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Failures of Just War Theory: Terror, Harm, and Justice*

F. M. Kamm

This article has three parts. In the first part, I shall try to provide an overview of issues related to both terror- and nonterror-killing inside and outside of standard war. It provides a framework within which we can locate some issues that will be explored in more detail in subsequent parts. The second part deals with the Doctrine of Double Effect (DDE) in standard just war theory. I criticize its prohibition on intending harm and consider cases where it is permissible, for example, to terror-bomb combatants and noncombatants. Through criticism of the DDE as a way of justifying unintended noncombatant deaths, I am led in the third part to focus on (a) the relative degrees of inviolability of various types of people in intergroup conflict and (b) a better justification for the permissibility of causing some types of foreseen noncombatant deaths.

I. OVERVIEW

Standardly, discussion of terror and justice has occurred in connection with whether terror-bombing is a just means by which to pursue a war, even one initiated in accord with justice. That is, in standard just war theory, a distinction is drawn between *jus ad bellum*—whether the war is, in principle, justified—and *jus in bello*—whether the means used to carry it out are justified. Just war theory is deontological insofar as not

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every means is justified in pursuit of just goals. Standardly, terror-killing of noncombatants (TKN), which involves intentionally killing them in order to produce fear in the nation that will lead to surrender, is ruled out as a means in fighting a just war. Use of it will, it is said, make the war unjust, even if it would be just when pursued by appropriate means.

But, suppose that those engaged in a just war kill retired leaders of the enemy country, leaders who previously unjustly started the war. This is done in order to frighten the enemy into surrendering.¹ Is such TKN permitted? I believe it is.

Jus in bello theory further distinguishes how we may treat combatants from how we may treat noncombatants. This is referred to as the Principle of Discrimination. Hence, it remains possible that standard *jus in bello* permits terror-killing combatants even if it rules out TKN. For example, would it have been permissible to drop an atomic bomb on sleeping Japanese soldiers in World War II to terrorize Japan?

Such issues are not what the topic of terror and justice is likely to call to mind since 9/11, in part because the 9/11 terror did not occur as a means during a standard, declared war between nation-states. Still, the focus in 9/11 remains on the deliberate killing of noncombatants as a means to some end. And we can also ask about TKN on 9/11, whether it is truly unjust as a means, even if used to pursue a goal which itself is just.

A short answer to this question is that a goal could be just and yet terror be an unjust means simply because not all just goals are important enough or of the right type to justify killings, let alone terror-killing. The *jus ad bellum* doctrine about standard war between nations deals with the issue of what injustices may be corrected by killing, even carried out in ways typically permitted by *jus in bello*. And so, outside of standard war between nation-states, we must also consider whether an injustice is severe enough or of the correct type to merit being corrected by means that involve killing, whether terror-killing or not, whether of noncombatants or of combatants.

For purposes of this discussion, let us suppose that even outside of standard war, the only injustices that merit any sort of killing are the same or analogous to those that would make a standard war between nation-states permissible. In *jus ad bellum*, just cause for nation-states has gradually become limited to defense against an actual or imminent unjust attack on one's own nation or another nation, with possible further just cause being intervention to stop genocide perpetrated by a government against its own citizens.

Why cannot groups that form nations though they lack a state satisfy the sufficient just cause criterion in the same way that nations that have

1. This case was suggested by Gertrude Ezorsky.

states can? Further, cannot groups that are not nations but are subject to genocide have the same just cause in defending themselves that others can have in defending them? Finally, if citizens would have just cause to kill to defend themselves against the abrogation of many important rights by an aggressor armed merely with tranquilizers, it is arguable that a group that is not a nation but is deprived of the same rights by an aggressor armed merely with tranquilizers has a just cause in defending itself by killing as well.²

If those killing outside of standard war between nation-states do not have a sufficient just cause, they fail a minimum standard analogous to a component of *jus ad bellum*. But meeting this minimum standard does not necessarily mean that a group may act as a state may if it met this standard. After all, should a band of individuals who officially represent no one but themselves have the same rights to defend a population as states that have some claim to be the legitimate representative of people? Perhaps this failure to be a legitimate representative is sufficient to rule out the permissibility of killing in any way, even for a sufficient just cause. Perhaps it is this failure to be a legitimate agent that makes the use of terror (which can be undertaken, rightly or wrongly, by a legitimate state) into the act of only a terrorist?

However, I find it hard to believe that no nonstate group can legitimately represent and permissibly act for people who suffer sufficient injustice. For example, it is possible that some nonstates, such as the French underground in World War II, meet the requirements of being morally if not legally legitimate representative agents and so may correct sufficient injustices by some form of killing. For purposes of this discussion, let us assume this is so. I also find it hard to believe that no nonrepresentative agent—a mere onlooker—could not sometimes have moral legitimacy in acting in a warlike manner. For example, suppose some sympathetic white individuals had begun killing slaveholders as a last resort had the North not taken action in an American Civil War. Their acts might have been permissible.

Standard just war theory typically assumes that means aside from TKN are available to pursue a just war, even if the war will then not be pursued as efficiently. Nonstates that have a sufficient just cause to kill, however, may not have access to means of war aside from terror-killing. Of course, they may have access to nonviolent protest.³ But let us assume this is not true or that the protest would be ineffective. As an aid in considering whether they—with a sufficient cause to kill and a valid

2. This does not necessarily imply that groups that lack certain legal rights that they should have, through legitimate, if mistaken, actions by a government rather than by way of illegitimate suppression, may kill to correct the situation.

3. As pointed out by Jeff McMahan.

claim to be (morally) legitimate agents—may resort to terror-killing, we might consider whether a state that no longer had any other means to pursue a sufficient just cause could permissibly resort to terror-killing. It will also help to consider whether, if they lack the means to terror-kill armed personnel, they may terror-kill noncombatants.

Further, it might be permissible for one side in a conflict to use terror but impermissible for the other side to use it. This is because one side may have no other means by which to pursue a goal that would justify terror against combatants or noncombatants, while the other side either has alternative, morally preferable means or does not have a goal whose achievement justifies use of terror.

On the other hand, it might be permissible for one side to use terror, even when it has other means by which to wage the war, if there is a discount ratio between terror and nonterror deaths (which there may not be). For suppose there were, for example, a 1,000 : 1 ratio between combatant nonterror and terror deaths. Then terror-killings would not be prohibited but only discounted in value relative to non-terror deaths. Hence, it might be permissible to avoid a thousand non-terror combatant deaths by terror-killing one combatant (who would not otherwise have been killed).⁴

II. WAR AND GENERAL MORAL PRINCIPLES

Now let us assume for purposes of argument that an agent has passed the sufficient just cause and morally legitimate agent points on the checklist for each previous means and we must decide on the permissibility of its TKN. (To refer to killing of people as a means of generating terror I will coin a new verb, “terror-kill.”) In this section, I will consider a common explanation in standard just war theory for why TKN is impermissible and contrast it with killing that this theory has considered permissible. I will argue that the explanation fails, for (a) it implies as impermissible what is permissible, (b) it implies as permissible what is impermissible, and hence (c) it cannot account for the distinction in permissibility of different acts when it is present.

The Doctrine of Double Effect is standardly appealed to in order to explain why TKN is impermissible even as a means to a greater good.⁵ The traditional DDE says that it is absolutely impermissible to act or refrain from acting intending an evil, even as a means to a greater good. It also says that it can be permissible to pursue a greater good by neutral

4. See appendix.

5. It is the foundation of Catholic just war theory and used by secular theorists such as Elizabeth Anscombe in “War and Murder,” reprinted in *Nuclear Weapons and Christian Conscience*, ed. Walter Stein (London: Merlin, 1960); and Michael Walzer in *Just and Unjust Wars* (New York: Basic, 2000).

or good means even if one will cause an evil as a certain and foreseen side effect, as long as the evil is less than (or, more generally, proportional to) the good to be achieved and there is no better way to achieve the good.⁶ Hence, according to the DDE, bombing a munitions plant to get rid of munitions (called “tactical bombing”) may be permissible, though we foresee that it will certainly kill some children as a side effect, but intentionally killing an even smaller number of different children in order to terrorize the community into surrendering is impermissible. However, not all acts that meet the standards of the DDE need be permissible. It provides a necessary rather than a sufficient condition for permissibility. It is just that when its conditions are met, the reason an act is impermissible cannot be that the means to a greater good leads to the (least) lesser evil.

It is important to keep in mind that a terror-bomber is not necessarily someone who directly hits the noncombatants. For suppose that a terror-bomber has not enough fuel to get directly over the children. However, he knows that if he directly bombs a munitions building that he can reach, its blowing up will, as a side effect, certainly kill the children. He hits the building only as a means of killing the children which is a means to ending the war through terror in the populace. This also qualifies as terror-bombing.

Notice also that there should really be two morally problematic aspects to terror-killing from the perspective of the DDE. The first is whether the individual intentionally killed as a means to producing terror is treated impermissibly; the second is whether those who are intentionally terrorized as a means to end war, but not otherwise harmed, are treated impermissibly.

The DDE as presented depends on a conceptual distinction between intending *X* and foreseeing that *X* will certainly thereby come about. I think there is such a conceptual distinction; the question is whether it has moral relevance. A common test for the conceptual distinction is the Counterfactual Test. It says, suppose that, counterfactually, an evil would not occur if you acted but all else remained the same. Would you, as a rational agent, have a reason not to act? It is said that the agent who intends the evil at least has a reason not to continue, but an agent who merely foresees the evil would have no reason not to continue.

It is important to realize that the DDE’s prohibition on intending evil does not necessarily lead to minimizing harm to noncombatants,

6. If not any evil less than the good is proportional to it, it will be a big problem to decide how much evil a good is worth. I shall not discuss this important issue here. An evil greater than the good can also be proportional to it, as when one does something that foreseeably kills a guilty aggressor in order to stop his paralyzing you.

since fewer noncombatants might be killed in terror-bombing that brought a war to its end than as collateral damage in a lengthy war. Rather, some argue, the point of the prohibition is to respect the dignity of the person. For example, Warren Quinn offered an explanation of the attempt to distinguish morally between intending evil and acting with mere foresight of its certain occurrence.⁷ The former, he said, was objectionable when it involved treating other people as available to be used for our profit; it involved treating people as mere means in an objectionable sense. The latter involved not being willing to constrain the pursuit of our goals by legitimate means simply because of the harm to others that would result. It could involve objectionably failing to treat people as ends in themselves by not taking seriously enough their interests as constraints on our goals. Objectionably treating as a mere means involves not treating as an end, but not necessarily vice versa. He thought that treatment as a mere means adds an additional morally objectionable element to merely acting despite harm to others, holding constant harm done in the two cases.

