonable because by intending to harm the pedestrian, the driver is not only agent-responsible for the harm, but morally responsible as well. To be morally responsible one must not only meet the conditions of agent-responsibility, one must also be praise or blameworthy for the act in question. To be praise or blameworthy for an act, one must have intended not only to act, but intended the consequences of that act. So in the context of the driver, to be morally liable to harm he must not only have acted in a way that harmed the pedestrian, but intended that harm as well.

Absent that intent, however, it is not clear that agent-responsibility would be a sufficient justification for the pedestrian to use lethal force. For example, if the driver lost control of the car through no fault of his own he may be agent-responsible for placing the pedestrian at risk, but he is not morally responsible. Agent responsibility entails only that one intended to perform the act that brought about a state of affairs. Moral responsibility
entails intending that state of affairs come about. To the extent choices he made about driving placed the pedestrian at risk in a way that the pedestrian’s choices did not place the driver at risk, he bears a responsibility for that risk that the pedestrian does not. However, this asymmetry in responsibility is small and not morally significant.

This view of agent-responsibility places the entirety of the blame on the individual who imposes risk on others without holding accountable those whose actions also contributed to bringing about that risk. While the pedestrian’s actions do not represent harm to the driver, she should have the same expectation as the driver that her actions entailed some risk. Narrow roads are hazardous, drivers lose control and accidents happen. Thus, to some degree, the pedestrian’s actions have also contributed to the situation that placed her life at risk. Thus she too is agent-responsible for the state of affairs that brought about the forced-choice situation. This being the case, however, the harm she would commit against the driver is intentional and unjustified, whereas the harm to her would be unintentional and unjustified. So, if we accept that it is always morally better to suffer harm than to commit it then the pedestrian would be obligated to take her chances and not kill the driver.

The difficulty for the pedestrian who cannot jump out of the way is that the harm is unavoidable and indivisible—either she or the driver will suffer its consequences. So, if she allows the driver to hit her, she will suffer an unintentional, though unjust harm. If, on the other hand, she attacks and kills the driver, she has committed an intentional and unjust harm. Morally speaking, it seems she should allow the driver to hit her. In fact, the pedestrian’s attempt to kill the driver who is not morally responsible would enable permissions on the part of the driver to use defensive force against her.
The point of the above discussion is simply to illustrate that self-defense is not always sufficient justification for the use of lethal force and that agent responsibility is not always sufficient to justify liability to attack. However, while defensive force based on agent responsibility may not always be justified, the above example does more or less reflect the traditional view of combatant liability: defensive force is justified against agent-responsible actors in order to avoid an imminent harm. The fact that combatants engage in activities that entail harm, regardless whether they intend harm, makes them agent-responsible. The imminence condition, however, does not entail that combatants must be under fire in order to justify the use of lethal force: imminence does not entail immediate. Because the enemy combatants participate in activities intended to harm him or those he has some obligation to protect, he is justified in using lethal force. As Walzer observes,

It doesn’t matter whether (combatants) are volunteers or conscripts; their individual moral preferences are not at issue; they have been mobilized for a singular purpose, and what they do advances that purpose. For its sake, they are isolated from the general public, housed in camps and bases, all their needs provided for by the state. In time of war they pose a unified threat.

Further, it does not matter if the enemy combatant plays a direct role in realizing this harm. Soldiers who are less directly involved, such as logistics and maintenance troops are still liable to attack, because those activities share the same purpose as the activities of those combatants more directly involved in the employment of lethal force. As long as their activities are practically inseparable from war fighting, then they are liable to attack.

The difficulty with the traditional view is that it seems to enable rights violations against persons by virtue of their membership in a particular group, in this case the group of enemy combatants, independent of their moral responsibility. In fact, as Walzer has
claimed, it is targeting others for lethal attack based on their membership in a particular class that is the crime of terrorism. Terrorists typically target persons based on their membership in a group, typically a state, whose policies they want to change. However, such membership does not entail moral responsibility. Many citizens, if not a significant majority, have little to do with forming specific policies and are far removed from any specific action a government may take. Agent responsibility entails awareness of the acts in question and a capability to choose whether to perform the act. So, even if one wanted to argue that citizens, by virtue of their participation in a political and economic process that supports a particular government bear some responsibility for the government’s actions, it would not be agent-responsibility. Since they are not agent-responsible, they are not morally responsible and are thus not liable to attack.

It should be obvious, however, from this discussion that pursuing a policy of holding those who are agent responsible liable to attack without consideration of membership in the class of combatants or noncombatants would expand the range of permissible targets to include noncombatants while restricting the range of permissible targets to exclude at least some combatants. A farmer, for example, who supplied enemy combatants with food would be liable to attack in the same way that logistics troops are liable. Their activities are necessary to the enemy’s ability to conduct operations and those operations entail harming friendly combatants. However, a combatant whose activities were not causally linked to any particular harm would be immune.

The traditional view plausibly deals with this concern by further limiting lethal force to just those persons engaged in activities that are practically inseparable from war fighting. In this view, the farmer would not be liable to attack because farming serves a
purpose independent from war fighting. The logistics soldier, however, does not. As Walzer observes, all combatants are legitimate targets because they are threats to each other. Moreover, whatever their particular role, they are an “organized, disciplined, trained and highly purposeful collective,” whose primary purpose is to pose a threat to an enemy force. Because their actions all serve this collective intent, they therefore bear some culpability for the harm they represent, and thus are liable to attack.

A more significant difficulty is the multiple reasons unjust combatants can typically give that obscures, if not negates, their liability. As previously discussed, combatants are coerced to fight either by the state or the enemy. However, for the most part, Soldiers do not have access to the real reasons for the conflict and cannot reasonably determine where the fault for the war lies. Thus, they reasonably believe their cause is just. Further, regardless of what they may feel about the cause, many play a supporting, non-lethal role, further limiting the threat they pose and thus the liability they bear. Since these factors undermine the unjust combatant’s ability to consent to participating in the war, where these factors hold, they diminish unjust combatants liability for those actions as well. As Lazar states,

(M)any unjustified combatants are morally innocent of the threat they pose, excused by either duress or because they reasonably believe their cause to be justified, in conditions of uncertainty and high risk. Moreover, in the radically information-poor context of war, there is no way for the justified combatants to discriminate between innocent enemies and those who are indeed culpable for fighting. Until a new “revolution in military affairs” complements laser-guided weaponry with guilt-seeking missiles, the culpability view of war threatens to make just killing impossible.

Here restricting liability to attack to those persons engaged in activities that are practically inseparable from war fighting will not satisfy all of our moral concerns. If the circumstances of the conflict diminish the rationality of unjust combatants, then they are neither agent nor morally responsible for the harms they commit. Thus, if the pedestrian
should allow herself to suffer harm rather than harm the driver who has lost control of his
car, then it would follow combatants should prefer to suffer harm rather than harm even
unjust combatants who are not morally responsible for their actions.

If this view of liability is correct, then most killing in war—even killing of
combatants fighting for an unjust cause would not be morally permitted. For an unjust
combatant to be liable to attack, he must not only fight for the unjust cause, he must do so
intending to realize the injustice the cause represents. As noted above, however, those
conditions often do not hold for combatants on either side of the conflict. If we accept
that reflective combatants should be aware of these facts, then even if we accept it, it
would be unreasonable to hold them responsible for the justice of their cause; these facts
should motivate an extreme reluctance to engage enemy combatants unless they can
establish those combatants’ moral responsibility.

It also follows from this view of liability that noncombatants, to the extent they
are morally responsible for harms done to just combatants, are liable to attack.\textsuperscript{23} As noted
above, the traditional view can deal with this concern by limiting liability to only those
who are engaged in activities that are inseparable from war fighting. However, in the
context of combating irregular adversaries, noncombatant activities are often practically
inseparable from war fighting. As noted in chapter three, collaborators, supporters, and
sympathizers are all engaged in activities that support armed adversaries but it would be
wrong to consider them combatants, since their activities, by definition, do not
necessarily entail harm. Further, while there is typically a core of active combatants, the
adversarial categories described in chapter three suggest that many of the persons who
need to be targeted in order to win an irregular war are not organized, disciplined, or even highly purposeful.

The point of this discussion has been to establish that self-defense cannot enable permissions to use lethal force absent a morally responsible adversary. Given the difficulties associated with discriminating between agent and moral responsibilities, these considerations place an enormous burden on combatants to discriminate when applying force in a way that would likely make conventional warfare morally untenable. This, of course, is the conclusion that both McMahan and Lazar want to draw, though arguably for different reasons. McMahan wants to argue that where there is a just cause, combatants are not moral equals and because they are not moral equals, unjust combatants should not fight. Lazar, on the other hand argues that even where there is a just cause, moral liability entails most, if not all, killing in war is immoral and thus no Soldiers should fight. As he notes, rights respecting wars are practically impossible.24

However, the traditional view does have ways of accommodating these concerns. The first, as already noted, is to limit liability to attack to only those whose activities are practically inseparable from war fighting. As Thomas Nagel notes, a person may only be subjected to hostile treatment by virtue of the threat that person represents as “hostility or aggression should be directed at its true object.”25 This limitation avoids liability for persons based on class membership while limiting civilian liability to those who are involved in activities such as munitions manufacturing, which is already a feature of most accounts of the traditional view.26

Regarding liability for combatants who are not morally responsible for the harms they commit, one response would be to treat them just as one would unjust
noncombatants: as collateral damage. Doing so would mean extending considerations of proportionality to the harms one would commit against combatants, which would seem to limit the amount of force one would be permitted to use and risk extending the conflict. It would remain to be seen whether such considerations could be reasonably put into practice, but conceptually, at least, they are compatible with the traditional view.

Placing such considerations into practice, however, would be eased by the fact that the traditional view assumes an existential threat. In the face of an existential threat one can justify a great deal of collateral harm, especially when committing that harm also contributes toward victory. It may be unjust to kill certain unjust combatants, because they are merely causally, not morally, responsible. However, since that killing contributes to the speedy realization of a just cause, the collateral harm of those combatants would not count the same as collateral harm of noncombatants. Further, since the harm they represent is existential, just combatants would still be plausibly permitted to use lethal force against unjust combatants without running into any serious concerns about doing more harm than good. However many unjust but innocent combatants they may kill, it will likely still be morally preferable to defeat.

This point does not entail that this account of liability does not have any impact on conventional operations. While there may not be such a thing as a guilt-seeking missile, this account suggests that there is an obligation to take additional risks in order to give enemy combatants the opportunity to surrender. For example, prior to the outset of Operation IRAQI FREEDOM, US forces offered Iraqi regular army units the opportunity to surrender. These offers, motivated by the belief that most Iraqi Soldiers would prefer not to fight if given an alternative, increased risk by removing the element of surprise
regarding US operations as well as exposing US Soldiers to incidents of “false surrender” by Iraqi forces. This risk was further increased by the fact that Soldiers were not allowed to even engage Iraqi carrying weapons, as long as they did not appear hostile.²⁷

I do not mean to fully resolve the impact of this account of liability on the traditional view other than to point out that the concerns it raises seem to be, in principle at least, addressable. For the reasons stated above, I think that McMahan’s view is impractical and unnecessary when applied to traditional conflicts. While Lazar’s argument points out important difficulties with McMahan’s account, he does so to advance an argument for pacifism rather than solve ethical difficulties associated with war fighting.

However, in the context of irregular adversaries, I think that holding individuals morally responsible and thus liable for the harms they commit will solve the conundrums articulated earlier. By restricting lethal force to only morally responsible armed adversaries and expanding it to morally responsible noncombatants this account of liability suggests that we have to look to something besides self-defense to justify the use of lethal force. Otherwise, we would end up with a nonsensical ethic that would prevent killing adversaries who are not morally responsible and enable killing civilians who are morally responsible, since the latter would often be the only way to limit the harm done by the former.

**Fairness and the Employment of Lethal Force**

What should be obvious from the above analysis is that while self-defense may still be a sufficient justification for the use of lethal force in regular conflicts, where combatants’ activities are easily separable from non-combatant activities, it will fail as a
justification when combating irregular adversaries. The reason it will fail is that not every act of self-defense entails respecting the rights of those towards whom that act is directed. Just as in regular conflicts, many irregular adversaries are also coerced or deceived into fighting. One could plausibly count the harm done to them as collateral damage; however, the demands of proportionality would significantly constrain just combatant courses of action, likely to the point of making operations ethically untenable.

Additionally, the increased integration of non-combatant activity into activity that is practically inseparable from war fighting would increase the burden of discrimination beyond just the requirement to discern morally from not morally responsible adversaries. It would also require combatants to discern what their adversaries were morally responsible for. The activities of collaborators, supporters, and sympathizers arguably place just combatants at risk, but it seems both disproportional and indiscriminate to subject them to the same lethal force one would armed adversaries.

On the other hand it seems unfair to limit just combatant activities to simply engaging armed adversaries. If the activities of non-combatant adversaries play a significant role in the harm done to these combatants, then it seems reasonable to permit them the means to prevent that harm, even if it means harming those adversary noncombatants. The point here is not that Soldiers do not have a right to defend themselves; rather, it is that if our justification for lethal force is self-defense, then we would not likely be justified in using the force necessary to successfully defeat irregular adversaries, because then not all those adversaries would be subject to harms—lethal or non-lethal. In fact, it was this justificatory gap that created the conundrums described in previous chapters. The reason Soldiers were often denied permissions to use lethal force
was because the collateral harm they would cause did not seem to be warranted when
they were merely at risk of harm, rather than suffering harm.

The point here is that just as norms associated with regular conflict are
constrained by the requirement to respect certain rights, norms associated with irregular
conflict should be constrained by the requirement to be fair. If the purpose of combating
irregular adversaries is to create the conditions for a just, mutually shared, political order,
then combatants will have to fight in a way that establishes and strengthens the
institutions associated with that order. Since, as John Rawls has argued, the justice of
those institutions is contingent on their capability to fairly distribute the social goods they
create, it makes sense to appeal to fairness when using force to set conditions for the
development of those institutions.28 In fact, Applbaum notes that the fairness principle is
the “most promising” approach to resolve the moral tension associated with adversarial
interaction.29

Introducing the concept of fairness as a governing principle in warfare may seem
counter-intuitive. In fact, the tired cliché, “all’s fair in love and war,” suggests we have a
strong intuition that while we should limit the harm we cause when fighting wars, we
should take every possible advantage and fight as unfairly as we possibly can. Despite
some obvious similarities that I will appeal to shortly, war is not a game and Soldiers
should take whatever advantages – fair or unfair—that they can find to defeat the enemy.
So, though the traditional view requires combatants to respect the rights of enemy
combatants and noncombatants, they are not required to “play fair,” except in the thin
sense of respecting those rights. Beyond that, combatants are permitted to exploit, with
few exceptions, whatever enemy vulnerabilities they discern. They are permitted to do so
because there is no over-arching social good that the adversarial relationship in regular war creates. Rather, the purpose of war, in the traditional view, is to terminate the adversarial relationship by destroying the adversary, or at least their ability to resist.

This last point suggests another counter-intuitive aspect of introducing fairness to govern behavior in irregular war. Adversarial relationships are only justified by virtue of the social good they create. The adversarial relationship between prosecuting and defending attorneys, for example, is intended to create justice for the community by ensuring the guilty are punished and the innocent protected. In the case of the attorneys, as long as both sides play fair and the institution functions appropriately, then that social good will be realized.

However, the adversarial relationship found in war fighting does not entail creating a similar social good. In the traditional view, just combatants fight to prevent the injustice the war represents. The purpose of their fighting is to destroy the enemy. So rather than the adversarial relationship being necessary to create the shared good, it is its most significant obstacle. Unlike the attorney example, where both can act in accordance with the principles of justice to create justice, the same cannot be said for war. While both sides can fight for unjust reasons, both cannot fight for just reasons. At least one side has to be wrong. Since one side has to be wrong, it cannot be justified in committing the harms associated with fighting wars.

However, while the adversarial relationship, even in irregular warfare, may not be necessary to create justice, one cannot establish the conditions required for the development of just social institutions without engaging the adversary. Since, as discussed in chapter three, the purpose of that engagement is to bring the adversary into
the kind of normative space where there are alternatives to the violent interaction entailed by the enemy relationship, “playing fair,” as I will discuss below, is necessary to set the conditions for the creation of that space.

The Fairness Principle

The fairness principle captures two important intuitions regarding moral permissions and obligations. First, it acknowledges that receiving benefits can entail obligations and second, obligations must be connected to voluntary acts. Further, the fairness principle entails that free-riding is not permitted. It obligates everyone to do their share regarding social practices from which they willingly benefit. As such, its application can generate a range of obligations from paying taxes to fighting wars. In fact, application of such a principle is necessary to create the normative space necessary to entreat adversaries into cooperative behavior.32

Of course, simply receiving a benefit does not entail an obligation to share the burdens associated with its creation. For example, imagine a person who lives in a neighborhood where people take turns playing pleasant music for the others benefit. While that individual may benefit from the music, we can imagine that he has not asked to benefit and is perfectly happy without it. Therefore it would be unfair for his neighbors to impose the costs of providing this music on him.33 The reason it is unfair is because receiving a benefit is different than accepting it. The difference between receiving a benefit and accepting it is that the latter involves consent, whereas the former does not. It is this consent that then enables and constrains how we are permitted to treat other persons, even when that treatment may harm the other person. As Applbaum notes:

For two well-known and complementary reasons, genuine consent is a very potent permitter of actions that, absent consent, would be wrong. First, some actions are presumptively wrong because they harm the welfare of others, but since we ordinarily presume that people know what is
in their own welfare, their consent to a presumptively wrong action against them reverses the presumption that the action in fact harms them. Second, some actions are presumptively wrong because they override or undermine the will of others, and so fail to treat others as autonomous—
that is, self-ruling-agents. But performed with consent, these actions properly respect the will of the target, and so become exercises in autonomy, rather than violations of it. 34

So for it to be fair for persons to be liable for some kind of harm, they must have somehow consented to that liability, where consent must be “intentional, free and informed.” 35 Of course, this consent does not always need to be explicit. The fairness principle is further enabled by the idea that persons who have consented to participate in social activities are liable for whatever risks come with that activity. Consider, for example, a game of take-down football. While a player may not prefer to be tackled, by virtue of playing the game, he participates in an activity that subjects others to being tackled. For him to exempt himself from being tackled would thus give him an advantage over the other players they would reasonably consider unfair. Such an advantage, in fact, would entail a form of free-riding since this player would be attempting to benefit from the fact the others are subject to being tackled while he is not. Since that is unfair, the harm done to the player when he is tackled is not unfair.

If one accepts that the game metaphor can apply to other situations, then we can have a powerful tool for discerning what would count as fair treatment in a variety of social interactions where preference and the requirements of the “game” do not coincide. According to Applbaum, the concept “game” has two complementary senses. The first sense is as a strategic interaction and the second as a rule-governed social practice. As a strategic interaction, it permits players to subject other players to certain harms as long as those harms are committed within the “rules” of the game. As a rule-governed social practice it permits some players to restrict the other player’s liberties. 36 Both of these
senses fit with Walzer’s view of war as “rule-governed” activity where it is right to resist aggression; however, that resistance is subject to restraint. So, by conceiving war, in this case specifically irregular war, as a “game” in which fairness matters, then we can determine those circumstances where not only would it be permissible to kill, but to commit other presumptive moral harms as well, including coercion, deception, and interference.

It is, however, important to note that the criteria for consent are fairly stringent. It must be actual, informed, and voluntary. It does not need to be stated, as noted above, but for actions to count as consent, they have to be done knowing what those actions entail. Typically, if a person dons a football uniform and takes to the field during game time, it is reasonable to presume he has consented to being tackled if the ball is thrown to him. However, we can imagine that this person is a foreigner who does not understand the rules of the game. We can further imagine that he was deliberately deceived by a malicious local into believing that only those who had the ball were not subject to tackling. In this case, we would likely think it wrong for him to suffer the harm associated not only with being tackled, but being deceived as well.

So up to this point, the game “model” would seem to apply to armed adversaries, collaborators, supporters and sympathizers who have intentionally taken up the adversary cause and who intend their actions to realize that cause. I will take up later permissions associated with harming those who are deceived or coerced, but the next concern I wish to address is determining exactly what one is able to hold adversaries liable for. The fact that someone participates in a game does not entail unlimited liability for the consequences of that game. For example, coaches, trainers, and spectators all play a role
in the success or failure of the team they support, but that does not mean that they can be tackled. Similarly, just because a noncombatant places herself at risk through her support for the adversary cause, it does not follow that she is liable to the same kind of harms the armed adversary she supports is. It would seem unfair to subject someone who displays a Hizballah flag on their door to an intentional drone attack, just because Hizballah launched rockets into Israel. Displaying a flag may mark someone as a supporter, but that does not entail they have consented to the harms the organizations has committed and which makes them liable to attack in turn.

