

# Health Justice for Unjust Combatants<sup>1</sup>

Blake Hereth  
University of Arkansas  
[sbhereth@uark.edu](mailto:sbhereth@uark.edu)

**ABSTRACT:** Are field medics morally permitted to treat unjust combatants? I distinguish between two kinds of enemy combatants: *reactivated* ones who will rejoin the fight, and *deactivated* ones who won't rejoin the fight. Helen Frowe has argued that field medics aren't permitted to treat reactivated combatants but is silent about deactivated ones. First, I argue that Frowe's account plausibly extends to a moral prohibition on treating deactivated combatants in addition to reactivated ones. Second, I argue that the best argument for treating deactivated enemy soldiers extends also to reactivated ones but holds only for groups, which undermines Frowe's general position.

## 1. FIXING THE GOALPOST

The debate between reductive individualists and collectivists has reached a fever pitch. My hope for this essay is to contribute a fresh angle to the debate grounded in healthcare justice. In particular, I shall focus on the question of whether partisan or nonpartisan field medics are permitted to provide care and treatment to unjust combatants. Before explaining the structure of my argument, however, I'll define reductive individualism in the following way:

### REDUCTIVE INDIVIDUALISM:

For every true principle of permissible warfare  $W$ , there is some true, morally equivalent principle of permissible defense  $D$  to which  $W$  reduces (and *vice-versa*), where all instances of  $D$  are individual (and not group) principles.

My characterization is shared by most reductive individualists including Helen Frowe (2016: 31; 2014: ch.5), Jeff McMahan (2009: 83), and François Tanguay-Renaud (2017: 116). Understood this way, critics of the view have a clear path forward: identify one instance of  $W$  that's not reducible to  $D$ . In other words, find a moral principle applicable in warfare that lacks an individualist, 'private' defense equivalent. As an example of this, consider David Rodin's argument endorsement of the following principle:

### RETREAT:

If individual  $S$  unjustly threatens individual  $R$ ,  $R$  can avert  $S$ 's threat to them either by harming  $S$  or retreating from  $S$ , and both courses of action are equally feasible for  $R$ , then  $R$  ought to retreat from  $S$ .

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Rodin endorses this principle in the context of self-defense: If you are attached in a public place and can safely retreat, you ought to do so. But, Rodin argues, the principle is *false* if applied to states during warfare, replacing ‘individual *S*’ with ‘state *S*’. States are under no obligation to retreat, lest they appease aggressive and expansionist states. Rodin thus claims to have identified one member of *D* (i.e., RETREAT) that has no true *W* equivalent.<sup>2</sup> Frowe counters that RETREAT has no true *W* equivalent because states can’t retreat: There are no neutral territories into which they might find safe haven. Thus, she argues, the problem with RETREAT is not that it’s *morally* inapplicable to permissible warfare, but rather that the relevant empirical antecedent isn’t satisfied in warfare.<sup>3</sup>

I don’t propose to weigh in on whether RETREAT is the exception critics of REDUCTIVE INDIVIDUALISM seek.<sup>4</sup> Instead, I shall make the methodological observation that if Frowe’s empirical claim is true, then (in my view) she will have successfully defeated Rodin’s putative counterexample. And this will be true in virtue of the fact that the warfare equivalent of RETREAT is false, whereas REDUCTIVE INDIVIDUALISM says it must be true. This helps us identify the goalposts somewhat: non-reduction in virtue of *non-moral* properties is insufficient to counterexample REDUCTIVE INDIVIDUALISM, but non-reduction in virtue of *moral* properties is sufficient. The goalpost can be formalized as follows:

**IRREDUCIBLE:**

If *W* is a true principle of permissible warfare but, in virtue of its moral properties, lacks a moral equivalent principle of defense *D*, then REDUCTIVE INDIVIDUALISM is false.

While I have offered reasons to believe IRREDUCIBLE is an appropriate goalpost for counterexamining REDUCTIVE INDIVIDUALISM, I shall not offer further defense of it and assume its truth throughout this paper. If IRREDUCIBLE is false, then reductive individualists owe us a clearer account of their position and its truth conditions. In what follows, I argue IRREDUCIBLE is satisfied by a plausible principle of bioethics, well-established in classical just war theory and enshrined in international law. Here’s the principle:

**TREATMENT:**

The treatment of deactivated unjust combatants (and maybe, in some cases, reactivated unjust combatants) by partisan or nonpartisan field medics is often all-things-considered morally obligatory even if just combatants don’t consent to their treatment.

Article 12 of the Geneva Convention, for example, reads:

Members of the armed forces and other persons mentioned in the following Article, who are wounded or sick, shall be respected and protected in all circumstances. They shall be treated humanely and cared for by the Party to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political

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<sup>2</sup> Rodin (2010), at 128.

<sup>3</sup> Frowe (2016), at 40-41.