The DDE's other requirement that evil must be proportional to good does serve to limit noncombatant harm, because one is not permitted to achieve a good whatever the cost to noncombatants. But it must be combined with a general preference for killing combatants rather than noncombatants (the Principle of Discrimination) in order to achieve the fullest permissible reduction in noncombatant deaths. (This assumes that minimizing noncombatant deaths by terror-killing is impermissible.) For example, Michael Walzer argues that it is not enough for *jus in bello* that we not intend to kill noncombatants; we must intend not to kill noncombatants (admittedly, without giving up war to do so). That implies that even if we would only kill noncombatants as a side effect proportional to the good of our goal, we could be obligated to instead achieve our goal by doing what harms a greater number of combatants. This may include causing more deaths among one's own combatants, not merely those of the opposing side. Walzer goes so far as to say that the DDE would be mere casuistry (in a pejorative sense) if it did not itself include this addendum.⁸ Notice that if this implies that he does not think that the distinction between terror-bombing and tactical bombing (that kills as a side effect) all by itself is morally important, then his position would imply favoring terror-bombing of

7. See Warren Quinn, "Actions, Intentions, and Consequences: The Doctrine of Double Effect," reprinted in his *Morality and Action* (New York: Cambridge University Press, 1994). I argue that this is a revisionist account of the moral significance of the DDE in my *Morality, Mortality* (New York: Oxford University Press, 1996), vol. 2.

8. See Walzer.

noncombatants that reduces noncombatant deaths and terror-killing of combatants that reduces combatant or noncombatant deaths.

I have discussed the DDE and the Counterfactual Test elsewhere in detail.⁹ Here I will only describe a few problems with the DDE relevant to terror-killing and just war theory.

A. *The Absoluteness of a Too Wide DDE*

1. *Threats.*—The first problem with the traditional DDE per se is its claim to be absolute, never overrideable. (Though not all those who use the DDE in just war theory treat it as absolute.) If intending evil were never permissible, one could not intend even in self-defense the death of a guilty aggressor or a morally innocent person who has been made into a fatal threat to oneself. But intending death in ordinary self-defense seems permissible. For example, adopting any criterion of death one thinks is correct, assume that one would have to repeatedly aim at the death of a psychotic child who will kill you unless you see to it that he is dead. Is terror-killing also permissible sometimes? Suppose many people will shortly come at you with a deadly force. Perhaps they would rather not be doing this, but they are under the control of a surrounding population. (So they are not malicious aggressors.) It is permissible, I believe, for you to stop them if you can, even by killing them. However, you have insufficient force to stop them, and you would certainly die, having killed only a few. The only way to save your life is to kill one of the combatants at the back of the force (who would not otherwise have died) so that the surrounding population (ignorant of your true weakness) believes you can reach them and is terrorized into calling off these forces. Presumably one can defend oneself by using such a combatant in this terror-killing. Presumably, you could also defend the life of someone else who is similarly under attack in the same way.

This case shows that killing in self- or other-defense and terror-killing are not mutually exclusive. It also shows that sometimes a soldier who would never have harmed someone—as his comrades in front would have finished the job before he ever had the chance—can be used as a means to self- or other-defense.

Is there a prohibition on terror-killing threats when their being terror-killed would not stop the threat they themselves present but would be otherwise very useful? Or are the members of the force in my previous example liable to be used to end a war or win another battle just because they try to attack someone on my side in some way? To consider this possibility, imagine that nothing I do can stop the front members of

9. See F. M. Kamm, "The Doctrine of Triple Effect and Why a Rational Agent Need Not Intend the Means to His End," *Proceedings of the Aristotelian Society* (2000): 21–39, and "Justifications for Killing Noncombatants," in *Midwest Studies in Philosophy* (2000): 219–28.

the force from killing me. Nor does an attack on them prevent this force itself from threatening others in the future, as they will be retired from service subsequent to this attack. Before I die, may I kill a soldier at the back who would not otherwise die if this will terrorize the surrounding population, as above, into stopping the war? I think it is indeed morally problematic to do this.

Might it be justified as follows: If the reason I was under attack were that I was a member of a group, could an attack on me be considered an attack on all members of the group? This might allow me to terror-kill a distant member of the force to save other members of my group, if I could have terror-killed such a member to save myself or another person also under attack. On this view all attacking soldiers are, in general, susceptible to being permissibly used in any way for the purposes of stopping a war. Suppose this is not true. Here is another possible justification: Suppose it is permissible for someone who will not be able to defend himself against someone's attack to uselessly kill these attacking forces in any case. (This is a rejection of the view that an attack on one who attacks must have some chance of being efficacious.) Then, I believe, my killing members of the force is permissible even if I would not take advantage of my option to kill unless their deaths served useful terror purposes. In this case, I kill someone who would not otherwise have been killed because I took advantage of a permission and capacity to kill him now in order to pursue a separate goal whose pursuit did not give rise to the permission.¹⁰ This justification would work if the force were malicious aggressors, I believe. But suppose the force is composed of conscripted soldiers who might be construed as morally innocent threats.¹¹ Put to one side the view that one may use attacking soldiers in any way for purposes of stopping a war. Is one permitted to kill these who attack, if this would be useless in stopping the attack? If not, there would be no right to kill that one could take advantage of for the separate goal of terror-killing.

Now suppose that I could actually defend myself against the conscripted attackers by killing the soldier at the back of the force. However, supererogatorily, I choose not to do so, as I do not want to kill a young conscripted soldier just to save my life. Then I learn that killing him would terrorize the surrounding population into surrendering. Even supposing that it is not permissible, in general, to terror-kill attacking soldiers to end a war, I believe that because I can permissibly kill this soldier to save myself (or another person under his attack), I may ex-

10. This is a case that illustrates a point that will be made below: permissibility of an act need not be affected by the intention with which an agent acts.

11. I discuss why they might be viewed this way below.

ercise my option to kill him, when killing him still saves me (or another), for the separate goal of stopping the war by terror.

In justifying terror-killing in some of these cases I have made use of the following idea: (1) if the factors that would make my act permissible are objectively present (e.g., the act of killing can be made permissible if it would save my life and it will save my life), then the act remains permissible if I do it for another reason (e.g., not to save my life but to terror-kill someone to stop the war), even if I would not have done the act for the sake of the factor that makes it permissible (e.g., to save my life). Call this the Principle of Alternate Reason. In the cases I have given, the alternate reason refers to a good (i.e., ending the war) greater than the original good that made the act permissible. But in relying on the Principle of Alternate Reason, I am assuming that the greater good does not justify the act in the way that the lesser good does. Arguably, the act would remain permissible even if I acted only for a bad reason, for example, because the soldier was short.

If the act remains permissible regardless of the reason given for it, it might still be that someone acts badly in doing the act for a bad reason. (Judith Thomson suggests this.) Would this be true, however, if I kill the soldier when it will save my life but only in order to stop the war by terror from his death? I do not think so. Consider an analogy. Suppose my apartment landlord provides me with a parking space at cost to him though he is not obligated to do so. He also need not incur costs so that tenants in other landlords' buildings have parking spaces. Suppose further that I was going to pass on using the parking space until I learn that if I take it, other landlords in the community will be influenced to provide parking spaces to their tenants. If I use the space for this good cause, I think I not only act permissibly but also do not act badly toward my landlord. This is true even though we could not justify costs to him just in order to help other landlords' tenants, *per se*.¹²

2. *Nonthreats*.—Perhaps it is easier to accept the DDE as absolute if it applies only when one is intending evil to persons who are not threats or parts of threats (e.g., shields) even when they are technically combatants. In the beginning of the article I mentioned the case of the sleeping Japanese combatants who will soon retire. I asked if we could terror-kill them. This is indeed a morally problematic case. If we were permitted to kill them to eliminate their potential for future attacks, we could, I believe, choose to exercise that option, even if we would not otherwise do so, in order to use them for terror purposes. But they are not future threats. It is only if the status of soldier or past-attacking soldier somehow made one liable to being used in any way necessary

12. I thank Agnieszka Jaworska for help in refining this analogy.

to stop an unjust war or aspects of it, that it would be permitted to terror-kill these soldiers.¹³

Suppose, however, that nonconscripted people who are not now and will not in the future be threats have, through their previous acts carried out because of conscientious commitment to an unjust cause, responsibility for a current unjust war. Could they be terror-killed to stop war? I have already said that I think this is permissible, in part because it is permissible to use someone who has acted sufficiently unjustly as a mere means to save his victims or potential victims. This case shows that noncombatants as well as combatants may be killed, contrary to the Principle of Discrimination. Consider a nonwar example to support this claim: Suppose A deliberately takes B's crucial organs. A is captured and is no longer a threat. However, the only way to save B is to transplant all of A's organs into B. I think doing so is permissible.

Now consider a case in which the lesser intended evil to a person would lead to avoiding a still greater evil to that person. For example, suppose it is impermissible to intentionally paralyze A's legs as a means to a greater good. It would still be permissible to do this as the alternative to permissibly killing A as a mere side effect. This is, in part, because it is much better for him to be paralyzed in a terror-bombing than to be nonterror-killed. This is an instance of what I call the Principle of Secondary Permissibility.¹⁴ It sometimes allows as an alternative an act that would not have been permitted in the first place when the alternative act is the one, of all those that could reasonably be done, that minimizes the harm that would have been done to the same person. (The minimization condition rules out picking a somewhat less harmful act that would have been done, but not the least harmful one.) The Principle implies that sometimes we need to know the alternative that would have permissibly been done before we can decide whether an act of a certain type is permissible. (Notice that this principle, unlike a general consequentialist justification, does not imply that if the consequences will be the same (or better), it does not matter how we bring them about. For it does not claim that if it would be permissible to let someone die, then it would also be permissible to kill him, even when we are not actually in a position to leave him to die of other causes.)

The Principle of Alternate Reason might be understood as a different form of secondary permissibility in which the act remains the same but a factor that would not have initially justified the act may be

13. I shall return to this issue in Sec. III.A. What I say (in Sec. III.B) will also bear on whether our response should be different if the sleeping conscripted soldiers had previously been threats.

14. I discuss it in my *Morality, Mortality*, vol. 2.

one's reason for bringing about the act secondarily given that factors that justify the act are present.

In another case, suppose it would be permissible to produce a great good by innocent means despite the foreseen evil side effect of killing Joe and Jim. There is an alternative, however: We could bring about the great good by intentionally killing Joe as a means and without harming Jim. I believe it is permissible to kill Joe as a means, for example, in terror-bombing, in part because he will be no worse off than he would otherwise permissibly be and Jim will be much better off.¹⁵ What if those who would die shortly anyway would not die as a result of a permissible act but of an impermissible act? For example, during World War II, the Allies were asked to bomb trains carrying people to Nazi extermination camps. If it were certain that these people would soon die of wrongful Nazi acts and if our killing them would have been a means to saving others or ending the war (perhaps through terror produced), it would have been permissible to do so, I believe. These cases imply that when combatants or noncombatants will be no worse off than they would otherwise have been, it is sometimes permissible to terror-kill them.

