

Just Warfare Theory and Noncombatant Immunity

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Introduction

According to just war theory, a just war is a war against military aggression or the serious intentional threat of military aggression or a war of intervention to protect fundamental human rights. A just war must also satisfy a proportionality norm: the reasonably expected moral gains of commencing and sustaining military intervention must exceed the reasonably expected moral costs.¹ In this tradition, the justice of the war is

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1. This statement requires interpretation. Just as one may use lethal self-defense, if necessary, to defend against a serious but non-lethal attack, a nation may respond to an aggressor with greater force than was employed against it. Injuries suffered by the aggressor will be discounted in the just war calculation.

regarded as a separate issue from the justice of the conduct of the war. Justice in warfare requires, above all, respect for noncombatant immunity.² Those engaged in war are prohibited from deliberately attacking those who are not soldiers, those who are not political leaders of soldiers, and those who are not supplying soldiers with the necessities to carry out warfare. Combatants are those whose activities materially assist the war effort (or in a more narrow construction, those engaged in the war effort).

The right of noncombatant immunity forbids inflicting harm on noncombatants as either an end in itself or as a means to an end. In other words, noncombatants have the right not to be deliberate targets of attack.³ The right of noncombatant immunity, however, condones unintended harm to noncombatants, provided the proportionality norm described earlier is observed. The proportionality norm means that the good effect that one aims to achieve must be greater than the collateral damage to noncombatants that one foresees, but does not intend. Additionally, the proportionality norm requires that there must not be another option available that realizes the same expected benefit but with less expected collateral damage. Noncombatant immunity also extends to combatants who have ceased to be contributors to the war effort, either by surrendering or by becoming incapacitated.⁴

This essay examines the justice in warfare component of the just war theory.⁵ How should we regard the right of noncombatant immunity as just characterized? Common-sense rhetoric tends to regard respect for noncombatant immunity as a litmus test for moral rectitude. Contemporary statements of just war theory reflect this view, as in this succinct formulation: "Terrorism strikes at the defenseless, not at the combatant forces of a social unit, and is thus by nature a crime against humanity."⁶ Politicians appeal to this sentiment, drawing sharp lines between "us" and "them." The first Secretary of the Department of Homeland Security, Tom Ridge, observed, "We face a hate-filled, remorseless enemy that takes many forms, hides in many places, and doesn't distinguish between innocent civilians and military combatants."⁷ My question is the following: what is the nature and moral force of this distinction?⁸ I shall conclude that we

2. See generally MICHAEL WALZER, *JUST AND UNJUST WARS* (1977) for an excellent contemporary statement of just war theory. See also PAUL RAMSEY, *THE JUST WAR: FORCE AND POLITICAL RESPONSIBILITY* (1968).

3. See WALZER, *supra* note 2, at 43.

4. See generally WALZER, *supra* note 2; RAMSEY, *supra* note 2.

5. See generally Jefferson McMahan, *Innocence, Self-Defense, and Killing in War*, 2 J. POL. PHIL. 193 (1994) which anticipates some of my arguments and conclusions. See also Jefferson McMahan, *Self-Defense and the Problem of the Innocent Attacker*, 104 ETHICS 252 (1994); Jefferson McMahan, *The Ethics of Killing in War*, 114 ETHICS 693 (2004) [hereinafter McMahan, *Killing in War*]; Lionel K. McPherson, *Innocence and Responsibility in War*, 34 CAN. J. PHIL. 485 (2004).

6. JAMES TURNER JOHNSON, *CAN MODERN WAR BE JUST?* 60 (1984).

7. Serge Schmemmann, *The Quarrel over Iraq Gets Ugly*, N.Y. TIMES, Jan. 26, 2003, at WK1.

8. My conclusion is that just warfare theory, on its own terms, does not issue an

should reject the idea that just warfare theory prescribes an absolute and exception-free condemnation of what we are prone to call terrorist acts.

Although it is not universally accepted, the norm that warring nations should not deliberately attack civilians under any circumstances is deeply engrained in popular moral opinion and embodied in current international law and treaties.⁹ Despite the criticisms developed below, the wide acceptance of these norms may be doing significant good. So why criticize them? My suspicion is that the position that the duty to refrain from attacking civilians in war and military operations is well supported by acceptable, fundamental nonconsequentialist¹⁰ moral principles is unfounded. And like any unfounded moral position, it probably does more harm than most like to think.

The following examination of just war theory represents an internal rather than external critique of this philosophical position. The key question here is not what we should regard as morally acceptable, all things considered. Instead, the question is what is morally acceptable according to the deontological tradition of moral thought, in particular what is the morality of self-defense against aggressive attack? I must give notice at the outset that this account of the morality of self-defense is, to some degree, revisionary. I conclude that just warfare theory, as recently elaborated by Michael Walzer, Paul Ramsey, and other distinguished thinkers, rests on fundamental errors.¹¹

absolute condemnation, free from exceptions, of what we are prone to call terrorist acts.

9. See WALZER, *supra* note 2, at 136.

10. In ethical theory, nonconsequentialism is the denial of consequentialism, the position that one morally ought always to do an act that would produce an outcome no worse than the outcome that would have been brought about by any other act one might have done instead. Rejecting consequentialism, the nonconsequentialist typically embraces constraints—that there are some kinds of acts that are intrinsically wrong. Acts of this type should not be done even when doing one would bring about the best possible outcome. The nonconsequentialist also typically embraces options—that there are some innocent acts that it is morally permissible to do even though in the particular circumstances they would not bring about the best possible outcome. See Bernard Williams, *A Critique of Utilitarianism*, in J. J. C. SMART & BERNARD WILLIAMS, *UTILITARIANISM FOR AND AGAINST* (1973) (criticizing utilitarianism for its commitment to consequentialism); see also MARCIA W. BARON ET AL., *THREE METHODS OF ETHICS: A DEBATE* (1997) (debating the merits of consequentialist ethical theory against the rival doctrines of Kantianism and virtue ethics); Frances Kamm, *Towards the Essence of Nonconsequentialism*, in ALEX BYRNE, ROBERT STALNAKER, AND RALPH WEDGWOOD, *FACT AND VALUE: ESSAYS ON ETHICS AND METAPHYSICS FOR JUDITH JARVIS THOMSON* (2001).

11. Just war theory traditionally includes the requirement that only morally legitimate political authorities, not individuals, may engage in violence with the intention of killing one's adversary. On this view, to qualify as just, a war must be initiated and waged by competent authority, a lawful government. One need not be an anarchist to regard this requirement as plainly unacceptable. Just military combat could surely occur in a state of nature, absent any constituted authority. If the scale of such combat were large, we would be talking about war. Also, if an unjust political authority rules the land, in favorable circumstances it would be just for individuals banding together informally to rebel against their rulers. If one's country is unjustly invaded, and the extant government does not mount an effective defense, private individuals may legitimately wage war

I. The Idea of a Noncombatant

Are individuals who do not threaten violence entitled to immunity from deliberate attack? The proposed line between combatants and noncombatants locates the moral boundary between people who are, and those who are not, materially contributing to the war effort.

In her essay, *War and Murder*, G. E. M. Anscombe perhaps sharpens the line in a way that narrows the class of permissible targets. Her moral rule is that one must never attack the innocent, and “[w]hat is required, for the people attacked to be non-innocent in the relevant sense, is that they should themselves be engaged in an objectively unjust proceeding which the attacker has the right to make his concern; or—the commonest case—should be unjustly attacking him.”¹² In this sense, innocence and lack of innocence are clearly distinct from innocence and culpability: one can be engaged in an objectively unjust proceeding while being blamelessly ignorant of its unjust character. An individual, therefore, can be morally innocent but not innocent in a sense entitling her to immunity from justified attack.

There remains a question as to what counts as being an engaged participant in a war effort. Must one be (a) doing something that one believes, with good reason, will advance the war effort and also (b) doing something that actually advances it? Or must one also (c) intend to advance the war effort by one’s actions? Or would any one of (a) through (c) by itself be sufficient? Because (a), (b), and (c) may exist to varying degrees, noncombatant status is a sliding rather than binary classification.

