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## SYMPOSIUM ON SETH LAZAR'S SPARING CIVILIANS: INTRODUCTION

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'Killing civilians is worse than killing soldiers'. So opens Seth Lazar's *Sparing Civilians*: a painstaking defence of the moral protection of non-combatants in war. Lazar insists that this principle 'commands near universal assent [...] it is written into every major historical and religious tradition that has addressed armed conflict [...] it is widely and viscerally affirmed.' And yet it stands in need of defence – thanks, in no small part, to the attempts of some philosophers to erode this apparently fundamental tenet of the ethics of war.<sup>1</sup>

The increasing theoretical focus on the rights and duties of individuals in war, rather than the status of collectives and their representatives, has laid bare the difficulties in sustaining the general worseness of killing non-combatants compared to killing combatants. As Lazar agrees, a great deal of the justificatory work for killing a person is done by invoking her liability to harm – that is, whether, and the extent to which, she has forfeited her usual rights against being harmed. On a widely-accepted account of liability, which Lazar shares, a person becomes liable to harm when harming her is a necessary and proportionate means of averting an unjustified threat for which she bears sufficient moral responsibility.<sup>2</sup>

The threshold of sufficient moral responsibility will largely determine how widespread liability is. If one need be only minimally

<sup>&</sup>lt;sup>1</sup> I take myself and Victor Tadros to explicitly argue against the general worseness of killing non-combatants compared to killing combatants. See Frowe, *Defensive Killing* (OUP, 2014), and Tadros, 'Orwell's Battle with Britain: Vicarious Liability for Unjust Aggression', *Philosophy and Public Affairs*, (2014) 42, 1, 42–77. Jeff McMahan, in contrast, has tried to reconcile some kind of widespread, if largely contingent, non-combatant immunity with his other claims about the ethics of war, but his work has undeniably contributed to eroding the plausibility of non-combatant immunity. See, for example, *Killing in War* (Oxford: OUP, 2009), especially Chapter 5.

<sup>&</sup>lt;sup>2</sup> Jeff McMahan is the most well-known proponent of this account. See, for example, *Killing in War* (Oxford: OUP, 2009).

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responsible (for example, knowingly engaging in a risk-imposing activity, or knowingly making only a 'small' or indirect causal contribution to a threat, however we judge that), then many people will be liable with respect to the threats of an unjust war.<sup>3</sup> If, in contrast, one must be significantly responsible (for example, fully culpable, posing a direct threat), then comparatively few people will be so liable.<sup>4</sup>

But, crucially, settling the appropriate threshold of responsibility will not generate a distinction between the liabilities of combatants and non-combatants. Rather, as Lazar argues in his earlier influential response to Jeff McMahan's *Killing in War*, liability-based accounts seemingly force what he calls a Responsibility Dilemma for the just war theorist. The lower the threshold for sufficient responsibility for an unjustified threat, the greater the number of combatants *and* noncombatants who will be liable to be harmed. Many non-combatants knowingly contribute to the unjustified threats of war. If knowingly contributing to unjustified harm – perhaps even in only small, indirect ways – can ground liability, these non-combatants will be liable to harm. This horn of the dilemma thus undermines noncombatant immunity.

But if the appropriate threshold is significant responsibility for an unjustified threat – say, being fully culpable for a significant contribution – then few non-combatants *or* combatants will be liable to harm. Many combatants have at least partial excuses for contributing to unjustified threats – they might act under duress, be convincingly misled as to the justice of their cause, and so on. This horn of the dilemma undermines the possibility of fighting a just war at all, since

<sup>&</sup>lt;sup>3</sup> Jeff McMahan and Cecile Fabre both suggest that one's causal contribution to an unjustified threat must pass a certain threshold of significance in order to ground liability. I have argued that what matters is whether one contributes, not how much one contributes. Some theorists think one can be liable without making a causal contribution, provided that one is, for example, culpable in some relevant respect (see, e.g., Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (OUP, 2011); Kimberly Kessler Ferzan, 'Culpable Aggression: The Basis of Moral Liability to Defensive Killing', *Ohio State Journal of Criminal Law* (2013) 9, 669–695. Recent work has also cast doubt on the plausibility of distinguishing between the 'size' of contributions at all. See Victor Tadros, 'Causal Contributions and Liability', *Ethics* (2018) 128, 2, 402–431, and Carolina Sartorio 'More of a Cause?' (unpublished manuscript). For a partial defence of the role of degrees of causation in liability, see also Helen Beebee and Alex Kaiserman, 'Causal Contribution in War' (unpublished manuscript).

