

Resolving the Responsibility Dilemma

Recent work on the morality of war has unsettled the accepted version of just warfare theory for this domain. This accepted doctrine is a synthesis of traditional just war theory and twentieth-century international human rights views on wars of aggression and humanitarian intervention.¹ Its key thesis is that independently of the moral merits of the cause for which one fights, a combatant who fights for her country in a declared war is morally entitled to aim fire at enemy combatants, forbidden to aim fire at noncombatants, and required to refrain from military activity that would impose disproportionate unintended side effect damage on noncombatants.

The unsettling move denies that combatants fighting an unjust war have any right to kill enemy combatants opposing their efforts. In just the same way, individuals engaged in armed robbery have no moral right to fight back against others who oppose the robbers' efforts with lethal force (provided that this is necessary to stop the robbers).

The standard-bearer for this revisionary just war theory is Jeff McMahan.² In a nutshell, McMahan's view is that each individual has a moral right not to be killed, but one can partly forfeit this right and render oneself liable to justifiable attack. Someone who is a mere bystander to a conflict is not liable to be killed even if his death would serve our purposes in the conflict. One becomes liable to justifiable lethal attack by being responsible for an injustice or unjust threat that is sufficiently bad that killing, if necessary to block the threat or eliminate the injustice, is warranted. To be responsible here does not require being morally culpable or blameworthy. The responsibility that triggers liability obtains when an individual voluntarily does an act that foreseeably causally contributes significantly to the posing of the threat or maintenance of the injustice. Let us say that those who pass this test for liability to permissible attack are *agent responsible* for perpetrating injustice.

1.

The revisionary just war theory has attracted many criticisms. One concern is that this doctrine has implications for conduct and policy that collide with some of our strongest convictions about morally permissible conduct in war. Seth Lazar has pressed this concern in the form of a dilemma.³ We intuitively firmly believe that it is acceptable for combatants to shoot at combatants and morally forbidden for combatants to aim their fire at noncombatants. Revisionary just war theory as presented by McMahan has trouble vindicating this firm conviction. On the one hand, it is not clear that combatants fighting for an unjust cause are plausibly regarded as forfeiting their normal human right not to be killed on McMahan's account. Soldiers in modern wars standardly can appeal to the excuses of duress and ignorance that block any imputation that they are culpable for fighting for an unjust cause if their cause is indeed unjust. If merely voluntarily making choices that foreseeably contribute to an unjust cause suffices to establish liability to be killed, then if this standard allows the killing of many combatants fighting an unjust war, it equally allows the killing of many noncombatants who in one way or another contribute the same enterprise. On the other hand, if the standard that triggers liability to be killed is raised, so that noncombatants on the side of the country waging an unjust war are deemed morally ineligible targets of those fighting for the just cause, then by the same token that same standard will shelter unjust combatants from liability to morally permissible violence. Either way, revisionary just war theory cannot deliver the verdict

that is the centerpiece of modern moral sensibility regarding war—that it is permissible to aim fire at combatants (when various satisfiable conditions are met) but morally impermissible to aim fire at noncombatants. Lazar concludes that “McMahan must choose between two unpalatable options: either adopt a contingent form of pacifism, or concede that many more noncombatants may be killed than is currently thought defensible.”⁴

In response: The two horns of the responsibility dilemma are not equally sharp. Acceptance of the idea that under modern conditions of war there will be no morally permissible means one can employ to carry out a successful just war effort threatens moral disaster. Under modern conditions there will continue to be massive unjust war campaigns, which if unopposed by effective military force will bring about catastrophic levels of human rights violations. In many such situations nonviolent endeavors will not be an effective substitute for military force. If as a contingent matter morality properly construed demands that we be pacifists in the face of thuggish threats, that would be deeply troubling.⁵

In contrast, the thought that morality does not forbid, or does not categorically and unconditionally forbid, the killing of noncombatants in war might be an implication that reasonable people should accept. The line between combatants and noncombatants does not obviously track deep and compelling moral distinctions, but is rather invented as part of a convention intended to reduce the morally bad consequences that waging war tends to generate. Some historical examples of deliberately aiming fire at noncombatants and civilians are arguably justifiable or at least suggest imaginary variant cases in which targeting noncombatants would be justifiable. Think of terror bombing directed at the inhabitants of German cities in the course of World War II. For an example that is similar in some ways though it does not occur in the context of declared war, think of John Brown’s raid on slaveholding plantation owners and their families in the pre-Civil-War U.S. Perhaps sound moral argument could convince us to give up the idea that deliberately aiming fire at noncombatants in war is always and everywhere morally wrong.

The responsibility dilemma posed by Lazar raises the question, under what conditions is it morally permissible deliberately to aim to inflict violence on a person in the context of war. This essay proposes an answer to this question, or at least a framework for settling it. The proposal in short is that at the fundamental level of moral principle, no version of the distinction between combatant and noncombatant plays a substantial role in determining who is a permissible object of violent attack. The suggestion then is that we should embrace the first horn of Lazar’s dilemma and so deny there is really a dilemma here to be faced at all.

A preliminary clarification is in order. McMahan and Lazar and others discuss when a person is liable to be attacked. A person who is liable to attack has forfeited, to some extent, her deontological moral right not to be the object of deliberate attack. But without doing anything to forfeit one’s rights and without triggering liability to attack, one might still become the object of permissible attack, according to the views under discussion. The moral right not to be harmed might not be regarded as absolute and exceptionless, but as overrideable when the consequences of refraining from doing what the right standardly forbids would be extremely bad. Some would say that up to the limit of disaster or catastrophe, we should honor each individual’s important moral rights not

to be targeted for attack. In other words, according to moderate deontological views, people are inviolable, up to a point.

This essay proposes abandoning this two-tier structure of liability and overrideability. For any moral right not to be treated in certain ways, the right gives way if the ratio of the badness to nonrightholders if the right is not acted against to the badness to rightholders if the right is acted against is sufficiently favorable. This sliding scale is affected by the moral praiseworthiness and blameworthiness of the persons our rights-respecting or rights-infringing action would affect, so that the more morally culpable an individual is with respect to the situation in question, the less tilted the balance of consequences needs to be in order that acting against her right be morally justified.

2.