<sup>4</sup> For additional critiques of reductive individualism, see Draper (2016), at 7; Lazar (2016); Kutz (2005); and Walzer (1977), at 146.

opinions, or any other similar criteria.... [T]hey shall not willfully be left without medical assistance and care, not shall conditions exposing them to contagion or infection be created.... Only urgent medical reasons will authorize priority in the order of treatment to be administered. (Convention I, “For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,” 1949)<sup>5</sup>

In her work *Defensive Killing*, Helen Frowe explicitly denies TREATMENT, pitting her preferred version of reductive individualism against the current consensus. However, Frowe’s rejection of TREATMENT is powerful. Thus, reductive individualists generally have powerful reasons to accept her account. A successful defense of TREATMENT, therefore, provides reason to reject REDUCTIVE INDIVIDUALISM.

Starting with Frowe’s own account, I first distinguish between *deactivated* and *reactivated* unjust combatants and show why Frowe opposes treating the latter: namely, because reactivated unjust combatants will resume their unjust threatening of just combatants. Then I offer three reasons to believe Frowe’s account also implies a ban on treating deactivated unjust combatants. First, because spending finite medical resources on unjust combatants of *any* stripe depletes those resources for just combatants. Second, because REDUCTIVE INDIVIDUALISM entails the falsity of EQUALITY, the falsity of which requires *prioritizing* just combatants over unjust ones. Third, because Frowe fails to account for other kinds of harms, such as economic or labor-based harms, that are caused by the treatment of deactivated unjust combatants. Next, I show why the reductive individualist’s moral prohibition on treating deactivated unjust combatants violates a plausibly true principle of group risk-taking. Because the principle applies *exclusively* to groups, it lacks an individual moral equivalent. Thus, it satisfies IRREDUCIBLE. And because the principle supports TREATMENT, the mainstream view is vindicated and REDUCTIVE INDIVIDUALISM is false.

## 2. FROWE’S ACCOUNT

*Unjust* combatants are those who fight for a morally unjust side of an armed conflict. They are contrasted with *just* combatants, who fight for a morally just side of the conflict. When combatants are injured, their prognoses fall into two general categories, the first of which is:

### REACTIVATED:

*S* is a reactivated combatant just in case, were *S* to receive medical treatment, then *S* would reassume the moral equivalent of their prior combatant status.

There are proliferate examples of reactivated combatants in warfare. Most war-injured combatants recover and resume their duties within hours, weeks, or months. In cases of long-term armed conflicts, injured combatants sometimes resume their military duties after years. Moreover, there are individualized or ‘domestic’ analogues of reactivated combatants. Consider one example by Frowe:

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<sup>5</sup> An importance difference between TREATMENT and a separate thesis, which I shall call NEUTRALITY, according to which partisan and nonpartisan field medics are morally obligated to be *strictly* neutral with respect to combatant partisanship. The Geneva Convention appears to entail NEUTRALITY, and Frowe and others interpret it this way, as well. However, TREATMENT is weaker than NEUTRALITY despite being entailed by it. Still, a defense of TREATMENT constitutes a defense of some of the most controversial aspects of NEUTRALITY.

*Rescue:* Attacker breaks into Victim's house, and kills Victim's family. As he is trying to strangle Victim, Victim hits Attacker over the head, rendering him unconscious. Victim calls the emergency services, who dispatch both the police and an ambulance. The ambulance arrives first. Paramedic immediately starts trying to revive Attacker. Assume that Victim correctly believes that if Paramedic revives Attacker, Attacker will continue in his attempt to murder Victim. Victim hastily tells Paramedic this. (Frowe 2014: 202)

Is Paramedic permitted to revive Attacker? Frowe answers in the negative, writing that the "prohibition on causing harm trumps the prohibition on allowing harm" (Frowe 2014: 202). Frowe then remarks,

If I'm right that Paramedic may not treat Attacker because Attacker will then try to kill Victim, why is it absurd to think that the Red Cross may not treat unjust combatants who will then try to kill just combatants? (Frowe 2014: 203)

Frowe's insistence on the *moral equivalence* of Paramedic reviving Attacker and the Red Cross reviving (reactivated) unjust combatants reflects her commitment to REDUCTIVE INDIVIDUALISM.<sup>6</sup> Later commenting on the non-partisan nature of the Red Cross, Frowe considers whether the Red Cross might *ever* be permitted to treat reactivated unjust combatants.<sup>7</sup> She concludes they can be:

Does this mean that the Red Cross ought not to be neutral between just and unjust combatants? I think that the answer to this question is yes, but that does not entail that the Red Cross may not assist unjust combatants. I think that it *is* permissible for the Red Cross to assist unjust combatants. But it is permissible if, *and only if*, the just combatants consent to their doing so. (Frowe 2014: 205)

To illustrate, Frowe provides the following case:

*Dangerous Rescue:* Victim and Attacker are both badly injured. Attacker's accomplices are guarding the entrance to Victim's house, and will let Paramedic in only if she agrees to treat both Victim and Attacker. (Frowe 2014: 205)

As this would help badly-injured Victim, he has good reason to consent, and if he consents, "he thereby consents to the threat that [Paramedic] poses to him by treating Attacker" (Frowe 2014: 206). Frowe, however, is unclear what judgment we should draw in cases like the following:

*Triple Rescue:* Victim, his Partner (who was also unjustly harmed by Attacker), and Attacker are all badly injured. Attacker's accomplices are guarding

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<sup>6</sup> Cf. Fabre (2009), at 54-55. Fabre concurs with Frowe that medical professionals treating reactivated unjust combatants are liable to defensive harm.