<sup>&</sup>lt;sup>4</sup> We might also think that moral responsibility is partly determined by the degree of one's causal contribution, such that those who culpably make only negligible causal contributions do not meet the threshold.

<sup>&</sup>lt;sup>5</sup> Seth Lazar, 'The Responsibility Dilemma for Killing in War', *Philosophy and Public Affairs* (2010) 38, 2, 180–213.

any war will inevitably involve intentionally killing large numbers of non-liable people. Wherever we set the threshold, what Lazar calls the Overlap Hypothesis will apply: a significant proportion of noncombatants will be as responsible as a significant proportionate of combatants for the unjustified threats of the war.

Several theorists believe that the lower responsibility threshold for liability is the right one – that it is not generally plausible that only those who threaten directly, or fully culpably, might lack rights against defensive harm. It is this belief that underpins what Lazar sees as the assault on non-combatant immunity. Lazar himself leans towards the second horn of the dilemma: he thinks that the responsibility threshold for liability is high, and thus most non-combatants and many combatants are not liable to be killed, even if they are on the unjust side of a war. If war is ever justified, he argues, it must be because lesser-evil considerations play a much more significant role in that justification than previously thought, since they must justify the harms that we inflict on many combatants as well as on non-combatants. By granting this possibility, he thinks we can avoid pacifism without rendering non-combatants fair game.

If we were looking for other moral principles that command near universal assent, we might well pick the principle that killing a combatant – even if he or she is justly fighting for a just cause – is not wrong or, at the very least, is not like an ordinary murder. Michael Walzer famously argues that '[s]imply by fighting, whatever their private hopes and intentions, [combatants] have lost their title to life and liberty'. Just like the principle of non-combatant immunity, this principle of combatant non-immunity enjoys an entrenched and noble history – the killing of soldiers is celebrated and admired across cultures – and is reflected in our legal practices. But it too is challenged by recent work on individual rights and duties. Just combatants do not plausibly forfeit their rights by posing justified

<sup>&</sup>lt;sup>6</sup> Sparing Civilians, p. 18.

<sup>&</sup>lt;sup>7</sup> Sparing Civilians, p. 10.

<sup>8</sup> Walzer, 136.

<sup>&</sup>lt;sup>9</sup> Scholars of international law disagree about the precise status of combatant-killing in the law-for example, whether there is such a thing as a legal 'combatant's privilege' to kill, or merely a legal immunity from prosecution (see e.g., Adil Ahmad Haque, *Law and Morality at War*, (Oxford: OUP, 2017); Jens David Ohlin, 'The Combatant's Privilege in Covert and Asymmetric Conflicts', *Yale Journal of International Law* (2015) 40, 337–393. Ohlin describes the combatant privilege to kill without legal sanction as 'the basic building block of the law of war'). Either view satisfies the claim our legal practices reflect this principle.

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defensive threats to people who are posing unjustified lethal threats. Just combatants thus seemingly retain their normal rights against being killed. Unjust combatants, in contrast, are at least candidates for liability: at best, *their* rights depend on whether, for example, they have a sufficient excuse for their wrongdoing. And, as Jeff McMahan has argued, even granting the role of excuses, it is hard to believe that the objective wrongfulness of their killings is irrelevant to unjust combatants' moral status. <sup>10</sup> It matters, morally, that unjust combatants are typically merely excused for their actions, whereas just combatants are typically justified.

That Lazar grants the moral significance of both individual liability and the justness of one's war makes his defence of the worseness of killing civilians all the more impressive. His claim is especially ambitious because it is intended to apply to both just and unjust combatants: even when one should not be killing anyone because one's war is unjust, it is still worse to kill civilians than soldiers. *Sparing Civilians* thus serves as a substantive response to Henry Shue's lament (which Lazar iterates in his response in this symposium) that revisionist just war theorists have nothing to say to unjust combatants, other than imploring them not to fight at all. Lazar's view does not grant unjust combatants permission to fight, but indicates how the gravity of their wrongdoing might be constrained.

