

# The Dissipation of Liability: Rescuing the Theory of Intervening Agency

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*Within the conventional Just War Theory, there exists a principle that non-combatants are immune from being targeted. However, scholars such as Jeff McMahan argue that those who are morally responsible for threatening lethal harm incur liability to be harmed themselves, defensively. In this context, a debate has emerged over whether non-combatants supporting an unjust war could justifiably be targeted by the victims of that war. This paper explores the moral justifications for discrimination, where only combatants can be rightfully attacked and killed, while non-combatants enjoy the privilege of non-liability, specifically examining the Intervening Agency theory that draws on the concept of causal proximity and liability to defensive killing.*

According to conventional Just War Theory, combatants are defined as that class of people whose enterprise is to fight on command, being equipped with weapons and trained in the art of combat.<sup>1</sup> Combatants are typically soldiers. Non-combatants, conversely, are those not directly involved in the violence of war, typically known as civilians. There is a principle within conventional Just War Theory that non-combatants are immune from being targeted. However, in his book *Killing in War*, Jeff McMahan argues that those who are morally responsible for threatening lethal harm incur liability to be harmed themselves, defensively.<sup>2</sup> In this context, a debate has emerged over whether non-combatants supporting an unjust war could justifiably be targeted by the victims of that war. Non-combatant immunity coincides with Just War Theory's principle of discrimination, which stipulates that attackers must discriminate between non-combatants and combatants when choosing their targets. This makes sense to the casual observer, but in philosophical ethics, one wants to identify an explicit moral justification upon which to base the principle of non-combatant immunity. After all, why would a civilian instigating and perpetuating an unjust war be immune from attack while the conscripted soldier is not? Clearly, the instigator and funder of a war is as morally responsible for the harm inflicted, if not more so, than the soldier. And if this is the case, then what is the moral justification for discrimination, that only combatants can be rightfully attacked and killed, while non-combatants enjoy the privilege of non-liability? One theoretical answer to this question is Intervening Agency.<sup>3</sup> Intervening Agency, however, is not wholly unsusceptible to reasonable reservations. But Intervening Agency can be rescued from those problems and effectively stand as a moral justification to the principles for discrimination and non-combatant immunity.

The idea of Intervening Agency as presented by David Rodin, and subsequently challenged by Helen Frowe, is proffered within the context of the temporal and causal factors relevant to the agent threatening unjust harm. As Rodin notes in his response to the "troubling conclusion" that McMahan makes about non-combatants being liable to direct attack in "certain rare circumstances," causal proximity will affect liability relative to the imminence of the attack. The hypothetical Rodin provides to explain this is that of "a cutler who made a knife used by a third party to threaten the life of the [victim]."<sup>4</sup> "Most people," he posits, "would not believe that [the cutler] is liable to be killed even if this were the only way to avert the attack."<sup>5</sup> Rodin concludes that "if causal proximity plays a role in determining liability," then one can avoid the "troubling conclusion" that remote agents (i.e., civilians) are liable to defensive killing, regardless of the inherent moral responsibility they incur by supporting the unjust war efforts.<sup>6</sup> Rodin argues that moral responsibility does not alone determine liability, but that proximity plays a crucial role. He

1 Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 2015), pp. 144-145.

2 Jeff McMahan describes liability as a state where a person would not be wronged by being attacked. It comes from the notion that all humans have the right to not be attacked, and to attack them is to violate that right. But one has the agency to behave so as to forfeit that right. By attacking another, one forfeits their right to not be attacked; hence, they are liable to harm. For more on the principle of liability to defensive killing, see Jeff McMahan, "Just Cause for War," *Ethics & International Affairs* 19:3 (2005): pp. 1-21.

3 David Rodin, "Justifying Harm," *Ethics* 122:1 (2011): p. 91.

4 *Ibid.*, p. 90.

5 *Ibid.*, p. 90.

6 *Ibid.*, p. 90.

admits that the potential problems of assigning some degree of liability in accordance with the imminency of the attack are “unlikely to be settled at the level of intuitive assessment of cases,” but that a “good theoretical explanation for why causal and temporal proximity affect liability” is required.<sup>7</sup> The proposed explanation is Intervening Agency. From Rodin:

Where two or more persons share responsibility for unjust threatened harm, defensive force should be presumptively directed at the agent whose intervening action is most proximate to the threat. However, in order to be plausible, those principles will have to allow for cases in which the proximate agent is an institutional or collective agent. For example, in war, defensive force can be employed against anyone within the chain of command, not merely those who fire the guns. Similarly, any member of a criminal conspiracy seems potentially liable to defensive force. What seems to make the difference [...] is a particularly strong form of shared intention to bring about harm, often existing in a formal or institutional context.<sup>8</sup>

Intervening Agency is a theory that essentially boils down to the concept of proximity. In justifying the discrimination between combatants and non-combatants, Intervening Agency identifies the last component in the causal chain of unjust harm (e.g., the soldier firing the rifle at the victim) as the most liable to defensive killing, because the soldier is the proximal agent. The rescued version that this author presents here incorporates the notions of social agreement and dissipation to make up for those reasonable reservations to which Intervening Agency is susceptible.