For the most part, permissions associated with the fairness principle follow a one-for-one exchange with liabilities. Fairness is, if nothing else, both discriminate and proportional. Those who kill should expect to be killed. Those who coerce and deceive should expect to be coerced or deceived. Finally, those whose actions enable the adversary cause should expect to be prevented from engaging in those acts. It is important to note that harms justified by fairness are not retributive. Rather, responding harms are justified by the fact they are necessary to stay in the game.

It also follows from this view that those who do not engage in killing, coercing, and deceiving, should not expect to be treated so as well. Of course, this killing, coercing, deceiving, and interfering are not themselves unbounded. Since fairness is discriminate and proportional, actions that conform to the fairness principle will be as well.

Discrimination and Fairness

As should be evidenced by the previous discussion, discrimination when combating irregular adversaries is significantly more involved than discrimination in regular conflicts. Where the traditional view requires friendly combatants to discriminate
enemy combatants from noncombatants; the moral requirements of irregular warfare will require them to discriminate armed adversary, collaborator, supporter, and sympathizers from morally innocent civilians, whose actions do not facilitate the insurgent cause. Further, given the diverse ways each category contributes to the fight, combatants will have to further discriminate in the means they are permitted to employ to engage these diverse adversaries. Where in the traditional view all combatants are subject to lethal force, in irregular warfare, not all adversaries are.

Proportionality and Fairness
Where the traditional view of proportionality requires combatants to ensure the harm done to noncombatants does not exceed the good expected from the use of lethal force, the moral requirements of irregular warfare also requires them to consider the harms to adversaries as well. Fairness only entails harming those who are liable to that harm. To be liable for that harm, one must be morally responsible for the actions that entail that liability. To be morally responsible for the actions that entail that liability, one must have chosen to conduct those actions under the conditions of minimal rationality. Whatever those conditions are, they exclude coercion and deception. Given, as I will discuss shortly, that many adversaries have been coerced or deceived, it will be unfair to harm them.

Further, the ends of irregular warfare differ from that of regular warfare in a way that is relevant to proportionality calculations. Whereas the end of regular war is the destruction of the enemy’s forces, the end of irregular war, as noted, is a just political order where the parties in conflict are willing to settle disputes non-violently, in accordance with the rule of law. In this latter regard, irregular warfare can take on the
characteristics of policing, where policing, “seeks to secure the common good of the very society within which it operates.” 39 This point entails a significant difference between regular and irregular conflict. In regular warfare, combatants have a very limited relationship with enemy communities. Their obligations are largely negative: avoid harming noncombatants and limit the destruction caused to civilian infrastructure. The reason these obligations are so limited is that there is no social contract between combatants and enemy noncombatants. After the defeat of enemy forces that may change; however, during the conduct of combat operations, the welfare of enemy communities is not a significant concern for combatants.

However, in the case of combating irregular adversaries combatants must take into account the common good of the communities in which they operate. This point is true even if combatants do not intend to establish a social contract between them and those communities. Their purpose is not simply to defeat armed adversaries, but to defeat them in a way that sets conditions for a just civil society. To set these conditions, irregular combatants will find themselves embedded and indebted to these communities in ways regular combatants are not. This point suggests that not only should combatants seek to use the least force possible, but that must use force in a way that is accountable to those communities. Otherwise, they will risk doing much more harm than good when attacking armed adversaries. 40

This point does not suggest that combatants will not be permitted to harm, coerce, or deceive noncombatants. In this view, harms done that uphold or strengthen the political order will be permissible, especially when failure to commit those violations will undermine this order. So, if refusing to stop collaborators, sympathizers, and supporters
entails rights violations incurred by insurgents or terrorists, then that refusal is self-defeating.

At this point, it might seem like I am arguing for a “hearts and minds” approach to irregular warfare that emphasizes building support for one’s own cause by demonstrating the positive benefits of cooperation. This view has received a great deal of criticism largely because it has seemed to fail in Afghanistan.\textsuperscript{41} I will take this point up more in the next chapter, but for the moment, I would simply point out that the requirement to transform relationships from non-cooperative to cooperative does not rule out coercion, deception, or even killing. What is does rule in is the requirement to take into account the moral responsibility of the armed and non-combatant adversaries. It also rules in acting in a way that builds cooperation for a just society supported by a functioning political order that allows for the fair distribution of social goods. This view also recognizes that the conditions of justice may take time to develop and may be culturally informed.\textsuperscript{42} This point suggests that often the best military operations can do is to facilitate the realization of those objectives, even though such operations by themselves cannot guarantee them. I will take up this point in detail in chapter five.

\textit{Liability to Risk in Irregular Warfare}

So to answer the question, “how much risk and harm may combatants expose adversaries to,” we have to consider the application of discrimination and proportionality across the categories of adversaries. To the extent these adversaries’ actions or omissions expose just combatants and innocent others to harm, and there is no other just way to end the conflict, they all may be placed at risk. The reason they may be placed at risk is that their activities, at a minimum, place others at risk. Thus to follow a policy where
adversaries, even non-combatant adversaries, cannot be exposed to risk would be to allow them a free ride for the risk and harms their activities entail. That not only seems unfair, it also constrains just combatants courses of action in ways that enable the realization of the unjust cause.

**Armed Adversaries**

Armed adversaries, by definition, employ lethal force and are thus liable to lethal force themselves. Given the application of the law-enforcement paradigm as a guide for the use of force, this permission may seem counter-intuitive. Police, for the most part, are only allowed to use lethal force against criminals when they are in the process of committing a crime, and then typically only to prevent further violence. Absent the requirement to prevent the crime, police are typically prohibited from killing even known criminals.

However, this point is where the policing analogy breaks down. Criminals threaten individuals, not societies. The criminal threat to individuals may become so great that it stresses the social fabric and strains societies; however, the objective of this activity is not to impose an alternate order as much as it is to unfairly benefit from the order that exists. This is largely true of even organized crime. These organizations seek to exploit individual vulnerabilities to obtain resources; however, they do not seek primarily to replace the social order. If they did, they would no longer simply be organized criminals but would be better described as insurgent or terrorist organizations.

The same is not true for armed adversaries as I have defined them in chapter three. By employing or threatening to employ lethal force in the service of an unjust cause that threatens, as its primary objective, the maintenance or establishment of a just
social order, they are liable to the use of lethal force themselves. Further, this liability is not contingent on the commission of a violent or lethal act. Because the threat they represent is continuous—as long as they are under arms—their liability is continuous. While this liability may be continuous, it is not unlimited. Armed adversaries are typically not existential threats to the societies they attack, despite their goals. If they were existential threats, then we would not consider them adversaries, but enemies, in the sense described in chapter three. As enemies, different permissions would be available to combatants.

However, while these adversaries may not be existential threats to society, they are threats to the institutions that society relies on to provide order. This point may suggest that it would then be better to treat armed adversaries as criminals, since absence an existential threat, proportionality would constrain actions that threaten innocent or non-morally responsible individuals. The point here is that the threats we are considering here are not simply threats to communities or threats to individuals. Up to this point I have conflated social order and political order, treating threats to the one as threats to the other. However, one can threaten the political order without threatening the existence of the society that political order represents. For example, the goal of insurgents in Iraq, arguably, is the imposition of a particular political order to govern Iraqi society, not the destruction of Iraqi society itself. It is a fight over who controls it, not whether it survives. Given the lesser threat to the political order as opposed to social existence, proportionality will further constrain combatant options suggesting, at least, that the law enforcement model is always preferable when engaging armed adversaries.
However, it is not always possible to engage armed adversaries under the law enforcement model and adequately address the threat they represent. The point I have been trying to make is not that threats come in the form of either enemy or criminal. Rather, the point is that the traditional view, which we tend to employ when dealing with irregular threats because they are more serious to the society than criminal threats, is not adequate to capture the nuances associated with dealing. While adversaries, in the sense I have described, are threats to a particular order, they are also participants in a particular society.45

For that reason, operations against them must take into account, as a matter of proportionality, the fact that the harm done to these adversaries can sometimes work against their integration—voluntary or forced—into that society. As noted in chapter two, there is a kind of “insurgent math,” where even legitimate attacks against armed adversaries can undermine the social fabric those attacks are intended to preserve. Recalling the example of the Marine lieutenant, this point suggests there will be occasions when it will be wrong to attack even obvious armed adversaries. However, as I will discuss in chapter five, that limitation should not restrict combatant’s ability to prevent such armed adversaries from accomplishing their goals.

Collaborators

As noted in chapter three, collaborator activity is necessary to armed adversary capabilities. Collaborators, for example, may provide information on friendly combatant movements, hide ammunition in their homes, or participate in the deception of friendly combatants. These roles appeared to have been played by the civilians in the village Corporal Myers’ unit was attempting to aid when it was attacked. By requesting the
assistance, its leaders deceived US forces into exposing themselves to harm. By reporting on their movements, it appears some civilians provided intelligence to the Taliban forces. By moving ammunition to gunners in the village—something observed by members of Myers’ unit—at least some citizens appeared to have participated in the harms that were committed. In the context of regular warfare, these activities are analogous to the kinds of activities support troops, who may not kill the enemy, but whose activities are necessary to that killing. Again, collaborators are not subject to these harms out of retribution; rather they are subject to these harms in order to avoid future harms. Without combatants, they would not represent the threat of harm; but without them, there would be no harm to represent.

Because of the necessary connection of their activity and harm to combatants, they may be targeted in order to prevent them from assisting armed adversaries. As such, they are subject to harms such as coercion, deception, and other forms of interference. Such harms could include detention and imprisonment or being subject to deception as part of an intelligence collection effort or to mislead armed adversaries regarding friendly combatant intentions. To the extent these harms are not lethal, they will typically conform to the requirements of proportionality.

Collaborators, however, pose a special problem for combatants. Because of the necessary connection between collaborator activity and harm to combatants, it would seem reasonable that they should be liable to attack as well. We can easily imagine a situation where in order to prevent an armed adversary attack one could kill a collaborator, thereby limiting the harm not only by the armed adversaries, but to friendly combatants as well. The difficulty with this view is that the principle of fairness requires
that the harms to which one is liable is limited by the role one plays. Recalling the football game metaphor, there is—or at least can be—a necessary connection between the activity of the coach and the ability of the team to win the game. Despite this necessary connection, however, the coach is not liable to being tackled. The reason for this limited liability, in part, is that the he is not entitled to tackle. So since collaborator activity is, by definition, limited in a way similar to the coach in that it is non-lethal, it would seem only fair that they would not be subject to lethal force in turn.

We can easily imagine, however, another situation where the only way to prevent an unjust harm by armed adversaries would be to kill a collaborator. It could be the case, for example, that a group of armed adversaries will attack, but only if they receive a signal from a collaborator. We can further imagine that friendly forces are not able to strike the armed adversaries to disrupt the attack. Their only hope is to prevent the collaborator from giving the signal. For the sake of the example, we can further imagine that the friendly combatants are not able to detain the collaborator, only kill him.

Given our discussion in chapter three, combatants are required to take extra risks to prevent unjust harms. Given that the killing of the collaborator would count as an unjust harm, they would have to assume the risks associated with an attack rather than kill him. But we can further imagine that the friendly combatants know they will not be able to withstand the attack and will all likely be killed. The pressure to kill the collaborator in this case will be considerable. It will also be permissible. As discussed in chapter three, liability to risk is limited by the fact combatants are not required to take so much risk they knowingly cannot accomplish the mission or maintain enough capability to continue the war effort. If there were other choices – such as withdrawal from the
position—they should probably take it. But given the choice between killing the collaborator or being killed, combatants would be permitted to kill a collaborator. Given that his actions have a necessary and causal connection to the unjust harm and given that he meets the conditions of moral responsibility for those actions, he is liable to attack.

Supporters

Unlike collaborators, the activities of supporters facilitate, but are not necessary to, the operations of armed adversaries. As such, their contribution to the harms committed by the armed adversaries may be active, but because they are not necessary, their contributions are much less direct. Since their contributions are much less direct, their liability is much less direct. They are, of course, liable to some form of harm. Because their activities are neither lethal nor causally necessary to the harms done to friendly combatants or to other innocents, the requirements of proportionality and fairness suggest they are not subject to lethal attack. They would, however, be subject to coercion, deception and other forms of interference that prevents them from supporting armed adversaries. Such harms could include population control measures, such as curfews, or detention or quarantine to prevent access to armed adversaries.

While supporter activity is neither lethal nor necessary to armed adversary lethal capabilities, it is active. Here, “active” simply entails an act of commission as opposed to an act of omission as discussed previously in this chapter. For example, we can imagine a situation, similar to the one above, where friendly combatants can only prevent some great harm by killing a supporter. In this case, it is less clear that killing the supporter is permissible. Respecting persons entails respecting what they have consented to, regardless of the consequences of that consent. Otherwise, we reduce moral reasoning to
simple utilitarianism where the harms we are permitted to commit are only restrained by the relative good they entail. A supporter may intend to support a cause, but she has limited her commitment to that cause by limiting the kinds of things she will do in support of it. Combatants have to respect that limit by refraining from killing. In this case, they would have to take their chances with the armed adversaries.

Fortunately, these sorts of situations, where choices are literally as stark as choosing between killing a supporter or being killed, rarely obtain in real life. Combatants almost always have alternatives to accomplishing their mission than to commit an unjust harm. In fact, as discussed in chapter three, if the moral requirements of irregular warfare permit combatants to limit their risk by foregoing certain missions, it further requires them to forego missions in order to avoid unjustly placing others at risk as well. This point is not to suggest that discussions about liability to supporters – or other adversary noncombatants for that matter – are trivial. Rather it is intended to illustrate what sorts of justifications would not be sufficient to employ lethal force. We can easily imagine a commander considering lethally engaging supporters in order to further some legitimate military objective. The point of the discussion above is to indicate that there would be no circumstances where that would be permissible.

**Sympathizers**

Sympathizers are like supporters in that while their activities may contribute in some way to adversary capability, they are neither lethal nor necessary to the harms armed adversaries commit. Unlike supporters, their contributions are passive, often characterized by tacit acceptance of an armed adversary presence or unwillingness to cooperate with just combatants or local authorities in a way that impedes the
establishment of a just political order. They are typically motivated by sympathy for the insurgent cause, but also desire to limit their liability. Thus theirs is more a crime of omission rather than commission. They do not so much help armed adversaries as fail to stop them. Because they do not engage in lethal activity, they are not subject to lethal attack.

Sympathizers would, however, be subject to coercion, deception, and other forms of interference in order to prevent their activity, however passive, from benefitting the adversary cause or impeding the friendly cause. The requirements of proportionality would suggest these harms would be more limited than what supporters and collaborators would be subject to. For example, they could be subject to coercive measures such as population control that limits their contact with armed adversaries. They may also be subject to coercive and deceptive measures, like paying taxes, meant to set conditions for a just political order.

(*Coercion, Deception and Liability to Attack*)

Of course not all adversaries, whether armed or not, are morally responsible for the harms they commit. Just like combatants in regular war, they can be deceived or coerced into participating in the adversary cause. Detention facilities in both Iraq and Afghanistan are filled with young men who were deceived or coerced into fighting and who, if given a choice, would gladly quit. This point presents a challenge to a view of military ethics that associates liability to harm with moral responsibility. If one cannot sort the guilty from the innocent then moral responsibility cannot be effectively used as a criterion to sort out those who are and are not liable to attack.
However, the purpose of employing moral responsibility is not just to determine individual liability but also to determine the rules we should play by if individuals were, in fact, liable. I have already articulated the different kinds of harms individuals morally expose themselves to by virtue of their informed, intentional, and voluntary participation in the adversary cause. This view expands on the traditional view, which only holds persons liable to attack by virtue of their membership in a group, namely the group of enemy combatants, independent of their guilt or innocent relative to the harm they cause. However, if we hold individuals liable to attack by virtue of their moral responsibility, then it seems we would have to ignore those combatants who are coerced, deceived, or otherwise not morally responsible for the harms they cause. If that restriction is correct it would seem that we not only are placing an unrealistically high burden for discrimination onto just combatants, we are tying their hands relative to their ability to combat threats to the political order. Further, such a restriction would leave the non-traditional view I am articulating vulnerable to the charge that it amounts to an argument for pacifism.

Re-framing the military ethical question of displacing risk in terms of fairness allows us to articulate additional rules that account for limited moral responsibility. There may be no way one can kill, coerce, deceive, or otherwise interfere with someone who is not morally responsible for their actions without violating their rights. But there may be a way to violate those rights fairly. In fact, as Rawls notes, injustices that advantage the least advantaged may be considered fair. This point suggests that, in principle at least, that there are at least some circumstances where individuals may be disadvantaged, independent of their consent, in order to serve the requirements of justice. Returning to
the game metaphor, this point suggests that just because one does not want to play a
game does not mean that one cannot be bound by its rules.

For example, we can imagine a parent telling an older sibling to play a board
game with a younger sibling. The older child may not wish to play but is told he will be
punished if he fails to do so. Though he is coerced to play the game we would still say he
is obligated to play by its rules. The reason he would be bound by those rules is because
to the extent the younger sibling is not complicit in the parent’s coercive act, it would be
unfair to cheat against her. As Applbaum notes, “(a)t the core of the fair-play argument is
the notion that to not play fair is to be unfair to someone.”47 Since the younger sibling
has done nothing to warrant being treated unfairly, the older sibling may not cheat against
her. Further, by being obligated to play by the rules he is liable to the same sorts of risks
that anyone else playing the game is.

This point entails only that there are circumstances where coercion or deceit do
not permit someone to be exempted from the rules. There are, of course, circumstances
where they would be exempt since, in general, moral obligations cannot arise out of
unjust acts.48 It is not hard, for example, to imagine a set of circumstances where the
younger sibling is complicit in the parent’s coercive act. In such a situation, the older
sibling may not be bound by the rules of the game and may be permitted to cheat to make
it less likely that the younger sibling would force him to play in the future. Note here,
however, that even this permission to cheat is bounded. He is permitted to cheat in order
to make future coercion less likely. He would not be permitted to cheat, for example,
because he just wanted to be cruel to his sibling. The point here is simply that whatever
permissions he has depend in large part on the role the younger sibling plays in the circumstances that forced the game in the first place.

However, even if we want to allow the older sibling to cheat that permission does not entail that he is immune from harms associated with playing the game. In general, to the extent one attempts to free-ride in a game one may place other players unfairly at risk. In such a case, one would be liable to being harmed by those other players so that they may reduce the risk of harm to themselves. So while coerced players may be permitted to cheat in order to reduce risk to themselves, they are still liable to harm by others who also presumptively have a right—within the rules of the game—to reduce their own exposure to harm. This is an important point. Adversarial ethics does not require that all players be bound by the rules equally in all circumstances. It is sufficient for our current purposes to show that players may be permitted to harm free-riders just as they would willing players.\textsuperscript{49}

By analogy, then, those persons who are coerced or deceived into engaging in adversary activity can be subject to the rules associated with that activity, including the risks that come with it. While the fact of their coercion may entitle them to cheat in some way, it does not allow them to cheat when doing so places others unfairly at risk. Since I have assumed the justice of the stronger side’s cause, this point suggests that adversaries, for the most part, will be bound by the “rules” of irregular warfare. I do not intend, however, to take up in detail what permissions they may have if they are coerced to fight. My concern here has only been to establish a basis on which just combatants may harm them.
However, this point does not suggest that combatants have not done something wrong when they harm coerced or deceived persons. It only suggests that they may not be fully liable for those wrongs. The weight of that responsibility belongs to those who did the coercing and deceiving in the first place. As Applbaum notes:

\[(O)ne\ who \ rightly \ violates \ another’s \ right \ has \ reason \ for \ reluctance \ and \ regret, \ and \ perhaps \ even \ remorse \ and \ resentment. \ Morality’s \ recognition \ of \ these \ remainders \ reaffirms \ the \ moral \ importance \ of \ the \ victim \ even \ as \ it \ permits \ victimization.\]^{50}

What this point does suggest is that just combatants should do due diligence to determine the moral responsibility of those whom they would harm. This due diligence would be required in order to address the sorting concern raised earlier. Much of the justification for targeting combatants in regular conflicts rests on the fact that sorting guilty from innocent is a practical impossibility. While the nature of irregular warfare, which emphasizes integration into a community, alleviates some of the difficulties associated with discerning moral responsibility, this concern is not fully resolved. Nor is it likely that it can be. There will always circumstances where just combatants will have reasonable doubts regarding the liability of a particular adversary. However, the account of fairness I have articulated suggests that even in such circumstances, they would be permitted to act. They would be permitted to act because even coerced and deceived adversaries are not permitted to free-ride in a way that exposes others to harm. That would be unfair as well.