Sparing Civilians develops and defends five central arguments:

- 1. *Necessity*: Killing civilians is (often) unnecessary, but killing soldiers is necessary. Unnecessary killing is worse than necessary killing.
- 2. *Opportunism*: Killing civilians is opportunistic; killing soldiers is eliminative. Opportunistic killing is worse than eliminative killing.
- 3. *Risk*: More risky killings are worse than less risky killings. Killing a civilian is riskier than killing a soldier because the civilian is more likely to be innocent.
- 4. *Defencelessness and vulnerability*: Killing the defenceless and vulnerable is worse than killing those who are less defenceless and vulnerable. Civilians are more defenceless and vulnerable.

<sup>10</sup> McMahan, Killing in War, 114-115.

<sup>&</sup>lt;sup>11</sup> Henry Shue, 'Do We Need a 'Morality of War'?', in David Rodin and Henry Shue (eds.), *Just and Unjust Warriors* (Oxford: OUP, 2008), 87–111.

5. *Combatant non-immunity*: For various reasons, including their recklessness and their voluntary exposure to risk, killing combatants is better than killing civilians.

None of these arguments is presented as individually decisive. But Lazar claims that, taken together, they give us overwhelming support for *Moral Distinction*:

Moral Distinction In war, with rare exceptions, killing non-combatants is worse than killing combatants.

It's worth noting that Lazar does not defend the claim that killing *liable* non-combatants is worse than killing liable combatants. Since he thinks that non-combatants are hardly ever liable, he sets this possibility aside (it would, perhaps, fall under the 'rare exceptions' category, in which it is not worse to kill non-combatants). Of any actual war, Lazar thinks that very nearly all non-combatants and many combatants on both sides are non-liable. But, if Moral Distinction is true, it is still worse for both just and unjust combatants to kill non-combatants.

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The four commentators in this symposium – Cheyney Ryan, Victor Tadros, Alec Walen and Yitzhak Benbaji – each offer important clarifications of Lazar's thesis, along with insightful objections. <sup>12</sup> Each paper independently constitutes a significant contribution to our understanding of the moral status of both combatants and non-combatants, and the papers' breadth is testimony to the scope of Lazar's book.

Cheyney Ryan begins by articulating a general concern that just war theorists fail to properly recognise the role of the citizenry in the waging, if not the fighting, of war. That a citizen can be required by her state to contribute to a war – to devote her resources, or to fight directly – demands that she be in a position to authorise the war, both on grounds of legitimacy, and grounds of prudence. That one will bear the cost of war undoubtedly serves as a constraint on one's willingness to wage war. And authorisation need not mean voting for the war – rather, it can be manifested by providing the general support that makes the war possible. Popular support is essential for

<sup>&</sup>lt;sup>12</sup> The papers were originally presented at a joint workshop on *Sparing Civilians* and *Defensive Killing*, hosted by the Carnegie Council for Ethics and International Affairs in New York in September 2015, and co-sponsored by the Society for Applied Philosophy, Australian National University and the Knut and Alice Wallenberg Foundation.

sustaining the war; concomitantly, one need not defeat an enemy militarily if one makes war sufficiently unpalatable to its people. Both civilians and soldiers can thus be responsible for wars in the authorisation sense of 'responsible', even if they do not fight themselves. As elsewhere in his work, Ryan cites the deep unfairness of protecting an authorising civilian population at the expense of the fighting population: as he argues, when the U.S. went to war in Vietnam, 'the vast majority of soldiers had little or no choice in becoming contributing agents, while the American people had complete choice as authorizing agents'.

Ryan argues that their authorising role in the war affects both the responsibility of citizens for the harms of war, and the character of harms inflicted upon them in as part of that war. Once we think of citizens as authorizing agents, we have reason to doubt Lazar's claim that harming civilians is typically opportunistic: that it makes objectionable use of the civilians, treating them as 'props' in a horror show. Ryan defends this claims by way of an analogy with harms to Mafia bosses who have ordered a violent turf war. If harming the bosses is a means of stopping the violence, we would be unlikely to view such harming as wrongful opportunism. We are not trying to derive benefits from harming them which we could not have derived in their absence, which is how Lazar defines opportunistic harming.