Those reservations are illuminated in Helen Frowe’s, “Non-Combatant Liability in War.”<sup>9</sup> Here, Frowe uses slightly altered versions of the hypothetical scenarios that Rodin presented to set up her argument against Intervening Agency:

**Naughty Minister:** Criminal has been released from prison as a result of financial cuts in the prison system. The cuts are a direct result of fraudulent mismanagement of the finances by the Minister, who acted in the full knowledge that his actions would endanger the public. Criminal is trying to kill the Victim, who can save his life either by killing Criminal, or by lethally trampling over Minister.

**Provocation:** Villain culpably provokes Attacker into attacking Victim. Victim can save his life either by killing Attacker, or by lethally trampling over Villain.<sup>10</sup>

According to Intervening Agency, Criminal and Attacker are the proximal agents, and their liability to defensive killing supersedes that of Minister and Villain, respectively. But Minister and Villain bear a greater measure of moral responsibility, or culpability. This result, where the proximal agent bears more liability to defensive killing, is morally challenging, because we know that it was the actions of Minister and Villain that ultimately led to the harm upon Victim. And does it not seem right that those most responsible for the outcome should be the most liable to defensive harm? This is not to say that Attacker and Villain bear no liability, for they are agents who of their own volition have chosen to inflict harm upon Victim, third-party influence notwithstanding. However, though Intervening Agency identifies the proximal agent as the most liable, it is clear from these scenarios that the proximal agent is not always the most *culpable*. As such, we have pinned liability to those less culpable.

Culpability in war is not exclusive, nor is it binary. Culpability is scalar. Non-combatants who vote for government officials knowing they will work to wage an unjust war, happily pay taxes for funding the war efforts, and work in bomb-making factories or for supply-chain contractors to move necessary equipment to strategic locations bear a greater degree of culpability than non-combatants who actively protest the war and have sought to avoid contributing to war efforts. But war would not be possible without the cooperative economic and logistical efforts of the populace *in toto*. Therefore, it is reasonable to conclude that all non-combatants bear some varying measure

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7 Ibid., p. 91.

8 Ibid., p. 91.

9 Helen Frowe, “Non-Combatant Liability in War,” in Helen Frowe and Gerald Lang eds. *How We Fight* (Oxford: Oxford University Press, 2014).

10 Ibid., p. 176.

of culpability in war because without their collective contributions, both witting and unwitting, the war could not exist.

Still, even in war, certain lines should not be crossed. The line demarcating combatants and non-combatants as legitimate targets is one of the lines drawn by conventional Just War Theory. Indeed, targeting civilians is a slippery slope that is in our best interest to avoid. However, we must satisfy our conceptions of morality while staking out that line, lest we find we have drawn it arbitrarily. As is seen by the application of Intervening Agency in the two scenarios mentioned above, the theory faces some problems when used to justify that line. But an augmented version of Intervening Agency that incorporates the concepts of social agreement and dissipation into its mechanics does provide the “theoretical explanation for why causal and temporal proximity affect liability,” in a way that provides a moral undergirding in support of the principle of discrimination.

Of all people, Frowe is the critic whose suggestion rescues Intervening Agency from these problems. She proposed that “an intervening agent can voluntarily take on the liability to defensive killing.”<sup>11</sup> This proposal is her offer of a rescued version of Intervening Agency, and it is close to what this author believes to be the most tenable moral defense of discrimination and non-combatant immunity, despite the fact that Frowe presents it as an impotent final trick to try to save Intervening Agency, a theory she finds lacking. However, when dismantling this rescued version, she only goes on to say that it “doesn’t seem like something” we, as society, would agree to do.<sup>12</sup> For all of Frowe’s insight and thoughtfulness in her approach to moral justifications of non-combatant immunity, this author believes this is where she is mistaken. Frowe writes:

