

**Should Citizens Pay for the Costs of Their State's Unjust
Actions? Defending an Individualist Moral Responsibility-
Based Account of Liability**

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List of Acronyms

DAP Democratic Authorisation Principle

LEDP Liability for Epistemic Deficit Principle

LPL Liberal Principle of Legitimacy

NDJ Natural Duty of Justice

RJWT Revisionist Just War Theory

TJWT Traditional Just War Theory

Abstract

Should Citizens Pay for the Costs of Their State's Unjust Actions? Defending an Individualist Moral Responsibility-Based Account of Liability

A state that violates international law incurs a duty to repair harms caused by its transgression. This will often require pecuniary compensation to be paid to injured parties. To discharge its reparative duty, the state will use public funds or increase taxation. Its reparative burden is, therefore, passed on to its citizens. When, if ever, is this morally justified? In this thesis, I defend an individualist moral responsibility-based account of liability against a number of objections and demonstrate that it can provide intuitively compelling and theoretically defensible answers to the question of whether a particular state's citizens should pay for the costs of its unjust actions.

In defending my account, I will reject an argument which holds that the moral responsibility-based account cannot assign liability for overdetermined harm. The argument runs as follows: no individual is causally responsible for an overdetermined harm; causal responsibility is a necessary condition of moral responsibility; and moral responsibility is a necessary condition of liability. I deny the possibility of overdetermination, and I argue that the *appearance* of overdetermination simply reflects a lack of sufficiently fine-grained evidence. This presents us with a problem – we do not know who is culpably morally responsible for the harm. If we do not know who is culpably morally responsible for the harm then we do not know who is liable for the harm. I argue, however, that individuals can render themselves liable for a harm by culpably depriving its victim, or someone acting on her behalf, evidence of the identities of the persons liable for the harm. These arguments underpin my defence of the capacity of an individualist moral responsibility-based account of liability to explain when citizens should pay for their state's unjust actions.

I defend my argument against some other important objections, but I also reject an alternative approach to explaining whether citizens should pay for the costs of their state's unjust actions. I call this the 'Collectivisation Strategy'. Its proponents believe it capable of avoiding the numerous problems that are said to besiege an individualist moral responsibility-based account of liability. This alternative account conceives of the state as a corporate moral agent, and it holds that the state, *qua* corporate moral agent, can be liable for unjust harm. The key to its success, however, is explaining *when* and *why* the state, so conceived, is justified in imposing shares of its liability-burdens on its citizens. I consider and reject two such justifications. Having rejected these alternative accounts, and by overcoming the arguments made against individualist moral responsibility-based accounts, I demonstrate that my account is intuitively compelling and theoretically defensible, and can tell us whether particular a state's citizens should pay for the costs of its unjust actions.

The University of Manchester

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1. Introduction

1.1 Should Citizens Pay for the Costs of their State's Unjust Actions? Defending an Individualist Moral Responsibility-Based Account of Liability

I believe that a huge numbers of Iraqi citizens have been and are being wronged by being made to bear the costs of Saddam Hussein's decision to invade Kuwait in 1990. The United Nations Compensation Commission has awarded approximately \$52.4 Billion in compensation for losses or damages suffered as a result of the invasion (United Nations Compensation Commission, 2014). Some argue, and I agree, that citizens of the UK should be made to pay for the costs resulting from the Blair government's decision to invade Iraq in 2003. These contrasting judgements might reflect a belief that those who are responsible for a harmful state of affairs have a duty to repair it, and we do not think the citizens of Iraq were responsible for the invasion of Kuwait. All of the citizens of the UK, however, are responsible for the Blair government's decision because it was democratically elected. But this might not be the whole story; the decision to invade Iraq was met with widespread opposition in the UK and many did not vote for the Blair government. That an individual is only responsible for the things he or she could have made a difference to seems like common sense. The vast majority of the citizens of the UK, including those who voted for the Blair government, can point out that his or her actions made absolutely no difference to the war.

It might be that this intuition that the UK's citizens should pay for the costs of their state's unjust actions is based in an acknowledgement that the citizens of the UK could bear the costs of reconstruction in Iraq, while the Iraqi citizens struggle to bear the costs of the invasion of Kuwait. But it seems intuitively correct to say that the citizens of the UK and the USA, rather than the citizens of states that did not participate in the invasion, such as France and Germany, should be made to bear the costs of reconstruction. Even though the citizens of France and Germany are just as capable of repairing the harm as the citizens of the UK and USA, it seems right that they should not bear the costs. So what principled explanation can be offered in support of these intuitions?

To answer this question, we might turn to international law. The judgement of the Permanent Court of International Justice during the 1928 *Chorzów Factory* case set forth the basic principles governing inter-state reparations:

The essential principle contained in the actual notion of an illegal act [...] is that reparations must, so far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award if need be, of damages for loss sustained which would not be covered by restitution in kind or payments in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law (Permanent Court of International Justice, 1928).¹

When a state breaches international law it is expected to fully repair harms resulting from its breach. This basic principle put forward in *Chorzów Factory* case has received various interpretations and articulations, and yet it is argued that,

jurisprudence and doctrine almost completely fails to discuss the theoretical foundations of, or rationale for, reparations. The various and potentially conflicting aims of compensatory justice, deterrence, and punishment that could provide a coherent basis for developing detailed rules are largely unexamined as are contemporary theories of law and economics and restorative justice. This gap leaves open the question why and to what extent reparations should be afforded (Shelton, 2002, p.837).

Perhaps other international norms can give us the answer. For example, the International Commission on Intervention and State Sovereignty report, *The Responsibility to Protect*, posits a state's responsibility to rebuild following military intervention (2001, p.39). It says there “should be a genuine commitment to helping to build a durable peace, and promoting good governance and sustainable development” which can require “the commitment of sufficient funds and resources” (ICISS, 2001, p.39). The report does not, however, offer principles for assigning the duty to rebuild (Pattison, forthcoming, p.1). Nor do we have a systematic normative theory of post-conflict reconstruction, and there has been limited discussion of the international community's responsibility to rebuild (Gheciu and Welsh, 2009). So we still do not have any

¹ James Crawford (2002) has codified the International Law Commission's articles on state responsibility.

theoretical support for my earlier judgements about whether a particular set of citizens should be made to bear the costs of their state's unjust actions.

The reason why it is important that we determine whether, and why, citizens should be made to pay for the costs of their state's unjust actions is that the citizens of a state will be burdened whenever a state discharges a reparative duty. International law conceives of the state as an agent, but like any corporate agent, in the words of 1st Baron Thurlow, it has "no soul to be damned or body to be kicked" (Coffee, 1981 cited in Erskine, 2010, p.261). To discharge a reparative duty, the state will utilise resources that would otherwise be owned privately by its citizens, or owned collectively and used to fund public services that benefit the citizens. The state burdening its citizens in order to discharge its duty, and transfer these resources to the parties it has wronged, will strike us as morally problematic if the citizens do not have a duty to contribute the resources. Our intuitions about the wrongness of Iraqi citizens paying for the harms caused by the Hussein regime suggest that they have no such duty. The aim of this thesis is to develop principles that can help provide a coherent moral basis for laws governing inter-state reparations by demonstrating why and when citizens have a moral duty to pay for the costs of unjust state actions.²

In this thesis, I will defend an account of moral responsibility-based liability that can offer intuitively compelling conclusions in examples like the US-led and UK-led 2003 invasion of Iraq and Iraq's 1990 invasion of Kuwait. In the next section of this introduction I will outline the theoretical background of the arguments I will make throughout. Many of the arguments put forward in this thesis are constructed upon ideas found in Revisionist Just War Theory. Ideas about moral responsibility-based liability found within this body of work can help our thinking about the question of whether citizens can have a duty to pay for the costs of their state's unjust actions. They do not provide us with a complete answer, but this thesis aims to make the answer complete.

² An essential component of any normative account of inter-state reparations, post-conflict reconstruction, or the responsibility to rebuild, will be principles concerning the duties of a state's individual citizens. In this thesis I focus on cases where states unjustly cause harm.

In Section 1.2 I will identify the theoretical background of the arguments that will be made in this thesis. I will then, in Section 1.3, clarify the account of moral responsibility-based liability I will employ throughout. Some argue, for various reasons, that a moral responsibility-based conception of liability will yield counterintuitive implications. I will introduce each of these arguments in Section 1.4. These arguments are often made by theorists who conceive of groups as moral agents. They argue that in order to overcome these arguments, liability needs to be conceived of at the group level. In Section 1.5 I outline such arguments. I call this the *Collectivisation Strategy*. In this thesis, I will reject alternative accounts put forward by proponents of the Collectivisation Strategy. In Section 1.6 I will outline the role each chapter has in my overall argument.

1.2 Theoretical Background

The question of when citizens should pay for the costs of their state's unjust actions has received much attention in two separate and burgeoning areas of political theory. In this thesis I will engage with the insights of both in order to answer the question of whether citizens should pay for the costs of their state's unjust actions.

On the one hand it is a question relevant to Just War Theory and the matter of the principles that should guide the actions of belligerents or international institutions in the aftermath of a conflict. On the other hand, some will believe that an adequate answer to my question will require that we conceive of the state as a corporate moral agent. The question of whether collectives can constitute moral agents has received plenty of attention. I will draw on the insights of philosophers working in both areas, using ideas proposed by Revisionist Just War Theorists to defend an individualist account of moral responsibility-based liability, and reject the idea that the state must be conceived of as a moral agent in order to give an adequate answer to my motivating question. This account holds that sometimes citizens have a duty to pay for the costs of their states unjust actions, and it is more theoretically and intuitively compelling than competing accounts that reach similar conclusions.

Revisionist Just War Theory (RJWT) challenges some of the central tenets of Traditional Just War Theory (IJWT). Michael Walzer, whose ideas exemplify

TJWT, holds that war “is always judged twice, first with reference to the reasons states have for fighting, secondly with reference to the means they adopt (2006,p.21). This distinguishes the justice of war – *jus ad bellum* – from the justice in war – *jus in bello*. He says a just war can be fought unjustly and an unjust war fought justly (Walzer, 2006, p.21). He holds that combatants who fight justly do no wrong despite fighting for an unjust cause. They only do wrong if they violate *jus in bello* requirements. The *ad bellum* requirements apply only to the state. There is a moral parity between combatants who do not violate the rules of conduct during war, *regardless of the justness of their state’s cause for war*. Because combatants on both sides threaten each other, this entails an equal permission for combatants to kill one another (Walzer, 2006, p.41). Non-combatants on both sides, however, do not threaten anyone and are therefore non-labile. As we will now consider, RJWT rejects the moral equality of combatants and this defence of the principle of non-combatant immunity.

Jeff McMahan, whose work exemplifies RJWT, applies principles governing the permissibility of individual self-defence, and liability to defensive harm, in non-war contexts, to questions about the morality of war. He claims that persons engaging in justified self-defence against a culpable attacker do not lose their right not to be attacked. Otherwise, this would mean that “police would forfeit their right not to be attacked by criminals they justifiably threatened.” (McMahan, 2008, p.21) In the context of war, “a combatant who takes up arms in self-defence or in defence of other innocent people against an unjust threat does nothing to lose his or her moral right not to be attacked or to make himself or herself liable to attack” (McMahan, 2008, p.22.) War is only justified if it is undertaken in self or other defence. Harm inflicted in pursuit of any other ends is unjust. Individuals morally responsible for an unjust harm forfeit their right not to be harmed – this is what it means to be liable. The non-liability of just combatants denies the idea of the moral equality of combatants that is central to RJWT. McMahan also claims that non-combatants “bear significant responsibility for initiating or sustaining an unjust war” (2004, p.725) and that this can render them liable to military attack, therefore denying the TJWT principle of non-combatant immunity.

Just War 'Theorists' discussions about when and why non-combatants on the unjust side in a war are liable to attack can help us answer the question of whether citizens should pay for the costs of their state's unjust actions. Walzer says the following about post-conflict reparations:

civilians on both sides are innocent, equally innocent, and never legitimate military targets. They are, however, political and economic targets once the war is over; that is, they are the victims of military occupation, political reconstruction, and the exaction of reparative payments [...] Reparations are surely due to the victims of aggressive war, and they can hardly be collected only from those members of the defeated state who were active supporters of the aggression. Instead, the costs are distributed through the tax system and through the economic system generally, among all the citizens [...] In this sense, citizenship is a common destiny, and no one, not even its opponents, can escape the effects of a bad regime, an ambitious or fanatic leadership, or an overreaching nationalism [...] acceptance says nothing about their individual responsibility. The distribution of costs is not the distribution of guilt (1977, p.297).

I think many will believe it counterintuitive to claim that citizens who opposed a bad regime, such as Hussein's Baathist Party, should be made to pay for its harmful actions. Many will find it intuitively plausible to claim that citizens of the UK should pay for the costs of reconstruction in Iraq. This suggests we should resist the 'TJWT' treatment of these issues. Yet some proponents of TJWT have reservations about any attempt to justify imposing reparations on citizens. Brian Orend, for example, argues that we should not "penalise unduly the civilian population" for aggression carried out by their regime, and monetary compensation ought to come "first and foremost, from the personal wealth of those political and military elites [...] who were most responsible for the crime of aggression" (2006, p.203). Orend recognises this might limit our ability to extract resources from aggressors but he asks "why civilians should be forced, through their tax system, to pay for the damage if they are not in some sense responsible for it?" (2006, p.167).

Jeff McMahan, on the other hand, argues that civilians can bear some degree of responsibility for their state's unjust wars, and are therefore "potentially liable to certain forms of action that might be necessary to prevent or correct the wrongs involved in the war [...] There can be forms of liability in war that fall well short of liability to military attack" (2009, p.218). He says "fairly minimal forms of responsibility for an unjust war may render civilians liable to

contribute to the payment of reparations to the victims of their country's unjust war" (2009, p.219). McMahan's claim is that civilians might not be liable to military attack because the degree of their responsibility is very low, but this might be sufficient for liability to reparations. By recognising that non-combatants can be morally responsible for contributing to an unjust war, RJWT can help me to answer the thesis's motivating question. Ultimately, I will develop an account of citizens' duties to bear reparative burdens that has affinities with – but is deeper and more detailed than – McMahan's account.

1.3 A Moral Responsibility-Based Account of Liability

Before I continue, it will be useful to clarify some of the concepts and terms that will be frequently used in this thesis. Different theorists often conceive of terms like innocence, responsibility, and liability in different ways. My account will borrow many terms, concepts, and principles from McMahan's influential work on liability to preventative harm.³ I will now outline the account of moral responsibility-based liability that many of the arguments in the thesis will depend upon.

First, we should get clear about what it means for an individual to be *morally responsible* for something. T. M Scanlon says an individual can be attributed responsibility for an action, attitude, or outcome that is the causal consequence of a free exercise of her agency. It can be attributed to her as its *author* (Scanlon, 1998, p.248). An attitude or action is attributed to an individual when it was under her deliberative control. An outcome is attributed to her when it was a reasonably foreseeable causal consequence of actions she authored. An outcome is reasonably foreseeable if a person with reasonable capacities could be expected to foresee its occurrence given the available evidence. Attributing these things to an individual provides appropriate grounds for engaging in a moral assessment of his or her will in order to determine whether she is an

³ McMahan rejects alternatives to his 'responsibility account' in McMahan, 2005. For criticisms and alternative positions see, for instance, Lazar (2009), Fabre (2012), Ferzan (2011), Quong (2012), and Thomson (1991).

appropriate target of praise, blame or indifference. I will take blameworthiness and culpability to be equivalent notions, implying that an individual exhibits fault regarding an attitude, action or outcome. If an individual has a valid excuse, however, she might be partially or fully excused for it, and therefore be less than fully culpable, or not culpable at all – the *degree* of her moral responsibility can vary in accordance with the existence of excusing conditions.

Second, we need to be clear what it means to be liable. For Walzer, to say individuals are innocent is to say “that they have done nothing, and are doing nothing, that entails the loss of their rights” (2006, p.146). The right Walzer is talking about is the right not to be harmed. McMahan contrasts this with a notion of moral innocence, which we use to describe someone lacking in guilt, culpability, or blame (2009, p.11). McMahan uses the term liable to describe someone who has forfeited her right not to be harmed. McMahan says to “attack someone who is liable to be attacked is neither to violate nor to infringe that person’s right, for the person’s being liable to attack just is having forfeited his right not to be attacked, in the circumstances” (2009, p.10). In this thesis I will employ the term liability in the same way as McMahan.

However, this conception of liability is not without criticism. Victor Tadros rejects the idea that liability necessarily implies right-forfeiture, he argues that the citizens of the UK are liable to taxes and “that is nothing to do with responsibility” (2012, p.261-262). He says

When a person is liable to be harmed, in harming them we do not infringe a right that a person has. That may be because they have lost a right, or it may be because they never had the right in the first place [...] The most important way in which we can lack a right not to be harmed for the sake of some goal, I suggest, is if we have an enforceable duty to bear that harm for the sake of the goal. It makes little sense to say that I have an enforceable duty to bear harm, and yet that I have a right not to be harmed. This implies that if my duty to bear harm is enforceable, others (perhaps not all others) may harm me without infringing my rights, and hence I am liable to be harmed (Tadros, 2012, p.262).

To say that a person is liable to some harm, on Tadros’s account, means she lacks a right not to be harmed as a means of preventing some other harm, and her lacking a right corresponds with an enforceable duty to bear that harm, and to not resist others attempts to impose it on her, if this is necessary to prevent that other harm. Whenever an individual has an enforceable duty to bear such

harm, he thinks we should describe him or her as liable to that harm. Tadros believes that he would have a duty to rescue a drowning child if he could do so by incurring a small harm. He says “I have no right not to suffer this harm for the sake of the child, and hence I am liable to be harmed to rescue the child” (Tadros, 2012, p.264). I share Tadros’s belief in enforceable duties of rescue, but I do not agree that these should be called liability-duties. We should, following McMahan, conceive of being liable as having forfeited a right against being harmed as a means of preventing or repairing an impermissible harm. This will ensure it is always clear that the individual in question has an enforceable duty to bear harm because she forfeited her right not to be harmed.

We achieve greater clarity by using labels that distinguish different types of enforceable duties. These duties can be incurred for different reasons and different morally relevant facts will determine the demands they make on their subjects. If an individual has an enforceable duty to rescue a person from a great harm simply because she can do so by incurring only a very tiny harm, then her duty is grounded in a different set of facts to someone who has a duty to repair that great harm because she is culpably morally responsible for causing it. By using liability to denote only those enforceable duties that are grounded in a particular set of facts, means that when someone is described as being liable, this will indicate which facts ground her duty and determine the demands it makes on her. Things will be clearer, then, if we use liability in McMahan’s narrower sense of that term. So whenever I describe an individual as being liable, I mean it in this narrower sense.

Third, there is an important distinction between liability and desert. If a person deserves harm there is a moral reason for harming him that is independent of any further consequences. By contrast, a person is liable to be harmed only if harming him will serve some further purpose (McMahan, 2000, p.9). This distinction is also reflected in McMahan’s Necessity Constraint.⁴ He argues that:

⁴ Seth Lazar provides an excellent discussion of the concept of necessity in self-defence and the application of the necessity constraint in the context of war (Lazar, 2012).

the assignment of liability is governed by a requirement of necessity. If harming a person is unnecessary for the achievement of a relevant type of goal, that person cannot be liable to be harmed. The infliction of deserved harm, by contrast, is not governed by a requirement of necessity, since the value of a person's getting what he deserves is not instrumental and hence is not necessary for anything beyond itself (McMahan, 2009, p.9).

An implication of this is that if a threat for which an individual is liable could be eliminated just as effectively by killing him as compared with incapacitating him without killing him then he is only liable to being incapacitated (McMahan, 2009, p.23). I call this the Necessity Principle. It requires that individuals who are acting in defence of their own or others' rights always minimise the amount of harm, or the risk of harm, caused by their actions. A defensive action is not justified if it violates the Necessity Principle.

Fourth, it is important to note that whether a defensive action is justified depends on whether it satisfies two proportionality principles. McMahan says "the criterion of liability to attack in war is moral responsibility for an objectively unjustified threat of harm" (2009, p.35). His "narrow proportionality constraint" holds that the degree of an individual's liability depends on the "strength of the excusing conditions that apply to his or her action" (McMahan, 2009, p.175). The "degree of a person's liability is manifest in the severity of what may be done to him without wronging him – that is, in the stringency of the proportionality requirement" (McMahan, 2005, p.394).

The more powerful an individual's excuse, the more stringent the proportionality constraint becomes. If his excuse is trivial then he is "virtually liable to the same degree of harm to which he would be liable in the absence of the excuse" (McMahan, 2009, p.175). Because moral responsibility for an unjustified threat is the criterion for liability to defensive attack, a blameless responsible threat must be liable to some degree. He says that although irresistible duress "may render a person altogether blameless, it does not render him wholly nonresponsible" (McMahan, 2009, p.175-176). If an individual is blamelessly morally responsible for causing you an unjust threat, then defensive force may be proportionate only if it inflicts perhaps even less harm than he would otherwise inflict on you (McMahan, 2009, p.193). This is the Narrow Proportionality Principle.

McMahan holds that the ‘Wide Proportionality’ requirement “is concerned with bad effects on those who have not made themselves liable to suffer those effects” (McMahan, 2009, p.27). It is more restrictive in cases of harms intentionally rather than unintentionally inflicted on the non-labile (McMahan, 2009, p.22). This proportionality requirement justifies actions that cause wrongful harm by appealing to a ‘lesser-evil’ justification (McMahan, 2009, p.173). The reasoning is this: if an individual’s rights are contravened by an action without justification then her rights are violated; if her rights are contravened by an action that is justified then her rights are infringed. Rights are infringed when those inflicting the harms that contravene the rights of a non-labile person do so either, (a) intentionally as a means of, or (b) as a foreseen but unintended side-effect of, the prevention of a greater harm (McMahan, 2009, p.173). An example of the first kind of case would be one where one non-labile person can be harmed in order to save the lives of 1000 non-labile persons. An example of the second kind of case is where a combatant acts in a way that will foreseeably kill one innocent civilian as an unintended but unavoidable side-effect of an all-things-considered justified action that will save the lives of 500 innocent civilians. A harmful action is justified only if it satisfies the Wide Proportionality Principle.

Fifth, it should be highlighted that an individual cannot be liable on the basis of an objectively justified action, even if it infringes others’ rights. An action is objectively justified if it satisfies the principles that govern the liability account – when it is both proportionate and necessary. The facts that make it *objectively* permissible or justifiable exist “independent of the agent’s beliefs” (McMahan, 2009, p.43). An action is merely subjectively permissible or justified when the agent acts on the basis of reasonable beliefs that are objectively false, and the act would be objectively permissible or justified if those false beliefs were true” (McMahan, 2009, p.43). If a person acting in defence of his or another’s rights acts with a subjective but not objective justification, then he is morally responsible for an objectively unjust or impermissible threat or harm (though,

as outlined above, excuses for his false beliefs might diminish his blameworthiness).⁵

One way in which my argument will differ from McMahan's, however, is in the conditions necessary for liability. McMahan holds that an individual can be liable on the basis of her blameless moral responsibility for an objectively unjustified threat. By contrast, I believe that some degree of blameworthiness or culpability is a necessary condition of liability. This does not require that an individual is fully culpable or maximally blameworthy, so partially excused persons are still liable. Consider the following example:

The Conscientious Driver: A person who always keeps her car well maintained and always drives carefully and alertly decides to drive to the cinema. On the way, a freak event that she could not have anticipated occurs that causes her car to veer out of control in the direction of a pedestrian (McMahan, 2007, p.165)

McMahan says it is impermissible to drive when one will lose control and threaten the life of an innocent person. The risk of this happening is so tiny that driving is a permissible type of activity. However, because "she knew of the small risk to others that her driving would impose, and because she nonetheless voluntarily chose to drive when there was no moral reason for her to do so – in short, because she knowingly imposed this risk for the sake of her own interests – she is morally liable to defensive action to prevent her from killing an innocent bystander" (McMahan, 2009, p.166). Although the degree of the driver's liability is diminished by strong excuses, he believes she is still liable to being killed. McMahan believes the driver is liable to being killed because the harm in question is indivisible – either the driver or the pedestrian must bear it. This is his account of 'agential-responsibility'.

I suspect many will not share McMahan's intuition in this case. This is consistent with the pedestrian being permitted to defend himself. Rather, one accepts only that the driver has not forfeited her right and would therefore be permitted to defend herself against the pedestrian. Neither is liable, both have

⁵ Throughout the thesis I will use the terms just, justified, and permissible interchangeably. I will also use the terms unjust, unjustified, and impermissible interchangeably.

a right to defend themselves. I cannot, however, defend at length here the case for making culpability a necessary condition of liability, which would take me away from the central issues of the thesis. The critique of McMahan's view of 'agential-responsibility' has been already extensively documented elsewhere, particularly by Lazar (2009; 2010). Notwithstanding, it is worth nothing that if one agrees with McMahan's account of agential-responsibility, it will make my defence of the moral responsibility-based account of liability and my rejection of alternative accounts a much *easier* task. This is because it will nullify one of the strongest objections to it. This is the objection that when citizens contribute to an unjust state action, they will have excuses that diminish the degree of their moral responsibility, and therefore also their liability, meaning that it would be impermissible to impose on the citizens the full costs of repairing the unjust harms caused by their actions.

Thus, in this thesis I will conceive of a liable person as someone who has forfeited her right not to be harmed because she is culpably morally responsible for an impermissible threat or an impermissible harm. I will also adopt the principles of Necessity, Narrow Proportionality and Wide Proportionality. I will not defend these principles at length, a robust defence can be found in McMahan's works.

I will assume the following. If an individual is liable to proportionate harm necessary for the prevention of an impermissible threat then she will be liable to proportionate and necessary reparative burdens should the impermissible threat not be averted. If an individual is liable to proportionate reparative burdens necessary for the repair of an impermissible harm then she was at some prior point in time liable to proportionate preventative harms necessary for the prevention of the impermissible threat. In other words, there is continuity in the grounds of liability to preventative harm and liability to reparative burdens; both are grounded in moral responsibility for an objectively unjustified action that either threatens or causes impermissible harm. Discussion in this thesis will often shift between literature concerned with issues relating to liability to preventative harm and literature concerned with

issues relating to liability to reparative burdens.⁶ Although my fundamental question concerns liability to reparative burdens, the same principles determine individuals' liabilities to preventative harm and to reparative burdens, so debates concerning the content and implications of those principles in the context of preventative harm are relevant to my project.

In the next section I will outline five arguments which claim that when an impermissible harm is the causal consequence of a collective action, a moral responsibility-based account of liability cannot justify imposing the entire costs of repair on its individual participants. In what follows in the rest of the thesis, I will show how my account can overcome these arguments. In the section that follows I outline others' attempts to construct an account that overcomes them.

1.4 Five Arguments against the Moral Responsibility Account

1.4.1 Diminished Moral Responsibility

The first argument against the individualist account of moral responsibility-based a liability rests on the belief that the degree of defensive or reparative harm an individual is liable to varies in accordance with the degree of her moral responsibility for the causing the original impermissible harm. This is the insight of the Narrow Proportionality Principle. If the degree of an individual's moral responsibility is diminished because she has genuine excuses for performing an objectively unjust action, then the harm she is liable to will be of a lower degree than it would have been without those excuses. So if individuals act together and cause impermissible harm, but are partially or fully excused for causing that harm, then the degree of their liability is diminished. The seeming problem is this: there could be cases where the sum of their combined liabilities does not provide grounds upon which the *full* costs of repairing the impermissible harms caused by their actions can be justifiably imposed upon them. If we cannot permissibly burden the persons who caused the harm with the full costs of repair, then some, perhaps all, of the costs will either be borne

⁶ Gerhard Overland takes a similar approach. He questions whether wealthy individuals who have duties requiring them to stop contributing to global poverty are also legitimate targets of defensive force (2013).

by the victim of the impermissible harm or agents who were not implicated in its production.

This argument can be applied to the question of whether citizens should be made to pay for the costs of their state's unjust actions. Someone making this argument would argue that the citizens of a state have excuses for their actions which diminish the degree of their liability for the harms they contributed to. For example, the citizens of the UK can claim that because their tax-contributions were coercively compelled, they are excused of blame for the impermissible harms their taxes created the opportunity for combatants to cause. They might also claim that they had no reason to doubt the validity of the evidence that the Blair's government's public justification for invading Iraq was based. It seems reasonable to think that these excuses absolve the citizens of any blame. There may not be grounds for imposing the costs of repairing harm suffered by Iraqis on the UK citizens who causally contributed to its occurrence.

1.4.2 No Causal Connection

The second argument runs as follows. When an impermissible harm is the causal consequence of a collective action, sometimes no individual can be morally responsible for it. An individual is causally responsible for something if it was caused by her action(s). One event is a cause of another event if the former was necessary for the occurrence of the latter, in the sense that had the former not occurred, then the latter would not have occurred. This is known as 'but-for' causation. The argument here says that harm can be 'overdetermined' in the sense that no individual's action was but-for necessary for its occurrence. If it takes only three attackers to roll a boulder down a hill and kill a victim, but six attackers simultaneously push it, then none of their actions were but-for necessary for the outcome. This is significant because if an individual is not causally responsible for the harm then she cannot be attributed moral responsibility for it, and therefore she cannot be liable for it either. It seems highly counterintuitive, however, for the attackers to evade liability for the overdetermined harm. The moral responsibility-based account of liability yields intuitively incorrect conclusions in overdetermination cases.

It could be argued that when citizens pay their taxes, or vote in an election, the outcome of their collective action is overdetermined. A state needs wealth to wage a war. It must pay its combatants and buy weapons. The wealth is created by its citizens' actions and transferred to the state in the form of taxation. If a state has much more wealth than that which it needs to fight a war, its citizens can each claim that even without their personal tax-contributions, the war would have been fought in the exact same way as it was actually fought. In the absence of causal responsibility for the war, the citizen is not morally responsible for it, and therefore not liable on the basis of his or her actions.

1.4.3 Epistemic Deficits

The third argument runs as follows. We encounter an epistemic deficit when despite having gone to reasonable lengths to determine morally relevant facts we are unable to do so. In the cases I am concerned with the morally relevant facts are those that pertain to who is liable for a specific impermissible harm. It can be argued that a moral responsibility-based account of liability will be unable to provide determinate answers about who is a permissible target of preventative harm or reparative burdens because there will be an epistemic deficit. It could be impossible to determine who caused an impermissible threat, for example, or the degree of moral responsibility individuals bear for a threat they actually did cause. If an individual is subjected to preventative harm to which she is non-liable then her rights are contravened. Epistemic deficits increase the probability of mistakes being made, and in some cases we might have absolutely no idea who is liable. If we cannot identify who is liable, then the harm might go unrepaired.

If it can be shown that the harms caused during an unjust war are not causally overdetermined, and that individuals are culpably morally responsible for causing them, there is the related problem of demonstrating which citizens actually caused them. It might be the case, that although we know that *some* citizens causally contributed to the impermissible harms, we are unable to say with a sufficient degree of certainty *which* citizens. For example, we would need to identify which citizens' taxes contributed to which incidence of impermissible harm. An epistemic deficit might leave us so uncertain about

who is liable and for what, that we would not be justified in imposing a reparative burden on them.

1.4.4 Insufficient Funds

The fourth argument runs as follows. The Narrow Proportionality Principle holds that an individual is only liable to a certain amount of necessary harm. A reparative burden harms its subject. It requires him or her to give up resources that he or she could have otherwise used in service of his or her own interests. How much a burden will harm an individual depends on the size of the burden and his or her wealth prior to it being applied. The crux is this: a reparative-burden of the same size imposed on separate persons with unequal wealth will *harm the poorer more than the wealthier person*. An individual might be incapable of both contributing to the repairs of harms for which she is liable and satisfying her basic needs. A narrowly proportionate reparative burden might cover only a small fraction of the costs caused by her actions. If he or she been wealthier than a larger burden would have been narrowly proportionate. A non-liable person would then need to cover the costs of repairing the harm. There will also be cases where the liable individual will simply lack the resources needed to repair any of the harm she is liable for, so she will not be capable of meeting any demands for reparation.

If we imagine a case where a state wages an unjust war, and we can clearly identify *which* citizens caused which impermissible harms, and the *degree* of their moral responsibility for doing so, we still might not have adequate grounds upon which we can justifiably distribute the full costs of repair. This is because the citizens' general level of wealth might be so low that imposing the full costs *would be narrowly disproportionate because each of them would suffer a great harm by being made to bear the full cost*. It might only be permissible to impose a much smaller share on each liable individual citizen. In some cases the liable citizens might be so poor that imposing any burden on them will be pointless.

1.4.5 Membership Argument

To overcome these apparent issues, some subscribe to the 'Membership Argument', which appeals to a widely-shared intuition. This is the intuition that sometimes when an individual is a member of a group, and other members of

the group cause impermissible harm, she can be expected to pay for the costs of harms caused by other members. Sometimes it seems that facts about an individual's membership of a group can make it appropriate to burden her with the costs of repairing harms she is not liable for.

A state might wage an unjust war, and cause a great number of impermissible harms, but only a handful of its combatants and politicians be culpably morally responsible for the harm. Their combined liability might only stretch to a fraction of the costs of repair. The combatants might have strong excuses for fighting, and their personal wealth means they can barely afford to pay any reparations. The rest of the citizens, however, carried on with their lives enjoying the wealth, rights and freedoms the state provides for them. It seems intuitive that these citizens should pay for the costs of their state's unjust actions. In this thesis, I will challenge such a view and defend an account of moral responsibility-based liability that overcomes the five arguments outlined in this section.

1.5 Collectivising Liability

The objections in Section 1.4 suggest that the moral responsibility-based account of liability cannot provide intuitively compelling conclusions in relevant cases. In this section I will introduce an alternative argumentative strategy that attempts to provide an account of liability that can provide them (again, this thesis will challenge this account). The 'Collectivisation Strategy' does not reject the idea of moral responsibility-based liability; instead it shifts it from the individual level to that of the collective. As I will consider in later chapters, in Avia Pasternak's 'Limiting States' Corporate Responsibility' and Anna Stilz's 'Collective Responsibility and the State', liability is assigned to the state, conceived of as a moral agent, a justification is given for the state imposing shares of its liability-burden on its citizens, and this justification does not appeal to their moral responsibility for the harm needing repair (Stilz, 2011, Pasternak, 2013). These arguments are constructed around what I call the 'Corporate Liability Premise'. This premise holds that some collectives constitute corporate moral agents and can be liable for impermissible harms.

As I will consider in detail in Chapter 6, Stilz argues that when a harm results from a collective action and it exceeds the sum of the participants' liabilities, we would fail to treat the victims' interests seriously if no one is assigned responsibility for their repair. She says this response would overlook "the fact that the agents who produced the outcome are not limited to the individuals involved; there is an additional agent – the incorporated group itself – to which we can attribute responsibility (Stilz, 2011, pp.193-194)⁷. A significant virtue of the Corporate Liability Premise is that in cases where the individuals who caused impermissible harm cannot be permissibly burdened with the full costs of its repair, it might be permissible to burden the corporate agent with the full costs. The corporate agent can then permissibly impose shares of its liability-burden to its individual members if they have duty to bear a share of its burden.

This view has some similarity to a seminal piece, 'Collective Responsibility', in which Joel Feinberg argues there are cases where a collective is at fault but its fault does not distribute to its individual members. For example, when individuals failed to prevent a harm that no individual could have prevented on his or her own, but all could have prevented by acting together. Because the fault of the group does not distribute to individuals, we might think group-liability is non-distributive too.⁸ But Feinberg says that group-liability is "inevitably distributive" and so group-liability appears to be unjustified (1968, p.687). It is inevitably distributive in the sense that what harms the group harms its members. In the case of institutional groups, however, he says we often think that "members must answer for the harms caused, or commitments made by, an earlier generation of members" (Feinberg, 1968, p.687). This suggests that group liability is justifiable in the case of institutional groups. So what we learn from Feinberg is this: there is a clear challenge to explain *why* its members are accountable for the other members' actions. Or, as proponents of the Corporate Liability Premise would have it, for the actions of the corporate agent.

⁷ A Similar argument is made by Philip Pettit who claims that individuals in incorporated groups will often have excuses for causing harm, but we can hold the incorporated group responsible for the harm alongside them (2007, p.196)

⁸ For further discussion of these kinds of cases see Virginia Held (1970).

To be clear, there are potential instrumental justifications for giving groups *legal* personhood. It can, for example, avoid the epistemic problems that will befall an account that allocates cost on the basis of individual's responsibility for causing harm. It might be easier to attribute the breach of duty to the group rather than a specific person. Assigning reparative duties to a group might also ensure that victims can hold liable an agent with sufficient funds. These instrumental benefits might explain the intuitive attractiveness of endorsing the Collectivisation Strategy in the case of unjust state actions too. I am more sceptical of the notion of corporate *moral* agency (understood in non-instrumental terms), and the idea of assigning groups the same moral standing as natural persons.⁹ But I do not intend to reject the notion of corporate moral agency in this thesis. Instead, I will show that in the case of states, endorsing the corporate liability principle does not yield the benefits we might expect it to since there is (as yet) no adequate explanation of when a state can permissibly impose shares of its liability-burdens on its individual citizens. Moreover, I will demonstrate that we can overcome the problems with an individualist moral responsibility-based account of citizens' liability to reparative burdens.

1.6 Thesis Outline

I will now outline each chapter in turn.

In Chapter 2 I will reject the No Causal Connection argument, as outlined in 1.4.2. I will argue that there are *no* genuine instances of causal overdetermination. There is only ever an *appearance* of overdetermination when there is an epistemic deficit. In short, I will argue the following. An epistemic deficit occurs whenever we lack access to morally relevant facts, such as who caused an impermissible harm. A consequence of an epistemic deficit can be the victim of impermissible harm (or their agent, such as a judge) being unable to identify permissible targets of reparative burdens. I will argue, however, that an individual can render herself liable to reparative burdens by being culpably morally responsible for causing an epistemic deficit that deprives the victim

⁹For more on the possibility of corporate agency see Peter French (1984) and Christian List and Philip Pettit (2011)

(or their agent) knowledge of who is liable for the harm. This not only applies in alleged overdetermination cases, but any case where individuals cause an epistemic deficit that prevents the identification of liable persons. This will enable us to reach intuitively compelling conclusions in non-ideal epistemic conditions. The view presented in this chapter will form the basis of my own moral responsibility-based account of citizens' reparative duties. It overcomes both the No Causal Connection argument and the Epistemic Deficit argument.

In Chapter 3, I will outline the Collectivisation Strategy and its proponents' reasons for rejecting the individualist moral responsibility-based account of liability. The Collectivisation Strategy relies on the Corporate Liability Premise, as introduced above. This requires the invocation of the existence of a corporate moral agent. Its proponents must explain *why* a liable corporate agent can permissibly impose shares of its burdens on individuals. I consider some implications the endorsement of this premise has for any such explanation. I then contrast this approach with how the individualist account I endorse could respond to cases of impermissible harm caused by the contributory actions of participants' in a collective action. This is where I begin my response to the Diminished Moral Responsibility argument, Membership Argument, and Insufficient Funds argument, although I do not complete this response until Chapter 7. I conclude this chapter by taking stock of the challenge that proponents of the Collectivisation Strategy have set for themselves, in anticipation of considering and rejecting their accounts in later chapters.

In Chapter 4 I will consider Avia Pasternak's Intentional Membership account, which attempts to explain why and when a state, *qua* corporate moral agent, can permissibly impose burdens on its citizens in order to discharge its own duties to repair impermissible harms. I will argue that the normative architecture of Pasternak's account is unclear. I provide two contrasting accounts that could fill in what I perceive to be a crucial gap in her account. These are the Membership Account and the Complicity Account. I will argue that the Membership Account, which I believe Pasternak must rely upon in order for her account to retain its core features, cannot justify a state imposing burdens on its citizens and that it yields various counterintuitive implications.

In Chapter 5, I will consider the second account that I believe Pasternak could appeal to, which is the Complicity Account. This account has certain structural similarities to my individualist moral responsibility-based account of liability. A fundamental difference between these two accounts, however, is that the Complicity Account incorporates a *non-causal* notion of authorship within an account of individual liability for the prevention or repair of impermissible harm. This will build on Chapter 2, where I will reject accounts of liability that eschew the necessity of a causal connection between an individual's liability-grounding choice and an impermissible harm.

In Chapter 6, I reject Anna Stilz's argument, which attempts to use Kantian ideas about citizens' obligations to obey reasonably just states to explain when citizen of liberal democratic states, such as the UK and USA, can be burdened with a share of the costs of their state's unjust actions. Stilz, like Pasternak, endorses a corporate account of state liability. I will reject Stilz's account, by arguing that it conflates matters of justice and legitimacy, and as a result her account does not tell us when a state is justified in imposing shares of its own liability-burdens on its citizens. I then construct an internally coherent account using Stilz's premises. But it (a) relies on a controversial premise, and (b) its conditions will rarely be satisfied by states that cause unjust harm.

