

## **Just Warfare Theory and Noncombatant Immunity**

Word count 8734

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: in the actual circumstances of initiating or sustaining military conflict, the reasonably expected moral gains must exceed the reasonably expected moral costs.<sup>1</sup> In this tradition the justice of the war is regarded as a separate issue from the justice of the conduct of the war. Justice in warfare requires above all respect for noncombatant immunity.<sup>2</sup> Those engaged in war are prohibited from deliberately attacking those who are not soldiers, not commanders and political leaders of soldiers, not supplying soldiers with the wherewithal to carry out warfare. Combatants are those whose activities materially assist the war effort. One may not aim at inflicting harm on noncombatants as one's end or as a means to one's end. In other words, noncombatants have the right not to be intended targets of attack. The right of noncombatant immunity allows that in the course of war it may be acceptable to inflict harm on noncombatants that is not intended as end or means to one's end, provided a proportionality norm is observed: the good effect that one aims to achieve must be greater than the bad effect of collateral damage to noncombatants that one foresees but does not intend, and there must not be available another option for action that gains 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.

This essay examines the justice in warfare component in just war theory.<sup>3</sup> 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 are aligned with this common-sense 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."<sup>4</sup> Politicians appeal to this sentiment, sometimes by way of drawing sharp lines between "us" and "them." The first U.S. secretary of homeland security, Tom Ridge, characterizing the present-day threat to U.S. security, has 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."<sup>5</sup> My question is: what is the nature and moral force of this distinction?<sup>6</sup> To anticipate my conclusion: we should be skeptical that just warfare theory really does issue in any absolute and exceptionless condemnation of what we are prone to call terrorist acts.

The examination conducted in this essay is internal to just war and warfare theory rather than any sort of external attack on it. The question here is not what should be regarded as morally acceptable all things considered but

rather what is morally acceptable according to the deontological tradition of moral thought, in particular the morality of self-defense against aggressive attack. I should give notice at the outset that my account of the morality of self-defense is to some degree revisionary and that my account of noncombatant immunity concludes that just warfare theory as elaborated recent distinguished exponents such as Michael Walzer and Paul Ramsey rests on fundamental errors.<sup>7</sup>

#### THE IDEA OF A NONCOMBATANT

Is it so that moral immunity from deliberate attack should arise from the circumstance that one is not currently menacing? 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.

G. E. M. Anscombe has maintained that if one's activities only provide what soldiers need in the course of ordinary life, rather than what they need as soldiers, one is a noncombatant.<sup>8</sup> But the Anscombe position draws the circle too narrowly. Without daily nourishment, soldiers cannot fight, just as they cannot fight without bullets. Those who supply what enables soldiers to fight are materially contributing to the war effort. The relevant line-marker is a causal notion: If one's activities significantly increase the probability that group X's war-making will be successful, one is materially contributing to X's war effort.

The traditional version of the combatant/noncombatant distinction might seem to correspond to a moral line that should be drawn between ways of assisting evildoers in ordinary life. A restaurant owner who serves a meal to a known bandit is not materially assisting the bandit's crimes. A gun dealer who sells a gun to the same bandit is implicated in the crimes the latter commits, we might think. This way of thinking draws the same distinctions the traditional just war doctrine draws.

However, the traditional way of drawing these lines does not withstand scrutiny. There might be a morally relevant distinction in the intention of the meal-provider and the gun-provider, but then again, there might not be. The meal-provider might be acting with the aim of facilitating the bandit's crimes, and the gun-owner might not be. The same is true if we associate the gun-provider's act with a greater raising of the probability that crimes will be committed. Again, this might or might not be the case, but it is not necessarily the case (and in scenarios of war may not even typically be the case). Of course, the just war theorist is a deontologist who distinguishes between the quality of agency involved in bringing about harm by doing or allowing, but both the meal-provider and the gun-provider are plainly both on the doing side of that line. Both the meal-provider and the gun-provider might try to excuse their assistance to the bandit by saying "If I don't do it, someone else will," which would mean that their activity is not a but-for cause of the bandit's crimes. In either case, the circumstances might be such as to vindicate or defeat the proposed excuse. Consider a case in which the meal-provider and the gun-provider both are equally in a position to know that the assistance they provide to the bandit is a

necessary condition of some serious wrongful commission of harm by the bandit. In this case, both are materially assisting a crime and both are equally culpable for doing that. The fact that the provision of a gun has a psychologically more vivid and salient connection in our minds to the eventual wrongful acts done is not per se morally relevant.

What holds in ordinary life holds also in the case of war. The traditional narrow line drawn between combatants and noncombatants as characterized by Anscombe cannot be sustained. It should be noted that on the view I favor, medical personnel treating wounded soldiers behind the lines and thus facilitating their return to battle are materially assisting the war effort and hence should qualify as combatants not as noncombatants. Good consequences may flow from establishing and upholding conventions that stipulate that medical personnel and farmers supplying food to the troops and other indirect providers of aid should be deemed illegitimate targets of military attack. But such considerations of expedience should be sharply distinguished from a sensible development of the just war theory itself.

#### THE MORAL SHIELD PROTECTING NONCOMBATANTS

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

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 nonculpable in this respect. Let's say he is acting on the basis of false beliefs, and that if his beliefs were true, he would be justified in attacking you. Moreover, he is not culpable for having these false beliefs. In contrast, Jones is culpable for the deception. We may suppose his evil plan is to trick Jones into killing you. But this was in the past. Jones now is not doing anything that menaces your life and we can suppose there is nothing Jones could do that would now undo his deception and remove the threat to your life that Smith's aggression represents.