<sup>7</sup> What about partisan field medics employed by the unjust side? Reductive individualism implies they ought not treat reactivated unjust combatants.

the entrance to Victim's house, and will let Paramedic in only if she agrees to treat Victim, Partner, and Attacker. Victim consents to the risk and shouts for Paramedic to enter, over the objections of Partner, who doesn't consent and fears a revived Attacker will overpower and kill them both.

What should Frowe say about this case? On the one hand, it might seem that Victim's serious injuries entitle him to care that Partner lacks a right to prevent. Thus, we might say that *Partner*, like Paramedic, makes herself liable to defensive harm if she attempts to prevent Paramedic from treating Victim. On the other hand, Victim's treatment comes at serious risk to Partner and Partner has a right to avert serious risks to herself. Thus, we might say that *Victim*, like Paramedic, makes himself liable to defensive harm if he lets Paramedic in to treat all three parties. Given Frowe's claim that *causing harm* trumps *allowing harm*, and given that Partner merely allows harm to Victim whereas Victim causes harm to Partner, Frowe would likely side with Partner in the case of *Triple Rescue*. Thus, on Frowe's account, consent is required on the part of *all* parties under unjust threat. Returning to the Red Cross, Frowe writes:

Why would just combatants consent to the Red Cross's assisting unjust combatants? Well, presumably they would do so only if consenting is in their own interests. It would obviously be best for them if the Red Cross assisted only the just combatants. But the Red Cross cannot operate under these conditions, because it is presumably only when they treat both sides that combatants on both sides will refrain from attacking them. So, the just combatants have a choice between having the Red Cross help both sides, and having them help neither side. If they are made better off overall by having the Red Cross help both sides, they could rationally consent to the Red Cross's contributing to the threats posed by unjust combatants. (Frowe 2014: 206)

Frowe's claim is that just combatants *could rationally consent* to the Red Cross's activities. But that's not the same as claiming they *do, in fact, consent* to those activities. And as cases like *Triple Rescue* show, the consent of *each and every* at-risk just combatant is necessary for the permissibility of the Red Cross's treating reactivated unjust combatants, on Frowe's view. Needless to say, as an empirical claim about the actual consent of all at-risk just combatants, this is false. As a contingent fact, there is surely always *some* just combatant who doesn't consent to the Red Cross's treatment of reactivated unjust combatant even if their side is also helped by the Red Cross's presence.<sup>8</sup> Thus, the Red Cross is frequently (if not always) forbidden from treating reactivated unjust combatants. Even if that's false, this paper isn't only about *nonpartisan* field medics, but also *partisan* field medics, and just combatants would surely broadly object to *their own* partisan medics treating reactivated unjust combatants.

Thus, Frowe's account plausibly both nonpartisan and partisan field medics treating reactivated unjust combatants without the consent of all at-risk just combatants. Moreover, as Frowe's judgments about individualist cases like *Rescue*, *Dangerous Rescue*, and *Triple Rescue* are extremely plausible, REDUCTIVE INDIVIDUALISM is committed to them on pain of implausible denial. But what about the second prognosis for injured combatants?

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<sup>8</sup> Cf. Parry (2017).

#### DEACTIVATED:

*S* is a deactivated combatant just in case, were *S* to receive medical treatment, then *S* would not reassume the moral equivalent of their prior combatant status.

There are multiple ways to be a deactivated combatant: dying or become permanently comatose, military discharge, and swapping moral allegiances. Deactivated combatants lose the *moral equivalent* of their prior combatant status in each of these cases, whether by losing their combatant status altogether (death, permanent coma, military discharge) or by enlisting in a just moral cause (swapping allegiances).<sup>9</sup>

What does Frowe's account, as well as REDUCTIVE INDIVIDUALISM generally, imply about treating deactivated unjust combatants? Frowe says nothing explicitly about deactivated unjust combatants. However, they differ from reactivated unjust combatants in a key respect: Once treated, they won't continue unjustly threatening just combatants. Thus, it's less apparent that just combatants have a moral right against their treatment and that field medics are morally prohibited from treating deactivated unjust combatants. Despite this, there are three reasons why Frowe and reductive individualists ought to support a prohibition on treating even deactivated unjust combatants. First, due to the unfortunate reality of finite medical resources in war, devoting medical resources to the treatment of *any* unjust combatants, including deactivated ones, depletes those much-needed resources for just combatants. Such depletion deepens the vulnerability of just combatants, the prevention of which they have a moral right. Second, reductive individualists universally reject the following thesis of traditional just war theory:

#### EQUALITY:

Unjust combatants and just combatants are equally liable to be harmed in war.