Similarly, Ryan argues, when citizens authorize a war by knowingly sustaining that war, we cannot plausibly describe harms aimed at them as 'opportunistic', or think that one objectionably treats them as a tool by harming them in a bid to halt a war for which they are responsible. Ryan suggests we instead think of this as *persuasive* harming, and that it's much less obvious that persuasive harming in this context is worse than eliminative harming.

Ryan argues that thinking about the role of the citizenry in war, and the broader meaning of victory, also puts pressure on Lazar's understanding of when harming civilians might be necessary. Lazar grants that the necessity argument does not provide significant support for Moral Distinction, since we can imagine cases in which harming civilians is necessary for achieving some military end: necessity, he says, 'protects civilians least when they need it most'. But whereas Lazar focuses on somewhat anomalous cases within

<sup>13</sup> Sparing Civilians, p. 54.

asymmetric warfare and terrorism, Ryan argues that the worry is much more general, since Lazar's approach assumes a particularly narrow account of what it is to win a war. Military victories that do not crush morale can lead to a mere hiatus rather than genuine defeat: citing Clausewitz, Ryan suggests that 'true victory can never be achieved by military means alone'. Lest his be thought an overly pessimistic view of world affairs, Ryan suggests that only this kind of thinking plausibly explains the United States' use of atomic weapons against Japan at the end of World War Two. Whilst unnecessary for securing an immediate military victory - the Japanese no longer posed a credible threat - the attacks were intended to destroy the Japanese people's willingness to fight war in general. And, Ryan suggests, experience from World War One had shown that less dramatic harms, such as slow starvation, would not achieve this kind of victory. Given the goal of comprehensive and lasting victory, much greater harms, aimed at civilians, might well be construed as necessary.

Alec Walen's discussion also focuses on Lazar's claim that opportunistic harming is worse than eliminative harming – specifically, on Lazar's acknowledgment that many killings in war combine these modes of agency, but that non-combatants killings are nonetheless *more* opportunistic than eliminative, whilst combatant killings are more eliminative than opportunistic. Hence, non-combatant killings are still worse than combatant killings, even if both are eliminative and opportunistic to some degree.

Walen asks us to compare three versions of a trolley case in which a bystander can divert a trolley away from five towards one.

- (i) *Benevolent* The bystander is concerned to save the five and regrets the death of the one.
- (ii) *Mixed* The bystander acts somewhat benevolently and somewhat maliciously: she acts only because she can save the five and would have turned the trolley if the one were absent, but she also hates the one and is glad of his death.
- (iii) *Malicious* The bystander would not have turned the trolley unless doing so were justified, but she is not motivated by the justifying reasons. Rather, she acts on her hatred of the one. She would not turn the trolley if the one were absent.

Walen is doubtful that the mixed-motive bystander acts wrongly at all – at least, in killing the one, she does not plausibly violate any claim of his. We might blame her for being partly motivated by malice, but she nonetheless acts on the appropriate justifying reasons. It's unlikely, for example, that we would try to prevent her from diverting the trolley – on the contrary, we might even encourage her to divert.

The malicious bystander, in contrast, may act wrongly. But she does not commit a serious wrong on a par with an ordinary murder – she is not like someone who turns the trolley onto the one when there are no five to be saved. Hers is a much lesser wrong: it is, Walen claims, 'a *wrongful* killing, but it is not a wrongful killing'. The wrongness attaches to the bystander's offensive attitude towards the one, not to the action she performs. And this kind of wrongdoing is not, he argues, the sort of wrong 'on which to hang much of interest for just war theory.'

If so, Lazar's argument that, despite their mixed motives, non-combatant killings are importantly worse than combatant killings in virtue of being more opportunistic looks false. Rather, this kind of worseness is, Walen claims, 'irrelevant to any kind of distinction between permissible and impermissible action that should be a concern to just war theory.' Even if killing non-combatants is more opportunistic than eliminative, the presence of mixed motives seems unlikely to provide the kind of robust support of non-combatant immunity that its defenders, including Lazar, are seeking.