Having rejected what I take to be the strongest alternative accounts of why and when citizens should pay for the costs of their state's unjust actions, in Chapter 7, I will defend the superiority of my individualist moral responsibility-based account, by demonstrating how it can provide intuitively compelling conclusions in cases like the 2003 Iraq war and Iraq's 1990 invasion of Kuwait. This argument must confront what I believe to be the strongest objection to my individualist account – the Diminished Moral Responsibility argument. Citizens will often have strong excuses for causally contributing to their state's unjust wars. In the case of tax-contributions, which are a necessary condition of a state fighting, the citizens are coerced into contributing. In liberal democratic states, it seems the citizens also have an all-things-considered moral duty to pay their taxes because this enables the state to uphold its citizens' basic rights. I will argue, however, that citizens in the UK and USA can be blamed for causing impermissible harms resulting from unjust state actions.

This is because the citizens have a duty to take reasonable steps to minimise the risk of their tax-contributions causing harm. Failure to take these steps means they can be blamed for them. I will draw on arguments made in Chapter 2 in order to overcome the obvious epistemic problem of identifying whose actions contributed to impermissible harm. I will then make some suggestions about how the liable citizens' government, or an international authority burdening it, should distribute burdens given the absence of sufficiently accurate evidence about the causes of impermissible harms.

In Chapter 8, I will conclude by summarising the ways in which my individualist moral responsibility-based account of liability has overcome the numerous arguments made against the viability of an account of this kind.

2 Responsibility, Causation, and Liability

In this chapter, I will reject the claim that an individualist moral responsibility-based account of liability cannot provide intuitively compelling conclusions in cases where a collective action is said to produce an overdetermined harm. This is the No Causal Connection argument introduced in 1.4.2. Harm is said to be overdetermined in the morally relevant sense when *no individual's action is its cause*.

Christopher Kutz describes the Allied firebombing of Dresden in 1945 which caused the death of at least 35,000 civilians. He says the

city was bombed in three raids, and at least 1,000 planes and 8,000 crewmen were directly involved in the raids, in various roles as pilots, navigators, bombers, and gunners. The firestorm was already raging before many crews dropped their bombs. Each crewman's causal contribution to the conflagration, indeed each plane's, was marginal to the point of insignificance (Kutz, 2000, p.119).

He argues that a moral responsibility-based explanation of each participant's moral accountability for the firestorm is precluded by the causal insignificance of each of their contributory actions. I will call this example Dresden Firestorm.

In his work on non-combatant liability in war, Jeff McMahan provides another example – this time hypothetical – to illustrate this problem.

Robot Referendum: A government holds a referendum on whether to fight an unjust war. The war is overwhelmingly approved with Yes-votes far exceeding the threshold needed to win the referendum. The result is automatically implemented through a signal sent to robots pre-programmed to fight with no further human involvement.¹⁰

According to McMahan, some people think that a necessary condition of being responsible for an event is having made a causal contribution to its occurrence. He says that since “at least some of us must be responsible for this war, it seems that either causation is not necessary for responsibility or else each voter, or at least each person who voted in favour of the war, contributed causally to the war by voting” (2009, p.217).

¹⁰ This is a re-write of McMahan's original example (2009, p.217).

These examples give us reason to doubt whether causation is a necessary condition of moral responsibility and liability. There is a widely held and deeply rooted belief that one event is the cause of another if the latter event would not have occurred ‘but-for’ the first. This means the first event was, on that occasion, *necessary* for the second event. In overdetermination cases, however, no individual’s action is a but-for necessary condition of an outcome, and so it seems we cannot attribute moral responsibility for it to any individuals. As a simpler and smaller-scale case, consider the following example:

Rolling Rock: Greg, a successful businessman, is walking his dog in a valley. Unbeknownst to Greg, six of his business rivals are at the top of the valley trying to dislodge a boulder with the intention of killing him. None of the six could dislodge it on his or her own. Though it is clear that it would only take three persons pushing their hardest to dislodge it, all six pushed their hardest. They flee as the boulder begins to roll. Some flee across bridges. Greg is next to a set of buttons that open chutes in the bridges. If Greg drops one attacker it will cause him or her severe harm but slow the boulder enough for Greg to be able to escape to safety.

Most people will believe it intuitively permissible for Greg to harm any of the attackers as a means to saving his life. Most people will agree that this is because each attacker has rendered him or herself *liable* to defensive harm. That is, each has forfeited his or her right against being harmed in order to prevent the threat. The important question, then, is whether a moral responsibility-based account of liability can explain our considered judgements about the liability of participants in cases like *Rolling Rock*, *Robot Referendum*, and *Dresden Firestorm*.

In this chapter, I will argue that (a) an action is a cause of an outcome if and only if it is necessary for its occurrence, and (b) causal responsibility is a necessary condition of liability. However, I will also argue that there is (c) causation in (what appear to be) overdetermination cases.

An appearance of overdetermination is, I will argue, the *result of an epistemic deficit*, where we lack the morally relevant facts needed to give determinate answers about who is liable for a harm. If we do not know who is liable for the harm, then we will not know what means of preventing the harm, if any, are permissible. I will argue, however, that individuals who do not contribute to the impermissible harm might *contribute to the epistemic deficit*. If an individual is

culpably morally responsible for denying the victim, or an agent acting in defence of the victim's rights, knowledge of objectively permissible defensive measures, she renders herself liable for the impermissible harm.

In Section 2.1, I will outline two categories of overdetermination cases. These are cases of 'pre-emptive' and 'duplicative' overdetermination. Both of these are regarded as problematic for but-for account of causation. In Section 2.2, I will consider an alternative account of causation that some claim to be capable of avoiding the problems that trouble the but-for account. This alternative is the NESS-Test of causation. In Section 2.3, I will reject the NESS-Test by rejecting the overdetermination problem. In Section 2.4, I will consider an account which grounds liability in moral responsibility for a culpable intention to cause harm. I reject this account. In Section 2.5, I will argue that the failed contributors in overdetermination cases can be culpably morally responsible for causing an 'epistemic deficit'. They are liable to harms when the epistemic deficit impedes permissible means of self-defence or other-defence. This means my individualist moral responsibility-based account of liability will yield intuitively compelling conclusions in the apparent overdetermination cases.

2.1 Moral Responsibility, Causation, and Liability

In Section 1.3 I outlined the account of moral responsibility-based liability that will be used throughout the thesis. This account is constructed around the concept of moral responsibility. Attributions of moral responsibility are attributions of authorship of events to moral agents. This means an event – attitude, intention, action or outcome – was the causal consequence of a free exercise of moral agency. Attributions of moral responsibility are the basis for appropriate praise and blame of the moral agent. Such responses would not be appropriate were the agent merely *causally* responsible for an event. In this section I will briefly consider what it means for a moral agent to be causally responsible for something, and introduce the problem of overdetermination.

An attribution of moral responsibility for an outcome implies that the moral agent performed an action that was causally responsible for the outcome. To say that the agent's action caused the outcome is to say that the outcome would not have occurred *but-for the occurrence of that action*. This is what it means

for an action to be a but-for, *necessary* condition of the outcome. If I intentionally kick a ball through a window, for example, it would not have gone through the window *but-for* my kicking it. Or if ten people vote on a proposition, and six yes-votes or no-votes is the winning margin, then, if six people vote ‘yes’ and three vote ‘no’, each of the six people morally responsible for a yes-vote is morally responsible for causing the vote to be won by the yes-voters. It would not have occurred but-for him or her casting a yes-vote. In apparent cases of causal overdetermination, however, no individual action seems to be causally necessary for the outcome. *Rolling Rock*, *Robot Referendum*, and *Dresden Firestorm* all appear to be overdetermination cases.

In his discussion of causation in the law, Richard Wright helpfully distinguishes between two types of overdetermination cases (Wright, 1985, pp.1791- 1798). An instance of (1) ‘*pre-emptive* overdetermination’ occurs when as follows: at least two sets of conditions occur; each is independently *sufficient* for an outcome, but one set pre-empts the other. The set that pre-empts the others brings about the outcome before the pre-empted set can do so. Neither set of conditions seems *necessary* for the outcome because the pre-empted conditions would have brought it about had the earlier conditions not done so. An example of this is where one assassin shoots a victim, but had he not done so another assassin would have done a short time afterwards.

An instance of (2) ‘*duplicative overdetermination*’ occurs when, (i) at least two sets of sufficient conditions operate *simultaneously*, or when (ii) more independently insufficient conditions than are jointly-necessary to cause the outcome operate simultaneously. An example of the first type of case is this: two assassins shoot a victim at the exact same time; each shot is independently sufficient to kill the victim. An example of the second type is this: in a ballot, 6 yes-votes are needed to win; there are 8 yes-votes cast. Each yes-vote is neither independently sufficient nor necessary for the outcome that actually occurred, because more yes-votes were cast than were necessary for the ballot to pass.

Robot Referendum is an instance of (2) duplicative overdetermination. None of the individual voters’ acts of voting were necessary for the outcome so the but-for account of causation cannot assign their acts of voting causal status. Under the but-for account, none of them are causally responsible, and, as such, none

of them are morally responsible for the war. This seems counterintuitive because the war would not have occurred had a sufficient number of voters not voted in favour of the war. The same can be said of the attackers in *Rolling Rock* and *Dresden Firestorm*, because, if we hold fixed the actions of all the other participants, then the harms that occurred would have occurred regardless of how any particular individual participant chose to act. Nobody caused harm.

Our considered judgements about cases of overdetermined impermissible harm, or overdetermined threats, however, tell us that participating individuals are *liable* for the harm or the threat of harm. One response would be to amend our moral responsibility-based account of liability and ground liability in something other than moral responsibility for *causing* harm. In Section 2.4, I consider and reject an account that grounds liability in moral responsibility for a culpable attempt at causing harm. Beforehand, however, I will consider an account of causation which attributes causal status to the actions of the participants in overdetermination cases. I will outline this in Section 2.2 and then reject it in Section 2.3.

2.2 The NESS-Test

This alternative account of causation is found within legal literature. This is the NESS (Necessary Element of Sufficient Set) Test. It holds that a condition is a cause of an outcome if it could have been a necessary element of a set of conditions minimally sufficient for the outcome. A NESS-condition need not be a but-for condition of the outcome. It must, however, be a but-for condition of a possible minimally sufficient set. It was first introduced by H.L.A. Hart and Tony Honoré in *Causation in the Law* (2002). It was developed further by Richard Wright (1985). It is conceived of as an account of causation-in-fact, so it is not just a construction for the sake of assigning causal status in non-ideal epistemic conditions. The NESS-Test can be incorporated within an account of moral responsibility-based liability. Such an account seems to provide a principled explanation of our intuitions in the overdetermination cases.

In this section I will draw upon Matthew Braham's and Manfred J. Holler's discussion of the NESS-Test in 'Distributing Causal Responsibility in

Collectives' (Braham and Holler, 2008). Braham and Holler claim that the problems that arise when trying to assign causal responsibility for harms caused by a collective action can be avoided if we abandon our attempts to "locate at least one person who can be said to have independently and with his or her 'own hands' created and implemented the collective outcome" (2008, p.146). This is the conception of "cause as authorship" which is equivalent to the but-for test (Braham and Holler, 2008, p.146). Their solution appeals to the NESS-Test. As we will see, the NESS-Test derives its value from its seemingly unique capacity to deliver intuitively compelling conclusions in overdetermination cases. However, in Section 2.3, I will argue that overdetermination cases are almost certainly non-existent, so we do not need the NESS-Test.

The NESS-Test attributes causal status to actions that *could have been* but-for conditions had certain other individuals' *not* performed certain actions. To attempt to show that the NESS-Test provides an intuitively compelling account of causation, Braham and Holler set out principles for assigning causal status to an event – C – with regards to an outcome – X:

Strict Necessity: C is necessary for the occurrence of X *whenever* X occurs.

Strong Necessity: C is necessary for the occurrence of X on *this particular occasion*.

Weak Necessity: C is necessary element of some set of existing conditions that is sufficient for the occurrence of X.

Strict Sufficiency: C is sufficient by itself for the occurrence of X.

Strong Sufficiency: C is a necessary element of some set of existing conditions that is sufficient for the occurrence of X.

Weak Sufficiency: C is an element of some set of existing conditions that is sufficient for the occurrence of X (Braham and Holler, 2008, pp.147-148).

Braham and Holler apply their principles to hypothetical examples in order to test whether they match our intuitions about causation. They believe that by doing this we will see that the NESS-Test (that is, Weak Necessity, which is equivalent to Strong Sufficiency) is needed to explain our firmly held intuitions about causation. They argue that the *Weak Sufficiency Principle* can be rejected because any C is assigned causal status if it is conjoined with the conditions

that were causes of X. For example, the fact that a cigarette lighter was half full is clearly not a cause of the fire it was used to light. To see why we should reject the other principles it will help us to consider some further examples:

Assassination 1: Fred and Alex aim and shoot at Greg at exactly the same moment. Each shot is independently sufficient to kill Greg.¹¹

This is a case of duplicative overdetermination; two independent causal processes – C1 and C2 – arise at the same time and each is independently sufficient for X. The *Strong Necessity Principle* cannot assign causal status to the actions of Fred or Alex because if Fred's bullet had not killed Greg, then Alex's would have done. Neither of their actions is necessary. This is why the but-for account seems to be inadequate. So we might use the *Strict Sufficiency Principle*. This would assign causal status to both Fred's and Alex's actions. But this is problematic in cases of duplicative overdetermination:

Assassination 2: Greg is held up in his car by Fred, Alex and Paul, who together tie Greg up and then push his car over a cliff. It is sufficient for Greg's death that only two of the assassins hold him up, tie him up, and push his car over the cliff.

In *Assassination 2*, for each of the three assassins, their personal contributions do not satisfy the *Strict Necessity Principle*, *Strong Necessity Principle*, or the *Strict Sufficiency Principle* (Braham and Holler, 2008, p.149). The *Strict Sufficiency Principle* is ruled out because none of their contributions is independently sufficient for Greg's death. These principles do not explain pre-emptive cases either:

Assassination 3: Fred and Alex are both intent on killing Greg. Alex has poisoned Greg's water bottle. But just as Greg is about to take a sip, Fred shoots him.

Pre-emptive overdetermination occurs when an outcome X is brought about by some actual sufficient condition C1, but had C1 not occurred, then X would have been brought about by another independently sufficient condition, C2. In *Assassination 3*, the *Strict Necessity Principle* and *Strong Necessity Principle* fail to assign causal status to the actions of either assassin because of the presence of

¹¹The four assassination examples I offer are reformulations of similar examples used by Braham and Holler (2008).

other sufficient conditions. The *Strict Sufficiency Principle* assigns causal status to both Fred and Alex, but Braham and Holler maintain that in pre-emption cases like *Assassination 3*, the pre-empted condition did not in fact cause the outcome (2008, p.150). Alex's actions should not be assigned causal status in *Assassination 3*. This is highly intuitive. So any principle that assigns the pre-empted conditions causal status is counterintuitive and should be rejected.

We need a principle that can deal with duplication cases and pre-emption cases. The answer for Braham and Holler is the *Weak Necessity Principle* and the *Strong Sufficiency Principle*. These hold that: C caused X if C was a necessary element of some set of existing conditions that was sufficient for X (2008, pp.150-151).

These two principles tells us that to be ascribed causal status for event X, a prior event C need not be *the* cause, in the sense of its being the single sufficient condition present on that occasion, or *a* cause in the senses of the *Strict Necessity Principle* and *Strong Necessity Principle*; it just needs to be shown to be a "causally relevant condition" of X (Braham and Holler, 2008, p.150). A causally relevant condition carries "causal efficacy" for X (Braham and Holler, 2008, p.151). So we can assign the status of cause to actions independently insufficient for X when each was a necessary part of a possible set of existing conditions minimally sufficient for X. This is the 'NESS-Test'.

To apply the test we define a set of conditions, S , that are minimally sufficient for X. 'Minimally Sufficient' means no subset of S would be sufficient for X. An ' S ' is the conjunction of conditions, s_1, s_2, s_3 , and so on, each of which is necessary for S if we hold fixed the remainder of the conditions in S . Each condition then passes the but-for test. So each is a necessary element of that minimally sufficient set of conditions (Braham and Holler, 2008, p.151).

To help see the NESS-Test. Imagine a referendum where 6 million Yes-votes are needed to reach the winning threshold. A minimally sufficient set is made up of 6 million votes. If 6 million and one Yes-votes are cast, none of those individual Yes-votes is a but-for condition of the outcome of the referendum. On the but-for account of causation, then, no particular individual's Yes-vote was a cause of the outcome. Therefore, none of them can be attributed moral responsibility for the outcome. However, each of those Yes-votes could be

part of a minimally sufficient set – S – composed of another 5,999,999 Yes-votes. No individual Yes-vote is a but-for condition of the outcome of the referendum, but each vote satisfies the NESS-Test, and is therefore a cause. Adopting the NESS-Test means all the Yes-voters can be assigned causal responsibility for the outcome and therefore moral responsibility for it too.

In *Assassination 1*, both Fred and Alex's actions satisfy the NESS-Test for the outcome of Greg's death. Each could be combined with a set of existing conditions minimally sufficient for that outcome – e.g. the gun being loaded and Greg being alive at the moment the bullet pierces his body. In *Assassination 2*, Fred, Alex and Paul's actions satisfy the NESS-Test since each was potentially part of a minimally sufficient set of existing conditions that involved just two of them pushing the car. In the example of pre-emptive overdetermination – *Assassination 3* – Fred's shooting is a NESS but Alex's action is not. Alex's action could not be a necessary element of an existing set because Greg had already been killed by Fred; Alex's action could not have combined with existing conditions to cause Greg's death. If an alternative cause emerged, or would have emerged subsequent to the actual cause, this does not vitiate its causal status (Braham and Holler, 2008, p.152). Correctly, the NESS-Test does not assign the pre-empted contributions causal status.

The denial of causal status to pre-empted conditions is endorsed by Wright. He provides an example analogous to *Assassination 3*: imagine David shoots and kills Paul just as Paul was about to drink a cup of tea that had been poisoned by Claire. David's shot was necessary for the sufficiency of a set of actual antecedent conditions that did not include the poisoned tea. Claire's poisoning of the tea was not a necessary element of any sufficient set of actual antecedent conditions. Paul had not even drunk the tea. Even if Paul had drunk the poisoned tea, the poisoning of the tea would not be the *cause* of Paul's death if the poison did not work instantaneously but the shot did. Wright says that

a set of antecedent conditions sufficient to cause P's death must include poisoning of the tea, P's drinking of the poisoned tea, and P's being alive when the poison takes effect. Although the first two conditions actually existed, the third did not. D's shooting P prevented it from occurring. Thus there is no sufficient set of actual antecedent conditions that includes C's poisoning of the tea as a necessary element. Consequently, C's poisoning of

the tea fails the NESS test. It did not contribute to P's death (Wright, 1985, p.1795).

For Wright, then, a NESS-condition is one that is operative at the time of the outcome and can be combined with other operative conditions to form a minimally sufficient set. This is why the NESS-Test gives us the right answer in the causal pre-emption cases. It dismisses pre-empted conditions as inoperative. The poison was prevented from becoming operative because Paul was killed by the bullet from David's gun. The NESS-Test does not assign causal status to pre-empted conditions, and neither does the but-for account. However, the but-for account does not assign causal status to the pre-empting conditions either. Therefore, it looks like the NESS-Test is the correct account.

If we consider *Dresden Firestorm*, *Robot Referendum*, and *Rolling Rock*, these look like instances of duplicative overdetermination, where there were more non-pre-empted, individually unnecessary conditions, than what was minimally sufficient to bring about the outcome. Each, however, could have been a necessary element of a set of conditions minimally sufficient for the outcome.

In light of the pre-ceding discussion, we should not regard pre-emptive causation cases as genuine instances of causal overdetermination. It is clear in the pre-emption cases that the pre-empted factors did not form part of a causal chain that ended in the relevant outcome. The NESS-Test requires us to dismiss the pre-empted conditions, and in doing this we get the intuitively correct results. In the next section, however, I will go further than this, and argue that there are almost certainly no cases of duplicative overdetermination. That is, all instances of alleged duplicative causation can be recast as instances of pre-emptive causation. The problem is that our lack of sufficiently fine-grained evidence creates an appearance of duplicative overdetermination. I will also argue that the NESS-Test is only worth retaining as an account of causation-in-fact if there are genuine instances of duplicative overdetermination, since a suitably qualified but-for account of causation can provide us with intuitively compelling answers in pre-emption cases. Ultimately, I believe there are almost certainly no cases of duplicative overdetermination.

2.3 Rejecting the NESS-Test

The NESS-Test appears to provide a theoretical basis for an intuitively compelling set of conclusions in duplicative overdetermination cases. I will now argue, however, that we do not have sufficient reason to abandon the but-for account of causation. This is because there are almost certainly *no* genuine overdetermination cases. I cannot prove that duplicative overdetermination is not a physical possibility, but I will argue that the chances of it happening are so small that we ought to assume that *all apparent duplicative overdetermination cases are merely causal pre-emption cases that we cannot solve*. The NESS-Test's value comes from its ability to deliver intuitively compelling conclusion in overdetermination cases. So if my argument succeeds, we can dispense with it.

The requirement that a NESS-condition be operative and combinable with existing conditions at the time of the relevant outcome means pre-empted conditions are categorised as non-causal. This has some important implications. In *Robot Referendum*, for example, there was a point at which enough Yes-votes had been cast to ensure the war would be fought. If votes were counted by computers as soon as they were cast, then Yes-votes cast after the winning margin had been met would *not* be NESS conditions. This suggests that there was a single set of Yes-votes that were minimally sufficient for the outcome, and all other Yes-votes were pre-empted and therefore are not causally relevant. Importantly, however, it also seems like the Yes-votes cast before and after this point would not be *but-for* causes of the outcome. This is because it is true the outcome would have occurred had any particular Yes-vote not occurred. So the NESS-Test gives us the correct result whereas the but-for account does not.

On the other hand, one might think that if the Yes-votes were counted in a different order to that in which they were cast then there would be more than one minimally sufficient set of NESS-conditions. If the Yes-votes were counted after voting had finished, all the Yes-votes cast prior to the count are NESS-conditions. Each could form part of a minimally sufficient set. This is not the case, however, because *uncounted votes are not operative*. Votes become operative when counted. When a sufficient number of Yes-votes are counted the referendum is won. These are the causes of the vote being won as it was won – by their votes being counted. All uncounted Yes-votes are pre-empted.

Compare this to an example where Alex injects Greg with a lethal poison that will lay dormant in his system for 48 hours before activating and killing him. Fred shoots Greg dead 8 hours after the poison is injected. The poison, like the uncounted votes, threatens to be a NESS-condition of Greg's death, but it is the shot, like the counted votes, that was a NESS condition of Greg's death.

These cases demonstrate that the NESS-Test must dismiss events that occur after a particular point in time for it to make intuitive sense. We do not want an account that attributes causal status to conditions that were pre-empted because we have firmly held intuitions about their causal status. If Alex fires a shot at Greg a few milliseconds before Fred fires a shot, and Alex's shot enters Greg's brain and kills him a millisecond before Fred's shot enters his brain, even though there was a point in time where both bullets were air-borne and each was sufficient to kill Greg, when Fred's shot enters Greg's body it could not combine with existing conditions to be a NESS of Greg's death. Greg was already dead. Unlike the but-for account, the NESS-Test explains our intuitions that Alex's shot was a cause of Greg's death and Fred's shot was not.

When applying the NESS-Test, to dismiss pre-empted causes we need to be able to identify which caused the outcome to occur *when it in fact occurred*. Conditions that become operative after this point in time are non-causal. We might wonder, however, whether the but-for account can be used to explain what were but-for conditions of an outcome occurring when it in fact occurred. Such specificity enables the but-for account to eliminate pre-empted contributions too.¹² In the aforementioned example, Alex's shooting is a but-for condition of Greg's death happening at the time and location at which it occurred. The counted votes that were minimally sufficient to bring about the result in a referendum were but-for conditions of it being won at that time.

¹² This point is also made by Eric Adams (2010). He argues that when events are specified in enough detail, a but-for account yields the same conclusions as the NESS-Test. The NESS-Test has traction where events are described in a way that suggests there were concurrent causes. I go further than Adams and reject the possibility of causal overdetermination. He avoids this issue. It will not help my current argument to detail the differences in our accounts.

But what about the alleged cases of duplicative overdetermination? These are cases where the NESS-Test appears indispensable. There might have been multiple simultaneous sufficient conditions that occurred, any one of which would have produced a death at the exact time and location at which it occurred. For example, we can imagine that Alex's and Fred's shots were both independently sufficient to kill Greg at the exact same time and location. It seems that both can be assigned causal status by the NESS-Test, but neither is a but-for condition of Greg's death, even with the added specificity. In these cases, however, we might look to the temporal sequence of the potential contributory conditions. We might find that although their negation would not change the timing or location of the death, their actions occurred in temporal sequence. Alex, for example, pulled his trigger slightly before Fred did, Alex just happened to be a little bit further away from Greg, so their bullets hit Greg at the exact same time. We might, then, be tempted to dismiss Fred's action.

Yet the argument could be refined, using an example where the two possible contributory actions were performed at exactly the same time and the negation of either of them would not have changed the time and location of the outcome. So neither is a but-for condition. For example, this could be true in *Assassination 1*. Or the winning margin in *Robot Referendum* might have been breached by 10 Yes-votes cast at the *exact same time*. However, the suggestion that there can be two simultaneously occurring, sufficient, operative conditions, or two sets of simultaneously occurring, sufficient, operative conditions, and that this presents us with undeniable cases of causal overdetermination, has been rejected by Martin Bunzl (1979). Bunzl claims there is only one completed causal chain that ends in a relevant outcome, and factors are either part of it or they are not, and those that are not are not causes. He says that that "two competing causal agents cannot occupy the same point in space and time" and so in alleged overdetermination cases "the problem is that we just cannot get close enough to the physical process to see which of the two competing causal agents is in fact causally efficacious" (1979, p.141).

Bunzl's point is this. In cases where we suspect (mistakenly) there might be causal overdetermination, there is in fact just one causal chain that resulted in the relevant outcome happening *as it in fact happened*. All other conditions that

do not form part of this chain are not a cause. There cannot be more causes of something than what was necessary for it to occur as it in fact happened. When Greg is shot by his two assassins, it is either true that (a) one of the bullets was a cause of his death, and it pre-empted the other, causing the damage that in fact killed Greg just before the next bullet entered his brain. Or it is true that (b) both bullets contributed to his death, in the sense that Greg died at a precise point in time due to the damage that had been caused by two separate bullets entering his brain. It might be true that either bullet would have killed him had the other not entered his brain, but that would have been a different death to the one that was caused by both bullets. It would have resulted from different damage to his brain. So in the alleged duplicative overdetermination cases it is just harder to distinguish pre-empting and pre-empted factors: “the illusion of causal overdetermination arises from nothing more than the same epistemic constraints that make for difficulties in distinguishing causes that pre-empt other causes” (Bunzl, 1979, p.147). There was a single causal chain, consisting of but-for conditions of the harm occurring as it in fact happened.

Consider an example where Alex empties Greg’s water bottle and fills it with more poison than is sufficient to kill Greg. Then Fred comes along and adds to the water bottle more poison than is sufficient to kill Greg. Greg then takes a sip of the water bottle before collapsing and dying as a result of the poison. The sip of poison might have been composed of molecules of the poison Alex added, Fred added, or a combination of both. The poison he drank was operative and causal, and what he did not drink was inoperative and non-causal. If he drank a combination of the poison added by Fred and Alex, then some of the poison Fred added, and some of the poison Alex added, would be pre-empted by the molecules that he actually drank. So in this case, both Alex and Fred’s actions were but-for causes of Greg’s death as it happened. That is, as a result of poison he ingested. Greg’s death was not, therefore, overdetermined.

I cannot prove Bunzl’s claims in this thesis, but can claim that even if laws of physics allow that there could be two events that occur at the exact same time and place, it is so unlikely to occur that it is as good as impossible. There is disagreement about whether time is continuous or discrete (Forrest, 1995). This disagreement is considered a moot point in physics. But if it is continuous

then, in theory, there is always a more precise time that could be given for a particular event. If it is discreet, however, then the smallest possible unit will be measured in Planck time. It has a value of 5.3×10^{-44} seconds. This means the probability of two events occurring at the exact same time is incredibly small.

Identifying a case of genuine duplicative causation is practically impossible. It is almost certainly the case that any *apparent* instance of *duplicative* causation is actually an instance of *pre-emptive* causation. Identifying which conditions were pre-empting and which were pre-empted will often be an impossible task too.

How is this relevant for the NESS-Test? This account gets its value from the fact it offers an intuitively plausible way of assigning causal status in cases of apparently overdetermined harm. The NESS-Test disregards pre-empted factors as causally relevant, but where there is duplicative overdetermination, there will be NESS-conditions that are not but-for causes of the harm. The but-for account will assign causal status to none of the duplicative causes. However, it is almost certainly true that an apparently overdetermined harm is just a case of causal pre-emption which we are unable to solve. If we had access to sufficiently fine-grained evidence we would not need to consider whether a condition is NESS or not. It would be a cause, or it would not be a cause. We could distinguish the but-for causes of the harm occurring as it happened from any pre-empted conditions that were not its causes. The epistemic deficit, however, causes the appearance of overdetermination.

Extensive investigations would be needed to determine whether, (a) a harm is genuinely duplicatively overdetermined, and (b) which actions were pre-empted and therefore not but-for conditions (or NESS-conditions if it turns out to be a genuinely overdetermined harm). In order to avoid such costly (and almost certainly futile) investigations, we might treat it as if their actions were causes, all those persons whose actions we cannot, with sufficient certainty, rule out as pre-empted causes. This would not be the assignment of matter-of-fact causal status, just an admission that we do not know which actions actually caused the harm. This would be a rule adopted for the sake of assigning costs in non-ideal epistemic conditions. On this rationale, costs would foreseeably be assigned to some failed contributors. Intuitively, this seems better than the victim or uninvolved parties bearing them. I suggest we should do this.

But would this mean abandoning causal responsibility as a necessary condition of liability? In short, no, it simply alters what the liable parties are causally responsible for. As I will argue below (2.5), in cases where it is uncertain which individuals' actions were causes and which were pre-empted, the same individuals can be liable on the basis of their culpable moral responsibility for the epistemic deficit that prevents the victim identifying who is culpably morally responsible for the impermissible harm. The conception of moral responsibility in this argument uses the but-for account of causation. This does not deny the causal responsibility requirement. It simply shifts it: instead of causal responsibility for the outcome, individuals face causal responsibility for epistemic deficits. Before making this argument, however, I must deal with a different argument which asserts that liability can be grounded in culpable moral responsibility for *attempting* to cause impermissible harm.

2.4 Causation as a Necessary Condition of Liability

Against the account I will defend shortly, it might be argued that moral responsibility for *attempting* to cause an impermissible harm can ground liability. This would deny the causation requirement I endorsed in Chapter 1. Such an argument would hold that an individual who is the victim of an impermissible threat is permitted to defend herself by imposing proportionate harm on individuals who attempted to cause her harm, even if their actions were not (but-for) causes of the threat that needs to be averted. In *Rolling Rock*, for example, each of the six is liable to defensive harm because each of them is culpably morally responsible for *attempting* to causally contribute. The question of which of them actually caused the harm can be put to one side.

This looks like an intuitively appealing idea. However, the problems that arise when abandoning the causal responsibility requirement are demonstrated by McMahan:

Aware that a villain plans to kill you, you begin to carry a gun. On one occasion you have the opportunity to empty the bullets from his gun and you do so. Immediately thereafter, he confronts you in an alley and tries to fire. As he continues to pull the trigger in frustration, you see that a second villain is preparing to shoot you from behind a narrow basement window (it is a tough neighbourhood). Unable to flee in time and also unable to fire with accuracy through the tiny window, you can save yourself only by

shooting the first villain, causing him to slump in front of the window, thereby blocking the second villain's line of fire (McMahan, 2005a, p.391).

McMahan believes it is intuitively plausible to think that Villain 1 is liable to being killed in order to stop Villain 2's attack. This is because Villain 1 is making a culpable attempt on your life. It also seems permissible to kill Villain 1 if this would prevent Villain 2 from shooting an innocent bystander rather than yourself (McMahan, 2005a, p.392). McMahan also says that it seems that even if Villain 1 had realised his gun wasn't loaded, and made no further attempt to kill you, this would not change his moral status. The Villains are morally responsible for culpable attempts to cause harm. These intuitions suggest that one can be liable for the prevention of a threat he or she does not cause, and when he or she is no longer culpably morally responsible for an existing threat of impermissible harm.

McMahan persuasively argues that we should reject these intuitions. If you can be justified in killing a person who you know poses no threat, in either self-defence or other-defence, in order to avert a threat for which he is not morally responsible, then this conflicts with an entrenched principle of common-sense morality: the principle that it is wrong to use the harming of an innocent person as a means of averting an equivalent or lesser harm to another. Someone might claim that Villain 1 is non-innocent. But McMahan says we are not concerned with "overall moral innocence". Instead, we are concerned with innocence that is relative to a particular act: "The same person may be liable relative to one choice but at the same time an innocent bystander relative to a different choice" (McMahan, 2005b, p.763). Villain 1 no longer threatens and is innocent in the sense that she is not morally responsible for any wrongful threat in existence. We should reject our intuitions about the villains' liabilities and retain the common-sense principle against harming the innocent.

The moral responsibility-based account of liability is clear about the grounds and possible objects of an individual's liability. It says that an individual can be liable only for harms she is morally responsible for causing. By contrast, the culpable attempt-based account is problematically vague. This leads to strongly counterintuitive results. The vagueness arises in that it is not clear when a liability-grounding attempt can be said to occur: does it occur when the

individual forms the intention to cause harm or when she begins to act upon the intention? McMahan considers whether a person becomes liable just because he *would* kill another *if* he could, or just because he intends to do so *in the future*, or to do so under circumstances that are *very unlikely* to obtain. He also asks: what if a person you could now use to defend yourself from a threat he did not cause, made an attempt on your life earlier that day, or earlier in the year, or is a murderer who was never punished, or a punished but unrepentant murderer? He concludes:

If liability is divorced from responsibility for an actual threat, it is an open question for what purposes a person who is liable to be killed may justifiably be killed. This problem is illustrated by the case in which the purpose of killing the first villain is not to defend the person he is attempting to kill but to defend a different person from a different threat. But there are other possibilities. We might, for example, kill those who are liable for culpable attempts in order to use their organs for transplantation. It is unclear, however, whether there is a stable, principled line between this unappealing suggestion and the view that it is permissible to kill the first villain to prevent an innocent bystander being killed by the second villain (McMahan, 2005a, p.393).

Whilst it may seem intuitively plausible to think that Villain 1 is liable on the basis of his culpable moral responsibility for a wrongful threat to you that now no longer exists, there might be no principled way of specifying the culpable-attempt-based account in a way that avoids these counterintuitive implications. McMahan also adds that

we must have a cogent reason for claiming that *that* form of culpability is sufficient for liability in these circumstances while other forms of culpability are not – for example, culpability for other forms of wrongful action now (such as lying to one’s wife), for a similar attempt in the immediate past, for other forms of serious wrongdoing in the past, for an intention or even mere willingness to engage in an unjust attack against you, or against some other innocent person, and so on. I doubt that any such reason exists (McMahan, 2005b, p.763)

If we drop the requirement of culpability for an actual threat, and replace it with culpability for an attempted threat, there seems to be no reason to draw the line at culpability for a present threat (McMahan, 2005b, p.764). The account is then opened up to a raft of counterintuitive implications, and it is not clear that a proponent could present principles that would avoid these implications.

Of course, ‘it is not clear that’ is not equivalent to ‘it is impossible that’. Perhaps a coherent version of the culpable attempt-based account of liability exists. McMahan has simply demonstrated that developing a coherent version would be a long and arduous process. This is a process we need not engage in, since, as I will now argue, the moral responsibility-based account can give us the right verdicts about individual liability.

2.5 Moral Responsibility for Epistemic Deficits

In this section I will argue that individuals can render themselves liable to harm when *they cause facts about an impermissible threat to be obscured*, and deny its potential victim access to objectively permissible means of self-defence. A straightforward example of this is non-combatants dressing the same as unjust combatants who are launching rocket attacks. The combatants’ victims would be unable to defend themselves if unable to distinguish the unjust combatants from the (non-liable) non-combatants. My claim is that this can render the non-combatants liable. It is important to note that an individual can causally contribute to an epistemic deficit without causally contributing to the impermissible threat the epistemic deficit sustains or facilitates. One way to do this is to deny the defender access to objectively permissible defensive means. Another way – and the one I will focus on here – is to contribute to an epistemic deficit that creates the impression of overdetermination and denies the defender knowledge of against whom such defensive means can be used.

I begin by appealing to an argument made by Kimberley Kessler Ferzan. Ferzan argues that if an individual creates an impression of posing an impermissible threat without actually posing one, she might not be permitted to defend herself against an attacker who she caused to see her as a threat. If she causes another to believe she threatens him with impermissible harm, she would lack a right of self-defence against him should he try to defend himself against the perceived threat (Ferzan, 2012, p.690). The reason, she believes, is that she is morally responsible for his mistaken beliefs that motivate him to undertake the unnecessary defensive measures (Ferzan, 2012, p.691). To see this, we should consider an example.

Imagine that Stu reasonably perceives Tom to pose a lethal threat that can only be averted by using lethal force against Tom. Imagine Tom did not cause a lethal threat but culpably created the appearance of one. Stu acts upon reasonable beliefs when taking the lethal defensive measures against Tom. Stu is therefore blamelessly morally responsible for the lethal threat to Tom. Does Tom have a right to defend himself against Stu by using lethal force? It seems intuitively correct to say Stu has a right of self-defence and Tom lacks one. This is because Tom is culpably morally responsible for Stu's mistaken beliefs. It is Tom's culpable moral responsibility for Stu's mistaken beliefs that renders him liable to the harm Stu causes him in order to prevent the apparent threat.

A similar idea is alluded to in McMahan's discussion of a just combatant mistaking an unjust combatant's moral status. If the overwhelming majority of unjust combatants are 'Partially Excused Threats', which McMahan claims to be the case in most wars, then just combatants are entitled to act on the *presumption* that the unjust combatants they face are Partially Excused Threats. He says it would be unreasonable for them to do otherwise in the absence of more detailed knowledge (2009, p.187). This might benefit unjust combatants who are fully culpable and not at all excused, but some combatants will be treated more harshly than their liability permits. Their excuses are relevant to the application of the Narrow Proportionality Principle. If the just combatant sees a fully excused unjust combatant as being only partially excused, she will believe that harms of a greater magnitude will be narrowly proportionate, which she would not if she knew the combatant was actually fully excused. McMahan says a just combatant might inflict an objectively disproportionate harm as a result (2009, p.188). He continues:

If an unjust combatant is not a Partially Excused Threat but is treated as if he were one, and if this treatment is worse than what his actual status demands, then he has probably been treated unjustly. But the just combatant who has treated him this way has acted with subjective justification, and the responsibility for his objective error almost certainly lies more with the unjust combatant than the just combatant (McMahan, 2009, p.188).

This suggests that when a subjectively justified defender acts upon a mistaken belief or assumption about an attacker's liability, the attacker does not possess a right to defend herself against the defender's objectively disproportionate threat, *if she is morally responsible for the defender's mistaken belief*. The defender is

required to act upon reasonable beliefs in the circumstances. If the just combatant's reasonable beliefs are mistaken, and this is the unjust combatant's fault, then the unjust combatant lacks a right of self-defence against the disproportionate threat.

How can these ideas help us overcome the problems that epistemic deficits might create for the victims of impermissible harms? Some simple examples will motivate my argument. Imagine I am your neighbour. You inform me that you suspect a villain wants to kill you and so you have stored a taser in your kitchen. I have grown to dislike you and would rather the villain succeed. I sneak in through the back door and remove the batteries from the taser. Or imagine that you are being pursued through a building you are unfamiliar with by a villain who is trying to kill you. I intentionally move the exit sign so that you are directed down a corridor you cannot escape from. In the first example I block your access to permissible defensive measures, in the second I block your access to knowledge of permissible defensive measures. In both of these situations, I am not culpably morally responsible for the lethal threat the villain poses, but *I am* culpably morally responsible for denying you access to, or knowledge of, objectively permissible defensive measures. I believe most people will find the claim that I am liable in these cases to be highly intuitive.

Now consider individuals whose potential contributions to harms were in fact pre-empted by others' contributory actions. These individuals will sometimes be culpably morally responsible for the epistemic deficit that leaves a victim unable to identify whose actions caused, and whose did not cause, her injuries. The obscuring of facts is sometimes an effective way of undermining objectively permissible defensive efforts, and can facilitate and sustain impermissible threats that would otherwise have been averted. It seems intuitively permissible to take action against those culpably morally responsible for such epistemic deficits, so I propose the *Liability for Epistemic Deficits Principle*:

An agent who is culpably morally responsible for obscuring facts that would otherwise provide the potential victim of an impermissible harm, or a defender acting on his or her behalf, with evidence of either (i) permissible means of self-defence, or (ii) the identity of agent(s) against whom defensive means may be permissibly used, is liable to proportionate harm necessary for the prevention of the impermissible harm.

The Liability for Epistemic Deficits Principle (LEDP) can explain the liability of failed contributors in the alleged overdetermination cases I have been discussing in this chapter. Individuals who failed to causally contribute to the threat did cause the defender (or someone acting in defence of her rights), to lack access to particular evidence about the cause of the impermissible threat.