Some scholars narrowly draw the distinction, defining combatants as individuals “who are engaged in fighting.”¹³ Emphasizing the perspective of a soldier struggling to discern permissible targets in a just war, C. A. J. Coady suggests that noncombatants are those “prosecuting the harms that are believed to legitimate resort to responsive violence”¹⁴ This definition implies that individuals who merely provide soldiers with goods

against the invaders provided the conditions for just war other than the putative requirement that just war may only be initiated by lawfully constituted authority, are satisfied. The reasons to reject the putative requirement that a just war combat must be initiated by lawfully constituted authority parallel the reasons to reject the idea that only a lawful state can genuinely engage in the practice of punishing wrongdoers, and that private individuals who deliberately impose hard treatment on offenders against the moral law cannot satisfy the conditions for justified punishment. See generally JOHN SIMMONS, *LOCKEAN THEORY OF RIGHTS* (1992) discussing this issue in the third chapter of his book. See also PAUL RAMSEY, *WAR AND THE CHRISTIAN CONSCIENCE: HOW SHALL MODERN WAR BE CONDUCTED JUSTLY?* (1961) for a nuanced history of the theory of justified revolution; cf. Robert K. Fullinwider, *Terrorism, Innocence, and War*, 21 *PHIL. & PUB. AFF. Q.* 9 (2001), which unduly emphasizes the importance of a competent authority in discussing moral issues of contemporary terrorism.

12. G.E.M. ANSCOMBE, *War and Murder*, in 3 *THE COLLECTED PHILOSOPHICAL PAPERS OF G.E.M. ANSCOMBE VOLUME III: ETHICS RELIGION AND POLITICS* 51, 53 (1981).

13. David Rodin, *Terrorism Without Intention*, 114 *ETHICS* 752, 757 (2004).

14. C.A.J. Coady, *Terrorism, Morality, and Supreme Emergency*, 114 *ETHICS* 772, 774 (2004).

required in the course of ordinary life, rather than what they need to perform as soldiers, are noncombatants.¹⁵

Soldiers, of course, are unable to fight without daily nourishment, just as they are unable to fight without bullets. Those supplying the resources enabling soldiers to fight materially contribute to the war effort. One might take the position that the relevant demarcation is a causal notion: when one's activities, if successful, would significantly increase the probability that group X's war effort will prevail, one materially contributes to X's war effort. An individual performing these activities is, therefore, a combatant for purposes of delimiting the just war immunity. This formulation draws the circle broadly. If a nation is mobilized for an exhaustive war effort, almost any productive activity may indirectly aid the war effort. Consider the following hypotheticals. If previously unemployed civilians join the labor force producing goods for home consumption, other workers are freed to make supplies for troops, and if some civilians make propaganda films boosting the resolve of the home work force, again production for military use grows.

A narrow understanding of the idea of the combatant corresponds with a moral line that could be drawn between ways people assist evildoers in ordinary life. A restaurant owner who serves a meal to a known bandit does not materially assist the bandit's crimes, we suppose. A gun dealer who sells a gun to the same bandit, however, is implicated in the latter's subsequent crimes, we might think. In short, an individual who provides a bank robber with what she needs in the ordinary course of life is not engaged in the enterprise of bank robbing; however, one who supplies the same bank robber with guns and a map indicating the exact location of a bank vault is so engaged. Similarly, an individual who supplies soldiers the means of warfare is engaged in the enterprise of war, while one who supplies the very same soldiers with food, clothing, and shelter during peacetime is not.

The common-sense way of drawing these lines, nevertheless, collapses under scrutiny. There might be a morally relevant distinction between the intention of the meal provider and the gun provider, but then again, there might not be. The meal provider might intend to facilitate the bandit's crimes, while the gun owner might not. The act of the meal provider might do more than the act of the gun provider to increase the probability that a crime will be committed, or the amount of wrongful damage done if a crime is committed, or both. The line between what is needed in the ordinary course of life and what is needed specifically to prosecute the problematic crime or military act does not necessarily correspond to any significant moral distinction. Of course, the just war theorist is a deontologist who distinguishes between *doing* and *permitting* harm, but both the meal provider and the gun provider are plainly on the doing side of that line.

15. See Thomas Nagel, *War and Massacre*, 1 PHIL & PUB. AFF. 123 (1972), reprinted in MORTAL QUESTIONS 53, 71 (1979) for an affirmation of this understanding of the distinction between combatant and noncombatant.

Each might try to excuse his assistance of the bandit by saying, "If I don't do it, someone else will," which would mean that his activity is not a "but for" cause of the bandit's crimes. In either case, the particular circumstances might vindicate or defeat the proffered excuse. Consider a case in which the meal provider and the gun provider are both equally positioned to know that their particular assistance to the bandit will enable him to commit a crime. In this case, both are materially assisting a crime and equally wrong for doing so. The fact that, psychologically, the provision of a gun has a more vivid and salient connection in our minds to the ultimate wrongful acts is not, per se, morally relevant.

What holds in ordinary life also holds in war. We should draw the line broadly, regard as combatants all who materially assist the war, and acknowledge that status as a combatant is a matter of degree. It should be noted that I endorse the view that medical personnel who treat wounded soldiers behind the lines, thereby facilitating their return to battle, materially assist a war effort and hence qualify as combatants. Good consequences may flow from establishing and upholding conventions that stipulate that medical personnel and farmers supplying aid to the troops and other indirect providers of aid should be deemed illegitimate targets of military attack. Considerations of expedience, however, should be sharply distinguished from the considerations that should figure in a proper development of just warfare theory.

II. The Moral Shield Protecting Noncombatants

Thus far I have tried to mark the line between combatants and noncombatants. But the combatant/noncombatant distinction does not coincide with the line that divides those who are morally legitimate targets of violence according to natural law and just war theory, on the one hand, from those who are not legitimate targets, on the other. So at least I shall argue. To see this point, it helps to consider self-defense scenarios.

In a just war, some people perpetrate lethal violence against other people in order to advance the just war cause. The question then arises, on whom may such violence be legitimately perpetrated? By way of example, take the scenario in which one or a few people, in order to save their own lives, perpetrate lethal violence against one or a few people in circumstances where such violence qualifies as self-defense. Who are morally appropriate targets in self-defense scenarios? This self-defense scenario offers a simple case of violence that many will consider permissible, so the judgments we make after reflection about self-defense offer some guidance for how to decide who may be killed in the course of prosecuting a just war.¹⁶

Consider the fault forfeits first principle. In a situation in which there

16. For contrasting views of the ethics of self-defense, compare Judith Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283 (1991), with Larry Alexander, *Self-Defense, Justification, and Excuse*, 22 PHIL. & PUB. AFF. 53 (1993), and Michael Otsuka, *Killing the Innocent in Self-Defense*, 23 PHIL. & PUB. AFF. 74 (1994).

is a wrongful threat to an innocent person's life, and only killing another person can avert that threat, it is morally better that among those who might die, a person who is significantly and culpably at fault with respect to this situation should be the one who dies. The following examples illustrate the principle.

A. Accommodation

You are being chased by a villainous aggressor who is trying to kill you and will succeed, unless you jump up to a niche where the aggressor cannot follow. There is a bystander standing in this niche who has a perfect right to be there. The bystander sees that if he accommodates you by moving to the back of the niche, you can jump to it and both of you will be safe. If the bystander does not move in this way, you could still save yourself, but only by jumping to the niche and jostling the bystander, causing a fatal fall. The bystander also sees that this is the case. The bystander declines to move to the back of the niche.

The example described does not specify the mental state of the niche occupier, whose failure to accommodate you creates a predicament in which either you or she must die. Perhaps this bystander believes she is entitled to remain there and expects you to respect her right even in your desperate plight. I deny that the bystander plausibly possesses any such right. On the facts described, she is at least grossly negligent, and hence significantly and culpably at fault, by virtue of failing to help you by moving to the back of the niche. The "fault forfeits first" principle dictates that it is morally preferable for the unaccommodating bystander to die rather than you. To save your life, it is then morally permissible for you to jump to the niche, causing the bystander to fall. Would you be seriously culpable for causing the death of the bystander? The fault forfeits first principle responds in the negative: you are entitled to privilege an innocent life over a culpable one. Acting to produce this morally better state of affairs is not acting wrongly and does not render you culpably at fault.