However, the presence of such doubts does entail that just combatants should take extra measures where possible in order to alleviate those doubts. Of course, taking such measures will not fully resolve epistemic concerns regarding liability, but it will limit the causes for regret that just combatants should reasonably have when they have harmed
non-liable persons. They may limit such causes by engaging adversaries in a way that gives coerced or deceived adversaries the opportunity to cease their harmful activities. Measures could include opportunities to surrender before being engaged with lethal force. Other measures could include amnesties for adversaries willing to change sides.

In the early days of the insurgency in Iraq, for example, Iraqi and US officials considered offering amnesty to insurgents to get them to cease their attacks against US and government forces. However, this amnesty was only extended to those who did not have “American blood” on their hands, out of the belief that killing an American soldier after the cessation of formal hostilities constituted murder and that letting murderers go free would undermine the conditions for justice in the new Iraqi order.

As time went on, it became apparent that many Iraqis committed lethal acts for reasons of honor or revenge that had little to do with the political goals of either side. Once those concerns were addressed, many did not fight again. It also became apparent that many insurgents were lied to by insurgent leadership regarding US intent or the kinds of activities they were going to undertake. Many suicide bombers, for example, had no idea the trucks they were driving were laden with explosives until it was too late. In other cases, many Iraqis took part in hostilities because they or those close to them were threatened with death. Clearly, given such accounts, denying amnesty to anyone with blood on their hands failed the requirements of discrimination.

**Displacing Risks on Innocent Noncombatants**

Up to this point, I have examined the risks and harms just combatants may be morally permitted to expose adversary combatants and noncombatants to when conducting operations. Of course, in undertaking these operations, as in regular warfare,
they will almost certainly expose innocent noncombatants to risk and harm as well. Unlike adversary noncombatants, however, innocent noncombatants have done nothing to make them liable to such risks and harms. So, as in the traditional view, it would make sense to preserve that immunity even in irregular warfare. The difficulty for this view, however, is that non-combatant integration into the adversary’s war fighting capabilities works both ways. If non-combatant collaboration, support, and sympathy are critical to the adversary’s victory, it will also be critical to the friendly victory as well. Therefore, it is reasonable to ask if there will be circumstances where innocent noncombatants may be intentionally harmed, coerced, or deceived if doing so is necessary to victory.

Irregular warfare presents another difficulty for combatants. As discussed in chapter two, the requirement to develop and maintain political order entails using the least force permissible in order to minimize any disruption to this order. Using the least force permissible further entails a prohibition against knowingly, though unintentionally, harming innocent noncombatants. Like police who engage in high-speed car chases, combatants are permitted to engage in activity that exposes innocent noncombatants to risk, but not to harm as is permitted in the traditional view. This prohibition entails unlimited liability to combatants or the mission, which, as a matter of practice, has constrained just combatant operations to the point of total failure. Since failure to realize the just cause is itself a kind of unfairness, I will argue that the fairness principle will permit certain harms to noncombatants in those situations where combatants are forced to choose between harming them or defeat.

In both cases, the problem for combatants is determining if there are any circumstances where they may place innocents at risk rather than themselves. Because of
the role they play, combatants have a *prima facie* obligation to accept risk if the alternative is displacing it onto noncombatants. However, when accepting that risk entails losing the war, it reasonable to ask if this prohibition against harm to noncombatants is absolute. In answering that question in the negative, we will have to do so in a way that avoids a purely consequentialist justification. If we do rely on a purely consequential justification, then we will have fatally undermined the commitment to rights and fairness that justifies the fighting in the first place.\(^5\)

In the first case, I will argue that in situations where avoiding harm entails a Pareto-inferior outcome from the perspective of rights and persons, it may be fair to subject innocents to at least the risk of harm, if not the harm itself. In the second case, innocent noncombatants who benefit from just combatant operations may be liable to unforeseen but unintended harms associated with those operations. While these harms can run counter to the state’s obligation to protect its citizens, it will nonetheless be fair to expose those noncombatants to these harms when failure to do so is self-defeating.

**Targeting Innocent Noncombatants**

If the purpose of irregular warfare is to bring non-cooperative persons into a cooperative relationship with a specific authority, then it makes sense to permit some kind of targeting of these noncombatants. However, neither the traditional view nor the view I have argued up to this point can make room for this kind of targeting. Just combatants may target adversary noncombatants to prevent them from engaging in certain activities, but I have not made the case that just combatants can harm, coerce, deceive, or otherwise interfere with any noncombatants in order to further their military and political objectives. For the purposes of this discussion, I will examine permissions
associated with targeting innocent noncombatants. I reason that if innocent noncombatants are liable to targeting, adversary noncombatants will be as well.

By employing the term “innocent noncombatants,” I refer to all noncombatants who have not engaged in any activity, passive or active, that supports the adversary cause. In this view, innocent noncombatants may refer to civilians who are allied or indifferent to the just cause, where allied applies to those civilians who collaborate, support, or sympathize with the just cause and indifferent applies to those civilians who take no actions to hinder the just cause. It may seem reasonable to give some preference to those who are allied over those who are indifferent. However, since neither are morally responsible for the harms associated with the conflict, from the perspective of fairness, permissions regarding any risk or harms to them will be the same.

Of course, as previously discussed, measures that benefit civilians, such as improvements in infrastructure, education, security, and other social goods necessary to a just, flourishing society would be permitted. It would be, however, beyond the scope of this project to discuss in any detail what specifically is required to win hearts and minds. So I will stipulate that just combatants may choose to benefit any non-combatant, adversary or innocent, if they deem it practically wise to do so. The reason I would stipulate this point without a great deal of discussion is that the fairness principle permits us to act towards others in ways that they would consent to. Of course, such benefits may not always be strictly “fair,” in the sense that they were deserved, but to the extent they do not violate persons or rights of persons they are permissible.

In fact, though I have pointed out previously that winning hearts and minds does not preclude certain kinds of harms, the analysis from chapter three suggests that those
harms absent beneficial institution-building practices would be immoral. Further, as noted in the last chapter, the requirement to transform relationships entails that combatants have to do more than simply avoid fighting using means that undermine the possibility for a future peace, as Rawls requires. They have to fight in a way that aims to realize that peace in the present. This means they have to fight in a way that entreats adversaries into a more cooperative relationship where they are responsive to the political order combatants are trying to protect. This point does not mean that entreatying is the only way to create the normative space necessary for such relationships, but it does mean it is a moral obligation and further, it means, counter-intuitively, that there may be instances where just combatants must act in a way that benefits the adversary.

The reason one may need to benefit adversaries is that the normative space for a desired relationship has to be in place before that relationship can be realized. The same sort of dynamic that work with basic trainees works for other relationships as well. So just as the drill sergeant may refer to recruits as Soldiers long before they possess any of the qualities of Soldiers, we have to create the space for cooperative relationships before we transform the adversary relationship. I do not intend to review all the sorts of practices that might entail. The focus of this project remains the norms associated with committing harms in pursuit of a just cause when combatting irregular adversaries. But the point worth noting here is that there will be times when the permission to harm will be overridden by moral requirements that entail benefits to adversaries.

The difficult case, however, is determining those permissions associated with harming others, even when that harm entails a benefit. Applbaum resolves this particular conundrum by noting that actions that avoid Pareto-inferior outcomes, that are outcomes
where one person is worse off even if others are better off, are permissible as a matter of fairness. To illustrate, he cites Bernard Williams’ familiar example of Jim, who has run across an evil dictator who has rounded up twenty locals. The dictator plans to kill all these locals unless Jim agrees to kill one. In this case, we will assume none of the locals have done anything to warrant this treatment and by killing one, Jim will clearly have unjustly violated that person’s rights. From a consequentialist point of view, it seems clear that Jim should kill the one local, since it will prevent the greater harm of the deaths of the other locals. We can even imagine that all the locals understand and accept this reasoning. None of them want to die, but they understand one unjust death is better than twenty.

However, if Jim agrees to kill the one local on consequentialist grounds, he undermines his overall commitment to respect for the right to life. By killing the one on these grounds, he is in effect saying that persons have a right to life unless nineteen other persons’ rights to life are at stake. Of course twenty in this case is an arbitrary number. But essentially so would any other number we prescribe. The point here is not that a principled commitment to the right to life is somehow worth a certain number of lives. The point is that even if we agreed on consequentialist grounds that more is always better than less, then wherever three persons’ lives are at stake and two can be saved by killing one, one person does not enjoy a right to life. This point is important. If the harms one commits in the conduct of fighting are justified by a particular commitment, then those harms have to be restrained by that commitment as well.

As noted above, however, a commitment to rights is not the only kind of commitment that can justify harms. A commitment to fairness can enable harms as well.
For example, Jim—and presumably the other locals as well—could note that the local whom he would kill will be no worse off if Jim kills him or if he does not. If Jim does not do it, the evil dictator will. Since the local will be no worse off and the others will be better off, then Jim’s killing of the local may be justified because it avoids the Pareto-inferior outcome of all involved being worse off.

My point here is not to challenge the notion of justice as fairness. Rather, my point is that what counts as fair, and thus what counts as just, does depend on the actor’s frame of reference. It is unjust that both Jim and the locals are placed in this situation. It is unjust that any local should be harmed and it is equally unjust that Jim is compelled to choose either to harm one or many. However, forcing Jim and the locals into that situation is analogous to forcing them into a kind of game, albeit a grisly one, where rules of fairness can apply. In this sense, Jim’s situation is like the older sibling compelled to play a game with a younger sibling. Assuming the younger sibling was not complicit in forcing her to play the game, the older sibling would be wrong to cheat when playing the game. Doing so would be taking advantage of someone who did not deserve it. It is unjust that Jim should have to choose. It is unjust that any locals should die. But Jim should shoot the one local. It is the fair thing to do.

Of course, the fact that Jim killed the local does entail that he should have regret for what he has done. The local’s death was unjust. But in this sense, Jim’s position is like the driver who lost control of his car and struck the pedestrian. Assuming the driver took all reasonable precautions to avoid such a situation, he may be agent responsible for that person’s death. He is, however, not morally responsible. It is beyond the scope of this project to fully examine under what conditions one should feel regret; however, it is
important to note that acting fairly can still result in moral residue combatants will have
to resolve.⁵⁶

Further, the point here is not that Jim is not morally responsible should he kill the
local. The point is that under conditions where failure to act will entail a Pareto-inferior
outcome, one may act fairly even while committing a harm one should reasonably regret.
This point allows us to maintain our commitment to fairness that is the central moral
feature of the social institutions the just side is presumably attempting to establish. This
analysis, then, gives us one principle governing risk and harms to innocent
noncombatants: combatants may act in such a way that places innocent noncombatants at
risk, if doing so is the only way to avoid outcomes that are Pareto-inferior.

*Collateral Harms:* The next concern, of course, is permissions associated with
collateral harms to innocent noncombatants. While the traditional view permits the
foreseen but unintentional harming of noncombatants, the moral requirements of irregular
warfare, as I have described them up to this point prohibit it. However, recalling the
examples from chapter two of the sergeant who was not permitted to employ smoke to
obscure his troops’ movement out of a hostile fire zone or the Marine lieutenant who was
prohibited from targeting armed adversaries, effectively giving them a permissive
environment from which to conduct operations, a policy that prohibits zero harm to
innocent noncombatants will, in practice, likely constrain friendly action to the point of
defeat.

This concern has been articulated multiple times, especially, as noted earlier, over
the rules of engagement in place in Afghanistan that generated the restrictions described
above. While higher commands have permitted some harms to noncombatants when it
was clear to them Soldiers’ lives were at stake, difficulties in getting these commands to accept the view from the ground have led to needless harm to Coalition Soldiers. Thus, what is needed is a policy that the Soldiers in contact can apply in order to minimize risk to innocents while minimizing the harm to themselves with a relative certainty that minimizes, if not eliminates, cause for future regret.

It is also important to note that while pursuing policies that place Soldiers at apparently excessive risk, Coalition forces also pursue policies that still put innocent noncombatants at risk. Consider, for example, precision missile strikes. While those strikes are arguably aimed at legitimate targets, to the extent they kill persons who are not able to give consent, such as children, then by virtue of the framework I have developed so far, they would be morally impermissible. However, if they are always impermissible then many of our most successful tools would almost always be impermissible since there is almost always the chance one may harm innocents. While I will take up in chapter five specific permissions associated with precision missile and drone strikes, I will now discuss under what conditions any harms to innocent noncombatants may be permissible, if any.

The first condition that must hold before combatants would be permitted to place noncombatants at risk of harm is that they must have reached the point where all other courses of action would entail either their deaths or the inability of their organization – at whatever level this decision is being made—to continue the fight. Unlike in the traditional view, however, this condition is not sufficient. As noted in chapter two, the moral requirements of irregular warfare entail the obligation to forego certain operations if it means harm to noncombatants. The point of the story of the Marines in Los Angeles
was to illustrate not only that they did not have to fire into the doorway in order to resolve the situation; they were not entitled to do so either. It would have been better to develop the situation and avoid the use of deadly force.

That restriction is in place not because the one perpetrating the violence is not liable to lethal attack, but because the victim of that violence is. However, we can imagine the situation developed to the point where the perpetrator had taken his victim hostage and was threatening to kill her if the police and Marines did not depart. This would put the police commander on the ground in a difficult situation. If he departed, the hostage would likely be killed and if he did not, he might reasonably believe she would also likely be killed. He could then plausibly conclude that the only way he had to prevent that unjust harm is to kill the perpetrator, which he cannot because the hostage is in the way. That, after all, is what hostages are for.

To resolve the situation, the police commander decides to shoot the hostage in the lower leg. The wound causes her to reflexively fall to the ground before the perpetrator has a chance to pull the trigger. When she does so, a police marksman shoots the perpetrator, preventing him from recovering from the shock of the first shot and harming the victim. Though the police commander intentionally targeted the victim for harm, he did so in a way that was to her benefit and arguably in a way that she would have reasonably approved of, given what her alternatives actually were.

In “The Just Distribution of Harm Between Combatants and Noncombatants,” McMahan makes a similar case for permissions associated with harms to noncombatants. Specifically criticizing Israeli Defense Force practices where they would call in relatively indiscriminate indirect fire and air strikes in densely populated Palestinian urban areas in
response to small arms fire from those areas, he argues that combatants may not place enemy noncombatants at greater risk than they themselves are willing to take – a point I have previously argued here as well. Addressing the concerns of Kasher and Yadlin that I took up in chapter two, he points out that while the state may have a duty to protect its citizens, which includes its Soldiers, that obligation cannot entail permissions they do not already have. \(^{57}\) Specifically, the obligation to protect one person does not entail the permission to harm another person, unless that person has done something to warrant that harm. By definition, however, innocent noncombatants have not warranted that harm. As McMahan notes:

> If a state may demand only a certain level of sacrifice from its combatants but can only avoid defeat either by compelling to make sacrifices beyond that limit or by inflicting an impermissible level of harm on innocent civilians, it is in the tragic position of having no permissible alternative to the acceptance of that defeat. \(^{58}\)

McMahan does allow, however, combatants one other alternative. To the extent noncombatants will benefit from the operations associated with the harm in question, they may be liable to harm as well. The point here is not that noncombatants who may benefit from the outcome of a particular conflict are liable to attack. If that were the case, then all noncombatants would be liable to attack by just combatants at least because, presumably, all persons benefit by victory going to the just rather than unjust. Rather, noncombatants may be considered beneficiaries of a war only when that war would diminish her expected risk of harm. \(^{59}\)

The difficulty with McMahan’s view is that it places friendly combatants in the odd position of displacing risk to friendly noncombatants, whom they have an obligation to protect, in favor of lessening risk to enemy noncombatants, towards whom they have no such obligation. While the state’s obligation to protect its citizens may not entitle
Soldiers to decrease their risk relative to enemy noncombatants, it also does not seem to
entitle them to displace onto friendly noncombatants. McMahan may be right regarding
the restriction on placing risk on enemy noncombatants, but he has not solved our
problem. Combatants would still be subject to unlimited liability before exposing any
innocent noncombatants at risk.

The difficulty for the practice, if not the theory, of this sort of unlimited liability is
that by making rights’ violations (in this case, the right to life) inviolable, it turns the
observance of that right into a fetish. As Applbaum noted, confusion arises when we
conflate concern for a person’s rights with concerns for the person. The appropriate
moral end is the person not the person’s rights. Rights are simply the means by which we
express that concern. So when failure to violate a right entails a person violation, we have
done something wrong.

To illustrate why we have done something wrong, consider, for example, the
problem for a commander who is about to launch an attack on a legitimate military
objective that is located close to a civilian residential area. The presence of that enemy
military force places his Soldiers at grave risk, so he has to destroy it or his Soldiers will
suffer unjust harms. The traditional rules of war allow him to conduct the attack, even
though he knows a number of those civilians will be killed. As long as he does not
intentionally target the civilians and his use of force is proportional, he will have done
nothing wrong in this view. However, he notes that if he fires some rounds in front of the
residential area with the intent to terrorize the residents into leaving, his attack will result
in fewer of their deaths.
Of course, terrorizing these civilians into leaving the battle area will represent a violation of their rights, which is prohibited under the traditional view. Further, it will place them at risk of harm, which is prohibited by the moral requirements of irregular warfare. Applbaum, however, observes that in respecting their rights, the commander risks violating their person should they be harmed in the attack. Thus in this circumstance respecting those civilian rights is self-defeating since it would likely lead to a violation of their persons.

The difference between a rights violation and a person violation is that the former represents a violation of a person’s agency whereas the latter, in addition to violating a person’s agency, diminishes her capacity for agency. Person violations entail damaging or denying someone’s moral agency by impairing that person’s capacity to choose and pursue her own ends, as “when one is killed, crippled, or severely deprived and degraded.” Of course, some rights violations—like the right to life—are coextensive with person violations. Violating someone’s right to life necessarily means violating that person. However, unlike the right to liberty, for example, violating the right to life does not just violate someone’s capacity for agency, it eliminates it.

So, certain harms, like coercing or deceiving, for example, may diminish one’s ability to exercise one’s agency. However, when one is killed or disabled in certain ways, one loses the capacity for agency. For that reason person violations are much more serious than rights violations. In fact, where rights violations can prevent person violations they are permissible, as the example above illustrates, because they preserve the capacity for agency at the expense of a particular opportunity to exercise that agency. It seems like a fair trade.
So just as shooting the hostage in the leg was permissible because it prevented her death, terrorizing the civilians into leaving the residential area may also be permitted since it avoids harms to at least some of them. There is no contradiction in violating rights if it means not violating persons. In this view, rights violation and lesser person violations will be justified if they prevent the greater person violation. This point then gives us the second principle regarding combatant permissions regarding harms to innocent noncombatants: rights violations that prevent the person violations are justified if there are no legitimate alternatives, to include foregoing the military action in question, to that rights violation.

Figure 4: Discrimination and Risk: This diagram shows the differences in the traditional and non-traditional view when viewed as a relation between the requirement to discriminate and the risk that discrimination entails. The “combatant” and “noncombatant” curves show that there is an inverse relationship between the effect of discrimination and the risk combatants and noncombatants experience. The area “unforeseen harms” lies between the combatant and noncombatant curves and reflects the permissible options when combating irregular adversaries. The area marked “foreseen harms,” which falls below the combatant and noncombatant lines, shows that as discrimination decreases, the chance of foreseen harm increases. To the left of the solid vertical line, those means would be impermissible unless they avoided a Pareto-inferior outcome. The positions marks “sympathizer,” “supporter” and “collaborator” show the relative requirement to discriminate when attacking armed adversaries. Thus, when attacking armed adversaries, one must employ extremely discriminate means when sympathizers are at risk and less discriminate means when collaborators are at risk.
Conclusion

I have argued in this chapter not only that self-defense is not a sufficient justification for lethal force, but also that when applied in context of the traditional view of *jus in bello* it yields counter-intuitive permissions and obligations that make military ethics in irregular war nonsensical. In response, I have argued that an ethics of fairness, that respects persons though while not always respecting rights, can resolve many of the absurd situations that have populated the examples I have cited. This point does not mean combatants are not entitled to defend themselves. It just means that as a justification that will only entitle lethal force against an imminent threat utilizing means that can effectively discriminate between those who are liable to harm and those who are not.

I have also argued in this chapter, agreeing with McMahan and Lazar, that fairness requires that we restrict the harms we commit to those who are morally liable to such harms by virtue of the threat they represent. Also agreeing with Applbaum, I have further argued that we need to consider non-lethal moral harms, such as coercion, deception, and interference as well. The result of that has been to argue, contra the traditional view, that certain noncombatants, by virtue of their actions, are liable to certain harms, though as long as they remain noncombatants those harms would be largely non-lethal.