Rolling Rock 2: Everything is the same as *Rolling Rock*, except two of the attackers are escaping along separate bridges that run above the valley. Greg realises he could pull a lever causing an attacker to drop into the valley, stopping the boulder but causing serious harm to the attacker. Attacker 1 contributed to the threat but Attacker 2 failed to do so. Greg rightly believes that at least one of them contributed to the threat but he cannot be certain whether only one or both did.

It seems intuitively correct to say the Attacker 2 should not be permitted to deny Greg permissible means of self-defence. In her absence, Greg would have a single objectively permissible and effective means of self-defence – dropping Attacker 1. If Attacker 2 were non-labile, then she would have a right to self-defence if Greg attacked her rather than Attacker 1. Attacker 2 should not be permitted to defend herself should Greg target her because she is culpably morally responsible for his epistemic deficit.

In alleged overdetermination cases the identity of causal contributors can be obscured by the presence of failed, pre-empted contributory actions. Every time an individual performs an attempted contributory action, that represents one more attempted contribution that will need to be disentangled from the others, in order to determine whether or not it causally contributed to harm, and whether or not other individuals' attempted contributions were causes of the harm. Some attackers are liable on the grounds of their culpable moral responsibility for the impermissible threat. The failed attackers are not liable on that basis. The LEDP holds that their liability is grounded in their culpable moral responsibility for causing the identities of permissible targets to be obscured in a particular way.

In *Dresden Firestorm*, for example, it will be impossible for anyone to determine which bombers were causes of harm and which were not. It is reasonably foreseeable, however, that their actions will at least be but-for conditions for the epistemic deficit being exactly how it is, even if they do not causally contribute to the impermissible harms that need to be prevented or repaired.

The bombers will be liable for the prevention of the impermissible harms regardless of whether they caused the harm. This, I believe, is an intuitive conclusion to reach in this case. In *Robot Referendum* the Yes-voters causally contribute to the epistemic deficit that obscures facts about which votes were but-for causes of the outcome. In *Rolling Rock*, all attackers culpably causally contribute to the epistemic deficit too. I will consider this further in Chapter 7.

2.6 Conclusion

The LEDP holds that individuals can render themselves liable for harms, by causing an epistemic deficit that threatens to facilitate or sustain an impermissible threat or impermissible harm. The deficit sustains the threat or harm by denying the victim of the threat (or her defender), evidence about an objectively permissible defensive measure. An adequate account of defensive harm should not permit individuals to culpably deny others' access to objectively permissible means of self-defence. This is the insight of the LEDP. The LEDP provides intuitive conclusions in *Dresden Firestorm*, *Robot Referendum*, and the *Rolling Rock* examples. It implicates as liable individuals who are culpably morally responsible for causing an epistemic deficit when that deficit causes the victim to be unaware of particular pieces of evidence relating to permissible means of averting an impermissible threat. It does not need to be true that the individual causally contributed to the threat the victim needs to defend herself from, it is sufficient that he contributed to that particular epistemic deficit.

The LEDP enables the individualist moral responsibility-based account of liability to deliver intuitively compelling conclusions in cases where it has been argued that it cannot. In the apparent overdetermination cases, it has been alleged that no individual can be attributed moral responsibility for a harm because none of them are causally responsible for it. In Section 2.2 I considered how adopting the NESS-Test of causation-in-fact enables us to attribute moral responsibility in cases of allegedly overdetermined harm. These attributions of moral responsibility for the overdetermined harm could ground attributions of liability too. In 2.3, however, I argued, that we do not need the NESS-Test. This is because there are almost certainly no cases of overdetermined harm. There is just an appearance of overdetermination

resulting from an epistemic deficit. In ideal epistemic conditions the but-for account would be sufficient. The NESS-Test offers nothing in these cases that the but-for account does not. Determining who caused the harm, however, will be incredibly difficult, probably impossible. Yet the voters in *Robot Referendum*, the bombers in *Dresden Firestorm*, and the attacks in *Rolling Rock* were causes of their victim(s) lacking certain evidence about the identities of their attackers, and therefore the identities of permissible targets of defensive harm.

The LEDP means that in overdetermination cases, the individualist account of moral responsibility-based liability can yield intuitively compelling conclusions. Endorsing the LEDP does not require that we abandon the causal responsibility requirement that I endorse either. In 2.4 I considered whether an account of liability that abandons it would be suitable. This account grounded liability in a culpable attempt to cause harm. Following McMahan, I have rejected this account as it seems incapable of retaining intuitive plausibility. The individualist moral responsibility-based account retains its intuitive plausibility because of the causal responsibility-requirement. This chapter has, therefore, served multiple purposes. It has overcome the No Causal Connection argument, defended the causal responsibility requirement, and also provided a principled manner of overcoming some of the problems posed by epistemic deficits. I return to the issue of epistemic deficits in Section 7.3. In the next chapter I consider three more arguments against an individualist account of moral responsibility-based liability and the alternative account proposed by those who make these arguments.

3 The Collectivisation Strategy

In Chapter 2, I rejected an argument which claimed that an individualist moral responsibility-based account of liability cannot provide intuitively compelling conclusions in a particular set of cases. These are cases where an impermissible harm is alleged to be overdetermined. I argued that there are almost certainly no overdetermined harms. This appearance of overdetermination reflects the fact that we lack access to a certain set of morally relevant facts. These are the facts that are relevant to determining who caused the harm. We are unable to say with a sufficient degree of certainty which actions caused the harm and which did not. If we had sufficiently fine-grained evidence, then we could. I argued that when we are capable of identifying who is culpably morally responsible for the epistemic deficit that prevents us identifying who caused the impermissible harm, those individuals can be liable on that basis. This is because our rights should prevent others from culpably denying us access to permissible means of self-defence. So if an impermissible threat appears to be overdetermined, then individuals can be liable to harms needed to prevent the impermissible threat, if they are culpably morally responsible for causing the particular way in which there is an appearance of overdetermination.

In this Chapter I will consider three arguments that I cannot outright reject like I did the No Causal Connection argument. These arguments are taken to favour the Collectivisation Strategy over the individualist account of liability I introduced earlier. I will consider in more detail why they are taken to provide support for the Collectivisation Strategy. The Collectivisation Strategy assigns liability to a corporate agent in the first instance. Only as a second step does it consider the distribution of costs from the corporate agent to its members. I will demonstrate the implications that pursuing this strategy has for any attempt to provide a theoretically coherent and intuitively compelling account of the justifiable distribution of costs in the case of unjust state actions. In subsequent chapters, I will assess particular Collectivisation Strategies that have been undertaken by those writing on citizens' reparative duties.

The first argument I outline in this chapter is the Diminished Moral Responsibility argument. I introduced this argument in Section 1.4.1. It appeals

to the fact that the degree of an individual's liability for a harm varies in accordance with the degree of her moral responsibility for causing the harm. It is conceivable that there could be an impermissible harm caused by the actions of participants in a collective action, where the combined sum of their liabilities does not cover the entire costs of repairing the harm. This seems particularly likely on an individualist moral responsibility-based account of liability. So, it is thought, we should assign liability to the collective as a whole: we should use the Collectivisation Strategy.

The second argument I outline is the Membership Argument. This argument states that a participant in a collective action might not causally contribute to an impermissible harm caused by some of its participants' contributory actions. For example, a cashier at a petrol station does not causally contribute to the oil spill the company is ordered to clean up. On a moral responsibility-based account of liability a participant will only be liable for harms he or she causes. But some argue that it seems intuitively correct to think the members should be made to bear the costs of their co-participants' contributory actions. Why might the Membership Argument support the Collectivisation Strategy? If we can hold the corporate agent liable for the harms that some of its members have caused, it is possible that its members have duties to contribute to the repair of the harm in virtue of facts about their relationship with the corporate agent, rather than their moral responsibility for the harm (or lack thereof).

The third argument I outline is the Insufficient Funds argument. It relies on the idea that sometimes there will be individuals who are liable for an impermissible harm, but there will be either (a) no way of harming them that will be an effective means of repairing the harm they are liable for, or (b) it will only be an effective means of repairing *some* of the harm they are liable for. In reparative cases, for example, this occurs when the individuals who are liable for an impermissible harm simply lack the resources needed to pay for the costs of its repair. There is no point imposing reparative demands on an individual when she is unable to meet them. This argument can be used to support the Collectivisation Strategy if there are cases where there are grounds for holding a corporate agent liable for a harm, and that corporate agent can

permissibly transfer more wealth to the victim than the individuals who are also liable for the harm can transfer to the victim.

In Section 1, I outline these three arguments, as they are made by proponents of the Collectivisation Strategy. In Section 2, I outline how the Collectivisation Strategy works and why it is believed to overcome the problems, outlined in Section 1, for the individualist moral responsibility-based account of liability. In Section 3, I will demonstrate why proponents of the Collectivisation Strategy cannot coherently appeal to individuals' liability for the harm in order to explain why a liable corporate agent can permissibly transfer its liability-burdens to them. My individualist account does not succumb to these conceptual restrictions.

In Section 4, I begin to demonstrate how my individualist account of moral responsibility-based liability will deal with these objections and provide a plausible alternative framework to that offered by the Collectivisation Strategy. Rather than conceiving of the individuals' collective action as a corporate agent, we should consider how the relationships between participants in a collective action create and sustain causal connections between their morally responsible actions. Sometimes, however, it will be impossible for us to identify the precise causal connections between individual's actions. There will be an epistemic deficit. As we have seen, this can render the individual participants liable for impermissible harms caused by other participants' contributory actions. I do not, however, deliver the full defence of the individualist account in this chapter. In Section 6 I take stock of what needs to be done to demonstrate that the individualist moral responsibility-based account of liability provides the best answer to the question of when and why citizens should be made to pay for the costs of their state's unjust actions. In Chapters 4, 5, and 6, I then consider and reject alternatives to my individualist account before completing my defence of the individualist moral responsibility-based account in Chapter 7.

3.1 Three More Arguments

In this section I present three arguments that proponents of the collectivisation strategy have made. These hold that when an impermissible harm is the causal consequence of the contributory actions of participants in a

collective action, an individualist moral responsibility-based account of liability will often yield counterintuitive conclusions regarding the distribution of the costs of its repair. Its conclusions are regarded as counterintuitive because it cannot establish the permissibility of imposing the full costs (or perhaps any) of repairing the harm, on (a) the individuals who caused the harm, or (b) participating in the same collective action as those who caused the harm.

3.1.1 Diminished Moral Responsibility

The Diminished Moral Responsibility argument, introduced in 1.4.1, relies on the idea that the degree of an individual's liability is determined, in part, by the degree of her moral responsibility for the impermissible harm that needs to be prevented or repaired. This is an implication of the Narrow Proportionality Principle. Excusing conditions diminish the degree of an individual's moral responsibility for a harm. An individual can be partially excused, meaning she is still to blame for the harm but to a lesser degree, or fully excused and absolved of *any* blame whatsoever. The Narrow Proportionality Principle says that a partially excused individual is, all things being equal, less liable than a fully culpable individual. If I cause harm but was acting under duress, for example, then the degree of my moral responsibility is diminished. How much it is diminished depends on how resistible the duress was. Irresistible duress would absolve me of all blame. For example, if someone holds a gun to my head and threatens to shoot me if I refuse to drive them away from the bank he has just robbed then I am fully absolved of all blame because of the duress.

Some might argue that blameless moral responsibility for an impermissible harm is sufficient for liability to preventative harm of the same – or even greater – magnitude. I think this is counterintuitive. More plausibly, some think blameless moral responsibility renders an individual liable to a much smaller harm than the impermissible harm she is morally responsible for. However, when the harm is indivisible and cannot be shared out between individuals, it is argued that it is morally better for the person morally responsible for it to bear the full harm, even though it exceeds the upper limits of her liability (Bazargan, 2014; McMahan, 2009). Bazargan claims that if the blamelessly morally responsible threat is made to bear the indivisible harm, then this is a lesser evil than the non-responsible victim being made to bear it (Bazargan, 2014, p.126).

On the other hand, some think that blameless moral responsibility is insufficient for liability to harm (Ferzan, 2012). This strikes me as the intuitively correct position. In this thesis I have assumed that (a) some degree of blameworthiness or culpability is a necessary condition of liability, and (b), liability varies with degrees of moral responsibility. So an individual who is morally responsible for causing impermissible harm, who is fully excused, is not, therefore, liable for the impermissible harm she caused to occur.

The Diminished Moral Responsibility argument is used by Anna Stilz in her 'Collective Responsibility and the State' (2011). Stilz argues that individuals can have "significant excuses" for contributing to the harmful outcome of a collective action (2011, p.193). She offers the example of a plane crash where "various employees' actions combined to create a disaster that no one employee could have reasonably foreseen. While several people did contribute to the crash, in isolation their separate actions seemed unlikely to lead to any disaster. It was only when their acts interacted with those taken by others in different parts of the organisation that the crash ensued" (Stilz, 2011, p.193). The contributing individuals' excuses produce a "responsibility shortfall": some liability can be attributed to individuals, but "this does not add up to liability for the entire harm. This is because the organization of the airline created an 'emergent effect' that made the total harm more than the sum of the employees' intentional contributions" (Stilz, 2011, p.193).

It is true that an individual cannot be morally responsible for a harmful consequence of her action if it was not reasonably foreseeable. It is worth recalling that an individual can be blamelessly morally responsible for an impermissible harm when the harm was extremely improbable. McMahan provides a useful illustrative example. Recall his conscientious driver example from Section 1.3. He argues that the driver is morally responsible for an impermissible harm. Driving creates a small risk of severe harm but it is so small that driving is permissible. This can be contrasted with a man whose cell phone has, unbeknownst to him, been reprogrammed so it will send a signal that detonates a bomb the next time he presses the "send" button (McMahan, 2009, p.165). In the airline example, Stilz might regard the harm as foreseeable but sufficiently improbable as to fully excuse the employees. But she might, on

the other hand, believe that the employees really could not have foreseen how their actions might have combined to cause harm. If this is the case then the employees will not even be morally responsible for the harm. In cases like the airline example, I expect the individuals do foresee some small risk of their actions combining to cause harm. On my account they would be non-culpable and therefore non-labile. This would not undermine Stilz's wider point, however, which is that the individualist moral responsibility-based account is inadequate in these cases. Considering this prospect, Stilz says:

One tragic response would be to say that no one is responsible for repairing this emergent harm. But this reply seems deeply unsatisfactory. First, it refuses to treat the victims' interests seriously: there are many incorporated groups that act together intentionally and perpetrate harms in our complex world. Are we to say that nobody is responsible for these consequences? Second, this response overlooks the fact that the agents who produced the outcome are not limited to the individuals involved; there is an additional agent – the incorporated group itself – to which we can attribute responsibility (Stilz, 2011, pp.193-194).

By conceiving of the group as a corporate agent, and assigning it liability for the harms its citizens have caused the victims, there will be an agent with a duty to bear the full costs of the harms that have been suffered. This would not be the case if we fail to recognise anything other than the liability of individuals. We can sum of this argument as follows:

P1. An individualist account of moral responsibility-based liability is subject to the Narrow Proportionality Principle.

P2. The members of groups might have excuses that diminish the degree of their moral responsibility for harm they have caused.

Therefore,

C1. Sometimes the members of groups that have caused harm are liable to costs that are less than the costs incurred by the victims of the harm.

P3. If members are liable only to costs that are less than the costs their victims incur, there will be costs intuitively owed to the victim that nobody is liable for.

Therefore,

C2. The individualist moral responsibility-based account of liability will not assign the full costs of repair to the individuals who caused the harm.

P4. A corporate account of liability assigns liability for the full costs of harm caused by the individual group members to the group, *qua* corporate agent.

Therefore,

C3. A corporate account of liability can assign liability for the full costs whereas an individualist account of moral responsibility-based liability cannot.

The shortcomings of the individualist account of moral responsibility-based liability can sometimes be overcome because there is a corporate agent that can be held liable for harms caused by its members. The corporate agent can be assigned liability for the full costs when the individuals could not. This argument, however, is incomplete. The next step for a proponent of this argument is explaining how a corporate agent can permissibly enact the required repairs. This is important because a corporate agent cannot discharge a reparative duty without burdening individuals. It needs to be shown, then, when and why it would be permissible for a corporate agent to impose the costs on individuals. Is this defensible? The argument I will consider next appeals to the intuitive plausibility of the members of a collective being made to bear the costs of repairing harms for which they are non-labile.

3.1.2 The Membership Argument

The Membership Argument holds that the individualist moral responsibility-based account of liability excludes from liability individuals who we think, intuitively, ought to pay for the costs of harms caused by a collective action. This can be inferred from Avia Pasternak's endorsement of an argument made by Christopher Kutz, which holds that "an individual's duty to share in the collective task of distributing a group's liability for harm is not necessarily the result of the fact that she *contributed* to the harm (after all, especially in large groups, individuals' actual contribution to the harm caused by the group can be minimal or non-existent)" (Pasternak, 2013, p.368). Similarly, Stilz believes that where membership of a liable corporation is voluntary, one "must 'own up' to the company's liability, even when these liabilities were not caused by one's acts" (2011, p.194). The Membership Argument has a simple form:

P1. An individual cannot be morally responsible for harms she does not cause.

P2. An individual can only be liable for harms she is morally responsible for.

P3. An individual can be a member of a group without causally contributing to the harms caused by other members' contributory actions.

Therefore,

C1. A member of a group who does not cause a harm which is caused by other members' contributory actions cannot be liable for that harm.

P4. Sometimes we think that, intuitively, members of a group should pay for the costs of harms caused by the contributory actions of other group members.

Therefore,

C2: The individualist account moral responsibility-based liability is intuitively inaccurate.

P5. A corporate account of liability can justify imposing the costs of repairing harms caused by members of a group on members who are not liable for them.

Therefore,

C3. In some cases a corporate account of liability has greater intuitive accuracy than the individualist account of moral responsibility-based liability.

The Membership Argument draws on the intuition that sometimes we think it is intuitively correct to say that members of a group should be made to pay for the costs of repairing harms for which they are non-liable but were caused by other' members contributory actions. This argument will only work in favour of the Collectivisation Strategy if, as premise 5 implies, affirming a corporate account of liability enables us to develop a theoretical justification for the corporate agent imposing the costs of repair on the non-liable members. This is a requirement of demonstrating that the Collectivisation Strategy represents a coherent alternative to my individualist account, overcoming the Diminished Moral Responsibility argument, and the argument I consider next.

3.1.3 Insufficient Funds Argument

A third set of concerns about the moral responsibility-based account of liability are suggested by Pasternak. She says that whenever a state causes harm, it might be necessary to assign liability directly to individuals or groups within a state, such as heads of government and the military. However, were this necessary, we would be faced with “‘liability shortfalls’, whenever it would be hard to identify those individuals within the state who are more responsible for its misconduct, or to extract the necessary resources from them” (2013, p.365). Even if the individuals are liable for the full costs they might not have the funds. This alludes to the Insufficient Funds argument:

P1. An individual’s wealth determines the level of costs she can bear.

P2. Sometimes a liable individual will be unable to bear the full, or any of the, costs of repairing the harm she is liable for.

P3. It is possible that the members of a group who are liable for a harm lack the wealth needed to bear the full costs, or any of the costs, of repairing the harm.

Therefore,

C1. Sometimes the individualist account of moral responsibility-based liability cannot assign the full costs of repairing harm to the individuals liable for them.

P4. Sometimes the combined wealth of the members (liable and non-liable) of a group would cover the full costs of repairing the harm.

P5. A corporate account of liability can justify imposing the costs of repairing harms caused by members of a group on members who are not liable for them.

Therefore,

C2. The Collectivisation Strategy offers us a better chance of ensuring harms are repaired by individuals who we think, intuitively, ought to repair them, whereas the individualist account of moral responsibility-based liability cannot.

It should be clear how these three different arguments against the individualist account of moral responsibility-based liability speak in favour of the

Collectivisation Strategy. Sometimes members of a group will cause impermissible harm but not be liable for the full costs of its repair. Even if the individuals who caused the harm are liable for the full costs, they might lack the wealth needed to repair it. However, sometimes we think that, intuitively, non-liable members of a group should be made to bear the costs of repairing harms caused by liable members. This speaks in favour of the Collectivisation Strategy because its proponents hold that a corporate agent can be held liable for the harm caused by its members' actions, and it can then justifiably impose the costs on the liable and non-liable members. For their arguments to succeed in making the case for the Collectivisation Strategy, however, we need a full theoretical justification that explains why and when a corporate agent is justified in imposing shares of its burdens on its members. The challenge for the proponents of the Collectivisation Strategy, then, is to provide principled, theoretical support for this *prima facie* intuitively plausible position.

3.2 The Collectivisation Strategy

In Section 1.5 I quoted Joel Feinberg's claim that whatever harms a liable group will "necessarily harm its members" (1968, p.687). If the members are non-liable, however, then this might strike us as morally problematic. Feinberg claims that this does not seem objectionable in the case of institutional groups (1968, p.687). This suggests that there is something morally relevant about membership in an institutional group that can justify the impact on the member. Explaining why this is the case is essential because of the "inevitably distributive" effect of group-liability (Feinberg, 1968, p.687). Providing this justification is essential to the Collectivisation Strategy. In later chapters I will reject its proponents' attempts at providing such a justification. In this section I will merely demonstrate why this strategy is *prima-facie* coherent. This depends on the plausibility of the Corporate Liability Premise, which relies on the idea of corporate moral agency. In this section I will outline an influential account.

The Collectivisation Strategy relies on the idea that groups can sometimes be regarded as moral agents. Is this idea plausible? Philip Pettit discusses cases of harm where although the "individuals involved may not bear a high degree of personal responsibility, together as a corporate enterprise they should carry full responsibility for what occurred" (2007, p.171). Examples of 'corporate' or

'group' agents are "companies, parties, churches, and universities [...] partnerships, voluntary associations, and town meetings" (Pettit, 2007, p.172). Christian List and Pettit argue that group agents can be candidates for moral blame. For a group to be a candidate for blame, it must be true that it (a) faces a normatively significant choice, (b) has understanding and access to evidence required for making normative judgements about its options, and (c) has the control required for choosing between them (2011, p.155). They argue that groups can form judgements or attitudes regarding propositions, when the propositions are considered by individuals, in accordance with the group's organisational structure. This might be all of its members, an authorised subgroup, or a single official and a variety of decision-making methods might be used (List and Pettit, 2011, p.159).

List and Pettit argue that we can coherently attribute control over an outcome to a corporate agent. We might think this is not the case because whatever a group does is done by individuals. If only individuals are in control of their own actions, then the individuals, and not the group, are in control of what the group does (List and Pettit, 2011, p.160). They argue that an individual doing something in a group's name is an 'implementing cause', whereas the group is the 'programming cause' (List and Pettit, 2011, p.162). For example, the group arranges things so certain individuals are identified as performers of a task and others as back-up. The group exercises control over the fact that some individual or other will make the necessary contribution. Its control over an outcome stands alongside each individual's control over whether it is he who makes the necessary contribution. So the "group agent as a whole has responsibility as the source of that deed, the 'planner' at its origin" (List and Pettit, 2011, p.163). An individual can be attributed moral responsibility for what he or she does for the group, and this is "consistent with the group's responsibility overall for ensuring that someone plays that part" (List and Pettit, 2011, p.164).

Holding a group responsible, List and Pettit argue, can avoid a "deficit of responsibility" (2011, p.165). These deficits come about when individuals have excuses for causing harm that diminish the degree of their moral responsibility. So this is an instance of the Diminished Moral Responsibility argument. List

and Pettit acknowledge that individuals who form “unincorporated collections may act in ways that predictably bring about bad results, without the members being individually or distributively culpable, or at least not fully culpable” (2011, p.165). However, whereas the members of an unincorporated collection cannot be held responsible as a group, an incorporated collection of individuals can be (List and Pettit, 2011, p.165). In the case of incorporated collectives, then, “we should hold the enactors [implementers] responsible [...] [b]ut we should also hold the corporate entity responsible for the harm that it arranges to have done (List and Pettit, 2011, p.166). Holding a group responsible will “ensure that there is as much blame delivered, as, on the face of it, there is blame deserved” (List and Pettit, 2011, p.167).

List and Pettit, Pasternak, and Stilz, all believe that an individualist moral responsibility-based account of liability is inadequate in cases where a harm is caused by the actions of members of a corporate agent. The existence of the corporate agent enables the theoretical justification of an intuitively compelling alternative that would otherwise be unavailable to us. This is the Collectivisation Strategy. Its proponents are committed to the Corporate Liability Premise. This holds that a corporate agent can be assigned liability for harms caused by individuals’ actions. The important next step, however, is explaining what makes it permissible for the corporate agent to distribute shares of *its* liability burdens to its members. The arguments I will make against the Collectivisation Strategy in subsequent chapters focus on attempts to provide a justification for *states* imposing shares of their liability-burdens on their citizens. Before making these arguments, however, I want to highlight some important differences between the Collectivisation Strategy and the individualist account of moral responsibility-based liability. Although my account recognises the significance of certain features of collective action, it (a) cannot be used to justify a liable corporate agent imposing shares of *its* liability-burdens on individuals, and (b) does not rely on the corporate liability premise.

3.3 A Limit on the Strategy: Corporate and Individual Liability

In this section I will argue that an individualist account of liability cannot explain why a corporate agent is justified in imposing shares of its liability-burdens on individuals. As I indicated in Section 1.3, a liable individual has

forfeited her right against being burdened as a means to repairing an impermissible harm. The forfeiture of this right corresponds with the acquisition of an enforceable duty to bear that burden for that purpose. A liability-duty is necessarily owed to a victim of impermissible harm. If a member of a corporate agent is liable to a burden, it is because he or she has caused someone wrongful harm. If an individual is subjected to harms she is liable to, then this discharges her duty to person(s) she has wrongfully harmed. This forms the basis of the argument I make in this section: conceptually, it cannot be true that when a corporate agent imposes on an individual harm that he or she is liable to, it is discharging its own liability-duty to repair a wrongful harm. It would, I claim, only be enforcing the individual's liability-duty to repair the wrongful harm that he or she is morally responsible for.

Why is this point important? A proponent of the Collectivisation Strategy might argue that a corporate agent can justifiably discharge its liability-duty to the victim of an impermissible harm it has caused by imposing some of the costs it is liable to on the individuals who also caused the harm to occur. So the argument would first claim that when those individuals caused the harm, as implementers of the corporate agent's intentions, they caused the corporate agent to become liable for the harm. It would then claim that because these individuals caused the corporate agent to become liable for the harm it can therefore justifiably impose shares of its liability-burden on those individuals. Let us think a little bit more about how this argument is supposed to work.

Imagine that A, B, and C are members of a corporate agent, Group, and through their collective action they cause impermissible harm to Victim. Their actions were taken in order to implement the Group's intentions to harm Victim. As a morally responsible author of the harm Victim has been caused to suffer, Group is liable for the harm to Victim. Group is, in List and Pettit's terms, the 'planner'. A, B, C and Group are all liable for the harm Victim has suffered.

The argument currently under consideration, however, holds that A, B, and C can be justifiably burdened with a share of Groups' liability burden *because they caused Group to become liable*. Recall that individuals become liable by authoring impermissible harm and being liable means having an enforceable duty to the

victim of the harm. So A, B, and C not only wronged the victim of the harm but also wronged Group by causing Group to become liable. The individuals are therefore liable for the wrongful harm they caused victim *and* the wrongful harm they caused to Group. So Group can justifiably impose on A, B and C the costs they caused Group to become liable to.

There is an obvious problem here. The Corporate Liability Premise relies on the idea that the corporate agent is a moral agent. It became liable because it authored the harm, *qua* moral agent. It cannot be true that (a) Group authored the harm, *qua* moral agent, and (b) A, B and C wronged Group by causing Group to become liable for the harm. This argument would hold that Group authored the harm and became liable, but A, B and C are liable for Group's liability because they wronged Group by *causing* Group to become liable for the harm. If this is true, then surely Group was not a morally responsible author of the harm to Victim.

There is nothing conceptually incoherent, however, in holding that Group can be liable for the harms caused by the actions of A, B, and C. It is perfectly consistent for all four agents to be liable for the same harm. This does not mean, however, that A, B and C are liable for Group's liability-burden. If the corporate agent were to impose reparative burdens on the individuals, in virtue of their liability, then it is just enforcing their liability-duties, which are owed to the victims. It might be permissible for it to enforce their duties on behalf of the victim, but it is not discharging its duties in the process. This argument has some important implications. First, proponents of the Collectivisation Strategy cannot appeal to individuals' liability duties to explain why the corporate agent can impose shares of *its* liability-burdens on them. This applies to my moral responsibility-based account of liability but also any other proposed account of liability. For example, the culpable-attempt-based account I considered in Chapter 2. The same is true of the account of complicitious liability I develop and reject in Chapter 4. Second, the proponents of the Collectivisation Strategy must, therefore, appeal to some other kind of enforceable duty. This is not necessarily a significant obstacle. As we have seen, sometimes it seems intuitively permissible to burden liable and non-liable group members with the costs of repairing the harms caused by other members. In the next section, as

part of my defence of the individualist account of moral responsibility-based liability, I will demonstrate the role that ideas about collective action play in this account. It does not endorse the Corporate Liability Premise, and so it does not succumb to the limitation just outlined.

3.4 The Role of Collective Action in the Individualist Moral Responsibility-Based Account

In my view an unjust state action occurs when a decision is made within state institutions, in accordance with established decision-procedures, which authorises citizens, and sometimes even coerces them into, acting in a manner that that will cause impermissible harm. A state action is undertaken as a result of a particular decision-procedure, on the basis of the inputs of various individuals, and the decision will be executed by variously positioned individuals within state institutions. For example, when a government or a legislature votes in favour of undertaking an unjust war, this will result in combatants being ordered to fight. Following Rawls, I understand institutions as

a public system of rules which defines offices and positions with their rights, duties, powers and immunities, and the like. These rules specify certain forms of action as permissible, others as forbidden; and they provide for certain penalties and defences, and so on, when violations occur (Rawls, 1999a, pp.47-48).

The institutions of the state – government, legislature, military, judiciary, police, health service, education system, and various other public institutions and services – are the product of the citizens' collective action. The occupants of these offices and positions often have the legal power to create laws that will be backed up by a threat of force. The laws are designed to bring about certain outcomes, such as the protection of individuals' rights. Citizens are also legally required to transfer wealth to the state institutions in the form of taxation. This enables the institutions to perform various functions on behalf of the citizens.

Consistently with this account of collective action and state institutions, I believe a moral responsibility-based account of liability can provide an intuitively and theoretically compelling explanation of whether individual citizens should pay for the costs of their state's unjust actions. Specifically, they are liable when they are culpably morally responsible for playing a part in the

collective action which is a (but-for) cause of a specific impermissible harm, or an epistemic deficit that threatens to facilitate or sustain that harm. Unlike the Collectivisation Strategy, I do not conceive of the collective as a corporate agent.

This view of collective action and individual liabilities has some affinities with that of David Miller. In ‘Holding Nations Responsible’ (2004) and ‘National Responsibility and Global Justice’ (2007), Miller provides us with two ideal type models that he thinks real groups may approximate to different degrees. These are the ‘like-minded group model and the cooperative practice model (2007, p.114). In order to explain the permissibility of individuals being made to bear the costs of collectively perpetrated harms, the former appeals to the causal connections that obtain between the actions of individuals in groups, whereas the latter appeals to them having a fair opportunity to participate in a collective’s decision making procedure and receiving a fair share of the benefits of membership. It is the first of these two models that is of relevance to my individualist account. However, his model faces problems that my account does not. He uses the example of a rampaging mob to illustrate his model:

If after the event we had to apportion individual moral or legal responsibility for what happened, we should need to identify the precise causal role that each had played in creating the damage. But it is also the case, I want to argue, that the whole mob bears collective responsibility for the effects of the riot, and together they can be held liable for the costs of repairing the damage to persons and property (2007, p.115).

Although Miller believes the whole mob can be held collectively responsible, he says that what “matters is that each person took part with the same general attitude [...] and each made some causal contribution to the final outcome” (Miller, 2007, p.115). He says:

we may not be able to disentangle individuals’ contributions. Consider several members of a mob throwing bricks at a plate-glass window at roughly the same moment: we cannot say that any particular brick thrower was (causally) responsible for smashing the window (Miller, 2007, p.115).

He says that just attributing collective responsibility to the mob is insufficient, because its members will have to bear the clean-up costs (Miller, 2007, p.116).

He says:

it may be impossible to assign specific shares of responsibility for what has happened to individual members of the mob. We may not know what causal contribution each made to the final outcome, and even if we did, it might still be controversial how responsibility should be divided (if there are recognised community leaders among the group conducting the rampage, should they be assigned a greater share of responsibility simply by virtue of that fact?). So our starting point must be that the group is collectively responsible, that other things being equal they are remedially responsible for restoring the damage they have caused and that every participant bears an equal share of that responsibility (Miller, 2007, p.116).

The term remedial responsibility is used to describe a duty to repair harm. So Miller's explanation of each individual's remedial responsibility to repair the harms caused by the group appeals to the fact that each of them caused the harm. But it does not require us to identify each of their precise causal contributions. To that extent, his account is similar to the one I put forward in Chapter 2. My account, however, makes culpability a necessary condition of liability, and holds that degrees of liability vary with it. Miller's account has rightly been criticised by Kasper Lippert-Rasmussen, who argues that if we had access to information about what each member of the mob did, we would not distribute remedial responsibility equally. We only do so for the purposes of a rule of regulation (2009, p.119). The equal distribution does not reflect a principle of justice. Indeed, Miller seems to unconvincingly dismiss the need for precise causal facts. He does not discuss the possibility of distributing shares of remedial responsibility in accordance with degrees of moral responsibility, which would require knowledge of individuals' causal contributions.¹³

Miller also says remarkably little about causation, given its central role in his account. He does not, for example, engage with the problem of overdetermination. When he says that we cannot assign causal responsibility to any of the brick-throwers, he seems to concede that cases like these will be problematic. It might not be true that all participants in the mob causally

¹³ Instead of 'moral responsibility', Miller uses the notion of 'outcome responsibility'. This is where an agent's voluntary action causes reasonably foreseeable harm. He distinguishes it from moral responsibility, understood as a precondition to praise or blame (2007, p.88).

contributed to the harmful outcome. All of this makes Miller's account rather course-grained, and lends credence to Lippert-Rasmussen's view that Miller is merely establishing a useful heuristic. It does not provide an adequate account of individual liability in cases of wrongful harms caused by the participants in a collective action.

Miller's account also gives a central role to collective action, but his account of causation and epistemic deficits leaves his account wanting. By contrast, my account of moral responsibility-based liability requires that a causal connection exist between an individual's culpably morally responsible action and a reasonably foreseeable harmful outcome, in order for the individual to be liable to preventative or reparative harm.¹⁴ This causal connection might exist because the individual contributes to the harm or to an epistemic deficit that will otherwise deprive the victim of the harm of knowledge of permissible targets of reparative burdens. Unlike the Collectivisation Strategy it does not attribute liability to a corporate agent. It attributes liability directly to individuals. It does not need to engage with the tricky question of demonstrating why individuals have a duty to shoulder a share of the corporate agent's liability-burdens. I will now say more about my account of collective action, with a view to addressing the three arguments outlined in 3.1.

3.5 A Reply to the Objections

An essential component of a collective action is intentional coordination. Participants coordinate their contributions in ways that are believed to be causally efficacious in achieving their shared ends, and the performance of a contributory action, or even just indicating an intention to do so, can establish a causal connection between two coordinated contributory actions. This causal connection can ground an individual's moral responsibility-based liability for the harmful consequences of another's contributory actions. In this section I

¹⁴ An individualist account similar to mine is been proposed by Erin Kelly (2003). Kelly, however, like David Miller, equates participation with causation and does not engage with the problem of overdetermination. Seamus Miller (2006) defends an individualist account of moral responsibility and considers overdetermination cases. However, his account is inadequate. It relies on it being true that each individual's participation in the collective action that caused the alleged overdetermined harm was a but-for cause of the others' participation.

shall consider how this can help me answer the thesis's motivating question, whilst responding to the objections that have been introduced in this chapter.

In his account of 'Shared Cooperative Activity', Michael Bratman argues that in order to succeed, individuals participating in a cooperative activity must have "meshing subplans" (Bratman, 1992, p.332). If we intend to paint a house together, but I want to paint it red while you want to paint it blue then our subplans do not mesh. Bratman says participants' intentions must also be appropriately connected, with dispositions of 'mutual-responsiveness' in intention and action (Bratman, 1992, p.339). If I no longer believe you intend to do your part then I will no longer intend to do mine. If I see that you have done your part very badly, then there might be no point in me doing my part. By creating my expectation of your contribution you can cause me to act. This mutual-responsiveness means a causal connection obtains between our actions.

Participants in a large-scale collective action might be unaware of the intentions and actions of the vast majority of their co-participants. Meanwhile, they might be highly responsive to the intentions and actions of a few co-participants, with whom they are engaged in a smaller scale cooperative activity that is partly constitutive of the larger collective action. It is possible that there will be a high degree of mutual responsiveness between particular sectors but not between particular individual participants in different sectors. But there will be some degree of responsiveness between the individuals, in virtue of their roles in sectors that are responsive to each other. What ensures this is the role of the coordinators. The contributory actions of the participants are intentionally coordinated in a way that is designed to achieve the shared ends of the collective action. The individuals whose contributions are being intentionally coordinated might not even be aware of the details of the coordination design.

A coordinator can alter the intentions of participants and cause them to perform contributory actions that they might not have otherwise performed. In issuing one set of orders, a military commander, for example, can cause combatants to perform actions they would not have performed without his orders. This establishes a causal connection between the commander's actions and their actions. This makes the coordinator morally responsible for the

outcome of their actions, but it can also establish a causal connection between their action and the actions of others who are coordinated by the commander. If the content of directives issued by the coordinator is dependent on some individuals indicating an intention to, or actually executing, a prior set of directives, then a causal connection can be established between their actions and individuals obeying a later set of directives. My suggestion is that this complex network of direct and indirect causal relations – from subordinate to commander to another subordinate, and so on – means we may attribute moral responsibility and liability to one subordinate, for the harms caused by other subordinates' coordinated actions.

Let me apply this suggestion to the state as a whole. The institutions of the state, in particular, the government, coordinate the actions of citizens in a manner that is intended to achieve certain ends. There are two broad ways in which they are responsive to the intentions and actions of individual citizens. First, the government of a democratic state is responsive to the citizens' ideas about what those ends should be and how to achieve them. Its government is elected on the basis of a manifesto. It can be removed at the next election. Its awareness of this fact makes it responsive to the perceived 'will of the people'. If it perceives that the public opinion opposes potential policy this gives it reason not to adopt it. If it believes citizens will resist a change in a law by engaging in widespread civil disobedience then it might relent. If large numbers of citizens threaten a strike, for example, it might accede to workers' demands. Second, the state also cannot function without the wealth its citizens provide through taxation. It needs this wealth, for example, to buy weapons to fight its wars. The government cannot authorise war if it does not have adequate resources at its disposal. The tax-contributions of the citizens thus give the government the opportunity to wage war. There is, in this way, a causal connection between the tax-contributions of ordinary citizens and the authorised actions of combatants. This could ground liability for their actions.

There are two objections that will be made immediately. The first will appeal to the idea of overdetermination. It will hold that no individual citizen's action could have made a difference. My response is that there are no overdetermined harm, we just do not have sufficiently fine-grained evidence. This will lead,

naturally, in to the second objection, which holds that we will not know, with anywhere near a sufficient enough degree of certainty, which citizens causally contributed to an impermissible harm. It might be possible to identify particular politicians or members of the military, but it is impossible to trace the causal nexus back to the contributions of the non-combatant citizens who merely pay their taxes and obey the state's laws. This is especially problematic given the but-for account of causation, which I endorse. On this account, it seems the only tax-payers who are liable are those that paid their taxes before the government reached the threshold of tax needed to fund the war.

Unsurprisingly, my response to these objections will appeal to the Liability for Epistemic Deficits Principle that I developed in Chapter 2. The third objection appeals to the Diminished Moral Responsibility argument. It holds that it will rarely be the case that citizens can be blamed for the harms suffered as a result of their state's unjust actions, to which they were indirect but-for causal contributors. As a result, their combined liability will not cover the full, perhaps any, of the costs of repairing their state's unjust actions. A full response will require entirely new arguments, which can show why and when a state's citizens can be *culpably morally responsible* for the harmful consequences of their state's unjust actions. I make these arguments in Chapter 7. For now it is enough that I have demonstrated the basic form of my response to the Diminished Moral Responsibility argument, Membership Argument, and Insufficient Funds argument. In brief, individuals can be morally responsible for indirect, as well as direct, causal contributions to harm; and membership in a collective matters only insofar as it enables these indirect causal connections to arise. It is the causal connections themselves that ground individuals' liability. A large number of a state's citizens will be culpably morally responsible for impermissible harms caused by unjust state actions, and perhaps even more will be culpably morally responsible for the epistemic deficit that threatens to facilitate or sustain the impermissible harm. The larger the number of liable citizens, the more the force of the Insufficient Funds diminishes.