May bystanders who have never been and never will be threats be terror-killed when they will be made much worse off than they otherwise will be? Suppose that we have the capacity to permissibly bomb a munitions plant to achieve a great good despite foreseen deaths as side effects, but we choose not to take advantage of this option because we do not want to cause the deaths. Then we find out that we could achieve the same great good if we terror-kill one of the people whom we could permissibly kill as a side effect of bombing the munitions plant. He is one of those whom we have the capacity to permissibly terror-kill as the alternative to causing his and many more deaths as a mere side effect. Why should the fact that we decided not to exercise our option to harm many people as a side effect, and so the one person would not otherwise have died, stand in the way of our terror-bombing him? The only reason he will be worse off if we terror-bomb than he would otherwise have been is that we refrain from doing what it is both permissible and within our capacity to do. The permissibility of terror-bombing in this case is an extension of the Principle of Secondary Permissibility, because it does not depend on considering what we would otherwise do. It depends on considering what we can (in the sense of permissible and within our capacity) otherwise do.

What if it would be permissible to bomb the plant and cause the bystander deaths as side effects but we had no capacity to do this (e.g., soldiers in the plant would shoot down our planes before we could bomb). Would it be permissible to terror-bomb one of the bystanders

15. There are also other conditions that play a role in the permissibility of this act.

to achieve the same good result? I think the fact that we do not merely refrain from doing what we can do but actually cannot do what is permitted marks a moral difference. It is a reason against the permissibility of terror-bombing the one person in this case because he will be worse off than there was any possibility of his being. What if someone else has the capacity to permissibly do what would kill the bystander but chooses not to do this. Does this give us license to do something harmful to the bystander? I do not think so.

Now consider the case in which we are capable of permissibly bombing the munitions plant and killing innocents as a side effect for the sake of winning a few battles due to the opponent's lack of munitions. We supererogatorily decide not to cause so many deaths just for the sake of this goal. Then we find out that, if we do bomb the factory to get rid of the munitions, our causing deaths as a side effect is what will terrorize people into surrendering.¹⁶ Hence, we bomb the factory, causing the deaths, in order to use terror to achieve an even better goal, total surrender. Winning a few battles due to lack of ammunition is also achieved and remains a possible step to winning the war had not the terror occurred, but we know that the terror will cause the war to end sooner. In this case, we do the same act we can permissibly do for one reason for another, terror-related reason. This is an instance of the Principle of Alternate Reason.

Alternatively, imagine that we decide not to cause so many side-effect deaths by bombing a munitions plant just for the sake of winning a few battles and then we find out that, if we terror-kill (by another means than bombing the factory) just one of the bystanders who would die as a side effect, we can achieve the surrender. I believe it is permissible to terror-kill in this case. (This is true even though we would not be capable of achieving the surrender through response to what we could initially permissibly do. This might be because the populace would have been so busy attending to the blowing up of the munitions that they would not have noticed the side-effect deaths.) This is a case in which both our reason and our act are different from what they initially could be; hence it involves both the Principle of Alternate Reason and the Principle of Secondary Permissibility.

The bystanders in these cases are people who will be made worse off if we terror-bomb than they would otherwise have been only because we are more selective in choosing our goals and/or in causing deaths than we are morally permitted to be. Hence, it seems to me that it is

16. This case is based on one presented for a different purpose by Judith Thomson in her "Self Defense," *Philosophy & Public Affairs* 20 (Autumn 1991): 283–310. She imagines that we are all along going to bomb the munitions plant to get rid of ammunition but it turns out it is the terror from side effect deaths that actually ends the war.

permissible to terror-bomb in these cases. The fact that we are capable of permissibly causing the deaths (as side effects) for one goal can make it permissible to terror-kill (at minimum) for a goal it would also be permissible to achieve with the death as a side effect, even if we lack the capacity to actually achieve the goal in that way.

Now, it may be said, even if it were permissible to kill some people (combatants and noncombatants) as mere means to stop attacks or to end a war, it might still not be permissible to use the terror intentionally evoked in other noncombatants as a means to stop attacks or end a war. For, it may be said, the DDE as an objection to terror-killing does not sufficiently focus on the distinction between causing terror and causing harm, whether the terror is intended or merely foreseen. It might be said that terror-killing is morally worse than other forms of intentional killing because terror *per se* is worse than harm. Is this true?

On one understanding of terror, it is fear of harm (to self or others) that can serve as a reason of prudence to end a war. However, even if such fear is widespread, it may be morally wrong to aggregate the fear of each and then claim that this huge amount of aggregated fear is a greater evil than the great loss suffered by an individual who is killed. After all, no one of the many who are terrorized suffers a loss as great as a person killed. Furthermore, such widespread fear is compatible with the killings being predictably timed and of predictable people. On a second understanding of terror, it is a form of panic that undermines rational judgment and agency, and individuals surrender once their judgment is undermined, not through an exercise of prudential judgment. It is this undermining of rational agency that, it might be said, makes terror morally worse than mere harm. Further, such panic is associated with unpredictable killings of unpredictable targets, and so the undermining of order necessary for civil society. But even if the second understanding of terror better accounts for its evil, are the panic and disorder really greater evils than the deaths of those killed? I do not think so, for if I have a choice between killing someone or terrorizing (in the second sense) many without any death, I should choose the latter.

However, even if panic is less of an evil than death, it might be said that the fearful noncombatants may not have the characteristics that (I have argued) make it permissible to intentionally harm noncombatants or combatants as mere means. The DDE could then be used to prohibit terror-killing A on the ground that killing him would be used to evoke terror in B and it is wrong to act intending the lesser evil of terror to B. To argue in this way would, I believe, show up another problem with the DDE. For, I believe, the big moral obstacle to terror-killing is justifying the killing rather than justifying the production of terror *per se*. To support this claim, imagine that we find out that noncombatants on

the unjust side, whom we could not permissibly harm in any other way, will experience terror leading to the country's surrender, if we bomb some trees. (They are irrational.) If we bomb the trees, moral objections to terror bombing should not then exist, I believe, even though we intend to terrorize these people as a means to end the war.

Alternatively, suppose the people are rational. We manage to convey that we are using a new terrifying weapon to destroy the trees. We do this because we know the people will see this as a threat to use the weapon on them and, hence, be terrorized. We either actually have no such weapon or no intention of using it on people. Could such a threat for purposes of terrorizing be permissible in order to stop a war? I believe it could be.

B. The Absoluteness of a Narrowed DDE

Now consider the DDE's prohibition of intending evil when it is narrowed to intending the particular evil of death to (nonconsenting) persons who have never been and will never be threats, and who cannot themselves but be made overall much worse off by the evil than they would have been or than we are capable of permissibly making them. (It is only this sort of evil that I shall consider as the means to terror henceforth and in the last option represented in the appendix fig. A1.) Is the prohibition of it absolute? Let us suppose that the bombing of Hiroshima is a case of intentionally killing many noncombatants that fulfills this condition of a narrowed prohibition. John Rawls, in an article attacking the morality of the U.S. bombing of Hiroshima, also claims that such a type of bombing could be morally permissible in some circumstances. For example, Rawls believes that, if Britain had stood alone against the Nazis in World War II and was about to lose the war and if such an attack on German noncombatants would have prevented the Nazi victory, it would have been permissible.¹⁷ These are very high standards to meet, but if they do make terror-bombing of noncombatants justifiable, then even a narrowed prohibition based on the DDE is not absolute.

I have mentioned Quinn's view that treatment of another as a mere means adds an additional objectionable element to conduct when we thereby treat people as available for our profit. But this element, on his view, does not make action absolutely wrong; it merely raises the bar for the reasons one must give to engage in it. Hence, it seems to me his view allows that it could be wrong to bring about much greater harm to a group simply as a foreseen side effect when one could instead cause

17. See John Rawls, "Reflections on Hiroshima: 50 Years after Hiroshima," *Dissent* (Summer 1995): 323–27.

much less harm to a different group by treating them as a mere means, for example, in terror-bombing.

Rawls and Quinn are examples of “threshold deontologists”: avoiding some great cost beyond a threshold can override the deontological constraints. Rawls, as we have seen, considers a case in which terror-bombing is the only option and the just cause is sufficiently important. By contrast, in discussing Quinn, I have suggested that his approach to the DDE would permit overriding the DDE even if there is an alternative way to achieve our goal. So, in his reasoning, the cost that goes beyond the threshold is not necessarily only the defeat of one’s cause. The cost that goes beyond the threshold can be the difference between the cost of several possible courses of action. For example, the difference in cost between course 1 and course 2 might be too great to merit staying with course 1. This could be true even though it would be permissible to use course 1 if course 2 were unavailable. The point is that avoiding the difference in cost between the courses of action could itself be a goal that is sufficient to override the DDE constraint. For example, suppose for the sake of argument that it would be permissible for us to terror-bomb some hundreds of noncombatants rather than do what will kill a million different noncombatants as a mere side effect. Suppose it would be permissible for us to do what kills the million as a side effect if this alone would stop the Nazis. Then, it should be permissible for us to terror-bomb hundreds to stop the Nazis, at least as the alternative to our doing what kills a million different people as a side effect.¹⁸

My conclusion at this point is that terror-killing, even TKN, is not necessarily wrong from a deontological point of view. Furthermore, it is consistent with there being one set of rules of war for everyone, that on occasion terror-killing can be permissible for one side and not another, just as causing side-effect deaths can be permissible on occasion for one side and not another. This is because what one may permissibly do depends on whether one has weapons to achieve one’s goal that need cause no deaths at all. For example, one side may have precision weapons to meet its goal without killing any noncombatants as a side effect while the other side has only more primitive weapons that would cause side-effect deaths proportional to their goal. If this side may permissibly cause side-effect deaths, then it could also be permissible for it, I have argued, to terror-kill only a few of its potential victims instead. With more sophisticated weapons, the secondary permissibility of terror-killing does not arise. Note, however, that there are cases in which it is not wrong for someone to resist what I may permissibly do to him. This, I believe, is often a mark of the fact that I can wrong someone in the

18. This leaves it open, I believe, that one may have no obligation to terror-bomb to stop the Nazis when this would be the only way to stop them.

course of doing what it is not wrong of me to do, in particular in overriding some constraint that ordinarily governs my behavior toward him.¹⁹

I have been considering only deontological arguments bearing on terror-killing. It is still possible that, from a consequentialist perspective, terror-killing is impermissible. This would be so if there were an uncontrollable slippery slope from permissible to impermissible instances of terror-killing once the absolute prohibition is not in place. Even a nonconsequentialist who denies that consequences are all that matter but gives some role to consequences might endorse a slippery slope argument against TKN, if the empirical evidence supporting it were available.