Jeff McMahan explains why he rejects EQUALITY by illustrating an individualist moral principle:

*Police:* If a murderer is in the process of killing a number of innocent people and the only way to stop him is to kill him, the police officer who takes aim to shoot him does not thereby make herself morally liable to defensive action, and if the murderer kills her in self-defense, he adds one more murder to the list of his offenses. (McMahan 2009: 14)

McMahan then explicitly extends uses *Police* as a counterexample to EQUALITY:

That those who are liable to attack have no right of defense is true not only in relations among individuals in civil society but also in war. Those who fight solely to defend themselves and other innocent people from a wrongful threat of attack, and who threaten no one but the wrongful aggressors, do not make themselves morally liable to defensive attack. By engaging in morally justified self- and other-defense, they do nothing to forfeit their right not to be attacked or killed.... Like the police officer, they may not be attacked, even in self-defense. (McMahan 2009: 14)<sup>10</sup>

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<sup>9</sup> Gross (2008) explores the objection that militaries should prioritize care of reactivated just combatants over deactivated just combatants, since the former are more critical to military success.

<sup>10</sup> Cf. McMahan (2007).

So much for killing. What about saving (i.e., treating)? Consider the following example:

*Hospital:* When Officer confronts Murderer and draws her gun, both of them shoot simultaneously, seriously injuring the other. An ambulance arrives, but Medic announces she has room for only one patient. The other will be left behind and will certainly die.

Frowe, McMahan, and all reductive individualists would insist that Medic *prioritize* Officer over Murderer. The same prioritarian account applies: Officer ought to be prioritized over Murderer because the health threat to Officer was *unjustly* imposed, whereas the threat to Murderer was *justly* imposed. Extending this to the medical treatment of deactivated unjust combatants in warfare, who were injured in the course of pursuing unjust aims, the medical needs of just combatants ought to be at least prioritized over those of deactivated unjust combatants.<sup>11</sup> Third, a broader array of harms are caused and rights violated when field medics treat deactivated unjust combatants.

*Break-In:* Intruder plans to rob Victim and kill her if she interferes with the robbery. Intruder breaks into Victim's house through a skylight. Luckily, Victim notices and yanks the rope, causing Intruder to fall and break his leg. Victim calls and requests an ambulance. However, due to unusual circumstances, only *Victim* can cover the cost of Intruder's ambulance ride and hospital treatment. If Victim doesn't pay, Intruder will remain untreated.

It's unjust to use *only* Victim's financial resources to treat Intruder *sans* Victim's consent. The harms to Intruder are ones for which he is morally responsible and to which he is morally liable, whereas Victim's causing harm to Intruder are reasonably imposed. Thus, Victim should not be uniquely burdened with harms for which she isn't morally responsible. Of course, perhaps *the state* in which Victim resides should offer free healthcare to all citizens. But that is morally different from forcing Victim, *and Victim alone*, to shoulder Intruder's costs. For partisan field medics whose resources are funded principally or exclusively by the taxpayers of their state, devoted to the near-exclusive care of their co-partisan combatants, the use of those resources to treat enemy combatants introduces an unjust burden on the taxpayers in a way analogous to *Break-In*.<sup>12</sup> As an

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<sup>11</sup> This isn't *strictly* incompatible with TREATMENT, according to which field medics are 'often' obligated to treat deactivated unjust combatants. Even if just combatants ought to receive medical priority, that is consistent with a frequently active obligation to treat unjust combatants. The issue is not one of *whether* medics are obligated to treat unjust combatants, but *when* or *in what order*. Note, however, that Article 12 of the 1949 Geneva Convention prohibits prioritizing injured combatants on any grounds other than 'urgent medical reasons', thereby prohibiting prioritizing treatment on the basis of combatant status. Thus, unjust combatants might rarely, or never, receive treatment under the prioritarian principle.

<sup>12</sup> Some might object that whereas partisan field medics are prohibited from treating deactivated unjust combatants, that's untrue of nonpartisan field medics, as the latter don't *uniquely* burden one state's taxpayers. The Red Cross, for example, is funded by all states party to the Geneva Convention. However, TREATMENT claims *both* partisan and nonpartisan field medics are often all-things-considered morally obligated to treat deactivated unjust combatants. Thus, the claim that partisan field medics are forbidden to treat but nonpartisan ones aren't entails the falsity of TREATMENT. However, nonpartisan Red Cross medics *undermine* the partisan aims of taxpayers by *increasing* the burden to partisan taxpayers: The better the Red Cross helps enemy combatants, the more healthy enemy combatants there are, and thus the more injured friendly combatants there are. And in asymmetrical warfare, the winning side

unfair burden, its nonconsensual imposition is often *pro tanto* impermissible. Thus, it's not often all-things-considered morally obligatory. Thus, if REDUCTIVE INDIVIDUALISM is true, then TREATMENT is false.