In order to make progress in deciding whether a huge moral gulf separates the action of aiming fire at noncombatants and that of aiming fire at combatants, we need to look at the notion of a *noncombatant*. It's somewhat hazy. The term suggests that the line is between those actually engaged in combat and those who are not, but this distinction lacks moral significance. Scientists developing weapons for the war effort, political leaders responsible for bringing it about that the nation they lead goes to war, and top administrators coordinating the manufacture and delivery of material the troops need to fight would all qualify as noncombatants on this construal, but all three seem to be morally eligible targets.

G. E. M. Anscombe suggests that the morally relevant line is between soldiers and those who are supplying soldiers with the means of fighting—bullets and munitions—on the one side, and on the other side people who are not doing that, but instead are carrying on activities characteristic of peacetime. So by this test, farmers supplying soldiers with food are not combatants and are protected by the moral shield of noncombatant immunity. The farmers are not aiding the soldiers *qua* soldiers but just *qua* human beings.⁶

If we are seeking moral principles that should govern the conduct of war and also govern the use of violence and threat of violence in other contexts, Anscombe's suggestion should strike us as dubious. Suppose I am the owner of the only gas station for miles, and the famous bank robbers Bonnie and Clyde pull up and want to purchase gas. In the circumstances it is perfectly clear that they need the gas to use their car for a planned armed bank robbery. If I sell them the gas, they will be able to rob a bank and will do so; if I don't sell them gas, their plan will be foiled. Suppose I am operating the gas station from behind a bulletproof counter. I can say No to their request with impunity, but instead I sell them gas. Suppose I know for certain that they will go on a killing spree as they rob the bank, so innocent lives are at stake. I am not aiding the armed robbers *qua* armed robbers; I am aiding them *qua* travelers on the highway, just as if they were peacefully moving along. Nonetheless in this example I am morally speaking complicitous in a murderous armed robbery. Someone who knows all the facts of the story and can only prevent the murders of the innocents at the site of the developing bank robbery by shooting me to prevent me from selling gas to the robbers in these circumstances would be morally justified in doing so.

This argument suggests that we need to accept a wide rather than narrow account of combatant status. At least, those who knowingly act in ways that causally advance the

perpetration of significant injustice to a significant degree should count as combatants.⁷ But even if a reconfigured way of drawing the line between combatant and noncombatant does not agree with the common thought that combatants are soldiers and noncombatants are civilians, this does not gainsay the possibility that according to revisionary just war theory, it is impermissible to target noncombatants for deliberate attack.

3.

In this section I present considerations that support the claim that people who qualify as noncombatants according to any sensible interpretation of the notion, revisionary or not, may become permissible targets of attack by those conducting a just war campaign in virtue of their culpable conduct. Noncombatants in war can fail to fulfill moral duties that bear on them as noncombatants, lack sufficient excuse for their wrongdoing, and become morally culpable on this basis. They can also fail to set their will toward the right and the good, as they ought, with respect to their moral duties as noncombatants, and become morally culpable on this basis. These failures on their part can become the core of a compelling case for the claim that, depending on further circumstances, they can be morally permissible objects of attack.

To borrow an example introduced by Robert Nozick, suppose that you are working quietly in your office, minding your own business.⁸ A suspected criminal in the act of escaping from a crime scene takes refuge in your office building and is being hunted by police with a view to apprehending him. Your presence in your office interferes with the police efforts to nab the suspected criminal. In this situation you have a moral duty to cooperate with legitimate law enforcement efforts, by getting out of the way, and if you deliberately or recklessly or negligently fail to comply, you forfeit some of your rights to be treated by the police only in ways that do not threaten your safety. If the criminal matter involves a sufficient threat to public safety, it may be reasonable and permissible for police to remove you from the premises even if doing so harms you, or to shoot at the suspect to prevent him from being an immediate threat to others, even if their bullets may strike you, or (if the stakes are high enough) even deliberately aim fire at you if that is the only way to prevent the criminal suspect from inflicting grave harm on others.

Exactly the same can be true in a just war context. I may forfeit some of my rights not to be harmed if without adequate excuse I fail to meet my duties as a noncombatant to cooperate with just war efforts or at a minimum not impede those efforts. My culpable acts or omissions as a noncombatant may render me liable to what would otherwise be impermissible infliction of collateral harm on me or even to being the intended target of attack. These points, generated by the logic of revisionary just war theory, unsettle our views as to what those engaged in just war may permissibly do to civilian noncombatants who are failing to accommodate (as they ought) just war efforts being undertaken by others. The civilian noncombatants may have moral duties to remove themselves from the scene of conflict, not allow their presence and ordinary activities to be a hindrance to just war efforts, prevent themselves from being used as shields or hideaways by unjust warriors, and so on.

These points get flipped around if the just warriors are being besieged by forces wrongly trying to defeat their cause and the besieged take refuge among noncombatants or seek help from them. Consider the example of a just guerrilla war, a just effort to resist an unjust occupation or a tyrannical government or some other set of gravely unjust

arrangements. If you are part of an informal guerilla force conducting a just war campaign, uninvolved civilians in your vicinity will likely have a moral duty to assist your efforts and to bear some risks and some expectable harm in order to do their part to bring this just war campaign to a successful end. In this situation, it may be morally permissible for guerilla fighters to take shelter among civilians, even if this puts the civilians at grave risk of harm from becoming the intended or foreseen but unintended target of counter-guerrilla fire. For similar reasons, it may be permissible for informal fighters waging a just war campaign to coerce uninvolved civilians into contributing to the cause. The guerrillas may simply be enforcing duties that all members of the community have to resist tyranny or unjust occupation. The claim that one is an uninvolved bystander so one should be let alone rings hollow if those claiming bystander status are bound by duties of beneficence (or reciprocity or justice promotion) to join the fray. Guilty bystanders can forfeit their rights not to be put in harm's way.

4.

Suppose one claims that soldiers fighting for an unjust cause are agent responsible for perpetrating injustice of sufficient magnitude to render them liable to be deliberately subject to lethal attack. One objection to this claim is that agent responsibility without culpability is too insubstantial to serve as a pivot point in an account of liability to be justly killed.⁹ Consider this example: in the aftermath of a highway accident, someone volunteers for the dangerous mission of driving an ambulance past bandit-infested territory to the accident site. The driver is behaving virtuously, even heroically, but driving any vehicle on roads imposes some risk on others on the road in the event of an accident, and failure to drive in a sufficiently competent manner renders one at fault in the event of an accident. Suppose the ambulance driver faultily but without culpability loses control of the vehicle and skids toward a pedestrian, who could save himself by killing the driver. Describe the case so it is clear that the driver is responsible for the imposition of what in the event turns out to be wrongful threat of death on the pedestrian. The claim that the driver has forfeited her right not to be killed here seems incredible. So, it is said, agent responsibility for perpetrating serious injustice is insufficient to render one liable to deliberate lethal attack. This line of thought presses us toward the contingent pacifist horn of the responsibility dilemma.