C. The Problem of Narrow Intention

Let us assume that there is no absolute prohibition on terror-killing nonconsenting persons who have never threatened nor will ever threaten harm, have not benefited from injustice, and cannot but be made overall much worse off in being killed than they would otherwise have been or than we are capable of permissibly making them. Our question will then be whether it is the DDE that explains the existence of a nonabsolute prohibition on TKN of this sort. The first problem with claiming that it does is the Problem of Narrow Intention, emphasized by Jonathan Bennett.²⁰ He notes that there may be a terror-bomber who can truthfully say that his intention is only to make the children appear dead (i.e., to make them lie on the ground quietly for a while) until the war is over, as the mere appearance of their death is enough to frighten the enemy into surrendering. He does not intend that the children be dead even as a means to their appearing dead; he just foresees that the only thing he can do to make them appear dead (bomb them, as he has no sleeping gas) will certainly also kill them. His certainty as to their death is no greater than the certainty of the person who foresees deaths as a side effect of bombing the munitions plant to destroy weapons. The DDE would then judge his bombing the children in order to end the war to be permissible even though it seems a clear case of terror-killing.

One approach to dealing with this problem, suggested by Quinn, is to reconceive what is the inappropriate object of intention. The DDE

19. Though I do not think that the permissibility of resistance is sufficient for showing that someone is wronged. See the discussion in Sec. III about combatants on the unjust side in war. Permission to resist is also not always available to someone wronged, in virtue of special obligations he may have not to resist.

20. See Jonathan Bennett, "Morality and Consequences," in *The Tanner Lectures on Human Values II*, ed. Sterling M. McMurrin (Salt Lake City: University of Utah Press, 1981), pp. 110–11.

so-revised (DDE[R]) would say that it is inappropriate to intend an evil but also to intend involvement of noncombatants (I would add, never-threatening, never-benefiting noncombatants) without their consent when we foresee that this will result in evil to them (I would add, that makes them much worse off than they would otherwise be or than we are capable of permissibly making them). Let us call this joint object of intention “evil*.” The terror-bomber, but not the tactical bomber in the standard case, intends evil*, because he intends involving the people knowing that harm will come to them. In the standard case, the tactical bomber only foresees evil*.

D. Deriving Permissibility from Intention

The second problem with the nonabsolute, narrowed DDE (and also for the DDE[R]) is more general: we cannot, contrary to the DDE, derive the permissibility or impermissibility of an act by considering the state of mind (broadly construed to include goals, motivations, reasons) of the person doing the act. Consider a case suggested by Thomson.²¹ Assume that tactical bombing is permissible only if the bombardier merely foresees evil* as a side effect and the evil* is proportional to the good to be achieved. Suppose the bombardier selected to bomb the munitions plant in tactical bombing is someone who would not have taken the job unless he knew that the children would be killed as a side effect. For it has always been a goal of his to kill some children, and he sees his bombing of the plant as a means of achieving that goal. Does the fact that he intends the evil* (here as a final goal rather than a mere means to a goal) and would not go on the mission if the evil* did not occur mean that it is impermissible for him to bomb the munitions plant? Must we wait until we find a bombardier who does not intend that the children die either as a means or goal? I think not. I agree with Thomson that an act is permissible because of its properties not because of the intentions—or as Kantians would put it, the maxim—of those who perform it. One may do a permissible act for a bad reason, not for the sake of the properties that make it permissible. Hence, the DDE is incorrect because it would declare as impermissible acts that are permissible.

Consider two possible responses to this objection. First, could we not say that it is permissible to do an act (with a wrong intention) so long as it is the type of act that someone with a good intention could perform and that this is also a way to derive permissibility from intention? But in deciding whether someone with a good intention could do the act, we consider the properties of the act, perhaps whether it leads

21. See Thomson, “Self-Defense,” and “Physician-Assisted Suicide: Two Moral Arguments,” *Ethics* 109 (April 1999): 497–518.

to a good greater than the evil* and whether the evil* causes the good. So we move from the objective properties of the act to determining that an intention with regard to it is permissible, not vice versa.

The second response tells us to focus not on the intention of the agent who does the act—a soldier following orders—but on the intentions of those who planned the attack or of the government who runs the war: the bombing, it is said, will be permissible if their intentions are permissible. But suppose that the nation and its generals are committed to killing children, though they act on this intention only when they have the cover of pursuing a just cause which results in children's deaths. (They do not pursue just causes that do not result in children's deaths.) Contrary to what this response implies, it is not impermissible for such a nation—Baby Killer Nation—to pursue the just causes it does pursue.

What may account for the view that there is a crucial distinction between terror-bombing and tactical bombing is a non-state-of-mind property: The bombing of the munitions plant, even if it were unaccompanied by the deaths of the children, produces a good, and the good (supposedly) qualifies as sufficient to justify bombing even when it actually also produces the evil*. Whether achieving this good is the aim or only an excuse of a particular agent when he does what will kill children is irrelevant to the permissibility of the conduct. If we (mistakenly) conceive of TKN cases as only ones in which someone directly attacks noncombatants, aiming to hit them, we will probably be imagining cases in which nothing but hitting the children can bring about a good greater than the evil*. In these cases, evil* is necessary as a cause of the greater good. By contrast, in the cases where blowing up the munitions leads to greater good, a neutral means, not an evil*, is (or even just could be, as I will explain below) a cause of the greater good. This difference in required causal structure—not states of mind—may help account for the sense that there is a difference in moral permissibility of tactical bombing and terror-bombing in standard cases. (However, below I shall argue that the difference is both not sufficient and not necessary to show that tactical bombing is permissible.)

Hence, when the bombardier in our example has a terror-bomber's intention (or even seeks the death of the children as a final goal) but he bombs a munitions plant whose explosion, independently of the involvement of the children, can cause a good to which the deaths of the children is proportional, his act is as permissible (or impermissible) as the act of a tactical bomber without these intentions. Suppose the ordinary tactical bomber's act is permissible. Then the deaths of the children are already justified by the good that results from bombing the munitions. If a particular bombardier also intends their death, he merely intends deaths whose existence is already justified. That cannot

make them be unjustified. If terror-bombing cases that have typically been contrasted with tactical bombing cases are ones in which the destruction of munitions could not itself produce a great good, and the harm to the children (or their involvement leading to harm) is necessary to cause the greater good, this helps account for the mistaken conclusion that it is the intention of the bomber that makes the moral difference.

In the immediately preceding discussion, I said “neutral means could be a cause of greater good” or “evil* is necessary as a cause.” I said this because sometimes even when evil* is a cause, it need not be. This, I believe, can be important to making an act permissible.²² To see this, consider how Thomson argues against the significance of the sort of causal structure that I have suggested is important to judgments of permissibility.²³ She says: “One possibility is to construe the doctrine [of double effect] as concerned, not with intendings, but with sheer causal order; I ignored this possibility in the text above, since I think it pretty obvious that the doctrine so construed has no future at all.”²⁴ Continuing, she says, “Suppose a Good pilot bombed a place in Bad that contained both a munitions factory and a children’s hospital, and that the Bads therefore sued for peace—not because of the loss of the munitions factory, but because of the loss of the children: the bombing terrorized the Bads, bringing home to them what war was going to have in store for them. It can hardly be thought that the fact that the causal route to the Goods’ winning the war passed through Bad terror, rather than through Bad lack of munitions, shows that it was impermissible for the pilot to drop his bombs.”²⁵

But in this case, I believe, the permissibility of bombing depends on the possibility that the bombing of the munitions that actually took place could have been justified independent of terror produced by the children’s deaths. Hence, it depends on the fact that the actual bombing could permissibly have been undertaken even if there were no possibility that fear generated by the bombing of the children would lead to peace. One may even foresee that fear generated by the unavoidable deaths will cause the war to end, but that does not mean that one cannot bomb the munitions that will cause the deaths, if destroying the munitions was also part of an alternative way to end the war and this goal justifies dead children as a side effect.²⁶

22. For an example of this, see the Track Trolley Case described in my *Mortality, Mortality*, vol. 2. (I owe the case to Keith De Rose.)

23. Thomson, “Self-Defense.”

24. *Ibid.*, p. 295, n. 9.

25. *Ibid.*, p. 297.

26. Notice that Thomson’s case is different from one in which the deaths of the children are necessary to sustain the destruction of the munitions plant because grief at their death is what prevents the parents from immediately rebuilding the plant. This sort

In my view, it is not the state of mind of the agent nor the actual causal structure that matters. Rather what matters is whether, if the actual morally problematic structure had not occurred, some other non-evil* event would have come about without any additional action of the agent and whether it would have been justified by its role in producing the greater good.²⁷ However, insofar as the DDE and DDE(R) emphasize only either (a) state of mind or (b) actual causal structure, they will be subject to both of Thomson's objections. In addition, even if we understand the DDE and DDE(R) as ruling out evil* as a necessary means to producing the greater good, the DDE and DDE(R) are still subject to the next objection.

E. Inability to Justify Side-Effect Deaths

The third problem with the nonabsolute, narrowed DDE, shared by the DDE(R), is that it is incorrect when it claims to justify tactical bombing.²⁸ Indeed, it will declare permissible some acts that are impermissible. The DDE and DDE(R) are perfectly general moral doctrines, here applied to a wartime context. But, as Philippa Foot pointed out long ago, the DDE leads to the wrong conclusion in nonwar cases.²⁹ This is because it is not true, as the DDE and DDE(R) hold, that it is no objection to neutral or good means to a greater good that a lesser (proportional) evil* will occur as a side effect and no other better means that do not cause as much evil* are available. For example, suppose I must rush five people to the hospital to save their lives. On the road I must traverse is an immovable person (Car Case 1). May I run over him because his death is not a means but only a side effect to the good, I only foresee but do not intend his death, and his death is a lesser evil* by comparison to saving five lives? I think not.

It may be said in response that this Car Case 1 is not strictly analogous to what happens in tactical bombing. For though involving or harming the person in Car Case 1 is not a means, driving over the spot that he already occupies (though not because he occupies it) is a means of getting to the hospital. Something comparable would be true in a

of necessary causal role in ending the war is, I believe, morally different from the deaths' being necessary to produce (rather than sustain) some effect that ends the war. For explanation of this, see F. M. Kamm, "Towards the Essence of Nonconsequentialism," in *Fact and Value: Essays on Ethics and Metaphysics for Judith Jarvis Thomson*, ed. Alex Byrne, Robert Stalnaker, and Ralph Wedgwood (Cambridge, Mass.: MIT Press, 2001), pp. 155–82.

27. My own view is actually more complicated. For (as noted in n. 26) if evil* is causally necessary for greater good to occur, but evil* does not produce the greater good but rather sustains it, it can be permissible to bring it about.

28. Thomson argued this as well in her "Self-Defense." I argued for the same conclusion in "Justifications for Killing Noncombatants."