We might try to rescue a version of [intervening agency] by arguing that an intervening agent can voluntarily take on liability to defensive killing. This is another pretty popular idea with respect to the relationship between combatants and non-combatants. We talk of combatants ‘assuming risks’ on behalf of their non-combatants: by donning a uniform, a person invites enemy combatants to target them instead of the non-combatants. But I doubt that this will do the trick. It would be very odd if those posing an unjust threat got to decide amongst themselves who was liable to be killed to avert that threat, making it impermissible for their victim to aim defensive force at some group members rather than others. Liability to defensive harm doesn’t seem like something we get to allocate by agreement.<sup>13</sup>

Frowe’s argument fails to take into account that the constructs of a society are a result of social agreement. Morality and war are two such constructs. And the attributes of liability and culpability are shareable if that is what society agrees for them to be. We do this with money. We do this with time. We do this with social norms, mores, and taboos. We decide, as a society, all manner of constructs in our cooperative effort to live happy, or peaceful, or at least stable and predictable lives. If we collectively agree that a piece of paper printed at the mint is valued at X, or that we should change the hours of our clocks on the same day every year, then why could we not agree that an intervening agent can volunteer to take on the liability of defensive harm? Morality is an abstract concept, like time, and it is subject to our general, collective thoughts on the matter. This author sees no reason why liability is barred from such a category.

As mentioned previously, culpability is not exclusive, but shared, and it scales relative to the degree of support given to the unjust war effort. It seems, however, that in our search for that demarcating line of discrimination, we want liability to be exclusive. And when we begin drawing that line among civilians, we approach the slippery slope. Therefore, to justify the principle of discrimination between combatants and non-combatants, we agree that liability can be voluntarily transferred. But the transferability of liability is not its only quality that we can rely on to satisfy our concerns about principles of discrimination.

Liability can also be ephemeral. Hypothetically speaking, if all the combatants in an unjust war have been killed, culpability of that war still exists among the non-combatants. But they are no longer liable to defensive harm because

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11 Ibid., p. 179.

12 Ibid., p. 179.

13 Ibid., p. 179.

the liability has disappeared. Liability comes with threat, and the remaining non-combatants in that society, though culpable, no longer pose a threat. So, even though Frowe and others might argue that liability cannot be rightfully transferred from one to another, and since liability to defensive killing only exists where there is a threat of danger, it stands to reason that liability dissipates once the assumer of risk (i.e., uniformed military personnel) is eliminated. And this is how the concepts of social agreement and dissipation rescue Intervening Agency as a satisfactory moral basis for non-combatant immunity and discrimination. The rescued version allows us to draw the line of distinction at the point of non-combatant.

Problematizing ethical theories like Intervening Agency with hypotheticals and abstruse arguments can at times feel dubious when considered in light of the blood and death of the warzone. In an attempt to provide a purely ethical (not merely ethical in the applied sense) basis for the principles of non-combatant immunity and discrimination, we problematize through hypotheticals to the point of moral futility. Franz Kafka's short story, "The Top," illustrates this conundrum. The main character, a philosopher, believes that if he can understand the smallest detail—in this case, the detail of a spinning top that children are playing with—then he can understand all things. But every time he picks up the spinning top to observe its details, he finds nothing but disappointment, followed by the piercing screams of irritated children. Like Kafka's philosopher, when examining ethical arguments, we often peer so closely into the mechanics of the thing we wish to understand that we look right past the very thing that intrigued us in the first place, leaving what we desired to know in the fading wake of our zealous investigation.<sup>14</sup>

Our efforts to problematize and challenge theories that provide moral grounding for principles of Just War Theory are not misguided, and they are certainly not fruitless. In searching for a principled justification of non-combatant immunity, our aim is to stand with moral certitude that it is unacceptable to kill the children of a belligerent nation that has waged unjust war against its victim. Now, drawing the killing line with the children of a belligerent nation is an easy line to draw. But what if we move the line to include the disabled, or the elderly, or pregnant women, or farmers? As we move that line, we begin to feel a little better with each degree. Perhaps pregnant women are also off limits, but maybe farmers can be included, and that would not feel as egregious as assigning liability to pregnant women and children? If we continue sliding that line in the direction of civilians working in bomb-making factories and for supply-chain contractors, we feel increasingly better about labeling those who fall behind that line as being liable to defensive killing. So, where do we draw the killing line in an unjust war? That line has been drawn by the traditionalists of Just War Theory, and that line is between the combatant and the non-combatant. It is a good practice to examine this line and the reasons for which it has been drawn there, so long as our practice does not leave us adrift among the aimless waves of esoterism. If morality exists, then it must shape our behavior, no matter how hard it may be to divine its boundaries.