B. Guilty Past

Suppose that Smith is an innocent aggressor currently engaged in attacking you. He is wrongfully trying to inflict lethal violence against you, but he is not culpable in this respect. Perhaps he is acting on the basis of false beliefs, and that if these beliefs were true, the attack would be justified. Moreover, he is not culpable for having these false beliefs. The culpable agent here is Jones, who used deception to induce Smith to form these beliefs. Suppose Jones' evil plan was to trick Smith into killing you. But now, Jones is no longer doing anything that menaces your life, and we can suppose there is nothing Jones can do that will now annul his deception and remove the threat to your life that Smith's aggression represents.

You have a right not to be killed in these circumstances—a right that Smith is violating. Two courses of action, either one of which would save your life, are available. You could kill Smith, the innocent aggressor, and thus prevent him from killing you. Or you could kill Jones, which would

sufficiently unnerve Smith to incapacitate him. Perhaps Smith, positioned so that he sees Jones, will witness your act of killing Jones and, as Smith is very emotionally attached to Jones, Smith will be prevented from acting effectively, thereby eliminating the threat against your life. These are the sole life-saving responses available.

Any plausible theory of justifiable homicide would approve killing Jones to save your life. The pertinent facts are that Jones has contributed to bringing about the situation in which your life is in peril, Jones is morally culpable for doing so, and your killing Jones would remove the peril against your life. Even though Jones is not currently acting in a way that menaces your life and Smith is, Jones' moral guilt and his causal responsibility for your peril jointly negate his moral immunity from harm. This claim does not settle the interesting question of whether it would be morally acceptable to kill Smith in self-defense if the option of killing Jones were not available. The principle of fault forfeits first, applied to this sort of case, justifies the judgment endorsed above.

The lesson of the self-defense case is readily applicable to the case of just warfare. Consider a spy working for the Allies in Germany during World War II. It turns out that to fulfill his mission the spy needs to kill someone. There are two possibly useful homicides, either of which would contribute equally to the spy's mission. One is to kill a young soldier raised in a culture that trained young men of ordinary sensibilities not to question the civil authority. The young soldier believes he is doing the right thing by serving in the German military. He is not blameworthy for having this belief, so he is morally not culpable for his soldiering activity. The other possibility would target a civilian, a noncombatant not engaged in any war-enabling activity. But this civilian is a fervent Nazi of evil mind. This noncombatant worked ardently to facilitate Hitler's rise to power and the consolidation of Nazi rule. I submit that you are morally obligated to kill the culpable civilian rather than the non-culpable combatant.

The case of a justified military strike against noncombatants, as described above, involves three factors: (i) the moral culpability of the noncombatant target; (ii) the impact of killing the noncombatant on prosecution of the just war cause; and (iii) the noncombatant's historic contribution to initiating and sustaining the unjust war effort.¹⁷ Would the presence of only two of these factors justify attacking noncombatants? Imagine a potential noncombatant target who culpably endorses the unjust war effort. The noncombatant is placed so that killing her would advance the just war effort; however, she neither contributed to the initiation of the unjust war nor assisted in sustaining it. Again we can consider how we should respond to analogues of this decision problem that arise in simple self-defense scenarios.

17. The number of individuals harmed or avoiding harm is also a relevant consideration. It may be permissible, for example, for me to kill several Evil Aggressors to save my own life. A firm limit, however, may exist on the number of Non-Culpable Aggressors I may kill to avoid my death.

C. Guilty Bystander Trying to Inflict Harm

You are driving up a narrow mountain road and see Evil Aggressor approaching in a large armored vehicle. Evil Aggressor intends to murder you in a head-on collision. Your only recourse is to drive onto the shoulder of the road. The shoulder happens to be occupied by an admirer of Evil Aggressor, Guilty Bystander, who is cheering and gloating at the prospect of your demise. Let us suppose it is clear that Guilty Bystander just happens to be there, and that he has not deliberately chosen to occupy the site you now need for your survival. Furthermore, he cannot maneuver to enable both of you to share the shoulder safely. You must either drive onto the shoulder, killing Guilty Bystander, or be killed by Evil Aggressor. Moreover, although the admirer is powerless concretely to threaten your life, he is doing his best to harm you. He is throwing snowballs to distract you and hasten your demise. Assume his efforts are entirely futile. Still, we might think that the combination of wrongfully taking pleasure at your anticipated demise and acting with evil intent, though entirely impotently, to facilitate your demise suffices to render this guilty bystander significantly and culpably at fault with respect to your mortal plight. Thus, the fault forfeits first doctrine would justify driving onto the shoulder, killing the Guilty Bystander, to save your own life.

D. Guilty Bystander Disposed to Inflict Harm

We might imagine a variant of this case involving an even more attenuated connection between the bystander's conduct and your injuries. First, suppose that the case is as described above, except that the Guilty Bystander is not trying actively to harm you now but is disposed to harm you right now if he could. I suppose that the fault forfeits first doctrine also applies here because of Guilty Bystander's evil intent. It is morally preferable that the guilty bystander dies rather than you and killing Guilty Bystander to save your own life seems justified. I would add that in both of the preceding hypotheticals, Guilty Bystander's evil attempt, or evil disposition, would suffice to render the bystander significantly and culpably at fault in a way that involves forfeiture, in this context, of his right not to be killed.

E. Guilty Bystander Exulting in Anticipated Evil

The next case for consideration eliminates the element of wrongful intent to cause harm. The guilty bystander is merely guilty of possessing a wrongfully positive attitude toward your imminent demise. He may cheer the Evil Aggressor, take sadistic satisfaction in contemplating your wrongful death, or exult in the triumph of evil. In this case, the guilty bystander is purely a bystander. He has no opportunity or intent to cause harm. Presented with this sort of example, many deontologists would insist that the bystander has not forfeited his right to be free from harm, and that you, the innocent driver, are forbidden to harm the bystander, even to save your life.

I disagree. I should add that the fault forfeits first principle commits its proponents to the claim that in a situation in which someone must die, it is morally better that one who is significantly and culpably at fault with respect to this situation should die rather than any non-culpable person who is available to die instead. This holds even when the significantly culpable individual neither causes, threatens, attempts nor is disposed to cause any concrete harm. At least this is so if you can be seriously at fault regarding a situation even though your fault involves neither the violation of anyone's rights nor any wrongful agency aimed at harm. A wrongful attitude toward the evil that others are perpetrating or threatening can be sufficient to negate protection. This position, while controversial, strikes me as correct. Merely taking malicious pleasure in the misfortunes of others does not establish sufficient culpability to dissolve the shield that the status of mere bystander confers. But if one varies the case by making the gloating of the guilty bystander increasingly malign, the judgment that it is wrong to harm him in order to save the innocent becomes attenuated and eventually dissipates altogether.¹⁸ (Imagine a person whose life activity entirely revolves around celebratory rehearsal in thought of horrific immoral acts, such as torture-murder of the innocent.)

F. Fault Forfeits First Doctrine in Just Warfare

The principle of fault forfeits first carries over to the issue of determining the morally preferred targets of violence in the course of prosecuting a just war. If one has a sufficiently important moral cause to justify waging war against the forces opposing that cause, and if killing someone would also sufficiently advance that cause to justify a killing, it would be morally preferable to kill a target significantly culpable with respect to the war rather than an innocent person.

In many cases, one can only advance the just war by killing enemy combatants, whether or not they are culpable. In many cases, when one could kill either combatants or noncombatants to advance the just cause, the combatants will be more culpable, or at least no less culpable, than the noncombatants. But if one is fighting combatants who are not culpable, and if the noncombatants are guilty bystanders in any of the ways detailed above, it will be morally preferable to kill noncombatants rather than combatants to gain a comparative advantage for the just cause.