29. Philippa Foot, "The Problem of Abortion and the Doctrine of Double Effect," reprinted in her *Virtues and Vices* (Berkeley: University of California Press, 1978).

tactical bombing case if we bombed a munitions plant on whose roof children are immovably lodged on the spot that the bombs must go through to reach their target, though we do not bomb intending to hit the children there.³⁰ But that is not how the tactical bombing case is typically described.

This complaint, raised on behalf of the DDE(R)'s ability to justify tactical bombing, does not eliminate the problem the DDE(R) has with Car Case 1. It does not declare impermissible action in Car Case 1 that is impermissible. Furthermore, it does not yet show that strategic bombing is permissible in the standard case. The complaint, however, does help us to see another problem with the DDE(R), namely, that it does not attend to the various ways in which the evil* that is a side effect might come about and the possibility that these differences might make a moral difference. Suppose another principle—call it Principle X—explains why action in Car Case 1 is impermissible. If only a general moral principle like Principle X is needed in order to decide war and nonwar cases alike, then Principle X, unlike the DDE(R), will at least declare impermissible strategic bombing when the children are immovably lodged on the plant.

Here are some other possible ways in which tactical bombing may cause death as a side effect: (a) our bombs, before or after they hit the plant, also hit and kill the children who are not in the plant, but near it; (b) the blowing up of the plant itself causes the death of the children near it; (c) our bombs not only hit the plant but also hit the roof of the nearby schoolhouse that falls on and kills the children; and (d) our bombs that hit the plant also cause an avalanche of rocks; the rocks land on the schoolhouse roof, which caves in and kills the children.

I suspect that option *a* is the way strategic bombing is typically conceived. The DDE(R) would permit it. Would action be permissible in an analogous nonwar case? Consider Car Case 2: We have to rush to the hospital to save five people. The road is clear to the hospital, but there is someone immovable at the side of the road. We know that the car we must drive unavoidably emits deadly fumes. Hence, it will kill the person at the side of the road. May we proceed in this case because the death of one is a less bad side effect by comparison to the greater good we seek? I do not think we may proceed, but the DDE(R) would not find the death of the one a sufficient objection. (I do not think that we may proceed, even if the bystander is far away but will die from the fumes.)³¹ If this is so, then we have another reason to think that Principle X, not the DDE(R), is necessary to account for permissible

30. I owe this case to Jeff McMahan.

31. That is, I do not think distance per se affects negative duties not to harm, even if it may affect noncontractual duties to aid.

and impermissible action in nonwar cases and that Principle X would rule out strategic bombing in option *a*. I believe that Principle X (which I have described elsewhere but will not describe here) may permit bombing in options *b* and *d*.³²

It may be pointed out that Car Cases 1 and 2 omit features present in war and, when we add it to nonwar cases, Principle X may itself allow harm to bystanders in a manner analogous to option *a*. One feature is that the country with just cause for war has to act in a way that endangers people because it is treated unjustly by another country. Hence, perhaps some or all of the evils that are necessary for its defense, though done by it, become the moral responsibility of the unjust country. Furthermore, in war a country confronts an unjust opponent and it is willing to take risks to do so. In a nonwar context, trying to defeat rather than retreat from an unjust threat is not always right. But Michael Walzer argues that when states are subject to unjust attack, it is not only permissible, but the right course to defend oneself. Those who take a stand against injustice may also contribute to strengthening a just world order. So, for a Car Case 3 to be analogous, we should imagine that it is right for A to try to defeat unjust B (judged independent of any side effects) and the strength of the rule of justice for all is greater if A takes a stand, but the car that travels in to fight B emits deadly fumes on bystanders. It may be asked, why should the bystanders pay high costs for a benefit they did not ask for on account of A's decision to do what it is right for him to do?

Note, however, that it is too simple to think that the constraints on harming bystanders in nonwar cases arise merely because those who escape or fight an unjust threat should never do what makes a bystander bear the cost of their rescue or fight or because the bystanders have a right to not be made to bear this cost. For if A and any others in the car could redirect B's threat away from them and toward C, this might be permissible according to Principle X itself.³³ (Supporters of Principle

32. I have described possible versions of Principle X (under the title the Principle of Permissible Harm, the Doctrine of Initial Justification, and the Doctrine of Causal Purity) in "Toward the Essence of Nonconsequentialism."

33. I do not think that the fact that one of the group that is threatened, rather than a bystander, redirects to C makes the redirection morally impermissible. Though C might also permissibly send it back toward the five as they were originally threatened. Note also that causing harm as one escapes an unjust threat rather than as one seeks to defeat an unjust threat may be permissible according to Principle X. For this seems analogous to what I call the Lazy Susan Case. This case involves moving threatened people away from a threat coming at them, with the side effect that a fewer number of people get killed. I think turning the Lazy Susan is permissible. Now suppose that A is trying to escape an unjust attack by B in a car with five other people and he knows the car will emit deadly fumes killing bystander C. He is permitted to escape in this way, if the Lazy Susan Case is any indication. I have discussed the Lazy Susan Case in my *Morality, Mortality*, vol. 2.

X should explain the moral difference between these different ways of threatening C.)

But what if we think bombing in option *a* is permissible, though producing an analogous threat to C in Car Case 3 is not permissible? (And recall that certain types of TKN will only be permissible if bombing in option *a* is permissible.) Then we may have to consider the possibility that the context of war is introducing special factors that override in some ways a general principle like X. (These factors are in addition to any general factors, such as extraordinarily horrific consequences, that account for the nonabsolute nature of Principle X.) This was the conclusion that Thomson reached as well, though she did not attempt to explain what it was about war that made bombing in option *a* permissible.³⁴ I shall return to this issue in Section III.

F. Inability to Distinguish among Noncombatants

The Car Cases and their analogous Tactical Bombing Cases raise concerns that the DDE and DDE(R) could declare as permissible acts that are impermissible. The fourth problem with the DDE and DDE(R) raises a version of this concern in a different way. Suppose that country A is waging a just war against country B, whose unjust acts make A's war just. Country B lies to the west of A. Neighboring country B on its west is country C, which is neutral in this war. There are several ways in which a munitions plant in B can be bombed. In route 1, A bombs the plant, and the foreseen side effect is that some of its own children living on the border with B get killed. In route 2, A bombs the plant and the foreseen side effect is that some of B's children in B are killed. In route 3, A bombs the plant in B and the foreseen side effect is that some of C's children living on the border with B are killed. In all these cases, let us assume the evil* is proportional to the good to be achieved. If we rely only on the DDE(R) to account for the permissibility of tactical bombing, then no moral distinction should be drawn between these different routes. Those who think that they may rush to the hospital in some of the Car Cases, thereby harming an innocent bystander, and who use this as a model for what may be done in war will have to allow themselves to treat the children in neutral C the same way as they treat the children in enemy B. Furthermore, if the number of children killed was less using routes 1 (killing A's children) and 3 (killing C's children), then if we just rely on the DDE(R), it will give a duty to minimize noncombatant deaths in all permissible ways, which should make it a duty not to choose route 2 (killing B's children).

The important point these cases bring out is that the DDE(R) alone treats noncombatants who are citizens of the enemy country the same

34. Thomson, "Self-Defense."

as other noncombatants. They are not more violable. If those who support the DDE and DDE(R) balk at these conclusions, then this shows that they too must think that something besides the DDE and DDE(R) accounts for the permissibility of killing in war.

Supporters of Principle X also face the problem of distinguishing between different classes of noncombatants. This is because, even if we use a form of tactical bombing that it permits, I do not think that all three routes would be on a moral par, nor that country A must always choose the routes with fewer deaths. Indeed, I think that if the DDE(R) or Principle X declares route 3 as permissible as the other routes, it would permit the impermissible.³⁵ If this is so, then even if tactical bombing of some sort were permissible, and even if the DDE(R) or Principle X were the principle in part explaining such permissibility, some principle in addition to these (call it Principle Y) must play a role. The DDE(R) or Principle X could at most be necessary not sufficient conditions for permissibility. Principle Y would have to explain why noncombatants in one country have a higher degree of inviolability than those in another country. Principle Y may explain other things as well, for example, why even combatants of one country are more violable than those of another and why different ways of killing than those allowed by Principle X are permitted in war.

If it does these things, it will help explain part of the idea of proportionality used when we decide that a goal justifies a certain number of deaths but not more. It will do this by helping us decide how many lives may permissibly be sacrificed in one country but not sacrificed in another country. It will tell us who is more inviolable and to what degree. Hence, understanding the proportionality component of a principle of just war can involve developing what I shall call “violability ratios.”

III. PRINCIPLES SPECIAL TO WAR

Let us now move beyond criticism of the DDE(R) and Principle X and consider some aspects of war in particular. This may help us distinguish morally among different noncombatants when acting in ways already judged to be permissible by Principle X (in Sec. III.A). We will then see if we can argue for extending the range of acts that are permissible in wartime beyond what Principle X permits ordinarily (in Sec. III.B).

A. *Violability Ratios*

In this section I will consider only cases where I assume that some general moral principle like Principle X would permit certain ways of harming people (such as bombing in options *b* and *d* described above).

35. A possible exception to this is when a state is morally wrong to remain neutral. I owe this point to a member of the audience at the City University Graduate Center.

The aim is to try to find (components of) Principle Y and so justify an agent's not being impartial between the populations of countries A, B, and C. Consider first that the government of country A may have a special, strong, positive duty to care for its own citizens and that this duty interferes with its acting equally on a principle that permits causing harm to its citizens and to others. Analogously, suppose that a general moral principle implies that it is permissible to turn a trolley away from five people toward one. An agent may still have a duty not to turn it toward his own child because of a special, strong duty of care he has to the child; he should rather turn it toward someone else. On this view, while the inviolability of noncombatants in the enemy country B is not lowered relative to a standard baseline, special care owed by A raises the inviolability of noncombatants in A when A is acting. This explanation for treating people unequally gives rise to a duty not to harm one's own noncombatants rather than noncitizens, if someone must be harmed in a permissible manner.

However, there is an alternative explanation for A's preference for its own noncombatants. One may conceive of the situation as one in which country A must decide whether to harm itself or harm someone else, both options involving (assumed) permissible ways to harm noncombatants. It may simply be supererogatory (beyond the call of duty but not forbidden by a duty to oneself) to direct a threat to oneself rather than send it to someone else to whom it is also permissible to send it. Analogously, suppose a trolley is headed toward killing five people and it is permissible to redirect it along another track toward killing one person instead. One track leads to Joe and the other to me. It is not impermissible for me to turn the trolley to Joe rather than toss a coin between me and Joe.³⁶ (I could also permissibly turn to two people rather than to me.) This conclusion is related to the permissibility of someone turning a trolley sent to him back toward the five and to the prerogative not to make big sacrifices in order to aid others.