As it happens, you have available two courses of action, either one of which would save your life. You could kill Smith, the innocent aggressor, thus preventing him from killing you. Or you could kill Jones, which would somehow unnerve Smith (he can see Jones and will witness your act of killing Jones and is emotionally very attached to Jones), thus preventing Smith from acting effectively and so eliminating the threat against your life. Those are your only life-saving possible courses of action; your only other recourse is to acquiesce in your being killed by Smith. You have a right not to be killed in these circumstances, let us say, a right that Smith is violating.

Any plausible ethics of justifiable homicide should yield the judgment that in the circumstances as described you morally ought to kill Jones and not Smith 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 seriously morally culpable for doing so, and your killing Jones would remove the peril against your life. Even though Jones is not now acting in a way that menaces your life and Smith is, Jones's moral guilt and his causal responsibility for your peril jointly undo his moral immunity from harm. (This claim does not settle the interesting question, whether it would be morally acceptable to kill Smith in self-defense if the option of killing Jones instead were not available.)

The lesson of the self-defense case transfers smoothly to the case of just warfare. Suppose one is a spy working for the Allies in Germany during World War II. It turns out that to fulfill one's spying mission, one needs to kill someone. There are two possibilities, either of which would contribute equally to one's mission. One is to kill a young soldier raised in a culture that trained men of conscience not to question the civil authority. He thinks he is doing the right thing by serving in the German military; he is morally nonculpable. The other possible useful homicide 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 the morally required course is to kill the culpable civilian not the nonculpable combatant.

The case of a justified military strike against noncombatants as I am imagining it involves three factors: the moral culpability of the noncombatant target, the fact that the killing of the noncombatant would materially advance the just war cause, and the fact that the noncombatant, though not presently or in prospect a contributor to the war effort, has significantly contributed to either the unjust war effort or the initiation of unjust aggression.<sup>9</sup> Might the presence of two of these three factors suffice to justify making war against noncombatants? We might imagine that the noncombatant potential target is placed so that her killing would advance the just war effort and that she culpably endorses the unjust war effort but that she has not ever contributed to bringing about the initiation of the unjust war nor to sustaining or facilitating it.

Consider a simple case: You are driving up a narrow mountain road, and see Evil Aggressor rumbling down the same road in a large armored vehicle. She intends to murder you by head-on collision. Your only recourse to escape this assault is to drive onto the right shoulder of the road. The shoulder happens to be occupied by fans of Evil Aggressor, who are cheering and gloating at the prospect of your demise. Let us suppose it is clear the fans just happen to be there; they have not deliberately chosen to occupy the site you now need for your survival and they cannot now do anything that would allow both they and you room to share the road shoulder safely. You must either drive onto the road shoulder, killing them, or be killed by Evil Aggressor. Let's say the fans here are Guilty Bystanders. Since these fans are not threatening you with harm, and have not acted in the past in a way that helped to produce the threat you now face, one might hold that they have not done anything that forfeits their right not to be harmed and you may not harm them even to save your life. The alternative

view would be that in these circumstances, culpability renders the Guilty Bystanders the ones who should die rather than you. I suppose that the more plausible view is that merely taking malicious pleasure in the misfortunes of others does not establish sufficient culpability to erode the shield that the status of mere bystander confers. But if one varies the case by making the gloating of the Guilty Bystanders more and more heinously evil, the judgment that it is wrong to harm them to save innocent lives becomes attenuated.

A slight variant of the case tilts the balance of reasons decisively in favor of the view that the innocent attacked person may kill the Guilty Bystanders. Suppose the fans are steadily disposed toward wrongful harm to you: they would wrongfully harm you if they could. They do not merely passively enjoy your plight; they would create or sustain it if they had the power to do so. The case is perhaps posed most sharply if we imagine the Guilty Bystanders as falsely believing they have the power to do wrongful harm against you and joyously pulling the levers that they wrongly believe will do you in. These Guilty Bystanders are Wannabe Evil Aggressors. Culpability plus an active disposition of the will toward wrongful harm renders one liable to suffer harm, even lethal harm, that is needed to save morally innocent life. What one would say about such a self-defense scenario carries over to just warfare scenarios. Noncombatants who are Guilty Bystanders in a way that includes a disposition to do harm if they could become legitimate targets of violence on behalf of a just cause.

#### NONCOMBATANTS AS WRONGFUL TRESPASSERS

I have raised the possibility that the noncombatant might not merit the status of noncombatant immunity because she is morally culpable both by endorsing the unjust war effort in which her country is engaged and also by culpably contributing to the process that gave rise to that war effort or contributed to its injustice or contributed to the injustice of the state of affairs the war effort is sustaining. One should also mention that there are other possible ways in which noncombatants might plausibly be viewed as legitimate objects of just war attack. For example, the people who are noncombatants and subject to attack might be unjustly enjoying the fruits of wrongful conquest and in particular might be using resources and inhabiting land to which they have no right. Consider unjust trespass. If someone wrongly invades your home and makes a camp in your home, you have the right to drive the invader from your home. It would be wrong to use or threaten violence more harmful than what is needed to extrude the unjust occupier, but on some moral views at least, the use of violence, even lethal violence, when necessary to regain possession of significant goods to which one has a clear moral title is not forbidden. If all else fails, one might say to the invader, whom one is unable physically to extrude, "Get out of my home or I'll shoot!". Suppose circumstances render it the case that if the intruder refuses to leave, the only safe recourse one has which expels the wrongful trespasser without bringing down harm on one's own head is to shoot to kill. The case as so far described does not specify if the continued