III. Noncombatants as Wrongful Trespassers

I have raised the possibility that some noncombatants might not merit

18. Jacob Ross posed the following question to me: Why not declare instead that the morally appropriate target of violence, among all whose death would advance the just cause, is that individual who has been more culpable over the entire course of his entire life? See also McMahan, *Killing in War supra* note 5, at 722. I suppose one would be rejecting rather than developing deontological ethics if one denied that to be a morally appropriate target of violence in a situation one must have violated a duty with respect to that very situation rather than at other times in one's life.

the protection of noncombatant immunity because they are morally culpable with respect to the unjust war their country is waging. Their past political efforts may have contributed to the current state of affairs, in which their country is fighting an unjust war. They might be doing everything possible to aid this evil enterprise, even if this amounts to scarcely anything. Or they might be firmly disposed to contribute to their country's unjust war effort if they could. At the limit, they might be culpable for endorsing the unjust war effort and celebrating its triumphs.

There are other possible ways in which noncombatants might plausibly be viewed as legitimate objects of a just war attack. They might, for example, be enjoying the fruits of a wrongful conquest. Specifically, they might be using resources and inhabiting land to which they have no right. For example, if someone wrongly invades and establishes camp in your home, you may expel her. It would be wrong to use, or threaten the use of, force beyond what was necessary to remove the unjust occupier, but on some moral views, the use of violence, even lethal violence, is not forbidden when necessary to regain possession of significant goods to which one has a clear moral title. If all else fails, one might say to the invader, whom one is unable physically to remove, "Get out of my home or I'll shoot!" This case, as so far described, does not specify whether the continued presence of the wrongful trespasser would present a slight irritation, a major nuisance, or a serious threat. If the trespass generates only irritation or nuisance, I assert it must be borne if one has no effective means to eliminate it without subjecting the wrongful trespasser to serious harm. Suppose, however, that the sole method to expel the recalcitrant trespasser without risking personal injury is to use lethal violence. If the trespass itself causes serious harm, many moral theorists would permit the victim to issue, and if necessary execute, threats of violence, in order to end the trespass.

The occupation of a country by a foreign conqueror or colonial power provides a parallel example of unjust trespass. In such a situation, the original inhabitants may have a legitimate grievance against civilian occupants, who are wrongly squatting on their land. Here, peaceful removal of the occupants would obviously be morally preferable, though not necessarily achievable.¹⁹ But violent removal of unjust trespassers is not in principle ruled out.

IV. The Noncombatant Status of Captured Soldiers

Another aspect of the distinction between combatants and noncombatants, as usually drawn within contemporary just war theory, is initially attractive but ultimately proves problematic. This is the claim of a

19. My abstract remarks do not imply moral judgments about particular military struggles against wrongful occupiers. That judgment must await a case-by-case analysis of the specific facts. I do not suggest, for example, that the IRA had a moral right to attack civilians in Northern Ireland, or that Palestinians presently have a moral right to attack Israeli civilians. See generally Saul Smilansky, *Terrorism, Justification, and Illusion*, 114 *ETHICS* 790, 792 (2004).

moral symmetry among combatants fighting on the just and unjust sides of a war. Both sets of combatants do no wrong in shooting at their adversaries, and both are equally bound to abide by constraints against harming civilians. Presuming a moral symmetry among all combatants, regardless of whether they fight for the country promoting or opposing the just war, has superficial appeal. It collapses, nonetheless, under close scrutiny. When two or more military forces engage in armed conflict, no more than one of the opposed forces will have a moral justification for engaging in the conflict. If one side has right on its side, it should not be opposed. Determining which side has the just cause requires, of course, careful weighing of multiple considerations. A single moral reason favoring a belligerent's war aims, for example, may be insufficient to establish that a belligerent is fighting for a just cause. In some conflicts, all the opposing parties have unjust war aims.

Now consider the soldiers fighting for an unjust cause. These soldiers should be regarded as individuals engaged in crimes. As a bank robber has no right to use violence to commit a crime, even when necessary for his self-defense, soldiers fighting to achieve an unjust goal are likewise forbidden to use violence.

The major objection to this conclusion is that, unlike a bank robber, a soldier is an agent of the state, and his professional role mediates his moral responsibilities. Therefore, he should be less culpable, or not culpable at all, when his performance of his formal duties violates the rights of others.²⁰ One may be morally justified in becoming a state official or agent of the state, and when this is so, one acquires a nontrivial moral obligation to subordinate one's personal judgment of right and wrong by carrying out what one is ordered to do, up to some limit of moral heinousness. Consider a prison guard who, in the course of fulfilling his professional duties, shoots an escaping prisoner. Assume the guard correctly and reasonably believes that the prisoner has been denied a fair trial and is innocent of the charges against her. The escaping convict ought not to be shot, but arguably the prison guard ought to fulfill her occupational duty and shoot, and the guard would not be guilty for doing so. The soldier ordered to kill enemy combatants whom she reasonably believes are engaged in a just cause is, morally speaking, in the position of the prison guard.

The response to this objection is that if an institution is generally just, the efficient functioning of the institution contributes to the just causes the institution serves. Those regulated by the institution have an obligation to assist in its efficient functioning, and those who accept an official role in the institution acquire an even stronger obligation to contribute to its efficient functioning by obeying the chain of command. Minor injustices resulting from obeying the chain of command should be tolerated. But a sensible deontological theory would surely hold that there are moral constraints on

20. I owe the argument in this paragraph, and the prison guard example, to an anonymous referee. See also Noam Zohar, *Collective War and Individualistic Ethics: Against the Conscriptio of "Self-Defense"*, 21 POL. THEORY 606 (1993).

the pursuit of institutional efficiency, and the substantial moral rights of those affected by the institution set such constraints. As for the hypothetical escapee situation, I do not believe that it is morally permissible to shoot an innocent escaped convict, even assuming that the unjustly convicted person should accept his sentence and not attempt to evade it. The interest in institutional efficiency cannot justify violating the substantial moral rights of individuals. A consequentialist might argue that upholding the generally just institution, even when its operation occasionally produces serious injustice, maximally protects rights over the long-term. This line of argument, however, is unavailable to the deontologist: just war theory is premised on a deontological philosophy with robust agent-relative moral rights – a philosophy incompatible with such consequentialist arguments.²¹

So if the soldier ordered to fight for an unjust cause is in a situation morally analogous to that of the prison guard in the above example, my view is that the soldier, like the prison guard, should refrain from shooting. I recognize that this analogy may be flawed. In a generally just society, a wrongly convicted individual may well have an obligation to accept the prescribed punishment. If so, the escaping innocent convict is not actually innocent—he may be culpable for attempting to escape. The obligations of a soldier ordered to fight on behalf of an unjust cause (and against those pursuing a just cause) may, therefore, differ from those of a prison guard confronting a culpable escaping convict (who is innocent of the crime for which he is in prison, but still wrongfully fleeing). The soldier confronts enemy combatants who are morally entitled to use violence. Engaged in a just cause, these enemy combatants are not culpable in any way. Accordingly, there may be grounds for the prison guard to shoot that would not carry over to the soldier fighting an unjust war.

Some have claimed that if an unjust warrior is not culpable, she will generally retain the right to fight in self-defense against enemy troops that have right on their side.²² In most circumstances of war, however, fighting in self-defense on the part of unjust warriors is likely to advance their unjust cause. If these morally bad effects of advancing an unjust cause are significant, as they will be when the stakes are high as in the case in most wars, any putative right of self-defense on the part of morally innocent unjust warriors would dissolve.²³ In any event, acts of self-defense by the

21. Moral obligations are traditionally conceived as agent-relative. Individuals owe an obligation to each and every rights holder. This duty, therefore, demands more than merely minimizing the overall incidence of rights violations. See generally ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974) (arguing against a “utilitarianism of rights”).

22. See McMahan, *Killing in War*, *supra* note 5, at 205-6; see also Paul W. Kahn, *The Paradox of Riskless Warfare*, 22 *PHIL. & PUB. POL. Q.* 2 (2002).