There is a further difficulty with McMahan's claim that soldiers serving in a military force waging an unjust war become liable to permissible attack by being agent-responsible for causally contributing to significant harmful wrongdoing. Wars are waged by large bureaucratic organizations. Not all soldiers fighting for one side or the other in a war are plausibly regarded as making significant causal contributions to the war effort. So if the claim is that being agent responsible for making a significant causal contribution to posing wrongful grave harm or risk of that on morally innocent nonthreatening persons is the trigger that renders it morally permissible for others to subject one to violent attack that is necessary to avert or undo the grave wrongful harm, a problem arises: Many soldiers standardly deemed combatants do not actually make significant causal contributions to wrongful grave harm imposition. Some soldiers march in parades or keep the barracks clean or provide entertainment to the troops or do other tasks that do not amount to significant causal contribution to imposition of harm. So in this way also the corners of the McMahan revisionary just war doctrine do not fit together coherently.

It is worthwhile to pause to consider the train of thought that might lead one to accept agent responsibility as a basis for forfeiture of one's serious rights not to be harmed. Consider the generic situation of uncertainty that shrouds an agent who is considering whether to undertake a certain course of action or refrain. The action will serve one's purposes, or likely do so, but there is some risk, large or small or even tiny, that the action taken will bring about harm to another person in such a way that, with uncertainty resolved, it becomes clear in retrospect that the action one has taken is wrong in the specific sense that had one known in advance the actual consequences of doing the act, one ought to have refrained from doing it. When one acts in these circumstances, if the risk of bringing about harm is sufficiently great, relative to the expectation of gain and the nature of the gain one hopes to generate by the action, choosing and doing this act in these circumstances is morally wrong, and blameworthy if one lacks a sufficient excuse. If the risk of harm is sufficiently small, relative to anticipated gain, one's action is morally permissible and not blameworthy at all, and if the expected gain far exceeds the expected harm and in addition the gains accrue to others and the agent is incurring cost and risk of harm to herself to secure these gains for others, the agent's action can be morally admirable and the agent morally praiseworthy. However, one can regard the agent in all of these cases as taking a gamble, and if the gamble turns out badly, and foreseeable harm to others actually comes about or threatens to come about, forfeiture of the agent's own moral rights occurs.

Some have responded that in these scenarios the situation is *ex ante* symmetrical as between agent and potential victim. When the agent drives a car knowing a crash might ensue (such that, had one known of the crash in advance, one should not have started driving), the pedestrian threatened with injury also faces a choice, whether to take a walk along this path, knowing one might be harmed in a car crash (such that, had one known in advance of the car crash, one should not have started walking along that very path). Both agent and victim are taking a gamble when acting, and if the gamble each takes is reasonable, why see forfeiture of rights on the part of agent not victim? I suppose the response is that had the victim known of the future sequence that will unfold, she would be imprudent to commence walking, whereas had the agent known of the future sequence that will unfold, she would be guilty of moral wrongdoing if she commenced walking. But had the victim clairvoyant foresight, she would foresee that she will be bringing about a situation in which she will have to kill a nonculpable agent to save her own life, and proceeding to walk along anyway in the face of this knowledge looks to be wrong. Even if the situation is asymmetrical with respect to risk imposition—suppose the driver imposes a greater risk on the potential victim than the victim imposes on the driver by way of possible infliction of defensive harm if an accident unfolds—the gain to self and others expected to accrue from action may also be asymmetrical, and favor the driver. The moral disagreement here boils down to disagreement as to whether there is any sliver of asymmetry here, and if so, whether it is enough of a plank on which to hang a claim of significant forfeiture of rights.¹⁰

Even if we have a case in which the factor of agent responsibility weighs in favor of one party in the interaction, one might hold that this factor absent any culpability is insufficient to justify self-defensive killing. One might hold that at most the person

threatened in such a situation is entitled to act to equalize the chances that one or the other of the innocent risk imposer and risk sufferer will die (or be severely harmed) if death or severe harm) must fall on someone in this situation.

5.

One could avoid being pressed to contingent pacifism if one could show that soldiers fighting for an unjust cause are (usually or nearly always) culpable (that is, blameworthy). If soldiers fighting for an unjust cause are nearly always seriously blameworthy for doing so, then the responsibility dilemma seemingly does not get off the ground. Showing that soldiers fighting for a just cause may deliberately attack unjust soldiers will then be easy as downhill sledding. Culpable perpetrators of significant injustice may permissibly be killed if doing so is necessary to prevent or undo the injustice.

But the responsibility dilemma is not so easy to avoid. There are two lines of thought that press against the idea that soldiers fighting for an unjust cause are mostly culpable so it is morally acceptable deliberately to kill them. First, on any plausible understanding of culpability, many soldiers will qualify as nonculpable. Many will sincerely believe they are doing the right thing after making reasonable efforts to discover what is right to do in the face of the call to arms. Many will have an excuse of duress or coercion, if the regime that initiates unjust war institutes draconian punishment against those who refuse conscription into military service and against soldiers who refuse to participate in an unjust war endeavor. Second, if the military force fighting for injustice contains a mix of culpable and nonculpable combatants, and culpability is necessary for liability to justified attack, then one will as a practical matter not know which of the combatants one faces are morally permissible targets. If one shoots at any and all enemy combatants in order to attack the culpable combatants, one is arguably aiming fire at morally innocent combatants, and injuring them is not merely a side effect of what one is doing. (One would be aiming at innocents either as a means to killing the culpable or in virtue of the fact that aiming at all combatants in the circumstances includes aiming at the innocents among them.) If so, one would be violating the constraint against targeting morally innocent persons.

The defender of the position that it is generally morally acceptable to aim fire at combatants who are prosecuting an unjust war has available some resources for pushing back against the lines of argument just described. Consider the excuse of nonculpable ignorance. In war, many are killed and maimed, many are displaced from their homes and become refugees, many people's important rights go unfulfilled, and so on. Joining a war effort, one is contributing to deliberate large-scale killing.