Thus far, I have argued that REDUCTIVE INDIVIDUALISM entails a moral obligation on the part of partisan and nonpartisan field medics to refuse to treat reactivated unjust combatants, that some of the reasons motivating this moral obligation support a similar prohibition on treating deactivated unjust combatants, and that REDUCTIVE INDIVIDUALISM therefore entails the falsity of TREATMENT. So far, this is not an argument against the reductive individualist's position. What's needed is a defense of a moral principle that satisfies IRREDUCIBLE. It is to that task that I now turn.

### 3. DEFENDING TREATMENT

#### TREATMENT:

The treatment of deactivated unjust combatants (and maybe, in some cases, reactivated unjust combatants) by partisan or nonpartisan field medics is often all-things-considered morally obligatory even if just combatants don't consent to their treatment.

Despite its widespread appeal, TREATMENT has few arguments marshalled in its favor (Gross 2006; 2011; May 2007, chapter 4).<sup>13</sup> Those that have been marshalled tend to imply its truth only indirectly in the course of defending EQUALITY.<sup>14</sup> To fill this argumentative gap, I offer a *direct* argument for TREATMENT that doesn't presuppose other theses reductive individualists deny, like EQUALITY.

Warfare, while carried out by individuals, is executed primarily at the behest of states. It is states who determine *why* a war is fought, *where* a war is fought, *when* a war is fought, and *who* fights the war. Policymakers and heads of state declare war and command their armed forces to wage it. Traditional just war theorists identify three central moral principles states must satisfy for wars to be morally just: *jus ad bellum* (just cause for war), *jus in bello* (justice during war), and *jus post bellum* (justice after war). While reductive individualists might haggle over the extent to which combatants are responsible for their state's actions, they agree that states are certainly responsible for their combatants' actions. One plausibly true principle that reductive individualists can and should accept is that if *S* orders *C* to kill liable party *L*, then *S* should be reasonably confident that *C* won't kill nonliable parties in the course of killing *L*. However, suppose *S*'s reasonable expectations are shattered and *C* culpably kills some nonliable person *N*. How ought *S* to respond to this? Combatants who culpably kill nonliable persons in war are routinely disciplined, and there are analogous courses of action for individuals to pursue in individualist cases (e.g., reporting *C* to local authorities). But consider a different case:

*Rage:*           Victim's life is jeopardized by Threat, who culpably intends to murder Victim. Nearby is Bystander, who is nonliable and looks rather like Threat

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benefits far less than the losing side. So, the winning side of a war is disproportionately burdened by funding the Red Cross, as it overwhelmingly benefits their enemies.

<sup>13</sup> Michael Gross defends a modified version of TREATMENT wherein deactivated unjust combatants, but *not* reactivated ones, are permitted to be treated. See Gross (2006), at 124.

<sup>14</sup> Cf. Cebula (2020).



except for a prominent birthmark on their cheek. Victim knows if (and only if) she kills Threat, she will be filled with rage and will subsequently murder Bystander because Bystander resembles Threat.

If these are the costs Victim expects, then Victim ought not defend herself against Threat. The presumptive justification for self-defense is defeated by Bystander's right against harm. Nor can Victim appeal to a lesser-evil justification, as Bystander's death is not impersonally worse than Victim's death.<sup>15</sup> Thus, Victim is forbidden from killing Threat in this case. Consider a variant of *Rage*, which I shall call

*Compulsion:* Victim's life is jeopardized by Threat, who culpably intends to murder Victim. Nearby is Bystander, who is nonliable and looks rather like Threat except for a prominent birthmark on their cheek. Victim recently had her eyes dilated and can't see sufficiently well to defend herself. Fortunately, Victim is being escorted to her car by Optometrist who can defend her. But Optometrist is strange: He is obsessive-compulsive and does everything in twos. Victim knows if she asks Optometrist to defend her against Threat, Optometrist will kill Threat (saving Victim's life) but will also kill Bystander.

Is Victim permitted to ask Optometrist to defend her? No, since it's just as impermissible for Optometrist as for Victim to murder Bystander after killing Threat. Even if Victim has a right to Optometrist's defensive assistance, her right is limited to *proportionate* defense. Killing Bystander is disproportionate in the wide sense, as Bystander is nonliable. Thus, Victim (and Optometrist) are forbidden from killing Threat in *Compulsion*. Begging the reader's patience, I shall ask them to consider one final variant of *Rage*:

*Shootout:* Wyatt Earp's life is jeopardized as Curly Bill and three Cowboys confront him in the town square—but dressed as civilians, unadorned by their distinctive red sashes. Fortunately, Doc Holliday and Earp's brother Virgil are close to Wyatt, in the saloon, and would swiftly come to Wyatt's defense if called. However, Doc and Virgil don't recognize Curly Bill or the Cowboys without their red sashes. Dozens of nonliable parties are scattered throughout the square, unaware of the impending fight. Wyatt lacks the time to wave them off; he must either sacrifice himself or call on Doc and Virgil to join him, knowing the latter option would result in untold casualties to nonliable folks.