Finally, I have argued that while the moral requirements of irregular warfare prohibit placing innocent noncombatants at risk, those requirements can be overridden when doing so either avoid as Pareto-inferior outcome or avoids a greater person violation than the harm otherwise represents. Thus while the moral requirements of combating irregular adversaries entails counterintuitive restrictions against targeting
adversary combatants while enabling permissions to target adversary and innocent noncombatants those restrictions and permissions are bounded by the requirement to create the kind of normative space necessary to allow for the sorts of imperatives and entreaties that will set conditions for developing cooperative relationships.

In the next chapter, I will apply the framework developed in chapters three and four to practices associated with combating irregular adversaries. In doing so, I will select techniques that pose the most significant moral challenges to balancing mission accomplishment, immunity, and force protection. These techniques will include precision missile attacks, population control measures, and the use of voluntary and involuntary human shields.
Chapter Five: Targeted Killings, Human Shields and Population Control

Introduction: Ethical Decision Making when Combating Irregular Adversaries

It should be apparent from the previous analysis that ethical decision-making associated with combating irregular adversaries will be significantly different from that of the traditional view. The “non-traditional” view I have argued for shifts focus from applying principles of proportionality and discrimination in a way that respects rights, to deciding where to displace risk in a way that respects fairness. These frameworks, however, are not exclusive. Rather, they are manifestations of the same set of moral concerns. So, the point here is not that our moral commitments are different in one context or the other; rather, the norms we observe in one will be different in the other precisely so we can maintain those moral commitments.

Having said that, this non-traditional view does encourage a different process for ethical decision-making in war. Rather than simply determining if the force one is going to use is directed at a legitimate military objective and proportional to the relative value of that objective as in the traditional view; in the non-traditional view, one must determine if the objective is legitimate, if the individuals targeted are liable to be targeted and if liable, liable for what sort of harm, lethal or non-lethal. Having determined if they are in fact liable to be harmed, combatants have the additional requirement to determine if the particular harm committed is proportional relative not just to the value of the military objective but also to the disruption to the political order caused by that harm. So while the essential categories of decision-making—necessity, proportionality, and discrimination—are the same as the traditional view, their applications are very different.
Where this difference is most apparent is in decisions about where to place risk. When balancing risk between mission, noncombatants, and themselves, Soldiers combating irregular adversaries are permitted to prioritize their lives over mission accomplishment up to the point that doing so does not itself place the political order at risk. To prevent that point from being reached, Soldiers may not only kill, coerce, and deceive adversaries, they may displace some risk onto noncombatants, adversary and innocent, as long as the harms represented by those risks is also proportional to the noncombatants’ cooperation with armed adversary forces. The point here is that to avoid foreseen harm to combatants, there are circumstances where they may risk unforeseen harms to noncombatants.

In this next section I will apply these tests to practices associated with combating irregular adversaries. I will begin by addressing concerns regarding Soldier risk raised in the previously cited examples of the NCO denied smoke, the Marine lieutenant denied permission to engage the enemy, and the humanitarian mission denied supporting fires. I will then examine targeted killings, human shields, and population control measures that require Soldiers to make decisions about risks and harms.

**Balancing Soldier and Noncombatant Risk**

Before turning to specific practices associated with targeting adversaries, I will first address the conundrums described by certain examples used throughout this discussion to illustrate how the non-traditional view would resolve the absurdities generated by the application of the traditional view to these non-traditional problems. These conundrums arose through a mismatch between the kind of war combatants were trying to fight and the ethics of war fighting they were trying to apply. The central feature
of the non-traditional environment is that adversary combatants are not only indistinguishable from innocent noncombatants; they are often integral parts of the same community. Thus, a policy of radical noncombatant immunity, where Soldiers may not take *any* actions that place civilians at *any* risk, entails Soldiers must absorb all that risk themselves.

That is a lot of risk.

![Figure 5: Traditional and Non Traditional Views. The transition from the traditional to non-traditional view is marked by shifts in Soldier obligations, permissions, and prohibitions: the obligation to accomplish missions becomes permissions to forego certain missions if they are too risky; the prohibition against targeting noncombatants becomes obligations, depending on their liability; the permission to place Soldiers at risk can become a prohibition as the presence of a political order creates space to seek less risky options and diminishes their liability to risk.](image)

**Unforeseen Harms: Calling for Smoke**

So, recall the NCO who was denied smoke to obscure his unit’s withdrawal while that unit was under fire. Although smoke is not inherently lethal, higher-level headquarters were apparently concerned that the rounds could strike and injure civilians. While these concerns are legitimate, the NCO’s request still seems to pass the tests
required by the non-traditional view. Because smoke is not inherently lethal his request passes the test of discrimination since no one was actually targeted for lethal force. In fact, no one was targeted for any harm whatsoever. However, smoke rounds can kill if they land in close proximity, so there remains the issue of whether the civilians in the area were liable to risk.

To resolve this issue, of course, the particulars matter. In the non-traditional view, civilians may be placed at risk if by doing so the political order is strengthened. This point means that whatever the risk is, it must not be more disruptive than the risk or harm it is intended to avoid. So, for example, if the smoke rounds would need to land inside a village in order to be effective their employment would be more risky and more disruptive than if those rounds could land outside village and still be effective. Here a sliding scale is appropriate: the closer the smoke rounds to the village, the more disruptive. The farther away the rounds less, the less disruptive they are.

Given that the Soldiers were under fire, it would seem that the political order was already disrupted. So it would seem reasonable to drop the rounds fairly close to the village. However, Soldiers would not be allowed to drop the smoke into the village where the likelihood of harming someone becomes extremely high—almost to the point of certainty. The non-traditional view permits Soldiers to place noncombatants at risk, but it restricts actions that lead to foreseen though unintended death.

This restriction arises from the fact that the permission to place noncombatants at risk is bounded by the same considerations that permit law enforcement officials to conduct activities like high-speed car chases in pursuit of criminals. Such actions are justified because failure to conduct those actions leads to a greater risk to civilians. This
view, however, does not permit combatants to take actions where harm to noncombatants is foreseen unless they can establish an active, supportive, and necessary connection to the activity of the noncombatant and the harms combatants are experiencing and there are no alternatives to avoid that harm.

So, to the extent that the smoke could land a relatively safe distance away from populated areas, the NCO should have received that support as any harm to noncombatants would then be unforeseen. As far as what constitutes a relatively safe distance, Soldiers should employ the same test Walzer and Margalit apply: if they would drop the smoke that near to their own civilians, then they should be allowed to drop it that close to any civilian area, as long as doing so also respects the restrictions noted above.¹ The point here is not that combatants should not do what they can to avoid harms to noncombatants; rather, it is to point out that generally applying such a radical policy of noncombatant immunity can lead to inconsistencies with other moral commitments.

Foreseen Harms Part One: Engaging Insurgents in Proximity to Civilian Areas

Second, recall the Marine lieutenant who wanted to engage with lethal fire what appeared to be insurgents planting IEDs along a route used by Coalition convoys. The location was near a village and the higher headquarters were concerned that civilians would be killed. This case is more difficult, since the lieutenant is asking for lethal force and the likelihood of collateral damage seemed high.

Given the evidence—the individuals were observed with bomb-making material and there were radio intercepts indicating insurgents were planting bombs in that area—I will accept as fact, for the sake of the example, that the individuals under observation were insurgents engaged in lethal activity. This being the case, they were clearly liable to
attack. The difficulty for the Marines was they did not have the means to engage those insurgents without likely harming noncombatants, given their close proximity.

However, that the insurgents could engage in this activity in close proximity to an inhabited area suggests the inhabitants, for the most part, were collaborating, supporting, or at least sympathizing with the adversary cause. That certainly was the view of the Marines. This point, in fact, brings us to another important point regarding combating irregular adversaries. From a practical standpoint, combatants need to know the culture, language, demographics, and social relationships in the areas in which they are operating in order to be effective. However, to the extent this sort of knowledge allows them to make judgments regarding noncombatant status as allied, adversary, or neutral it is morally required as well. In the absence of such knowledge, combatants should restrict the kinds of risks to which they expose noncombatants.

Assuming the targeted individuals were indeed insurgents and the villagers were cooperating with them, the Marines would be permitted to engage the insurgents as long as they did not expose noncombatants to any intended or foreseen harms. As noted before, the choices of the inhabitants matter. To be liable to risk, they must be in some way morally liable for the harm—in this case, the harm to Soldiers arising from the IED the insurgents were planting—placing them at risk is supposed to avoid. However, while their consent to cooperate makes them liable to risk, it does not make them liable to harm.

The difficulty, of course, for the Marines, is they do not know how much, if any, of this cooperation was a result of coercion or deception. Since, by the Marine lieutenant’s account, he had not observed any direct collaboration or support from the civilians, it is not clear that he could reasonably judge their status. Since he could not
reasonably judge their status as adversary, allied, or neutral, he should not take the
greater permissions associated with the adversary status. The difference is this: when
Soldiers are faced with foreseen harms to themselves they may choose to expose
noncombatant adversaries to foreseen, but unintended harms, much like they would be
permitted to do in the traditional view; however, they may only expose innocent
noncombatants to the risk of unforeseen harms, much like law enforcement officials are
permitted to do when pursuing criminals.

Further, in this case there appeared to be other options available to avoid the harm
the insurgents intended. The Marines themselves were not under direct attack; in fact
from the account provided, it did not appear that the insurgents were even aware of their
presence. The convoy’s passage through the area was not imminent. So actions such as
stopping, turning around, or taking another route were still available without incurring
additional risk. In fact, after the lieutenant reported the activity, the convoy was re-routed
to avoid the risk. A demolition team later went and removed the IED. These actions seem
to be the morally correct ones given the alternatives available.

It is worth pointing out, however, that these were the right courses of action by
virtue of the lieutenant’s options, not permissions, at least under the traditional view. If
the assessment that these individuals were, in fact, insurgents was correct, he would have
been permitted to attack them. In the traditional view, he would have been permitted to
attack them despite harms to noncombatants. His difficulty was that he did not have the
means to do so without violating a policy of radical noncombatant immunity.

This situation then brings up another important point regarding ethical war
fighting. For the lieutenant there were no other resources, other than helicopter gunship
support, which he could call on. While I do not intend to review all the possible alternatives that could have been available, the important ethical point this case raises is that there is a moral obligation—by virtue of Soldier and noncombatant rights—to ensure that combatants have the right means available to appropriately engage adversaries. Such means could entail different equipment or organization. In this case, having the right means might entail more personnel to permit the unit to safely enter the village and handle any threats that may arise. It may have entailed assigning a sniper team that could accurately engage the insurgents, without posing any significant risk to the noncombatants. Of course, there will always be technical and logistical limitations to what means Soldiers will be able to employ. However, since choosing the ethical course of action depends on choosing the most precise alternative available, it follows that improving that precision to the extent possible is itself a moral imperative.

Foreseen Harms Part Two: Troops in Contact Calling for Fire

Sometimes, however, combatants have no alternatives besides experiencing harm or displacing risk to noncombatants. So, recall the humanitarian mission that turned into an insurgent ambush. This unit was denied supporting fires that were necessary to break contact and get to safety. As a result, several members of the unit were killed and injured. The reason they were denied these fires, of course, was the proximity of noncombatants to the area in which the ambush was taking place. Given the policy of radical noncombatant immunity, the Marines could only be permitted the direct fire weapons they had on hand, which were clearly insufficient.

This case is different from the previous one in that 1) the Marines were under fire and taking casualties; 2) the village leadership appears to have actively collaborated with
the insurgents in order to lure the Marines into the ambush; and 3) the Marines reported seeing villagers assisting the insurgents by carrying ammunition to their firing positions. Taken as a whole, it appears that villager activity had an active and necessary connection to the harms the Marines experienced that was not evident in the previous example. As such, some villagers were liable to attack while others were liable to foreseen, but unintended harms, given the options the unit appeared to have had at the time.

Further, it appears that it would be possible, to some degree at least, to sort out which villagers were liable to such harms by virtue of their apparent assistance to the insurgents firing on the Marines. Thus to the extent that the Marines could limit the destruction of supporting fires to the insurgents and civilians collaborating with them, those fires would be permitted. Of course, the Marines have no way of telling if there are innocents or other noncombatants who would not be liable to attack who would also be harmed. In fact, the insurgents probably chose their positions to increase the likelihood of such a result. I will address this specific concern shortly in a discussion on the use of human shields.

However, as noted above, the non-traditional view does permit targeting noncombatants when they can establish an active, collaborative, and necessary connection to the activity of the noncombatant and the harms combatants are experiencing and there are no alternatives to avoid that harm. This point is no different than the liability McMahan ascribes to United Fruit executives who bear some responsibility for Eisenhower’s decision to send troops into Guatemala in the 1950s. He argues that if at some point the fighting could be ended by attacking those officials, such attacks would be permissible.\(^2\)
So, given that the Marines had no alternatives but to return fire onto the insurgents, they were already placing any innocents at risk. Further, given the circumstances, the Marines would not be entirely responsible for the risk those noncombatants faced. If Lazar is correct that the lethal pedestrian discussed in the previous chapter is responsible for at least some of the risk to the innocent, but out of control, driver as she walks down the narrow road, then it stands to reason that the insurgents in this case bear responsibility for placing those civilians at risk. To the extent that community’s leadership encouraged insurgent operations in their area, they bear some responsibility as well.

This point regarding responsibility suggests only that in trying to save their own lives, Marines would not be entirely responsible for the harms they commit. If the direct fire they have available were not sufficient to get them out of the ambush, they would be permitted to use greater, and thus less discriminate, force. Here the limiting factor on such force is that it must be necessary to disengage from the ambush as opposed to destroying the armed adversaries. The force required to disengage represents the least force possible to accomplish the immediate objective, which is to preserve the Marines’ lives.

So, in this case, Marines would be required to take additional risks to ensure that harm to innocent noncombatants, to the extent they could identify any, is unforeseen. However, while they would be required to take additional risks to limit the harm to adversary noncombatants, they would be permitted to use lethal force to break contact even if that meant foreseen harm to those noncombatants, such as the civilians who appeared to be supporting the insurgents. The reason they would not be permitted to treat
them as armed adversaries is 1) they were not shooting at the Marines and 2) the Marines could not determine if their support was consensual or coerced.

Because killing collaborating noncombatants was not necessary to break contact—killing armed adversaries is—targeting them directly would not represent the application of the least force possible. However, given the necessary connection between their activity and the harm done to the Marines, the Marines would be permitted to respond to the attack in a way that harms to those noncombatants is foreseen as an unintended by product of killing the armed adversaries firing on them.

It is important to point out here that, unlike in the traditional view, the Marines would have to consider the aftermath of the firefight and the requirement to transform the relationship with those in the village from adversarial to cooperative. Harming persons, especially innocent persons, typically gives them reasons not to cooperate. Of course, coercive force can have a short-term effect on compelling cooperation. In fact, this point has been made by a number of scholars and analysts who insist that successful counterinsurgencies require counterinsurgent forces to out-terrorize an adversarial population. Political scientist Edward Luttwak, in fact, famously criticized the new US counterinsurgency doctrine articulated in Field Manual 3-24 released in 2006, which articulated a “hearts and minds” approach that heavily emphasized attractive rather than coercive conduct. According to Luttwak, success depended on intimidation and terror, not security and economic development.³

Experience, however, suggests the successes associated with such an approach is limited. The French discovered this fact in Algeria where coercive techniques effectively eliminated the insurgency but so alienated the population to the point the French could no
longer govern, a point I will discuss in more detail later. Similarly, a close aide to Iraqi Prime Minister Nouri al Maliki stated that one important reason Iraq was reluctant to grant the immunity necessary for the long-term presence of US troops was the perception of those troops as killers, not defenders.  

Of course, as ambushing the humanitarian mission discussed here, aiding the population is not always effective either. I do not intend to fully resolve the debate over what the appropriate balance between coercive and attractive measures should be. However, the point I want to make here is that the non-traditional view does not entail that the Marines could not employ certain coercive measures against the village after the firefight; it just means that such measures would have to be non-lethal. I will discuss shortly additional ethical requirements such measures will further entail.

Another important issue this case raises is whether undertaking such humanitarian missions would be required in the first place. Certainly responding to requests for assistance—in this case generators—is precisely the sort of things Soldiers should be doing in the course of conducting counterinsurgent operations. The requirement to transform relationships entails communicating, assisting, and in some ways becoming a part of the communities in the areas in which combatants operate. The French counterinsurgent expert David Galula, in fact, points out that Soldiers should not be confined to purely military tasks, adding that a Soldier must be “prepared to become a propagandist, a social worker, a civil engineer, a schoolteacher, a nurse, a boy scout.” Such activities are necessary to strengthening the political order and undermining support for the insurgency.
However, though these tasks are necessary, the kinds of risks Soldiers are required to take to achieve them are limited, much in the same way that the kinds of risks they can place on noncombatants are limited: harms to them may be risked, but they may not be foreseen. Of course, in this example, I do not have enough information to determine what the unit’s leadership should have known about the likelihood of collaboration with insurgents by the village leadership, which would have entailed a high degree of certainty that the mission exposed the Marines to more risk than would be ethically warranted.

It is important to note that while the above examples illustrate important points regarding combatant and noncombatant liability to risk when combating irregular adversaries, they are not intended to be representative of US combatant experiences in combating irregular adversaries. In fact, there are numerous other examples where Soldiers were provided supporting fires, whether by artillery or air, that were critical to saving their lives. Of course, some of those fires may have entailed harm to noncombatants, which may not have been permissible. In the next sections, I will discuss what sort conditions must hold to effectively balance Soldier liability to risk with the mission and noncombatant immunities under the non-traditional view.

**Targeted Killings: Precision Missile Strikes, Drones, and Assassinations**

While liability considerations may limit whom combatants may target with lethal force, these same considerations also mandate that just combatants still undertake lethal targeting. Precisely because innocent noncombatants are not liable to attack, to the extent combatants have an obligation to protect those noncombatants, then they have an obligation to attack those who would threaten them. However, ethical decision-making
that *requires* one side to sit on its hands and hope a legitimate target presents itself is not much of an ethical framework.⁶ There just is no way to avoid risks and harms, even to those who are not liable to them, when fighting wars, regular, irregular, or otherwise.

An obvious implication of this analysis has been that precision is a moral requirement when combating irregular adversaries. While no means are perfectly precise (as Lazar noted, there are no guilt-seeking missiles), ethical decision-making in this context is about alternatives, and combatants should always choose the most precise means available. Further, to the extent that the means available are not sufficiently precise, relative to liability requirements, governments combating irregular adversaries are obligated to work on developing more precise means.⁷

In fact, concerns about collateral damage motivated President Bill Clinton in 1998 to shut down an operation against al Qaeda leadership in Afghanistan. In response, the US military worked to develop a more precise alternative. By 2000, the US Air Force had figured out how to mount a Hellfire missile onto a Predator reconnaissance drone and by November 2001 had used this new capability against Taliban leaders in Afghanistan.⁸ Of course, precision is not the only concern here; risk to friendly combatants is as well. The advantage of drones over other means of delivering lethal force precisely is that it also minimizes the risks combatants need to take.

It would seem, then, that precision missile strikes delivered by unmanned drones would be the perfect balance between lethality to adversaries and risk to noncombatants and Soldiers. Of course, precision missile attacks, whether by drones or manned aircraft,⁹ are not the only means to engage in targeted killing. I focus on them here because they are the most morally challenging; thus, with some exceptions I will note later,
permissions and restrictions that apply to it apply to other forms of targeted killing as well.

Certainly, because no missile is perfectly precise, there would still be impermissible targets. However, this greater precision, when coupled with accurate intelligence, should—and has—allowed US military forces to engage terrorist and insurgent targets without significant harms to either noncombatants or friendly combatants. For example, in November of 2002, in the first reported use of drone strikes outside Afghanistan, the US was able to kill six al Qaeda terrorists in Yemeni territory, including Abu Ali al-Harithi, who was then al Qaeda’s senior leader in that country. Since then, there have reportedly been more than 300 drone strikes mostly in Pakistan and Yemen, killing more than 2000 militants.

In fact, as a direct result of the success of these strikes in attritting al Qaeda leadership, CNN’s Security Analyst, Peter Bergen, has called for the US to declare victory over al Qaeda and focus on other matters of national interest. In particular, he cites the fact that the terrorist organization has not been able to launch any significant attacks against the US homeland, largely due to the decimation of their leadership by drone strikes in Pakistan and Yemen. While “defeat” may be something of a hyperbole, as Rand’s Brian Michael Jenkins argues, it is still the case that drone-strikes have played a significant and critical role in reducing al Qaeda capabilities. It may not be defeated, but it is also not the threat to the US that it once was.

Despite these successes, as well as the apparently successful balance between risk and liability, drone strikes still raise some significant moral issues. I will discuss two of these issues here. The first is the concern that lethally targeting individuals (as opposed to
enemy formations) constitutes assassination, which is prohibited by international law. The second is that the resulting collateral damage, though significantly less than what would occur by virtue of conventional strikes, exceeds the liability of those harmed and entails a greater disruption to a just political order than is warranted.