In ordinary life, there is a high moral bar against deliberately taking up arms and shooting at people. One must have very strong grounds for believing that the killing one is facilitating is justified. If evidence is scanty, one has a duty to investigate further, or refrain from fighting if the epistemic situation is completely and unavoidably cloudy.

The same high bar holds under the extraordinary circumstances of warfare. One cannot satisfy one's duty to make serious good-faith efforts to discover the reasons there are that bear on the justifiability of the war effort and thus the acceptability of one's joining it just by trusting the declarations of public officials. The historical record is rife with attempts by national leaders and elite intelligentsia to persuade the public that an unsavory, unjust war enterprise being undertaken is really just and fair and morally

admirable. (For a comparison, note that even if my wife is generally a nice and trustworthy person, if she suddenly declares that I should kill the neighbors, I surely ought not to kill the neighbors just on her say-so.) In a democratic regime or one that promotes free expression and open debate, one has a duty to investigate thoroughly before deciding that joining the military and becoming committed to kill on command is justified. In a dictatorship or a regime that throttles free expression and debate, there should be a strong presumption that the declarations of public leaders are not to be trusted and that any war plans being contemplated by their rulers are very likely going to serve some unjust cause. The sheer fact that someone sincerely believes his nation's war making is in the service of a good cause is a very long way from sufficient to establish that his joining a war effort on this basis is nonculpable.

Regarding the excuses of coercion and duress, we should again notice that the use of war as an instrument of policy for all practical purposes automatically raises the moral stakes, given the destructiveness of war, so that if a war is unjust, the moral wrong being perpetrated is extremely large, even gigantic. Hence if political leaders threaten harsh punishment if one does not comply with an order to join the war effort or contribute to it, the level of harm threatened that suffices to excuse wrongful killing and wrongful infliction of mayhem in an unjust war endeavor is very large. Again a comparison to ordinary life situations is instructive. If the robber threatens to break my legs if I do not shoot and kill the bank guards that are impeding her robbery effort, it would be blameworthy of me not to accept broken legs rather than perpetrate murders. The same holds I would say, if the robber credibly threatens to kill me unless I murder two bank guards. One extra murder is a very large consideration, to which my decision making should be responsive. Human nature being what it is, it is understandable that I might murder several to save my life and even murder several to save myself from suffering broken legs, but some understandable behaviors are still morally blameworthy. Now imagine that the bank robber issues a coercive threat that unless I make a necessary contribution to a robbery that will kill thousands of innocent nonthreatening people, he will murder me along with my immediate family. Here my yielding to this threat would be both wrong and blameworthy, I would say. Even a strong excuse can dampen culpability without extinguishing it. In making this claim I allow that there are morally wrong actions that are not at all blameworthy (culpable).

There are further possibilities that might favor the claim that a soldier fighting for an unjust cause against enemy soldiers who have a just cause to fight might yet have an excuse, or even possibly a justification, arising from duress.¹¹ One consideration is that the unjust soldier might be being asked to do seemingly wrongful acts but in circumstances such that he or she can truly say, "It makes no difference whether or not I do it." The soldier will perpetrate no harm that would not have come about anyway whether he or she did it or refrained from doing it. Another consideration is that the unjust soldier might be thought to be under an especially stringent duty to family, friends, or fellow countrymen, to prevent their coming to harm if possible. Both considerations are in play in this example: Suppose the evil dictator threatens the young peasants that unless they join his army and fight and kill for an unjust cause, he will kill their immediate family members. The dictator adds that if the peasants refrain from taking up arms to fight for an unjust cause, he will conscript other peasants who will do exactly the same unjust killing as the initially conscripted peasants would have done.

The special-ties excuse raises large issues this essay cannot address. Here I simply report the view I believe we should take: There are no special-tie duties that justify doing a wrong to avoid a similar wrong falling on a person to whom one has special ties. It is not permissible for me to commit a murder to avoid a similarly wrongful killing of my wife. So a threat to murder 100 fellow villagers unless I murder 100 strangers fighting against for me in a just cause does not excuse, much less justify, my taking up arms in an unjust cause.

The assertion that “It makes no difference whether or not I do it” does not necessarily give me an excuse for doing it from the standpoint of a nonconsequentialist ethics. However, it is always and everywhere a consideration. However, I doubt that it is standardly or even often available to one who is a participant in an unjust war. First, The availability of the excuse depends on its actually motivating the participation in unjust war by the unjust combatant. If I am gung-ho for unjust battle, the orientation if my will is culpable even if I am making no difference in outcome terms. Same goes if my will is culpable by virtue of my negligence or recklessness in calculating whether I would be doing wrongful harm if I enter the fray. Second, if I decline to participate and further resources must be expended to induce another to do the exact wrongful harming I would have done, there are then extra resources in the hands of evil dictator for prosecuting his unjust cause in other ways, so I will have made a difference in wrongdoing after all. Third, even if those who would take my place would do similar or even equivalent wrong, they are unlikely to be harming wrongfully just the persons in just the ways I would have done, and if so, “it makes no difference whether or not I do it” is just false. However, I acknowledge that there can be cases in which duress can excuse wrongdoing or even justify conduct that absent duress would qualify as wrongdoing.¹²

What about the concern that many soldiers serving an unjust cause, even if culpable, cannot be seriously culpable, because they engage in tasks that do not significantly advance the war effort? One response is that in an efficiently organized collective enterprise, tasks that work in the background to keep the enterprise functioning well do indirectly make a causal contribution. If entertaining the troops boosts morale and leads to more effective fighting, entertaining the troops causally contributes significantly to harmful wrongdoing. On the other hand, if some troops are really out of the causal loop altogether, they do acquire the status of bystanders (albeit culpable bystanders). If some soldiers serving a force that is waging unjust war are irreversibly assigned to guard paintings in museums from civilian vandalism, and are unavailable for any military purpose, they should count as bystanders for purposes of deciding the permissibility of attacking them.

In this discussion I have tried to put our judgments on decisions to contribute to war efforts into perspective by considering parallel cases from ordinary life. Anchoring judgments about choices regarding war to ordinary standards of wrong and blameworthy conduct is helpful, in that it counteracts a widespread tendency to consider the ethics of war as a special case in which individuals following the rules laid down get a free pass or something close to that and choices and actions that would seem abhorrent in the ordinary course of events are regarded much more leniently when the agents whose conduct is under review are wearing military uniforms and participating in wars declared by established governments. It is one of the singular achievements of revisionary just war

theory to insist that one set of moral standards governs choices about whether killing in war is permissible and whether killing one's neighbor or work mate is permissible.