presence of the wrongful trespasser in one's home would be a slight irritation, a major nuisance, or a cause of significant harm. If the trespass generates only irritation or nuisance, I suppose it must be borne if one has no effective means to eliminate it without subjecting the wrongful trespasser to serious harm. But if the trespass itself constitutes or generates serious harm, then many will hold that one is allowed to threaten harm in order to end the trespass and carry out the threat if it is resisted.

The occupation of a country by a conqueror or colonial power offers a parallel case to the unjust trespass or taking of land just discussed. In such a situation the people that suffers the wrongful taking of its land may have a grievance against civilians who occupy the wrongly taken land as well as against the military force that does the taking and sustains it. The civilian occupiers are wrongly squatting on land to which they have no right. Here the morally preferred scenario is surely that the victims of occupation force the wrongful occupiers off their land without violence or imposition of harm beyond the harm that is consequent on deprivation of possession of goods the possessors ought not to possess.<sup>10</sup>

#### THE NONCOMBATANT STATUS OF CAPTURED SOLDIERS

Another aspect of the distinction between combatants and noncombatants as usually drawn within contemporary just war theory glitters brightly but looks false when examined. This is the claim of moral symmetry between combatants fighting on the just side and on the unjust side: both sets of combatants do no wrong in shooting at their adversaries and both are equally bound to abide by constraints against harming civilians.

However, when two or more military forces engage in armed conflict, no more than one of the opposed forces will have moral justification for engaging in the conflict. If one side has right on its side, it should not be opposed. It should be stressed that whether or not one is fighting for the right, for a just cause, depends on the overall balance of all morally relevant factors. The claim that one is fighting for a just cause reflects an all things considered judgment and not merely a prima facie claim. The mere fact that there is a moral reason favoring the war aims of a belligerent does not show the belligerent is fighting for a just cause. In some conflicts all the opposing parties have unjust war aims. Now consider soldiers fighting in an unjust cause. They should be regarded as individuals engaged in crimes. Exactly as a bank robber has no right to use violence, even violence in self-defense, in the course of carrying out a crime, soldiers fighting to achieve an unjust goal lack the right to use violence.

Some have claimed that if an unjust warrior is nonculpable, she will generally retain her right to fight in self-defense against enemy troops that have right on their side.<sup>11</sup> However, in most circumstances of war, fighting by an unjust warrior in self-defense against enemy troops will coincide with fighting that advances the unjust cause she serves. The greater the moral stakes in a war, the greater the magnitude of the wrongful harm the victory of one's side

would accomplish, the more it is the case that the imperative not to advance an unjust cause trumps whatever putative right of self-defense might be claimed on behalf of nonculpable soldiers fighting for an unjust cause.<sup>12</sup> Moreover, it is more plausible to regard the morally innocent unjust warrior who fights to preserve her life as wholly or partially excused, not justified, in these attempts at self-preservation. Compare the morally innocent bank robber who is attacked by police and kills them, as she thinks, in self-defense. This is excusable killing on her part not justified self-defense.

Just war doctrine in its contemporary manifestations tends to distinguish the moral responsibility of soldiers to fight only according to norms of just warfare from their responsibility to fight only in just wars and to attenuate or deny the latter. Walzer writes that "by and large we don't blame a soldier, even a general, who fights for his own government."<sup>13</sup> 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 a status of immunity from harm much like the status of noncombatant. It is a violation of the war convention to harm or kill prisoners of war deliberately 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 (render one less blameworthy or not blameworthy at all).
3. Doing what is wrong as a result of excusable ignorance tends to excuse (render 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 nonblameworthy.
7. If what one does is entirely blameworthy, one should not be blamed.
8. A soldier who engages in war when his cause is unjust should never be blamed for doing so.

Acting under coercion or compulsion and as a result of excusable ignorance can lessen the degree to which an individual is blameworthy for a morally wrong act she perpetrates. Sometimes blameworthiness disappears entirely. But it is implausible to suppose that blame never attaches to soldiers who fight for an unjust cause. Coercion/compulsion and excusable ignorance are not always present when soldiers engage in an unjust war; and even when they are present, they do not always rise to a level that entirely excuses.

Sometimes the political rulers who command the agent to go to war are not in fact threatening dire penalties in the event of noncompliance. Coercion or

compulsion may not always be present to any significant extent. Moreover, in ordinary life, coercion or compulsion has to rise to a high level to excuse wrongdoing or transform what would otherwise be wrong into right conduct. If the 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 definitely 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 may know or should know that these rulers often make unjustified 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." In such cases there is likely no room for excusable ignorance of the fact that one's cause is unjust.

In a democracy with free speech in place, citizens have the opportunity and the responsibility to learn the relevant facts and make up their own minds as to 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 well be culpable. There may be an asymmetry here between the degree of responsibility fairly attributable to citizens who are recruited to serve in an unjust war in a democracy and in a tyrannical regime that severely restricts free speech and related civil liberties.