**Targeting Individuals and Assassination**

The requirement to target only those who are morally liable to such targeting means that combatants must target adversaries *individually*. However, as US Civil War jurist Francis Lieber notes, targeting specific individuals treats those individuals as though they were personally responsible for the crime of war and thus as outlaws. However, if combatants are moral equals then combatants on either side are not liable to such treatment. In fact, one test according to international law to determine if an act of killing was an act of assassination in wartime is if the target of that attack was an individual person.

This prohibition, however, simply highlights the difference between the traditional and non-traditional views, especially as reflected in international law regarding war. Lieber is right, to individuate someone for lethal attack is to make them an outlaw, but, by definition, armed adversaries are outlaws. As Gross argues, when combatants refuse to wear uniforms, or identify themselves as combatants in some other way, they are in violation of international law. Further, as long as they represent a threat to a just political order, then just combatants are obligated to confront them. So if the only way to identify armed adversaries is individually, then the only way to target them is individually. In fact, if McMahan is right and only morally unjust combatants are liable to
attack, then individuation, while perhaps not morally required in all circumstances, does seem to be the morally preferable means of targeting.

This analysis then gives us one condition for permissible precision strikes: the identity of the target is known and combatants have good reason to believe that the target is engaged in lethal activity associated with the adversary cause.

But targeting individuals is only a necessary, but not sufficient, condition for an act of killing to constitute assassination. The other necessary condition for assassination is the use of "treacherous means."\(^{17}\) Of course, treacherous should not be confused with "tricky." A combatant has not acted treacherously simply by surprising his adversary.\(^ {18}\) However, while not all uses of deception are treacherous, some, of course, are. Those that are involve some element of perfidy, where, according to international law, perfidious acts are "acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence."\(^ {19}\)

Thus, for an act to be treacherous, combatants would have to employ some sort of ruse that would reasonably breach the adversary’s confidence and undermine, as Gross notes, the trust required to end the war. Despite the animosity enemy and adversary relationships entail, treacherous conduct in war undermines the trust required to engage in the kinds of peace negotiations that would end it. For example, feigning surrender in order to lure a specific individual into a position where he may be killed would not only undermine trust in the white flag as a means to enable communication between enemies, it would undermine trust in the terms arranged even if the adversaries were to find some other means to communicate. Such an act would certainly count as treacherous. Of
course, killing anyone as a result of a feigned surrender is wrong, but employing the feint to kill a specific individual makes it assassination.\textsuperscript{20}

Of course, there is nothing about targeted killing that entails treachery. Firing missiles on enemy positions is a perfectly legitimate act of war. As Gross points out, however, a difficulty arises when we consider adversaries as outlaws but treat them as combatants.\textsuperscript{21}

Where combatants may be more or less attacked at will, outlaws are entitled to due process. The fact that outlaws are entitled to due process arises from the dual requirements to determine moral liability as well as preserve the political order. Thus if subjects of targeted killings are best thought of outlaws as opposed to combatants, then they are entitled to due process. Denying them that process would count as an act of treachery.

Gross’s concern, however, arises out of a false dilemma. While war fighting and law enforcement may be the dominant frameworks guiding the use of force by the state, it does not follow that any particular individual who threatens the state must either be a combatant or an outlaw. One person can be both. In fact, the category “adversary,” as I have defined it, entails an element of criminality since it is the adversary who represents the unjust disruption of the political order. In fact, it is the actions of the adversary, to the extent those actions can threaten the political order, that force the state to choose between permitting violent attacks against its population or killing him.

So targeting individuals as combatants, at least when those individuals choose not to identify themselves in any other way, does not entail an act of treachery. This point thus gives us a second condition for permissible targeted strikes. Not only must
combatants must be able to identify the target as a specific individual liable to attack, that identification must have been subject to some sort of process that conforms to the requirements of justice. It is beyond the scope of this discussion to fully articulate what such a process would be. However, it is important to point out that such a process does not require the presence of the accused nor does it require a court.22

While it may be beyond the scope of this discussion to fully articulate a due process, certain conditions for such a process do arise out of this analysis. First, individuals are often tried in absentia for crimes they have allegedly committed. That fact alone suggests while it would be preferable to employ a process where the accused gets to present her side, when the accused chooses not to participate in such a process, the state is not prevented from rendering a judgment about the accused’s activities. In fact, as result of the concern that the right adversaries are killed are captured, Soldiers operating in Iraq and Afghanistan have adopted procedures for collecting evidence and building cases against specific individuals.23

Further, as noted previously, persons may be liable to attack by virtue of their actions. So to the extent just combatants observe such actions, they would then be permitted the use of lethal force. As previously discussed, police are permitted to use lethal force against suspects who are in the process of committing a violent crime or have a history of violent crime and are trying to escape from custody. It stands to reason, then, if just combatants were able to detect armed adversaries engaged in activities such as planning and rehearsing violent attacks they would be permitted to kill them. The reason they would be permitted to kill them is that failure to do so would result in the deaths of innocents.
This point gives us an additional condition that would permit targeted killings: the subject of a targeted killing is observed engaging in activities that have a necessary connection to lethal harms to innocents. Again, I do not intend to fully address what such activities could be. The harms from this activity, however, would not have to be imminent to warrant a precision strike. Observing insurgents planting an IED, even when one could simply remove the IED later on, would be permitted, subject to restrictions on collateral damage previously articulated.

It also follows from this analysis that whatever that process is, it must be reliable. However, because no process is perfectly reliable, it further follows that it will typically be preferable to detain, rather than kill, armed adversaries. This preference, though, arises more out of the concern that just combatants might kill an innocent person, not because the guilty person has a right not to be killed. As Gross points out, terrorists are “combatants first and criminals second.”24 To the extent the adversary represents an ongoing threat to innocents, he forces just combatants to act against him. Because he forces action, when detention is not possible, killing—all things being equal—is justified. Just combatants should always avoid harm to innocents; however, it is the case that sometimes the best way to avoid that harm is killing those who would harm them.

This point does suggest one more criterion for distinguishing between legitimate killing and assassination. When possible, subjects of targeted killing should be given the opportunity to surrender, as long as giving them this opportunity does not risk further harm to innocents. Failure to offer this alternative, again, when it is possible to do so, would constitute treachery.
Treachery and Disruption to Political Order

However, while it is conceivable that there could be a targeting procedure, much like a trial in absentia, that would satisfy the due process criterion; missiles exploding in peoples’ living rooms, even bad peoples’ living rooms, hardly count as orderly. In fact, where the law enforcement paradigm is most appropriate, typically police are required to provide an opportunity to surrender. They typically do not shoot people in their homes, even when they have been positively identified as violent criminals. “Shoot first and ask questions later,” simply is not an ethical policy.

This point brings us to another criterion for just targeted killing: the force used must be proportional relative to the military objective as well as disruption to the political order. Regarding the military objective, since the armed adversary, by definition, is engaged in activities that will lead to the harm of innocents, perhaps large numbers of innocents, it seems killing him would be proportional to the harm his killing is intended to avoid.

Of course, acting disproportionately is not the same as acting treacherously. However, to the extent that a particular order represents trust relationships, then disrupting it could constitute a form of treachery. So, before one can establish if the killing is also proportional relative to the disruption of the political order, one must first ask, whose order? This point is important. So far, all drone strikes intended to protect US citizens have occurred outside US borders. Of course, these strikes presumably are intended to preserve the order of the countries in which they take place, like Pakistan and Yemen, who also face the same terrorist or insurgent threat. However, as evidenced by the Pakistani reaction to the US unilateral killing of bin Laden, it would seem—setting aside the possibility that the Pakistanis were complicit in hiding bin Laden—that at a
minimum, there was a gap between what the US and Pakistan thought was a reasonable disruption.26

Though not a precision missile strike, the killing of bin Laden illustrates the different kinds of order that are at stake when conducting targeted killings: domestic order, host-nation order, and international order. The domestic order is a concern, even when operations are conducted outside of national boundaries, because perceived unethical acts undermine domestic support for the war. This support is, of course, essential to continued operations, especially when confronting persistent adversaries such as al Qaeda. The fact that unethical acts, perceived or actual, would undermine support for continued operations is obviously not a bad thing. The American people should not support unethical operations and to the extent their objections undermine those operations, those operations should be undermined and the American people should be commended. The point here is simply that actions overseas can still have consequences at home that should be taken into consideration when undertaking those actions.

Of course, the host nation political order matters as well and entails that operations in other countries should strengthen, rather than undermine, that order. For that to be the case, these operations would at a minimum need to take place with the cooperation of the authorities in those countries. The reason for this is simple. Precision missile strikes do not simply disrupt the political order; they put the lives of that country’s citizens at risk. By putting the lives of those citizens at risk, they entail an obligation on the part of their state to protect them. This obligation would further entail a just cause against the United States, since it would be the United States that threatens their people. So, killing in a way that not only expands the conflict but puts the party
doing the killing on the wrong side of a just cause is not only counter-productive, it is nonsensical. In fact, the former commander in Afghanistan, General Stanley McChrystal makes a similar point:

Drones and Tomahawk missiles are useful and efficient, but there are dangers …When we retaliated with Tomahawks after our embassy was hit in Afghanistan, President Clinton said we were ‘not at war,’ but if we had been on the receiving end of those missiles, we might have seen the situation differently. If there is no risk to us personally, war becomes too easy, and those actions affect our relationships with other countries.27

Of course, not all countries, even nominally cooperative ones, will always choose to permit strikes, even when there is a strong case such strikes are in both countries’ interests. Even when they do permit strikes, not all partners are reliable enough to ensure that such strikes would be effective. In fact, the reason the US took unilateral action against bin Laden arose out of the concern that at least some Pakistani officials were complicit with the terrorist leader and any cooperation with Pakistani officials would result in tipping bin Laden off to the raid.28 This is a fair concern. If the actions or omissions of the host nation impede legitimate operations beyond concerns regarding preserving political order, then it is reasonable to ask on what basis should one take those to concerns into account.

Given bin Laden’s status as al Qaeda’s leader and the fact that he continued planning and supporting attacks against the United States (and Pakistan for that matter), Pakistani officials were arguably obligated to assist the US in apprehending him. The fact that they did not or could not cooperate, however, does not automatically enable permissions to override those concerns. However, an application of the principle of fairness suggests that whatever course of action US officials decided to undertake in Pakistan, they would have to accept that Pakistan would be permitted to conduct a similar
action in the United States if the situations were similar.\textsuperscript{29} That consideration, of course, does not mean the US would have to accept a unilateral Pakistani raid on US soil; it just requires US officials to ensure that a similar situation never arises. If there is a threat to Pakistan emerging on US territory, US authorities should cooperate with Pakistanis to address it.

The strike on bin Laden also raises some additional concerns regarding targeted killings. Precision missile strikes, of course, are not the most precise means available to target adversaries. The most precise means are combatants on the ground who are able to personally identify the targeted individual and have the means to capture or kill him without causing additional harm. Precision missile strikes are justified only when this means is not available or judged too risky.

In fact, it was largely such concerns that led US officials to choose to send in the SEAL team rather than conduct a precision missile strike. Not only would the results of the strike be uncertain since it would be difficult, if not impossible, to get access to the remains, the resulting collateral damage would entail the deaths of innocents and exacerbate tensions with the Pakistanis. Prior to the raid, surveillance showed women and children at the compound, so even if a missile could be precise enough to just destroy the compound, innocent deaths were still certain. In fact, while the rules of engagement the SEALs observed during the raid permitted killing obvious combatants, they prohibited targeting these women and children noncombatants, unless they proved to be a threat.\textsuperscript{30}

What may be of concern, however, is the fact that the SEALs killed bin Laden, rather than take him alive. Given the reported surprise and limited resistance—only one terrorist apparently fired a shot—it seems that it should have been possible to capture
him. According to the Washington Post’s account of the raid, when the SEALs had identified bin Laden, bin Laden retreated back to his room, either in an attempt to escape or retrieve weapons that were later found there. Before he got all the way into his room, a SEAL shot him twice, killing him.\textsuperscript{31}

If bin Laden were attempting to resist or escape, then the actions of the SEALs would not constitute assassination. If, on the other hand, he had tried to surrender or was shot before given the opportunity, then his killing would constitute assassination. This finding may seem inconsistent with the fact previous analysis suggests that a precision missile strike would have been permissible. This inconsistency, however, is resolved by the fact that the right ethical decision is determined by the choices one has. National leadership determined that precision missile strikes would not be effective and risked causing disproportionate casualties, especially given the inability to ensure bin Laden would be in the villa at the time of the strike. Military decision makers decided then to send in SEALs who could confirm bin Laden’s identity.

At the point of that identification, then, the SEALs had to choose between capturing and killing him. To determine which actions were more appropriate the SEALs had to determine not only if bin Laden represented a threat to them, but also if he were going to attempt to escape and remain a threat to others. While capture may be morally preferable to killing, killing in this case is much more morally preferable to escape. So all things being equal, it seems that bin Laden’s killing did not constitute assassination.\textsuperscript{32}

\textit{Signature Strikes:} Recently, US officials have begun launching strikes against terrorist targets based on those targets’ “signature” rather than “personality,” as strikes directed at particular persons are sometimes referred.\textsuperscript{33} Such strikes would not constitute
assassination, since they do not target individuals. However, they do raise additional concerns.

What distinguishes signature strikes from other sorts of targeted killing is that targets are selected not based on who they are or what harms they are about to commit, but whether their activities indicate they belong to a terrorist or insurgent organization. As the Washington Post reported, this approach “involved assembling threads of intelligence from multiple sources to develop telltale ‘signatures’ of al-Qaeda activity based on operatives’ vehicles, facilities, communications equipment and patterns of behavior.”

Employing signatures is, of course, nothing new. When fighting regular wars, military intelligence officers frequently look for signatures of enemy personnel and equipment in order to determine where to look for targets. Dust trails, exhaust fumes, and electronic signatures can all give away enemy movement and positions and, when placed in a context that excludes the possibility those signatures are associated with noncombatant activity, facilitates effective targeting. In the context of combating irregular adversaries, of course, is that only those who are liable are attacked. The precise means is less important. Targeting based on individual identity is, as argued above, permissible, but it is not the only permissible means.

The concern with signature strikes, though, is that intelligence analysis generally can only establish a probability, albeit perhaps a high one, that the targets in question are legitimate. It is, of course, impossible to review the specific signature development techniques here since they are classified. However, the Washington Post reported that intelligence officers are adept enough at it that they can tell what is occurring inside a
suspected terrorist compound “based on the location and number of security operatives surrounding the site.”

The difficulty with such a method is the risk of false correlations. While there may be a high probability that the numbers and locations of personnel and equipment, as well as other indicators, correlate with enemy activity, there is not certainty. Equipment and facilities associated with armed adversary activity can also be associated with civilian activity as well. Buildings used for planning lethal operations can also be used for social functions such as weddings and funerals. In fact, such confusion has already led to significant numbers of civilian deaths in Afghanistan where, on more than one occasion, US forces have struck Afghan weddings believing them to be gatherings of Taliban leadership.

Thus the risk of false correlations entails that any signature that would justify precision missile strike would have to eliminate the possibility of that false correlation. It is beyond the scope of this discussion to determine what such signatures would be, but it is worth observing that certain activities, coupled with the appropriate context, can establish liability to attack. For example, a large number of armed men loading weapons onto a truck in the vicinity of a friendly military facility would, on its own, indicate an imminent attack that would enable permissions to strike, especially if that sort of activity has been associated with armed adversary attack in the past.

It is worth emphasizing the importance of context here. The fact of armed men loaded in trucks is likely not sufficient to establish liability, especially in gun-cultures like Yemen and Pakistan. However, when one also considers the larger number, indicators, like vehicles and equipment that suggest association with armed adversary
groups, and the proximity of a friendly facility, the correlation between the activity and the likelihood of harm reaches the point where an attack would be permissible.

Of course, even when that threshold has not been crossed, just combatants are not precluded from action. They are just precluded from lethal action. They may still undertake actions to ascertain the purpose of the observed activity and if it is illegitimate, prevent it. They can send in troops to detain and question suspected insurgents. They can establish control points that disrupt armed adversary attack. These measures come with increased risk, of course, but to the extent they prevent foreseen harm to noncombatants, they are required.

Noncombatant Casualties

The last concern associated with targeted killing is the possibility of deaths to noncombatants. Obviously, when combatants conduct targeted killings, the likelihood of such collateral harms is dramatically reduced. This possibility is of course not eliminated, but as the raid on the bin Laden compound demonstrated, such raids tend to result in much fewer deaths than would a missile strike.\textsuperscript{37} Of course, this reduction is highly dependent on context. In situations where combatants can get to the objective and back out relatively easily with sufficient force to overwhelm armed adversaries, it can be very effective at reducing risk to noncombatants. However, those conditions do not always exist. As the IDF has discovered in Gaza, the number of combatants required to effectively attack a Hamas target is large enough such that even if they avoided using indirect fire and helicopter gunships, the damage to civilians and civilian infrastructure would still be significant.
However, while there are contexts where precision missile strikes will be preferable to “boots on the ground,” the fact of noncombatant casualties by either means continues to drive opposition to these strikes. Whether that opposition is justified will depend not only on whether these means can adequately address concerns regarding liability to risk and harm, but also on what the alternatives are. If precision missile strikes are the least harmful means to avoid disproportional harms, then they may be justified.

While the extent of noncombatant casualties is widely disputed, recent analysis suggests that precision-missile strikes have resulted in fewer noncombatant deaths than more conventional operations. According to analysis by the New America Foundation, the use of drones in Pakistan has led to a drop in civilian death rates from 50% in 2008 to 6% in 2012. In fact, despite that 2008 high, the overall noncombatant casualty rate for the period from 2004 to July 2012 is closer to 16%. Having noted the dramatic reduction, it is still important to point out that these low percentage rates still represent hundreds of persons. According to this analysis, out of 310 strikes reported, approximately 1870-2873 persons were killed. Of those persons killed, 1577 to 2402 were identified as militants. That means 293-471 noncombatant deaths.38

Of course, without “boots-on-the-ground” it is impossible to be sure that these rather specific numbers are accurate. In fact, according to a New York Times report in one incident in May 2011, the US government reported conducting a strike against a truck load of militants in Pakistan, killing 18 militants. British and Pakistani reporters, on the other hand, reported that the strike, whatever its intended target, hit a religious school and damaged an adjoining restaurant and house. While the strike did kill 18 persons, 12 of those were militants and six were noncombatants.39 Despite the fact there
may be no reliable numbers of civilian deaths associated with drone strikes, the New America Foundation numbers still suggest that the number of noncombatant deaths is significant. The question remains, however, is whether or not they were permissible.

According to the non-traditional view I have articulated, combatants would not be permitted to engage in strikes in which noncombatant deaths were foreseen, even if they were unintended. So precision strikes in dense urban areas as well as strikes against targets whose signatures entailed an element of ambiguity regarding status as armed adversary or noncombatant would not be permitted. But the non-traditional view does permit combatants to place noncombatants at risk of unforeseen harms, so it is not the case any legitimate lethal action must never result in noncombatant casualties. Police officers, for example, may fire their weapons at a violent criminal even where there is the possibility rounds could ricochet and hit an innocent. A similar standard would have to hold for precision missile strikes.

Further, whatever noncombatant casualties do occur, they also have to be proportional, not only to the harm avoided but also to the political and civil order. Interestingly, these factors seem to work in the favor of continued drone strikes. In 2011 a high-ranking Pakistani general stated that civilian casualties in the tribal areas were low relative to the high numbers of militants killed. 40 In fact, residents in those tribal areas have reported they prefer drone strikes to military operations by Pakistani forces, which tend to be more disruptive and less discriminate.41

Thus this analysis indicates that for targeted killings to be permissible, the means of targeting, whether personality or signatures, these methods would have to determine a positive liability to attack. Having determined a positive liability to attack, these methods
would have to further determine that, given the means employed, they would not
represent a foreseen harm to noncombatants. In principle this standard would still permit
a number of the reported strikes. While it would prohibit a strike against a militant
convoy that could hit a religious school, a restaurant, and a house, it would rule-in a
strike on the convoy as soon as it got a reasonable distance away.

Of course, a reasonable distance will still not provide certainty that no
noncombatants will be harmed. Human error or unexpected actions by noncombatants—
such as joining the convoy without combatants noticing, for example, entail that irregular
war free of noncombatant casualties is a practical impossibility. But as long as those
casualties are not foreseen and proportional, they are permitted. This concern about
proximity of armed adversary activity to civilians, of course, brings us to another concern
regarding combating irregular adversaries: the use of human shields.