Wyatt isn't liable to be killed by Curly Bill and his three Cowboys, but nor are the dozens of nonliable civilians in the town square. Whereas Curly Bill and the Cowboys aren't using the civilians as human shields (and will kill far fewer than Doc and Virgil), they are indifferent to their deaths. But they *shouldn't* be, and nor should Wyatt. Reductive individualists like Frowe would

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<sup>15</sup> Of course, Victim's death is worse *for Victim*, but Bystander's death is worse for Bystander. Frowe (2014: 23) emphasizes that there's "widespread consensus that it is wrong to kill bystanders in the course of saving one's own life."

(rightly) claim that Wyatt isn't permitted to call Doc and Virgil into the fight, as there's a lesser-evil *obligation* to refrain from killing more nonliable people than you save (Frowe 2018). Consider

*Crimes:* General orders a battalion of 500 combatants into a local village to identify and capture enemy spies. Despite General's confidence in her troops, she knows a handful of nonliable civilians will inevitably be killed: some by accidental crossfire, others intentionally as war crimes. General's predictions are accurate: three nonliable civilians are killed accidentally, two intentionally and culpably.

Assume the three accidental killings were an unavoidable side effect of identifying spies. Further, assume their accidental killings, while unjust, were nevertheless *justified* in virtue of preventing more nonliable deaths than were caused. What should we conclude about the two *intentional* killings of nonliable civilians? The reductive individualist might claim their deaths were unavoidable side effects of war. But *for whom* were they unavoidable? The murdering combatants are *culpable* but wouldn't be if their killing wasn't reasonably avoidable. So, their killing *was* reasonably avoidable. A second, more promising proposal is that these deaths were unavoidable side effects of *General's orders*. A battalion of this size is necessary to scout a village of this size, securely capture enemy spies, and minimize nonliable civilian casualties. But it's the *size* of the battalion that makes war crimes unpreventable, and so unavoidable, for General. Nearly all General's combatants will carry out their duties responsibly and with integrity. But inevitably *some* won't, and it's not reasonably feasible to ascertain who's whom beforehand.<sup>16</sup> Had General handpicked four or five of her most trusted, conscientious combatants to search the village, their mission would have failed but no war crimes would have been committed. By contrast, had General handpicked four or five *untrustworthy* combatants, or was in a reasonable position to join their search of the village and oversee their behavior directly but declined to do so, then General's orders would have been morally impermissible. So, the war crimes weren't reasonably avoidable *by virtue of the group's size*.<sup>17</sup> So, there's a *group-based justification* for General ordering the battalion to search the village.<sup>18</sup> Call the operative principle

## GROUP RISK

For any war *W* declared by state *S*: If *S* is justified in declaring *W*, reasonably foresees some combatants will culpably harm nonliable parties in *W*, but *S* can't reasonably prevent them by virtue of the large number of combatants, then the foreseen harms to nonliable parties are *group-unavoidable* (and *group-justified*) but not (fully) *individual-unavoidable* (or *individual-justified*).

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<sup>16</sup> The same holds for Wyatt Earp in *Shootout* if he foresees one of his compatriots will *culpably* kill a nonliable civilian. However, I have assumed Wyatt's actions in *Shootout* are more closely analogous to General's selection of four or five trusted, conscientious combatants, and that Wyatt's calling in backup would be impermissible because of lesser evil considerations. Cf. Kutz (2008), at 81-85.

<sup>17</sup> For a different (but compatible) explanation, see Clark and Cave (2010).

<sup>18</sup> This isn't the *only* justification, of course. If General knows nonliable parties will be killed at all, then General needs a lesser-evil justification to satisfy wide proportionality requirements.

So, for reasonable avoidability, size (but not *only* size) matters. So, GROUP RISK satisfies IRREDUCIBLE.<sup>19</sup> I shall now argue that GROUP RISK supports TREATMENT.

What GROUP RISK establishes is a specially group-based permission to proceed with warfare. However, because the risk is undertaken by the *group*, they acquire residual responsibilities.<sup>20</sup> Reductive individualists frequently endorse *compensatory* responsibilities for merely foreseeable harms inflicted on nonliable parties in self-defense and in war (Frowe 2014: 92, 104; McMahan 2009: 10). And reductive individualists would (rightly) insist that the culpable combatants, above everyone else, should bear the compensatory burdens for harms for which they are primarily responsible.<sup>21</sup> So, combatants culpable for war crimes should be punished, dishonorably discharged, fined, and the like.

However, the same isn't true of the states who declare war foreseeing some combatants will misbehave in these ways. For states, which are (or at least oversee) groups, these unjustified harms are, to some real extent, unavoidable. Still, risk-taking groups have compensatory responsibilities. What follows is a partial list of those responsibilities:

- Vetting: States should take reasonable precautions to ensure their cadets are properly trained to follow the moral rules of war, deny combatant status to cadets who demonstrate a lack of moral conscientiousness or technical adeptness, and emphasize the punitive consequences of cadets violating their moral responsibilities. (Training & Oaths)
- Enforcement: States should provide a reasonable degree of oversight to ensure their combatants execute their duties responsibly, swiftly punish combatants who culpably/negligently violate their duties or take unacceptable risks, and create public awareness of these consequences. (Oversight & Punishment)
- Repair: States should take reasonable measures to minimize the extent to which culpable, negligent, or accidental unjust harms caused by their combatants are harmful; and should minimize the extent to which those harms go uncompensated in cases where there's a non-trivial risk the harms were unjustly (or unjustifiably) imposed. (Harm Mitigation & Uncertainty)