3.6 The Challenge for the Collectivisation Strategy

The previous section's argument notwithstanding, advocates of the Collectivisation Strategy will say that there are some liability-shortfalls that the

individualist account simply cannot avoid. The Collectivisation Strategy, however, appears capable of avoiding them. There will be cases where a corporate agent is liable for an impermissible harm and we can justifiably impose a larger liability burden on *it* than we could justifiably impose on all of the individuals who caused the harm. As noted above, a potential stumbling block for the Collectivisation Strategy, however, is explaining why and when a liable corporate agent is justified in distributing shares of its liability-burdens to individuals. As I have argued, this explanation cannot hold that its individual members are liable for the corporate agent's liability-burden. It must demonstrate that the individuals have some other type of enforceable duty to bear a share of its burden. In Chapters 4 and 6 I reject two separate attempts at explaining why a liable state, conceived of as a corporate agent, can permissibly impose shares of its own liability-burdens on individuals. In Chapter 5 I reject an individualist account of liability different to my own. In this section, I will take stock of what must be done to demonstrate that a particular account is both a defensible and preferable alternative to my individualist liability account.

Much of the intuitive appeal of the Collectivisation Strategy and the Corporate Liability Premise, I believe, comes from the sense that sometimes there is something morally objectionable about participants in a collective action not bearing the costs of their co-participants' contributory actions. This suggests that there are moral reasons for burdening them that do not emanate from their individual moral responsibility for the harm. This is the Membership Argument. The Collectivisation Strategy might seem odd, however, when we consider that the Diminished Moral Responsibility argument is based precisely on the principle that people who *blamelessly* caused harm should not be made to bear the costs of repairing the harm. Yet its proponents will maintain that if the collective constitutes a liable corporate moral agent, its members could have duties to bear *its* burdens that apply independently of whether or not they are morally responsible for the harm. So we would then have a moral permission to burden the corporate agent, and foreseeably its individual members, rather than letting the harm go unrepaired or a non-liable agent be made to repair it.

The intuitive appeal of the Collectivisation Strategy also derives from what is regarded as an unfortunate implication of liability-shortfalls which are thought

likely to occur on an individualist account. It might be that the victims of an impermissible harm might not receive reparations, or an uninvolved bystander, both of whom have done nothing wrong, will have to take on the costs. I believe, however, that the danger of liability-shortfalls is overblown. I do not deny that when individuals participating in a collective action cause impermissible harm, such as the citizens' of a state inflicting impermissible harm during an unjust war, the individuals liabilities will be limited because they will have excuses that diminish the degree of their moral responsibility for the harm. There will also be cases where the individuals who caused the impermissible harms lack the resources needed to make adequate repair. The combatants who perpetrate impermissible harms during a war are unlikely to have the personal wealth required to compensate their victims. But this does not mean that there will be no other individuals with enforceable duties to repair the harms. There are other types of enforceable reparative duties and these are grounded in a different set of morally relevant facts to what grounds liability-duties.¹⁵

For example, there are duties that I will describe as 'capacity-based'. A capacity-based duty is one that an individual incurs just because she can repair or prevent an impermissible harm without incurring unreasonable costs. A typical example used to demonstrate the plausibility of this type of duty runs as follows:

Drowning Child: You are walking to work when you see a young child struggling in a pond. The child will drown unless you save him. The water is only half a meter deep and the only costs you will incur by saving the child is dirtying your shoes and clothes.

Most people think you have a duty to save the drowning child, whereas if the child was drowning in a fast moving river then you would have no such duty. I believe this duty is enforceable, if someone saw me hesitating but was unable to rescue the child herself, it would be permissible for her to coerce me into

¹⁵ Stephanie Collins (2015) provides an excellent discussion of the different sources of obligations incurred by individuals and collectives.

rescuing the child.¹⁶ What constitutes an unreasonable cost or risk is determined by factors such as the magnitude of the harm that needs to be prevented or repaired, and the probability of an individual's action succeeding in preventing or repairing the harm. I believe that enforceable capacity-based duties also exist when liability-shortfalls occur. So even if we cannot justifiably impose the costs of repairing harm on the individuals who caused it, this does not mean that nobody will have an enforceable duty to repair it.

Many scholars endorse capacity-based duties. For example, Christopher Heath Wellman argues that 'Samaritan duties' require us to rescue others from peril when we can do so without incurring unreasonable costs. He believes these duties can explain our obligation to obey a reasonably just state (Wellman, 1996). Victor Tadros also believes these duties are enforceable and that individuals can be coerced into discharging them (Tadros, 2012). David Miller identifies reasons of capacity as being relevant to the distribution of remedial responsibilities to repair harms between nations (Miller, 2007, p.103). If we accept that such duties exist we should worry less about liability-shortfalls.

Nonetheless, there will inevitably be cases where individuals suffer impermissible harms but no one has an enforceable duty to repair the harm. The victim would then be left to bear the costs unless another agent voluntarily takes them on. I suggest that these shortfalls might not be as concerning, however, because the harms suffered are not so acute as to trigger a capacity-based duty. Because the victim is not suffering from an acute deprivation, we should be less concerned about her losses. Furthermore, the individuals who caused the harm or uninvolved parties could also have some kind of contractual obligation to repair the harm. We can easily imagine how such contractual obligations might arise: the possibility of liability-shortfalls gives agents who interact with one another reason to create a contractual mutual insurance scheme, pooling resources for the sake of offsetting costs whenever harm is incurred but nobody is to blame for it. If there are no contractual obligations triggered when a liability-shortfall occurs, and the harm is not

¹⁶ Victor Tadros (2012) also believes these duties to rescue are enforceable.

sufficiently acute as to trigger a capacity-based duty for agents capable of repairing it, then this is just an unfortunate scenario that gives the agents involved reasons to establish insurance schemes.

Nevertheless, proponents of the Collectivisation Strategy could accept my claims about capacity-based duties and maintain that there are corporate moral agents, that can incur enforceable duties to repair harms, and that can permissibly burden individuals in order to discharge those duties. As such, the Collectivisation Strategy provides us with a better chance of avoiding cases where there are impermissible harms that nobody has an enforceable duty to repair. The arguments that I consider in the next chapter and chapter 6 will be directed at anybody who shares this intuition. In the next three chapters I will critique various views which hold that, in virtue of some morally relevant facts relating to their citizenship status, non-liable citizens can have duties to shoulder a share of the costs caused by others.

4 Pasternak's 'Intentional Membership' Argument

Let me start with a quick recap. As noted in the previous chapter, sometimes the combined liability of the agents that caused an impermissible harm does not provide adequate grounds for imposing the full costs of repairing the harm on them. We have seen that, for some, an individualist account of moral responsibility-based liability will often have this implication in cases where impermissible harms are caused by the contributory actions of participants in a collective action. As we have also seen, proponents of the Collectivisation Strategy believe that it is permissible to burden the participants with the full costs when they constitute a moral agent. On this account, the corporate agent can be liable for the full costs of repairing the impermissible harm caused by the participants' actions. It is liable as an independent agent – this is the Corporate Liability premise. For its defenders, this is not just a short hand way of describing an aggregate of reparative duties that apply to its individual members. The duty applies exclusively to the corporate agent. But an agent can only have a duty to do things it is capable of doing through permissible means. A corporate agent cannot discharge a duty without burdening individuals. If it can do this permissibly, the argument runs, then this account could avoid the problems that allegedly besiege an individualist account of moral responsibility-based liability.

The aim of this chapter is to reject a particular attempt at explaining when it is permissible for a corporate agent to transfer shares of its liability-burdens to individuals. This is Avia Pasternak's important and *prima facie* plausible 'Intentional Membership' argument. Despite its initial attractions, I will argue, that the normative architecture of Pasternak's account has inadequate foundations. More specifically, I will claim that although it is clear *how* or *when* an individual may be burdened with the group's liability, her account does not sufficiently explain *why*. To elaborate briefly, Pasternak cites Christopher Kutz's claim that intentional participants in a collective action can be expected to share in the harms the collective action causes. But she does not sufficiently elaborate on *why* we should accept Kutz's claim. Over the next two chapters I will consider two possible explanations for Kutz's claim: (i) the Membership Account (in this chapter) and (ii) the Complicity Account (in the next chapter).

Let me briefly outline these accounts. On (ii) the Complicity Account, an individual renders herself liable by intentionally participating in a collective action that caused reasonably foreseeable harm. This is an alternative individualist account of liability to mine. On (i) the Membership Account, which will be the focus of this chapter, an individual incurs a duty to contribute to the repair of harm because she has given a corporate agent permission to burden her as a means to discharging its liability-duty to repair the harm. I will argue that the Membership Account is congruent with more features of Pasternak's account than the Complicity Account is. But I will also argue that when applied to the case of liable states, the Membership Account cannot justify the imposition of the state's burdens on its citizens. It also yields, I will argue, some perverse incentives and counterintuitive implications. More specifically, the chapter will proceed as follows. In Section 4.1 I will outline Pasternak's Intentional Membership argument. In Section 4.2 I will outline in more detail the two competing accounts of intentional participants' duties to repair impermissible harms caused by a collective action. In Section 4.3 I will develop the Membership Account further. In 4.4 I will argue that this account is the one Pasternak should endorse (in order to be coherent). Finally, in 4.5, I will argue that the Membership Account will not succeed when applied to an involuntary association such as a state. I will not address the Complicity Account in detail until Chapter 5.

4.1 Pasternak's 'Intentional Membership' Argument

In "Limiting States' Corporate Responsibility", Pasternak argues that it is generally agreed that some states can be regarded as agents with their "own resources, rights, and duties" (2013, p.361). These states can be held "corporately responsible" for their policies. Although this responsibility "attaches in the first instance to the state itself, it is invariably the case that states pass their responsibilities on to their citizens" (Pasternak, 2013, p.361). If industrialised states had a duty to contribute funds to tackle climate change, for example, then the necessary funds would be "taken from the pockets of the citizens of industrialized states, though higher taxes or through a reduction in the provision of public goods and services" (Pasternak, 2013, p.361). In this sense, the "state's corporate responsibility is distributive" (Pasternak, 2013,

pp.361-362). Pasternak aims to “provide an account of the circumstances under which the effect of states’ corporate responsibility on their citizens is normatively justified” (2013, p.362). I will now outline her account in detail.

Referring to current practice in international law, Pasternak says “at least in the case of states, an important element of the current practice of holding them corporately liable is that it grants states the autonomy to decide how to raise the funds necessary to cover their liabilities (within certain boundaries), and, more specifically, how to distribute their liabilities between their citizens” (2013, 364). A state has a conditional permission to enforce its decision even when its citizens disagree with it (although it is not clear what she deems the conditions to be). We can justify the search for a normative justification for this practice, she argues, by considering the alternatives. We would need to:

- (1) “restrict the extent to which and/or manner in which states distribute their corporate liabilities between their citizens”;
- (2) “create international bodies with the authority to excuse citizens from liability for their state’s wrongs”; and
- (3) “assign liability directly to individuals or groups within the state who are most responsible for the harm (e.g. heads of government and of the military)” (Pasternak, 2013, p.365).

For Pasternak, this is likely to create “‘liability shortfalls’ whenever it would be hard to identify those individuals within the state who are more responsible for its misconduct, or to extract the necessary resources from them” (2013, p.365). So Pasternak is seeking an explanation of how a liable state, *qua* corporate moral agent, can permissibly distribute shares of *its* burdens to its citizens, because of the shortcomings of an individualist moral responsibility-based account of liability.

Pasternak says that when “a group becomes *corporately* liable for harm, the duty to bear the costs that result from the harm attaches to the group itself” (2013, p.363). It is important to note, however, that Pasternak uses ‘liability’ to refer to enforceable duties to repair a harm, and not in the narrower sense that I use. In her words, “Agents can become liable in this sense for a range of reasons:

because they caused harm, they are to blame for it, they are capable of addressing it, or have benefited from it” (Pasternak, 2013, p.363). I have been using the term ‘liability’ to refer to a duty incurred by an individual who has forfeited his or her right not to be harmed because she is morally responsible for an impermissible harm. Using it in a wider sense requires the reasons for the duty being incurred to be spelled out more clearly. I will continue to use the term liability in the narrow sense and distinguish different types of duty.

Let us now turn to the crux of her argument. Pasternak treats the task of justifying states’ exercising a large amount of discretion over the distribution of its burdens as a “problem of collective action”. She says its “core arguments are, firstly, that citizens (sometimes) act collectively in states, and secondly, that when they do, they can be expected to share responsibility for what their state does” (Pasternak, 2013, p.367). She notes that both these insights draw on the work of Christopher Kutz. The first is his idea that a collective action is the product of individuals orienting themselves around a joint project, where individuals have what Kutz calls a “participatory intention” – an intention to act as part of, or contribute to, a collective action (Pasternak, 2013, p.368). Pasternak calls individuals who intentionally participate in a group’s activities “intentional members” (2013, p.368). The second is Kutz’s ‘Complicity Principle’, “according to which an individual is accountable for what others do, when she ‘intentionally participates in the wrong they do or the harm they cause’” (Kutz, 2000, p.122; Pasternak, 2013, p.368).

Pasternak does not make it clear, however, why we should accept Kutz’s Complicity Principle. Although an implication of it is that “when individuals intentionally participate in a harmful collective action, they can be expected to be included in the set of individuals who will share the costs of remedy and compensation” (Pasternak, 2013, p.368). Pasternak follows Kutz in claiming that “an individual’s duty to share in the collective task of discharging a group’s liability for harm is not necessarily the result of the fact she *contributed* to the harm (after all, especially in very large groups, individuals actual contribution to the harm caused by the group can be minimal or non-existent)(Pasternak, 2013, p.368, paraphrasing Kutz, 2000, p.201). Instead, the individual’s “duty results from the fact that she intentionally took part in the collective activity

that had harmful results” (Pasternak, 2013, p.368). Whether or not she *caused* the harm, or is morally responsible for it, is irrelevant to her incurring the duty.

Let us now consider some further features of her account. First, there are four individually necessary and jointly sufficient conditions that must be satisfied in order for an individual’s participatory intention to be considered ‘genuine’. These conditions require that (1) the individual satisfies the group’s membership rules, (2) she is aware she is a member and “some of her actions are informed and rationalized by that fact”, (3) “she is reflectively aware of – or at least can reasonably be expected to be reflectively aware of – the collective goals and activities of the group of which she is a member”, and (4) her “membership status is not imposed on the individual against her will” in the sense that “if leaving the group has some cost for the individual, the cost is not unreasonable, and that if the cost of leaving the group is unreasonable, aversion from incurring that cost is not what motivates the individual to stay in the group” (Pasternak, 2013, p.369).

Second, for Pasternak, in the case of state membership, if citizens “do not engage in activities that signal their resentment of their state, it is reasonable to suppose that they are intentional participants” (Pasternak, 2013, p.375). Pasternak says that “for many individuals in many countries immigration is at least a viable possibility” (2013, p.375). But of course this is not an option where the costs of doing so are unreasonably high. Citizens might, however, be able to reject their citizenship status by signalling their intention to do so with sufficient persuasiveness. Examples of this are attempting to secede from, or attempting to minimise contact with, the state. Pasternak says the signalling must be *public*, and it must be clear why the citizen rejects her citizenship status. It must also be *consistent* and ongoing, especially in light of their continued enjoyment of certain benefits the state provides. Finally, it must be *credible*, in the sense that the citizen takes “all reasonable steps to mark her genuine rejection of her citizenship status” (Pasternak, 2013, p.375). Unless citizens go to reasonable lengths to signal their rejection of their citizenship, when there are reasonable opportunities to do so, we are justified in regarding them as intentional members who can be permissibly burdened by the state.

Third, Pasternak is aware that not all states allow citizens the freedom to form and express genuine participatory intentions. For her, only when a state upholds certain human rights is it reasonable to assume the four conditions are met. The rights needed for citizens to form genuine participatory intentions are certain security, due process, social, economic and political rights. The precise rights required can be subject to dispute, but the “core intuition is that in order to be intentional citizens, people must have the necessary protections and resources to understand their state’s activities, to reflect on their citizenship status, and express their discontent with it” (Pasternak, 2013, p.368). Where these rights are not fulfilled, the absence of protest should not be taken as a sign of intentional membership because individuals’ non-rejection of their citizenship status might not be an indication of a genuine participatory intention. It might be fear of the consequences of dissent that stops them. Or it might be the fact they have been brainwashed or misinformed about the state’s activities, or lack the resources needed in order to come to informed judgements about their state’s activities and their citizenship status.

Fourth, Pasternak is keen to emphasise that this is not a “voluntary account of citizenship, at least not in a “strict sense” (Pasternak, 2013, p.372). This is because,

intentional citizens do not necessarily choose to join their state, nor are they necessarily able to *de facto* leave it. That said, choice plays an important role in this account, for it assumes that, even if citizens do not choose to become members of their state nor can choose to leave it, they can choose whether or not to intentionally participate in it (Pasternak, 2013, p.372).

So although not “strictly voluntarist” as defined above, this element of voluntary choice is important. She rejects other accounts for lacking a sufficient degree of voluntarism, and appeals to David Miller’s claim that “as far as possible, we want people to be able to control what benefits and burdens they receive” (Miller, 2004, p.245 quoted in Pasternak, 2013, p.367). She notes that her account does not require citizens to *explicitly* approve the harmful policies that ground the state’s liability (Pasternak, 2013, p.366). This would exempt far too many citizens. Instead, because citizens have been “participating in and often benefitting from its activities” the onus is on citizens to signal their rejection of their citizenship and to do so with sufficient

persuasiveness (Pasternak, 2013, p.375). The citizens can be expected to incur ‘reasonable’ costs in the process. She says it is

notoriously difficult to define what unreasonable costs are [...] in the specific case of leaving one’s state, unreasonable costs are costs that threaten to undermine one’s basic rights. To illustrate, a reasonable cost of leaving one’s state would be ending up with a less well-paid job, or with fewer friends and family around. Unreasonable costs are things like having to work illegally, or not being able to feed one’s children or to provide them decent education (Pasternak, 2013, p.371, footnote: 34).

The reasonable costs of rejecting their citizenship, she claims, will generally dissuade a significant number of individuals from “leaving their country whenever it behaves in a way that might burden them with heavy liabilities” (Pasternak, 2012, p.379). This is because,

one can assume that, generally speaking, emigration is a physically, emotionally and morally challenging experience, which most individuals would prefer not to undertake. This fact suggests that even if a state behaves in a way that burdens its citizens with greater liabilities, it is quite unlikely that a significant portion of its population would respond by attempting to leave, or by expressing such intentions with sufficient persuasiveness (Pasternak, 2013, p.379).

This implies that even when the costs involved in rejecting one’s citizenship by emigrating, or expressing an intention to do so with sufficient persuasiveness, are reasonable, they are nevertheless high enough that most citizens would prefer to shoulder a share of their state’s “heavy liabilities” rather than to incur them. The citizens have chosen not to reject their citizenship status and to remain its intentional members, and this means that they can be permissibly burdened with a share of their state’s liability-burden.

This sophisticated and initially attractive account faces a notable issue: it needs to explain *why* it is the case that when citizens could reject their citizenship status and incur reasonable costs, they can be expected to either (a) reject their citizenship status (and in so doing deny the state permission to impose shares of its liability-burdens on them), or (b) not reject their citizenship status but thereby grant the state permission to burden them with a share of its liability-burdens. The issue with this is: the citizens find themselves forced in to this choice between two costly options. It is not clear, however, that this is fair.

4.2 Two Accounts of Intentional Participation-Based Duties

In this section I will outline two accounts of individuals' duties to contribute to the repair of impermissible harms caused by a collective action. These are the Complicity Account and the Membership Account. These might explain why it is fair for citizens to be subjected to the forced choice between rejecting their citizenship and bearing a share of the state's liability-burdens. There are parts of Pasternak's argument that suggest support for both, although the Membership Account is congruent with more features of Pasternak's account than the Complicity Account is. I will first outline the Complicity Account. It is constructed around Kutz's Complicity Principle:

Complicity Principle: (Basis) I am accountable for what others do when I intentionally participate in the wrong they do or harm they cause. (Object) I am accountable for the harm or wrong we do together, independently of the actual difference I make (Kutz, 2000, p.122).

Pasternak appeals to Kutz's Complicity Principle but does not elaborate sufficiently on her reasons for endorsing it. Perhaps Kutz's argument can help. In support of the Complicity Principle, Kutz says "I am the exclusive author of the actions I perform myself, as well as the events caused by those actions [...] I am an inclusive author of the actions of the group in which I participate, inclusive because I am one among those who can say "We did it"" (2000, p.106). This notion of inclusive authorship could explain *why*, as the Complicity Principle stipulates, intentional participants are accountable for the harmful consequences of the collective action. Parts of Pasternak's argument suggest this notion is at work. For instance, she says an intentional member's duty to shoulder costs "results from the fact that she intentionally took part in the collective activity that had harmful results" (Pasternak, 2013, p.368). And she says:

On the intentional citizenship account, when citizens intentionally participate in their state, they gain authorship of their state's activities: these activities become 'their activities' (or activities of 'their state'). It follows then that some actions that are performed by individuals other than themselves (e.g. troops in a faraway land) are attributable to them, because they and those other individuals intentionally participate in the same collective endeavour (Pasternak, 2013, p.374).

Perhaps Pasternak would argue that an intentional member inclusively authors' impermissible harms caused by an unjust state action and she is therefore liable

for those harms. In making this argument she would be endorsing the Complicity Account. This is an individualist account of liability. It grounds liability in inclusive authorship of impermissible harms. I do not, however, believe that it is necessary to invoke this account in order to explain how Pasternak's account works. In Section 4.3 I will argue that Membership Account in fact fits more closely into Pasternak's argument. The Complicity Account is incompatible with some key features of Pasternak's account. Next I will show how the Membership Account can also be derived from Kutz's work.

Kutz claims that sometimes the culpability of an organisation can be greater than that of its members (2000, p.199). He says that all intentional participants are accountable for what the organisation does, but this does not necessarily mean all of them are to blame. A blameworthy member is "accountable on the basis of what all did together" and accountable for her own lapse (Kutz, 2000, pp.199-200). However, because the wrong is emergent at the group level, a duty of compensation should emerge at the group level too (Kutz, 2000, p.200). So why are the blameless intentional participants accountable for the harm?

They have neither acted badly, nor caused harm. But they owe an inclusive duty as group members. They should share in the collective task of compensating their victims. Their obligations after the accident mirror the nature of their participation beforehand, as members of the venture that was foreseeably capable of doing great harm. Their inclusive duties as company members entails a derivative obligation to help make good their company's debts to its victims. (Kutz, 2000, p.201)

It is clear that the beneficiaries of the individuals' inclusive duties are the victims of the harm. It is not entirely clear, however, whether their inclusive duties are (a) owed to the victims, or (b) to the organisation which owes a duty to the victim, or (c) to both. What I call the Membership Account holds that the intentional participants' have duties that are owed to the organisation, and that require them to assist it in discharging the duty it owes to the victims. For Kutz, the organisation's duty is grounded in the fact it culpably caused harm, and he says "all members individually owe an inclusive duty of compensation, insofar as the organisation as a whole has a duty to compensate" (2000, p.201). This implies that the individuals' inclusive duties are both derived from, and contingent on, the existence of the organisation's duty. On this account, it does not seem to be necessary condition of their inclusive duties that the

organisation was culpably responsible for some harm. Intentional participants might take on duties to help the organisation discharge different types of duty.

The Complicity Account, on the other hand, is premised on the idea that because intentional participants are inclusive authors of the harm they render themselves liable to the costs of repairing it. Unlike the Membership Account, it relies on the intuitive sense that those who *wrongfully author* harm are the ones who ought to bear that harm. As a liability account, the intentional participant's duty to contribute to the repair of the harm is owed to the victims. Both of these accounts are plausible explanations of why intentional participants have duties to repairs harms caused by a collective action. Can either of them be incorporated within Pasternak's account to explain why the citizens of state are not wronged by their forced choice between costly options? In the next section I will argue that the Membership Account is congruent with important features of Pasternak's account that the Complicity Account is not.

4.3 Which Account Should Pasternak Endorse?

I will now identify three features of Pasternak's account which suggest that she needs to employ the Membership Account in order to explain why a state, *qua* corporate agent, can permissibly impose its burdens on its citizens. First, Pasternak endorses the Corporate Liability Premise. In Section 3.3 I argued that an adequate explanation of the permissibility of a corporate agent imposing shares of *its* liability-burdens on an individual cannot claim that those individuals are *liable* to it. Put simply, one agent cannot be liable for another's liabilities.

The Complicity Account introduced in 4.2 invokes liability-duties grounded in an individual's inclusive authorship of an impermissible harm. As an individualist account of liability, the Complicity Account cannot provide Pasternak with an explanation of why a corporate agent is justified in imposing shares of *its* liability-burdens on its citizens. The Membership Account, however, can. Pasternak could, of course, endorse the Complicity Account, but it would not provide a justification for a state, *qua* corporate agent, imposing shares of *its* liability-burdens on its citizens. She could either provide another

account to perform this role, or abandon the Corporate Liability Premise altogether.

It is worth reminding ourselves of why an individual cannot be liable for another's liabilities. To see this, consider how the Complicity Account holds that individuals are liable for impermissible harms they *inclusively author*, and the Corporate Liability Premise treats a corporate agent as a duty-bearing moral agent. Someone might argue that when a corporate agent's members inclusively author harm, the corporate agent can be assigned liability as an author of that harm too. They might then argue that the individuals are liable to a share of the corporate agent's liability-burden because they inclusively authored the corporate agent becoming liable. However, liability, as I understand the term, refers to the forfeiture of a right not to be harmed, and the acquisition of a duty to bear some harm, as a means to repairing an impermissible harm that one has authored *qua* moral agent.¹⁷ This duty is owed to the victim of that wrongful harm. So the argument under consideration would imply that a corporate agent can justifiably discharge its duty to the victim, by imposing its costs on the individuals, because they impermissibly harmed the corporate agent by inclusively authoring its liability. This is inconsistent, however, with the idea that the corporate agent is liable because it authored the harm. It cannot be true that (a) the corporate agent authored the harm and (b) the individuals wronged the corporate agent by authoring it becoming liable.

It would be conceptually coherent, on the other hand, to claim that when they inclusively authored the harm, they became liable for the harm, and so did the corporate agent. If, however, the corporate agent were to burden them on the basis of their liability, it would just be enforcing their duties to the victims of the wrongful harm. It would not be discharging its own duties to the victims.

¹⁷ My moral responsibility-based account of liability invokes a different notion of authorship. It holds that causation is a necessary condition of authorship. Kutz's notion of inclusive authorship eschews this causation requirement. I discuss his notion in more detail in Chapter 5.

The upshot is this: Pasternak could not appeal to the Complicity Account to explain why a state, *qua* corporate agent, could impose *its* burdens on citizens.

The second feature of Pasternak's account which implies a higher degree of congruity with the Membership Account, rather than the Complicity Account, is that the latter can only be applied when explaining why the *participants in a collective action that caused an impermissible harm* are liable for it. This is at odds with Pasternak's suggestion that her account applies regardless of the reason for a state being under a duty to repair some harm (2013, p.364). If a state incurred a capacity-based duty to repair a harm, because it is the most capable of repairing the harm, it would be odd to apply a liability account in order to explain why its citizens must bear a share of the burden, because the liability account rests on the idea that individuals have inclusively authored the harm in question.

The third feature is the absence of the Narrow Proportionality Principle. I believe an intuitively compelling liability account must include a principle of proportionality. In particular, the Narrow Proportionality Principle should determine the degree of each individual's liability. The degree of an intentional participant's liability should, therefore, vary in accordance with the degree of her moral responsibility for authoring the harm. Kutz believes that individuals can be blamed for harms they inclusively author (2000, p.142). If individuals can be blamed for harms they inclusively author, and their inclusive authorship grounds their liability, then their liability should vary in accordance with their blameworthiness. I develop this point in 5.1. Yet Pasternak says that "complaints about, or disagreements with" the distribution of the liabilities "are an internal matter to be resolved by the political community itself" (Pasternak, 2013, p.364). The only principled limit on the distribution of the state's liabilities seems to be that the state respects a certain set of human rights.

4.4 The Membership Account

In this section I will sketch the Membership Account in more detail. It is based in the idea that an intentional participant in a collective action gives the collective, *qua* corporate agent, permission to burden her. The corporate agent's permission to burden her corresponds with a duty to bear the burdens. This is an important difference between it and the Complicity Account. This

duty is not premised on any suggestion of wrongdoing on the part of the individual or that she in some sense authored the impermissible harm. The Membership Account's normative force comes from the fact that individuals are not wronged when they are made to bear burdens they have chosen to bear.

The intuitive plausibility of the Membership Account is clear. When discussing how a state's corporate responsibility distributes to its citizens, Pasternak draws an analogy with cases where shareholders in corporations incur financial losses when corporations are charged with compensatory duties (2013, p362). She talks of our "intuition that shareholders ought to be held liable (up to a limit) for their company's policies: since they intentionally participate *in the company* (by buying shares) they should be held to account" (Pasternak, 2013, p.369, emphasis added). Anna Stilz also says that when a business corporation causes harm,

the employees and shareholders ought to discharge a share of responsibility because they voluntarily joined the corporation. By incorporating, they gained access to a range of benefits unavailable otherwise. But gaining these benefits also means assuming liability to repair harms for which the company is responsible [...] Since the employees and shareholders chose to join, we can say they have accepted this bargain (Stilz, 2011, p.194).

The intuition that an individual's voluntary choice to be a member of a corporate agent, when she knows that this could entail bearing certain burdens, is at the heart of the plausibility of the Membership Account. I will now outline two necessary features of a plausible Membership Account.

First, if an individual chooses to become a member of a corporate agent, and in doing so she gives it permission to impose shares of its liability-burdens on her, then she has a duty to bear those burdens and wrongs the corporate agent if she violates it. This is an important difference between it and the Complicity Account, according to which an individual owes a duty to the victim of impermissible harm. The Membership Account, however, holds that when a corporate agent is liable for a harm, its members can have a duty to the corporate agent to bear its liability-burden. Their dereliction would wrong the corporate agent. But would it also wrong the victim? I believe it could, but the individual members owe the corporate agent and the victim different things.

For example, as a teaching assistant I have a duty to provide a student with the standard of teaching she can expect from the University. The University has a duty to provide her with a certain standard of teaching and I have been delegated the task of discharging its duty. It would be wrong of me to take on the task of discharging its duty to the student but to then fail to satisfy the standards. In taking on this role, I undertake a duty to the University and a duty to the student. If I fail to satisfy the requirements of my role I wrong both the University and the Student. As a consequence of my dereliction, however, the University has a duty to correct the wrong done to the student that exists independently of my duty to make right the wrong to the student.

If the student were, for example, owed compensation for the breach of the duty, then this compensation would be paid for by the University. The University delegated the discharge of its duty to me, and the University's duty to the student has been violated.¹⁸ Whether I would be required to pay that compensation depends on the contract I have with the University. Even then, if I was unable to pay the compensation, or the full amount owed by the University, then the University would be required to pay for it. Consider the following case:

Plants: Dean agrees to water Stephanie's plants whilst she is on holiday for a week. Dean promises he will water them every day without fail. Dean asks Laura to water the plants on Thursday and Friday. Laura promises to do so. Laura forgets to water the plants and the plants die.

In this example, I believe Dean has a duty to replace the plants. Laura does too. Laura's duty to Stephanie exists in virtue of her duty not to undermine Dean's attempts to discharge his duty to Stephanie. But should Laura be unable to replace the plants, or refuse to, Stephanie can rightfully expect Dean to replace them. This is because when Dean delegates the discharge of his duty to Laura, he does not relinquish his duty to ensure the plants are watered. On the

¹⁸ This is what Peter Cane describes as "Delegation-Based Liability". He says it "involves attributing the conduct of one person (A) to another person (B) regardless of whether (A) would be held personally liable for the conduct." This is because the duty or obligation that has been breached rests on the delegator (B) not the delegate (A) (2002, p.177).

Membership Account, a member's duties to a corporate agent, and to the target of its liability-duty, are analogous to Laura's duties. The members' have a duty to help the corporate agent discharge *its* liability-duty. The members also have a duty not to undermine the corporate agent's attempts to discharge its liability-duty by being derelict in their duties to assist it. If the corporate agent ceased to exist, however, their duties to help it discharge its liability-duty would cease too.¹⁹ The members' duties are contingent on the corporate agent's duty.

Second, whether the corporate agent is permitted to impose burdens on an individual member will depend on the content of her 'membership-bargain' with the corporate agent. I give the University permission to impose certain burdens on me – returning marking by deadlines and holding an office hour – in return for the wages it pays me. It cannot, however, take out loans in my name. The University cannot withhold my wages in order to compensate a former employee it was ruled to have unfairly dismissed. As such, whether a corporate agent incurring a duty automatically generates duties for all of its members, depends entirely on the content of their membership-bargains. The intuitive plausibility of the Membership Account rests on the idea that our voluntary choices and agreements can make it permissible for others to burden us. The account would lose plausibility if it held that by becoming a member of the corporate agent it gains a permission to burden you as it chooses in the absence of any explicit or implicit agreement to it treating you that way.

It is worth noting that a membership-agreement could also set terms of severance – what is required of either party should it decide to end the relationship. For example, a contract between employee and employer will detail the process by which the employee and the employer can relinquish themselves of any duties to one another. Again, what is crucial here is the idea that the corporate agent and its members have voluntarily agreed to the

¹⁹ If Dean died before Laura's delegated days to the water the plants arrived then she no longer has a duty to water them. This is controversial. If she does, it is a duty to be kind. Similarly, if the University ceased operating I would no longer have a duty to provide my students with the assistance that my role as a teaching assistant required me to.

relevant duties. The agreement might not need to be made explicitly, there might be cases where it is reasonable to expect individuals joining the group to be aware of its rules and conventions and their implications for the members.

The normative force of a plausible Membership Account comes from the fact that an intentional member of a corporate agent can choose to give it her permission to impose burdens on her. She would not be wronged by the imposition of burdens she has chosen to bear. As noted above, whether the corporate agent has this permission, and the limits to its permission, depends on what we can say the individual has agreed to by being an intentional member. When applied to the relationship between a citizen and her state, then, a complete Membership Account must explain when an individual's citizenship is sufficiently voluntary for it to be reasonable to say she has given her state permission to burden her with shares of its burdens. If we interpret Pasternak's account of citizens' duties to bear their state's burdens as being grounded in the Membership Account, it holds that the citizens have chosen to shoulder a share of their state's burdens if they have chosen not to reject their citizenship status when they could have done so without incurring unreasonable costs.

4.5 Rejecting the Intentional Membership Account

Although the Membership Account can offer proponents of the Corporate Liability Premise an explanation of why the members of voluntary associations can sometimes be permissibly burdened by that collective, *qua* corporate agent, it does not help them answer the question of why citizens of a state should pay for the costs of their state's unjust actions. This is because the state is to some extent an involuntary association. In 4.5.1, I will demonstrate why Pasternak's quasi-voluntarist account does not do enough to justify a state imposing its liability-burdens on its intentional members. The Membership Account is based in the idea that individuals are not wronged when made to bear burdens they have chosen to bear. But Pasternak's account imposes a forced choice between two costly options. The citizens have not chosen to be subjected to that forced choice. So this is a problem. In 4.5.2, I will consider whether Pasternak could justify imposing the forced choice on the basis of the fact that citizens benefit from their membership. I then consider in section 4.5.3 another line of argument that Pasternak could pursue but she explicitly rejects.

In 4.5.4, I will outline some perverse incentives that her account creates, and in 4.5.5 a counterintuitive implication of her account.

4.5.1 Unjustifiable Costs

Whenever a particular state's citizens will incur costs by rejecting their citizenship status, the Membership Account can only explain why individuals who have *chosen to become* the state's citizens have a duty to shoulder a share of the state's liability-burdens. It cannot be applied to individuals who did not choose to become its citizens and would incur costs in the process of rejecting their citizenship status. As I first noted in 4.1, on Pasternak's account, individuals who have been citizens of their state since birth are given a choice between, (a) remaining intentional citizens (and incurring a duty to shoulder a share of the state's burdens), and (b) rejecting their citizenship status at some personal cost but evading a duty to shoulder a share of the state's burdens. It is not clear, however, what, if anything, justifies imposing on the citizen that forced choice between two costly options. She certainly has not chosen to put herself into that choice situation, so why is it fair for her to be subjected to it?

Suppose we could somehow demonstrate that the citizen had freely chosen to be subjected to the forced choice. Perhaps she joined the state on the understanding that by doing so she incurs a duty to shoulder its burdens until she chooses to reject her citizenship status. Then the forced choice would not be morally problematic. Or perhaps we could show that she had rendered herself liable to it, or her being subjected to it was just part of some other kind of duty she is subject to. These reasons could perhaps explain the permissibility of the imposition of the forced choice. But that is not Pasternak's argument.

On Pasternak's account, the choice a citizen makes when subjected to this forced choice between two costly options, seems to determine which set of costs she is permissibly made to bear. If she chooses not to reject her citizenship status then she has a duty to bear a share of the state's burden; in order to reject her citizenship status she must bear the rejection costs. But this still does not establish why it is permissible to impose the forced choice on her. Pasternak cannot appeal to the fact that a citizen chooses to be an intentional member when faced with the choice between (a) remaining an intentional member and (b) rejecting her membership status, because this argument would

be circular. It would say that her choosing option (b) when faced with this choice makes it permissible to impose on her the forced choice between options (a) and (b). It seems that Pasternak needs to provide some additional argument to justify the imposition of this forced choice.

It might be objected that Pasternak's account only attributes participatory intentions to a citizen when the costs of rejecting her citizenship status are *reasonable*. As the costs are reasonable, it is fair to expect the citizens to incur them if she wants to avoid the consequences of not rejecting them (incurring a duty to bear a share of the state's burdens). I will now explain why this argument does not work. All states have a duty to uphold the basic moral rights of all persons within their borders. A state does not have a *duty* to ensure a naturalised citizen's life is as comfortable as it was in her previous state. This might simply be an impossible task, and it seems right to say that citizens do not owe it to each other to alleviate such costs. So there are some costs we think it is reasonable for an individual to incur in the process of rejecting her citizenship *if this is something she chooses to do*. The costs of exit are reasonable to bear for a person who has a strong desire to leave her state, but this does not make it appropriate to take her decision not to exit, or not reject her citizenship status at a similar cost, as an indication her agreement with the terms of association the state takes its citizens to be under. This idea is summed up well by John Rawls:

The government's authority cannot, then, be freely accepted in the sense that the bonds of society and culture, of history and social place of origin, begin so early to shape our life and are normally so strong that the right of emigration (suitably qualified) does not suffice to make accepting its authority free, politically speaking (Rawls, 1993, p.222).

This is why Rawls rejects the libertarian notion that "the relation of individuals to the state is just like their relation with any private corporation with which they have made an agreement" (1993, p.264). The existence of a right to emigrate does not mean that an individual citizen's decision not to emigrate should be taken as an indication of his or her voluntary agreement with the terms of association that the state currently takes its citizens to be bound by. The costs of exit are too high for this to be a justified response to a citizen's decision. As we saw above, Pasternak's argument suggests that if a citizen's basic rights would not be undermined by exiting then the costs of exit are

reasonable. She also claims these costs are likely to be high enough to discourage most citizens from exiting or expressing an intention to do so with sufficient persuasiveness through other types of action that signal their rejection of their citizenship status. So Pasternak's account takes a citizen's decision not to reject her citizenship status as being morally significant, in the sense that it grounds a duty to shoulder a share of her state's burdens. A citizen's less than fully voluntary choice will ground her duties to the state. Again, Pasternak has not explained why it is fair to ground the citizen's duty to bear a share of her state's burdens in this forced choice between costly options.

So Pasternak's account does not justify the imposition of the forced choice between costly options on a state's citizens. But a citizen's choice not to reject her citizenship status is what is supposed to justify the state imposing its burdens on her. Yet as the imposition of the forced choice is not justified, then neither are we justified in taking the consequences of that choice as justification for the state imposing shares of its burdens on her. As such, should the state impose shares of its burdens on her, it will cause her unjust harm.

4.5.2 Benefit

Does it matter that citizens benefit from their state's activities? Pasternak says that because citizens have been "participating in and often benefitting from its activities" the onus is on citizens to signal their rejection of their citizenship (Pasternak, 2013, p.375). As I have already noted, she also says that in light of the benefits they receive from the state their signalling must be credible and consistent. She does not, however, explain why their benefitting from its activities means the onus is on them to signal their rejection of their citizenship status. This is not to say that such an argument could not be made. Perhaps, the imposition of the forced choice between costly options could be justified by appealing to the fact that the citizens benefit from the state. I am not sure what this argument would look like, but I will now consider why such an argument seems unlikely to work.

First, if the benefits the citizens receive from the state are owed to them as a matter of justice, it simply is not clear why this would generate a duty to choose between bearing a share of the state's burdens or rejecting their

citizenship status at some personal cost. Second, it might be argued that by accepting the benefits the state provides for its citizens they are implicitly agreeing to bear a share of state's burdens, and in order to withdraw from this implicit agreement a citizen must reject her citizenship status. However, this argument would look a lot like an appeal to the notion of tacit consent, and would therefore be vulnerable to the same objections made against it.²⁰ One of these objections holds against any account which claims that a citizen has entered some kind of an agreement with her state. This objection holds that an individual cannot be said to consent, contract, or promise to do something if she does not know that that is what she is doing (Simmons, 1976, p.275).