**Human Shields**

One of the objections the Marine lieutenant could have reasonably raised when
confronted with insurgents planting roadside bombs was that any harms done to the
noncombatants would be the responsibility of the insurgents, since by operating so close
to their areas, they were effectively using those civilians as human shields. The problem
of human shields, in fact, is a central feature of ethical decision making when combating
irregular adversaries. By integrating civilians and civilian activity into activities that are
practically inseparable from war fighting, irregular adversaries integrate the use of human
shields into their way of war.42

The employment of human shields to render legitimate military targets immune
from attack is itself a war crime.43 The fact of its illegality, however, has not stopped its
relatively widespread practice. Hamas, for example, frequently places its rocket and mortar units next to civilian homes, schools, and other facilities in order to prevent an Israeli response, or failing to prevent that response, take advantage of the propaganda benefit dead civilians often entail. However, to the extent this integration compels unwilling civilians to place their lives at risk, it is wrong. Further, to the extent these civilians willingly place their lives at risk to impede attacking legitimate targets, they too have committed a wrong. However, the fact the use of human shields is wrong does not entail that attacking human shields is right.

Because integrating civilians and civilian activity into war fighting is such a central feature of irregular warfare, I have already said much regarding permissions associated with confronting human shields. To the extent persons are compelled to act as human shields, they are not liable to any sort of harm. In this way, they are like hostages. To the extent a lesser harm will avoid a greater harm, then it may be permitted if there are no other alternatives. Of course, there are epistemic difficulties associated with discerning whether any particular group of human shields is voluntary or involuntary. While in principle groups may declare themselves willing, thus alleviating this concern, such declarations are not the norm. In cases where willingness of the human shield is difficult to determine, combatants should presume that they are not voluntary.

A further difficulty here, of course, is that if there were no attack then there presumably would be no harm to avoid. So if combatants do not need to attack an objective where human shields are present, they should not. However, it would be equally unwise to adopt a general policy of rendering targets immune simply because of the presence of human shields, as having such a policy would just encourage their use. This
point suggests the first necessary condition for attacking an objective where human
shields are present: it must be necessary. For it to be necessary, attacking that objective
must avoid an imminent harm to other innocents. The reason for the imminence condition
here is the same as described in chapter four: unless harm is imminent, there is time to
find alternatives to placing innocent civilian lives at risk.

In the case of unwilling human shields, however, the necessity of the attack is not
a sufficient justification for it. There also must not be any alternatives to achieve the same
outcome. For example, if just combatants can avoid the adversary harm in some other
way, they should do so. Such alternatives could include attacking an alternate objective,
taking additional defensive measures, or moving the threatened population to a safe
location.

If those options were not available, then attacking the objective would be
justified. In this case, as noted above, risks or harms to innocent human shields that
prevent greater harms would be permitted. It is beyond the scope of this discussion to
determine what such measures would be; however, those measures would only be
justified if they avoided a Pareto inferior outcome. For example, if armed adversaries
were using human shields in a way that they would be harmed, regardless of friendly
combatant action and failure to attack the armed adversaries would lead to noncombatant
harm that would not otherwise occur, placing the human shields at risk would be
justified.

This point suggests that combatants would be justified to target human shields
directly. However, that would only be the case if doing so avoided a Pareto inferior
outcome for the human shield. As noted in chapter four, wounding a hostage to enable
killing the hostage taker can be justified if it means preventing the death of the hostage. To the extent, however, targeting human shields simply avoids harm to other innocents it cannot be justified. This restriction, however, would only apply to lethal harms. To the extent there were no other alternatives, combatants would be permitted to target human shields with non-lethal weapons or crowd control techniques in order to compel them to leave the objective. Of course, the adversary may not permit them to leave and employ lethal force to compel them to remain. So using non-lethal means could still entail lethal harms.

However, in this case, the adversary would commit those lethal harms, so the burden of responsibility belongs to him. In this event, the adversary is like the pedestrian who throws a fellow pedestrian in front of an oncoming car and when the innocent pedestrian tries to jump out of the way, she shoots him instead of the driver. In this instance, it would seem, the fault for the innocent pedestrian death would not be that of the driver as long as we can establish that the driver had no reasonable choice but to drive in way that contributed to the situation where someone would be harmed arose. That is the necessity condition in play. By analogy, as long as failure to attack the target led to failure to meet a similar moral commitment—such as the protection of other innocents—combatants would be justified in using such non-lethal means even though they would have a reasonable expectation that at least some of the human shields would come to harm.

It could be the case, however, that such non-lethal means are not effective. When that is the case, and failure to attack the shielded target entails a harm to innocents, then just combatants may be permitted to attack the target utilizing means that are discriminate
and proportionate. Because these human shields are innocent, combatants must seek to use means that place them only at risk and do not entail foreseen, though unintended, harms. However, if those means are not available, attacking the objective using means that do entail foreseen, though unintended, harms may be permissible.

However, to the extent any risks or harms are foreseen, just combatants will have to take additional risks in order to mitigate them. This means that in most instances, remote strikes, whether by missiles or indirect fire would be prohibited. Whatever means used would have to be very precise otherwise the attack would not likely be permitted.

This last condition, of course, is very similar to the traditional view of the application of force. However, it is distinguished from the traditional view in that it is a last resort after working through a range of alternatives that gradually permit increasing force to avoid a greater harm. In the traditional view, combatants are not required to consider such alternatives. If the objective is legitimate, they may attack it as long as the conditions of discrimination and proportionality are upheld. In this case, human shields are no different than any other noncombatant.

It is a different matter when the human shields are willing. Because they are cooperating with the enemy there is no presumption of innocence and thus no requirement to avoid targeting them directly. Of course, this point does not entail greater permissions regarding the means of targeting. Noncombatant adversaries are still noncombatants and are not generally liable to lethal attack. However, their status as adversaries does entail that just combatants do not need to look for alternatives to attacking the objective they are shielding. Because they have consented to the risks associated with being human shields, they are morally responsible for the commensurate
harm. In this sense they are like a pedestrian walking down the middle of the narrow road in order to prevent the passage of cars. The cars should avoid her, if possible, but if she gets run over, all things being equal, the fault is hers.

Thus there is a procedure that emerges for dealing with human shields. Where failure to attack a legitimate military objective will result in harms to innocents, just combatants are justified in attacking that target, even if human shields are present. However, the procedures they must follow and the means they may use will be constrained by whether those human shields have consented to place their lives at risk.

In the case of unwilling human shields, combatants are obligated to look for alternatives to attacking the objective. Failing such alternatives, they may employ non-lethal force if by doing so they are able to compel the human shields to move away from the target. Finally, if non-lethal means fail, they may attack the target using discriminate and proportionate means, even though such means may result in foreseen, but unintended harm to the unwilling human shields. In the case of willing human shields, just combatants are not obligated to look for alternatives to attacking the objective, but are still obligated to first employing non-lethal means before moving to lethal means that would result in foreseen but unintended harm.

Population Control Measures
In the aftermath of the ambush against the humanitarian mission described above, we can imagine that the US commander in the area wants to take additional measures to separate the insurgents from the civilian population to prevent the kind of collaboration that got his Marines killed. In fact, separating insurgents from the population is so closely correlated with successful counter-insurgency operations that it is more or less a
condition for victory.\textsuperscript{45} The British victory in the Boer War, for example, was widely attributed to British commander Lord Kitchener’s three pronged plan that included fencing off Boer land to restrict movement, incarcerating civilians to prevent their cooperation with Boer fighters, and burning farms in order to deny Boers food, shelter, and other supplies. However, these measures created a lot of collateral harm: of the 160,000 Boers Kitchener placed in concentration camps, more than 20,000 died due to the poor conditions in the camp.\textsuperscript{46}

The British are not the only ones who employed population control measures. During the counterinsurgency fight in Algeria in the 1950s, French forces employed a two-pronged approach that coupled governance-building measures with brutal raids, called razzias, which deprived the population of its livelihood and resulted in the forced relocation of women and children. Though brutal, these measures had a significant impact on insurgent operations and resulted in the reduction of insurgent attacks.\textsuperscript{47} While the French realized that such operations should only be conducted when they support their general policy of pacification, these methods eventually alienated the Algerian population as well as undermined support from the French public. These factors, more than any operations the insurgents undertook, contributed to the eventual French loss in Algeria.\textsuperscript{48}

While recent conflicts have seen less brutal operations associated with population control, the imperative to separate the population from the insurgents still figures prominently in counter-insurgent operations. For example, during the al Aqsa Intifada from 2000-2005, the IDF severely limited Palestinian movement through the use of checkpoints and security barriers. While apparently effective in reducing terrorist
violence in Israel, these measures resulted in damage to the Palestinian economy and the
detention of 10,000 Palestinians. Despite such harm, the Israelis are in the process of
constructing a large wall that will further isolate the Gaza strip from Israeli territory,
making it more difficult for terrorists—and civilians who may have jobs in that
territory—from easily moving in and out.

The US also has employed similar tactics when combating insurgents in Iraq and
Afghanistan. While some proved excessive, such as the detention of military aged males
in Anbar province during the early stages of the insurgency, others, such as the use of
checkpoints, barriers, and other movement control measures that restrict insurgent
movement, have proved effective without unjustly harming noncombatants. In fact these
measures, coupled with precision strikes to attrit insurgent leadership, were essential in
reducing insurgent related violence from its 2006-2007 highs, which nearly tore Iraq
apart.

It is in fact such tactics that bring us back to one of the central concerns of
combating irregular adversaries articulated in the introduction: much of what it seems to
take to be successful also seems inhumane, even (or especially) by the standards of war
fighting. So far, the framework I have developed has tried to stay on the side of humanity
while acknowledging, paraphrasing Lazar, that not only is a perfectly rights-respecting
war a practical impossibility, so is a harms avoiding war. However, there is a difference
when those harms are a result of a misapplication of policy or a result of the policy itself.
The demands of war fighting suggest that not every Soldier every time will make the
right judgment. I do not know how to prevent such errors from happening. However, as
long as there is a procedure in place to address and correct those errors, one has done
about as much as one can do to realize the just war ideal of limiting the harms caused by war.

If the moral error is the policy itself, however, then leaders are obviously obligated to fix the policy. What remains to be discussed, then, is what would constitute a fair policy of population control. As evidenced from the discussion above there are numerous measures counterinsurgents could take, but space does not exist here to review them all. However, what I will do is briefly discuss what conditions would have to hold for any particular population control policy or measure to be justified.

To the extent any particular measures respect the permissions and restrictions regarding liability towards adversary and innocent noncombatants they would of course be permitted. Such measures would, of course, rule out lethal force, so for the most part, the harms associated with the measures discussed here would entail coercion and deception. However, as the effect of population control measures on the Boers and Palestinians indicate, even when not lethal these measures can entail a lot of suffering.

As previously discussed, for a harm to be fair, it must somehow respect the consent of the persons affected. As described in chapter four, that consent does not have to be explicit. By agreeing to participate in certain social practices and institutions persons have tacitly consented to be bound the rules necessary for the maintenance of those practices and institutions. Failure to be so bound constitutes free-riding and free-riding is unfair. Because free-riding is unfair, states are permitted to place sanctions on those who would try it.

Of course, not everyone consents, explicitly or tacitly, to the sorts of practices and institutions that would be necessary to justify some of the measures just combatants may
want to consider. However, as McMahan noted, to the extent the persons accept the benefits associated with combating irregular adversaries they too can be bound by the norms associated with maintaining those benefits.

To say that someone is bound by norms, though, is not to say what those norms are. To determine what those norms are we would have to look at what sorts of policies would be fair in a given set of circumstances. Employing the game metaphor again, to know what is fair we first have to be clear about what the game is and what its objectives are. Then we will be in a position to determine what are the rules.

In the context of combating irregular adversaries, the “game” is about preventing armed adversaries from disrupting a just political order. The objective associated with winning that game is security for the population, which is achieved by eliminating armed adversaries and disrupting noncombatant adversary support. Its rules involve observing the permissions and restrictions on liability each category of adversary and innocent have. When those permissions and restrictions are insufficient to achieve the desired objective, they may be overridden, but only if by doing so person violations are avoided.

These rules suggest that measures that directly target populations for harm, such as destroying food, shelter and other items that are otherwise practically separable from war fighting, would not be permitted. It also suggests that measures that lead to economic impacts that lead to significant human suffering would also not be permitted.

However, these rules also suggest that what matters more is the implementation of the measure rather than the measure itself. Lord Kitchener’s corralling of Boers into squalid concentration camps might have been effective, but it was also unethical given the significant harm it caused to the Boer population. It is important to note, however,
that harm was not intended but was rather a byproduct of poor sanitation and inadequate food and water supplies. So, it was not so much the measure as the how the measure was implemented.

By contrast, during the conflict between Saudi Arabia and al Houthi rebels in 2009, the Saudi Arabian Armed Forces moved several thousand civilians out of villages in the contested areas into relatively comfortable dwellings with adequate food, water, and access to major cities. While their lives were certainly disrupted, the Saudi government took measures to ensure that disruption was minimized and that their persons, if not their rights, were not violated.52

The same could be said for most of the other measures under consideration here. There is nothing inherently unfair in barriers, checkpoints, curfews, and other restrictions until they result in deaths, starvation, and deprivation. At that point they become counterproductive and as Luban has noted, counterproductive measures are unjust measures.53

**Conclusion**

In this chapter I have examined the application of the principle of fairness in the context of combating irregular adversaries. While this chapter barely scratches the surface of all the different kinds of measures just combatants should consider when confronting irregular adversaries, it should provide a basic framework for determining what the rules should be.

However, the discussion above does outline the conditions necessary for a fair set of rules as well as outlines a process necessary for implementing them. Soldiers do not have to take so much risk that harm to them is foreseen. Further, they may undertake
courses of action to avoid harm that place noncombatants at the risk of proportional harms, as long as those harms are also not foreseen. Individual adversaries may be targeted as long as that targeting is subject to an evidenced based due process or they are observed engaging in lethal activity. Additionally, the harms they may be subjected to must conform to the permissions and restrictions associated with their status as combatant or noncombatant adversary.

Regarding process, whether considering precision missile strikes, attacking objectives where human shields are present, or implementing population control measures, combatants must first seek alternative non-lethal and non-disruptive means to achieve their legitimate military objectives. If those alternatives are not available, then just combatants may be permitted to take courses of actions that entail risk to noncombatants, but only to the extent those actions avoid a greater risk. The permission to trade lesser for greater harms is not simply an application of a consequentialist ethic. For such a trade-off to be fair, it also has to avoid a Pareto-inferior outcome. If those measures are not effective, then combatants may be permitted to take actions that result in foreseen, but unintended harm to noncombatants, but only if that action avoids a proportionate and Pareto-inferior harm to innocents.
Conclusion: Fighting Fair

The difficulty with applying the traditional view of military ethics to non-traditional environments is that doing so makes a fetish of human rights that ultimately undermines the respect for persons that the observance of these of the rights is supposed to encourage. This disconnect between the rules and the game they are supposed to govern has led to competing cries of moral outrage as US leaders try to eliminate risk to both combatants and noncombatants. The outrage arises because the competing practices of radical force protection and radical noncombatant immunity throw off the balance of risk Soldiers must achieve if they are to fight both effectively and ethically.

As the reports from Iraq and Afghanistan have clearly indicated, Soldiers are obviously taking risks in order to spare noncombatants harm. However, as the examples I reviewed in this discussion also indicate, there is a great deal of confusion over when, where, and how they should and should not take such risks. There is even more confusion over when noncombatants may be placed at risk. As a result, Soldiers have found themselves constrained in taking the fight to the enemy as well as enabled in killing noncombatants who even under the traditional view would not be liable to attack, as one must be at war with a state before one may be permitted to place its citizens at risk. However, the solution will not be found simply in abandoning these practices. In the context of combating irregular adversaries, we do not have a fully developed view of where the balance should lie.

The difficulty arises from the application of traditional views of military ethics in non-traditional situations. This is an important point. I have not argued that the traditional
view is wrong; rather, my point has been that where the traditional view does not take into account features of irregular warfare that are morally relevant, it inadequately accounts for the permissions and obligations associated with fighting irregular adversaries. Traditional situations are marked by a reasonable separability of military and civilian elements; the moral equality of combatants; the absence of a political order; and the presence of an existential threat. Non-traditional environments, however, are marked by the practical inseparability of civilian and military; the moral inequality of combatants; the presence of a political order; and the presence of adversaries who are not existential threats.

The difficulty arises here because when civilians become integrated in war fighting they are no longer obstacles to accomplishing the mission, as they are under the traditional view; rather, they become the mission. This is the point both Walzer and Kasher, who both argued within the context of the traditional view, missed when debating the merits of IDF practices that favored Israeli combatant safety over Palestinian noncombatants. Walzer argued that noncombatants were moral equals and thus deserving the same considerations as Israeli citizens. Kasher, on the other hand, argued that since the IDF was not in control of that territory, it had no way of extending those considerations without violating the rights of its combatants.

The difficulty with either approach is that they both require Soldiers to ignore noncombatants. Their only difference is how much risk combatants should bear when doing so. However, when noncombatants become the mission in this sense, combatants cannot afford this indifference. As such, paying attention to noncombatants presents combatants with two competing requirements: ensure civilian wellbeing in the context of
a just political order and prevent civilians from lending support, intentional or not, to the adversary. The former requirement entails nation-building programs that establish effective and just social institutions capable of fairly distributing social goods. The latter requirement entails subjecting civilians to lethal and nonlethal harms in order to ensure the adversary does not win.

Given these competing requirements, Soldiers, who are already subject to unlimited liability to risk, have nowhere to displace it. In the traditional view, Soldiers may displace as much risk onto enemy combatants as they can until doing so also places enemy noncombatants at risk. At that point they may still undertake actions that entail risk to noncombatants, but the harms associated with these risks must be both proportional and discriminate. However, if civilian wellbeing is a moral obligation and if armed adversaries are indistinguishable from civil society then Soldiers cannot effectively displace risk onto either. As noted earlier, this dynamic led to situations where it was impossible to take the fight to the adversary, at least in a way that was both effective and ethical. Indiscriminately targeting military-aged males in Iraq, for example, brought more young men into the conflict than it took out.

Determining a proper response requires that one first understand that this problem is not just a matter of policy. It will not be sufficient simply to revise current policies regarding the application of force and Soldier risk. As noted above, we have already tried that. Rather, one must understand that military ethics is about decision-making and when making decisions it matters what the options are. Irregular warfare presents combatants with different options than regular war, so to understand how to balance risk, one has to understand those different options and how they fit into a larger moral framework.
Civilians and civil society are integrated into adversary capability in ways that they are not in regular war. This difference entails different victory conditions that generate the different options available. In regular war, which the traditional view governs, the purpose of the use of force is to impose one’s will on the enemy. To impose that will combatants must engage each other, typically in open battle, to destroy each other’s capabilities. These wars are thus won when one side can destroy the other faster than the other can destroy theirs.

From a moral perspective, regular wars obligate Soldiers to take risks to destroy those enemy forces. Since enemy noncombatants are largely separable from these forces they should largely be ignored. If destroying enemy forces places these noncombatants at risk as well, Soldiers will have to further limit noncombatant their exposure to risk, taking additional risk to do so if required. However, the obligation to take additional risk to avoid noncombatant casualties is limited by the requirement to defeat the enemy. So risks that entail mission failure or an inability to continue the war effort are not required.

By shifting the emphasis on force from imposing will to establishing, strengthening, and preserving a particular political order; however, irregular adversaries upset this balance of risk. Where preserving the order is at stake, combatants must consider not only the harm the use of force causes relative to the military objective; they must also consider the disruption to the political order as well. When considering these factors, the emphasis on the use of force transitions from the most force permissible, as in the traditional view, to the least force possible, since that force represents the least disruption to that order.
Further, since the presence of this order entails operations are conducted within a community—as opposed to against it—combatants must also take care not to harm the members of that community in ways those members are not liable. This emphasis on individual liability represents another difference between regular and irregular war. Where enemy combatants are liable to attack by virtue of their membership in the group of enemy combatants, adversaries are liable by virtue of those actions for which they are morally responsible. This point follows from McMahan’s observation that holding someone liable to attack by virtue of their membership in a group is the same criteria terrorists use to justify their indiscriminate acts of destruction. His point is when fighting terrorism, combatants should not be moral equals.

Of course only targeting those who are morally liable is impractical in regular war. Put simply, if doing the right thing depends on the options one has available, then setting aside the pacifist option, combatants have no choice but to target each other as a group, even though, as McMahan correctly points out, many combatants play little to no direct role in the destruction the armies they belong to commit. However, when the aim of military action is to preserve or strengthen order it is equally impractical to target combatants based on membership since that disrupts the political order just combatants are attempting to defend.