23. It is tricky to extrapolate from the principles governing self-defense in ordinary life an ethics applicable to self-preservation in war. In a confrontation between a morally innocent attacker and a target who appropriately defends himself against such an assault, either party’s success will result in at least one innocent life saved. The outcome is not nearly as rosy in an unjust war: victory by a morally innocent attacker fighting for an unjust cause can trigger moral catastrophe.

morally innocent unjust warrior might be wholly or partially excused but never justified. Compare the morally innocent bank robber who is attacked by police and kills them, as this robber thinks, in self-defense. This is excusable killing on the part of the bank robber but not justified self-defense.

Just war doctrine in its contemporary manifestations tends to distinguish the moral responsibility of soldiers to fight only according to the norms of just warfare from the responsibility of soldiers to fight only in just wars. Just warfare doctrine also tends to attenuate or deny the latter. Walzer comments, "by and large we don't blame a soldier, even a general, who fights for his own government."²⁴ Hence, a soldier who fights fairly, even in an unjust war, is not guilty of any moral crime, and if he surrenders or is captured, he acquires immunity status, much like the noncombatant. It is a violation of the war convention deliberately to harm or kill prisoners of war, even if doing so would help advance the just cause. The argument for the limited moral responsibility of soldiers for their participation in an unjust war goes as follows:

1. Engaging in war when one's cause is unjust is doing what is morally wrong;
2. Doing what is morally wrong under pressure of coercion or compulsion tends to excuse (rendering one less blameworthy or not blameworthy at all);
3. Doing what is wrong as a result of excusable ignorance tends to excuse (rendering one less blameworthy or not blameworthy at all);
4. A soldier's engaging in war when his cause is unjust is always done under pressure of coercion or compulsion and as a result of excusable ignorance;
5. A soldier's engaging in war when his cause is unjust is always done under two conditions that tend to excuse;
6. These two conditions, alone or together, always suffice to render a soldier's engaging in war when his cause is unjust entirely excusable and not blameworthy;
7. If what one does is entirely unblameworthy, one should not be blamed;
8. A soldier who engages in war when his cause is unjust should never be blamed for doing so;

To be sure, acting under coercion, compulsion, or as a result of excusable ignorance may minimize blameworthiness; however, it is implausible to presume that soldiers fighting for an unjust cause are necessarily blameless. Indeed, coercion, compulsion and excusable ignorance are not inevitable aspects of fighting in an unjust war. Even when these are present, they may not exist to a degree that entirely excuses the soldier.

24. Walzer, *supra* note 2, at 39.

Sometimes the political rulers who command the agent to go to war are not in fact threatening serious penalties if the agent declines to obey the command. Coercion or compulsion may not always be present to any significant extent. Moreover, in ordinary life, only severe coercion or compulsion completely excuse wrongdoing. If a bad man threatens to kill me unless I kill two innocent people, and I kill two innocent people, what I do is wrong, and probably blameworthy. If the bad man threatens just to break my knees, and to avoid this penalty I kill two innocent people, I am certainly blameworthy.

Much the same may be true of excusable ignorance. Sometimes political rulers say, "Go fight for the nation! Our cause is just!" But most people would know, or should know, that rulers often make spurious or inflated claims. Sometimes political rulers announcing the call to war do not even try to present the conflict as morally justified. They say, "Our glorious army will crush its puny enemies. We are strong and they are weak." The fact that the political rulers mobilizing troops for war do not offer any moral justification for going to war ought to establish in the mind of a reasonable person a strong presumption that the war lacks justification. In such cases, ignorance of the injustice of the war would be inexcusable.

In a liberal democracy with open media, citizens have both the opportunity and the responsibility to learn the relevant facts and thus decide whether the nation's engagement in any wars they are asked to support and fight is just or unjust. If citizens fail to make use of these opportunities, and go to war falsely thinking their nation's cause is just, their ignorance may make them culpable. Naturally, there may be a stark asymmetry here between the degree of responsibility fairly attributable to citizens who are recruited to serve in an unjust war in a democracy and citizens recruited in a tyrannical regime, which severely restricts free speech and related civil liberties.

Morality surely prescribes a strong generic presumption against killing people. Powerful reasons are needed to overcome this presumption. If my wife says to me, "Kill the neighbors!", even though she is a reasonable person who usually speaks the truth, I must surely demand a much more complete account of the moral grounds for this killing. Additionally, I must check the facts and assess the argument for myself before I could possibly be justified in killing the neighbors. This presumption equally applies to killing in war. Moreover, one might well conclude from the historical record that most wars are unjust on all sides; therefore, there should not be a general presumption that when a political ruler says, "Our cause is just and our war effort is moral and right," she is speaking the truth.

Wars cause immense harm to humanity. One should not engage in war unless one has compelling moral reasons for doing so. A subjective belief in the justice of a cause is insufficient to excuse an objectively wrong war. Sometimes, those fighting in an unjust war are acting under either coercion or excusable ignorance, or both, and these conditions tend to excuse. But these excuses are not always present and will exist to varying degrees. Within just war theory, there is no good reason to hold that those who

engage in unjust war are seldom or never blameworthy. It may be expedient to presume otherwise, but expediency should not shape just war theory assessments.

The moral responsibility of individuals who engage in unjust war diminishes the significance of the distinction between combatants and noncombatants.²⁵ First, those who engage in unjust war are acting wrongly and without justification. Therefore, they may be acting culpably when they fire at enemy combatants. When fighting an unjust war, one perpetrates unjustified killings whether one shoots at combatants or noncombatants. If an unjust warrior has a choice of killing either two enemy noncombatants or a single enemy combatant, it is preferable to do the latter. Since both types of killings are wrong, it is morally preferable to kill the smaller number, other things being equal. Second, the fact that those fighting an unjust war are engaged in wrongdoing undermines the moral presumption that, if captured, they become noncombatants possessing the same right not to be killed as any other noncombatants. Suppose that soldiers fighting an unjust war are captured, and keeping them alive significantly hinders the just war effort. This may be because there is a large risk that if they are not killed they will escape and rejoin the army or it may be because tending to them diverts resources needed to win a crucial battle. To focus the issue, suppose that soldiers engaged in a just war can either fight and kill one hundred active enemy soldiers or slaughter one hundred captured enemy soldiers. Engaging in battle would be justified (the expected gain is worth the expected cost), but slaughtering the captured soldiers would achieve the same gain at less cost and therefore would more efficiently advance the just war effort. On these premises, the captured soldiers are not threatening, but bringing about their deaths would nevertheless be useful. The more it is the case that those engaged in the just war effort reasonably believe that the enemy soldiers lack an excuse for engaging in unjust war, the less plausible, I submit, a moral distinction between the active enemy and the captured enemy becomes. Under these circumstances, killing captured enemies also becomes more tolerable. The same argument supports trying captured enemies who are simply culpable combatants for war crimes. In principle such combatants could be guilty as charged and disqualified from the just war privileges of captured soldiers.

V. Guerrilla Combat

Guerrilla warfare takes many forms, but a common method involves irregular combatants who do not wear soldier uniforms when they engage in an ambush, and who take on the appearance of civilian noncombatants at other times. In so doing, fighters exploit the distinction between combatant and noncombatant and the reluctance of enemy soldiers to fire on noncombatants. The guerilla hides among civilians and presents enemy soldiers with a dilemma: attack locations with suspected guerrillas,

25. See generally McMahan, *supra* note 5.

inadvertently harming civilian noncombatants, or refrain from attack. Something of the same dilemma is present when enemy soldiers position themselves close to civilians so that their adversaries must either refrain from attacking them or inflict significant injuries on civilian noncombatant targets.

Traditional just war theory affords combatant adversaries a presumptive right to engage in fighting. Perhaps both sides should assume that even if their enemies are fighting for an unjust cause, they cannot be expected to know this is so. Additionally, according to this tradition, the distinction between combatant and noncombatant assumes its usual significance. Then both sides are obligated to fight in ways that do not compromise the ability of the opposing forces to distinguish combatants and civilian noncombatants and, when firing, to aim their fire solely at the legitimate combatant targets. Some theorists assert that if military personnel hide among civilians or shelter themselves among noncombatant persons and buildings, the moral responsibility for harm to civilian targets falls on those who hide and shelter, not on the enemy soldiers who then cannot carry on the fight except by attacking these presumptively illegitimate targets.