Suppose that we could establish that in a particular conflict the overwhelming bulk, or at least the majority, of those we classify as combatants fighting for an unjust cause are to some degree culpable for their contributions to this wrongful endeavor. If we can gain no more fine-grained information about who is culpable and who is not, then combatants fighting for a just cause are entitled to suppose that any given enemy combatant they encounter is likely culpable to some degree for serious wrongdoing and hence is likely liable to be attacked if doing so advances the just cause and hence may permissibly be attacked. There is a worry that obtrudes at this point. Even if for any given enemy combatant, the odds are that she is at least to some degree culpable for her participation in this war effort, it must be the case that if there are many enemy combatants targeted for attack, the odds will be overwhelming that some of them, we know not which ones, are innocent in the sense of morally blameless. In this situation, should this fact shield the enemy combatants from attack? (For a comparison, note that we do not believe that criminal punishment is unjustified even though it is certain that operating any criminal justice system will in fact find guilty and subject to punishment some innocent accused persons. We insist on rather high odds of guilt to warrant criminal conviction, but attacking someone in combat is not punishing the person and due process in combat situations is anyway out of the question.)

However, merely establishing that it is morally permissible (sometimes, usually, or always) for just combatants to attack unjust combatants does not by itself dissolve the responsibility dilemma. The dilemma as stated binds so long as there is symmetry in the liability to being a permissible object of attack in the situation of being a combatant or a noncombatant who happen to be on the unjust side. Just showing that combatants are liable to be attacked does not establish asymmetry. Maybe the strict account that holds unjust combatants liable to be permissibly killed also shows that unjust noncombatants are liable to be permissibly killed.

It might seem that once we have accepted a broad understanding of what constitutes a combatant, such that anyone who significantly causally contributes to an unjust war effort qualifies as a combatant, the problem just stated cannot arise. If the culpable are those who act wrongly and are blameworthy for their wrongdoing, then those who do no wrongdoing cannot be culpable, and if you do not causally contribute to the unjust war effort, it might be thought, you do not harm anyone, so a fortiori you do not wrongfully harm anyone, so the question whether you are culpable for wrongdoing does not arise.

This line of thought might appear to be sound but in fact harbors mistakes. Section 3 of this essay produced examples in which one can become culpable not by causally contributing to wrongdoing but by failing to fulfill a duty to help prevent wrongdoing. But further examples to be introduced in the next section entirely sever the link between causation, wrongdoing, and culpability. Without causally contributing to wrongdoing and without failing causally to contribute to prevention of wrongdoing a person can be morally at fault and morally culpable with respect to that wrongdoing.

This last claim might encounter resistance. How can those who do not causally contribute to wrongdoing be culpable for that wrongdoing? But not all culpability is *culpability for*.

Culpability is standardly understood as culpability for wrongful action or inaction that an agent has done or chosen. Culpability is nested within two prerequisite elements of responsibility. One is causal responsibility. If your action, or omission of action, does not cause harm or the threat of harm, and in addition does not fail to cause harm prevention you have a duty to bring about, you cannot be blameworthy. A second is agent responsibility. Agent responsibility enters the picture when what you are causally responsible for emerges from an exercise of your agency. Being agent-responsible for an action, the action and its outcome can properly be attributed to you, and you can be morally praiseworthy or blameworthy depending on their features.

There is nothing questionable about the idea of being culpable for some outcome, where this involves causal responsibility and agent-responsibility. But culpability or moral blameworthiness can also be freestanding, unanchored to causal responsibility or agent responsibility. Suppose in the Hitler era in Germany I vote for the Nazis and am an enthusiastic supporter of Nazi policies, and exult in their success. These acts might be causally impotent. They do not make any causal contribution, even a small one, to any wrongful harm or threat of wrongful harm that Nazis inflict on victims. So there is no wrong for which I am culpable, but I am culpable with respect to the Nazi crimes, in virtue of failing to make good faith efforts, within my capabilities, to orient my will toward the right and the good. Being seriously disposed toward significant evil in this way suffices to render me seriously morally culpable with respect to Nazi perpetration of injustice, such that I am an eligible target of just war violence directed at preventing or undoing Nazi injustice. Being eligible for this violence means that if harming or even killing me is useful for advancing the anti-Nazi cause, I have no moral right not to be killed for this reason, and no moral right to defend myself with lethal force against those who are advancing the anti-Nazi cause by attacking me.¹³

The upshot of this reflection is that we should acknowledge that culpability with respect to a war effort can attach to people who make no causal contribution to that war effort. So if we conceive of the combatant and noncombatant distinction as one between those who do and those who do not (significantly) knowingly causally contribute to a war effort, we should allow that noncombatants can be culpable with respect to the waging of a war and hence legitimate targets of attack if (sufficient) culpability renders one liable to be the permissible object of legitimate attack. Moreover, on the view advanced here, one can become culpable simply because, as it were, one's heart is in the wrong place, independently of failure on one's part actually to choose and act as one ought.

A slight complication here is that someone might contribute unknowingly but negligently to a war effort, and qualify as a noncombatant according to the proposed stipulation. Contributing unknowingly but negligently to the production of a large evil can surely qualify as acting wrongly and if one lacks an excuse for this faulty conduct, one can be blameworthy for it. This can happen. However, we should accept a more unsettling possibility, as illustrated by the example of the Nazi supporter whose supportive activities are causally inert and do no harm: one can be morally at fault and blameworthy with respect to a situation without wrongfully harming anyone. In fact we should go further: even if I engage in no activities at all, I can become culpable with

respect to a situation by setting my will toward evil even if that orientation of my will never issues in action at all, much less wrongful harming of anyone. It matters morally not just what we do and deliberately refrain from doing. It also matters morally whether we make ourselves disposed positively toward the right and the good or negatively toward moral wrong and evil.

So far the position on culpability affirmed here is just advanced by assertion. Why accept the assertion? The reason is that insulating judgments of culpability from judgments about causation is required by the plausible idea that “people cannot be morally assessed for what is not their fault, or for what is due to factors beyond their control.”¹⁴ At least some types of moral assessment are not subject to this kind of luck.