The presence of that order, in fact, determines in large part the rules combatants must observe to fight ethically. As Rawls has famously observed, a just political order depends on just social institutions. Just social institutions depend on being able to fairly distribute social goods, though what counts as a social good and what counts as fair are subject to social and cultural factors. Thus any harms associated with establishing,
strengthening, or preserving those institutions must also be in some sense fair. Employing such force fairly thus entails only targeting those who are liable in a way that avoids harms to those who are not.

In this way, a focus on individual liability both constrains and enables whom combatants may target and how. Obviously, armed adversaries, who commit the harms in order to oppose the current political order, are liable. Further, given the close association of noncombatants with harms committed by armed adversaries, noncombatants may also be liable as well. However, as Applbaum argued, fairness in adversarial relations entails that any harms are proportional to the threat they represent. The threat noncombatant adversaries represent depends on how their activities are causally and consensually associated with the lethal harms committed by armed adversaries. To the extent noncombatant activities are causally necessary and active, at least in the sense these are acts of commission, they are morally liable for the harms associated with those acts.

The criteria of causal necessity and active participation yields a taxonomy of adversaries based on the connection between their activities and the harms armed adversaries commit. So, in addition to armed adversaries, this taxonomy includes: collaborators, whose activities have a necessary and active connection; supporters, whose activities have a non-necessary but active connection; and sympathizers, whose activities are neither necessary nor active, but still provide “water” for the “warm sea” in which armed adversaries operate.

Given these categories, what counts as fair treatment is best understood through employment of the “game” metaphor. Here, Applbaum’s analysis is especially useful. Games, in the sense described here, may be considered as a strategic interaction between
multiple players or as a rule-governed activity. The idea of strategic interaction includes the idea that the players have interests they are trying to realize. Of course, games are not necessarily zero-sum. It is certainly possible to have a game where player interest coincide rather than conflict. However, when they conflict, the game metaphor can enable permissions for players to treat other players in ways they may not prefer, but by virtue of being in the game, to which they have consented. For that treatment to be fair, however, there has to be some sort of rules that govern the conflict.

In determining what is fair in these contexts, consent matters. If someone is coerced or deceived into committing an act they are not morally responsible for that act’s consequences. If they are not morally responsible for its consequences, then they are not liable to harm. However, as suggested above, when playing a game, consent does not entail preference. Where one consents to play in a game one consents to play by its rules, otherwise one is acting unfairly. So just as a football player can be subject to being tackled, which he would presumably prefer to avoid, adversaries can be subject to harms by other adversaries regardless of their preferences. However, the game metaphor helps illustrate how those harms are limited depending on the role persons play. Football coaches, who are as much a part of the game as the players on the field, are not subject to being tackled in part, because they themselves are not permitted to tackle.

Thus by analogy, those who kill should expect to be killed, those who coerce, should expect to be coerced, and those who deceive should expect to be deceived. This liability, however, is not retributive. Adversaries are subject to them in order to prevent the future harms their adversarial activity represents. Further, I do not mean to say here that these harms are exclusive. There would certainly be circumstances where it would be
permitted to coerce someone to prevent a deception or vice versa. The point here, though, is that whatever those harms are, they have to be proportional to the harms they are intended to avoid. That means to the extent noncombatant adversaries’ activities are non-lethal, they would not be subject to lethal harms.

Of course, especially in war, the “players” have not always consented. Particularly in irregular war, where many adversaries are pressed into fighting by virtue of circumstance rather than choice, it would seem odd to say for many of the combatants that they chose to be there. Where consent is unclear, illusive, or simply missing, agents may still act fairly. For the purposes of a game, the fact that the players did not want to play does not change what the rules are. The fact of their coercion or deceit may mitigate their moral responsibility for the harms they commit, but it does not permit them to free-ride and remain immune from risks willing players must take in accordance with the rules. For that reason they may be targeted. However, combatants must consider moral liability when targeting enemy combatants and prefer non-lethal means as long as those means do not entail unjust risks and harms to others.

What I have not done is fully explore what permissions coercion or deception enables regarding adversary actors. If someone is coerced to play football, it seems reasonable that they be permitted to cheat, especially if this cheating reduces risks to themselves. To the extent reducing that risk unfairly places it on others, then those others would be permitted to defend themselves, even if that means killing the non-morally liable unjust combatant. But my concern here has not been what rules adversaries are bound by. Rather, I have been more concerned how an account of moral liability can
better inform military ethical decisions and gives us a better set of rules to play by which to play.

Of course, in many practical situations, it is not always clear what the rules are. The example of Jim and the locals illustrated this point well. It was certainly unfair as well as unjust that Jim had to choose between shooting one local himself and allowing all twenty to die. It was also unfair and unjust for the locals to be subject to being shot. However, once in that situation, Jim and the locals were, in effect, in a game, where given the rules, it was possible to make a choice that was fair.

Of course, the rules of this game were not immediately obvious. Jim could give good reasons, from the point of view of justice for both shooting and not shooting the locals. However, the principle of fairness allows us to say something about what sort of rule and what sort of choice would be permissible, if not obligated, in this situation. To the extent any choice makes most persons better off and makes no persons worse off, it is the fair thing to do. Thus it would be fair for Jim to shoot the one local since by doing so that local is no worse off than he would be otherwise and the other nineteen are.

This application of the principle of fairness in the context of fighting irregular adversaries thus entails a shift in the permissions, obligations, and prohibitions Soldiers must observe. Obligations to accomplish missions become permissions to forego certain missions if they prove too risky; such permissions to protect the force can become in certain circumstances obligations to protect the force; and prohibitions against targeting noncombatants can become permissions, though those permissions are limited by a concept of discrimination that relies on moral responsibility to determine liability and a
concept of proportionality that accounts for the political order, not just the persons subject to it.

This analysis suggests a process for ethical decision making in war that is unique to this non-traditional view. Given the choice to harm, be harmed, or allow harm, combatants must first seek alternative, non-lethal means that address the threat while limiting the disruption to the political order. If preventing a terrorist attack can be served by either emplacing better defensive measures or by striking the terrorists in a way that non-liable noncombatants will be harmed, then they should choose those defensive measures.

Of course, these measures may be ineffective. In fact, it is worth pointing out that a purely defensive approach will not likely successfully resolve the conflict. So at some point Soldiers will be forced to harm in order to avoid harm, whether to themselves or others. Thus when non-lethal responses are no longer effective, then Soldiers are permitted to place noncombatants at risk of unintended and unforeseen harms, much the same way police are permitted pull out their weapons or engage in high speed car chases in order to detain criminals. If those alternatives are either ineffective or unavailable, then combatants may be permitted to place noncombatants at risk of foreseen but unintended harms, but only to the extent those actions avoid a greater risk to these same noncombatants.

The permission to trade lesser for greater harms is not simply an application of a consequentialist ethic. For such a trade-off to be fair, it has to avoid making anyone worse off than they would be otherwise. So, for example, it might be permissible to fire
into a crowd of civilians to stop a suicide bomber. While firing into the crowd would certainly put noncombatants at risk, they were going to be killed anyway.

This analysis suggests the following modification to some current practices associated with combating irregular adversaries:

**Targeted Killings:** The targeting of specific individuals is permitted; however, it is preferable where possible to detain rather than kill. When detention is not possible or too risky, individuals may be killed, but only using means that only place noncombatants at risk of unforeseen harms. That restriction may be overridden in order to avoid an imminent harm. For example, in order to prevent an imminent attack, combatants may strike armed adversaries in a way that places noncombatants at risk, as long as the means are sufficiently proportional and discriminate. Targeting persons based on signature is only permissible to the extent the signature entails liability to attack.

**Human Shields:** Combatants should avoid engaging even legitimate targets in the presence of coerced human shields. When failing to engage a legitimate target entails harm to other innocents, combatants may employ escalating force, preferring non-lethal means that risk only unforeseen harms. In the event those measures fail, then again, combatants may employ means that result in foreseen harms, but only if these harms are proportional and avoid Pareto-inferior outcomes.

So, for example, when armed adversaries in Somalia hid behind noncombatants while firing on US positions, ideally, US Soldiers would have available non-lethal means that would disperse the crowd of noncombatants in way that put them at less risk than the Somali combatants had already placed them. If that failed, then lethal means, such as skilled snipers who could specifically target combatants would be preferred to simply
firing at the combatants en masse, even if in principle, Soldiers were attempting to fire at the Somali combatants. If, however, their positions were about to be overrun, and there was no other way to avoid the harm overrunning those positions meant, then again, foreseen, discriminate, and proportional harms would be permitted.

This calculation changes somewhat in the presence of collaborative human shields. To the extent individuals choose to place themselves in between just combatants and a legitimate target, then the just combatants are not required to seek alternatives to engage the target. However, they still must prefer non-lethal over lethal harms and seek to avoid foreseen harms if possible.

*Population Control Measures:* Whole populations are not liable to lethal, coercive, or deceptive measures. The presence of small children, who by definition do not have the capacity for moral responsibility, suggests that any broad control measures that entail harm will not be permissible. However, the requirement to separate the population, especially collaborative, supportive, and sympathetic elements from armed adversaries is so closely related with success, that it seems that at least some measures must be permissible.

Here, the fairness-driven principle of avoiding Pareto-inferior outcomes in the context of a rule-governed practice, or game, provides good guidance on what kinds of measures would be permissible. The demands of the just political order determine in large part what the rules are. In such a view, practices that are coercive, deceptive, and disrupt that political order may be justified if they are sufficiently discriminate and proportional. Noncombatant adversaries would be subject to such measures by virtue of their cooperation with the enemy. In order to separate adversaries from the general
population, innocent noncombatant may be subject to measures that facilitate that separation, but only to the extent those measures are proportionate to the harms that would be done to them otherwise.

In this regard, the particulars matter when it comes to permissible population control measures. No lethal measures would be permitted because even adversary noncombatants are not subject to such measures. So, for the most part, any non-lethal measure would be permitted as long as its execution was sufficiently proportional and discriminate. So, if removing noncombatant adversaries from a contested area is necessary to defeat armed adversaries operating, then such a removal would be permitted, as long as there were measures taken to compensate for the resulting economic difficulties and disruption to social life. Here I contrast the tragic use of concentration camps in the Boer War, where 20,000 died, and the relatively humane relocation of Saudi residents from border towns where al Houthi rebels were fighting. By providing adequate and humane food, shelter, and water they compensated for the disruption to these persons’ social and economic lives. This disruption seems permissible given the alternative of living in an active combat zone.

Finally ... To effectively prepare Soldiers to handle the complex moral demands of combating irregular adversaries, military leaders must educate Soldiers to see themselves not only as warriors who destroy enemies. They must also see themselves as protectors who serve the public and are, in a sense, members of the communities in which they operate. This shift will require reconceiving the identity of the Soldier in a way that encourages character traits such as patience as much as it encourages aggressiveness. While I have not addressed what specific traits would make an excellent Soldier in the
context of combating irregular adversaries, this analysis does provide a sense for the principles they will serve. Acting fairly in the context of a just political order just does require a different kind of person than one whose role is to close with and destroy largely distinguishable enemy forces. This point does not mean that one person cannot learn to operate in traditional and non-traditional environments. It does mean that professional military education systems will have to pay attention to cultivating all the traits necessary to effectively move between them.

Further, what I have tried to address is the competing concern that restraint against adversaries as well as putting Soldiers in harms’ way to combat non-existentia threats is itself immoral. Those who argue that victory—at any cost—is the only thing that matters in war miss the point. Victory is the only thing that matters, but it is not worth any cost. There are some things one should not do in order to win. But it is a feature of modern warfare—regular and irregular—that there are a variety of ways to pay those costs.

So simply to point out that a certain policy of restraint forces these tradeoffs is not a valid criticism of that policy. Further, simply pointing out that a particular tactic is effective is not sufficient to morally justify it. Not making those tradeoffs entails negative consequences of their own. Thus while one cannot avoid making certain tradeoffs, it does not follow that one must either concede defeat or commit unethical acts. What does follow is that one is obligated to seek alternatives to practices that make a fetish of tactical victories, protecting Soldiers, or avoiding civilian casualties. Successful ethical reasoning, just like successful practical reasoning, entails balancing competing demands, not selectively ignoring them.
Introduction

1 For the purposes of this paper, I will use the word “Soldier” to refer generically to military personnel employed as ground forces in US or allied militaries. I will capitalize “Marines,” “Sailors,” and “Airmen” when referring specifically to members of the Army, Marine Corps, Navy, and Air Force.


3 Smith, 218.

4 Smith, 6.


7 Gray, 7.

8 Gray, 7.

9 Gray, 7.


14 Joint Pub 1-02, 71.


17 Smith, 281.

18 Jeff McMahan, “The Just Distribution of Harm between Combatants and Noncombatants,” Philosophy and Public Affairs 38, no. 4 (2010): 344. In this article, McMahan employs the term “traditional view,” in similar terms that I am using in this discussion. As I will argue, the “traditional view” is distinguished by features such as the practical separability of military and civilian, moral equality of combatants, and a description of the threat as existential, at least in the sense that the state’s existence depends on its ability to exercise rights to political sovereignty and territorial integrity.

Chapter One

1 Michael Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations (New York: Basic Books, 1977), 53-58. The right to political sovereignty and territorial integrity has also been codified in international law. Article 2.4 of the UN Charter states the following: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."

Article 51 also states “Nothing in the present Charter shall impair the inherent right of collective or individual self-defence if an armed attack occurs against a member of the United Nations.” The point here is that whatever one thinks of the justification of these rights, they are an accepted feature of international law. See United Nations. Chater of the United Nations and the International Court of Justice (New York: United Nations Department of Public Information, 1985). http://www.un.org/en/documents/charter/

2 Walzer, Just and Unjust Wars, 138-159. Regarding jus in bello provisions, this view is also articulated in the Law of Armed Conflict, which is based on customary international law and international treaties including the Geneva and Hague Conventions.

3 Walzer, Just and Unjust Wars, 53-54.

4 Paul Christopher, The Ethics of War and Peace: An Introduction to Legal and Moral Issues, Second Edition (New Jersey: Prentice Hall, 1999), 164-166. It does follow from this analysis that states that threaten the lives and liberty of their citizens do not enjoy the rights of political sovereignty and territorial integrity. This rationale has been used to justify humanitarian interventions, such as those in Bosnia and Kosovo. See also Walzer, 101-108.

5 Brian Orend, The Morality of War (Ontario, Canada: Broadview Press, 2006), 34. Also, as the Swiss jurist Emer de Vattel argued, “Nations or States are political bodies, societies of men who have united together and combined their forces, in order to procure their mutual welfare and security.” Emer de Vatel, “The Law of Nations,” in The Ethics of War, eds. Gregory M. Reichsberg, Henrik Sykse, and Endre Begby (Malden, MA: Blackwell Publishing, 2006), 506.

6 Orend, 34-35.

7 Michael Walzer’s Just and Unjust Wars, which I have previously cited, is probably one of the best known arguments for the relation between individual and state’s rights. Not everyone agrees. Charles Beitz argues that since citizens do not consent to be governed, their rights cannot transfer directly to the state. But he does acknowledge that the state does have an obligation to protect its citizens, which entails a right to defend political sovereignty and territorial integrity to the extent their defense is important to

8 John Locke, “A Treatise Concerning the True Original Extent and End of Civil Government,” in *The Longman Standard History of Modern Philosophy*, eds. Daniel Kolak and Garrett Thomson (New York: Pearson Education, Inc, 2006), 272-273. Locke noted even in conditions where cooperation is to everyone’s advantage, the strong will try to take advantage of the weak. Thus while man’s natural desire is cooperative civil society, his natural state is war. For that reason, it is in the interest of the individual to cede certain rights to a sovereign who is capable of and responsible for maintaining the order necessary to sustain cooperative civil society.


11 Patterson, 3. One of Patterson’s main criticisms of Just War Theory is that it has become formulaic and pacifistic. A checklist of criteria that are nearly impossible to fulfill in the context of modern conflicts.

12 Walzer, *Just and Unjust Wars*, 144

13 Walzer, *Just and Unjust Wars*, 130-132. According to Walzer, all a utilitarian ethic can do is either confirm our intuitions regarding the rules of war or suggest they be overridden. Under utility theory, no act is immoral by virtue of its character, only its outcome. Walzer does argue that in the cases of “supreme emergencies” the realization of an imminent catastrophic harm may justify the use of means normally ethically off-limits. All theories of utility emphasize the maximization of some good and the minimization of some harm. They disagree however on what exactly the good is. For the father of utility theory, Jeremy Bentham, it was pleasure. For John Stuart Mill it was happiness. Others consider it interest or well-being. In the context of Just War Thinking, the good is understood as victory for the just side, which is the best outcome of any war, even for the enemy. See William Shaw, “The Consequentialist Perspective,” *Contemporary Debates in Moral Theory*, ed. James Dreier (Malden, MA: Blackwell Publishing, 2006), 10.

14 Walzer, *Just and Unjust Wars*, 144.

15 Walzer, *Just and Unjust Wars*, 144.

16 Walzer, *Just and Unjust Wars*, 129.


From the insurgent standpoint, those two killed were likely related to many others who will want vengeance.”


23 Dexter Filkins, “’09 Deadliest Year for Afghans, U.N. Says,” New York Times, January 14, 2010, sec. A, 6. According to Filkins’ report, in 2009, there were reported 2412 civilians killed, which reflected a jump of 14 percent from 2008. Another 3,566 were wounded. What is significant about 2009, is that this was the first year it was reported that most of the death—2/3 (1630) were caused by Taliban. The number of civilian deaths caused by NATO forces fell by 28% to 596, due to the restrictive measures imposed by LTG McChrystal. Most caused by air strikes (359).


25 This additional consideration distinguishes ethical decision-making in irregular environments from conventional ones. The Law of Armed Conflict (LOAC), as well as most conceptions of JWT, permit the killing of enemy Soldiers under most conditions as long as a state of war exists. If one comes across an enemy soldier who is not incapacitated or trying to surrender one does not have to take any other considerations into account before killing him. It may make practical sense in some cases, as when US forces engaged the Iraqi military in 1991 and 2003 to offer surrender first. There, it was widely the case that conventional Iraqi forces preferred to surrender than to fight. Thus it made sense for US forces to give them the opportunity to do so rather than putting their own Soldiers’ lives at risk. But in the traditional view, there was no moral requirement. If military necessity were better served by engaging the enemy first, then US forces were morally free to choose to do so. Walzer notes that it is “not against the rules of war as we currently understand them to kill Soldiers who look funny, who are taking a bath, holding up their pants, reveling in the sun, smoking a cigarette.” Walzer, Just and Unjust Wars, 142.


29 Hurka, 38.

30 Hurka, 40.
31 Hurka, 41.
32 Hurka, 42.
33 Hurka, 42.
34 Walzer, *Just and Unjust Wars*, 119-120.
35 Hurka, 43.
38 Gross, 162.
39 Gross, 166. Gross argues that the deaths of enemy soldiers are not weighed in proportionality calculations. As I will argue later, enemy combatants count as a good since their deaths contribute to winning the war.
40 Hurka, 42.
41 Gross, 163.
42 Walzer, *Just and Unjust Wars*, 129.
43 Gross, 168.
45 Walzer, *Just and Unjust Wars*, 138-175.
46 Walzer, *Just and Unjust Wars*, 146.
49 Walzer, *Just and Unjust Wars*, 157. To illustrate his point, Walzer describes the example of French bomber pilots in World War II who were charged with attacking Nazi facilities in France. If they bombed from a high altitude, they were safer, but less accurate. If they bombed from a lower altitude, they were more accurate, but in greater danger. In the end they chose to take risk and bomb from a lower altitude than the optimally safe one because they recognized that they had obligation to their citizens to minimize the harm done to them, even if it meant taking extra risks. Walzer’s point is that noncombatants on any side enjoy the same rights, so considerations one would feel obligated to apply to one’s own citizens would also apply to enemy noncombatants as well.
51 Walzer, *Just and Unjust Wars*, 157-159.

52 Smith, 281.


54 Phillips.

55 Phillips.

56 Smith, 19-20.


58 James M. Dubik, “Human Rights, Command Responsibility, and Walzer’s Just War Theory,” *Philosophy and Public Affairs* 11, no. 4 (1982): 355. Dubik rejects Walzer’s conception that Soldiers give up their right to life in order to gain the right to kill. He argues that if rights to life and liberty are indeed natural then Soldiers—or anyone for that matter—cannot give them up.


61 Dubik, 363-364.

62 Kasher and Yadlin, 20.


**Chapter Two**


5 Walzer, *Just and Unjust Wars*, 144. Walzer notes that military necessity “justifies not only whatever is necessary to win the war, but also whatever is necessary to reduce the risks of losing, or simply to reduce losses or the likelihood of losses in the course of the war.”