The position that I am arguing for downplays the moral significance of the combatant versus noncombatant distinction. Therefore, the moral wrong of abusing or exploiting that distinction will be less on my account than on traditional accounts.²⁶ Consider the generic situation in which enemy forces occupy a country and some of the inhabitants resort to guerrilla combat to resist this occupation. They do so to compensate for conventional force inferiority. Now the guerrillas either have just cause to resist the occupiers or they do not. It is suggested below that if they do not, the occupation itself is just. This is a simplification, since cases could arise in which the occupation is unjust but resistance would also be unjust.

If the guerrillas have a just cause, they have a right to shoot at the invaders, and the invaders have no right to return fire. The invaders have no right either to pursue the guerrillas into the villages or to shoot at anyone. They may not fire on civilian noncombatants, avowed combatants, or combatants masquerading as civilians in order to perpetuate the unjust occupation. In this scenario, one could suppose that the guerrillas are wrong to hide among civilians or pretend to be civilians between episodes of combat because they make it more difficult for unjust occupiers who conscientiously wish to abide by the war convention to fight them successfully. However, I do not see why the guerrillas fighting in a just cause owe invaders an opportunity to attack them successfully.

If the guerrilla cause is just, and their tactics effectively advance the cause, I suppose the civilians are morally obligated to support the guerrillas' struggle and to shoulder some risk on their behalf. At a minimum, actions

26. What I go on to say about guerrilla warfare should generate a parallel revision in our understanding of the morality of sieges, blockades, and reprisals. See WALZER, *supra* note 2, chs. 10, 11, and 13.

by guerillas imperiling civilians do not cease to be just unless the expected harm to civilians is disproportionate to the anticipated benefits. Moreover, if the guerrillas' cause is just, civilians share an affirmative obligation to provide shelter, basic provisions and other aid. At the same time, they have a duty not to disclose to the unjust occupiers the location or identity of guerilla combatants.

On the other hand, suppose that the occupation of the country is just, and the resistance of the guerrillas is unjust. Now, the guerrillas have no right either to shoot at the occupiers or to imperil civilians by hiding or sheltering among them. The civilians have the right to go about their lives peacefully, without being drawn into an armed struggle.²⁷ The just occupiers have a duty to refrain from firing at peaceable civilians drawn into the line of fire against their will. Innocent civilians and the just occupiers share a moral responsibility to avoid unduly endangering genuinely innocent bystanders. This responsibility might generate a duty on the part of innocent bystanders to withdraw from areas where guerrillas are located, so that the just occupiers can attack the guerrillas without harming civilians. In some circumstances, if the guerrillas in one's neighborhood are sufficiently weak militarily, one may be obligated, as a peaceable civilian, to drive the guerillas away from areas where civilians are present. They may also be obligated to provide information to the just occupiers on the identity of suspected guerillas hiding among them. If civilians support an unjust guerrilla warfare effort, they may be culpable for doing so, and culpability may erode the moral shield of traditional noncombatant immunity.

In the case of just war against a guerrilla insurgency, the distinction between the combatant who is the legitimate target of military attack and the noncombatant who is not a legitimate target does not disappear entirely from the just warfare account. But the issue of just war (who has a just cause to fight?) profoundly shapes the obligations of just warfare (whom is it permissible deliberately to attack?) and the line between combatant and noncombatant does not have the make-or-break significance that it does in traditional just warfare doctrine.

VI. Morally Innocent Unjust Combatants

My claim is that whether or not one is morally insulated from deliberate attack during war depends more on the justice or injustice of the aims for which one wages war than on one's status as combatant or noncombatant. Roughly, if one is fighting for a just cause, one may fire on

27. The statement in the text is not quite right in all circumstances. A bystander caught in the cross-fire between just and unjust combatants has a moral duty to accommodate and facilitate the just combat effort at least by removing herself from the line of fire. See Robert Nozick, *Total War, Nuclear Deterrence Terrorism, Reprisals - Drawing Some Moral Lines*, REASON, Dec. 1978 at 19 reprinted in ROBERT NOZICK, SOCRATIC PUZZLES 300, 303 (1997), retitled *War, Terrorism, Reprisals - Drawing Some Moral Lines*.

those materially aiding the enemy's war effort, including those culpable agents who have acted in the past to bring into existence an unjust menace (or those who are disposed to do so if they could), and perhaps also those who endorse the unjust war effort, provided the endorsements rise to the level of serious culpability. This claim may be vulnerable to challenge.²⁸ The challenge further presses the logic of the claim that moral culpability, or lack thereof, plays a greater role in determining the limits of permissible attack than accounts of the war convention by traditionally-minded theorists such as Walzer and Ramsey wish to allow.

Consider the position adopted by the War Convention. Suppose you are engaged in a just war. You would have a moral right deliberately to attack morally culpable combatants fighting for an unjust cause, and perhaps deliberately to attack morally culpable noncombatants as well. What should be said about your supposed right deliberately to attack morally innocent combatants who are fighting on the side of injustice? The war convention constrains what it is permissible to do when fighting for a just cause. Just as one may not permissibly fire on morally innocent bystanders, even if doing so would advance the just war effort, a similar constraint may bar an individual from advancing a just cause by attacking morally innocent combatants.

Several considerations shape the ultimate morality of attacking certain individuals to advance a just war. Compare, as potential targets of attack, the morally innocent unjust warrior and the plainly innocent noncombatant, i.e., the true bystander. The former is at the least performing actions that are objectively morally wrong, except in very unusual circumstances.²⁹ This will be so even if an individual is hypnotized or so brainwashed that she is not morally responsible for her behavior, not fully an agent on this occasion but only an unjust threat. In many circumstances, the innocent unjust warrior will be acting as a morally responsible agent in performing combatant activities. This unjust soldier decides what to do on the basis of the information and reasons available to her, and she is morally responsible for her choices, even if they are ultimately excusable. Such an agent is the paradigmatic innocent wrongdoer. Both the doing of what is objectively wrong and the doing of what is objectively wrong as a responsible agent, though excused and not culpable, distinguish the morally innocent unjust warrior from the true bystander. These two distinctions ground the moral

28. See McMahan, *Killing in War*, *supra* note 5, at 209-21. See also McMahan, *Self-Defense and the Problem of the Innocent Attacker*, 104 *ETHICS* 252 (1994) exploring these self-defense issues and raising objections against the position that it is morally permissible to kill morally innocent attackers, but not committing firmly to any particular resolution of the issue.

29. I am imagining coerced participation in combat, which would not only excuse but also justify participation in war. Suppose, for example, that the evil dictator threatens to murder each of the 100 children in your province unless you join his unjust war as an enlisted soldier. You now face a choice of evils, and even if there is a strong deontological obligation not to violate people's rights by engaging in unjust war, the rights at stake might be outweighed by the evil that would fall on the children if you refrain from engaging in this rights violation yourself.

permission to attack the former but not the latter, even though warriors and bystanders are equally non-culpable.

This last claim is compatible with holding that there is some moral bar on attacking morally innocent unjust warriors. Their innocence is a moral reason, though not necessarily a decisive reason, for refraining from violence against them. It is impermissible to use military violence to advance a just cause in certain situations. The evil of attacking innocents, even innocents fighting for an unjust cause, may outweigh the moral gain that would accrue from advancing the just cause by such attack. A particularly important just cause, however, may override the bar on attacking morally innocent unjust warriors.

A third relevant factor that is often, though not always, present is that the advantage to the just cause that would be gained by attacking combatants fighting for an unjust cause is often far greater than that gained by attacking noncombatants. Noncombatants are often easy and tempting targets, but their destruction tends only marginally to advance the just cause. In contrast, to block the success of an unjust cause being advanced by a military operation, one must usually defeat the military forces arrayed under the banner of the unjust cause.

A fourth relevant factor, briefly described above, is the magnitude of the moral stakes in the combat. Proponents of a just cause that has significant moral value will have substantial license to attack enemy combatants.