Notice that the self/other asymmetry employed here is not being used to show that a certain course of conduct is permissible; it is being used only to show that once a form of conduct is independently determined to be permissible, one may select toward whom one will act by giving some preference to oneself. Furthermore, notice that it is not impermissible to turn the trolley to Joe, even if I would, in the absence of the side track going to Joe, refuse to save the five at all by turning the trolley onto myself. Hence, it can remain permissible to harm others

36. Jonathan Adler reminded me of the relevance of permissions related to self/other asymmetries, rather than duties of special care, in the war context. I had discussed them previously in connection with Peter Unger's views about the Trolley Problem in "Grouping and the Imposition of Loss," *Utilitas* 10 (1998): 292-319.

for some cause even though one would never oneself be willing to undergo the same harm to achieve that cause. This implies that it is not impermissible to cause noncombatant deaths to an enemy when one fights a just war merely because one would not impose the same losses on one's own noncombatants for the cause.³⁷

But I also think that it is (nonabsolutely) impermissible for A to choose route 3, killing neutral C's children. Indeed, it may be more impermissible to choose route 3, than to choose route 1, killing A's own children. This cannot be because A has a special duty of care for citizens of C, and it cannot be because of a self/other asymmetry that allows one to prefer oneself. Nor can it be because we have a duty not to bomb a neutral country, since we are not bombing them. We bomb the plant in B and (we can imagine) the plant's blowing up sends deadly fumes into country C. This suggests that noncombatants in B and even in A have lower inviolability relative to other noncombatants. (I shall return to this issue below.)

Hence, a second proposal based on these observations is that in activities undertaken by A in its war against B, noncombatants in B and A may both fall below the violability baseline for noncombatants in general (as in neutral C), but either A's duty of special care to its own noncombatants or a self/other asymmetry compensates partially, making A's violability higher than C's but lower than B's. Therefore, threats should not go to C, if they can go to B or A instead. On this view, war by its nature involves engagement between designated parties who are expected to absorb all costs. The appropriate analogy for war is a prize fight; people in the audience are not liable at all to being punched. This implies that neutrals are more protected than bystanders in the Car Cases. For example, in war, country A may not rely on Principle X to construct a defensive shield that redirects the unjust threat to it so that it goes to a neutral country, even if this will reduce deaths.³⁸ This leaves it open that very large numbers of noncombatant deaths in B should be avoided by choosing route 1 if it kills a much smaller number in A. That is, there may be some ratio in place between A, B, and even possibly C noncombatants such that when A acts, killing n people in C is, for example, like killing $300n$ (but not more) in A, and $500n$ (but not more) in B.

Next, keep in mind that in standard just war theory, a general moral

37. Douglas Lacky disagrees. He informs me that he has argued that one must be strictly neutral between noncombatants of one's own country and an enemy's country in deciding who is harmed by tactical bombing.

38. It may be suggested that neutral C is not to be harmed by A only to prevent C from also going to war with A. But even if C were weak and posed no threat to A, it seems to have greater inviolability.

principle like the DDE(R) or Principle X would be combined with a strong preference for killing combatants before noncombatants. (This is the Walzerian view that one should intend not to kill noncombatants.) The strongest version of this view implies that no tactical bombing by A that will kill noncombatants (A, B, or C) as a side effect is allowed if A combatants can be sent in to fight B combatants instead.³⁹ (C combatants may be rated as inviolable as C noncombatants even if they are fighting in an unrelated war with D.) A weaker version is that combatant casualties in A and B are strongly discounted relative to noncombatant casualties of both the homeland and of the country with which one is engaged in a just war.

Consider an example of the latter discount view: when A is fighting a war against B, a noncombatant death in B (caused by A) counts as much as 300 A combatant deaths. Hence, on this view, A's combatants must take great risks to avoid killing B's noncombatants but need not lose any number to avoid this. This suggests that A's relying on an air war with imprecise targeting rather than sending ground troops may violate *jus in bello* unless the discount ratio has been met.

Even if A combatants are more violable than B noncombatants, they are less violable than B combatants, at least from A's perspective when A fights in a war. How much less violable may depend on how individually responsible for being a threat we think B soldiers are and on the context in which the issue of violability arises. A combatant violability will decrease as the permissibility of B soldiers' acts decreases. Standard just war theory, however, permits soldiers on the unjust *ad bellum* side to do exactly what soldiers on the just side may do. *Jus in bello* is said to be separate from *jus ad bellum*. Why might this be, in part, true? Individual soldiers, at least those conscripted, may be more like morally innocent threats than evil aggressors, although they are in control of their actions. This is because sometimes it may be right for one to act as the agent of a state, especially a generally just democratic one, even when the act one does is unjust, without one being held accountable for the injustice of what one is doing. (A nonwar example might

39. Walzer's view makes it morally irrelevant that our soldiers are ours, at least when the comparison is with B noncombatants. But this view is compatible with the fact that they are ours is still morally relevant by comparison to B combatants. It is possible that citizenship is morally irrelevant when comparing noncombatants with combatants, even though citizenship is relevant when comparing combatant with combatant and when comparing noncombatant with noncombatant. This is an instance of what I call the Principle of Contextual Interaction: a factor can matter morally in some but not all contexts. Shelly Kagan's warnings about the Additive Fallacy also apply here.

be an officer carrying out an eviction order for a poor family for non-payment of rent from a very rich person's property.)⁴⁰

One way of arguing for this is through a two-level moral theory that emphasizes rules or principles. Sometimes the right act is one that accords with a principle that is overall best even if the act itself is not otherwise the best act one is capable of performing. It may be a correct principle that generally just democracies should get to carry out their policies even though they are sometimes unjust or at least that subordinate agents are not permitted to individually defy those policies.

If enemy soldiers have such reduced moral responsibility for their acts, it may be appropriate for A combatants to take greater risks to reduce the number of B combatants killed and for B combatants to defend themselves against even appropriate threats presented by A.⁴¹ A nonwar analogy is the person who is morally innocent and yet a threat to us. He may be responsible for his actions in being a threat (e.g., a child pulling a trigger) or merely hurled at us. Even in the latter case, if he will kill us, I believe we may kill him to defend ourselves. However, if we could avoid our death and his as well, by suffering a broken leg, or trying a maneuver that increased one's chance of death by only 0.1%, we may have to shoulder this cost. We would not have to shoulder it with a malicious aggressor.⁴²

Would this mean that there is some limit on the number of B combatants A's side may kill in order to save one A soldier from certain death as B combatants attack? I do not think so. For in a nonwar analogy, it is permissible (I believe) to kill many morally innocent threats to save one's life from them. But it could mean that A should choose from among various options for engagement so that each member of a large army takes a slight risk in order to avoid killing a greater number of enemy soldiers. If this is done, then some one of A's soldiers will die who would not otherwise have died.

Suppose, by contrast, that A combatants need take no risks to reduce numbers of B combatants killed. Then it is theoretically possible that from A's perspective A combatants should count for as much relative to B combatants as A noncombatants do. The latter ratio is very high, but even in this case would one think that it was permissible for A to arrange for an engagement in which it will have to kill any number of B combatants, merely in order to stop the death of one A civilian?

40. These points arose in discussion with Ruth Chang, Shelly Kagan, Jeff McMahan, and Larry Temkin.

41. This is a case, I believe, in which if a B combatant can respond to A's permissible attack on him, B is, nevertheless, not wronged in the course of a nonwrong act.

42. I argued for this in *Creation and Abortion* (New York: Oxford University Press, 1992).

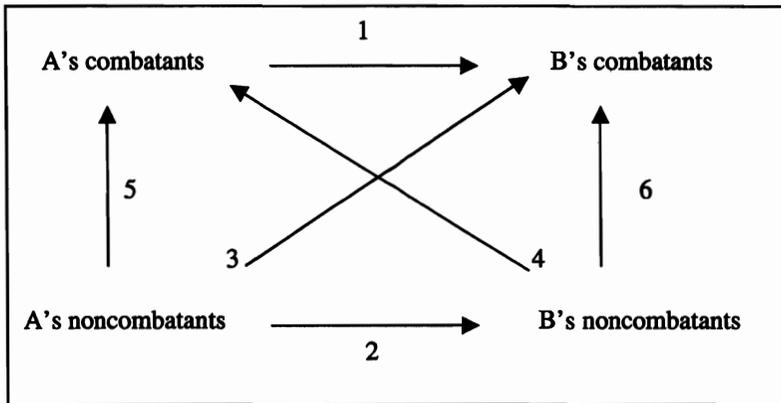


FIG. 1.—Violability ratios

I doubt it. Notice that it could be true that A combatants and noncombatants have the same degree of inviolability relative to B combatants, even though A noncombatants have greater inviolability than A combatants. That is, A combatants can have greater violability relative to A noncombatants but share the latter's status relative to B combatants.

Let me expand on this point. First note that it requires us to consider the topic of the violability ratio of one side's combatants to its own noncombatants. This, I believe, is a crucial topic, though it can be overlooked. As shown in figure 1, there are only four elements to compare but six comparisons to be made.

One of the A soldiers' tasks is to defend A noncombatants. Does this mean that any number of A combatants must die so that one of A noncombatants does not die? This seems unlikely. More likely, there is some violability ratio such that the death of one A noncombatant is equal to, for example, the death of 100 A combatants, at least when it is a question of A choosing among possible engagements or rescues of its noncombatants. (It is also possible that from A's perspective, the violability of its combatants is closer to the violability of its noncombatants than is the violability of B combatants to the violability of B noncombatants. This may be, in part, because it sees its soldiers as engaged in just warring and the difference between no warring acts and just warring acts is smaller than the difference between unjust warring acts [even permissibly undertaken by B soldiers] and no warring acts. Or it is because of the self/other asymmetry: that they are both "our" people [from A's perspective] unites them in a way that effaces to some degree their roles relative to each other? B combatants cannot be united with B noncombatants to efface the difference in role in the same way, from A's perspective.)