Hence, if Pasternak's account relied on the idea that by benefiting from her state a citizen agrees to shoulder a share of the state's burdens, it can be objected that a citizen does not know what is at stake when deciding whether or not to reject her citizenship status. It is unreasonable for us to attribute the status of intentional participant to an individual who lacked the rights and liberties needed to form and express genuine participatory intentions. So why is it, that when those rights and liberties obtain, it is reasonable to attribute moral significance to her choice that she is unaware of it carrying? Unless a citizen understands that by intentionally participating she gives the state permission to burden her, then we cannot say that she has given it her permission.

4.5.3 A Quasi-Voluntarist Account of Political Obligation

Pasternak's account does not justify the imposition of a forced choice between costly options on individuals. Her account needs to be supplemented with an argument that provides this justification. I have just considered the possibility of an argument that appeals to the fact that citizens' benefit from their state's activities, but I doubt whether such an argument could succeed. In this section I would like to consider another way in which Pasternak might provide this justification. I believe that a justification could perhaps be provided by

²⁰ A. J. Simmons (1976) provides an excellent critique of attempts to use tacit consent as the basis of an account of political obligation.

endorsing some kind of quasi-voluntarist account of state legitimacy which holds that the citizens have a political obligation to bear a share of their legitimate state's burdens but can free themselves from that obligation by rejecting their citizenship status.

Accounts of political obligation tell us when citizens have duties to support and comply with their legitimate state's decisions to burden them. Pasternak rejects non-voluntarist 'legitimate authority' explanations of citizens' duties to shoulder a cost of their state's unjust actions because these do not allow an individual's own attitudes regarding his or her citizenship status to play any role in determining when he or she can be made to shoulder a share of the state's burdens (2013, p.367). These legitimate authority accounts hold that when a state satisfies some objective criteria of legitimacy (for example, upholding its citizens' basic rights), its citizens incur duties to bear shares of its reparative burdens, and facts about an individual's voluntary choices are irrelevant to their political obligations. A quasi-voluntarist account of political obligations, could, it seems, give individuals the type of control over the costs they bear that Pasternak believes they ought to have, and also justify the imposition of the forced choice. Pasternak, however, emphasises that she is not endorsing a legitimate authority argument:

the intentional citizenship argument is not concerned with the legitimacy of a group as a condition for the justification of the distributive impact of its liability. In fact, on the intentional membership account it is possible that members of illegitimate groups will have to share liability for their group's actions, so long as they intentionally participate in them (e.g. at least some members of the SS) (Pasternak, 2013, p.373).

Pasternak explicitly rejects the suggestion that her account is a legitimate authority account, but a legitimate authority account could perhaps justify the imposition of the forced choice that her account does not justify. The success of such an argument would, of course, also depend entirely on the viability of the quasi-voluntarist account of state legitimacy and political obligation it is premised upon. I consider legitimate authority accounts again in more detail in Chapter 6. Again, the justification of the citizens' enforced choice is elusive.

In Section 4.4 I argued that Pasternak wants her account to (a) explain why a state, *qua* corporate agent, can impose shares of its reparative burdens on its

citizens, (b) apply regardless of the reasons for the state incurring a reparative duty, and (c) not incorporate proportionality principles that will place stringent restrictions on the state's autonomy to distribute its burdens as it sees fit. I argued that retaining these features requires her to endorse the Membership Account rather than the Complicity Account. The Membership Account, however, is premised on the power that individuals' voluntary choices have to generate duties. By contrast, Pasternak's account grounds a citizen's duty to bear a share of her state's burdens in her choice between two costly options – bearing a share of its burdens or rejecting her citizenship status. But she has not justified the imposition of the forced choice. The forced choice is not something the individual can be said to have chosen, her choice not to reject her citizenship status cannot be appealed to in order to justify its imposition. I have suggested some possible ways of explaining why the citizens are not wronged by this in 4.5.2 and 4.5.3. As it stands, however, her account does not justify a state imposing its burdens on its citizens because it does not justify the imposition of the forced choice that is supposed to provide it with that justification.

4.5.4 Perverse Incentives

Applying the Membership Account to states that perpetrate serious injustices will create perverse incentives for liable states, their citizens, and the agents interested in holding them to account. There are three perverse incentives it will create. It can (i) incentivise those who are interested in securing reparations for the victims of unjust harm to maintain the existence of a state agent that will foreseeable cause more unjust harm, it (ii) provides the members of the liable state agent with the incentive to destroy the state and form a new one, and (iii) it gives citizens an incentive to use the threat of rejecting their citizenship status in order to influence the state's distribution of the liability-burden to its citizens.

The first perverse incentive is that it gives those interested in ensuring that the beneficiaries of a state's liability-duty receive their dues an incentive to ensure the continued existence of that state. This is because the Membership Account requires that the state persist in order for its citizens to incur derivative duties to discharge the state's liability-duties. This is troubling in cases where the

liable state-agent is one that we would rather its citizens destroyed and replaced with a better state. We can imagine a state that upholds the rights and liberties needed for its citizens to be regarded intentional members but which frequently violates the rights of non-citizens by waging wars of aggression. Or it provides some of its citizens with the conditions needed for intentional membership but does not provide them for all of its citizens, regularly violating the basic rights of a minority.

The second perverse incentive applies to the citizens of the liable state-agent. The citizens have an incentive to see the state-agent destroyed and replaced with another state-agent. If a state agent's enforceable duty is incurred because it is morally responsible for the impermissible harm, then its citizens, whose collective action upholds that state, and who will bear the state's liability-burdens, have an incentive to act together to destroy their state and create a new state-agent with a different moral identity to the liable state-agent. The citizens also have an incentive to secede and form a separate state-agent that is not liable for the harms that their current state-agent is liable for. This could result in a liability-shortfall. Intuitively, it seems too easy for the citizens to evade duties to repair unjust harm and deny the victims the possibility of receiving their dues from the liable state.

Third, the risk of citizens responding to the state burdening them by rejecting their citizenship might constrain the state in counterintuitive ways. For example, if the UK were placed under a duty to compensate Iraq for the costs of reconstruction following the 2003 invasion, the citizens of Scotland could avoid a duty to bear a share of the costs by seceding from the UK. The UK government might respond to this possibility by announcing an intention to burden Scottish citizens less than the rest of Britain, in order to avoid incentivising their exit. This incentivises the citizens to push for exit in knowing this will put pressure on the state to limit the burdens it imposes on them. Intuitively, this seems unfair to the citizens who are made to bear a greater share as a result of their co-citizens threat to reject their citizenship.

The reason these perverse incentives exist is that individuals' duties to bear a share of their state's burdens are contingent on the existence of the state-agent and their continued intentional membership of it.²¹ As it stands, it seems as if the state-agent ceases to exist, or the citizens reject their citizenship status, they will cease having a duty to bear the costs of the impermissible harms that their state is liable for.²² There might be principles that can be used to explain why a liable state's citizens cannot simply disband their current state and reconstitute under a different identity, or divide into numerous different states, in order to avoid being made to bear shares of its burdens. But I am unsure what these would be, and how they could be justified without conceding that the primary subjects of the duties to repair the harm are the individuals, rather than states *qua* corporate agents.

4.5.5 A Counterintuitive Implication

When outlining her account, Pasternak says that "I examine cases where states become liable for harm, without paying attention to the specific reason that renders them liable" (2013, p.363).²³ As such, the intentional membership account is supposed to apply regardless of the reason why the state incurred an enforceable duty to repair harm. This is counterintuitive. There are surely duties to contribute to the repair of harm that apply even to citizens who reject their citizenship status. Imagine that an international authority imposes on the UK a capacity-based duty to repair a harm suffered by the Republic of Ireland. A natural disaster has rendered the citizens incapable of fulfilling their basic rights. The UK state could repair the harms and distribute these burdens in a

²¹ When putting forward his account of national responsibility, David Miller claims a benefit of his account is that we might want to hold a nation responsible for actions performed by states that no longer exist. For example, holding the German nation responsible for the actions of the Nazi state (Miller, 2007, p.112). My account is sensitive to this worry and looks to identify liability-duties that will track individuals when exiting a state or when their state ceases to exist.

²² Citizens could still be individually liable on basis of their moral responsibility for the harm.

²³ Recall that Pasternak uses the term liability in a wider sense than I do.

way that will not require any individuals to bear an unreasonable cost. Intuitively, whether the citizens reject their citizenship status seems irrelevant to whether they should bear a share of this burden. This also seems unfair for the citizens who do not reject their citizenship status. Why is this? If the state is under an enforceable capacity-based duty, and the intentional membership account permits citizens who reject their citizenship status to avoid being burdened, as the numbers rejecting their citizenship status increases, so too does the size of the burden the other citizens will be required to bear.

4.6 Conclusion

In this chapter I have argued that we should not endorse Pasternak's Intentional Membership account. In 4.1, I outlined Pasternak's account and drew attention to the absence of sufficient reasons for thinking that intentional members should incur duties to bear a share of the costs of the state's burdens. In 4.2, I considered whether Christopher Kutz's work can provide us with an explanation. There are, I argued, two different accounts that can be drawn out of Kutz's work – the Complicity Account and the Membership Account. In 4.3, I argued that the Membership Account has greater congruence with features of Pasternak's account. In 4.4, I outlined the features that I believe a plausible Membership Account must exhibit and what its proponents must do for their account to be complete. In 4.5, I rejected attempts to use the Membership Account to explain citizens' duties to bear a share of their state's burdens.

If Pasternak wants her account to (a) explain why a state can impose shares of its burdens on its citizens, (b) explain its permission to do this regardless of the reason for it incurring a reparative duty, and (c) not include proportionality principles that will unduly restrict the state's autonomy to distribute its burdens, then she must endorse the Membership Account. I argued, however, that the Membership Account works only when a citizen has voluntarily chosen to join the collective. Instead, Pasternak's account takes the result of a citizen's choice between two costly options to determine whether she has a duty to bear a share of the state's burdens. The arguments in 4.5 held that Pasternak's account, in its current form, does not explain why it is fair to impose on a state's citizens a forced choice between two costly options. The forced choice is not something the citizens have chosen to bear, and their failure to reject

their citizenship status cannot coherently be appealed to as a justification for it. Without justifying the forced choice we should not take a citizen's choice not to reject her citizenship status as justifying the state imposing shares of its liability-burdens on her. If it does burden her, it does so without justification.

I then considered possible arguments that Pasternak could use to justify the imposition of the forced choice. The Intentional Membership argument could work if the citizens were shown to have some duty to bear the state's burdens or reject their citizenship status. I argued that it is unclear whether the fact that citizens *benefit* from the state could provide this justification. Pasternak rules out a prima-facie plausible argument which appeals to citizens' political obligations by declaring that her account is not a legitimate authority account. I then considered a number of perverse incentives it creates, and a counterintuitive implication, and these give us further reason to reject a quasi-voluntarist Membership Account.

A number of these problems could be avoided by endorsing an individualist account of liability duties such as the Complicity Account. On such an account, if a liable individual were to exit her state, or the state collapsed, then she would retain her liability-duty. It would, therefore, avoid the perverse incentives and counterintuitive implications Pasternak's account yields. The Complicity Account holds that citizens who are inclusive authors of impermissible harms caused by unjust state actions are liable for their repair. If a citizen is an intentional participant at the time at which reasonably foreseeable impermissible harms are caused by her co-citizens' contributory actions then she is one of its inclusive authors. To have avoided being an inclusive author of an impermissible harm the citizen would need to have rejected her citizenship status. It can then be argued that because we have moral reasons not to be in inclusive authors of impermissible harm, the imposition of the forced choice between costly options is justified. We ought not to be an inclusive author of impermissible harm, but if we choose to be an inclusive author of such harm then we can be made to bear the costs of repair.

Endorsing the Complicity Account, however, would carry some important implications for Pasternak's account. It could not be used to show when a state is permitted to impose shares of *its* liability-burdens on citizens, it would only

apply when the state's citizens inclusively authored the harm needing repair, and would bring with it proportionality principles that limit the permissible distribution of the costs of repair among the liable citizens. Despite all of this, the Complicity Account would, it seems, avoid many of the objections I have made against Pasternak's account when conceived of as a quasi-voluntarist Membership Account. It might also be thought to avoid some of the problems that are said to besiege an individualist moral responsibility-based account of liability because the Complicity Account can implicate the non-contributing members as liable. In the next chapter I will reject the Complicity Account.

5 The Complicity Account

When constructing her Intentional Membership account, Pasternak endorses Christopher Kutz's Complicity Principle. But she does not provide us with sufficient reasons for endorsing it. I have argued that we can derive from Kutz's work two explanations of how intentional participants in a collective action can incur duties to contribute to the repair of impermissible harm. I called these the Membership Account and the Complicity Account. I argued that the former rather than the latter is congruent with more features of Pasternak's account. According to the Membership Account, an individual chooses to put herself under a duty to assist a corporate agent discharge its reparative duties. This explains the permissibility of it imposing its burdens on her. I then argued that the Membership Account could not be combined with Pasternak's quasi-voluntarist account of citizenship, in a way that justifies a state, *qua* corporate agent, imposing shares of its liability-burdens on its citizens. Pasternak might, however, endorse the Complicity Account, which holds that by intentionally participating in a collective action an individual renders herself liable for reasonably foreseeable impermissible harms caused by the contributory actions of other participants. In this chapter I reject this account.

The Complicity Account may seem to be attractive because it could potentially implicate a greater number than the moral responsibility-based account of liability I endorse. It implicates more people whenever there are intentional participants who are not morally responsible for causally contributing to the unjust harm. Its broader scope means it could do a better job of overcoming the Insufficient Funds argument. It can also match the intuitions of the proponents of the Membership Argument, who claim that sometimes members of a group can be expected to shoulder the costs of repairing harms caused by other members' actions. The Complicity Account could provide a principled explanation of that intuition. So it is worth considering in detail.

Yet, I begin the chapter by noting one limitation that should be placed on it. As it is a liability account, I will argue that the Narrow Proportionality Principle and Necessity Principle should be applied. The upshot of this, I will argue, is that the degree of an individual's liability can be diminished by excuses. This

limits its ability to deal with liability-shortfalls. Even then, it may still appear as if it could do a better job than the moral responsibility account on the grounds that it could implicate more persons as liable. However, I will argue, that there has not yet been a sufficiently convincing defence of a Complicity Account.

To demonstrate this, in Sections 5.2 and 5.3, I will outline two different Complicity Accounts: Kutz's and then Saba Bazargan's. I will demonstrate that Bazargan's account is more fully developed than Kutz's. For this reason, the remainder of the chapter will zero in on Bazargan's account. In Section 5.4, I begin my analysis of Bazargan's account by questioning the intuition he thinks necessitates his Complicity Principle. In Section 5.5 I, will outline some important ambiguities and indeterminacies in Bazargan's account. In Section 5.6, I will defend the ability of a moral responsibility-based account of liability to provide intuitively compelling conclusions in relevant cases, before considering a case where the two accounts (Bazargan's and my own) yield different conclusions. I will argue that Bazargan's account comes to the wrong conclusions, but accept that he and others might disagree. In Section 5.7, I will consider another case where the two accounts reach different conclusions, and again I will claim that the moral responsibility-based account reaches the correct conclusion. In Section 5.8, I will discuss Bazargan's notion of 'prominence', suggesting how it could help his account avoid some of the counterintuitive implications. He seems to endorse two interpretations of it. Both of these are problematic. Ultimately, the notion of 'inclusive authorship', which the entire account is premised upon, does not provide necessary support for his intuitions, the notion of prominence, nor his Complicity Principle.

5.1 The Complicity Account and Diminished Liability

In the preceding chapter, I introduced the Complicity Account. This account holds that an individual's liability for an impermissible harm is grounded in her intentional participation in a collective action, when that harm was the reasonably foreseeable consequence of other participants' contributory actions. She is liable for these harms she did not cause because her intentional participation makes her an *inclusive author* of others' contributory actions. Prima

facie, the Complicity Account has a number of virtues. First, liability for an impermissible harm would extend to *all* inclusive authors rather than just those individuals who caused it. This would be regarded as a favourable by proponents of the No Causal Connection argument, Insufficient Funds argument, and the Membership Argument. Second, establishing which citizens were intentional participants might be an easier task than establishing who caused impermissible harm. So it offers a better response to the Epistemic Deficit argument too. Third, individuals' liability-duties would not be contingent on their continued membership of the collective and would track them upon their exiting the collective or it ceasing to exist. So it would also avoid some of the counterintuitive implications of the Membership Account.

The Complicity Account does not claim to provide us with a justification for a state, *qua* corporate agent, imposing shares of its burdens on liable citizens. Instead it merely explains when the individual citizens are liable for the impermissible harms. Whether or not the state is a corporate moral agent, by imposing burdens on them it, the state would only be enforcing the liable citizens' duties. It would not be discharging its own duties. The Complicity Account does not require us to conceive of the state as a corporate agent.

Does the Complicity Account offer a stronger response to the Diminished Moral Responsibility argument than my individualist account of moral responsibility-based liability? I believe it is just as vulnerable to this argument. There are certain principles that a plausible Complicity Account must abide by. The Narrow Proportionality Principle holds that the degree of an individual's moral responsibility for an impermissible harm helps determine the highest magnitude of harm it would be proportionate to impose on her. Sometimes it will be better for non-liable persons to be harmed than a liable person being subjected to more severe harm than she is liable to. The Necessity Principle says that individuals are only liable to harms that are necessary; any harm that is not necessary for bringing about the relevant outcome is impermissible.

The Complicity Account is, I argue, more intuitively compelling when it incorporates these principles than when it does not. However, incorporating these principles means it is vulnerable to the Diminished Moral Responsibility argument. We can imagine a case where a state causes impermissible harm but

the vast majority of its citizens had excuses for intentionally participating. For example, perhaps the citizens had little reason to doubt the sincerity of their government's justifications for the war. When faced with the prospect of leaving one's place of birth behind in order to avoid being implicated in a war as one of its authors, when that war *might* be impermissible, the appropriate level of blame is very low. The degree of their liability is diminished by their excuses. The excuses might be so powerful that their combined liability does not provide grounds upon which they can be permissibly burdened with the full costs of repairing harms caused by the war. This is important: a properly constrained Complicity Account is not immune to the Diminished Moral Responsibility argument. So its initial attractiveness is to that extent undermined. Before launching my other objections, it will help to describe two different Complicity Accounts in detail.

5.2 Kutz's Complicity Principle

Christopher Kutz argues that when a harm results from a collective action, explaining the participants' moral accountability for the harm requires an account that does not take a causal contribution to be a necessary condition accountability (Kutz, 2000, p.122). At the heart of his argument is the idea that the concept of moral responsibility cannot provide theoretical support for our intuitions about individuals' moral accountability in cases of overdetermined harm. As we saw in Chapter 2, harm is claimed to be overdetermined when the number of individuals performing actions that could have combined to cause the harm exceeded the necessary number. This means that no individual's action was but-for necessary for the harm. As such, no individual's action was a cause. The concept of moral responsibility has an internal causation requirement. Individuals can only be morally responsible for things they cause. Therefore, nobody is morally responsible for the overdetermined harm.

Building on these assumptions, Kutz claims that the following conceptions of accountability cannot explain our intuitions in overdetermination cases:

Individual Difference Principle: I am accountable for a harm only if what I have done made a difference to that harm's occurrence. I am accountable only for the difference my action alone makes to the resulting state of affairs.

Control Principle: I am accountable for a harm's occurrence only if I could control its occurrence, by producing or preventing it. I am accountable only for those harms over whose occurrence I had control (Kutz, 2000, p.116).

The Individual Difference Principle (IDP) and Control Principle (CP) are, according to Kutz, "principles of common-sense morality and moral psychology that limit our common, non-philosophical understanding of individual accountability" (2000, p.3). The IDP and CP are inapplicable in overdetermination cases because of their causation requirements.

As explained in Chapter 2, Kutz uses the 1945 Allied bombing raid of Dresden as an example of overdetermined harm. He points out that "[e]ach bomber can truly reply to the victims or their survivors, "Why blame me? I have not caused your suffering, nor made you worse off" (Kutz, 2000, p.122.) Intuitively, however, this strikes us as the wrong conclusion. We think that the participants can be blamed for their role in the bombing. This, he says, is why we need his Complicity Principle:

Complicity Principle: I am accountable for what others do when I intentionally participate in the wrong they do or the harm they cause. I am accountable for the harm or wrong we do together, independently of the actual difference I make (Kutz, 2000, p.122).

What does Kutz say in support of this principle? Support for this principle comes from a novel, non-causal notion of authorship. He says that sometimes when "we act together, we are each accountable for what all do, because we are each authors of the collective act" (Kutz, 2000, p.138). This authorship does not consist in a causal relationship. He says:

within the modality of collective action, teleological relations play the primary role in relating actors to events [...] Inclusive ascription is fundamentally teleological rather than causal [...] We are properly held accountable for the actions of groups (and of individual group members) in which we participate, because these actions represent our own conception of our agency and our projects. This conception, embedded in our participatory action, is thoroughly normative: it expresses what we desire, what we will tolerate, and what we believe. If a set of agents' participatory intentions overlap, then the will of each is represented in what each other does qua group member, as well as what they do together. The logical overlap permits us to say they manifest their attitudes through one another's actions [...] The coincidence of our intentions grounds my accountability for your actions (Kutz, 2000, pp.140-141).

What is a participatory intention? It is an intention to perform an action that is supposed to causally contribute to the achievement of the aims of a collective action – a contributory action. The participatory intentions of individuals participating in the same collective action overlap. That is, they intend to causally contribute to the same collective action. This overlap makes all participants inclusive authors of the collective action and of the causal consequences of one another’s contributory actions. This is why Kutz believes the Complicity Principle can explain the accountability of all participants in the bombing of Dresden. He says the “will of each was manifest in the acts of all. And so the victim may rightly focus on the effects of the joint act while blaming the individual” (Kutz, 2000, p.142). Thus, for Kutz, a bomber can be blamed for the outcome without being causally responsible for the outcome.

However, this is limited to individuals who are, as a matter-of-fact, group members. Kutz insists that this: “should be distinguished from merely vicarious or expressive claims of authorship, as when I say ‘we won the Superbowl!’” (Kutz, 2000, p.107). How is matter-of-fact membership determined? For some groups, the “identity of the group consists just in the fact that a set of persons is acting jointly with overlapping participatory intentions” (Kutz, 2000, p.105). For example, consider a set of individuals pushing a car up a hill. Their overlapping participatory intention is what separates individuals as members from non-members. By contrast, other groups have more demanding membership criteria (Kutz, 2000, p.105). For example, I do not become a member of Walsall Football Club by running onto the pitch and kicking the ball. In groups with additional membership criteria “only the actions of bona fide members of the group can be attributed to the group [...] Furthermore, the actions performed by bona fide group members must be consistent with the particular powers and limitations of the member’s role” (Kutz, 2000, p.107). Thus, only *members* are inclusive authors, and only of other members’ contributory actions.

Why might we accept his notion of authorship? It seems uncontroversial to say that a participatory intention, like all freely held intentions, is indicative of an individual’s will. That is, her aims, attitudes, and intentions. When individuals intentionally participate in a collective action, this indicates an attitude of

favour, or at least tolerance, regarding others' reasonably foreseeable contributory actions. This could be what Kutz means when he says the will of each is represented in others' contributory actions. We can consider other members' contributory actions when assessing how blameworthy we think an individual is *for intentionally participating*. But for Kutz, every participant is morally accountable *for the causal consequences of each other's contributory actions*. This is a much more controversial claim since it rejects the common-sense belief that an individual can only be blamed for things she has caused to happen.

According to my moral responsibility account, an individual is only the author of things *she* has caused. This includes intentions, actions, and outcomes. The notion of authorship on Kutz's account is non-causal. I am an inclusive author of harm I did not cause and I can be blamed for it. The conception of moral responsibility also allows us to blame individuals for *attempting* to cause harm, even when we are not sure if they actually caused it. Our reactive attitudes would not, I believe, be tempered by the fact that we cannot be certain whether or not an individual caused the harm she attempted to cause. We can blame the Dresden bombers for *participating in the bombing raid*. But Kutz thinks we can blame individual participants *for the harm* despite also claiming that none of them are causally responsible for the harm. So why should we accept his claim? This is where Kutz would appeal to the notion of inclusive authorship – he would say that the overlap in their participatory intentions makes them inclusive authors of one another's contributory actions. We do not get a real sense, however, of what it means to inclusively author something. This is what Kutz needs to do if we are to have sufficient reason to accept his claim about how intentional participants can be blamed for harms that they did not cause.

Another important problem with Kutz's account concerns principles for differentiating degrees of inclusive authorship and therefore participants' accountability. How do we differentiate different degrees of inclusive authorship? Kutz's account on this is ambivalent and ultimately inconsistent. He claims the IDP is the source of an intuition that a bomber participating in *Dresden Firestorm* is less blameworthy than a bomber who singlehandedly caused all of the harms suffered that night. He admits that participatory wrongdoing

“seems less culpable than direct commission, in virtue of the relation between agent and event” (2000, p.148). Yet this is in contradiction with his belief that:

if we attempt to make room for the [individual difference] principle, we will fall into contradiction, since the basis for complicitous accountability is inconsistent with the Individual Difference Principle. If accountability is relative to causal contribution, then the Dresden bombers ought not to be accountable at all. Once the Complicity Principle has been invoked to satisfy the threshold condition of accountability, it cannot simply be disregarded in judgements of the form or degree of accountability (Kutz, 2000, pp.147-148).

In light of this, he says there is no single framework for assessing accountability. He says he will proceed “interpretively, by eliciting intuitions and judgements that I take to reflect what variously positioned respondents really would think in specific situations” (Kutz, 2000, p.148).

He then contradicts himself in light of this, by endorsing criteria that he thinks underlie our judgements about different levels of participant accountability. The criteria Kutz suggests we use to differentiate participants’ blameworthiness are that of “functional significance” and “perceived salience of contribution” where our “assessment of functional significance underwrites criteria of subjective assessment” in the sense that greater functional significance means a more stringent subjective assessment (2000, p.160). The excusing power of an individual’s ignorance, for example, is diminished as the role’s functional significance increases. Indeed, Kutz says that an individual’s “complicity along the dimension of consequences will vary functionally, according to the scope of his contribution. The stronger the links between him and the collective act, the less it matters that he remained ignorant of its nature” (Kutz, 2000, p.157).

These criteria are far from satisfying. It is difficult to see how this criterion of functional significance refers to anything other than the expected causal significance of an individual’s role – something Kutz explicitly *denies* should ground an individual’s accountability. What was the functional significance of a bomber’s contribution in *Dresden Firestorm*? If it was overdetermined, then attackers do not, and should not expect to, make any causal contribution. So, if functional significance matters for liability, then the bombers are not liable. Perhaps functional significance only kicks in to determine the extent of one’s liability, once participatory intentions have established that one is liable. But

this is an unexplained discrepancy: why should functional significance determine the extent of liability whilst not determining whether or not one is liable? And again, what if their role involves no causal contribution, as seems to be the case with the bombers? Thus his account of differentiated liability seems to be internally inconsistent.

As we have seen, Kutz believes that his Complicity Principle is needed in order for us to hold anyone morally accountable for the consequences of overdetermined harm. In support of this, he argues that all intentional participants are inclusive authors of the harmful outcome, in virtue of the teleological overlap in the content of their participatory intentions. The implication is that we can blame each of them for harmful outcome he or she did not cause. I have argued that Kutz does not give us sufficient reasons to endorse this notion of inclusive authorship, which is itself internally incoherent.

5.3 Bazargan's Complicity Principle

In this section, I will outline Saba Bazargan's account of complicitous liability. His account *may* appear to resolve the problems with Kutz's account. He identifies a set of cases where the Complicity Principle might be needed for an intuitively compelling explanation of liability. This does not rely on any controversial claims about causation, or a lack thereof in alleged overdetermination cases. He also says we need to look at a participant's *expected* rather than *actual* causal contributions when determining the degree of his or her inclusive authorship and therefore complicitous liability. Kutz cannot make this move since, for him, participants in an overdetermined harm cannot expect to make, and do not make, any causal contributions to the harm.

Bazargan appeals to our intuitions about the liability of an intentional participant in a collective action, who does not causally contribute to threats of impermissible harm, that are caused by her co-participants' actions. He does not deny that some of the participants cause, and are morally responsible for, threats of or actual instances of impermissible harm. It is the intentional participants who had roles that required them to contribute to impermissible harm, but *did not actually cause impermissible harm* that his account is supposed to implicate. In particular, he wants his argument to show that all unjust

combatants “can be morally liable to be killed in virtue of participating as a combatant in an unjust war, even if that participation ultimately results neither in posing threats nor contributing substantially to the war” (2013, p.179). More specifically, to show that a combatant can be killed ‘opportunistically’ – in order to avert or prevent a threat she is not morally responsible for (Bazargan, 2013, p.182).²⁴ In these cases the killing of the individual presented an opportunity to prevent a harm she did not cause.

Bazargan’s Complicity Principle says:

Complicity Principle: I am liable for the wrongs committed by other members of a cooperative project in which I intentionally participate, even if my participation fails to contribute causally to those wrongs (Bazargan, 2013, p.184).

His argument for it appeals to the following example, *Bank Robbery*, which is worth describing at length:

Bank Robbery: Suppose a criminal mastermind puts together a plan for robbing a bank. She hires five individuals, each of whom agrees to participate in the robbery. The recruits are made aware that part of the plan is to kill witnesses in the bank. The mastermind does not physically participate in the robbery – instead, she provides the plan, the layout of the bank, the equipment, etc. One of the recruits, J, is stationed on a second floor balcony above the bank, as a look-out. Her role is the least important. The mastermind would have commenced with the plan even without a look-out. Suppose that J is not a very effective look-out – in fact, she falls asleep on the job. Fortunately for the robbers, J’s incompetence has no negative effect on the robbery, though her participation does not causally contribute to the robbery or murders either. The plan succeeds, and two witnesses are killed (Bazargan, 2013, p.182).

Bazargan claims that it is intuitively correct that J is liable to lethal harm necessary for the prevention of the murders. He says intuitions alone are not decisive, so he will outline a “synoptic” account of complicitous liability to provide further grounds for thinking that ineffective combatants are liable to preventative harm (Bazargan, 2013, p.184). His account appeals to the idea that when an individual takes on a role requiring her to contribute to a collective action, because “she willingly took on this function, we can ascribe to her inclusive authorship of the function’s end” (Bazargan, 2013, p.188).

²⁴ See Warren Quinn (1989) for the distinction between opportunistic and eliminative agency.

Using the example of combatants rescuing a prisoner of war (POW), Bazargan says that to each soldier “we can attribute partial authorship of the cooperative act in which rescuing the POW consists” (2013, p.185). Because of their authorship of this broader project, “soldiers laying down suppressive fire are inclusive authors of the cooperative act consisting in physically carrying the POW to safety; and the soldiers physically carrying the POW are inclusive authors of the cooperative act consisting in laying down suppressive fire” (Bazargan, 2013, p.186). So both Kutz and Bazargan endorse the idea that the teleological connections between members’ participatory intentions, underlie attributions of inclusive authorship to each member, for one another’s contributory actions:

each soldier’s decision and subsequent attempt to act according to her role – which has the cooperative act of saving the POW as its object – relates her teleologically to that cooperative act. This is just to say that she has made it her function to help bring about this act; this functional relation, which survives a failure to contribute effectively, grounds the attribution of inclusive authorship (Bazargan, 2013, p.186).

His explanation of inclusive authorship also appeals to the idea that members can make claims about other intentional participants’ contributory actions, which non-members cannot. He says that combatants are all inclusive authors of the cooperative acts that constituted the rescue of the POW because “any soldier can appropriately say, without equivocation: “we laid down suppressive fire and carried the POW to safety”” (Bazargan, 2013, p.186). Yet Bazargan’s account does differ from Kutz’s in at least two important ways. First, Kutz conceives of his account as doing all of the work whenever we need to determine the accountability of individuals for wrongful harms resulting from a collective action. Bazargan conceives of his as having a more specific role. He says his account will yield intuitive conclusions by “grounding the liability of unjust combatants not only in their individual contributions to an unjust war but also in their complicit participation in that war” (Bazargan, 2013, p.179). Individuals can be liable on the basis of their moral responsibility for, or inclusive authorship of, impermissible harm.

Second, he provides a principled way to differentiate degrees of individuals’ inclusive authorship:

One factor determining how much complicitous liability a participant bears is the degree of inclusive authorship that can be properly attributed to the participant. And one factor determining the degree of inclusive authorship a participant bears is the *type* of role that the participant has in the cooperative project [...] some roles have the function of contributing far more than others. All things being equal, the greater the degree to which one is supposed to contribute to a cooperative act, the more prominent one's role in that collective act. The more prominent one's role in the cooperative act, the greater the degree of inclusive authorship she bears (Bazargan, 2013, p.188).

The prominence of a role is determined by the causal contribution an individual occupying the role is expected to make. It is important to note that it is *expected* rather than *actual* causal contributions that determine degrees of inclusive authorship. He says “ineffective soldiers in the squad rescuing the POW will bear greater inclusive authorship for the rescue of the POW than will, for example, sailors aboard a minesweeping vessel – even if their respective contributions to the rescue of the POW are on a par” (Bazargan, 2013, p.188). This is because the soldiers' roles were designed to contribute more than the sailors' roles. The degree of an individual's complicitous liability can also, for Bazargan, be diminished by excuses such as ignorance and duress (2013, p.188 and p.193). The primary difference between Bazargan's account and my account is that my account relies solely on a notion of authorship that appeals to causal facts, whereas his appeals to a non-causal notion of ‘inclusive’ authorship. This difference mirrors the difference described above between the moral responsibility account and Kutz's account.

5.4 Bazargan's Intuitions

Having outlined Bazargan's account, I will now assess it. At the heart of his argument for his Complicity Principle is his example of ‘J’ the look-out. The example is supposed to pump an intuition about the liability of non-contributing intentional participants. Bazargan expects us to share his intuition that J is liable to harm necessary for the prevention of harms caused by other participants' contributory actions. There are, however, more plausible explanations for the intuition that J is liable. Let me explain.

Recall that, in 2.4, I argued that we should reject a purely culpability-based account of liability because it will have counter-intuitive implications. This is because it eschews the requirement of a causal connection between a liability-

grounding culpable action and impermissible harm. Bazargan also rejects culpability-based liability, claiming it has “strange” implications (Bazargan, 2013, p.174). However, it seems that the intuition that J is liable and would not be wronged by being killed, might be better explained by the fact that J exhibits a culpable will, rather than the fact of her intentional participation. It is just that by intentionally participating J exhibits a culpable will. To test this hypothesis, we might try to remove culpability from the equation altogether:

Bob 1: Bob is a shopkeeper. Dora is a leftist activist, who is targeted by a malicious head of the secret services in a crackdown on far left opposition. This is unbeknown to the general population of the state, which is generally perceived to be a solidly liberal democratic state that respects human rights. It has, however, been subject to much recent terrorist activity by religious extremists. Malicious government agents convince Bob that Dora is a terrorist. Bob has no reason to doubt the government’s agents’ evidence and agrees to play a role in their plan to arrest her. He is asked to press a button under his counter if he sees her passing. The button will alert the agents to her location. He is informed that should Dora try to escape, the agents will shoot to kill. He is informed that if he warns her then he will be sent to prison for life. He is given the option of not participating at all. Bob chooses to intentionally participate because, after all, he wants to protect innocents from a terrorist attack. The agents fit a button under his counter. Bob, however, fails to see Dora passing and does not press his button. Another shopkeeper pushes a button and alerts the agents who move in on Dora.

Dora is not liable to the harm threatened by the government agents – be it imprisonment or death. Bob has blamelessly participated in their attempts to capture or harm her – he was subjectively justified in believing she was a terrorist and he had a duty to help capture her. Would it be permissible for Dora to use Bob as a human shield in order to escape? It seems not. This suggests to me that that non-culpable intentional participation does not render an individual liable to preventative harm. When discussing combatants who are innocently mistaken about their side’s unjust aims, Bazargan claims these combatants are liable to opportunistic killing. This is because they are “in a position to know that participating in any war is morally risky activity” (Bazargan, 2013, p.190). Bazargan might see Bob in the same light, in which case, he would deem Bob to still be liable despite being non-culpable.

To further stave off the suspicion that culpability drives our intuitions, Bazargan would need to be committed to a particular conclusion in a slightly different case. Consider a variation on *Bank Robbery* (outlined in the previous

section). Suppose some different bandits, with whom J had no association, are threatening people's lives. J could be shot in order to save the people's lives. For example, suppose there was a robbery occurring across the street and those robbers were also shooting innocent people. I suspect many who think J is liable to be killed in Bazargan's example will agree that J is liable here too. This suggests that the *culpable will* J demonstrated by intentionally participating explains the intuition – rather than that her *intentional participation* makes her complicitously liable for others' contributory actions. Bazargan must deny this is the case and maintain that J is *liable only for her co-participants' actions*.

Some might deny that J is liable for the robbery across the street, I would agree. In response to this, an even stronger explanation of J's liability would, I believe, appeal to the fact that J is morally responsible for a *culpable omission*. The omission was a but-for condition of her co-participants' harmful actions, but not the harms occurring across the street. Specifically, J knows of the plan to rob the bank and kill innocent persons. J has a duty to prevent this happening. J could have called the police or given false information to the robbers in an attempt to cause them to flee. Plausibly, by being culpably derelict in our duty to prevent harm we become liable for the harm we were supposed to prevent (I will not pursue this at length here, but I do think a strong case can be made. I consider omission-based liability again in Chapter 7). I think that many people will believe that this is the reason why J is liable to harm needed to prevent harms caused by her co-participants actions.

To pump this intuition further, consider *Bob 2*, where everything is the same as in *Bob 1*, except that Bob knows Dora is a leftist rights activist despised by the secret services. By intentionally participating in the plan, Bob exhibits a culpable will and can be blamed for *intending* to contribute. He cannot be required to bear costs for his omission, since the risk of being put in prison for life means he has no duty to intervene and warn her. To support his Complicity Principle, Bazargan must maintain that Bob's intentional participation renders him liable in *Bob 2*. I do not share this intuition.

If Bazargan maintains that Bob is liable in *Bob 2*, and it is his intentional participation that renders him liable, then this is consistent with his intuition about J. I do not share these intuitions. But, of course, intuitions are not

decisive. Thus, I will now concentrate on getting a clearer understanding of his account of inclusive authorship before drawing out its implications in other cases. Perhaps the account of inclusive authorship can give us reasons for accepting Bazargan's intuitions and some of its more dubious implications.

5.5 Problems Defining Inclusive Authorship

Bazargan's account contains crucial ambiguities and indeterminacies. It is difficult to pin down the necessary and sufficient conditions of inclusive authorship. When we try to do so we see that it rides on a series of intuitions, some are more plausible than others. However, any attempt to build principles upon these intuitions is problematic. In this section I will quickly outline one difficulty for Bazargan: it is unclear, *who*, exactly, is an author of *what*, and *when*.

Imagine that, once upon the balcony J no longer wished to intentionally participate in the robbery. She tried to use her mobile phone to alert the police but drops it on to the pavement below. Then she faints. J's participatory intention ceased and she ceased attempting to contribute to the robbery. It is not clear whether Bazargan would want to say that J is an inclusive author of the other robbers' actions. I suspect Bazargan would require a con-current participatory intention. So let's suppose that he would not hold the remorseful J liable because she is no longer an inclusive author of the robbers' actions.

Now imagine that everything is the same as in *Bank Robbery*, except for the fact that J escapes unscathed and knows that the gang will use the stolen money to fund other unjust activities that will involve the deaths of innocent persons. J did not causally contribute to any robberies. J is forced out of the gang because she is inept. She wishes them the upmost success in the future but, crucially, is *no longer a member* – the gang has clear membership rules. Can J be regarded as either liable for, or an inclusive author of, the future impermissible harms? It is not clear what Bazargan would say about this case. It is also not clear what he would say about a case where J continues to be a member of the gang but is not expected to make any causal contribution to the collective end. Call this being a 'mere member'. Thus, his account of authorship is fuzzy at the margins.

Bazargan does say:

each soldier's decision and subsequent attempt to act according to her role [...] relates her teleologically to that cooperative act. This is just to say that she has made it her function to help bring about this act; this functional relation, which survives a failure to contribute effectively, grounds the attribution of inclusive authorship (Bazargan, 2013, p.186).

This suggests that to be an inclusive author of others' actions an individual must have made an *attempt* – effective or not – to contribute to the collective end. But it is still not clear whether an individual is an inclusive author of only of things that (i) happened during the time when she is attempting to enact a role that requires her to contribute, or (ii) whether being a mere-member who once attempted to contribute is sufficient for ongoing inclusive authorship.