Since we should accept that so far as is possible our moral judgments of the moral blameworthiness and praiseworthiness of an individual should not be affected by moral luck (contingencies beyond the individual’s power to control), we should hold as equally blameworthy an individual who hates Jews and would murder them if he could but through sheer luck fails to encounter any and another individual who has the same murderous disposition, encounters Jews, and murders them. If the only difference between the two individuals is that one happens to encounter Jews and the other does not, this difference is not a proper basis for differential moral assessment of the two individuals.

Objection: two individuals might be equally disposed toward evil, but when they encounter opportunities to act on their murderous impulses, one resists the temptation and does not do evil and the other does not resist and does actually do evil. So assessing individuals simply by their standing dispositions or traits of character (so far as they bear some responsibility for their formation) would be mistaken.

Reply: Insofar as individuals facing decision problems make choices, for which they are responsible, in ways that do not simply reflect their dispositions at the time of choice, then choices independently contribute to an individual’s moral praiseworthiness or blameworthiness. This leaves standing the point that if two people are equally disposed to an act, and one has an opportunity to do it, and one does not, and both would have done the act if given the opportunity, the two should be deemed equally praiseworthy or blameworthy so far as this combination of disposition and choice is concerned.

The general claim being invoked in this juncture is that whether one has the opportunity or the causal capacity to do harm lies beyond one’s power to control. If what we are morally responsible for at most is what lies within our power to control, we are morally responsible at most for the orientation of our will, not whether the will encounters opportunities to do good and evil, and not whether one is causally efficacious if one does encounter such opportunities.

This general claim could be disputed. Suppose we accept it. This is a claim about what triggers moral praiseworthiness and blameworthiness. Of course it does not follow from claims about what triggers moral blameworthiness (culpability) that culpability alone triggers forfeiture of rights in a way that renders one liable to permissible attack. Above I argued that agent responsibility for bringing about unjustified harm is an insufficient basis for such liability. But there are intermediate possibilities. One is that when one acts in a way that violates another person’s moral rights, doing what at the time of action there was sufficient evidence available to the agent to establish as morally

wrong, even if the agent is entirely blameless for the doing of it, the agent thereby forfeits some of her moral rights, the nature and extent of this forfeiture being determined by the character of the moral rights the agent has violated.¹⁵ Let's say the agent is fully agent responsible for rights violation in these circumstances.

This is a possibility, but we should be unmoved by it. An agent's entirely morally nonculpable behavior does not trigger forfeiture of rights. Suppose two persons do the best they can, but one has reasoning talents the other lacks, so equally admirable efforts to figure out what is morally required in this situation result in the talented individual getting the right answer and acting on it and the less talented individual getting the wrong answer and acting on it. Sheer lack of talent does not render one less morally considerable, degrade one's moral status or lower whatever moral bar prevents others from harming one. Perhaps the less talented individual should have made good faith efforts to avoid the situation in which his lack of reasoning and decision making talent would cause harm to others. If that is so, there is moral culpability in the background, which might distinguish the agents, and provide grounds for the claim that the culpable has to some degree forfeited her moral rights. But when that is not so, the agent's moral innocence despite doing wrong is untarnished.

Being agent-responsible and being fully agent-responsible for serious rights violations often accompany another factor that I would contend is a significant determinant of the moral permissibility of acting against some agent's right. Attacking an agent who is (maybe fully) agent-responsible for some wrongful threat of unjust condition is often a very effective means to avert the threat or to eliminate or reduce the bad condition. Often attacking an individual who is agent-responsible for a threat is pulling on a very effective causal lever for improving the situation. My suggestion is that we tend to be misled by the confluence of possible factors and tend to ascribe to agent responsibility including full agent responsibility a determining moral power it lacks. Even when attacking an individual who is fully agent-responsible for some rights violation will not help to boost rights fulfillment here and now, doing good to the particular threatened individual, we might expect that attacking the agent-responsible agent will boost rights fulfillment in future by deterring others from similar action that similarly threatens individual rights

One step to downgrading the claimed role of agent responsibility (causing harm) in bringing about forfeiture of rights is to recognize that fault forfeits first.¹⁶ This means that if someone must be made to suffer harm to protect people's moral rights, the preferred person who should be made to suffer harm is the person who is most culpable with respect to that situation, provided she is significantly culpable. So suppose Amy's moral rights are threatened with violation, Ben is agent-responsible for the threat but entirely morally blameless, and Clare is a bystander who is morally culpable with respect to this situation. Fault forfeits first says that if one can prevent Amy's rights from being violated by harming either Ben or Clare, Clare should be the one who is harmed. Fault forfeits first is plausible, I submit. But its acceptance would not amount to eliminating entirely the factor of causation of harm as a partial determinant of one's moral status as possessing or forfeiting one's moral rights. One could accept fault forfeits first but also maintain that when there is no appropriate culpable individual imposing harm on whom would serve to avert or undo a moral rights violation of some person, an individual who is agent-responsible (or on another view, fully agent-responsible) is the next-in-line

eligible target for violence or harm imposition aimed at maintenance and restoration of people's moral rights, provided the moral gain of rights fulfillment expectable from such action is sufficiently great.

However, one might discern a kind of ripple effect from the insulation of an individual from moral culpability by moral luck considerations. Not all moral judgments are subject to moral luck constraints. The judgment that my practical reasoning efforts on some occasion have been deficient is not deflected by the claim that my failures were beyond my power to control. Another example: the judgment that I lack virtue, for example, that I am cowardly rather than courageous, is not undermined by the fact that my failure to possess traits necessary for achieving virtues is beyond my power to control. But if judgments of culpability are blanketed by the fact that the conduct for which one is subject to blame is beyond one's power to control, there is a case for holding also that downgrading of a person's moral status by deeming her to have forfeited some of her moral rights is also defeated by a showing that the act or choice that is supposed to trigger forfeiture was beyond the individual's power to control. The judgment that one is liable to harm in virtue of one's faulty conduct or omission is not a judgment that one merits punishment, but it arguably shares with that judgment the feature that its appropriateness requires blameworthiness on the part of the person singled out for negative judgment. In contrast, the judgment that it is permissible to harm a person simply in virtue of the fact that harming her will prevent large bad consequences or bring about large good consequences does not contain any negative judgment at all on the character or conduct of the person judged, so this judgment can surely be appropriate in the absence of any showing of culpability on the part of the person being judged a permissible object of attack.

7.