Now notice two important implications of the fact that there is a high discount on A combatant deaths relative to A noncombatant deaths. First, suppose A noncombatants will face counterattacks (e.g., terrorism) prompted by anger when too many B noncombatants (or even combatants) are killed. Then the fact that A noncombatants are more inviolable than A combatants gives A combatants another (indirect) reason to risk themselves rather than kill B noncombatants (and even combatants). For their taking such risks is a way of their appropriately sacrificing themselves to save A noncombatants from subsequent retaliation. Attending to the violability ratio between combatants and noncombatants on the same side is important, in part, because it leads to this result. Second, if there is only a discount ratio between A combatants and A noncombatants, so not any number of A combatants must die to save one A noncombatant, it may also be true that A may do what saves many A combatants even though as a side effect it kills an A noncombatant. If this is permitted, it can give the other side, B, a reason to sometimes do what will kill a few A noncombatants rather than many A combatants. If A soldiers need not die to save certain A noncombatants and may even in certain ways do what kills some, the opponent need not always favor A noncombatant lives to A soldiers' lives. Hence, violability ratios between combatants and noncombatants on the same side can be the basis for attacks on the Principle of Discrimination.⁴³

43. Consider also the implications of the possibility that A combatants can be more violable relative to A noncombatants and yet (to A) have the same inviolability as A noncombatants relative to B combatants. Does this view lead to problems when we face a choice among all three parties? For example, suppose that one A noncombatant death is equal to 100 but not more A combatant deaths and equal to three hundred B combatant deaths but not more, at least when deciding on when to engage with the enemy. Suppose that in a particular case 350 B combatants will have to be killed if A is to rescue one A noncombatant stranded and under threat of death from natural causes. (If the A noncombatant were under attack from 350 B combatants I assume he could permissibly kill them all if this is necessary to save himself and that A combatants may do in his defense what he may do.) But fifty A combatants could lay down their lives to save the one noncombatant by fighting off the 350 B combatants who would respond to any attempt to save A noncombatant. May A engage with the 350 B combatants because the A combatant/B combatant ratio and the A combatant/A noncombatant ratio will be satisfied, or not save the noncombatant because the A noncombatant/B combatant ratio is exceeded? (I am grateful to Ian McMullen for raising this issue.) To answer this question we should, I think, see what defense of whom would trigger the engagement, and so in this case A combatant should not step in to defend an A noncombatant when saving him is not worth the number of B combatants. On the other hand, suppose a possible engagement involves 110 A soldiers defending themselves against 350 B combatants, but the latter would be equally pleased to kill one noncombatant as a side effect by choosing an alternative route to its goal. What I have said implies that while one noncombatant could kill any attacking B combatants if necessary to save himself, he need not be defended (as a matter of duty) if this can only be done by sacrificing 110 A combatants (even assuming there is no shortage of A combatants for other goals). Suppose A has to choose between

In sum, violability, from the point of view of A waging war, in increasing order seems to be neutrals, A noncombatants, B noncombatants, A combatants, and B combatants. But if there is only a discount ratio between combatant and noncombatant deaths rather than a lexical ordering, then it is wrong to claim that if one has nonterror (or terror) means to use against combatants, one should use them rather than have engagements harming noncombatants. The ordering reminds us that we should distinguish between harming one's own combatants and an opponent's combatants (or noncombatants) for the sake of one's own noncombatants. (Fig. A1 in the appendix would have to be modified to take account of this.)

The violability ordering given above depends at least on A's having a sincere (or perhaps reasonable, if not true) view of itself as satisfying *jus ad bellum*, after which, from its perspective, such factors as self-preference can permissibly enter in. For suppose that the war A is fighting is unjust and A knows it, but A should not stop fighting because this would have an even worse effect from the point of view of justice given that the war has started. Then, I believe, its own combatants and noncombatants have greater responsibility to shoulder burdens of war than do those of B, and A should know this. A's duty of special care to its citizens should be replaced, I believe, by a concern that it and its citizens not bring harm to others through injustice or be associated with injustice. (I shall say more about this in III.B below.) Then violability in increasing order might be neutrals, B noncombatants, A noncombatants, B combatants, A combatants. If accompanied by reconsideration of the preference for combatant deaths of the just side over noncombatants of the unjust side, this ordering might put the violability of the unjust A's noncombatants higher than that of the victim B's combatants. The additional violability of A combatants and noncombatants may still be moderated to some degree (if the violability of B citizens would be were B the unjust side) if the combatants are only acting on a correct principle of obedience to a ruling authority (as discussed above) and the noncombatants have limited responsibility for the state's policies.

B. Group Liability

Suppose, as has been argued, that the DDE and DDE(R) are incorrect general moral principles. Suppose that the correct general Principle X

(1) picking an engagement where it would have to kill 1,000 B combatants to save 200 of its combatants and (2) doing what would kill only one A noncombatant to save those 200 combatants. Do the ratios given imply that it should kill (not only let die) its own noncombatants for the sake of its combatants, e.g., as a side effect of an operation to save the 200 combatants? Perhaps so. If the idea of finding actual ratios seems implausible, the points I have made could be put into terms of reasons. For example, that one will kill combatants rather than noncombatants (even when both are on the same side) is not always a definitive reason against a course of conduct with the opposite result.

rules out terror-killing of noncombatants (with the exceptions noted in Sec. II) and also some cases of tactical bombing, for example, where our bombs would directly kill noncombatants (of the sort described in connection with a narrowed DDE) in manner *a*. While this prohibition need not be absolute, in most circumstances the goals to be achieved by bombing would not override the prohibition. This implies that other means would have to be used, unless some consideration present in wartime invalidated the application of Principle X in some respects. What might such considerations be, and do they validate tactical bombing *a* and looser restrictions on TKN? In this section, I shall present two arguments for special circumstances overriding Principle X in some ways. Both arguments, in different ways, imply that it is a mistake to think of B noncombatants as analogous to the bystanders in the Car Case to whom Principle X applies. They can have lower inviolability than these bystanders. (I argued above that C [neutral] citizens are not like such bystanders; they have higher inviolability.)

1. *The Liability Argument.*—Consider the following argument, which I shall call the Liability Argument. Just states typically have the authority to draft some of their own citizens to become combatants. Having the right to send combatants to fight and perhaps be killed by the enemy is the right to intentionally put people in danger as a means to a goal, a right not typically held by just anyone. Hence, if just anyone sent people into danger, he would violate Principle X. Even the right to send people into danger is not exactly the right to deliberately kill one's own soldiers as a means to a great good. For example, a just state not in the most dire circumstances may not kill its own soldiers (who do not volunteer for death) in order to (somehow) terrorize the enemy and, thereby, win a war.

What might a just state do to its own noncombatants, including children? Suppose that it must deploy from its own territory missiles against the enemy or else surrender. However, the missiles sometimes backfire and cause deaths among civilians around the area where they are deployed. Efforts are made to minimize such harm, but some of it is unavoidable (Backfiring Missile Case 1). Presumably, a just state involved in a just war is permitted to use the missiles if the cause is important enough. Yet, if just anyone did this, he would violate Principle X. (In nonwar emergencies, perhaps a state may do similar things to its own citizens. Then the factor of war will be needed only to explain the permissibility of its doing these things to some noncitizens.)

A state is permitted to do these things to its combatants and noncombatants despite its having a special duty to care for its own citizens. I have not yet given an argument for the state having these powers. A possible argument follows.

A state may override Principle X to draft its own citizens and expose

them (even children) to risks and harms because it is acting on their behalf as a collective. Citizens are to accept these risks and harms in wartime for the good of the collective of which they are a part. A collective is necessary in order that the benefit of civilized society be available to people. Even those, such as children, who have not yet reaped benefits of being a part of this collective are members of the collective that is organized to be of service to these children should they survive.⁴⁴ This is a justification in terms of imposing risks and harms on people for their own collective good. Perhaps it is not strong enough. I shall assume for the sake of argument that it is adequate.

Now suppose one's own state is engaged in an unjust war. For example, suppose it has, without satisfying conditions for *jus ad bellum* or *jus in bello*, sent off a deadly missile toward another country which will kill many in that country. Suppose further that our state realizes right after it sent the missile off that it has been unjust. The only way for it to stop the missile is to send off another missile to destroy the first one. This second missile, like the one in our earlier example, will backfire and as a side effect kill some of our own noncombatants. We could imagine that it kills fewer than, the same number as, or even more than the ones that would be killed unjustly in the other country if the first missile was not stopped (Backfiring Missile Case 2).

Would it be permissible and even obligatory for the government to send off the second missile, despite its duty of care for its citizens and despite a self/other asymmetry that sometimes permits us to prefer ourselves? I believe it would be permissible and even obligatory to send off the second missile. If this is so, what is the justification for the state's right to endanger its own citizens in this case? It cannot be that the state's act is aimed at the greater good of its citizens collectively, as in the previous argument, because—assuming a distinction between being just and faring well—it is not their good that is being served. Rather, I believe the justification is that citizens of a country are liable for having risks and harms imposed on them in order that their country not be unjust, as much as they are similarly liable in order that their and their country's interests be promoted. I believe that they can have such liability even if they are not morally responsible for the injustice. (If one's country is unjust even to its own citizens, the citizenry is also liable to bear some costs to make its state internally just, insofar as this is possible. If this internal task has failed, the citizenry can still be liable, I think, for bearing costs to prevent its state's injustice to others. Perhaps this is because the state is still one's state even when it does not treat one as a member should be treated.) This claim was also implicitly relied

44. I owe this point to Stuart Swetland.

on in Section III.A when we revised the order of violability for a state that began an unjust war but for reasons of justice cannot stop.

We are already familiar with the idea that a country owes reparations to victims of its injustices, even though those whose taxes will pay for the reparations are a new generation, never participating in or benefiting from the injustice. The suggestion is that other costs besides money may be imposed to prevent the injustices of one's state, imposed even on those never participating in or benefiting from the injustice. (I agree that much work in political philosophy would have to be done to justify such a liability. I am only claiming that justifying it may be necessary in order to justify certain acts in war that endanger noncombatants.)

Admittedly, the citizens' liability for bearing costs may have to be moderated due to the opposing view that those not morally responsible for threats should be treated in some ways differently (as was said above in discussing morally innocent threats) from those who are morally responsible. For example, those on the just side might nevertheless have to accept some greater risks so that harm to some members of the unjust side is reduced. I have said that the group liability in my account does not depend on group responsibility for unjust action or policy. In this connection, note also that citizens being liable for bearing costs is not the same as their having a responsibility to bear the costs, as it does not imply that they must volunteer to suffer large costs. Are they morally permitted to try to resist the harms that would befall them during the effort to stop their state's unjust war? (For example, may they shoot back at the second missile that will harm them?) If acting on such a permission interfered with attempts to stop the injustice of their country, it would seem to be unjustified even if it were excusable.

It has been argued that a state may do some harmful things to its own citizens and, in essence, override the applicability of Principle X in some respects, for reasons of collective good or collective justice. Now we must continue the argument to show that it may sometimes do similar things to the citizens of the country against whom it wages just war. (For example, tactical bombing in *a* that directly harms noncombatants of an enemy country as a side effect is supposed to be the parallel to the case of backfiring missiles.) If, in order to show this, we relied merely on the argument that a state may do things to its own citizens for their collective interest, it could be pointed out that this justification does not apply at all to the citizens of the opponent state. "Why," these citizens may ask, "should you impose risks and harms on us for your own good when it is not for our own good?" In this question, there are two claims: (i) it is not for our good that risks and harms are imposed on us but for your good, and (ii) you are not our state and so cannot impose costs on us as you might impose them on your own citizens.