Individuals who intend only ever to be mere-members and never intend or attempt to contribute might be ruled out. After all, Bazargan says that the degree of an individual's inclusive authorship and complicitous liability is determined by the degree of his or her expected causal contribution to the collective action (Bazargan, 2013, p.182). But then *why* could a mere-member not also claim “we did it”? What precludes her from being an inclusive author? It is unclear how Bazargan would respond to these concerns. I highlight them to demonstrate the crucial lack of detail in the account and the difficulties this causes when assessing it more generally. We need to be provided with a more determinate account of inclusive authorship that can answer these questions.

In the remainder of this chapter I will argue (i) that the account of inclusive authorship offers little in support of the Complicity Principle in cases where it yields dubious conclusions, and (ii) that it offers us little of value that the moral responsibility-based account of liability does not offer us. This gives us reason to doubt the viability of the Complicity Account.

5.6 Moral Responsibility for a Threat of Impermissible Harm

The Complicity Principle is intended, by Bazargan, to provide a principled way of differentiating between the liabilities of combatants and non-combatants on the unjust side of a war. Many of the combatants will bear the same degree of moral responsibility as non-combatants on the unjust side in the war. He claims, however, that the combatants have a higher degree of complicitous liability than the non-combatants. This is why unjust combatants are generally liable to lethal harm but unjust non-combatants are not. Using the distinction

between combatants and non-combatants, in this section I will argue (i) that his account yields some counterintuitive implications that the moral responsibility-based account of liability does not. I will also argue (ii) that it does not offer much of value that the moral responsibility-account cannot.

Bazargan claims that *effective* unjust combatants, including those who participate under conditions of duress, are liable because of their minimal moral responsibility for the threats they pose (2013, p.193). What about *ineffective* combatants? Bazargan describes combatants who do not “contribute substantially” to the war’s aims as “ineffective”. Effectiveness, he says, is a “dispositional property”, and a “combatant need not be occurrently contributing at t in order for the combatant to be an effective combatant at t . For example, a sleeping combatant can be an effective combatant. (Combatants who are *hors de combat* – such as soldiers incapacitated by injury – are technically non-combatants and are thus not ineffective combatants)” (Bazargan, 2013, p.180). A combatant who is only temporarily incapable of threatening the enemy – e.g. the sleeping combatants – is still a combatant. At some point during the conflict they will resume threatening their enemies. Accordingly, the reason J (the sleeping look-out from *Bank Robbery*) is classified as ineffective, while the sleeping combatant is not, is that J will be ineffective for the duration of the robbery. By contrast, the combatant will be effective later in the war. Bazargan wants his account to implicate ineffective combatants as liable. I will argue, however, that this means it will unavoidably implicate combatants rendered *hors de combat*. This is clearly implausible.

Several steps show how Bazargan cannot avoid this conclusion. First, consider Lazar’s point that that “through fear, disgust, principle, or ineptitude, many combatants are wholly ineffective in war, and make little or no contribution either to specific micro-threats, or to the macro-threat posed by their side (some are a positive hindrance)” (Lazar, 2010, p.190). Second, we should consider whether, and why, these ineffective combatants might still be liable. McMahan suggests that the fact

[t]hat their circumstances do not prompt them to kill is a matter of luck in avoiding a situation in which they must kill or be killed. Because they are able and conditionally committed to kill, and because the conditions that would prompt them to kill have a significant probability of arising, they

significantly increase the objective risk that people who are not liable to be killed will be killed by them. They are therefore responsible for making it unavoidable that, unless they are killed, others will remain at significant risk of being wrongfully killed. That is the basis of their liability, even if it later turns out, in a way that no one could have predicted with confidence, that they have gone through the war without harming anyone (2011, pp.548-549).

Additionally, an unjust combatant who does not pose or contribute to an immediate threat might be deployed in a way that influences the strategic, defensive, or evasive moves made by the just side. He might, for example, limit their ability to defend themselves by fleeing the impermissible threats. Furthermore, McMahan emphasises that most “soldiers in support roles are trained to fill combat roles, and will do so if necessary. In both their support role and their potential combat role, they substantially increase the objective risk that innocent people will be killed” (McMahan, 2011, p.549).

Perhaps, then, combatants who caused no harm were still liable during the conflict on the basis of their moral responsibility for the risk or threat they subjected non-liable persons to. In support of this second step – that ineffective combatants are liable – consider the following example:

Madman: There is a small island inhabited by 50 persons. A madman intends to row to the island and shoot and kill one of its inhabitants at random. The inhabitants cannot escape, and it is certain that he will eventually kill one of them. He will then leave the island and never return.

When rowing toward the island the madman threatens each and every one of the islanders. He was liable from the moment he began enacting his plan because he posed a threat to the islanders. His liability does not depend on him posing a determinate, proximate threat to any particular individual. He was liable to being killed even before any of the inhabitants were in shooting range.

Analogously, a combatant yet to join the front line poses a threat to a great number of people – all the people on the just side that there is a risk of them harming. Combatants who are about to be, or are being, deployed, are liable to being killed when it is foreseeable that they will pose a risk of significant impermissible harm in the near future. The liability of a combatant who does not currently pose a proximate threat to a non-liable person can be explained by their moral responsibility for threatening to contribute to a proximate threat in the future. So as a third step, notice the moral responsibility-based account

of liability can help itself to this explanation of the liability of temporarily ineffective combatants. A temporarily ineffective combatant committed to fulfilling her role's requirements is one who is morally responsible for imposing a risk of impermissible harm on non-liaible persons.

Fourth, we should wonder what the Complicity Principle can offer us in these cases that the moral responsibility-based account cannot. One potential difference is that it implicates individuals who *were* morally responsible for an impermissible threat, but are now neither morally responsible for an existing impermissible harm nor impermissible threat. This might strike some as an intuitively plausible idea – until we arrive at the fifth step in this argument.

Fifth, notice that the Complicity Principle's account of ineffective combatants' liability also renders *hors de combat* liable. The moral responsibility-based account of liability does not have this uncomfortable implication. In international law the status of *hors de combat* is ascribed to individuals who are not engaged in hostilities, including civilians, prisoners of war, the sick and wounded, and those who are shipwrecked. Some of these individuals might be implicated as liable on Bazargan's account. Imagine the following example:

Shipwreck: A warship containing unjust combatants has become stricken on the edge of an island well within the just side's waters. The just side have since secured the waters around the island. There is no foreseeable chance of them being rescued by the unjust side. Their presence does not hinder the just side's cause in any way since there is no need to stray near to the island. The combatants will not threaten impermissible harm for the remainder of the conflict. The unjust combatants, however, intend to cause harm to just combatants if an opportunity to do so arises.

The moral responsibility-based account of liability would tell us that the combatants were liable to attack prior to becoming stranded because each contributed to a threat of impermissible harm. However, upon becoming stranded that threat ceased. The situation of the combatants, however, is analogous to that of J in *Bank Robbery*. The combatants are not morally responsible for any of the threats currently posed by other unjust combatants, but all enacted roles designed to contribute to the unjust collective ends. Each

also *retains* a participatory intention and will contribute if circumstances allow it. This means that, on Bazargan's account, they are liable to opportunistic harm.²⁵

To see how this could happen, suppose the just side could deflect rocket attacks by the unjust side onto the island, rather than onto open land. Suppose that doing so would change the minds of the unjust combatants that continue to pose a threat. Bazargan would have to allow this. In fact, Bazargan's account could allow for the just combatants to execute some unjust combatants using horrific means if it would change the minds of other unjust combatants (and the proportionality and necessity conditions are met). I cannot see a reason why the same could not be done, according to Bazargan's account, to prisoners of war or to unarmed combatants. By contrast, this is a permission to kill in order to pursue just ends that the moral responsibility-based account cannot establish – I think, rightly.

In this section I have shown that my moral responsibility-based account of liability delivers the same plausible results that Bazargan's delivers: temporarily ineffective combatants are liable. But my account also gives us plausible results that Bazargan's account cannot do: permanently ineffective combatants are not liable. In the next section I will consider another problematic implication of Bazargan's Complicity Principle.

5.7 Participation in a Morally Heterogeneous Collective Action

There is another way in which Bazargan's account implicates individuals who I think many will believe to be non-liable. The problem is that *all* individuals who intentionally participate in a collective action that risks impermissible harm are liable to being opportunistically harmed in order to prevent that impermissible harm. This liability extends to individuals who intentionally participated in a collective action but only intended to contribute to the just

²⁵ Recall that Bazargan does not explicitly state that intentional participants must retain their participatory intention in order to be complicitious liable intentional participants. I have assumed that this is the case. Even if it is not, this objection will still stand since they did have a participatory intention at the time of enacting their role.

ends that were pursued alongside some unjust ends. Bazargan considers this issue in the context of war:

If combatants are complicitously liable for the unjust aims pursued by their effective cohorts, then it seems the presence of any unjust aim is enough to make all the combatants on that side complicitously liable to be opportunistically killed (Bazargan, 2013, p.191).

Imagine that a state pursues both just and unjust ends in a war. This is what Bazargan calls a “morally heterogeneous war” (2013, p.191). Imagine that an individual intentionally participates on the condition that he contributes only to the just ends. He will still intentionally participate in the same collective action as those who participate with the intention of contributing to the unjust ends. Bazargan holds him liable. This is clearly very problematic.

To see this, consider the following case. There is a combatant on the unjust side who participates with the *sole aim* of protecting non-liable persons. Knowing that her state’s unjust incursion into a neighbouring state’s territory will put particular minority groups at risk, she and others put themselves forward on the condition that their role in the invasion will be to afford protection to persons who would otherwise be left at great risk. They are assigned to a peace-keeping unit that is certain to fulfil this, and only this, justice-furthering role.

Alternatively, suppose that there is a state that is fighting a war with a generally just cause, but with a subsidiary unjust aim. It is intervening to protect the non-liable citizens of a socialist state from the invading forces of a fascist state. But in doing so, the liberal state intends to kill a number of influential socialist leaders who will non-violently resist the formation of free markets in the aftermath of the war. Do all combatants on the just side become liable to being opportunistically killed in order to prevent this impermissible harm being inflicted just because they intentionally participate in the same collective action? They may have no expected or actual causal role in the killing of the leaders.

It is counterintuitive to claim that combatants who intentionally participate in a morally heterogeneous war will become liable in the way that Bazargan’s account suggests. James Pattison gives the label ‘tangential soldier’ to a combatant who makes significant contributions to a war, without effectively

contributing to their institutions main just or unjust aims. Such a soldier might be obstructive or subversive of those aims (Pattison, 2013, p.44). It is conceivable that participants can have roles that are designed to – and in fact do – contribute to the pursuit of only just ends. Such as the peacekeepers in my earlier example. These combatants are liable for impermissible harms on Bazargan’s account since they intentionally participate in a collective action that foreseeably caused impermissible harms. Even if intentional participation could ground liability, this seems very counterintuitive.²⁶

Bazargan’s appeals to proportionality criteria in order to explain the impermissibility of killing combatants with solely just aims: “[i]f these just aims are significantly more numerous or morally important than the unjust aims, then killing the combatant can be impermissible, despite that she is liable to be killed” (Bazargan, 2013, p.191). But this is inadequate. If it were true that killing one of them would not at all hinder the pursuit of the just ends – and we can easily imagine a situation where this would be the case – then he or she would still be liable to being killed opportunistically to prevent impermissible harm caused by her fellow combatants. My intuitions suggest that we should look for an account of liability that does more to discriminate between individuals who pursue just and unjust ends. On the moral responsibility-based account of liability, only those who are culpably morally responsible for impermissible harm (or threats thereof) are liable to preventative harms.

So Bazargan’s account is over-inclusive in two ways. First, it implicates as liable individuals who are not culpably morally responsible for causing harm. So I reject it. Second, even if we allowed that intentional participation could be the basis of liability (which I deny), it seems very counterintuitive to suppose that all individuals who intentionally participate in a morally heterogeneous collective action, including those who intend to cause just harm, and do actually cause only just harm, should become liable for the contributory actions of intentional participants who culpably cause unjust harm. His account would be more intuitive if there was a principled way for it to avoid these implications.

²⁶ Of course, I believe that only those who are morally responsible for causing an impermissible harm or impermissible threat are liable.

In the next section, I will consider whether Bazargan's notion of prominence might help his account avoid some of the counterintuitive implications. Any attempt to finesse this idea, however, raises more questions for the account than it delivers answers. What this shows, I will argue, is that the plausibility of a Complicity Account relies on our intuitions about certain cases, but any attempt to refine it in order to make it more determinate, or to avoid the counterintuitive implications, will prove increasingly problematic.

5.8 Prominence

According to Bazargan, the degree of an individual's complicitous liability for an impermissible harm depends on the degree of her inclusive authorship. This, in part, depends on the prominence of her role in the collective action that caused the impermissible harm. If the prominence of a role vis-à-vis a threat depends on an individual's expected causal contribution, this might seem to help Bazargan's account avoid some of its more worrying implications. For example, the combatants in morally heterogeneous wars with roles requiring them to cause only justified harm could claim that their roles were not prominent vis-à-vis the unjust aims. It could also help to avoid counterintuitive implications in *Shipwreck* – at some point after becoming stranded, the combatants no longer had any 'prominence' in any of the impermissible threats to non-liable persons, and would therefore not be complicitously liable.

His understanding of 'prominence' however, seems to elide a distinction between 'threat-specific' prominence and prominence in the collective action as a whole. He says:

All things being equal, the greater the degree to which one is supposed to contribute to a cooperative act, the more prominent one's role in that collective act. The more prominent one's role in the cooperative act, the greater the degree of inclusive authorship she bears (Bazargan, 2013, p.188).

The above quote does not make clear whether the degree of an individual's inclusive authorship for a specific impermissible threat is determined by the prominence of her role in the creation of (i) that particular threat, or (ii) in the collective action more generally. In different places, Bazargan suggests each interpretation.

First, when discussing his example of combatants rescuing a prisoner of war, he says “ineffective soldiers in the squad rescuing the POW will bear greater inclusive authorship for the rescue of the POW than will, for example, sailors aboard a minesweeping vessel [...] since they have roles that feature more prominently vis-à-vis the end of the rescuing the POW” (Bazargan, 2013, p.188). This suggests that prominence is to be interpreted in what I call a ‘threat specific’ or ‘narrow’ sense. The relevant threat here is not ‘waging war’, but something more fine-grained and small-scale than this.

Second, though, he also says the “inclusive authorship and thus the complicitous liability that each combatant potentially bears is substantial – enough to ground a permission to kill the combatant if necessary to prevent her cohorts from imposing unjust threats – since it is her function to contribute substantially to the war’s aims” (Bazargan, 2013, p.191). This is a ‘broad’ interpretation of the prominence condition. The relevant threat here is ‘the war’s aims’.

Both interpretations are problematic. It is unclear how we are supposed to apply the criteria of prominence, which relies on the idea of an expected causal contribution. There is no causal connection between a complicitously liable individual’s attempt to enact her role, and a specific threat that needs to be averted. This is a problem for the narrow interpretation of prominence. I am not sure what principles, if any, could be elucidated in order to tell us when one individual’s role means she is expected to contribute to a specific actual threat to a greater degree than someone enacting a different role in the same collective action.

As for the wide interpretation, imagine the following example. Unjust combatant A has caused an immediate threat to the life of non-labile just combatant X. It is also true of both unjust combatants B and C that each would kill X given the opportunity to do so. Neither causes the threat of impermissible harm. B is in the same platoon as A. C is in a different platoon to A and B. Both, however, would kill X if in A’s position. It seems that if both are liable, then intuitively, they are equally liable. The equal liability of B and C coheres, I believe, with the broad interpretation of prominence that I suspect Bazargan endorses. Perhaps, then, Bazargan endorses the broad

interpretation. But it still isn't clear why we should accept this, and what exactly it means to bear a higher degree of inclusive authorship, without just stipulating that (a) they enacted roles that could require them to cause greater harm, therefore (b) they are liable to greater harm themselves. The notion of inclusive authorship does not provide the notion of prominence with explanatory support (and vice versa). Again, this seems like pure intuition.

It would make sense to affirm expected causal contribution as an important variable in determining degrees of liability when liability is grounded in culpable moral responsibility for a threat of impermissible harm. It would be an important consideration when determining the degree of an individual's culpability. And, of course, this is exactly what the moral responsibility-based account of liability claims. Its internal causation requirement means it gives us determinate and intuitive answers. An individual can only be liable for harms she is culpably morally responsible for *causing*. This would yield the correct conclusions, I believe, in *Shipwrecked* and *Bank Robbery*. Bazargan's account, however, implicates as liable individuals who have not caused and do not threaten impermissible harm themselves. These are the wrong results. The Complicity Principle and accompanying notion of inclusive authorship do not provide sufficient reasons to doubt our intuitions that speak in favour of the moral responsibility-based account and against the Complicity Principle

5.9 Conclusion

In this chapter, I have argued that the plausibility of the Complicity Account hinges on the notion of inclusive authorship. I argued that it is difficult to determine what exactly it means to be an inclusive author of a harm, other than the idea that as an intentional participant in a collective action, whereby your participatory intention overlaps with those whose contributory actions cause harm, means you can claim "We did it" and therefore be held liable for it. The notion of inclusive authorship, as it has been presented, does not tell us *why* the intentional participant can make that claim about others' actions, and *why this renders them liable*. The entire argument seems to rest on intuition.

I have argued that both Kutz and Bazargan fail to provide us with an adequate account of inclusive authorship, and this is needed to provide their Complicity

Principles with explanatory support, other than that which is conferred by intuitions in relevant cases. I have argued that the Complicity Principle rests on unstable intuitions, and adherence to it has counterintuitive implications in certain cases. The individualist moral responsibility-based account of liability, however, does not yield these counterintuitive implications. So there is little of value that the Complicity Account can offer which it does not offer. The notion of inclusive authorship does not give us reason to reconsider our intuitions.

The discussion of prominence further demonstrated the internal problems of the Complicity Account. It is unclear exactly how it should work in particular cases or why we should accept it as being the correct determiner of an individual's complicitous liability. We should be able to look to the notion of inclusive authorship for support, but it does not offer any. The entire account seems to rest on intuitions in particular cases, but does not do enough to support the counterintuitive implications it also yields.

A Complicity Account does not, therefore, present us with a feasible account of liability. As such, it should not be used to explain citizens' duties to bear the costs of their state's unjust actions. So it could not provide Pasternak's Intentional Membership argument with an explanation of the source of the intentionally participating citizens' reparative duties. This means that both the Membership Account and the Complicity Account cannot provide Pasternak's account with an explanation of why a liable state's citizens, who do not reject their citizenship status, have a duty to bear a share of their state's burdens.

In Chapter 6 I will consider a different attempt to justify a state, *qua* corporate agent, imposing shares of its liability-burdens on its citizens.

6 Stilz's Democratic Authorisation Principle

In Chapter 4, I distinguished between two types of participation-based reparative duties. The Complicity Account invokes liability-duties whereas the Membership Account tells us when a collective, *qua* corporate agent, can permissibly burden individuals in order to discharge its own liability-burden. In Chapter 4 I rejected Pasternak's quasi-voluntarist Membership Account. In this chapter I consider and reject a non-voluntarist Membership Account. In this chapter, I consider and reject Anna Stilz's Democratic Authorisation Principle (DAP), developed in her article 'Collective Responsibility and the State' (2011). Her DAP, tells us when a state, *qua* corporate agent, can permissibly burden its citizens as a means to discharging its own liability-duties. Unlike Pasternak's account, it does not rely on the idea that an individual's citizenship status is under the citizen's control. Instead it relies on ideas found in non-voluntarist accounts of state legitimacy. It holds that if a state is legitimate, then its citizens should pay for the costs of its unjust actions.

In Section 6.1, I will outline Stilz's argument and indicate where it is incomplete and indeterminate, and leaves us uncertain about *why* and *when* a citizen can be permissibly burdened with a share of her state's liability-burden. Over the course of the chapter, I will explain how Stilz could make her account more complete and determinate, and assess whether this modified version of her account can achieve the things she wants her account to achieve. She wants her account to justify the citizens of the UK and USA being made to bear the costs of the 2003 invasion. I argue that neither Stilz's account nor my modified account provides this justification.

More specifically, Stilz's account is premised upon a Kantian conception of state legitimacy. I will argue in Section 6.2 that it must therefore also be premised upon the Kantian idea of a Natural Duty of Justice. It is important to appreciate, however, that the Natural Duty of Justice does not tell us whether a state's laws are just or unjust. Thus, in Section 6.3, I will argue that Stilz's account does not do enough to show why a liable state would be justified in shifting its burdens to its citizens (in the form of increased taxation). Thus, in Section 6.4, I will consider what implications a reliance on the Natural Duty of

Justice has in terms of developing a stronger authorisation account. I sketch a modified authorisation account which still relies on many of Stilz's premises. This modified account imports an account of justice, in order to establish when a law requiring citizens to bear the costs of an unjust state action is a requirement of justice. However, in Section 6.5 I will argue that this account relies on a controversial premise, and it relies on demanding criteria of justice and that few, if any, states actually satisfy. I conclude that as yet there has not been an adequate explanation of the permissibility of a liable state, conceived of as a corporate agent, distributing shares of its liability-burdens to its citizens.

6.1 Stilz's Legitimate Authority Account

In this section, I will outline Stilz's argument for her Democratic Authorisation Principle (DAP). Some states, Stilz claims, can be regarded as moral persons that can be held responsible separately from their individual citizens (2011, p.191). The question the DAP is supposed to help answer is *when* "is the state as a corporate moral agent morally entitled to pass on responsibility to its members?" (Stilz, 2011, p.190). The DAP helps us answer this by showing when the citizens of a liable state each have a "task-responsibility" to help the state discharge its duties. A task-responsibility is a duty to bring about an outcome (Stilz, 2011, p.195). In what follows, I will use the term task-responsibility and duty interchangeably. The DAP should tell us when a citizen has a duty to bear the costs of repairing harms caused by an unjust state action.

If an individual is a member of a voluntary association, like a corporation, task-responsibilities are grounded in a 'membership bargain' (Stilz, 2011, p.194). This is where the individual agrees to bear burdens in return for benefits of membership. Stilz, however, regards membership of a state as sufficiently *involuntary* so as to rule this out as a plausible explanation of a citizen's duty to shoulder a share of her state's burdens.²⁷ Stilz's DAP does not appeal to facts

²⁷ Avia Pasternak criticises legitimate authority accounts like this for not taking account of individuals' attitudes regarding their membership of their state and not giving them enough control over the benefits and burdens they receive (2013). In an older article, (2011) she provides a legitimate authority account of her own. I am not sure whether or not she believes these accounts complement each other. I focused on

about an individual's consent to, agreement with, or identification with her state (2011, p.197). Instead, the argument for the DAP runs as follows: a citizen has a political obligation to an authorised state, a state is authorised "when a justification for the state's rule could be offered to the member that he has reason to accept", when a state is authorised a "member's will is implicated in his state", so "he has reason to "own up" to what an authorised state does" (Stilz, 2011, p.198).²⁸

It is not yet clear what it means for a citizen's will to be implicated in her state's actions. Stilz appeals to Hobbes's idea that an authorised state is one that exercises its citizens' rights, and as the owners of those rights, citizens should take responsibility for its actions (2011, p.199). This authorisation model, Stilz says, is compatible with different accounts of citizens' rights and duties. She affirms a Kantian account which holds that each citizen has an equal basic moral right to freedom (Stilz, 2011, p.199). It is still not entirely clear, however, what this means and, in particular, *why* the citizens would incur a duty to contribute to the repair of the harms caused by the authorised state.

Stilz's discussion of the notion of authorisation helps to clarify somewhat at least. Authorisation involves the transfer of a right from one agent to another. The state's unique role as the defender of citizens' rights explains how this transfer occurs:

if a state that credibly interprets my basic right exists, then I *necessarily* authorize it – whether I agree to join it or not – since I require its system of law to secure me against others' interference [...] when reflecting rationally, we understand that we better secure this right by allowing someone else to judge and enforce it. This is why the state is an authorised state; it is not simply forcibly imposed on us, but an institution we can understand and endorse in a moment of calm reflection (Stilz, 2011, p.200).

A state is unique in its capacity to uphold individuals' basic rights. Stilz claims our own attempts to interpret and enforce their rights will be self-defeating,

what I believe to be her stronger account in Chapter 4, and limit my attention to Stilz's legitimate authority view, as I regard it to be the strongest of such accounts.

²⁸ John M Parrish (2009) also endorses a legitimate authority account of citizens' duties to bear the costs of unjust state actions. There are many similarities between his account and Stilz's. I focus on Stilz's account as I believe it is stronger. Parrish's account is, however, vulnerable to many of the points I make against Stilz's.

since private “judgement and enforcement of rights paradoxically renders our enjoyment of them less secure, because individuals’ judgements about the extent of their rights conflict” (Stilz, 2011, p.200). We need to state to coordinate our interactions and ensure mutual non-interference (Stilz, 2011, p.200). Stilz says there are, however, limits to our obligation to the state:

There is some essential content [...] to what can count as a reasonable public interpretation of our basic right. As long as this minimal threshold is passed, we are bound to act in accordance with the authority’s judgement, since by accepting such a procedure we “do better” overall in securing our rights than by substituting our private judgement for the authority’s. This is true even when in this particular case the authority’s judgment about our rights is incorrect. The overall gains to the security of our rights from coordination, unity, and peace outweigh the possible better answers as to what our rights might require in this case (Stilz, 2011, p.200).

Consider here Stilz’s explanation of why citizens’ can incur duties to repair harms caused by their state’s unjust war. If an aggressive war is undertaken by their state, Stilz says we must ask “was this war undertaken in accordance with an authoritative judgement that citizens had moral reason to accept? If the authority’s judgement to undertake the war passes the minimal threshold for binding its citizens, then they should take responsibility for it” (2011, p.201). She says we can imagine a scenario where a state justifiably undertakes a pre-emptive war in defence of its citizens’ rights. For example, if an evil regime is bent on using weapons of mass destruction. This shows that a pre-emptive war qualifies as a “possible exercise” of the citizens’ rights (Stilz, 2011, p.201). She then says that if a state is authorised “when it makes a judgement that it faces such an evil regime and goes to war, its citizenry is liable for the war even if the authority’s judgement about their situation is gravely wrong” (Stilz, 2011, p.202). But why does it remain authorised when its judgement is gravely wrong?

The idea here is that an authority can still function as an authority – it can bind its subjects even when they disagree with the substance of its decisions – even though its subordinates do not take themselves to be under an obligation to obey when it makes a clear mistake, the kind of mistake that shows that what the authority is doing couldn’t possibly qualify as an interpretation of their rights. Defending this position, of course, entails holding that there is a significant difference between mistakes that show an authority is not interpreting justice at all and other kinds of possible mistakes that an authority might make (Stilz, 2011, p.201).

How do we determine what kind of mistake our state has made? Stilz says we need to work out when a state’s acts qualify as a reasonable interpretation of its

citizens' rights, asking what "features does the state have to have if its laws are to qualify as interpretations of our rights, rather than some other kind of judgement?" (2011, p.202). She says Kant provides us with a useful heuristic. Kant claims that the right to freedom gives me "the warrant to obey no other external laws than those to which I could have given my consent" (Stilz, 2011, p.202). She takes this to imply that a state upholds its citizens' basic rights if its "laws qualify as a possible general will, by passing a minimal threshold for taking each citizen's interests into account" (Stilz, 2011, p.202). She admits that "hypothetical consent is a vague standard" (Stilz, 2011, p.202). But she says a legitimate state's laws must pass this minimal threshold, and the only type of state that does this is a "state that guarantees citizens' personal inviolability, basic subsistence, freedom of belief and expression, and legislates a system of private rights that treats them equally and in which they have a democratic voice and vote" (Stilz, 2011, p. 204). These constitutional essentials and basic legal entitlements could be regarded as reasonable requirements of a citizen's basic rights. But Stilz does not seem to require that in order for a state to be authorised, that every law or policy be a reasonable interpretation of its citizens' rights, in the sense that it is the object of a possible general will among citizens.

Consider Stilz's primary example of the US and UK-led invasion of Iraq in 2003. She says it "was arguably an aggressive war, which is illegal under the UN charter" (Stilz, 2011, p.205). The DAP, however, provides a moral basis for "distributing political liability to citizen taxpayers of the US and the UK" because "these states credibly interpret their citizens' rights" (Stilz, 2011, p.206). She argues that even dissenters are liable for repairing the harms "because even these dissenters require the framework of law that the state provides, if their rights are to be publicly defined and enforced [...] state power is being exercised in a way that takes account of their fundamental constitutional interests" (Stilz, 2011, p.206). So Stilz believes that despite being an illegal war of aggression, the state's judgements were ones their citizens had moral reason to accept, and therefore those citizens can justifiably be made to pay for the costs of their state's actions.

This is still vague. There are three problems with Stilz's account. First, Stilz does not offer determinate criteria for identifying when a state is 'not

interpreting justice at all'. Providing such criteria will enable us to say when a state that otherwise satisfies Stilz's 'minimal threshold' conditions has acted in such a way that it cannot permissibly burden its citizens with the costs of repair. Second, it is still not clear *why* the fact a state is an authorised state means I can be burdened with a share of the costs of repairing harms caused by its actions.

Third, many citizens' rights are violated when their state fights an unjust war. Recall Stilz's claim that our basic right to equal freedom gives us a warrant to obey no laws other than those we could hypothetically consent to. Could citizens hypothetically consent to a law requiring them to contribute resources to the fighting of an unjust war? It seems unlikely. Let us begin by considering the meaning of consent. An act of consent involves the transferring to "another of a special right to act within areas where only the consenter is normally free to act" (Simmons, 1976, p.276). The rights of others impose limits on the permissible exercise of my rights, so I cannot consent to someone violating another's rights because I do not have this right. I could not consent, for example, to someone using my money to fund unjust harm, and therefore, I could not consent to the state doing so either. I might *agree* to this, but in adhering to this agreement I go beyond my rights and act unjustly myself.

Let us now consider hypothetical consent. This is used to justify interferences with an individual's freedom in the absence of her explicit consent. When a state restricts an individual's freedom through taxation, for example, this can be justified by showing that the citizen would have explicitly consented to it. Again, citizens' rights set limits on the possible objects of their hypothetical consent. Also, in the absence of a citizens' explicit consent, a state is not justified in assuming that a citizen would consent to laws that burden her for any purposes other than upholding her and her co-citizens basic rights. So if a state fights an unjust war, and increases taxation as a means to funding it, then this interference with her freedom is not a possible object of her hypothetical consent. Her basic right to equal freedom has been violated by her state. Yet Stilz's account implies that a citizen can also have a duty to bear the costs of her authorised state's unjust actions. Furthermore, the state's decision to compel its citizens to contribute to the repair of harms caused by the state's

unjust actions is not a possible object of a citizen's hypothetical consent either, because it is not necessary for upholding her or her co-citizens basic rights.

Stilz might reply as follows: the UK and US citizens have reparative duties *because it is better for them to have their mistaken state than no state at all*. Citizens will realise that they "do better" in securing their basic right in terms of unity, peace, and coordination, by obeying the state, rather than trying to interpret and uphold their basic rights on their own. The state is legitimate, even if it is not just. But this misses a key point: justice, and not legitimacy, should be the standard that triggers citizens' reparative duties. Legitimacy (political obligation) does not entail justice. The invasion of Iraq was not just. It was not something a citizen of the UK could have consented to, since it was not a possible exercise of her rights. But we might nonetheless think that because the UK generally does a reasonably good job at upholding its citizens' rights, its citizens have a duty to support and comply with it. If a citizen's disobedience would risk the gains a state brings in terms of unity, coordination, peace and stability, then we can argue that she has a duty to obey it. A free and equal citizen would accept that it is better to live in the UK rather than no state at all. That is, the UK is legitimate.

A state that does unjust things, of course, is not necessarily unworthy of obedience. I am not suggesting we reject the notion of legitimacy altogether. Rather, my point is that whether the state is justified in imposing reparative burdens on its citizens is determined by duties of justice rather than a political obligation. Unless the payment of the reparations is needed to uphold the legitimate state (because otherwise the state would collapse), there is no requirement for individuals to pay for their state's wrongdoing. In other words, the question of whether they should obey a state is a separate question to whether they should pay for its wrongdoing. The former is determined by its legitimacy: the latter is determined by justice. In the case of Iraq, if a UK citizen refused to pay reparations to Iraqi victims of the war, it seems unlikely that the UK would collapse. The DAP cannot explain why this would be unjust. The potential reply that a free and equal citizen would accept that it is better to live in the UK, rather than no state at all, fails to show that they have reparative duties.

The upshot is this. Even if we have reasons to obey the state because the alternative would be worse, this is different to having a duty (of justice) to shoulder a share of the costs created by the state's unjust actions. That is, legitimacy does not automatically imply reparative burdens for citizens. Rather, it seems more plausible to hold that its decision to burden the citizens in order to fight the war, and to repair the unjust harms caused during the war, is justified only if free and equal citizens could have possibly consented to it.

6.2 The Role of the Natural Duty of Justice

In this section I will argue that a Kantian Natural Duty of Justice (NDJ) is an essential part of Stiliz's account. This will demonstrate that Stiliz is, in fact, committed to a minimal standard of justice as a requirement for reparative duties, contrary to what she expressly claims (and in line with my own view). The NDJ helps to make clearer when a citizen has an enforceable duty to obey her state's laws, even when she thinks its laws are in some way deficient. So it can explain when a state can permissibly compel the citizen's obedience. That is, when it exercises legitimate authority. It says that when a state is reasonably just, a citizen has a duty to comply with its laws even if she believes that a different set of laws could do an even better job at upholding her and her co-citizens' basic rights. It is important to note, however, that the NDJ does not provide *any* laws with a justification. It does not tell us whether a law is just or unjust. The justification for the laws comes from the fact they *uphold the citizens' basic rights*. As we will see, the NDJ might also require our obedience to unjust laws. This is if non-compliance would lead to a breakdown in respect for the law in general, putting others' basic rights at even greater risk. By the end of this section, we should be clear what role the NDJ has in an authorisation account that can explain when citizens have reparative duties.

It will help to have a clearer understanding of the way the NDJ operates with regards to the requirements of justice. Jonathan Quong says the argument for the NDJ relies on the idea that a person can be said to have legitimate authority over another when "the alleged subject is likely better to fulfil the duties of justice he is under if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to

directly fulfil the duties he is under himself' (2011 p.128). So in the case of political institutions, if there is

some just institution X that is necessary to secure the basic rights or claims of person P, then person P has a claim against everyone else to support and comply with institution X insofar as this is necessary to maintain X and does not come at an unreasonable cost to others. Each person whose rights and claims are secured by X has a similar claim against others. It thus follows that if we fail to fulfil our natural duty of justice, we fail to provide specific others with what we owe them as a matter of justice (Quong, 2011, p.128).

The NDJ tells us that a state exercises legitimate authority when it does a reasonably good job at uphold its citizens' basic rights. In virtue of their basic rights, the citizens have a duty to obey the state's laws. As the duty applies only when it would not be unreasonably costly to support and comply with the state, it only applies to those whose basic rights have been secured. And, in a similar vein to Quong (2011), Gerald Gaus says having a "duty to yield resources to the state does not imply that this duty is owed to the state [...]they are part and parcel of what is required to respect each other as free and equal persons and to respect their basic rights. And we owe this to each other, not to a political organisation or its agents" (Gaus, 2012, p.470). So when a state is reasonably just, its citizens owe it to *one another* to support and comply with its laws, because those laws uphold one another's basic rights to equal freedom.

Sometimes, however, the NDJ can require compliance with unjust laws that violate basic rights. As it is articulated by Rawls, the NDJ says we have a duty to "comply with and do our share in just institutions when they exist and apply to us", and "assist in the establishment of just arrangements when they do not exist, at least when this can be done with little cost to ourselves" (1999a, p.99) This duty, he says, "binds citizens generally and requires no voluntary acts in order to apply" (Rawls, 1999a, p.100). He says serious violations of justice can occur in reasonably just societies, but in "certain circumstances the natural duty of justice may require a certain restraint [...] there is a limit on the extent to which civil disobedience can be engaged in without leading to a breakdown in the respect for law and the constitution, thereby setting in motion consequences unfortunate for all (1999a, p.328). If disobeying a state's laws would risk causing wider injustices through a breakdown in respect for law, then the NDJ says that citizens should not take such risks. In the case of unjust

tax increases, for example, where widespread tax avoidance could lead to the state lacking the resources needed to uphold citizens' basic rights, the NDJ would require their compliance.

When a state's law is reasonably just, in the sense that the law upholds the citizens' basic rights, the NDJ requires their compliance with its laws even when a citizen believes a different set of laws would do an even better job of securing their basic rights. The law does not need to be ideally just, only reasonably just. Even when some of a state's laws are *unjust*, then the NDJ can still require compliance with the state's laws if disobedience would risk a further breakdown in respect for the laws that *are* reasonably just.

Although she does not say so explicitly, it seems that Stilz's argument relies on an NDJ. She says the "ground of our obligation to the state is our one fundamental right: when reflecting rationally, we understand that we better secure this right by allowing someone else to judge and enforce it (Stilz, 2011, p.200). She also says that each "person has a basic duty to cooperate in securing freedom for himself and for others, and where his state satisfies these criteria, he will have a duty to cooperate in sustaining it, since freedom cannot be secured without a system of law" (Stilz, 2011, p.204). She also argues the state is the unique vehicle capable of delivering social justice, saying "if a state that credibly interprets my basic right exists, then I necessarily authorize it – whether I agree to join it or not – since I require its system of law to secure me against others' interference (Stilz, 2011, p.200). If it is reasonably just, then regardless of any voluntary act, I have a duty to support and comply with it.

This is important when we consider Stilz's belief that even when a state makes a mistake when attempting to interpret its citizens' rights, the benefits it brings about in terms of coordination, unity, and peace mean it is still authorised. This suggests she shares Rawls's belief that the NDJ can bind us to state's that make unjust laws. Indeed, Stilz uses the UK and US led invasion of Iraq as an example of an authorised state making a mistaken when interpreting its citizens' rights. Crucially, the NDJ does not provide justification for the war in Iraq. The war was not an exercise of its citizens' basic rights. Hence, it seems Stilz herself ought to be committed to justice, not mere legitimacy, as the appropriate standard for citizens' reparative duties. The NDJ would not require

compliance with a law of reparation except in the unlikely situation that non-compliance would risk a further breakdown in respect for the law in the UK and USA that are reasonably just.

6.3 Alternative Explanations of the Citizens' Duties

Suppose we take justice, not legitimacy, as necessary for the imposition of reparative burdens on citizens. How would this play out? If the UK were to impose the costs of reconstruction in Iraq on its citizens, it might be true that the citizens have an all-things-considered duty to obey that particular law and pay the increased taxes, but this does not mean the state's decision to burden them was justified. To show that it was justified, it would need to be shown that the tax increase is necessary to enforce *a duty of justice the citizens are subject to*. In the case of any unjust law, it is true that if there were no risk of further right violations as a consequence of disobedience, then a citizen would do no wrong in disobeying that law. If the citizens could avoid paying the unjustly increased taxes without putting their co-citizens' rights at risk, then neither the state, nor the parties it owes reparation to, e.g. citizens of Iraq, would be wronged by their evasion. The citizens are, in fact, wronged by its imposition.

To succeed, the argument for the DAP must establish that the state's decision to burden its citizens is one that coercively compels them to discharge an enforceable duty which they are subject to. That is, it must rely on a justice-based account – not on the NDJ. If this is correct, it needs to be determined when the citizens are subject to such a duty, and where it comes from. I pursue this line of argument in more detail in the next section. Before that I want to raise some additional important points that are informative in gaining a deeper understanding of what an adequate authorisation account would look like.

There is another argument that I suspect someone might make, which appeals to the NDJ. This would hold that if the state is liable to costs, but the state will not be able to uphold its citizens' rights to equal freedom if it transfers resources to those with rights to reparation, then its citizens, in virtue of their NDJ, must contribute the resources needed for it to continue upholding those basic rights. In other words, a citizen has a duty to give up to the state what it

needs in order to continue functioning as a reasonable just state when it is made to pay for its unjust actions.

For this argument to work, we need to ask whether the state has any resources of its own in the first place. The idea that the state has resources of *its own* which it can use to discharge its liability-duties is perhaps something we are led to by the idea that the state is a corporate agent. But I think this is untenable. We should understand the resources under the state's control as things that the citizens, as co-participants in a mutually beneficial cooperative venture, have equal moral claims on. This is what explains our belief that the state must be able to publicly justify its spending to its citizens. So whenever the state transfers resources to the victims of impermissible harm *it is transferring resources that they collectively own*. This is why it needs to be shown that the citizens have a duty to give up the resources the state transfers to the victims, and not just the resources required to keep the state reasonably just once that transfer is made.

There is a further problem. Consider the external agent imposing the burden on the state. The NDJ applies just as much to that agent as it does to the citizens of the state. Why should the *state's* citizens, more so than *anyone else*, put forward resources in order to ensure that the state can discharge its liability-burden and continue functioning as a reasonably just state. We need a substantive account of its citizens duties in order to demonstrate this. In order for an external agent to be justified in burdening the state, it needs to be seen that the burdening of the citizens will enforce a duty that they are subject to and *others are not*. It is not enough to simply say that the citizens have a duty to support reasonably just institutions. For instance, why could the International Court of Justice require that British citizens who opposed the war in Iraq be required to pay rather than German citizens, who also opposed the war? Both the British and Germans are subject to the NDJ: they have duties to rebuild Iraq. Why, then, should it be especially the British that have to pay? The NDJ does not demand this.