Morality surely prescribes a strong generic presumption in favor of refraining from killing people. Powerful reasons are needed to overcome this presumption. If my wife says to me, "Kill the neighbors!", then even though she is a nice reasonable person who usually speaks the truth, I must surely demand a much more complete account of the moral grounds for this killing and I should check the facts and assess the argument for myself before I could possibly be justified in killing the neighbors. This presumption still holds when what is at issue is killing by soldiers in war. Moreover, one might well conclude from the historical record that most wars are unjust on all sides, so there should not be a general inclination to believe that if any political ruler says, "Our cause is just, and our war effort is moral and right", what she says is probably true.

Wars cause immense harm to humanity. One should not engage in war unless one has compelling moral reasons for doing so. If one lacks compelling reasons, but engages in warfare anyway, killing without justification, the mere fact that one believes one has justification does not excuse the wrong. 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 at all, and even if present they vary by degree. 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 pretend otherwise, but expediency does not shape just war theory assessments.

The moral responsibility of the individuals who engage in unjust war lessens the significance of the moral boundary line between combatants and noncombatants.<sup>14</sup> First, those who engage in unjust war are acting wrongly and without justification (and they may be acting culpably) when they aim their fire at the enemy combatants. Fighting an unjust war, one perpetrates unjustified killings whether one shoots at combatants or noncombatants. Second, the fact that those fighting an unjust war are engaged in wrongdoing calls in question the moral presumption that if they are captured or surrender, they then become noncombatants who have 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. Perhaps there is a large risk that if they are not killed they will soon escape and once again pose a military threat. Perhaps tending to them diverts resources needed to win a crucial battle, the fate of which is hanging in the balance. To focus the issue, suppose that soldiers engaged in a just war can either fight and kill 100 active enemy soldiers or they can instead slaughter 100 captured enemy soldiers. Engaging in battle would be justified (the expected gain is worth the expected cost) and slaughtering the captured soldiers would achieve the same gain at less cost and so would better further the just war effort. On these premises, the captured soldiers are not threatening, but bringing about their deaths would be useful. The more it is the case that those engaged in the just war effort have good reason to believe that the enemy soldiers have no good excuse for engaging in unjust war, I submit that just war theory should not draw a moral boundary line between the active enemy and the captured enemy and should not regard killing the captured enemy to be morally impermissible.

#### GUERRILLA COMBAT

Guerrilla warfare takes many forms, but one recurrent issue is posed by the scenario of irregular combatants who do not wear uniforms but rather engage in ambush and then take on the appearance of civilian noncombatants at other times. So characterized, the guerrilla fighter aims to exploit the distinction between combatant and noncombatant and the presumed disinclination of the enemy soldiers to fire on noncombatants. The guerrilla hides among civilians, and presents enemy soldiers with a dilemma: either one pursues the guerrillas and attacks them, in which case one must fire on civilian noncombatants as well as on the guerrillas sheltering among them, or one does not pursue and attack the guerrillas, so that their strategy of sheltering among civilian noncombatants effectively insulates them 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 predictably inflict significant injuries on civilian noncombatant targets.

If one supposes that from the perspective of a combatant engaged in warfare, the combatant adversaries must be presumed to have a right to engage in fighting (if their cause is actually unjust, they cannot be expected to know

this), and the combatant/noncombatant distinction has its traditional significance, then both sides have the obligation to fight in ways that do not compromise the ability of the opposing forces to distinguish combatants and civilian noncombatants and to aim their fire only at the legitimate combatant targets. Some theorists assert that if military personnel hide among civilians or shelter among noncombatant persons and buildings, so that opposed forces cannot attack them without also attacking the illegitimate targets, 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 I am arguing for downplays the moral significance of the combatant versus noncombatant distinction. It follows that the moral wrong of abusing or exploiting that distinction will also be less on my account than on traditional accounts.<sup>15</sup>

Consider the generic situation in which enemy forces occupy a country and some of its inhabitants resort to guerilla combat to resist this occupation. Perhaps the forces opposed to the occupation are militarily weak, so waging conventional warfare is unfeasible. Now either the guerrillas have just cause to resist the occupiers or they do not. (I will suppose that if they do not, the occupation itself is just, but of course 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 shoot back. The invaders have no right to pursue the guerrillas into the villages and no right to shoot at anyone--genuine civilian noncombatant, avowed combatant, or combatant masquerading as civilian--in the villages for the purpose of sustaining the unjust occupation. In this scenario, why suppose the guerrillas do wrong to hide among civilians or pretend to be civilians between episodes of combat? No doubt they make it more difficult for unjust occupiers who conscientiously wish to abide by the war convention to fight them successfully, but I do not see why the guerrillas fighting in a just cause owe these scrupulous invaders a fair opportunity to attack them successfully. If the unjust occupiers cannot be presumed conscientiously disposed to refrain from shooting at civilians, the guerrillas who shelter among civilians increase risks of civilian death and injury and destruction of property. But if the guerrilla cause is just, and the tactics being pursued efficiently advance the cause, I would suppose the civilians are morally obligated to support the guerrilla struggle. At least, the pursuit of courses of action otherwise just that also have the effect of risking civilians do not cease thereby to be just unless the expectable harm to civilians is disproportionate. Moreover, if the guerrilla cause is just, there is surely some moral obligation to aid the guerrillas that falls on the civilians. The required aiding presumably includes helping the guerrillas to hide from their pursuers and providing the guerrillas shelter and provisions. It also involves some duty to refrain from giving information to the unjust occupiers concerning the location or identity of the guerilla combatants.