If war is a collective effort by combatants and non-combatants—and as such, war cannot be made without the cooperative effort of both classes, indeed that, according to Frowe and "many just war theorists, [...] there doesn't seem to be any principled – or morally significant – difference between the contributions" of the two—then what if one of those groups volunteered to be liable to defensive killing?<sup>15</sup> That group could wear a uniform that identifies them as such. That group could take the most dangerous positions in the war effort. Persons mobilized for the war effort would consist predominately of persons from that group, though not necessarily exclusively, but predominately nonetheless. That group would be 'directly involved in the hostilities.' And that group would consist of persons who, no matter what their assignment or duty is within that group, they would be not only willing, but committed to picking up a gun and killing enemy combatants. This group would be, of course, uniformed military personnel.

Frowe argues against this by objecting to the idea that liability can be transferred. "Even if a person volunteers to bear a defensive harm in your stead, this does not rid you of liability nor make it impermissible for your victim to kill you."<sup>16</sup> However, Frowe's assumption does not quite 'do the trick,' and here's why. Culpability remains, but liability has dissipated with the elimination of a necessary component that helped create the threat. If German citizens were

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14 Franz Kafka, "The Top," in Nahum N. Glatzer ed. *The Complete Stories* (New York: Schocken Books, 1971), p. 444.

15 Frowe, pp. 174-175.

16 *Ibid.*, p. 179.

responsible, and therefore culpable, for the unjust harm inflicted during World War II, are they necessarily liable to defensive killing after the war ended? Of course not. The whole idea of liability to defensive killing exists only in a situation of threat, such as in the domain of war. Remove the threat, and there is nothing to defend against.

First, if we were to use the example of "Provocation" again, once Victim killed Attacker, Victim would no longer be permitted, legally or morally, to also kill Villain. Once Attacker is dead, the organization whose intent it was to kill Victim is no longer functional as a threat. The two work together to accomplish the full consequences of the threat, which leads this author to his second point. If killing in unjust warfare is a result of a group consisting of non-combatants and combatants alike, then the threat is neutralized once part of that group has been killed. It does not matter if the group of non-combatants were killed off to enough of an extent that their supportive function ceases to be effective, or if the combatants were killed off to such an extent. In either event, the entire machine would no longer function as a credible threat. Even Frowe acknowledges this nature of the combatant/ non-combatant teamwork to accomplish unjust warfare goals when she says, "there doesn't seem to be any [...] significant difference between the contributions of combatants compared to those of non-combatants."<sup>17</sup> But the problem with identifying non-combatants as being liable to defensive killing is that children (and the elderly, and pregnant women, and farmers) exist in that group, whereas they do not, except in extremely outlying circumstances, among the uniformed military personnel.

It is understood that uniformed military personnel are those who will be firing the rifles, even if they are cooks or clerks, or high-ranking military commanders. Children, the disabled, the elderly, and so forth do not conscript themselves into the military. Though they may contribute to the unjust war effort, such as school-aged children writing letters of moral support and encouragement to soldiers at the front, it is objectively immoral to target those children, no matter their measure of culpability. So, society makes a tacit contract with uniformed military personnel and all agree that the military will bear a large measure of culpability of that war, and also the liability to defensive killing. Though it may not satisfy Frowe and those who seek an impenetrable moral justification for non-combatant non-liability, the goal of finding a moral basis for avoiding the intentional killing of non-combatants (children, et al.) has been accomplished through a temporal chain of events wherein those assuming liability and culpability on behalf of non-combatants are volunteering to be legitimate targets. Intervening agency thus achieves its status as a theory grounding non-combatant immunity and discrimination in morality by having uniformed military personnel voluntarily, saying "me first" in accordance with the social agreement made among the populace.

The reality of war is that it is a fog, and as Clausewitz has observed, it proves to be limitless, reaching new heights of atrocity with each epoch of technological advancement. Ethics mean nothing if not applied, and the arena of war may be the most crucial of human domains in which to define morality. But war is also a matter of practice involving societies, not individuals, so considerations of how morals play out in the theater of war cannot be removed from the social nature of definitions on these matters. Just because something has only a practical advantage does not necessarily mean that it is not a moral win. We want a moral justification for non-combatant immunity to feel confident that our rules of *jus in bello* are right, not just practical. But if a practical result that aligns with our highest estimations of morality is the best we can do, then we are indeed manifesting morality. In our search for an objective moral justification of the Just War principles of non-combatant immunity and discrimination—should we agree that liability to defensive killing is either transferrable or ephemeral, and we can certainly decide to agree as much if we so choose—then we can be certain that limiting our defensive killing to those unjustly doing us harm to uniformed military personnel is indeed justice in war.

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17 Ibid., p. 174.