6.4 A Modified Authorisation Account

In this section of the chapter, I will present an alternative authorisation account, constructed using Stilz's premises. This holds that a state can

permissibly impose the costs of repairing harms caused by an unjust state action on non-labile citizens, when doing so *enforces a duty of justice*. This is the case when a law requiring non-labile citizens to bear a share of the costs of unjust state actions can be justified to them as free and equal citizens. Whether a law can be justified to a free and equal citizen is the test of its reasonableness. If a law is reasonable then it upholds its citizens' basic right to equal freedom. A law requiring non-labile citizens to bear a share of the costs of an unjust state action can be justified to free and equal citizens when the unjust state action was the result of a reasonable interpretation of the citizens' basic rights. This is the case when the state's action resulted from a decision-procedure that could be justified to free and equal citizens. This account makes it clear when and why a state can justifiably impose reparative burdens on non-labile citizens.²⁹ In this account, the duties incurred by citizens are duties of justice that are owed to their co-citizens rather than the state, *qua* corporate agent. Some citizens are liable for impermissible harm, and other non-labile citizens have duties of justice to shoulder a share of their liability-burdens.³⁰

This authorisation account is constructed around Rawls's 'Liberal Principle of Legitimacy' (LPL), which holds that political power is only exercised legitimately when done so "in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in light of principles and ideals acceptable to their common human reason" (1993, p.137). Rawls's free, equal citizens are characterised by their possession of two moral powers – a "capacity for a sense of justice and a capacity for a conception of the good. A sense of justice is the capacity to understand, to apply, and to act from the public conception of justice [...] the capacity for a conception of the good is the capacity to form, to revise, and rationally to pursue a conception of one's rational advantage or good" (1993, p.19).

²⁹ Recall that I take the term liability to refer to the forfeiture of a right and acquisition of a duty grounded in a moral agent's authorship of an impermissible harm.

³⁰ My primary concern here is with working toward what I regard as the strongest possible authorisation account. I will not detail how it can be combined with the corporate liability premise. I suspect suitable amendments could be made.

Rawls believes there will be disagreement about the requirements of justice among reasonable citizens. It is their sense of justice that enables fair social cooperation. A ‘public conception of justice’, that all rational and reasonable, free and equal citizens could endorse is one that ensures fair terms of social cooperation. In virtue of their sense of justice, reasonable citizens promote fair terms of cooperation even if adherence to these terms is not the best option in terms of advancing their own conceptions of the good (Rawls, 2001, pp.6-7). Fair terms of cooperation are promoted because, when proposing laws, reasonable citizens offer justifications it is reasonable to believe reasonable and rational, free and equal, citizens could accept. This is called ‘public justification’ – understood as “arguments addressed to others: it proceeds correctly from premises we accept and think others could reasonably accept to conclusions we think they could also reasonably accept (Rawls, 1999b, p.155). If a law is publicly justifiable, it is the possible object of a free, equal, rational and reasonable citizen’s consent. Laws that are publicly justified are reasonably just, because they uphold the freedom and equality of the citizens. The LPL requires that a state’s laws are reasonably just, and reasonably just laws are ones that exercise the citizens’ basic moral rights.

The LPL and the NDJ can be combined in such a way that tells us when a state can permissibly coercively enforce its reasonably just laws despite citizens disagreeing with the laws’ content. Quong argues that the NDJ requires us to support and comply with reasonably just institutions, and not just perfectly just institutions, where reasonably just institutions are those for which “good arguments can be made by reference to values or principles acceptable to all citizens conceived as free and equal”, because given “the fact of reasonable disagreement about justice, interpreting the duty in this latter way is the best way to create and sustain just conditions” (Quong, 2011, p.133). When a state’s laws can be publicly justified to citizens conceived of as rational and reasonable, free and equal, the laws constitute fair terms of cooperation, promoting the citizens’ capacities for a conception of the good and for a sense of justice. A reasonable citizen might not regard a state as *ideally just*, but will recognise when it is reasonably just, and that her co-citizens have a claim to her obedience because its laws uphold their basic rights. A reasonably just state can justifiably enforce its laws despite their disagreements.

A publicly justifiable law limits citizens' freedom in ways that are necessary for upholding one another's equal freedom. It does not require them to limit their freedom for any other ends. Any taxation, for example, must be publicly justifiable. If a law requires a citizen to do more than is necessary to uphold her co-citizens' rights then it violates her basic rights. For example, raising taxes for all citizens in order to fund the activities of a religious group adhered to by the majority of citizens would be unjust, since all citizens could not reasonably be expected to accept it. This tax increase limits their freedom in ways that are not reasonably required for the upkeep of their or their co-citizens' basic rights. What about a law burdening citizens with a share of the costs of repairing impermissible harm for which they are non-liable? I will now show when such a law could be publicly justified to free, equal, rational and reasonable citizens.

Rawls describes the end of stable, reasonably just democratic institutions as something that is "realized through citizens' joint activity in mutual dependence on the appropriate actions being taken by others" (Rawls, 2001, p.201). To ensure citizens perform the appropriate actions, such as obeying laws, the state must provide appropriate incentives or coerce them. Upholding one another's equal freedom requires a fair distribution of the benefits and burdens of social cooperation. The state's coercive laws can achieve that fair distribution, by, for example, coercively imposing taxes in order to redistribute wealth. Reasonable and rational citizens could consent to the imposition of such legal burdens, that limit their freedom, and compel contributions necessary for the success of the cooperative pursuit of justice. They will also recognise that it is necessary for some citizens to take positions of power, in the government, judiciary, police force, and the military, which will require them to take decisions that cause harm in defence of their co-citizens' rights. The purpose of these positions is to protect the citizens' rights, and the success of the cooperative venture is dependent on people taking them. If occupants of these positions mistakenly cause impermissible harm, however, they could render themselves liable for its repair. I believe that rational and reasonable citizens could consent to bearing these costs under certain circumstances.

A reasonable citizen would recognise the necessity of citizens fulfilling roles that require them to use lethal force in protection of their co-citizens' rights.

Sometimes persons in these roles will need to make a judgement based on less than perfect evidence. It seems unfair that when they are reasonably mistaken in their judgement, having gone to reasonable lengths to verify their beliefs about the permissibility of their harmful actions, those citizens should be left to bear the costs of their actions, whereas the rest of the citizens bear none. It seems reasonable for a citizen to demand that her state will distribute the costs to other citizens as a condition of her taking on that role too. She can claim that the rest of the citizenry would have consented to sharing the costs in order to incentivise someone to take that role. This is why I believe a law requiring the redistribution of the costs is one that reasonable and rational citizens could accept. It could be publicly justified as a reasonable requirement of upholding citizens' basic rights.

A reasonable citizen could not, I argue, consent to shouldering a share of the costs of *any* unjust harm caused by her state's actions. Reasonable citizens respect others' basic rights, so will require that their state go to certain lengths to ensure that its actions do not violate anyone's rights (its actions are not unjust). The design and implementation of laws and policies should be based on reasonable beliefs about their justness. That is, the individuals responsible for designing and implementing laws and policies should be at least *subjectively justified* in believing that they are just. This is what it means for a state action to be a reasonable but mistaken interpretation of its citizens' rights. Out of concern with others' basic rights, a reasonable citizen would expect her state to implement procedures that ensure this. Such decision-making procedures can be publicly justified. If a state's decision-making procedures satisfy this condition, then a law requiring its citizens to bear the costs of objectively unjust but reasonable state actions could be publicly justified too. This is because reasonable citizens will recognise that sometimes mistakes are made by the persons who are charged with protecting their basic rights.

I believe that the 2003 invasion of Iraq would not satisfy the aforementioned criteria. The UK and USA did not go to great enough lengths to verify their evidence. But the account I have developed in this section, unlike Stilz's, provides a complete and determinate explanation of when a state is justified in burdening non-labile citizens with the costs of repairing impermissible harms.

The requirement of public justification is central to this. The citizen has a duty to contribute to repair of the unjust harm when the law requiring her to do so is publicly justified. This law could only be publicly justified in cases where the unjust state action was the result of a publicly justifiable decision-procedure.

6.5 Rejecting the Modified Authorisation Account

In this section, I will argue that (a) it is unlikely that any existing state has ever satisfied the conditions that must obtain in order for this modified authorisation account to justify the imposition of the costs of an unjust state action on non-labile citizens, and (b) for this account to succeed we must endorse a particular controversial idea – that blameless moral responsibility is sufficient for liability to harm.³¹

Stilz's authorisation account has also been criticised by Endre Begby (2012). I think his argument rests on a misinterpretation, attributing to Stilz an account similar to my modified account. But his account raises some important questions for my modified authorisation account. Begby claims Stilz's "argument would apply only to state actions that are (in legal terminology) unjustified but excusable" (Begby, 2012, p.101). Using Stilz's example of a state undertaking a pre-emptive war, Begby says it must be the case that the state acted upon a "reasonable interpretation of its citizens rights (the right of self-defence), and the action was further reasonable in that it was based in good faith on objectively credible evidence" (Begby, 2012, p.103). Saying the actions of the state are "reasonable" means they are "*excusable* though not ultimately justified" (Begby, 2012, p.103). He provides the example of being attacked by a deranged person brandishing an unloaded gun. Begby claims that although justification for harming in self-defence depends on whether the gun is actually loaded and the existence of a genuine threat, you might be excused for doing so if you are justified in believing the gun is loaded. He doubts whether the 2003 invasion of Iraq can be regarded as excusable in the sense just described.

³¹ McMahan (2009) and Lazar (2014) endorse this position.

Turning to Stilz's example of the Iraq war, the alleged justification for the invasion was that Iraq possessed and was prepared to use weapons of mass destruction. The UK government claimed that those weapons could be launched within 45 minutes of an order being given. Begby notes that "Stilz nowhere says what she takes to be the limits of justified pre-emptive self-defence" (2012, p.104). It is also open to dispute, he says, as to what constitutes an "imminent attack", but the criterion of necessity and last-resort will be crucial (Begby, 2012, p.104). He goes on to say that:

The internal logic of Stilz's Kantian contractarian argument further reinforces the case for a narrow criterion. She insists that the state acquires its mandate from individuals who are motivated to protect the rights of all human beings. We should expect such individuals to choose rules that impose tight restrictions on their state's power to violate the rights even of outsiders (Begby, 2012, p.105).

The reason *why* citizens can be permissibly burdened with the costs of repairing impermissible harms caused by others – on either Stilz's or a revised account, is not explored any further. Begby is not concerned with that aspect of Stilz's account.³² I think the modified authorisation account I have sketched above can make this position plausible. But Begby is right that the internal logic of the authorisation account suggest a narrower criterion – this is what the modified account captures.

Yet Begby concentrates on another important point – if a state's actions are only authorised when they pass these tight restrictions then there will be very few, if any, real world cases to which the authorisation account applies. Begby claims that there have probably never been any wars that satisfy these criteria, and that the UK and US governments in no way acted on a "reasonable interpretation" of their citizens' rights when invading Iraq (2012, p.105).

Hence, if a more demanding conception of reasonableness and state legitimacy is invoked, such as the one which I believe is necessary for an authorisation account to work, then it is much less likely to be satisfied in real world cases.

³² Although he does express scepticisms about an account that grounds duties to shoulder costs in ideas about hypothetical consent, but does not pursue it (Begby, 2012, p.101)

Such a demanding conception is not evidenced in Stilz's account. As we have seen, Stilz's account relies on a criterion of legitimacy in order to explain why citizens of the UK and USA would have a duty to bear the costs. It does not, as I have argued, go far enough to justify the imposition of those costs. Perhaps this allows her account to capture a greater number of actual cases, but it comes at the cost of not justifying the imposition of the state's burdens on its citizens. The alternative account offers this justification but at the cost of more demanding conditions.

Returning to Begby's claim that Stilz's account applies to unjust state actions that were excusable, individuals who causally contribute to these unjust state actions will be blamelessly morally responsible for the impermissible harms. The modified authorisation account also holds that non-labile citizens can be made to bear the costs of unjust state actions when those actions were 'reasonable' in the sense that they were subjectively justified even if not objectively justified. But if we think there is a threshold of moral responsibility – i.e. a certain degree of culpability or blameworthiness – that must be met in order for an individual to be liable to preventative or reparative harm, then the modified authorisation account will be rendered useless.

Although I do not prove this in this thesis, I have been assuming that there is a threshold of moral responsibility that must be met for an individual to be liable to costs or harms, and that blameless moral responsibility is insufficient for liability. This would render the revised authorisation account unworkable, since it holds that free and equal citizens could only consent to bearing the costs of unjust state actions that were reasonable but mistaken interpretation of their basic rights. That is, the unjust state actions were the result of a procedure that went to reasonable lengths to ensure their objective permissibility. So the revised authorisation account would be unworkable, unless it could be shown that reasonable and rational citizens would consent to shouldering a share of costs to which they are non-labile, when the liable persons were *culpably mistaken* in believing that their harmful actions were objectively permissible.

If we do accept that blameless moral responsibility can ground liability, or an argument is made to show that my authorisation account can be applied even when the citizens who caused the harm were acting in a blameworthy manner,

then my modified authorisation account could be combined with my individualist account of moral responsibility-based liability. It could hold that in cases where some citizens are liable for the impermissible harm, their non-liable co-citizens can be permissibly burdened by their state with a share of the liable citizens' burdens. I expect, however, that my authorisation account will rarely, if ever, be satisfied, and that the individualist moral responsibility-based account of liability will be our most useful tool when justifying the distribution of the costs of unjust state actions.

6.6 Conclusion

Stilz's authorisation account, I have argued, is inadequate. Her DAP cannot explain why the liable state would be justified in burdening its citizens with shares of its liability-burdens. If we cannot show that the citizen has a duty of justice, which requires her to bear a share of the state's liability-burden, then the citizen would do no wrong if she avoided bearing a share of that burden (provided she does not risk destabilising the state). Ultimately, her account does not do a good job at telling us when and why citizens can be justifiably burdened with the costs of unjust state actions. The modified authorisation account I have proposed, which relies on many of Stilz's premises, can provide a plausible explanation. This is when such a law can be shown to be reasonably just. The criterion of public justification is important here. I believe a law requiring non-liable citizens to contribute could only be publicly justified when the unjust action was the result of publicly justified procedures. However, its usefulness relies on the controversial idea that blameless moral responsibility is sufficient for liability. Even if that can be defended, its conditions will be rarely satisfied and therefore will rarely justify states imposing reparative burdens on citizens.

Together in this chapter and Chapter 4 I have demonstrated that there is, as yet, no adequate explanation of when a state, conceived of as a liable corporate agent, can permissibly impose shares of its liability-burdens on its citizens. In the next Chapter I will consider in greater detail whether the individualist moral responsibility-based conception of liability I endorse, and which is not

reliant on the corporate liability premise, can reach compelling conclusions in Stilz's favoured illustrative case – the UK and US-led 2003 invasion of Iraq.

7 Liability for Unjust State Actions

In the preceding chapter I rejected Stilz's Democratic Authorisation Principle. Stilz believes it can explain why the vast majority of the citizens of the UK and USA could be permissibly burdened by their government, if, for instance, the International Court of Justice were to burden their governments with the costs of repairing harms caused by the invasion of Iraq in 2003. In this chapter, I will demonstrate how the moral responsibility-based account of liability can deliver intuitively compelling conclusions in this particular case. It can, I will argue, justify the imposition of the costs on the vast majority of both states' citizens.

My argument will be based on a number of reasonably uncontroversial assumptions that will not be argued for in detail. First, I will assume that had it been true that Iraq possessed weapons of mass destruction, and it was true that it intended to use them to cause impermissible harm, then the war might have been justified. If the war was justified the harms inflicted might have been permissible. Second, the US and UK governments' claims about Iraq's weapon capabilities were false. It was an unjust war. Third, I will also assume that citizens of the UK and USA had good reasons to question the justness of the war. Approximately one million UK citizens protested in London against the war, the Leader of the House of Commons Robin Cook resigned, and 149 MPs voted against the motion seeking approval for the invasion. This widespread opposition suggests that the Blair government had failed to make a conclusive case for invasion, and it was reasonable for citizens to hold genuine doubt about the justness of the war.

The figures concerning the number of deaths and casualties suffered as a consequence of the 2003 invasion are the subject of controversy. Neither the UK nor the US keeps any official records. According to the website Iraq Body Count, a conservative estimate of the total cumulative reported deaths in Iraq between 2003 and 2014 is 205,992. Around 75% of these deaths were civilians (Iraq Body Count, 2015). At the time of writing, Iraq is the most unstable it has been since the 2003 invasion. The US and the UK, among other states, are carrying out air strikes against Islamic State insurgents who have carved out a stronghold inside Iraq and Syria (Chulov and Shaheen, 2015). The UK is

supplying the Iraqi military and Kurdish fighters with weapons to fight them (Ministry of Defence, 2014). Since the 2003 invasion there has been civil war, insurgencies, suicide bombings and the almost daily killings of civilians. There has been widespread destruction of transport infrastructure, roads, bridges, and railways, as well as communication networks, healthcare, water, sanitation, and education provision. The costs of repairing this harm has been, and will continue to be, very high.

I will argue that the victims of the impermissible harms hold claim-rights against liable citizens in the UK and USA, who have duties to repair the harms. In this chapter I will outline principles that can be used to identify which UK and US citizens are liable. I will argue, in particular, that the vast majority of tax-paying citizens are to blame to some degree for the harms. They are to blame because they pay taxes that the state needs in order to wage war. This is, of course, a controversial claim. Taxation is coercively imposed and almost impossible to avoid paying. I will acknowledge that this might mean the citizens have excuses that absolve them of blame. It can also be argued that in a state such as the UK or USA, the citizens have an all-things-considered moral duty to pay their taxes because of the numerous good ends those states bring about. As such, not only are citizens forced to pay taxes, the citizens are also justified in paying them. I will argue, however, that because citizens have an opportunity to influence how their taxes are spent, failure to exercise these opportunities means a citizen can be blamed for its state's unjust actions. This liability is grounded in the fact that an individual whose actions (paying tax) caused impermissible harm did not take reasonable steps to minimise the risk of impermissible harm. The citizens who failed to take these steps violated the Necessity Principle.

A problem for any attempt to attribute moral responsibility for impermissible harms caused during a war to a tax-paying citizen is that it will often be very costly, perhaps impossible, to determine who did, and did not, cause a specific impermissible harm. In this chapter, I will draw on the Liability for Epistemic Deficits Principle that I introduced in Chapter 2. This principle holds that an individual can be liable to proportionate harms necessary for the repair of an impermissible harm when she is culpably morally responsible for causing an

epistemic deficit that obscures facts about individuals' culpable moral responsibility for the impermissible harm. I will develop the argument for this principle in this chapter. Citizens of the UK and USA are to blame for the epistemic deficit that prevents us identifying exactly who is culpably morally responsible for the impermissible harms and to what degree. I will argue that this can make it permissible to impose reparative burdens on them.

In Section 7.4, I will outline how the agents of reparation – the government of the liable individuals and the international authority that burdens it – should proceed in light of the epistemic deficit. In section 7.5, I will defend the application of 'collectivised' reparative burdens – where the costs the individual citizens are liable to are aggregated and a demand for reparation is delivered to their government. There is a risk involved when imposing such burdens but there is also an important benefit. The government might distribute the costs in an unjust manner, but there is value in securing its willing cooperation. I will consider when the external agent of reparation will be permitted to impose a collectivised burden when it is also reasonably foreseeable that the government will distribute shares of the burden in an unjust manner.

7.1 Omission-Based Liability

There is a plausible explanation of individuals' duties to contribute to the repair of impermissible harms that I have not yet considered in detail. I will build on this account in this chapter. The account grounds an individual's liability in a culpable omission. A culpable omission occurs when an individual is culpably morally responsible for failing to discharge a duty to prevent harm or to minimise the risk of harm. Imagine the following example:

Parking: Claire is a passenger in a car. The driver parks on a slope, gets out, but forgets to put the handbrake on. The car begins rolling forwards down the hill towards pedestrians. Claire can prevent it hitting the pedestrians by applying the handbrake.

I believe that Claire has an enforceable duty to apply the handbrake. If she does not apply it, she is liable for the repair of the harms suffered by the pedestrians. There was an action available to Claire that would have prevented the harm. I expect most people will believe this to be the intuitively correct. Our intuitions might be less firm in cases where Claire can only reduce the

chance or probability of an impermissible harm occurring and cannot guarantee its prevention. For example, if the handbrake failed, she could beep the horn in order to warn the pedestrians. This might only minimise the risk of harm, because the pedestrians might not be able to move out the way in time, or be listening to loud music through headphones. I believe that if she does not take steps to minimise the risk then she is liable for the harms that resulted.

When proposing the idea of duties to prevent harms that we did not cause, it is often said that such a duty only exists when we can prevent the harm without incurring unreasonable costs to ourselves. If I can prevent a child drowning at the expense of ruining my new shoes then I have a duty to do so. I would not have a duty to jump into a swelling river in order to save a child. The demandingness of the duty refers to how much cost an individual is expected to bear. The demandingness of a capacity-based duty to bear *reasonable* costs in order to minimise a risk of harm depends on four factors; (1) the probability of the unjust harms occurring; (2) the probability of an individual's action being able to prevent it; (3) the cost the individual would incur when performing that action; (4) the magnitude of the harm to be prevented.

In a somewhat similar vein, McMahan argues that civilians have duties to oppose their government's unjust wars, and if they do not discharge their duty, they are responsible for the war. He says that,

responsibility may be greater the more control the citizens have over their government; hence responsibility and liability may be greater among the citizens in a democracy than among those in a dictatorship [...] the dangers citizens in a dictatorship face in opposing their governments are generally greater and weigh more heavily against the duty of opposition (McMahan, 2009, p.215).

However, McMahan notes that a problem with omission-based responsibility arises when one individual acting alone cannot prevent the harms. McMahan says that this observation leads to "difficult questions about coordination problems in collective action" and these are "particularly intractable when it takes many people acting together to produce significant good consequences, each individual's contribution to the outcome is insignificant, yet each incurs a significant cost in contributing" (2009, p.216). He says the incentives in these cases favour inaction, and he has no satisfactory answers to these questions.

The collective action problem is evident in my case study. In the UK and USA, a sufficient number of citizens engaging in protest plausibly could have prevented the governments invading Iraq. This would have been relatively costless for any individual citizen since they have the right to protest. This right permits them to hold mass meeting and protests in an attempt to influence their co-citizens and also their government's intentions. The citizens also have the right to participate in the political process by voting in local and national elections. There is a reasonable possibility that by protesting and raising awareness of the unjust harms, you will influence another citizen, who could themselves influence another citizen, and so on, until it becomes clear to the government that the war does not have the support of the public. When war is not imminent, public pressure could also lead to governments enacting constitutional changes designed to minimise the possibility of governments undertaking unjust wars. Even if the chance of one person having this ripple effect is very small, the actions are relatively costless and could prevent serious right-violations. This is why each citizen has a duty to go to reasonable lengths to try to minimise the risk of their state causing impermissible harm.

Citizens in the UK and USA have a duty to go to reasonable lengths to try and get their government to put in place constitutional checks and balances that will minimise the risk of unjust wars. If a sufficient number of citizens' act in this way then the necessary changes are highly likely to occur. Even though the probability that one citizen's actions would be a but-for condition of a change in government policy is often very low, the magnitude of the impermissible harms that the government could cause, and the high probability that such harms will occur, means the citizens have a duty to go to reasonable lengths to minimise the risk of unjust war. As the probability of unjust war increases, the duty becomes more demanding. If the citizens do not discharge this duty then they are culpable.³³

³³ Causation is an ineliminable feature of the omission-based account of liability. An individual cannot have omission-based liability for a harm she could not prevent or minimise the risk of. Someone might maintain that it is only when an *action* causes a

7.2 Tax and Liability

The argument made in 7.1 is controversial. I do not intend to defend it at length here. The argument I make in this section does not depend on its success. It does, however, make use of the idea of culpable omissions. It is based on the idea that whenever an individual causes a threat of harm, she has a duty to go to reasonable lengths to minimise the amount of harm she causes. If she does not go to these reasonable lengths, she can render herself liable to harm, where she would not have been liable had she gone to those reasonable lengths. This explains why citizens have special duties to prevent their own state causing unjust harm. McMahan says:

[c]itizens have a special responsibility for unjust wars fought by their own state for the simple reason that it is their institutions that are then malfunctioning – institutions that operate on the basis of their labour, through their financial support, and ostensibly with their consent and for their benefit. In many cases they neither consent nor benefit but do not deny that the institutions are theirs, that they and not others are the ones who are ruled by them and participate in their functioning [...] these facts give them a special responsibility to ensure that the institutions are not a source of unjust harm to others whom the institutions do not serve (McMahan, 2009, p.215).

The account that I develop in this section will explain why citizens have a special responsibility to ensure that their state is not the cause of unjust harm. It is because the state's actions are the causal consequence of the citizens' contributory actions. The citizens' also have the opportunity to influence their state's actions by exercising their democratic rights. When citizens fail to exercise their democratic rights in this way, they culpably omit to act upon a duty to minimise the risk of their actions causing harm, meaning they can be blamed for the unjust state actions caused by their contributory actions.

In what ways do citizens actions contribute to a war? Citizens sometimes elect politicians who authorise military action. Additionally, some citizens *are* politicians who authorise war. Some produce munitions, some are combatants

harm that an individual is morally responsible *for causing the harm*. The account I develop in 7.2 should satisfy these people.

or have jobs supporting combatants, and nearly everybody pays taxes that provide the state, and its government, with the resources needed to wage war. The UK spent approximately £43 billion of taxpayers' money on defence in 2014 (HM Treasury, 2014, p.30). The state being able to perform certain non-military functions is also essential for it to be capable of waging war. In part, this is simply because citizens are more likely to oppose military action when the citizens' basic rights are not being fulfilled. So whenever a state wages war, many of its citizens have causally contributed to it in some way, by contributing taxes to functions that are necessary for the war to go ahead. Their contributions to the impermissible harm might be very remote, but they still form part of the causal chain. On this basis, I will now argue that many of the tax-paying citizens of the UK and USA were to blame for causing the Iraq war and many of the harms suffered as a result. They are culpably morally responsible for the war because they failed to act to minimise the risk of their actions causing impermissible harm.

This argument must overcome two powerful objections. First, is the 'Justified Action Objection'. This says that in a state such as the UK or the USA, citizens have an all-things-considered moral duty to pay their taxes since their taxes are necessary for the state to successfully uphold its citizens' basic rights. A citizen can claim that she only intended to cause the just ends, and these were sufficient to justify her risking causing some unintended but foreseeable unjust harm. As McMahan argues, we cannot be liable for a harm on the basis of an objectively justified action.

The second objection is the 'Coercion Excuses Objection'. That is, citizens have excuses for paying taxes because they were coerced. It is extracted from their pay before it reaches their bank accounts. To avoid paying tax would be very demanding – a citizen would have to not work and not purchase goods. This objection claims that citizens cannot be blamed for paying taxes. If citizens are not culpably morally responsible for the harms they are non-liable.

In what follows, I will consider these two objections. I will argue that a citizen is justified in paying taxes only when she also goes to reasonable lengths to minimise the risk of her taxes causing impermissible harm. This is in fact a requirement of the Necessity Principle. Citizens can foresee that their

coercively extracted taxes could cause impermissible harms, and have the opportunity to minimise the risk of this happening, so those who do not go to reasonable lengths to do so lack an objective justification and can be blamed for the impermissible harms caused by their taxes.

7.2.1 The Justified Action Objection

I will first consider, and reject, the Justified Action Objection. To do this, we need to start by revisiting the principles of necessity and proportionality. Recall, first, that the Necessity Principle requires persons acting in the defence of others' rights to ensure that their defensive measures will cause the least amount of harm possible. In order to achieve this, it might be necessary for the defender to undertake a series of actions. Some of these actions might not be instrumental in preventing harm to the person whose rights she was defending, but instrumental in preventing harm to the attacker. For example, if a tactical bomber on the just side in a war could fire warning shots, giving persons in the vicinity of a munitions factory a chance of escaping that they would not otherwise have, then it is morally required. Failure to do so renders her action objectively unjust – she did not go to reasonable lengths to minimise the risk of harm.³⁴ If a defender fails to act in such a way as to minimise the risk of harm, she renders herself liable to harm. This is true even when the action that grounded her liability would have been objectively justified had it been the only defensive strategy available to her. The opportunity to minimise the risk of harm makes a difference to what she must do in order to remain justified.

The Wide Proportionality Principle tells us when it can be permissible to cause harm to non-liable persons. That is, it can be permissible when it is an unintended but reasonably foreseeable consequence of actions that otherwise would be permissible. Whether it is permissible depends on how much harm it

³⁴ An important question concerns the level of risk individuals should put themselves under in defence of others' rights. In the cases I will consider the agent acting in defence of others' rights will be capable of taking additional steps in order to minimise harm without incurring *any* additional risk of harm. McMahan discusses this issue in 'The Just Distribution of Harm Between Combatants and Non-Combatants' (2010)

averts in comparison to that which it causes. Let us imagine that the harms the tactical bomber will foreseeably but unintentionally cause to non-labile non-combatants are widely-proportionate and necessary. This case can be modelled using variations on a classic trolley problem case:

Trolley 1: There are five people on a track with a runaway trolley heading towards them. The five cannot escape the trolley. However, there is a man on a bridge and next to him is a lever that can switch the trolley on to another track. On the other track there is just one person who will certainly be killed by the trolley.

It is intuitively permissible for the man to divert the trolley away from the five and toward the one. The man can claim that he did not intend the death of the one, he just intended to save the five, and that he would rather the one somehow avoided being harmed after he pulled the lever. The individual the trolley has been diverted toward had done nothing to forfeit her right against being killed in order to prevent harm to others. The harm he will suffer can be described as a right-infringement, but not a right-violation. As he acted permissibly, he would not be liable to being harmed by the individual on the track, or someone acting in her defence.

McMahan argues we cannot be liable on the basis of an objectively justified action. He notes, however, that it seems intuitive that a non-labile non-combatant could permissibly kill the objectively justified bomber in self-defence. This is because people are not morally required to submit to being wronged, even by another's justified action (McMahan, 2005a, p.399). The bomber is non-labile, but non-labile non-combatants who will be foreseeably harmed by her actions will be wronged by her objectively justified action. Their rights will be infringed. Being non-labile, the bomber would also be wronged by their defensive actions. So she is permitted to defend herself. So neither the bomber nor the non-combatants are liable, but both can permissibly defend themselves against the other. McMahan says there is a moral parity between them, and third parties would not be permitted to intervene in defence of either (2005a, p.400). Third-parties can intervene to prevent right-violations, but not in order to prevent an individual engaging in morally justified action (McMahan, 2005a, p.400). This is analogous to *Trolley 1*. The one on the track is non-labile, and so is the man on the bridge. But she could permissibly use force to prevent him diverting the trolley toward her if possible and he would

be permitted to defend himself against her. Because both are non-labile, a third party could not intervene on his or her behalf. Now consider another variation:

Trolley 2: Things are the same as in *Trolley 1*. But now the large man on the bridge has the opportunity to use a megaphone to warn the one individual on the track that he is about to redirect the trolley toward her. This would increase her chance of escaping. Provided she was quick enough and did not trip, she could reach an alcove further down the track. There is a bystander observing events, who is stood next a lever that will open a trapdoor on the bridge. The bystander could drop the large man on the bridge on to the track and stop the trolley. The large man diverts the trolley toward the individual on the track without warning her.

The man's action is widely-proportionate. The good it brings about outweighs the wrongful harm that will be caused as a reasonably foreseeable side-effect of his saving the five. However, he violates the Necessity Principle. He violates it because he does not act to minimise the risk of harm. I believe he is liable to being dropped on to the track because his action lacks objective justification. The victim on the track and the bystander could permissibly harm him in defence of the victim's rights, and he would not have the right to defend himself. He would not have rendered himself liable, however, had he warned her. Some might find the suggestion that the man renders himself liable controversial, given that there is no guarantee of escaping the trolley. It is sufficient for his liability, I argue, that the warning would give the individual a reasonable chance of avoiding the harm. He has not undertaken the course of action that minimises the risk of harm, therefore violating the Necessity Principle, and therefore his action is not objectively justified.

What explains his liability, then, is that he becomes culpably morally responsible for the threat to the individual when he fails to minimise the risk. He has violated one of the central principles of justified self and other defence. Furthermore, if the permissibility of diverting the trolley in *Trolley 1* is dependent on the fact that the harm to the one is a reasonably foreseeable but unintended side-effect of saving the five, then in *Trolley 2* we have good reason to question the coherence of the man's claim that it was unintended. If he fails to minimise the risk of harm, it would seemingly be inconsistent for him to claim that he did not intend the harm and wished she had escaped from the threat he had redirected toward her. It indicates that he is at least morally indifferent to causing her harm. So his failure to go to reasonable lengths to

minimise the risk of harm means that (a) he has violated the Necessity Principle and (b) undermined the claim that the harm was unintended.

Trolley 2 is analogous to the situation of the tax-paying citizen in a liberal democratic state. The tax-paying citizen might claim that when she pays her taxes she only intends to contribute to the just ends her state pursues, and it is just an unintended but reasonably foreseeable consequence of her contributory action that she risks causally contributing to the infliction of impermissible harm. But citizens in a liberal democratic state have the opportunity to influence their government's policies. Failure to exercise these opportunities means they have not attempted to minimise the risk of their actions causing impermissible harm. This is a violation of the Necessity Principle, so their actions are not objectively justified. The implication of this argument is that the citizens have an all-things-considered duty to pay their taxes *and* go to reasonable lengths to minimise the risk of their taxes causing impermissible harm. A citizen's failure to minimise this risk also suggests that she is at least indifferent to the fact that her contributory action could possibly cause impermissible harm. Indifference to such grievous harms warrants a reaction of blame. I will now consider whether the fact citizens are coerced into paying tax means we cannot, in fact, blame citizens for harms caused by their taxes.

7.2.2 The Coercion Excuses Objection

Let us now turn to the second objection, which is the Coercion Excuses Objection. It holds that a citizen's tax contribution was coercively compelled. She could not have avoided contributing without incurring unreasonable costs. This gives her a significant excuse for causally contributing to the impermissible harm her taxes foreseeably financed. This is an appeal to the Diminished Moral Responsibility argument. Therefore she is not liable for the harm. I will now challenge this claim. If an individual is presented with the opportunity of performing an action that influences the outcome of an action she is coerced into performing, then she has a duty to take the opportunity and minimise the risk of her coerced action causing harm. Failure to do so makes it appropriate to blame her for the harm she has caused. The reason why coercion and duress excuses us is that an individual can claim she would not have otherwise caused the harm. It would be inconsistent for an individual

who was coerced into causing a threat of unjust harm, but who made no attempt to prevent that happening when there were reasonable opportunities to do so, to claim she regrets causing it. In support of this, consider the following:

Well 1: Jim has fallen down a well and is seriously injured. This annoys Rachel who hates Jim. Rachel turns to Hannah and says, “If you do not say ‘No’ in the next 10 seconds, I will (a) give you a choice of being killed and thrown down the well, which will kill Jim, or (b) throwing a bucket of rubble down the well, which will kill Jim”. Hannah knows that Rachel is unpredictable and occasionally violent, but does not believe Rachel will act on her threat. Hannah remains silent. After ten seconds, Rachel withdraws a gun and points it at Hannah, threatening to shoot her dead unless she throws the bucket down the well. It was reasonably foreseeable that Rachel would do this, given Hannah’s knowledge of her violent tendencies and hatred of Jim. Hannah throws the rubble down the well and kills Jim.

Hannah caused Jim’s death. Hannah could have prevented Jim’s death by saying “No” within the first ten seconds. But Hannah did nothing, she allowed herself to be coerced into killing Jim. Hannah might claim that she would have been killed had she not thrown the rocks down the well. This is true. But that is not the point. At an earlier time, Hannah could have prevented herself being coerced by Rachel at all. Hannah did not push Jim down the well, nor did she prompt Rachel to act as she did, but Hannah’s omission – staying silent – means she is *culpably morally responsible for causing Jim’s death*. A bystander would be permitted to harm Hannah in order to prevent her throwing the bucket (assuming the bystander could not reach Rachel). Now consider a similar case:

Well 2: Everything is as in *Well 1*, except for the content of Rachel’s threat to Hannah. The content of Rachel’s threat to Hannah is: “I am thinking of a number between 1 and 100. If you do not guess it, I will offer you a choice between (a) being killed and thrown the well, which will kill Jim, or (b) throwing a bucket of rubble down yourself, which will kill Jim”. Hannah stays silent.

The difference here is that Hannah has no action available to her which is guaranteed to avoid her being coerced into killing Jim. She might guess the wrong number. By not attempting to guess the number, however, Hannah can be blamed for causing Jim’s death. This is because she did not take reasonable steps to minimise the risk of being coerced into causing him unjust harm. If she had gone to those reasonable lengths, then even if she is coerced into causing unjust harm, she is not to blame for doing so, and is non-labile.

Hannah is liable to preventative harm inflicted by a bystander protecting Jim. *Well 1* and *Well 2* demonstrate the following: whether we can appeal to an excuse of coercion or duress to avoid liability for impermissible harms we have caused depends on what we did to minimise the risk of our being coerced into causing impermissible harm.

These conclusions apply to my case study. The citizens of the UK and USA, can be blamed for harms caused by their tax contributions, when they have failed to go to reasonable lengths to minimise the risk of impermissible harm being the casual consequence of their coerced tax-contributions. A citizen has reasonable opportunities to minimise the risk of harm. She foresees that the tax she has paid, and will pay in the future, could cause impermissible harm, so her claim that she would rather not have caused such harm is undermined by the fact that she failed to take reasonable opportunities to minimise the risk of that happening. It indicates indifference to the prospect of having caused serious harm; this makes it appropriate to blame her. She might not have been able to avoid being coerced into causally contributing to the impermissible harm, but she had the *opportunity to avoid being to blame for causally contributing to it*.

In all of the cases considered in this section, it has been stipulated that the individual has performed an action that is a cause of the occurrence of an impermissible harm. The obvious objection to this argument will claim that it is impossible to know whether an individual tax-payer made (but-for) causal contributions to the Iraq invasion. I will now respond to this objection.

7.3 Liability for Epistemic Shortfalls

In Chapter 2, I argued that an individual who is culpably morally responsible for contributing to an epistemic deficit that conceals the identities of individuals who are culpably morally responsible for an impermissible harm, can render herself liable to proportionate harms necessary for the prevention of the impermissible harm. I endorsed the Liability for Epistemic Deficits Principle:

An agent who is culpably morally responsible for obscuring facts that would otherwise provide the potential victim of an impermissible harm, or a defender acting on his or her behalf, with evidence of either (i) permissible means of self-defence, or (ii) the identity of agent(s) against whom

defensive means may be permissible used, is liable to proportionate harm necessary for the prevention of the impermissible harm.

In this section, I will argue that citizens who pay their taxes, without taking steps to minimise the risk of their contributions causing impermissible harm, can also be blamed for contributing to the epistemic deficit that prevents us from being able to identify which citizens causally contributed to impermissible harms. It is reasonably foreseeable to the citizens that their tax-contributions will not only (a) cause impermissible harm, but will also (b) obscure facts about the causal nexus of an impermissible harm. If after going to reasonable lengths, we still cannot discern with sufficient degree of certainty who caused the impermissible harm and who did not, then citizens who are culpably morally responsible for the epistemic deficit are liable to being burdened with the costs of repair even though they might not have caused the impermissible harm.

A state would not be able function without citizens' causal contributions. There is undeniably a causal connection between citizens' tax contributions and the harms perpetrated by the state. Its capacity to fight an unjust war is grounded in the wealth its citizens create through their labour. Citizens are aware that they will have no knowledge of how their particular tax-contributions are spent. Tracing the causal connection between specific incidences of harm and citizens' contributions is likely to be impossible. However, as it is reasonably foreseeable to a tax-paying citizen that the victim of unjust state actions, or a defender acting in defence of the victims' rights, will be unable to identify who caused specific harms, the citizens can be attributed moral responsibility for this epistemic deficit. What makes the epistemic deficit morally problematic is that it threatens to prevent the repair of impermissible harm. It will sustain the harm. This is why causing an epistemic deficit can ground liability for the harm. I will now defend this claim.

When defending our own rights or the rights of others, we must go to reasonable lengths to verify our beliefs about persons' liabilities. When faced with an epistemic deficit, one thing we might consider doing is relaxing the evidential threshold. Suppose you are not sure whether Y or X is killing Z. You want to enforce Z's rights. But you're not sure whether to target Y or X. Instead of requiring yourself to be 95% sure of the perpetrator's identity, you

might drop the threshold to just 55%. This might strike you as particularly justifiable when the individuals you are considering targeting – in this cases Y and X – are culpably morally responsible for your epistemic deficit.