Suppose on the other hand that the occupation of the country is just and the resistance of the guerrillas is resistance in the service of an unjust cause. The guerrillas in that case have no right to shoot at the occupiers and no right to impose any risks on civilians by sheltering or hiding among them. The civilians in this case have the right to go about their lives peacefully without being drawn into armed struggle.<sup>16</sup>

In this case, the just occupiers have a duty to aim their fire at the combatants and those who materially assist them and to refrain from shooting at peaceable civilians who are drawn into the line of fire against their will. I would say there is a moral responsibility shared by innocent civilians and just occupiers to bring it about that the war against the unjust guerrillas can be fought without unduly endangering the lives of genuine innocent bystanders. On the side of the innocent bystanders, in some circumstances this responsibility might generate a duty on their part to withdraw from areas where guerrillas are located, so that the just occupiers can shoot the guerrillas without shooting civilians. In some circumstances, if the guerrillas in one's neighborhood are sufficiently militarily weak, one may be obligated as a peaceable civilian to drive the guerrillas away from the areas where civilians are present or to provide information to the just occupiers about which of the apparent civilians hereabouts are really guerrilla combatants in disguise.

In this case also the line between combatant who is the legitimate target of military attack and the noncombatant who is not does not entirely disappear from the just warfare account. But the issue of just war very significantly shapes the obligations of just warfare and the combatant/noncombatant distinction is both redrawn and fades in importance.

#### MORALLY INNOCENT UNJUST COMBATANTS

My claim is that whether or not one is morally insulated from deliberate attack in the course of war hinges more on the injustice or justice of the war aims one's fighting serves than on one's status as combatant rather than noncombatant. Roughly, if one is fighting for a just cause, one may aim one's fire at those who are materially aiding the war effort and also those culpable agents who have acted in the past to bring into existence an unjust menace (or who are disposed to do so if they could).

This claim may be vulnerable to challenge.<sup>17</sup> The challenge presses further the logic of the claim that moral culpability and its lack play a greater role in determining the limits of morally permissible attack than accounts of the war convention by tradition-minded theorists such as Walzer and Ramsey wish to allow.

Suppose you are engaged in just war. Granted that you have a moral right deliberately to attack morally culpable combatants fighting for an unjust cause and perhaps some morally culpable noncombatants, 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 aim fire at morally innocent bystanders even if doing so would advance the just war effort, one might be bound by a similar constraint against advancing one's just cause by attacking morally innocent combatants. Why not?

In response: There are several moral factors that interact to determine the degree to which it is morally acceptable deliberately to attack a given individual to advance the just war. One constraint is utility. Attacking the individual must advance the prospects of success in the just war effort if it is to qualify as morally permissible. The extent of the morally valuable benefit to be gained from attacking an individual will affect the issue whether attacking her satisfies proportionality requirements. Another factor is whether the individual is engaged in activities that materially advance the unjust cause or is instead a bystander. Another factor is whether the individual is acting now or has acted in the past to advance the unjust cause in ways that are seriously culpable, blameworthy. Another factor is the magnitude of the stakes. A just cause can be more or less significant, and the victory or defeat of a just cause can be accompanied by other morally relevant consequences, good and bad.

Culpability always tends to shrink the moral shield that protects an individual from the possibility of being justifiably attacked. It is better to attack culpable combatants rather than nonculpable combatants, all else being equal. The moral bar that confers greater immunity on noncombatants is less if the combatants who might instead be the targets of attack are morally nonculpable (and shrinks further or disappears altogether if the noncombatants are culpable and other conditions are met).

The morally innocent unjust warrior is engaged in conduct that is objectively morally wrong. The victory of his cause would bring about serious injustice. Even if just warrior and unjust warrior are equally innocent, the fact that the latter is actually fighting against moral right and the former is actually fighting for it makes a difference to what it is permissible for each to do. My sense is that it is at least permissible for the just warrior to attack the morally innocent unjust adversary and it is at most excusable not justified for the morally innocent unjust adversary to engage in fighting for her side.<sup>18</sup>

Consider the possible 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 pure as the driven snow. My sense is that those fighting for the just cause are usually doing what is right even if they are blameworthy for doing so, and those fighting against them are doing what is wrong even though they may be morally meritorious. However, if by some fluke the just cause would be just as well advanced by the killing of the just warriors as by the killing of the unjust warriors,<sup>19</sup> from a moral standpoint it is better all things considered for the morally innocent unjust warriors to live and for the morally guilty just warriors to die.

Culpability does not trump all other factors. A due recognition of its moral significance can acknowledge that under circumstances which may hold widely it is morally permissible for those fighting a just war deliberately to aim their fire at morally innocent combatants fighting for the unjust cause.<sup>2021</sup>

#### 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 combatants are morally guilty of the crime of war and that when this is so, surrendering or being captured does not confer on them the status of noncombatant immunity, it might be urged that these are merely logical possibilities with no practical relevance. Just war theory aims to give sensible advice for the morality of conflict in actual and likely scenarios. In actual circumstances, we never know that 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. Moreover, in actual circumstances of war, even if we have good reason to believe our cause is just, we never have good reason to believe that the enemy soldiers lack good reason to believe their cause is just, so the scenario of just warriors fighting guilty criminals can be and should be ignored.