Yitzhak Benbaji's paper argues that *Sparing Civilians* falls victim to the Responsibility Dilemma that Lazar poses to McMahan: that is, Lazar does not give us grounds to reject pacifism, nor to adequately sustain non-combatant immunity. Even if killing civilians is worse than killing combatants, killing non-liable combatants could still be sufficiently bad to make war impermissible. The truth of Moral Distinction is thus consistent with pacifism. And, since Moral Distinction does not tell us how much worse it is to kill a civilian than a combatant, it does not rescue non-combatant immunity which, to Benbaji's mind, is numbers-insensitive. It leaves open the possibility that when the cost of killing soldiers is high, it's still overall best to kill civilians instead.

Benbaji focuses on Lazar's Risky Killing thesis – the claim that killing a non-combatant is riskier than killing a combatant because the non-combatant is less likely to be liable. Lazar believes that (other things being equal) killing an innocent person is worse the more likely it is that she is innocent. The higher the risk of wrongful harm that one imposes on a person, the more disrespectful one's action. Benbaji explores the implications of Risky Killing for what he calls *Spare and Fight* and *Spare and Surrender* cases.

Spare and Fight: To take over a strategic hill and thereby pre-empt a deadly aggression, defenders must either engage and kill enemy combatants at relatively close quarters, or, use an aircraft to attack enemy civilians whose presence on one of the routes leading to the hill is an obstacle to its successful conquest. Any attempt to capture the hill by pushing civilians away would cause delay and eventually failure.

Spare and Surrender: In order to eliminate a deadly threat that aggressors pose, defenders must first kill civilians who constitute an irremovable obstacle for taking over a strategic hill (the hill being the only point from which a surprise attack on the aggressor is possible). Again, any attempt to push them away instead of killing them would slow down the invasion and ultimately lead to failure.

Killing the civilians in *Spare and Fight* is prohibited under international law even if the alternative is killing a greater number of combatants (Benbaji points out that defenders of civilian immunity typically regard it as numbers-insensitive in this way). And, killing the civilians in *Spare and Surrender* is prohibited even if there is no alternative for achieving the military advantage, and thus the alternative will lead to the killing of (even more) innocent people by the aggressors.

Benbaji points out that *Spare and Surrender* cases will be common features of asymmetric wars in which non-state combatants conceal themselves amongst the civilian population. And, he argues, Lazar's defence of Risky Killing commits him to prohibiting killing anyone in such cases, since Lazar argues that killing at random when one might kill innocent people is as bad as intentionally killing the innocent. In cases in which a combatant cannot tell whether she is firing on combatants or civilians, she must refrain from firing altogether.

For Benbaji, if Moral Distinction is to adequately protect civilians, Lazar must show that killing becomes *much* worse the riskier it gets And he must strengthen what he calls the Deontological Clause – that intentionally killing innocent people is worse than unintentionally allowing others to kill innocent people – to insist that killing is *much* worse than allowing others to kill. However, Benbaji argues

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that endorsing this clause undermines Lazar's grounds for holding military leaders in breach of civilian immunity, if we also accept its close cousin that intentionally killing innocent people is worse than intentionally allowing others to kill innocent people. This violates what Benbaji calls the 'No Gap' thesis, according to which there is no moral difference between the responsibility of a combatant for the killings she carries out, and the responsibility of her leader for omitting to prevent those killings.

Benbaji suggests that Risky Killing is also undermined by distinguishing more clearly between danger-risk and liability-risk – that is, between the risk that one will inflict harm, and the risk that the person whom one harms will not be liable. An action's overall riskiness must be a function of both the degree of danger-risk and of liability-risk. But, unlike liability-risk, danger-risk is insensitive to whether one is a combatant or a non-combatant. Thus (assuming the equal weight of each determinant) there will be cases in which the greater danger-risk to a combatant outweighs the liability-risk to a non-combatant. If it is very likely that the combatant will be killed, exposing her to that risk might be impermissible even granting that she is more likely to be liable. Benbaji suggests that setting aside the danger-risk, and focusing instead on cases in which one intends to kill one's victim (irrespective of how likely one is to succeed), best captures the disrespect that motivates Risky Killing. (Tadros, in his paper, also argues that the likelihood of success seems irrelevant to the wrongness of an intentional killing.)