6 ISAF Commander’s Counterinsurgency Guidance (Headquarters, International Security Assistance Force Kabul Afghanistan, 2009) 2. According to the assessment, “The intricate familial, clan, and tribal connections of Afghan society turns “attrition math” on its head. From a conventional standpoint, the killing of two insurgents in a group of ten leaves eight remaining: 10-2=8. From the insurgent standpoint, those two killed were likely related to many others who will want vengeance.”

7 Walzer, *Just and Unjust Wars*, 119-120.

8 Walzer, *Just and Unjust Wars*, 119. Because the immediate, short-term, military objectives are embedded in the larger, overall military objective, proportionality calculations apply to both. But when it comes to the more limited, short term objectives, proportionality must be calculated in terms of its contribution to that objective, not in terms of the value of the overall objective.


10 Walzer, *Just and Unjust Wars*, 53-54, 101-108. See also Christopher, 164-166. It does follow from this analysis that states that threaten the lives and liberty of their citizens do not enjoy the rights of political sovereignty and territorial integrity. This rationale has been used to justify humanitarian interventions, such as those in Bosnia and Kosovo.

11 Walzer, *Just and Unjust Wars*,151-152.


14 According to Lamothe, some US military personnel were at fault for poor planning, absent leadership, and lack of preparation in a subsequent investigation.


16 Kasher and Yadlin, 17.

17 Kasher and Yadlin, 17.

18 Kasher and Yadlin, 17-18.

19 Kasher and Yadlin, 15.

21 Erlanger

22 Bethany Bell, “Counting the Casualties of War,” BBC Online, 28 January, 2009, http://news.bbc.co.uk/2/hi/middle_east/7855070.stm (accessed 9 October 2011). See also Gross, 255. Gross notes that while Israel and Palestinian sources counted similar numbers of overall casualties, they differed significantly in what they counted as combatant and noncombatant. Palestinian sources counted 1,434 dead, of whom over 900 were noncombatants. Israeli sources counted 1166 to 1370 dead, of whom 300 to 400 were noncombatants.

23 Kasher and Yadlin, 13, 15.


25 Smith, 281.

26 Walzer, Just and Unjust Wars, 53-58.


31 Tony Pfaff, Resolving Ethical Challenges in an Era of Persistent Conflict, (Carlisle, PA: Strategic Studies Institute, 2011), 22.


33 Alderson, 30-31.


35 In most jurisdictions in the United States, police would be prohibited to attempt to kill a violent criminal if bystanders would knowingly be harmed. This is true regardless of how many others the police officer may think may be harming the criminal’s escape. See Kleinig, Chapter 1.

Chapter Three
1 For an account of existential threat under the traditional view see Walzer’s discussion of Supreme Emergency, where he characterized the threat Nazi Germany posed to Europe as an “ultimate threat to everything decent in our lives, an ideology and a practice of domination so murderous, so degrading even to those who might survive, that the consequences of final victory were beyond calculation.” Walzer, Just and Unjust Wars, 252-253.


4 Professor Nancy Sherman’s work underscores this point as it highlights the permanent negative psychological impact that the guilt associated with killing places on combatants. See Nancy Sherman, The Untold War: Inside the Hearts, Minds and Souls of our Soldiers (London, UK: W.W. Norton and Company, 2010).


6 Luban, Lawyers and Justice: An Ethical Study, 105.


8 Norman, 120.

9 Dubik, 364.


11 Applbaum, 1537.

12 Applbaum, 2055.


15 Snider, Nagl, and Pfaff.

16 Luban, Lawyers and Justice: An Ethical Study, 131-132.

17 Luban, Lawyers and Justice: An Ethical Study, 133.

18 Luban, Lawyers and Justice: An Ethical Study, 134.

19 Luban, Lawyers and Justice: An Ethical Study, 134.

Risking harm, of course, can result in harm. The point I am making here is simply that there is a moral difference between placing someone at risk and harming her. Combatant activity, because it entails the use of lethal force, entails risks. When conducted in the proximity of noncombatants, it places them at risk. But since risk does not entail harm, placing them at risk is not the same as harming them.


Luban, *Lawyers and Justice: An Ethical Study*, 121.

Rebecca Kukla and Mark Lance, “Leave the Gun and Take the Canoli: Putting Imperatives in their Place,” (Unpublished Manuscript, Georgetown University, 2010), 1.


Goffman, 49.

Goffman 51.


Sells, 31.

Sells, 67. According to Sells, Serbian agitators pre-positioned the rocks and Milosevic’s intentionally employed the story of Lazar and the Battle of Kosovo to provoke a violent response.

Sells, 68.

Sells, 69.

Michael Ignatieff, *The Warrior’s Honor: Ethnic War and the Modern Conscience* (New York: Henry Holt and Company, 1997), 39. Of course, the events, which shaped and motivated the conflict, occurred against a complex political, historical and social background. However, while it would be mistaken to place the cause of the conflict on Milosevic’s and other Serbian nationalist’s manipulation of the Lazar narrative, both Sells and Ignatieff the narrative as an important factor in driving the violence that ensued.
ignatieff, 54.

39 j. glenn gray, the warriors: reflections on men in battle (new york: harper and row, 1970), 159.

40 schmitt, 29-30.

41 rousseau, social contract, 171 and 173.

42 schmitt, 28-29.


45 pfaff, resolving ethical challenges in an era of persistent conflict, 9.


47 walzer, just and unjust wars, 251-268. walzer justifies the direct targeting of german civilians by the british prior to the us entering the war because at that time defeat was imminent and the consequences of defeat—enslavement by the nazis—represented a grave threat to civilization

48 these conditions are adapted from tony pfaff, “military ethics in complex contingencies,” transformation of the army profession, 2nd ed., eds. don snider and lloyd matthews (boston, ma: mcgraw hill, 2005), 413.

49 lance, leave the gun, 18-19

50 lance, leave the gun, 20-21

51 lance, leave the gun, 19.

52 lance, leave the gun, 21.

53 lance, leave the gun, 19

54 mcmahan, “just distribution,” 367.


chapter four


5 Jeff McMahan, “The Ethics of Killing in War,” Ethics 114 (July 2004), 719. See also Lazar, 704.

6 Lazar, 701

7 McMahan, Killing in War, 40.


9 Lazar, 706.

10 Lazar, 706.

11 Lazar, 706.

12 Lazar, 706. See also Harry G. Frankfurt, “Freedom of the Will and the Concept of the Person,” Journal of Philosophy, 68 (January 1971), 5-20, http://www.jstor.org/stable/2024717. Matters regarding the relationship between will, intent, and moral responsibility are, of course, complex. The point, in fact, that I am making here that one can intend an act without intending (or even being aware of) harms associated with that act. Additionally, as Lazar notes, one can intend an act, intend the harms associated with that act and still not be morally responsible for that act. To be morally responsible for an act, one must, as matter of freely exercising one’s will, intend the act and intend the harms associated with that act. In short, to judge matters of will, we have to know what the agent wants.

But we have to know more than just what the agent wants. As Frankfurt notes, addicts can want to take a drug, for example, but there is a difference between the addict who wants to want to take a drug and an addict who does not, but does anyway because he cannot overcome the addiction. While both are addicted, Frankfurt would argue that the former takes the drug as a matter of free will and the latter does not. Because the former takes the drug as a matter of free will he is blameworthy for that act in a way that the other addict is not. Thus it is the second-order desire that determines whether the act is done freely or not: free will requires not only that an agent have a desire to act, but has a desire to have that desire to act. It is beyond the scope of this project to fully develop this view of free will or deal with objections. However, for the purposes of this discussion, to the extent a combatant wants to want to kill, he is morally responsible for that killing.

So, for example, a combatant may genuinely desire to kill but as long as that first order desire is a function of coercion or deceit or any other factor that prevents the formation of the second order desire, he is not morally responsible. Of course, the presence of the second order desire does not assure moral responsibility. We can imagine, that a combatant has been deceived, for example, regarding the justness of his adversary’s cause as well as his own. As a result he genuinely possesses a second order desire to kill the adversary, but here the second order desire is not made under the conditions of minimal rationality, so again, he is not praise or blameworthy for the acts he commits in the conduct of fighting for the unjust cause. The point here is that anything that prevents the conditions of minimal rationality will mitigate if not negate moral responsibility.

However, this analysis does give us an account for moral responsibility that is adequate to differentiate responsible and non-responsible combatants. To the extent a combatant is agent responsible and possesses a second order desire relative to the harms he would commit, he is morally responsible. Otherwise, he is not.
Lazar 709. Lazar makes this same point by describing an example where a guest at a reception extends her hand to greet a dignitary. At the same time, a third party projected a holographic image of a gun into your hand. The dignitary then forms the justified belief that the guest is threatening her life. In response, she draws a pistol and shoots the guest. His point with this example is to illustrate that the self-defense justification may reasonably be employed despite no responsibility on the part of the attacker.

Walzer, Just and Unjust Wars, 138-143. Walzer makes the point that even when combatants are not actively engaged in employing lethal force, they are still liable to attack by virtue of their status as combatants. Walzer’s reasoning is that combatants, by virtue of their role, represent a persistent threat. While there is certainly reason to forego killing someone who is not an immediate threat, Walzer notes that as a policy, such a restraint favors the stronger side as it “is the weaker side that persistently refuses to fix any limits on the vulnerability of enemy soldiers.”


McMahan, “Liability and Collective Identity: A Response to Walzer,” 15. See also McMahan, Killing in War, 232-233. In Killing in War, McMahan cites at length Osama bin Laden’s “Letter to the American People,” where bin Laden argues that the American people, as a group, are liable to attack based on the harms he claims the US government has committed against Muslims. Bin Laden points out that if America is truly free, then the American people have freely chosen their government, which in turn entails consent to the harms it has committed.

This point does not entail that militaries do not have other purposes. US military efforts to bring relief to Haiti after the 2010 earthquake are a case in point. According to this analysis, when military activities do not entail harm, they would not be liable to attack.

McMahan, Killing in War, 115-122.

Lazar 701.

McMahan, “The Ethics of Killing in War,” 725. McMahan argues that the executives of the United Fruit Company, who persuaded the Eisenhower administration to overthrow the Guatemalan government, were liable to attack as long as attacking them would have had the same efficacy as attacking combatants.

Lazar 724.


Walzer, Just and Unjust Wars, 145.

28 Rawls, *Theory of Justice*, 110-112. Rawls also argues that it is a matter of fairness to adjust the means of war to promote a just peace. His point is that from behind the “veil of ignorance” rational persons would agree, as a matter of fairness, to constrain the harms they commit in the conduct of war in order to set conditions for a future peace. My point is that while it may be fair to play by the rules, the rules themselves do not have to be fair. In fact, it is the idea that there is a difference between playing fair and respecting rights that led Lazar to his conclusion that even when all combatants conform to the rules, a rights respecting war is a practical impossibility. See Rawls, 379.


30 Applbaum, 91-92.

31 Lazar, 700-701.

32 Applbaum, 1533-1534.


34 Applbaum, 1537-1541.

35 Applbaum, 1605-1611.

36 Applbaum, 1507-1512.


38 Applbaum, 1555-1562.


40 In fighting Communist insurgents in Malaysia (1948-1960), British military leaders were successful only after they integrated police and military operations in a way that protected the population, while still applying pressure to insurgents. John Nagl, *Learning to Eat Soup with a Knife: Counterinsurgency Lessons from Malaya and Vietnam* (Chicago, IL: University of Chicago Press, 2002), 65-68.

41 Lara M. Dadkhah, “Empty Skies Over Afghanistan,” *New York Times*, February 18, 2010 quoted in McMahan, “The Just Distribution of Harm Between Combatants and Noncombatants,” 343. This article quotes one defense analyst’s response to the rules of engagement, saying: “the pendulum has swung too far in favor of avoiding the death of innocents at all cost. General McChrystal’s directive was well intentioned, but the lofty ideal at its heart is a lie, and an immoral one at that, because it pretends that war can be fair or humane.”

42 Jiyul Kim, *Cultural Dimensions of Strategy and Policy* (Carlisle Barracks, PA: Strategic Studies Institute, May 2009), 20-23. My point here is that the creation of just social institutions will certainly have a cultural aspect and foreign military forces will often be ill-suited to develop them. In such cases their role will be largely constrained to setting conditions for local officials to exert control. As such, the permissions
I am arguing for here do not require these institutions be in place, just that establishing them must be a part of the overall engagement plan. Without a coincident effort to build just institutions, killing and other harms would not be justified.

43 Police rules of engagement in the United States vary according to jurisdiction. However, Tennessee v. Garner 471 US 1 (1985), the United States Supreme Court found that deadly force against a fleeing suspect may not be used unless the police officer has probably cause that the suspect poses a significant threat of death or serious physical injury to him or others. This point entails officers may use deadly force not only to prevent an imminent act of violence, but also in the case they have reasonable cause to believe the suspect they are trying to arrest or prevent from fleeing committed a violent felony. According to New York State Penal Code, Article S 35.30 police officers may use deadly physical force against those reasonably suspected of using physical force in the conduct of a crime or in the conduct of felonies such as kidnapping, arson, escape or burglary in the first degree, or they were armed when fleeing. The New York City Police Department’s “Manual on the Use of Deadly Force” provides additional guidance stating “Police officers shall not discharge their firearms to subdue a fleeing felon who presents no threat of imminent death or serious physical injury to themselves or another person present.” I am indebted to Inspector Michael Hurley, New York City Police Department for these references. Michael Hurley, email message with author, June 17, 2010.

44 Max G. Manwaring, A Contemporary Challenge to State Sovereignty: Gangs and Other Illicit Transnational Criminal Organizations in Central America, El Salvador, Mexico, Jamaica, and Brazil (Carlisle, PA: Strategic Studies Institute, 2007), 2. The author notes that the growing capabilities of transnational criminal organizations is posing a threat to national sovereignty that is just as serious, but significantly different than the kind of threat state adversaries typically represent. Rather than taking control in one “major stroke,” they “slowly take control of national territory (turf) one street or neighborhood at a time (coup d’ street) or one individual, business, or government office at a time.” The implication of the growth of such organizations is that there may be some organized criminal groups against whom the rules associated with a war fighting ethic may be more appropriate.

45 In the case of counter-terror operations, armed adversaries are not always members of the same society where military action is taking place. For example, many Al Qaeda in the Arabian Peninsula (AQAP) members operating in Yemen are from Saudi Arabia or other countries. I will take this sort of problem up in the next chapter, but the point here is that the requirements of irregular warfare entail taking into account local interests, even if those interests coincide with adversary interests.

46 Rawls, 14-15.

47 Applbaum,1662-1663.

48 Applbaum,1776-1777.

49 Applbaum, 1808-1811.


51 Applbaum, 210-213. Applbaum notes that “(i)f utilitarianism or a straightforward consequentialism is the correct moral theory, then there are no deep moral objections to an adversary profession or institution that, all things considered, breaks even on benefits and burdens.”

52 Rawls, 379.
Rebecca Kukla, “Myth, Memory, and Misrecognition in Sellars’ ‘Empiricism and the Philosophy of Mind,’” in *Philosophical Studies*, 101, no. 2/3 (2003), 167. In this essay, Kukla argues that we induct others into normative space through what she describes as an “odd process” of “misrecognition,” where one treats another as though they were already bound by certain norms and capable of negotiating that normative space. This only works if the other uptakes that misrecognition and misrecognizes herself as well. In this way, this misrecognition plays a constitutive role by making true the fiction it expresses. The point here is that just as Soldiers are misrecognized as such long before they possess the qualities of Soldiers and are thus capable of navigating the normative space that entails, irregular warfare requires measures that function in somewhat the same way.

54 Applbaum, 1843-1845.

55 Applbaum, 1883-1889

56 Nancy Sherman, *The Untold War: Inside the Hearts, Minds, and Souls of our Soldiers* (New York: W.W. Norton, 2010). Sherman’s analysis describes this moral residue and its significance to the ethics of not just war-fighting, but for care of Soldiers as well. Taking into account the requirement to deal with this residue would be a moral requirement associated with leader’s obligations to care for their Soldiers.

57 McMahan, “Just Distribution,” 348

58 McMahan, “Just Distribution,” 349

59 McMahan, “Just Distribution,” 360

60 Applbaum, 1913-1914.


62 Applbaum, 1897-1898.

63 Applbaum, 1918-1919.

Chapter Five

1 The restriction assumes that Soldiers already bear a higher burden of risks than friendly noncombatants. So the metric of civilian risk is a higher standard in this case than Soldier risk.

2 McMahan, “The Ethics of Killing in War,” 725


For the purposes of this discussion, I have treated drone and manned aircraft strikes as moral equals. The difference, of course, is the latter entails more risk than the other. Thus, the only time manned aircraft would be morally preferable over drones is if the extra risk was required to ensure noncombatants were not killed.


11 Zenko, 63.


13 Brian Michael Jenkins, Al Qaeda in Its Third Decade: Irreversible Decline or Imminent Victory, (Santa Monica, CA: Rand, 2012), vii.

14 Gross, 100-103. Gross cites the 1863 Lieber Code on assassination which states, “The law of war does not allow proclaiming an individual belonging to the hostile army an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage.”


16 Gross, 108-109. The 1907 Haque Convention IV Respecting the Laws and Customs of War on Land states that to be qualified as a belligerent combatants must wear a “fixed distinctive emblem recognizable at a distance.” Documents on the Laws of War, 48.

17 Wachtel, 682.

18 Wachtel, 683.

19 Wachtel, 688.

20 Gross, 110.

21 Gross, 104-105.

22 See Dave Luban, “What Would Augustine Do?: The President, Drones, and Just War Theory,” Boston Review Online, 6 June 2012, (http://www.bostonreview.net/BR37.3/david_luban)obama_drones_just_war_theory.php) (accessed 12 July 2012). Luban argues that what is important is not who administers the targeting process but that the process is
“based on a genuinely skeptical, probing structure, with a heavy burden of proof on those proposing a killing and an institutionalized “devil’s advocate” to argue against each and every deadly nomination.

23 The author personally participated in this process in Iraq from 2004-2005.

24 Gross, 106.

25 Pir Zubair Shah, “My Drone War,” Foreign Policy, March-April 2012, 61. See also Zahir Shah Sherazi, “Most of those killed in drone attacks were terrorists: military,” Dawn.com, 9 March 2011. http://dawn.com/2011/03/09/most-of-those-killed-in-drone-attacks-were-terrorists-military/ (accessed 12 July 2012). Both articles cite a speech made by a senior Pakistani general stating that US drone strikes were effective at countering militants who were fighting the Pakistani government for control over Waziristan.

26 After the raid, Pakistani officials closed the passage into Afghanistan the US forces were using to resupply troops in Afghanistan, arrested the Pakistani doctor accused of assisting US intelligence agencies in identifying bin Laden, and put pressure on aid organizations suspected of having an association with the US. See “Bin Laden Raid led to ‘Chilling Effect’ on Aid Groups,” PBS Newshour, May 24, 2012 http://www.pbs.org/newshour/bb/world/jan-june12/pakistan2_05-24.html (accessed 12 July 2012)


29 Here I am simply arguing for a relatively straightforward application of Kant’s Categorical Imperative, “Act only on that maxim through which you can at the same time will that it should become a universal law.” Immanuel Kant, Groundwork of the Metaphysic of Morals, trans. H.J. Paton (New York: Harper, 1956), 88.


31 Shroder, 738-742.

32 The account I have articulated does not, of course, raise all possible ethical considerations associated with the raid. For example, the reported use of a civilian vaccination program to obtain the DNA to identify bin Laden risks undermining trust in those programs.


35 Miller, “CIA.”

37 Shroder, 756. According to the account in the Washington Post, bin Laden’s son Khalid, a woman, and two men in the compound were also killed. The account is not entirely clear on the circumstances of these deaths.


40 Sherazi. In the article, Sherazi quotes Major General Ghayur Mehmood, the Pakistani 7th Division Commander, who acknowledged “a few civilian casualties,” as well as disruption to social order that caused many civilians to leave the area order as well as caused unspecified problems for law enforcement. However he also stated that between 2007 and 2011, 164 Predator Strikes killed a total of 964 terrorists.


42 Gross 167. Of course, not every act of operating among civilians entails a use of human shields. As Gross notes, there is a difference between utilizing human shields and failing to take reasonable precautions to prevent injuries to noncombatants. Both are crimes, but the latter is a lesser crime.


48 Durand, 19-21.

49 Mansoor, 79.

50 In the early stages of the insurgency, US Army leaders emphasized increased lethality as well as a range of aggressive tactics including detention of military aged males. See Dexter Filkins, “The Fall of the Warrior King,” *New York Times*, (October 23, 2005): 54.
51 Mansoor 79-82

52 The author obtained this information from Saudi Armed Forces Officers who participated in the operations against the al Houthi during a visit to the former battlesights 2-3 December 2011.

53 Luban, Boston Review.
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