Among the moral travesties of warfare are merely foreseen harms and intentional, culpably imposed harms to nonliable enemy civilians (Talbert and Woffendale 2019). Many civilians are killed, others are seriously or permanently injured, others are mildly injured, and still others can't return home or are separated from their families by death or geography. It is widely accepted that merely foreseen harms are morally appropriate candidates for repair: that is, states should (where reasonably feasible) limit their combatants' ability to cause merely foreseen harms to nonliable parties and should provide compensation when those harms are actualized. The duty to repair grows stronger when the harms were, or had a non-trivial risk of being, imposed culpably or without justification. To make this more concrete, consider

- Criminal:* General, who foresaw that *some* of her troops would commit war crimes, has identified the culprit. Corporal confesses his crime to General: He

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<sup>19</sup> Here I assume that if *p* is an emergent moral property of group action but not an emergent moral property of individual action, then *p* satisfies IRREDUCIBLE.

<sup>20</sup> Cf. Corlett (2010).

<sup>21</sup> Cf. Bazargan-Forward (2017) and May (2007), chapters 11-13.

tortured two nonliable civilians, shooting a young mother in the leg and breaking her son's arm. Fortunately, neither Mother nor Son have died. But unfortunately, both are in critical condition. General is faced with deciding how to repair the unjust evils Corporal has wrought.

General might command Corporal to provide treatment to Mother and Son. However, this works only if Corporal can be trusted and has adequate medical knowledge and skills. Let's assume Corporal lacks those skills and is unable to provide adequate treatment to Mother or Son, as is true of most combatants in the actual world. What are General's responsibilities then? If General had been unable to *prevent* Corporal from unjustly harming Mother and Son in the first place, she would have been morally obligated to do so. Here, General can *mitigate* the extent to which Corporal's actions harm Mother and Son by issuing orders for them to be treated by friendly medical professionals. And this is not simply *General's* responsibility, as the *whole group* undertook these risks and thus became responsible for mitigating the unjustified harms to Mother and Son. So, logically prior to General's orders, Medic (*qua* group-member) is morally obligated to treat Mother and Son. So, there's a group obligation to treat Mother and Son.

But these are nonliable enemy noncombatants and this paper concerns *unjust combatants*. Why think a group obligation exists to treat unjust combatants, whether reactivated or deactivated? To stack the deck against my position, let's grant that *all* unjust combatants are *fully liable* to defensive harms. Even a generous admission like this is compatible with the possibility that unjust combatants aren't liable to a variety of *non-defensive* harms. For example, even unjust combatants are not liable to be raped, tortured, or (in the case of deactivated combatants who plausibly claim to surrender) killed for non-defensive reasons.<sup>22</sup> Yet these harms are predictably common in war (McLauchlan 2014; Scholz 2006). By this, I don't mean that the *average* harm suffered by unjust combatants is one to which they aren't liable. Rather, it's that there are *many* actual harms to unjust combatants to which they aren't liable. Given the predictable chaos of war, it is also likely that these unjustified harms are *undercounted*. The true number of unjust combatants who suffer disproportionate harms is unknown and likely *numerous*. So, it's foreseeable that numerous unjust combatants will suffer disproportionate harms in war. So, the risk-taking groups are responsible for these harms, including *repairing* these harms. Because it's unclear *how many* and *which* unjust combatants were disproportionately harmed, groups who proceed with warfare despite foreseeing these harms ought to treat unjust combatants. Nor are unjust combatants liable to being placed at risk of unjustified harm. Thus, GROUP RISK implies TREATMENT.<sup>23</sup>

Before concluding my defense of TREATMENT, I hope to fend off one important objection. Assume that the average harm to unjust combatants is one to which they're liable. If true, then for any unjust combatant *S*, it's more likely than not that *S*'s injuries are ones to which *S* is liable. So, for any unjust combatant *S*, it's likely the risk-taking group isn't morally obligated to treat *their* injuries. So, risk-taking groups are generally *not* obligated to treat unjust combatants, a conclusion that contradicts TREATMENT. Argued another way: The average just combatant is unlikely to be culpably responsible for deploying disproportionate force. So, it's irrational to *act as if* the average

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<sup>22</sup> This claim is compatible with the claim that torture can be used or justified defensively. For a defense of defensive torture, see Steinhoff (2012). For criticism, see Lang (2017).