In reply: Just war theory should proceed in stages. The first stage should clarify what is morally permissible and impermissible in given circumstances, on the simplifying assumption that all parties possess the knowledge that is relevant to their choice of conduct. Next we should consider what morality requires when this full-knowledge assumption is relaxed in various ways. Roughly, when people act wrongly from ignorance of facts or norms, their ignorance may be blameworthy or innocent. Innocent ignorance excuses and at the limit fully exonerates.

None of this has any tendency to show that moral guilt and innocence systematically have no bearing on the just conduct of war. The more egregiously immoral the war aims of a belligerent waging an unjust war, the less likely it is that the citizens of the belligerent nation who endorse the war aims are guiltless in doing so. The more democratic and open the society, and the more educated the citizens in a society waging unjust war, the more likely they had the opportunity to form a sound judgment of the morality of the conflict and are 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 rough and ready statistical judgments: One may know enough to know that many citizens of Stuttgart in 1944 were culpable for having supported Hitler, even if one has no basis for saying which ones. So far as I can see, there simply is no basis for pleading that we can never know enough about people engaged in war to form reasonable beliefs about their degree of complicity and moral guilt if the war is unjust. Consider the position of the German citizens who pleaded "we're not guilty" when challenged by the army prosecutor in the movie *Judgment at Nuremberg*. Their claim is not that the facts are so murky that we

should always withhold judgment. Their claim is that the facts are clear and exonerate 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 sometimes reasonably judge whether or not people are guilty of complicity with evil amidst the tumult of war.

The general position I have been urging is that when many people are jointly causally responsible for bringing about a situation in which a morally important just cause will be defeated unless some people die, it is morally preferable, other things being equal, that those who are morally guilty for creating this state of affairs should die, not the morally innocent.

In this connection it is important to guard against a tempting confusion of thought. For all that I have said here, it might be so that a compelling case can be made that promulgating and enforcing the traditional norm of noncombatant immunity and a presumption that combatants are innocent of the crime of war if their cause is unjust might bring about morally excellent consequences over the long run. Attacking civilians in the course of war tends to generate hatred of the enemy on both sides, and to inhibit the conditions of 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 (since they cannot surrender without exposing themselves to risk of suffering severe punishment). These considerations of expediency should be distinguished from considerations internal to the morality of just warfare, which is a deontological theory that supposes some courses of action are right or wrong quite independently of their tendency to produce best outcomes. My aim in this essay is to press the internal logic of just war theory.

#### ABSOLUTE AND MODERATE CONSTRUALS 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 should not be attacked. Even if all my arguments to this point are successful, they do not 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. So consider a clear case where this right unambiguously applies: 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 nonguilty bystanders to the conflict. Just warfare principles say that these innocent bystanders do not have an absolute right not to be harmed, because it may be that a morally permissible attack on legitimate military targets has the foreseen or unforeseen but in any event strictly speaking unintended result of killing some innocent bystanders. Providing the proportionality constraint is satisfied, such attacks may be morally acceptable. But all of this leaves an important core prohibition: The innocent

bystanders have a moral right not to be deliberately attacked, that is to say, they have the right that others not seek to harm them either as an end or as a means to the others' end.

The next question is: is this moral right of innocent bystander civilians not to be attacked an exceptionless principle or does it admit of exceptions? Is terrorism morally wrong always or sometimes?

A right is absolute just in case one morally ought to respect it, abide by the duties associated with it, whatever the consequences of doing so. If there are any such rights, they are never overridden.

Is the right of noncombatant immunity properly construed absolute and exceptionless, never overridden? We might reserve the term "terrorism" so that it applies only 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 does not intend harm to such bystanders, but that causes harm to them that violates the proportionality requirement to such an extent as to convey the message that the terrorist is not concerned to minimize by-stander casualties. Might military actions that fit these descriptions ever be morally justified all things considered?

The absolutist holds that moral rights, or some sacred moral rights, should be respected whatever the consequences. Even if the heavens would fall, some ultimate catastrophe would ensue, if moral rights are not violated, the absolutist holds that one morally ought nevertheless to abide by the constraints specified by moral rights.

Absolutism is a hard saying. In the abstract it may sound nice to say that one should never act against certain moral rights, but if the consequences of conformity to rights would be sufficiently horrible, most of us would say that in extreme circumstances rights should bend and break in the interest of morality.

Michael Walzer wrestles with this issue and attempts to allow exceptions to the rule that rights should be respected yet to cabin the exceptions in a narrow formula.<sup>22</sup> He proposes in effect that justice should always be done unless the heavens are really about to fall. If a supreme emergency arises, the right of noncombatant immunity gives way and it is morally acceptable to attack innocent bystanders.

He 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. The bombing raids directed at residential districts of German cities in 1940 and 1941 he takes to be both clear violations of noncombatant immunity and clearly morally justified.<sup>23</sup> The supreme emergency doctrine holds that the right of noncombatant immunity morally ought always to be obeyed unless the consequences of obedience rise to the level of moral catastrophe. The annihilation of a national community or some morally equivalent disaster would qualify as consequences so horrible that if one can prevent them only 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. The last condition would rule out violations of noncombatant immunity that would cause greater evil overall than the evil the violations aim at averting.