Perhaps the crucial reason why it is morally permissible to attack and kill enemy soldiers when they are prosecuting an unjust war and one is fighting for a just cause in opposing them is that killing enemy soldiers in these circumstances makes a contribution to winning the just war, and in the case at hand, the moral stakes in this conflict are very high. The crucial point is not that the enemy soldiers have made themselves liable to be killed but that their right not to be killed is overridden by the bad consequences of respecting their right.

Any nonabsolutist deontology will allow for such overriding by catastrophe. Judith Thomson long ago noted that the morality of self-defense might differ from the morality of war in just this respect: In war, the stakes of a single battle may be high, and the battle may be linked to an ongoing campaign with gigantic stakes.¹⁷

However, the view I am tentatively proposing will strike some as carrying counterintuitive implications. Suppose a just cause of great moral importance can be advanced equally well by killing completely nonculpable soldiers fighting for the unjust cause or by killing an equal number of totally uninvolved bystanders. Just suppose. The view that denies that sheer causing of wrongful harm or sheer perpetration of wrongful harm opens the door to liability to be killed will say that it is in itself a matter of indifference whether we advance the just cause in this situation by killing soldiers or bystanders. Notice that accepting a deontological constraint against harming innocent bystanders even to bring about greater good does not settle the stringency of the constraint. Better to allow two murders than to perpetrate one morally exactly

comparable murder oneself, perhaps, but still better to murder one than to allow (say) three murders. I am tentatively suggesting, if those one must harm to prevent a greater harm are really entirely morally innocent in the sense of blameless, and if the harm one would avert justifies the harm one perpetrates, one should prefer to inflict the least harm on the morally innocent no matter what their further relations are to the harming one is averting. Fault forfeits first says that to advance the just cause, harming the culpable is morally preferred to harming the nonculpable, even if the nonculpable are causally responsible or agent responsible for the injustice one's harming will avert. But fault forfeits first taken by itself is silent on the further question, when choosing among nonculpable targets, whether bystanders are morally less eligible for harm than those causally or agent responsible or fully agent responsible.

From a deontological perspective, the fact that the consequences of one's action may be very large does not wash away all further deontological considerations as irrelevant. Perhaps the various factors interact. The greater the ratio of the costs to nonrightsholders overall if a particular right is respected to the costs to rightsholders if their particular right is not respected, the greater the case for not respecting the right in this case. The case is amplified if the person whose right will be violated has partly forfeited the right in question by her moral culpability with respect to this situation. Contrary to what I have urged in this essay, but do not claim to have conclusively defended, the case might sometimes also be amplified by considerations of agent responsibility.¹⁸ In particular, some will accept what this essay calls "full agent responsibility" (acting wrongfully, but blamelessly, in the evidence-relative sense) as a significant factor.¹⁹

The upshot of this discussion is that the responsibility dilemma as characterized by Lazar does not lead us to the conclusion he claims it provisionally supports—namely, that "the prospects for grounding the ethics of war in individual rights are poor: any theory of our rights to life that is sufficiently indiscriminate to work in the chaos of war is not discriminating enough to be a plausible theory of our rights to life."²⁰

The take-away lesson from this discussion is more modest. Individual moral rights do not enter the moral reasoning that determines what we ought to do only as constraints to be respected and honored. Individual rights are also goals to be promoted, and sometimes rights as goals trump rights in the role of constraints.²¹

The formulation of the point in the preceding paragraph is in a way misleading. The fact that aiming fire at an individual would significantly advance an important just cause and refraining from aiming fire at that individual would significantly retard that important enterprise can play a role in a deontological principle that balances several interacting factors to determine the degree of eligibility for being the target of such violence that is assignable to that individual. Great consequences hanging in the balance can override a deontological prohibition and render it the case that a bystander may be the legitimate target of attack. But soldiers (and civilians) on the side of the unjust cause are usually not mere bystanders. They will usually be causal contributors to the effort, agent responsible to some degree for these contributions, and most important, culpable even if only to a small degree. One's small blameworthiness, insufficient by itself to render one a permissible target of attack, may interact with other relevant factors, and notably the amount of good that killing one will expectably produce. (Recall, terror bombing of Berlin during World War II might have been justified even though terror

bombing of Buenos Aires, even with exactly the same good effect on the Allied war effort, would have been unjust killing.)

9.

The discussion in this essay has mostly set to the side epistemic considerations that at the end of the day will significantly affect what one is and is not morally permitted to do in the course of waging war. The considerations of individual blameworthiness and praiseworthiness that this essay urges are crucial to the determination of who may permissibly attack whom are largely opaque to participants and bystanders facing actual war. So besides a discussion of fundamental moral principles bearing on the morally proper conduct of war, we need a discussion of derivative, secondary moral rules, which more readily lend themselves to guiding the conduct of people facing war situations and trying to figure out what morally they are permitted, required, and forbidden to do. These secondary rules will not require individuals to base their decision about what to do on information that they cannot obtain. So in a way the discussion in this essay is preliminary: a full resolution of the responsibility dilemma requires a discussion of derivative rules to guide conduct as well as of fundamental principles that fix what is morally right and wrong.

About such secondary rules I will say only that they are to be viewed as means to bringing it about that people's conduct approximates more closely to conformity to what the fundamental principles determine to be right and wrong. In settling the content of the secondary rules, the fundamental principles do not get tossed aside as irrelevant. Moreover, it is not at all obvious that a careful discussion of justifiable secondary rules of just warfare, rules for the practical guidance of conduct, would resurrect the traditional war convention centered on the moral equality of soldiers doctrine or anything close to it. I myself doubt this resurrection would occur. But this is a topic for another occasion.²²

¹ . The canonical statement of the accepted view is Michael Walzer, *Just and Unjust Wars*, 4th ed. (New York: Basic Books, 2006).

² . Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114 (2004), 693-732; also McMahan, *Killing in War* (Oxford: Oxford University Press, 2009).

³ . Seth Lazar: "The Responsibility Dilemma for *Killing in War*: A Review Essay," *Philosophy and Public Affairs* 38 (2010), 180-213.

⁴ . Lazar, 181.