The problem, however, is that individuals who do a very effective job of obscuring facts could make it impossible to satisfy even this relaxed evidential threshold. We might have absolutely no idea who the perpetrator was. In cases like this, I suggest, if we can, with a sufficient level of certainty, determine who is culpably morally responsible for causally contributing to the epistemic deficit, then the costs should be imposed upon them. In doing this, we shift the ‘burden of proof’ to those who are culpably morally responsible for our lack of certainty about the identity of liable persons or their precise liabilities. The onus will then be on them to demonstrate that they are not culpably morally responsible for the harm. The upshot of this is that the victim of impermissible harm, or an agent acting in her defence, will not have to shoulder the costs of repairing the impermissible harm, or the costs associated with the process of establishing the precise liabilities of individuals. Instead, those culpably morally responsible for the epistemic deficit will shoulder them.

This is even more intuitively plausible when other conditions are met. For example, if the process of verifying facts of the matter is time-consuming, then the victim of a harm could suffer greater harm as a result of a delay in repairs. We should do our best to avoid this. Or if the process of determining the relevant facts is costly in terms of resources, then it seems particularly wrong that the victim or her defender should be made to bear these costs. In still other cases, there might be insurmountable epistemic obstacles. These cannot be overcome no matter how much time and how many resources are devoted to revealing the relevant facts. Again, my suggestion, therefore, is that the burden of determining who is liable for the harm should be shifted from the victim, or her defender, to the individuals who are culpably morally responsible for the epistemic deficit.

Judith Jarvis Thomson presents a similar example, though without such a principled rationale. She describes a legal case where A went hunting with B and C and either B or C shot A in the eye. The court ruled that A could claim the full costs from either B or C, leaving it to them to resolve any further

disputes about who caused the harm. The court ruled that B and C “brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with each to absolve himself if he can. The injured party has been placed by the defendants in an unfair position of pointing to which defendant caused the harm” (Thomson, 1986, p.207). If the plaintiff was left with the burden of determining who caused her harm, then she would be without remedy. Therefore, the “burden should shift to each defendant to show that he did not cause the injury; and, if neither can carry that burden, then both should be held liable” (Thomson, 1986, p.194).³⁵ In support of the court’s judgement, Thomson says it might feel unfair to hold both defendants liable but “that feeling is certainly swamped by the feeling of unfairness which is generated by the thought of the plaintiff’s being without remedy from either of them” (1986, p.209). I offer a principled explanation for Thomson’s intuition. Individuals – in this cases, B and C – who are culpably morally responsible for an epistemic deficit that obscures the facts needed to determine who is liable for an impermissible harm can be made to bear the costs of repairing that impermissible harm. The burden of proof is shifted to them.

Returning to the question of whether citizens are liable for unjust state actions, citizens who failed to take reasonable steps to minimise the risk of their actions causing impermissible harm are liable for the impermissible harms that perhaps some of them did not causally contribute to. All contribute to the epistemic deficit. Each individual’s contributions are simply another factor to be disentangled from the complex web of contributions that obscures the causes of the impermissible harm. Citizens who go to the reasonable lengths to minimise the risk of their actions causing impermissible harm are not to blame for the impermissible harm or the epistemic deficit that threatens to sustain it. The citizens have a moral duty to go to reasonable lengths to minimise the risk of their actions causing impermissible harm regardless of whether or not the epistemic deficit exists. The epistemic deficit is a problem because it will cause the harm to persist; it would not be a problem in the absence of the harm. So if the citizen discharges her duty to minimise the risk of her actions causing

³⁵ For a discussion of the differences between ‘standards of application’ in legal and moral contexts, see Christian Barry (2005).

impermissible harm then she is non-culpably morally responsible for any impermissible harms she in fact causes and the epistemic deficit. As she is not to blame for the harms or the epistemic deficit she is not liable for the harms.

To avoid liability for the harms suffered during and after the invasion of Iraq, citizens of the UK and USA should have discharged their duty to go reasonable lengths to minimise the risk of causing impermissible harm. A citizen in the UK or USA should have opposed the invasion of Iraq. It is difficult to specify precisely what this would involve. But I imagine that attending public demonstrations in the build up to a war and encouraging others to attend, would be sufficient. This is not much, but if every citizen capable of publicly protesting had done so, the war would almost certainly have not happened. When war is not imminent this would require spending some time getting involved with the activities of pressure groups that push for the implementation of sufficiently stringent constitutional checks and balances. I think this is intuitively plausible – the reasonable steps a citizen has a duty to take do not seem at all demanding when we consider the serious right-violations that their state threatened to, and actually did, perpetrate in Iraq.

In the case of Iraq's 1990 invasion of Kuwait, we will reach a different conclusion about the liability of the average tax-paying citizen. The citizens did not have reasonable opportunities to minimise the risk of their actions causing impermissible harm. The citizens could not be blamed for failing to attempt to prevent their contributions causing harm by attempting to influence government policy. This is because the Hussein regime did not permit public expressions of disapproval. There will be members of the Hussein's Baathist regime, and the military, who can be blamed for the impermissible harms caused during the invasion. The average citizen whose only contribution is her tax-paying, however, is not to blame for causing impermissible harms, and the epistemic deficit that results is not morally problematic because it does not obscure permissible defensive measures since the blameless contributors are non-liable. I believe the conclusions my account reaches in these cases are intuitively correct. The vast majority of the citizens of the UK and USA are liable for harms suffered as a result of the 2003 invasion, whereas the vast majority of Iraqi citizens are not liable for harms suffered by Kuwaitis in 1990.

7.4 Burdening the Liable Citizens' Government

I will now make some suggestions about how the agents of reparation should act under non-ideal conditions. These agents might be an international institution (such as the International Court of Justice) and the government of the liable citizens. The international institution may impose a reparative burden on the government, and the government will then be tasked with deciding how the reparative burden will fall on its citizens. I cannot defend my suggestions at length, but hope they will demonstrate how the individualist moral responsibility-based account of liability, can guide the actions of the agents of reparation in certain non-ideal conditions.

The moral responsibility-based account of liability is based on the ideal of a fair distribution of harm. When there is an epistemic deficit, and we cannot identify with sufficient certainty which persons caused the harm in question, it is fair to shift the burden of proof to the persons who culpably caused these non-ideal epistemic conditions. There is an important question, however, about how costs should be distributed between those who are culpably morally responsible for the epistemic deficit. I cannot defend a full account here, but I will make some suggestions that are inspired by ideas found in literature on the distribution of costs in tort-law cases where there is insufficiently conclusive probabilistic evidence about the causes of harm.³⁶

In tort law, if there are multiple parties that could have caused the harm, costs are often assigned in accordance with the probability that each individual caused the harm. Similarly, an important factor when it comes to the moral liability of an individual who is also culpably morally responsible for the epistemic deficit is the probability that her action contributed to the

³⁶ Richard Wright discusses the idea of probabilistic causation and risk-creation and its consistency with Tort law's requirement of actual causation (Section 3, pp.1826-1813, Wright, 1975). See also Thomson's *Remarks on Causation and Liability* (1986, Ch.3) for further discussion of Tort Law's treatment of cases where we do not know which negligent agent actually caused the harm needing repair.

impermissible harm which the epistemic deficit threatens to sustain. This will, in part, determine what harms it would be narrowly proportionate to impose on her. We do not know, for certain, whether she caused the impermissible harm. But she lacks a moral complaint against being burdened in this manner because she is culpably morally responsible for the deficit. She does not have a legitimate complaint if she is subjected to a particular burden on the basis of probabilistic estimates and generalisations about citizens' probable liabilities.

Here, then, is how I suggest reparations should proceed. The external agent of reparation (usually, the International Court of Justice) should begin by aggregating the costs of repairing the impermissible harm. It should make a judgement about the approximate liabilities of the citizens. It should consider the types of potential but-for contributions citizens might have made to the harms, such as paying taxes, voting for a government, producing munitions, and so on. It should categorise citizens based on types of causal contributions. The external agent of reparation, should then consider what excuses are likely to apply to citizens in each category, and the probability that a citizen in each category caused impermissible harms. It can then determine what percentage of wealth a citizen in each category should pay. Like cases should be treated alike, differential treatment must be justified. It should then impose an appropriately sized aggregate burden on the government – a burden equivalent to the sum decided in the first step – and suggest how it should be distributed between the categories of citizens. The liable citizens' government should go to reasonable lengths to determine whether certain citizens should be exempted from liability altogether – for example, those who went to reasonable lengths to minimise the risk of their contributory actions causing impermissible harm. It can then be left to the individual citizens to dispute their individual categorisations, and the contributions demanded of each category. The government might implement mechanisms for citizens to seek exemptions.³⁷

³⁷ The costs involved in this process might be sufficiently high as to justify not establishing them at all. The state's ability to uphold its citizens' rights might be hindered by this expense. This might outweigh the wrong done to citizens who are wrongfully burdened.

The suggestions just made should help the individualist moral responsibility-based account of liability to appear capable of providing a practically feasible and morally justifiable set of principles that can guide the distribution of costs created by unjust state actions under non-ideal epistemic conditions. One important feature of this account is the idea that the total costs are aggregated and imposed on the liable citizens' government. The government is then tasked with imposing these costs on individual persons. The external agent of reparation, perhaps the International Court of Justice, is not required to impose costs directly on the liable individuals. It does not, in Pasternak's words, 'pierce the veil of the state' (2013, p.365). It does, however, stipulate that there is an ideally just way of the state distributing the costs, and this is determined by facts about each individual's involvement in the production of the impermissible harms.³⁸ By imposing the burden in this collectivised manner, however, there is a risk that the government will not impose an ideally just distribution of the costs.

What if it is reasonably foreseeable that the government of the liable citizens will distribute their burdens in an unjust manner? It might impose the burden equally when there is strong evidence to suggest that not all citizens are equally liable, or it will fail to exempt clearly non-liable persons. The costs of imposing a fair distribution via international law might outweigh the benefits of doing so. The value of having the government discharge the burden without needing to be coerced or sanctioned, even if it distributes it in an unjust manner, might outweigh the wrong done to certain citizens. In the next section I will consider what implications this possibility has for the permissibility of the practice.

7.5 Collectivised Reparative Burdens

The individualist account of liability I endorse is compatible with 'collectivised burdens'. It does not, however, conceive of the state as a corporate moral agent, rather just a set of institutions upheld by the citizens' collective action. Demands for reparation to the liable citizens from victims (or the enforcers of their rights) are addressed to their government, which is tasked with imposing

³⁸ It does not justify giving states the kind of discretion over the distribution of costs among citizens that Pasternak wants her account to justify giving them (2013).

the burdens on the citizens. These burdens will, in this way, be ‘collectivised’: the burden is initially addressed to the government, who then impose it on the citizens. It will be left to its government to coercively extract resources from liable citizens.

Why so? Because a collectivised reparative burden respects the sovereignty and territorial integrity of the state. Things will almost certainly go better if the liable citizens’ government voluntarily complies with the external agents’ reparative demands. Attempts to force the government’s compliance could involve sanction regimes, or even military action taken to forcibly secure the resources owed. These methods could cause harm to non-liable persons, delay repairs, and damage international relations between peoples. If the only option were to force the government’s compliance, or to bypass it entirely, then it might be better to drop the case and allow the liable individuals to escape without being made to bear the costs of repairing the impermissible harms.

There is a risk of the government distributing the burden in an unjust manner. If the government imposed all of the costs on a select group of citizens, for example, and in doing so deprived them of the means to fulfil their basic rights, the external agent of reparation has good reason to retract its demands for reparation. We might think, however, that the value of securing the willing cooperation of the liable citizens’ government gives us reason to tolerate some unjust distributions. A difficult question thus arises: how unjust may a distribution be, while still being better than no reparation at all? These judgements are inevitably context-sensitive. But the individualist moral responsibility-based account of liability can, I believe, give some guidance.

Specifically, I will argue that, in some cases, citizens wrongfully burdened by their government will have a duty to bear that wrongful burden. This is the case when the wrongful burden satisfies the Narrow Proportionality Principle. Imagine the following example:

Trapdoor: X, Y, and Z have tied V to a track and released a heavy, slow moving truck that will roll down the track and kill V. X, Y, Z are each (but-for) causes of the threat. The three of them take up a position on a bridge overlooking the track. Bystander, D, notices that X, Y, and Z are all standing upon the door to a chute. D is standing next to the button that opens the chute. If D presses the button, X, Y and Z will each fall on to the track below. This will result in each of them breaking both legs but the trolley will

stop. X and Y realise that by cooperating they can support each other above the chute to ensure that only Z will drop down. This will result in Z being paralysed, but will avert the lethal threat to V.

It is intuitively permissible for D to press the button even though it is reasonably foreseeable that X and Y will cooperate to unfairly burden Z. This is because the harm to Z is narrowly proportionate. Had Z been the only one on the bridge then it would have been permissible to drop him in front of the trolley, even if it killed him. D does not act impermissibly by pressing the button, but X and Y do when cooperating to subject Z to an unfair share of the preventative harm. It would be permissible for Z, if possible, to coercively compel X and Y to bear a fair share. It would not be permissible, however, for Z to avoid bearing the unfair share if doing so would result in V being harmed.³⁹

D must work with the reparative options available to him. D can only save X if he opens the chute and subjects Z to the risk of being made to bear an unfair share of preventative harm. I suggest, then, that Z's rights are violated by X and Y, who subject Z to an unfair share of preventative harm. But Z has a duty, owed to V, to shoulder these narrowly proportionate costs. Z could only permissibly defend herself against the unfair share by transferring shares of the preventative harm to either X, or Y, or both. Z could not permissibly defend herself by imposing harm on D or V. V and D should not have to bear any of the harm when the harms suffered by Z are narrowly proportionate. Z cannot permissibly evade this share of the harm, except by shifting it to X and Y.

This example is informative for our thinking about collectivised burdens. Where the agent of reparation (in this example, D) imposes a burden on liable citizens' government (in the example, X and Y, who control the distribution amongst the X-Y-Z group), and the government distributes that burden in an unjust manner (in the example, by paralysing Z), it is permissible for the agent of reparation to continue demanding reparation from the government, as long as the unfair shares are still narrowly proportionate. Z's rights are violated by X

³⁹ If, however, Z was made to bear a narrowly disproportionate burden, Z could justifiably avoid the disproportionate element of the harm (if practically possible), even if this means that V will suffer impermissible harm.

and Y in this case. Z has a right that they bear a fair share. D, however, does not wrong Z at all. The right that X and Y violate does not impose a duty on D.

However, if the citizens are subjected to unjust and narrowly *disproportionate* burdens, this gives the external agent of reparation reasons to reconsider whether to cease demanding reparation, or to pursue more coercive measures. When citizens are subjected to narrowly disproportionate burdens, the external agent of reparation can still be permitted to impose a collectivised burden. This is the case when the wrongful harm suffered by the citizens is sufficiently outweighed by the beneficial consequences of reparations being paid and the government voluntarily cooperating with reparative demands. The citizens in power are violating their co-citizens' rights, and the external agent of reparation is infringing them. If there were some practical way for the citizens to avoid the disproportionate share of their burdens they would do no wrong.

The external agent can claim that it hopes that the government will treat its citizens justly, but it is a reasonably foreseeable side-effect of burdening the government that some citizens will be treated unjustly by their government. As the number of liable persons being subjected to narrowly disproportionate shares increases, or even non-liable persons being subjected to burdens, then the external agent has increasingly strong reasons to cease its reparative demands. At some point the wrongful harms suffered at the hands of the government will be so high as to render the external agent of reparation's decision to impose a collectivised burden widely-disproportionate and unjust.

The discussion in this section and the preceding sections will, I believe, show that the moral responsibility-based account of liability can yield intuitively compelling conclusions. It can justify the imposition of reparative burdens on governments, even when the evidence available leaves us far from certain about which citizens are morally responsible for the impermissible harms and the degree of their moral responsibility. The agents of reparation ought to treat individuals fairly, and only impose unequal burdens on citizens when there are good morally relevant reasons for doing so. However, the prospect of the government of the liable citizens not implementing an ideally fair procedure does not mean that the external agent must cease its reparative demands or pursue more coercive measures. This can make it permissible to impose

collectivised burdens, even when they are distributed in an unjust manner, and leave it to the state's citizens to resolve disagreements about its distribution.

7.6 Conclusion

The individualist moral responsibility-based account of liability can justify imposing the costs of repairing harms caused during the 2003 invasion of Iraq on the governments of the USA and UK (and, for that matter, most other states that participated in the invasion). This is because the vast majority of the citizens of those states can be blamed for causally contributing to the epistemic deficit that means we cannot identify which of them causally contributed to the impermissible harms and which did not. Neither state could have provided its combatants with the opportunity to cause impermissible harm if was not for the tax-contributions made by their citizens. For example, building and buying war-ships, aircraft, munitions, tanks, guns, paying combatants, and so on. Not all of the citizens' tax-contributions will have given rise to the opportunity to cause impermissible harm. But the way the institutions of the state function means that we will never know which citizens did create those opportunities.

In 7.2 I argued that citizens can be liable for the harms caused by unjust state actions because they contribute the taxes that enable the state to cause harm. I defended this claim against two objections, the Justified Action Objection and the Coercion Excuses Objection. The former holds that an individual cannot be liable on the basis of objectively justified action, and citizens are objectively justified in paying their taxes when the vast majority of their taxes are being used for the upkeep of their co-citizens' basic rights. The latter holds that the citizens are non-liable because they cannot be blamed for paying taxes, and they cannot be blamed for paying taxes because the taxes are coercively extracted. These objections are defeated by acknowledging that the citizens in liberal democracies have reasonable opportunities to minimise the risk of their tax contributions causing impermissible harm. I have argued that a citizen fails to go to these lengths, (a) violates the Necessity Principle, and therefore her harmful actions are not objectively justified, (b) undermines any claim she might make about how the harms were merely an unintended consequence of an action intended to bring about much greater good, and (c) any claim she make about how she wishes she had not caused the unjust harms to occur. As

her omission violates the necessity principle, suggests she intended the harm, and exhibits indifference to being its cause, she can be blamed for causing it.

In anticipation of an obvious objection, in 7.3 I reintroduced the LEDP. The obvious objection would hold that we can never know with sufficient certainty which citizens' tax-contributions actually causally contributed to unjust harm. The LEDP, however, allows us to assign liability on the basis of citizens' culpable moral responsibility for the epistemic deficit. When citizens pay their taxes, they risk causing impermissible harm and also contribute to the epistemic deficit that obscures the causal nexus of any such impermissible harm. I have argued that citizens who fail to act upon their duty to take advantage of reasonable opportunities to minimise the risk of their taxes causing impermissible harm are culpably morally responsible for any impermissible harms they happen to cause and the epistemic deficit that threatens to facilitate or sustain the harms.

The arguments in this chapter have completed my defence of the individualist account of moral responsibility-based liability. At the start of the thesis I introduced five arguments that are made against accounts like mine and I have now responded to all of them in a way that can help me to provide intuitively compelling answers to the question of whether a particular set of citizens should pay for the costs of their state's unjust actions. First, in Chapter 2 I demonstrated that there are almost certainly no overdetermined harms, there is just an appearance of overdetermination, and this reflects an epistemic deficit. This rejected the No Causal Connection argument. Whenever there is an unjust state action, it is caused by individuals, and it is not overdetermined.

Second, the Liability for Epistemic Deficit Principle (LEDP) was constructed in order to provide intuitively compelling conclusions in cases where there are epistemic deficits. The Epistemic Deficit argument holds that epistemic deficits will often prevent us identifying all, or perhaps any, of the individuals who causally contributed to an incidence of impermissible harm resulting from an unjust state action. The LEDP allows us to assign liability to individuals who culpably caused the epistemic deficit. This enables my account to overcome the problems posed by epistemic deficits in cases where individuals are culpably morally responsible for the deficit.

Third, the Diminished Moral Responsibility argument holds that the degree of citizens' liabilities will be diminished by excuses that partially, and often fully, absolve them of blame for causally contributing to impermissible harms. Their taxes are coercively extracted and in liberal democracies citizens have a duty to pay their taxes. The arguments in 7.2 rejected these claims. In short, the citizens can be blamed for the harms when they omit to act upon their duty to go to reasonable lengths to prevent their actions causing unjust harm. The citizens who are derelict in this duty are to blame to some extent for the harms. A small degree of culpability can render us liable to quite a large level of cost.⁴⁰

Fourth, my account is likely to implicate many more citizens than I expect critics of an individualist moral responsibility-based account might have otherwise expected. In 3.5 I argued that there will be a complex web of causal connections obtaining between individuals in large-scale collective action. The problem, of course, is not being able to identify them. I believe that the LEDP can do a lot of work here. It can implicate all the individuals who performed actions that might have contributed to the harmful outcome of the collective action when the causal consequences of their contributory action are obscured. As such, my account should help us to overcome the Insufficient Funds objection, because it will implicate a very large the number of citizens. As the Collectivisation Strategy also needs to explain why individual citizens can be burdened in order to discharge their state's liability-duties, I imagine there will not be much difference in the numbers of citizens that either can justify burdening. Importantly, however, as I have argued, proponents of the Collectivisation Strategy are yet to provide us with an adequate account of when a state, qua corporate agent, can justifiably impose its burdens on citizens.

Fifth, the Membership Argument appealed to one of the central intuitions behind the Collectivisation Strategy. This is the intuition that sometimes it seems right that non-liable group members bear the costs of repairing harms that some of other members have caused. Whilst this may seem intuitive, the arguments in Chapters 4, 5, and 6, have shown that attempts to provide a

⁴⁰ McMahan, for example, claims that "fairly minimal forms of responsibility for an unjust war may render civilians liable to contribute to the payment of reparations to the victims of their country's harms" (McMahan, 2009, p.219)

theoretical rationale for this intuition are found wanting. As such, the individualist account of moral responsibility-based liability provides us with the strongest account of when citizens should pay for the costs of their state's unjust actions.

In Section 7.4 I presented some ideas about appropriate ways for the agents of reparation to distribute cost under non-ideal epistemic conditions. The purpose of this was to demonstrate that the individualist account of moral responsibility-based liability can provide us with guidance in these cases. In 7.5 I considered how this account is consistent with imposing collectivised burdens on states, and the problems posed by governments that do not implement an ideally just distribution of costs. I believe the discussion in these last two sections will go some way to dismissing doubts about whether the account can offer any practical guidance in non-ideal conditions.

8 Conclusion

In Chapter 7, I demonstrated how the individualist account of moral responsibility-based liability can provide intuitively compelling conclusions regarding the distribution of the costs of repairing harms caused by unjust state actions. I argued that citizens can be liable on the basis of their tax-contributions. I rejected three objections to this controversial claim. It might be objected that (a) taxes are coercively extracted, (b) the citizens are morally justified in paying their taxes, and (c) it is impossible to trace any causal connection between an individual's actions and impermissible harms. I argued that citizens who fail to act upon a duty to go to reasonable lengths to prevent their tax-contributions causing impermissible harm are culpably morally responsible for any harm their contributions cause, and for the epistemic deficit that obscures morally relevant facts about the causal consequences of citizens' tax-contributions. I appealed to the LEDP in support of this argument. I then demonstrated how my account can provide guidance to agents of reparation in non-ideal epistemic conditions, and to an international authority imposing reparative demands on the government of liable individuals, when their government is not implementing an ideally just distribution of costs. Ultimately, the account I have developed provides theoretically and intuitively compelling answers in cases of harmful unjust state actions, and can guide the actions of agents distributing the costs of repairing those impermissible harms.

In this conclusion I will bring together the various arguments I have made in the earlier chapters and draw out their implications for the question I began with – should citizens pay for the costs of their state's unjust actions? Many people share intuitions about particular cases, but theorists disagree about what principles can best explain their intuitions. For example, it seems intuitively correct to say that the vast majority of the citizens of the UK and USA should pay for the costs of the 2003 invasion of Iraq, whereas the citizens of France and Germany should not pay for the costs of that invasion. Many also believe that the citizens of Iraq are wronged by being made to pay for the costs of the Hussein regime's invasion of Kuwait in 1990. I share these intuitions, and I have constructed principles that tell us *when* citizens should pay for the costs of their state's unjust actions and supported these with arguments that explain *why*.

Theorists seeking to explain whether the citizens of a particular state should pay for the costs of its unjust actions will endorse either an individualist account of liability or a corporate account of liability. In this thesis I have not rejected the Corporate Liability Premise – instead I have (1), rejected its proponents’ attempts to justify a state, *qua* corporate agent, imposing shares of its liability-burdens on individual citizens, and (2), defended an intuitively and theoretically compelling individualist account of liability. This account does not conceive of the state as a corporate moral agent, but instead a set of political institutions which exist and function because of the contributory actions of individual citizens. My account extends ideas found within the literature on individual liability to self-defensive harm, and revisionist just-war-theory, providing an intuitively compelling alternative to accounts that endorse the Corporate Liability Premise. Providing a robust individualist account of moral responsibility-based liability, which can be applied to cases of unjust state action, is one of the main contributions this thesis makes to the relevant literature. Within this account there are other significant contributions. For example, I have provided a novel way of dealing with overdetermination cases. This recasts any allegation of overdetermination as an epistemic deficit. The arguments in support of the LEDP are also an important contribution. It enables proponents of the individualist account of moral responsibility-based liability to provide intuitively compelling conclusions in relevant cases. My arguments against others’ attempts to justify a state, *qua* corporate agent, imposing shares of its burdens on its citizens have also set a challenge for the proponents of the Collectivisation Strategy. I will now run through the separate arguments I have made throughout this thesis, highlighting the important connections between each of them, and demonstrating their value.

8.1 My Argument

In Chapter 2, I defended my individualist account against claims that it cannot deliver intuitively compelling conclusions in alleged overdetermination cases. I call this the No Causal Connection argument. It holds that sometimes a harm caused by a collective action is overdetermined in the sense that no individual participant in the collective action is causally responsible for the harm. This argument can be used to reject the moral responsibility-based account of

liability in favour of either an account of liability that eschews the causal responsibility requirement, or one that endorses the Corporate Liability Premise. First, I endorsed McMahan's reasons for rejecting an individualist account of liability that eschews the causal responsibility requirement. I then provided a novel response to the No Causal Connection argument. I argued that there are almost certainly no cases of causal overdetermination. An impression of causal overdetermination reflects an epistemic deficit. We are simply incapable of determining who caused the impermissible harm. But this threatens to leave us with nobody to hold liable for the impermissible harm. The Epistemic Deficit argument holds that the individualist account of moral responsibility-based liability will be rendered useless in cases where certain evidence is obscured.

I then argued that when an individual is culpably morally responsible for the epistemic deficit that denies the subject of an impermissible threat or harm access to permissible defensive measures, she renders herself liable to proportionate harm necessary for the prevention or repair of the harm the epistemic deficit threatens to facilitate or sustain. This is the basis of the Liability for Epistemic Deficit Principle (LEDP). This principle enables my individualist account of liability to deliver intuitively compelling conclusions in overdetermination cases. My account recasts overdetermination cases as epistemic deficits, and then grounds the attackers' liability in their culpable moral responsibility for the epistemic deficit that prevents access to permissible defensive measures. The LEDP provides me with a response to the Epistemic Deficit argument and the No Causal Connection argument.

Critics of my account might accept what has been said about the necessity of causal responsibility for liability, and the ability of the moral responsibility-based account to deal with overdetermination cases and epistemic deficits. But there are further arguments that they might make, which I have repudiated throughout this thesis. In Chapter 3 I introduced and developed three more of these arguments. First, the Diminished Moral Responsibility argument holds that when the citizens of a state have excuses for contributing to the unjust state action, the degree of their moral responsibility will be diminished, and therefore so too the degree of their liability. It might be diminished to such an

extent that their combined liabilities will not cover the full costs (or any) of the harms they have caused. Second, the Membership Argument appeals to the intuition that members of a group should bear the costs of their co-members' actions even when they are not liable for them. Third, the Insufficient Funds argument holds that the liable citizens might simply lack the resources needed to repair the harms they have caused. These three arguments can be seen to support the Collectivisation Strategy. If some members of a group cause harm in pursuit of the group's ends, but have excuses for causing the harm, consequently their combined liability will not justify imposing on them the full costs of repairing the harm they have caused. Alternatively, the individuals who cause the harm in pursuit of the group's ends might be liable for the full costs of repair but simply lack the funds needed to cover the costs. The Collectivisation Strategy, however, claims that a corporate agent can be attributed moral responsibility for the harms caused by its members, and assigned liability for the full costs of its repair. A proponent of the individualist account might counter this and claim that a corporate agent cannot bear burdens without burdening individuals. But the Membership Argument holds that sometimes it seems intuitively correct that the members of a collective action should bear the costs of repairing harms they are not liable for. This is when the harms are caused by other members' contributions to their collective action. The individualist account of moral responsibility cannot explain why the non-liable members can be made to bear the costs of other members' contributory actions, but proponents of the Collectivisation Strategy claim they can. In Chapter 4 and Chapter 6 I rejected two of these attempted explanations.

Having detailed these three arguments against the individualist account of moral responsibility-based liability, and how they provide support for the Collectivisation Strategy, I then considered what the proponents of either framework must do in order to provide an intuitively and theoretically compelling explanation of when citizens should pay for the costs of their state's unjust actions. The proponents of the Collectivisation Strategy need to tell us when and why a state, qua corporate agent, is justified in imposing burdens on its citizens as a means to discharging its own duties. I argued that this explanation cannot appeal to a liability-duty. It must appeal to a duty grounded in facts about an individual's relationship with the liable corporate

agent. But if such a duty exists in the case of citizens and their liable state, the problems besieging the individualist account can be sidestepped. The citizens' duties to their state could be of such a type that whether the citizens are morally responsible for causing the impermissible harm for which the state is liable, and to what degree, is irrelevant to the grounds and demandingness of their duties. The state will be permitted to impose shares of its liability-burdens on citizens who are not liable for the harm themselves, and possibly impose a greater burden on the citizens who are liable for the harm than what their liability permits. This would assuage the worries of proponents of the three arguments made against the individualist moral-responsibility-based account.

As for my individualist account, I provided the beginnings of my response to the objections detailed earlier in Chapter 3. I believe opponents of individualist moral responsibility-based accounts fail to appreciate the extent of the causal connections that obtain between the actions of participants in a collective action. In large scale collective actions there will often be a large number of individuals who causally contribute in some indirect way to the actions of individuals who directly perpetrate harm. These causal connections will, however, be obscured. They will be obscured by the actions of other participants. The LEDP, however, gives us grounds for holding participants liable without establishing whether they culpably caused the harm. It is sufficient that they culpably caused the epistemic deficit. As such, a potentially large number of participants can be held liable for the costs of repairing the harm.

I cannot entirely dismiss the three arguments against my account that I detailed in Chapter 3, I can only give reasons why I think my account is not as vulnerable to them as we might have otherwise believed. I conceded that there will still be cases where the full costs of repairing harms caused by the contributory actions of participants in a collective action cannot be justifiably imposed on the individuals who caused the harm. I have suggested, however, that we might also endorse an account of capacity-based duties to repair harm. These hold that if an agent is capable of repairing a severe harm without incurring unreasonable cost then he/she has a duty to do so. If these duties exist, then when participants in a collective action cause harm, the fact that

they cannot be justifiably burdened with the full costs of repair does not necessarily mean that nobody has a duty to bear the costs. Nevertheless, there might still be cases where the persons who caused the harm cannot be justifiably burdened with the full costs of repair, and nobody else has an enforceable duty to repair the harm because the harms are not especially acute. The fact the harms are not especially acute means we should be less concerned.

I postponed the application of my account to cases of unjust state action until Chapter 7. Before doing this I wanted to reject the alternative explanations of citizens' duties to contribute to the repair of harms caused by unjust state actions. In Chapter 4 and Chapter 6 I rejected different attempts at combining the Corporate Liability Premise with an explanation of the permissibility of a state, qua corporate agent, imposing shares of its burdens on its citizens. First, Chapter 4 considered Avia Pasternak's account. This relies on the fact that the citizens exercise some control over their citizenship status. It is a quasi-voluntarist account. Pasternak appeals to Kutz's notion of intentional participation, arguing that citizens who do not exercise reasonable opportunities to reject their citizenship status are intentional members. Intentional members incur a duty to shoulder a share of their state's liability-burdens. In order to avoid this duty, the citizens should reject their citizenship status, even at some personal cost. I argued that because the citizens will incur costs when rejecting their citizenship status, the consequences of their choice between two costly options does not justify those who do not reject their citizenship being burdened with a share of the state's liability burdens. The citizens' choice not to reject their citizenship status is taken as justification for the state imposing its burdens, but I claim that the forced choice needs to be justified in the first place for this account to work. The account also yields some counterintuitive implications that give us reasons to doubt its viability.

In my discussion of Pasternak's account, I drew a distinction between two different accounts of individuals' duties to contribute to the repair of impermissible harms caused by the contributory actions of participants in a collective action. Both of these can be seen in the work of Christopher Kutz. I argued that the Membership Account must be endorsed by Pasternak if she wants to retain certain key features of her account. The Complicity Account,

on the other hand, presents an individualist alternative to my moral responsibility-based account. If it is viable, it might provide a stronger response to the arguments made against my individualist account.

The Complicity Account would hold that *all* citizens who intentionally participate in their state's activities are inclusive authors of impermissible harms resulting from an unjust state action. As inclusive authors they are each liable for the impermissible harms. This would satisfy the intuitions of those who endorse the Membership Argument and the Insufficient Funds argument. It eschews the causal connection requirement so it avoids the No Causal Connection argument. The fact that we need not trace a causal connection between a citizen's liability-grounding action and the impermissible harms means it will avoid the Epistemic Deficit argument, provided we can establish the fact of an individual's intentional participation. I argued that it is still vulnerable to the Diminished Moral Responsibility argument, because surely an individual's excuses for intentionally participating in the collective action should diminish the degree of their liability. However, the fact that it could implicate more individuals than the moral responsibility-based account means it could still perhaps do a better job at avoiding liability-shortfalls than my account. In Chapter 5, however, I rejected the Complicity Account.

In Chapter 5, I outlined Kutz's notion of inclusive authorship and Saba Bazargan's use of this Kutzian idea to construct an account of complicitous liability to preventative harm. I rejected Kutz's account because (a) he fails to give us a real idea of what it means to inclusively author something, and (b) his account of how to differentiate between different degrees of inclusive authorship is internally incoherent. I then rejected Bazargan's account because (a) like Kutz he fails to provide an adequate account of inclusive authorship, (b) it yields counterintuitive implications in certain relevant cases, and (c) does not provide sufficient reasons for thinking that those implications are correct rather than undermining his account. The problems with Kutz's and Bazargan's accounts give us good reason to reject the viability of any Complicity Account.

In Chapter 6 I rejected Stilz's Democratic Authorisation Principle. Her account utilises non-voluntarist ideas about political obligations as a way of explaining

why citizens have a duty to shoulder a share of their liable state's burdens. I argued that Stilz' account cannot show why the state is justified in burdening its citizens, and that it only shows when the citizens have an obligation to obey its (potentially unjustified) laws. I argued that Stilz's account elides the distinction between matters of justice and matters of legitimacy. I also constructed a stronger account out of her premises. This account invokes duties of justice that require non-liable citizens to shoulder a share of the costs that their co-citizens have rendered themselves liable to when contributing to unjust state actions. This alternative account, however, will only be capable of explaining citizens' duties in few (if any) real world cases and it relies on a claim that I think we should avoid making. This is the claim that blameless moral responsibility for a harm is sufficient to ground for liability for its repair.

Finally, in Chapter 7, having considered three alternative explanations of individuals' duties to bear the costs of unjust state actions, and rejected each of these, I then demonstrated that my individualist account of moral responsibility-based liability can provide an intuitively and theoretically compelling explanation. I recounted these arguments at the beginning of this chapter so will only do so very briefly here. The key to completing the defence of my account was overcoming the Diminished Moral Responsibility argument. This is because the most common contribution that citizens make to unjust state action is through their tax-contributions. But there are two significant objections to any attempt to ground liability in tax-contributions. First, citizens are justified in paying their taxes. Second, citizens cannot be blamed for paying taxes because they are coercively extracted. I argued that where citizens have reasonable opportunities to minimise the risk of their taxes causing impermissible harm they have a duty to do so. Being derelict in this duty deprives their action of objective justification and makes it appropriate to blame them for the harms they caused. I then drew on the LEDP in order to overcome an objection which appeals to the fact that we lack access to evidence about the causal consequences of individual citizens' tax contributions.

Over the course of this thesis, I have demonstrated how my individualist account can overcome the five different counter-arguments I identified in

Chapter 1, and in a way that provides compelling answers to the question of whether citizens should pay for the costs of their state's unjust actions. The arguments in Chapter 2 dealt with the (1) No Causal Connection and (2) Epistemic Deficits argument. The arguments put forward in Chapter 7 responded to the (3) Diminished Moral Responsibility argument. If these arguments succeed, then when a liberal democratic state such as the UK or USA acts unjustly, then a large number of its citizens will be permissible targets of reparative burdens. An intuitive implication of my account is that those who went to reasonable lengths to protest their state's unjust actions would not be liable to reparative burdens. The vast majority of citizens in the UK and USA have not done this. The fact that the vast majority of citizens are liable should assuage the worries of proponents of the (4) Insufficient Funds argument. It does not explain why citizens should bear the costs of harms for which they are not liable – which the (5) Membership Argument suggest – but (a) I have rejected the strongest accounts (Pasternak's and Stilz's) of non-liable citizens' duties to bear the costs of harms caused by their co-citizens, and (b) if the number of citizens implicated is sufficient to cover the costs of repair then this will diminish the incentive to find a way of justifying the burdening non-liable citizens.

8.2 Further Implications

My individualist account can be used to assess practices that have not been considered in this thesis. For example, debates about the morality of sanction regimes, like those imposed on Iraq when under the rule of Saddam Hussein. Sanctions regimes restrict the liberty of individual citizens in an attempt to cause a change in the behaviour of their state institutions. This can, in theory, serve an important preventative function by incentivising the citizens of the state to seek to change its threatening policies. It is morally problematic, however, when the state's citizens, whose actions sustain the state and enable the government to threaten harm, lack reasonable opportunities to stop contributing or to change their government's intentions. I suspect my account will provide reasons against burdening the citizens of illiberal regimes as a means to pressuring them in to pushing for change. This is for two reasons. First they will not be culpably morally responsible for their government's

choices because they lack reasonable opportunities to influence its policies, and second, the absence of these opportunities will mean sanctions are even less likely to achieve desired results.

My individualist moral responsibility-based account can potentially contribute to discussions about duties to alleviate climate change or global poverty. There is growing literature discussing the idea that by causally contributing to severe deprivation individuals will incur duties to alleviate it (Barry, 2005; Pogge, 2002). These contributions can be made, for example, by consuming products produced in supply chains that sustain poverty, and by upholding a government that participates in the shaping of international laws and institutions that sustain and permit these practices. I believe my account can make a valuable contribution to the literature on this issue. It can do this by clarifying the reasons why contributing to severe deprivations generates a duty to alleviate them. My account holds that an individual incurs a duty to contribute to the repair of harm when she is culpably morally responsible for doing so. I believe that individuals are regularly culpably morally responsible for contributing to severe deprivations, by participating in supply chains that sustain poverty and engaging activities that contribute to climate change, and then not going to reasonable lengths to attempt to influence their government's policies. Their government is an agent capable of minimising the risk of their actions causing impermissible harm.

8.3 Conclusion

The main contribution this thesis makes is a robust defence of an individualist account of liability that provide intuitively and theoretically compelling explanations of citizens' duties to bear the costs of their state's unjust actions. Avia Pasternak, citing David Miller, says "a core guiding principle in matters of distributing collective responsibility is that 'as far as possible, we want people to be able to control what benefits and burdens they receive'" (Miller, 2004, p.245 cited in Pasternak, 2013, p.367). My individualist account maintains a commitment to this ideal. It only holds individuals liable for harms when there was reasonable opportunity to avoid being liable. This account extends many widely-accepted ideas about moral responsibility and liability, which have been refined and defended in debates about liability to defensive harm and the ethics

of war, to the question of whether a particular set of citizens should pay for the costs of their state's unjust actions. It holds that the citizens are liable for impermissible harms when they are culpably morally responsible for causing the harms, or an epistemic deficit that threatens to facilitate or sustain the harm. Their individual liability explains the permissibility of their government burdening them with proportionate burdens necessary for repairing the harm.

In this chapter I have brought together the various arguments I have made throughout the thesis in support of my favoured account and against alternative accounts. I have shown the various steps of my defence of the individualist account of moral responsibility-based liability, defending it against the five arguments identified in the Chapter 1. It can, I have argued, demonstrate why the vast majority of the citizens of the UK and USA can be permissibly burdened with the costs of repairing the impermissible harms that have resulted from the 2003 invasion of Iraq. On the other hand, it can explain why the vast majority of Iraqi citizens have been wronged by being made to bear the costs of the 1990 invasion of Kuwait. The vast majority of the citizens of the UK and USA did not fulfil their duty to minimise the risk of their contributory actions causing impermissible harm. This duty is discharged by taking reasonable steps to influence government policy. By failing to discharge this duty the citizens bear some degree of culpability for the harms caused. The citizens of Iraq, however, had no such duty because there were not reasonable opportunities to influence their government's policies. Even if they causally contributed to harm suffered during the invasion of Kuwait, they are not culpably morally responsible for them and are therefore non-labile. The alternative accounts that I have considered and rejected all failed to justify the imposition of reparative burdens on the citizens of states liable for unjust harm.

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