One possible response to Walzer's characterization of Allied terror bombing would be to deny that the actual policy necessarily violated the war convention. Set this issue aside as irrelevant here. Suppose we are considering a case like the World War II case that Walzer is analyzing and stipulate that the case does involve a violation of the war convention. 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 entirely abandoning the right of noncombatant immunity or qualifying it to death.<sup>24</sup> Nonetheless Walzer's position is inherently unstable and ultimately unacceptable.

The problem lies close to the surface of Walzer's discussion. 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 all things considered. But Walzer stipulates that only when the absolute amount of the evil that one averts is extremely large, amounting to moral catastrophe, does the right of noncombatant immunity give way. But this makes no sense.<sup>25</sup> If it is morally acceptable and perhaps even required to attack and kill 100,000 innocent German bystander civilians to prevent the murder of a million people, then why is it not equally morally acceptable and perhaps even required to attack and kill a single innocent bystander civilian in another situation when that would prevent the murder of ten people? Whatever the ratio of evil perpetrated to evil avoided that justified the perpetrator in the supreme emergency, that same ratio should justify proportionately smaller-scale violations in nonsupreme emergencies.

#### CONCLUSION

My conclusion is that the right of noncombatant immunity has smaller scope than is often supposed, 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 upshot then is that one cannot swiftly and easily infer from the fact that an enemy combatant is attacking civilian noncombatants or killing captured soldiers to the conclusion that the enemy combatant is fighting unjustly and

committing a moral wrong by violating the right of noncombatant immunity. These judgments are always uncertain and complex. Moreover, they always rely on a prior judgment about which side, if any, in a military conflict is fighting in the service of a just cause. This essay has not addressed the question, what constitutes a just cause that rationalizes military combat. By setting this issue to the side in this essay I do not of course mean to convey any suggestion that this issue is simple or easy. Finally I should reiterate that this discussion has been an exploration of just war theory from the inside and has not addressed the external issue whether just war theory sympathetically construed can withstand criticism from rival moral approaches such as consequentialism.

\* I am grateful to the Institute for Ethics and Public Affairs at San Diego State University for inviting me to give a presentation that eventually became this essay. I presented a version of this essay at the American Political Science Association meeting, August, 2003, and another at the Southern California Philosophy Conference at UC Riverside, October, 2003. I thank the audiences on both occasions for helpful criticism. Thanks also to Thomas Hurka for instructive conversation and to *Ethics* readers and editors, Larry Alexander, Joseph Boyle, Kasper Lippert-Rasmussen, Jeff McMahan, Darrel Moellendorf, Douglas Portmore, Mathias Risse, Hillel Steiner, and George Wright for very useful written comments.

---

<sup>1</sup>. This statement requires interpretation. Just as one may use lethal self-defense, if necessary, to defend against a serious but nonlethal attack, a nation may respond to aggression in a way that predictably creates more harm to the aggressor than is averted for the threatened victim. But the moral disvalue of harms to the aggressor is discounted to some degree in the just war calculation.

<sup>2</sup>. An excellent contemporary statement of just war theory is Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977). See also Paul Ramsey, *The Just War: Force and Political Responsibility* (New York: Charles Scribner's Sons, 1968).

<sup>3</sup>. A fine essay by Jefferson McMahan anticipates some of my arguments and conclusions. See McMahan, "Innocence, Self-Defense, and Killing in War," *Journal of Political Philosophy*, vol. 2, no. 3 (September 1994): 193-221. I owe this reference to

---

Thomas Hurka. See also McMahan, "Self-Defense and the Problem of the Innocent Attacker," *Ethics* 104, no. 2 (January, 1994), pp. 252-290.

<sup>4</sup> . James Turner Johnson, *Can Modern War Be Just?* (New Haven and London: Yale University Press, 1984), p. 60.

<sup>5</sup> . Cited from the *New York Times*.

<sup>6</sup> . My conclusion is that just warfare theory on its own terms does not issue any absolute and exceptionless condemnation of what we are prone to call terrorist acts. The examination conducted in this essay is internal to just war and warfare theory. The question here is not what should be regarded as morally acceptable all things considered but rather what is morally acceptable according to just war theory.

<sup>7</sup> . Just war theory traditionally includes the requirement that only morally legitimate political authorities and never private individuals may engage in violence that includes the intention to kill 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 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 punishment of wrongdoers and that private individuals who deliberately impose hard treatment on offenders against the moral law cannot satisfy the conditions for (justified) punishment. On this latter issue, I agree with John Simmons's discussion in "The Right to Punish," chapter 3 of his *the Lockean Theory of Rights* (Princeton: Princeton University Press, 1992). For a discussion of the moral status of contemporary terrorism that relies too heavily and uncritically on the competent authority requirement, see Robert K. Fullinwider, "Terrorism, Innocence, and War," *Philosophy and Public Affairs Quarterly*, vol. 21, No. 4 (Fall, 2001), pp. 9-16. A nuanced historical discussion of the development of a theory of justified revolution within just war theory is in Paul Ramsey, *War and the Christian Conscience: How Shall Modern War Be Conducted Justly?* (Durham: Duke University Press, 1961), chap. 6.

<sup>8</sup>. G. E. M. Anscombe, "War and Murder," in Anscombe, *Ethics, Religion, and Politics: Collected Philosophical Papers*, vol. 3 (Minneapolis: University of Minnesota Press, 1981), pp. 51-61.