Personal culpability will weaken one's right to be free from deliberate attack. This is because it is better to attack culpable rather than non-culpable combatants, all other things being equal. It is similarly preferable to attack culpable rather than non-culpable noncombatants. The fault forfeits first doctrine asserts that it is better to attack the culpable rather than the non-culpable, but it does not, per se, rule out attacking non-culpable individuals if there are no culpable targets whose destruction or incapacitation would advance the just cause.

The morally innocent unjust warrior is engaged in conduct that is objectively morally wrong. His side's victory produces serious injustice. Even if the just warrior and the unjust warrior are equally innocent, the fact that the former fights to achieve good, while the latter opposes it, is morally significant. I conclude that it is permissible for the just warrior to attack the morally innocent unjust adversary. Furthermore, it is at best excusable, but certainly never justified, for the morally innocent unjust adversary to fight for her side.³⁰

30. See McMahan, *Killing in War*, *supra* note 5, at 722-25; see also Otsuka, *supra* note 16, at 74-94. Otsuka suggests that the circumstance in which a morally innocent, unjust attacker intends to carry out an attack that is, in fact, wrong can generate a moral permission to use lethal violence against such an attacker. But a morally innocent person who becomes a lethal threat without any exercise of her own agency is assimilated to the class of innocent bystanders, who may not be harmed even to save one's own life from wrongful attack. This position is consistent with the further claim that the right to attack innocent attackers is sharply limited. Whereas one is allowed to kill in self-defense any

Consider the hypothetical scenario in which the warriors fighting for the just cause are morally guilty—they have every reason to believe they are fighting for the wrong—and the unjust warriors opposing them are morally innocent—they have every reason to believe their cause is just. I maintain that the warriors fighting for the just cause do what is right, even if they are blameworthy for doing so. Furthermore, those fighting against them are doing what is wrong, even though their actions may be morally meritorious. In the unusual circumstance that killing warriors on either side would equally advance the just cause,³¹ it would be preferable for the morally innocent unjust warriors to live and for the morally guilty just warriors to die. So I contend that in this odd circumstance it is morally permissible, or even morally required, to kill one's blameworthy comrades in a just war enterprise rather than morally innocent enemy combatants fighting for an unjust cause.

Culpability, though a significant consideration, does not trump all other factors. It may be morally permissible for those fighting a just war to deliberately fire on morally innocent combatants fighting for the unjust cause.³²

VII. Should Rights Reflect What We Can Know?

Against my claims that (1) it is sometimes morally preferable to attack guilty noncombatants rather than innocent combatants, and that (2) sometimes the combatants are morally guilty of the crime of war and, when this is so, surrendering or being captured does entitle them to noncombatant immunity, it might be urged that these are merely logical possibilities with no practical relevance. Just war theory should provide sensible advice readily adaptable to real world scenarios. In actual circumstances, we never know whether civilians on the enemy side are morally culpable, so what we might permissibly do to them if we had this knowledge is not an issue to which just war theory should pay any attention. Additionally, we can rarely apprehend whether enemy soldiers subjectively and reasonably believe their cause is just. Given these limitations, individual culpability should be excluded from the set of considerations informing legitimate targets of attack. So runs the objection against 1 and 2.

number of evil aggressors who are menacing one's life, one might insist that when self-defensive attack against morally innocent attackers causes more deaths of innocent people, or equivalent evils, than it prevents, the right to such self-defensive violence fades away. In just wars this condition is often satisfied.

31. What sort of case could this be? Consider James Thurber's imaginary civil war history, *If General Grant had been Drinking at Appomattox*, which appeared in the *New Yorker* on December 6, 1930, and recounts what would have happened if General Grant had been drinking at Appomattox. Given that the generals who carry out the surrender procedure would be hopelessly confused, winning the battles could have meant losing the war.

32. See Larry Alexander, *Justification and Innocent Aggressors*, 33 WAYNE LAW REVIEW 1177 (1987) for the argument that self-defense against innocent attackers is, at most, excusable but never justified.

I respond that just war theory should proceed in stages. The first stage should clarify what is morally permissible and impermissible in given circumstances, with the simplifying assumption that all parties possess the relevant knowledge regarding their choice of conduct. Next, we should consider what morality requires when this assumption of full knowledge is weakened in various ways. When people act wrongly based on ignorance of facts or norms, their ignorance may or may not be blameworthy. Innocent ignorance excuses and may fully exonerate certain acts.

None of this has any tendency to show that moral guilt and innocence have no significant influence on the just conduct of war. The more egregiously immoral the war aims of belligerents, the less likely it is that the citizens of the belligerent nation, who endorse the aims of the war, are guiltless in doing so. The more democratic and open the society, and the more educated the citizens in the society waging unjust war, the more likely it is that they had the opportunity to form a sound judgment of the morality of the conflict and are, therefore, culpable if they neglected or misused this opportunity. One may lack detailed evidence about individuals in an enemy nation, but have a reasonable basis for approximate statistical judgments. One may conclude without specific evidence on each individual that many citizens of Stuttgart in 1944 supported Hitler and that many of them were blameworthy for doing so. There simply is no basis for pleading that we can never have sufficient information to form reasonable beliefs about opponents' degree of complicity and moral guilt. Consider the position of the German citizens who pleaded "we're not guilty" when challenged by the army prosecutor in the 1961 movie *Judgment at Nuremberg*. Their claim was not that the facts were too murky to sustain a judgment. Rather, they insisted that the demonstrable facts exonerated them (and that this judgment can be sensibly formed without a criminal trial or similar elaborate investigation). Their particular claim might be dubious, but I endorse the general claim that an observer can often reasonably surmise whether individuals were complicit in wartime evils.

I should explicitly state that, on my view, the fact that considerations of culpability affect what harms one may permissibly impose on persons does not erase the distinction between permissibly imposing harm on a person and punishing that person for wrongdoing. For all that I have said, it may be that the coercive imposition of serious punishment on persons should be carried out only by an authorized government agency and according to a finding of criminal wrongdoing by a trial or some other form of due process. Nonetheless, if my life is threatened, whether I may permissibly kill other persons to save my own life depends on their culpability with respect to the present threat. If in the heat of action I have no way of assessing likely culpability, the culpability factor drops out of consideration. But in many situations, participants in war and observers of military conflicts can roughly estimate likely culpability, and this estimation will define permissible responses.

In this connection it is important to guard against a tempting confusion of thought. Nothing I have affirmed in this essay rules out the possibility

that, enforcing both traditional noncombatant immunity and the presumption that combatants are innocent of the crime of war, even if their cause is unjust, produces morally desirable consequences over the long-term. Attacking civilians in the course of war tends to generate hatred of the enemy on both sides and to inhibit the conditions of a just and lasting peace, no matter what the outcome of the conflict. Holding soldiers responsible for the justice or injustice of their cause tends to encourage their belief that they should fight to the bitter end, even in a lost cause, because they cannot surrender without exposing themselves to the risk of severe punishment. These considerations of expediency should be distinguished from considerations internal to the morality of just warfare, the deontological theory that supposes some courses of action are right or wrong, quite independently of their tendency to produce best outcomes. My aim here is to press the internal logic of just war theory.