Benbaji argues that we can read Risky Killing in two ways: *de dicto* or *de re*. The *de dicto* reading focuses on overall riskiness: if one will kill one innocent person whether one performs action A or action B, A and B are equally risky. The *de re* reading is individualised, comparing the riskiness of killing each person threatened by A with the riskiness of killing each person threatened by B. Benbaji argues that the *de re* reading is less plausible because it yields counterintuitive results. It requires us to kill more people in cases in which increasing the number of threatened liable people correspondingly decreases the risk that any given threatened person is innocent (assuming one cannot distinguish between the liable and the non-liable). And yet, he argues, the underlying thrust of Lazar's account commits him to the

de re reading, focusing as it does on disrespectful attitudes to individuals.

In order to resolve the implausibility of the *de re* reading, Benbaji argues that Lazar must concede the relevance of numbers: he is forced 'to the position that standard consequentialist reasons easily outweigh the Risky-Killing-based reason for killing a greater number of liable people.' Hence, Risky Killing cannot produce the number-insensitivity that defenders of non-combatant immunity (ought to) seek.

Victor Tadros's paper offers a systematic and comprehensive critique of *Sparing Civilians*, objecting to each of the five arguments Lazar marshals in favour of Moral Distinction. He is generally sceptical of Lazar's claim that Moral Distinction can be plausibly applied to the actions of unjust combatants. For while it may be true that harming a person opportunistically (or, in Tadros's terms, manipulatively) is harder to justify than harming her eliminatively, it doesn't follow that *unjustified* opportunistic killings are worse than *unjustified* eliminative killings. Such killings may well be on a moral par when they are both impermissible. Since unjust combatants are, by hypothesis, unjustifiably killing both combatants and non-combatants, Lazar's arguments do not support the worseness of opportunistically killing civilians compared to eliminatively killing combatants.

Tadros is also sceptical of Lazar's suggestion that in order to judge the soundness of Moral Distinction, we should hold constant the reason why a person is being killed. As Tadros points out, it's precisely the different reasons at play in killing non-combatants compared to killing combatants that seem to underpin our moral condemnation of intentional non-combatant killings. As we saw above, Walzer suggests that combatants may be killed because they pose threats. But non-combatants, in most people's view, do not pose threats, which makes it wrong to kill them. Whilst not inconsistent with Moral Distinction, Tadros suggests that Lazar's exclusion of the reason why a person is killed is at odds with the most common reason for believing Moral Distinction.

Moreover, by invoking necessity as a defence of the worseness of killing civilians, Lazar seems to rely on the reasons why a person is killed to support Moral Distinction. Necessity is an inherently instrumental notion: something can be necessary or unnecessary only in relation to a given end. The natural understanding of the claim that killing non-combatants is unnecessary, and that Lazar explores at length, is that killing them is unnecessary for achieving military ends (or so the story goes). Thus, in killing non-combatants, we can't be aiming at military ends (or at least, not solely at military ends). But then we do not hold our aims constant if we hold that, in effect, combatant killings are less bad because they *do* serve military ends – that is, because they are necessary for achieving military ends. Nor, Tadros claims, do these comparisons hold constant the number of people affected by a killing. Killing combatants is necessary because it protects other people from harm. We thus have goods relevant to the badness of killing combatants that are absent with respect to the killing of non-combatants.

Tadros argues that even if we revise Moral Distinction to accommodate the different ends and effects of different killings, we still have grounds to reject it. Most strikingly, he argues that when one is fighting an unjust war, it is in fact often worse to kill a combatant than a non-combatant. Killing just combatants not only wrongs the combatants. It also furthers the unjust side's unjust ends. It simultaneously prevents the combatants from achieving their just ends – ends that they have made significant sacrifices to pursue. Moreover, combatants have admirably put themselves at risk for the sake of others. We have reason to think that this makes killing them worse than killing those who have not tried to save others (much as many people think it especially bad when a police officer is killed in the line of duty).

As I indicated above, each of these papers contains much more than I have been able summarise here, as, of course, does *Sparing Civilians* itself. In his response, Lazar mounts a characteristically robust defence of Moral Distinction that clarifies and refines each of his arguments and, he suggests, further strengthens our moral grounds for protecting civilians in war. Those already familiar with

the book will know that it is a remarkable piece of work; those yet to read it will, I hope, be encouraged by this symposium to do so.

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