⁵ . For a view of these matters pretty much entirely opposed to the position this essay defends, see Larry May, "Human Rights, Proportionality, and the Lives of Soldiers," in this volume. However, the extent of our disagreements may be mitigated, to a degree, if we note that there are different levels of moral thinking, and his discussion is oriented, in part, to what current international law properly understood implies about what our practices should be. Besides the level of fundamental moral principles, which fix what we ought to do, there are derivative levels, including the intuitive level morality into which members of a particular society are trained, and also laws, and social norms. The derivative levels ought to be set with an eye to bringing it about that cognitively limited, selfish, and poorly informed beings like us conform as closely as possible to fundamental level norms. Following R.M. Hare, most accept that the idea of there being different

levels of moral thinking makes good sense within a consequentialist moral framework, but I would contend that a plausible nonconsequentialism needs to accept it also. If we should be nonconsequentialists, we should be multi-level nonconsequentialists. See R. M. Hare, “The Archangel and the Prole,” in his *Moral Thinking: Its Levels, Methods, and Point* (Oxford: Oxford University Press, 1982).

⁶ . G. E. M. Anscombe, “War and Murder,” reprinted in her *Ethics, Religion, and Politics: Collected Philosophical Papers* (1991). Anscombe’s proposal regarding how to understanding the distinction between combatant and noncombatant is supported by C. A. J. Cody, *Morality and Political Violence* (Cambridge: Cambridge University Press, 2008).

⁷ . If classifying as combatants people who do not engage in combat is deemed to offend ordinary usage, we could instead say that the combatant/noncombatant distinction should be replaced by a distinction between those who knowingly causally contribute to a war effort and those who do not.

⁸ . Robert Nozick, “War, Terrorism, Reprisals—Drawing Some Moral Lines” (review of Michael Walzer *Just and Unjust Wars*), reprinted in Nozick, *Socratic Puzzles* (Cambridge, MA: Harvard University Press, 1997), 300-304.

⁹ . On this point, see Seth Lazar, “Responsibility, Risk, and Killing in Self-Defense,” *Ethics* 119 (2009), 699-728. My view (not defended here) is that agent responsibility for perpetrating evil in the absence of culpability is not just insufficient to trigger liability to violence (provided the violence will mitigate or undo the evil), but is not even a significant moral factor weighing in favor of liability. Also, independently of that idea, I would hold that fault forfeits first: other things being equal, the morally preferred target for violence directed at undoing or preventing a serious evil or injustice is an agent who is seriously culpable with respect to that evil or injustice and more culpable than anyone else involved in the situation. [self-identifying reference deleted]

The example in the text does not by itself support these claims even if one accepts it as a counterexample against the claim that agent responsibility for evil can be a sufficient condition for liability to violence (that will avert or undo the evil). In the example, the moral praiseworthiness of the agent responsible individual arguably outweighs the agent responsibility factor in this case. This leaves it wide open that agent responsibility might be a morally significant factor, whose significance emerges in other examples.

¹⁰ . Larry Alexander and Kimberly Ferzan, “Culpable Acts of Risk Creation,” *Ohio State Journal of Criminal Law* 5 (2008); also Kimberly Ferzan, “Culpable Aggression: The Basis for Moral Liability to Defensive Killing,” *Ohio State Journal of Criminal Law* 9 (2102). They also make another point: If you held that the driver forfeits her right not to be killed when she is agent responsible for skidding toward a pedestrian, then it would be morally wrong, not merely imprudent, for the pedestrian to have commenced walking along that path that will cross the path of the skidding car, had she knows in advance of the sequence that would unfold.

¹¹ . On this issue see Victor Tadros, “Duress and Duty,” forthcoming.

¹² . See Tadros for convincing argument on this point.

¹³ . Freestanding culpability as just characterized may perhaps involve causation in a hypothetical fashion. If my will is turned to Nazi evil, then I am disposed to act under some range of circumstances I might encounter to advance the Nazi cause. If that is not

so, we might wonder whether my will is sufficiently evil to render me liable to be harmed in order to block Nazi advances. Perhaps merely being disposed passively to wish for Nazi victory, without any disposition to act so as to promote Nazi aims, cannot render one sufficiently culpable to be legitimately subject to violence. But even if that is right, it remains the case that there can be serious culpability without culpability for.

¹⁴ . Thomas Nagel, "Moral Luck," reprinted in his collection *Mortal Questions* (Cambridge: Cambridge University Press, 1979), 24-38, at 25. Nagel characterizes the no-moral-luck position but rejects it. In this connection one should note Robert Adams's forthright acceptance of moral luck in his "Involuntary Sins," *Philosophical Review* 94 (1985), 3-31.

¹⁵ . Jonathan Quong mentions this position but does not affirm it in his "Liability to Defensive Harm," *Philosophy and Public Affairs* 40 (2012), 45-77.

¹⁶ . [self-identifying reference deleted]

¹⁷ . Judith Thomson, "Self-Defense," *Philosophy and Public Affairs* (1991). The suggestion is made in passing.

¹⁸ . Saba Bazargan argues that minimal culpability and agent responsibility might fail to generate forfeiture of the right not to be harmed but still favor attacking the minimally culpable harmdoers if someone must be attacked to prevent a very bad outcome. See his "Killing Minimally Responsible Threats," *Ethics* (2014).

¹⁹ . Larry Alexander takes this line.

²⁰ . Lazar, "The Responsibility Dilemma," 213. However, in broad terms, the discussion in this essay upholds Lazar's insight, which is that the revisions to modern just war theory proposed by McMahan and others lead to more far-reaching changes in our moral convictions in wide reflective equilibrium than the advocates of revision have tended to suppose. The dust has not yet settled on the project of rethinking the morality of self-defense and of just war theory.

²¹ . This point holds for small-scale interactions involving small rights of few people in ordinary life, and also holds for large-scale interactions involving big important rights of many people in extraordinary events such as war. See Amartya Sen, "Rights and Agency," *Philosophy and Public Affairs* (1982). In the text I mention examples of situations in which refraining from acting against a person's right not to be harmed would have enormous bad consequences. However, I would hold that there can be examples in which an act that inflicts a modest harm against a rightbearer can be justified by modest benefits that would accrue to nonrightholders, even though no enormous consequences are at stake. What triggers the overriding of a person's right is that the ratio of (1) harm to nonrightholders if the right is not infringed to (2) the harm to rightholders if the right is infringed is sufficiently favorable.

²² . Notice that the war convention includes both the norm that soldiers fighting in declared wars and aiming fire at enemy combatants act permissibly regardless of the justice of the cause for which they fight and the norm that soldiers fighting in war should refrain from deliberately attacking bystanders and should take care not to impose disproportionate unintended but foreseen damage (collateral harm) on bystanders. The second norm might find its way into the set of justifiable secondary rules of war even though the first does not.