VIII. Absolute and Moderate Construction of the Revised Right of Immunity from Deliberate Attack

To this point I have been discussing where exactly to draw the line between those who may legitimately be attacked in war and those who may not be attacked. Even if all my arguments to this point are successful, they do not entirely reject the fundamental moral idea of noncombatant immunity. In war, as in peacetime, some persons have a right not to be killed, which includes a right not to be deliberately attacked.³³ Consider the following unambiguous case. The just warriors are confronting evil aggressors, and they are tempted, by reasons of military expediency, to turn their weapons on innocent civilians who are merely non-guilty bystanders to the conflict. Just warfare principles applied to this case do not yield the judgment that these innocent bystanders have an absolute right not to be harmed. This is because it may be that a morally permissible attack on legitimate military targets may have the foreseen or unforeseen, but, in any event, unintended result of killing some innocent bystanders. Provided that the proportionality constraint is satisfied, such attacks may be morally acceptable. The innocent bystanders, nevertheless, retain a crucial moral right not to be deliberately attacked. That is, others may not seek to harm

33. This formulation carries a commitment to a controversial proposition in traditional just war theory, which is not at issue in this essay. The proposition is this: the right of noncombatant immunity is the right not to be deliberately attacked, and is not violated by one who directs fire only at combatants (or a legitimate military target) while knowing but not intending that harm to noncombatants will result, provided the unintended harm is not disproportionate to the good effect at which one does aim. I have no quarrel with this aspect of traditional just war theory, which incorporates the doctrine of double effect. See Frances Kamm, *Failures of Just War Theory: Terror, Harm, and Justice*, 114 *ETHICS* 650 (2004) for criticism of the doctrine with emphasis on its implications for morally permissible ways of waging war; see also Francis Kamm, *Towards the Essence of Nonconsequentialism*, in *FACT AND VALUE: ESSAYS ON ETHICS AND METAPHYSICS FOR JUDITH JARVIS THOMSON* 155 (Alex Byrne et al. eds., 2001) for development of a deontological moral position that eschews the doctrine of double effect.

them as a means to an end or as an end in itself.

The next question remains whether the innocent bystander civilian's moral right to be spared from an attack is a right that holds without any exceptions. A right is absolute if and only if one is bound to respect it, regardless of the consequences. Is the right of noncombatant immunity as defined by the War Convention absolute in this sense? Is infringing this right always morally wrong or merely sometimes? We might limit the term "terrorism" to deliberate violations of the War Convention. The terrorist then is one who engages in an attack intending to harm morally innocent civilian bystanders. Alternatively, the terrorist might engage in an attack that inadvertently rather than intentionally harms such bystanders. This harm, nevertheless, may be sufficiently great to suggest that the terrorist is unconcerned with bystander casualties. Might military actions that fit these descriptions ever be morally justified, all things considered?

The absolutist holds that certain moral rights should be respected, even if the heavens would fall. This view is initially appealing, but if the consequences of protecting these rights were truly catastrophic, most would agree that those rights must yield. Michael Walzer, who wrestles with this issue, prescribes narrow exceptions to this absolutist rule according to a specific formula.³⁴ He proposes, in effect, that justice should always be done, unless the "heavens" are really about to fall. For him, if a supreme emergency arises, the right of noncombatant immunity gives way, and it is morally acceptable to attack innocent bystanders.

Walzer finds in the policy of terror bombing as carried out by the Allies fighting against Hitler's armies in the darkest days of World War II a compelling instance of supreme emergency. He contends that the bombing raids directed at residential districts of German cities in 1940 and 1941 were clear violations of noncombatant immunity but, nevertheless, morally justified.³⁵ The supreme emergency doctrine commands rigid respect for the right of noncombatant immunity, unless doing so would produce moral catastrophe. The annihilation of a national community or some morally equivalent disaster would qualify as consequences so horrible that if one can only prevent them by violating noncombatant immunity, one morally ought to do so. In a supreme emergency, otherwise wrongful violations of the right of civilian bystanders not to be deliberately attacked are justifiable, provided they are necessary to prevent the threatened catastrophe from coming about and provided proportionality is satisfied.

34. See WALZER, *supra* note 2, chs. 12, 16, and 17.

35. This hypothetical does not necessarily represent the actual history of the war. Military historian John Keegan writes that only in 1942 did the British military conduct regular bombing raids on residential neighborhoods rather than military and industrial facilities. See JOHN KEEGAN, *A HISTORY OF WARFARE* 374 (1993). If Keegan is correct, then British terror bombings were not responses to a supreme emergency and thus could not conform to Walzer's rules. Walzer might respond that given the limits on the technology of targeting in 1940 and 1941, the idea of aiming at a target smaller than a large area were fatuous, so one could not credibly claim to be intending to hit a factory and not the surrounding neighborhoods. If so, a supreme emergency may well have existed in 1940 and 1941.

One possible response to Walzer's characterization of Allied terror bombing would be to deny that the actual policy necessarily violated the war convention,³⁶ but I will set this issue to the side. Assume that this strategy violated the War Convention and was necessary to avoid the destruction of a national community. Is Walzer's supreme emergency doctrine coherent and plausible? Should supreme emergency become a principle of just war theory?

I am sympathetic to Walzer's attempt to jettison absolutism without either abandoning the right of noncombatant immunity entirely or qualifying it to such an extreme that it hardly retains any content.³⁷ Nonetheless Walzer's position is inherently unstable and ultimately unacceptable. The problem lies close to the surface of Walzer's discussion. Walzer stipulates that the right of noncombatant immunity must only yield when the aggregate evil avoided approaches moral catastrophe. This argument is faulty: the basic logic of this position supports killing innocent bystanders under far broader circumstances.³⁸ What seems to be carrying the burden of argument toward the relaxation of the war convention is the consideration that in some circumstances the ratio of the evil that one perpetrates by violating noncombatant immunity to the evil that one averts by this means is sufficiently favorable that the violation is justified. If it is morally acceptable, and perhaps obligatory, to attack and kill 100,000 innocent German bystander civilians to prevent the murder of one million people, then why isn't it equally permissible to attack and kill a single innocent civilian bystander to prevent the murder of ten people? Whatever ratio of evil perpetrated to evil avoided that justified violating noncombatant immunity in the supreme emergency should similarly justify proportionately

36. The argument would be that if one is entitled to attack factory workers, because they qualify as combatants, one is entitled to attack them in their homes and, if one does so, the deaths of noncombatant family members, if any, would be merely foreseen and not intended. So by the doctrine of double effect, the killings of the noncombatant family members would be permissible provided the proportionality condition is satisfied. The issue that arises here is whether or not it is correct to maintain that when one drops a bomb on a house, killing its inhabitants, the deaths of those present who are not the target of attack are only foreseen and not intended. See Philippa Foot, *The Problem of Abortion and the Doctrine of Double Effect*, reprinted in PHILIPPA FOOT, *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* 19-32 (1978) (discussing the problem of closeness of descriptions).

37. See ANSCOMBE, *supra* note 12, and RAMSEY, *supra* note 11, chapter 8 for discussions of the argument that the war convention should be obeyed regardless of the consequences. However, in these essays adherence to absolutism is supported by appeal to religious premises and specifically to the imperative to trust in God, who has responsibility for the consequences.

38. The dogmatic-sounding statement in the text is supported as follows. Any proposed definition of absolute catastrophe or supreme emergency would necessarily appear arbitrary. Wherever one draws the line that separates supreme emergency from a lesser problem, the question arises, why draw the line there and not elsewhere? Walzer provides no answer. A further difficulty is that wherever one draws the line, one must justify the extraordinary difference in the permissibility status of a violation of noncombatant immunity that occurs just below the line compared to a similar violation that occurs just slightly above it. A deontological defense of my proposition that eschews any brightline and avoids discontinuities in moral judgment would be more compelling.

smaller violations, even where no supreme emergency looms.

Conclusion

My conclusion is that the right of noncombatant immunity has a more restricted scope than is often supposed. It can be overridden by considerations of moral culpability and innocence, and unless we are absolutists, can be overridden by the consideration that the consequences of respecting noncombatant immunity would be sufficiently bad. A theme in this discussion has been that the issue of just cause takes priority in just war theory casuistical judgment. What one may permissibly do to combatants and noncombatants in the course of war depends to a very large extent on the justice or injustice of one's cause. The lesson to be drawn is that one cannot swiftly and easily infer from the fact that an enemy combatant either attacks civilian noncombatants or kills captured soldiers that he is fighting unjustly and committing a moral wrong by violating the right of noncombatant immunity. These judgments always involve a complex balancing of opposing reasons. Moreover, they always rely on a prior judgment about which side, if any, is fighting in the service of a just cause in a military conflict. This essay has not addressed the question of what constitutes a just cause that rationalizes military combat. By setting this issue to the side in this essay I do not mean to convey any suggestion that this issue is simple or easy. Finally, I should reiterate that this discussion has been an internal exploration of just war theory and has not addressed the external issue whether just war theory sympathetically construed can withstand criticism from rival moral approaches, such as consequentialism.