<sup>23</sup> The focus of GROUP RISK is restricted to culpably harming 'nonliable parties', whereas my argument in this paragraph extends the focus to culpably harming 'partially liable parties' (i.e., they are liable to *defensive* harms, but not to *non-defensive* harms). But this is a plausible extension, as groups are responsible for *all* unjustified harms they foreseeable impose. So, they are responsible for *narrowly disproportionate* harms they foreseeable impose.

just combatant is guilty. By analogy, it's irrational to act as if the average unjust combatant is *innocent* (i.e., culpably harmed in excess to their liability).<sup>24</sup> My reply: If risk-taking groups fail to treat *any* unjust combatants, they will (foreseeably) fail to treat *unjustly harmed* unjust combatants, which they are obligated not to do. If treating the other unjust combatants is a side effect of discharging this duty, then the risk-taking groups merely do more than is required in the course of doing all that is required. But that suggests a tougher objection: If treating *all* unjust combatants allows reactivated unjust combatants to cause further unjustified harms, this is a side effect incompatible with the moral obligation of the group: namely, to prevent greater evils.<sup>25</sup> Both objections fail. First, the consensus view permits only *unintentionally caused* unjust harms. The risk-taking group bears *ex ante* responsibility for allowing unjust harms and, if they leave unjust combatants untreated, they would be just as responsible as the culpable friendly combatant. To see why, consider the following case:

*Caught:* Corporal is about to commit a war crime—torturing an unjust, disarmed, critically wounded combatant for mere pleasure—when General catches him. General can prevent Corporal from torturing Enemy only by lethally shooting Corporal. However, General knows that Corporal is one of their best soldiers and that his death would weaken their chances of winning a just war. For that reason, General walks away, allowing Corporal to torture Enemy.

By walking away, General permits intentionally caused harms *on behalf of the group* whose collective purpose is to prevent greater evils, thus making the group *complicit* in Corporal's intentionally caused unjust harms. And complicity in intentionally caused unjust harms is morally equivalent to intentionally *causing* unjust harm. So, if the consensus view permits only unintentionally caused unjust harms, then it prohibits intentionally caused unjust harms and their moral equivalents, including intentional failure to prevent them. A sufficient condition for complicity in intentionally caused unjust harms is consciously refusing to prevent those harms either by preventing their alleviation. So, the consensus view prohibits conscious refusal to alleviate intentionally caused unjust harms. So, the consensus view fails to undermine TREATMENT.

## 4. CONCLUSION

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<sup>24</sup> Is this irrational? Consider some routine military practices: conditional threats to follow orders, aggressive inquiries to ensure compliance and identify guilty parties, and group-based punishments to foster group-responsibility and cohesion. And it is difficult to maintain that the particular individuals, *qua* individuals, are liable to these *prima facie* mistreatments. But these practices needn't assume that *any particular* just combatant is guilty. Indeed, most aren't. So, the practice of providing medical care to all unjust combatants needn't assume that *any particular* unjust combatant is innocent. Indeed, most aren't. At most, how individuals are treated in these cases reflects their *group-responsibility* (i.e., their membership in the risk-taking group), not their individual responsibility.

<sup>25</sup> If true, this entails that just combatants are lesser-evil justified in *intentionally causing* unjust harms to nonliable and liable parties. In fact, in cases where the evils to be prevented are sufficiently great and require the intentional murder of nonliable or partially (but insufficiently) liable parties, they are lesser-evil *obligated* to engage in war crimes. On Frowe's view, lesser-evil obligations entail no liability. So, just combatants with lesser-evil obligations to commit war crimes aren't liable to defensive harm. Plausibly, they wouldn't be liable to *punitive* harm either, having done only what they were required to do. See Frowe (2018).

REDUCTIVE INDIVIDUALISM claims that all true moral principles of permissible warfare are reducible to true moral principles that bind individuals. So, if it's false, it is because some true moral principle of permissible warfare is irreducible. One line of attack is to defend cases where *only* a group-level or collective principle plausibly explains our ethical intuitions. Another, more modest, strategy is to identify cases where *not only* individual-level principles explain them. I have pursued the latter strategy, defending the mainstream view, enshrined in the Geneva Convention, that the treatment of deactivated unjust combatants (and maybe, in some cases, reactivated unjust combatants) by partisan or nonpartisan field medics is often all-things-considered morally obligatory even if just combatants don't consent to their treatment. Call this thesis TREATMENT. First, I explain why reductive individualists like Helen Frowe deny TREATMENT with respect to what I call *reactivated* unjust combatants, and then explain why they also have good reasons to deny TREATMENT with respect to *deactivated* unjust combatants. Second, I develop a novel defense TREATMENT. A plausible principle, GROUP RISK, entails that war crimes committed by particular members of the group, while reasonably avoidable for individuals, are (to a real extent) not so for groups. So, the justification for permitting them is collective but not individual. GROUP RISK, in turn, implies that states and military hierarchies are responsible for vetting and enforcing the moral responsibilities of their combatants, as well as making repairs when their combatants fail in those responsibilities. One unfortunate empirical fact of warfare is that unjustified harms both to nonliable civilians *and* unjust combatants are undercounted. States thus have good reason to treat *all* unjust combatants, including (at least in some cases) reactivated ones. So, TREATMENT is true and satisfies the irreducibility criterion. So, REDUCTIVE INDIVIDUALISM is false.

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