<sup>9</sup>. Another factor that affects some just warfare assessments of what may permissibly be done is the number of people who would be harmed or saved from harm under various scenarios one's action might bring about. Although one might hold that one person may prefer to save her life by killing any number of Evil Aggressors rather than acquiesce, one might hold that there is a limit to the number of Nonculpable Aggressors one may permissibly kill to save one's own life or the life of another single individual.

---

<sup>10</sup> . These sketchy and abstract remarks do not warrant any specific moral judgments about any particular military struggles against what is thought to be wrongful occupation. The application of just war theory to any particular conflict requires serious consideration of the facts of the matter as they interact with just war principles. Such engagement with the facts of any particular situation is entirely beyond the scope of this essay.

<sup>11</sup> . McMahan makes this assertion in “Innocence, Self-Defense, and Killing in War,” pp. 205-206.

<sup>12</sup> . Extrapolating from ordinary cases of killing in self-defense to killing to preserve one’s life in the course of engaging in unjust war tends to mislead. In the prototypical conflict between a morally innocent attacker and a single attacker person who counterattacks in self-defense, at this point self-defense by either party if successful will preserve one morally innocent life at the cost of another. This symmetry is absent in typical unjust war scenarios, in which the victory of those who are morally innocent and fighting for an unjust cause would lead to an outcome that has to be assessed as extremely bad from an impartial standpoint.

<sup>13</sup> . Walzer, *Just and Unjust Wars*, p. 39.

<sup>14</sup> . This is a theme in McMahan's essays cited in footnote 3.

<sup>15</sup> . What I go on to say about guerrilla warfare generates parallel revisions in our understanding of the morality of sieges, blockades, and reprisals. On these topics, see Walzer, *Just and Unjust Wars*, chapters 10, 11, and 13.

<sup>16</sup> . The statement in the text is not quite right. 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. On this point see

---

Robert Nozick, "War, Terrorism, Reprisals—Drawing Some Moral Lines," reprinted in Nozick, *Socratic Puzzles* (Cambridge, MA and London: Harvard University Press, 1997), pp. 300-304; see p. 303. This was initially a book review published in 1978.

<sup>17</sup> . See McMahan, "Innocence, Self-Defense, and Killing in War," pp. 209-221; also McMahan, "Self-Defense and the Problem of the Innocent Attacker," McMahan explores the issue, and raises objections against the position that it is morally permissible to kill morally innocent attackers, but does not commit himself firmly to any particular resolution of the issue.

<sup>18</sup> For pertinent discussion see Judith Thomson, "Self-Defense," *Philosophy and Public Affairs* 20, no. 4 (Fall, 1991), pp. 283-310; also Larry Alexander, "Self-Defense, Justification, and Excuse," *Philosophy and Public Affairs* 22, no. 1 (Winter, 1993), pp. 53-66; and Michael Otsuka, "Killing the Innocent in Self-Defense." *Philosophy and Public Affairs* 23, no. 1 (Winter, 1994), pp. 74-94. Otsuka suggests that the circumstance that the morally innocent unjust attacker intends to carry out an attack that in fact is wrong can license lethal violence against such an attacker, whereas 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 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 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 conditions of just war, this condition is often satisfied.

---

<sup>19</sup> . What sort of case could this be? Perhaps matters are as depicted in the James Thurber story that imagines what would have happened if General Grant had been drinking at Appomatox. Given that the generals who carry out the surrender procedure will be hopelessly confused, winning the battles will mean losing the war.

<sup>20</sup> . But see Larry Alexander, “Justification and Innocent Aggressors,” *Wayne Law Review* 33 (1987), pp. 1177-1189, for pertinent argument. Alexander holds that self-defense against innocent attackers is at most excused, not justified.

<sup>22</sup> . Walzer, *Just and Unjust Wars*, chapters 12, 16, and 17.

<sup>23</sup> . This might be an imaginary, hypothetical example, not one that actually occurred. Military historian John Keegan writes that only in 1942 did the British military set aside the policy of directing bombing attacks against military targets and aiming instead at “area bombing,” i.e. making residential neighborhoods the targets. See Keegan, *A History of Warfare* (New York: Alfred A. Knopf, 1993), p.374. If Keegan is correct, then by Walzer’s norms there never was a time when the British both aimed to terrorize and were justified in doing so by supreme emergency. Walzer might hold that given the limits on the technology of targeting in 1940, the idea of aiming at a target smaller than a large area was fatuous, so one could not claim to intend to hit a factory rather than the surrounding neighborhoods. In that case, supreme emergency would have applied in 1940 and 1941.

<sup>24</sup> . For discussions that insist that the war convention should be obeyed regardless of the consequences, see Anscombe, “War and Murder,” and Ramsey, “A Thought-Experiment: Cannot the Use of Unlimited Means of War Sometimes Be Justified?”, chapter 8 in his

---

*War and the Christian Conscience*. But 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.

<sup>25</sup> . The dogmatic-sounding statement in the text is supported as follows. Wherever one chooses to draw the line of absolute catastrophe above which what would otherwise be rights violations are permissible, the question arises, why not draw the line somewhere else? The answer can only be arbitrary, I say. At least, Walzer provides no answer. Also, wherever one draws the line, it will be difficult to justify the extraordinary difference in the permissibility status of an action just above and just below the line. My position receives further support if one can develop a deontological moral rights theory that eschews any absolutist line-drawing and hence any discontinuities in moral judgment. I believe this can be done. But this is a task for another essay.