Here is a possible answer to the first claim. If one's country is

engaged in a just war that satisfies *jus ad bellum*, then its enemy country has done something sufficiently unjust to support a war against it. Above it was argued (in dealing with the case in which our own country unjustly set off a missile) that citizens of a country should be liable for risks and harms in order that their country not be unjust, as much as in order that they and their country's interest be promoted. This implies that the citizens of the unjust country we fight when we are just should also be liable to risks and harms in order that their country not be unjust to us. (The fact that country A benefits from the end of country B's injustice does not mean that it should take the risks for the benefits any more than in Backfiring Missile Case 2 B rather than unjust A should accept the risks for the benefits of avoiding the first missile.)

But now we have to deal with the second claim: who are we—not their state—to impose losses on them? By hypothesis, their state continues to pursue its unjust ways and so will not do what imposes losses on its citizens in order that their state not be unjust. This may be either because it believes it is not unjust or because it does not care if it is unjust. (It might be because it believes it does not have a duty to stop its injustice when its citizens will thereby be harmed. But I have argued against this.) In interpersonal relations, if someone has a duty to me to do something and does not do it, it is not necessarily true that I may interfere with him to enforce his duty. But I may go to some legitimate authorized agent, like the police or the state, to have the duty enforced. In inter-nation relations, there is often no international agency that will enforce the duties of one state relative to another. And, arguably, when that is the case, a state may itself try to enforce duties owed to it. Hence, when the just state conducts tactical bombing against the unjust state, knowing that noncombatants will suffer as a side effect, the just state may be seen as permissibly imposing risks and losses that the opponent state should be willing to impose on its own people to do what prevents its own injustice.⁴⁵

Hence, a state that is at war, at least the unjust state, loses, with respect to its opponent, the exclusive authority of a sovereign state over its populace. Its citizens can be put at risk in the service of the state waging just war against it, as that state could put its own citizens at risk to stop its injustice were it unjust. (Hence, one is tempted to call this a "Shared Sovereignty Argument," but for reasons to be given below, I will not use this title.)

45. Suppose it were only permissible but not obligatory for a state to stop its injustice in a way that harms its citizens. Then the argument would have to claim that because it is permissible for B to do something, it is permissible for A to do it. Because this is not, in general, true, it would have to be argued that it is true to the particular context where A and B are at war.

We can summarize the Liability Argument (so far) as follows: (1) If our country is unjust to others, our government has a duty to stop the injustice and our citizens are liable for some costs imposed by our government to stop the injustice. (2) If another country is unjust to us, their government has a duty to stop the injustice and their citizens are similarly liable to costs imposed by their government. (3) Suppose the unjust country's government does not do its duty and there is no international policeman to enforce the duty. (4) Then, to enforce the duty, we (or another country) may enforce the duty or stop the injustice and we (or another country) may impose similar costs on their citizens in doing so.⁴⁶

An interesting further question is whether a country fighting a just war has something like the authority even to draft citizens of the country it is fighting for the just cause. If so, it would have a right to expose those "draftable" citizens to dangers comparable to the ones to which it can expose its own combatants. Note, however, that its own combatants are permitted to defend themselves against the risks presented to them by combatants they fight. But if a state may treat as drafted in its service some of the citizens of the state it is fighting, it will be drafting them to accept risks and harms from the very same state that drafts them, against whom defense seems impermissible. Something comparable may occur when soldiers are subject to the risks of so-called friendly fire.

Recall that it was argued in Section III.A that a state does not have special duties of care toward the citizens of other countries the way it has toward its own citizens. Further, independent of such a duty of care, a state's selecting its own noncombatants for harm rather than another state's noncombatants whom (an argument shows) it is also permissible to harm was said to be supererogatory conduct, given a permissible self/other asymmetry. These points were supposed to help justify preferences among noncombatants to harm and some violability ratios. The Liability Argument now adds to an explanation of increased violability of B citizens from A's point of view, given that it takes itself to be just and B unjust. Unlike special duties and self/other asymmetry, which could account for why A citizens (from A's point of view) get better treatment than B citizens, without lowering B citizens from a general baseline, the Liability Argument, based on A's view that B is unjust in its war, helps explain why A sees B citizens as occupying a position lower than the general baseline violability. But the fact that A in making war acts to get a collective benefit for its citizens may help lower its citizens' violability relative to neutral C whose violability is even less than that of ordinary bystanders, according to the prize-fight model.

Together all these factors reinforce the following claims: (1) If there

46. Later (see pp. 688–89 below), two more steps will be added to this argument.

is a choice between endangering its own noncombatants or those in the country it is fighting, a state believing itself to have just cause may favor its own noncombatants at least to some degree. How much is expressed by a violability ratio or a discount rate for the deaths of the other side's noncombatants versus its own. (2) If a country would rather forgo a goal in its just war than permissibly harm itself for the goal when harming itself is the only way to achieve the goal, this does not mean that it may not still permissibly impose such costs on its opponent.

Notice again that the self/other asymmetry has not been used to show that a course of conduct against an enemy country is permissible; it is only used to decide between conduct that has already, on independent grounds, been shown to be permissible. The Liability Argument moved from what a state should do though it harms its own citizens to what it may permissibly do to an unjust opponent. However, if a state should do what causes its own citizens harm X , even in the presence of a duty of care, it is possible that it may cause harm $X + N$ to its opponent to whose citizens it has no duty of care. Proving this would involve a further step to show that a citizenry's liability is not limited by what its own state may do to it in the course of fulfilling a duty to correct the state's unjust actions.

So far, in expanding the scope of permissible killing beyond Principle X, we have considered noncombatant killings that are direct side effects of means we use in pursuing other goals. What about terror-killing? I said that except in the most dire cases, when a state is pursuing a just war that serves its interests, it is prohibited from terror-killing its own nonvolunteering citizens, whether they are combatants or noncombatants, to achieve wartime goals (modulo exceptions described in Sec. II that could also justify terror-killing one's own citizens). Of course, its combatants are not helping an unjust cause as A sees it. Hence, it is still possible that those who are noncombatants or combatants on the unjust side may permissibly be terror-killed. To consider this possibility we use the same strategy employed above in the Liability Argument. Suppose that A is fighting an unjust war and comes to realize it is unjust. It is prepared to stop fighting; however, military leaders in charge of the war will not stop it. The only way to stop the deadly missile it has sent to B is for the president to deliberately harm A combatants or noncombatants because, we may imagine, doing this would terrorize the military leaders into stopping the war. May this be done?

Possibly it is permissible to use A combatants as mere tools to stop the state's injustice. This implies that stopping its own unjust war is even a more important goal than pursuing its just war and its own interests. It can be more important that we not do injustice than that we avoid being its victim. Suppose it is not permissible to use noncombatants in this way except in the direst of cases (e.g., B's whole country will be

destroyed by A's unjustly sent missile). If A may terror-kill its own combatants to stop its unjust war, the Liability Argument will imply that it may terror-kill B's combatants in similar circumstances to stop B's unjust war. (But, it may be said, A would then be terror-killing B's combatant to prevent its being a victim, and it was said only that A might terror-kill [its own] combatants to prevent its being unjust. A terror-killing B combatants is permissible, I believe, if it does in fact prevent B from being unjust by means it [like A] should be willing to use to prevent its injustice. This is true even if A's motive for terror-killing B combatants is to prevent injustice to itself.) This conclusion bears on the case of the sleeping Japanese soldiers that I introduced at the beginning of the article. It implies that they could permissibly be terror-killed to stop a war if the costs of the continuing war were great enough.

Could it be that it is only the duty of special care or a permission based on a self/other distinction that stands in the way of A terror-killing its own noncombatants to stop its own unjust war? If not, then the grounds for the prohibition may apply quite generally to citizens of the country it is fighting and will rule out terror-killing noncombatants, except when general overriding conditions on Principle X ("direst circumstances") apply.

What about neutral states, like state C in our example, involving B and A at war? The theory now being presented distinguishes, I think, between what A may do to citizens of B and what A may do to citizens of C in regard to overriding Principle X. Not all states have an obligation to fight injustices to A or stop injustices that B commits. And even if it were good for C that A triumph over B, just as it is good for A and its citizens that A triumph, C has done nothing to lose its right to decide by itself what goods it will pursue and whether its citizens will be enlisted to help A. This is unlike B, I have argued. Hence, A's conduct toward C is at minimum still governed by Principle X and more likely by the code of a prize fight. Suppose a certain type of tactical bombing against the plants in B is not permitted by Principle X or prize fight rules because of the way in which it affects citizens in C. Then A may not engage in such a type of tactical bombing, except to the extent that these principles and rules are nonabsolute for perfectly general reasons, such as horrific consequences.

Consideration of neutrals raises a question for the Liability Argument. For suppose there are noncombatants of neutral countries living in A or B. The Liability Argument implies that they have greater immunity from harm than noncombatants of A or B. But if this is true, it serves as confirmation of the argument, I believe.

Suppose an agent other than a state has passed the various just cause and moral legitimacy tests. Could the same exemption from Principle X offered by the Liability Argument that applies to a state apply

to this other agent in its relations with the combatants and noncombatants of its opponent? It would apply only if this agent has moral (if not legal) authority to enlist and endanger people on its own side to pursue a just war and especially to stop an unjust war it might be fighting. But due to the implications of any special duty of care to its own people or the self/other asymmetry discussed above, its refusing to sacrifice people on its side for a goal need not always interfere with the permissibility of harming others for this goal. (It is because the Liability Argument can justify behavior of nonstates that we should not call it the Shared Sovereignty Argument, for in these cases there is no sovereign state that could be said to exercise powers of sovereignty over its opponent. I owe this point to Ronald Dworkin.)

The analysis in Section III.A and in this section has spoken many times of what an agent who believes he satisfies *jus ad bellum* may do. Of course, each side may think of itself as having the just cause. It may be argued that only if one is really in the right is one justified in overriding Principle X or even killing in manners in accord with Principle X. But there are at least two views about this matter. According to what we may refer to as an objective theory of permissibility, one's act is permissible only if one is acting as an agent with complete knowledge (empirical and moral) of things as they actually are and with perfect moral motivation would act. Then no reason could possibly be given for having to act differently. For example, Thomson imagines that Jones presses a doorbell that someone else hooked up to a bomb, when there is no way Jones could know this, and so Jones kills Jim. She says that Jones does not act permissibly.⁴⁷ By contrast, Thomas Scanlon argues that the objective view abstracts too much from the agent's point of view, especially if there was no other way in which it would have been reasonable for him to act.⁴⁸ On this agent-centered theory of permissibility, Jones did not act impermissibly. Scanlon's view of permissibility is one way to account for why two countries are both permitted to override Principle X in light of the Liability Argument. It is also an additional reason (to the one given by a two-level moral theory) why soldiers on each side may be acting permissibly in killing.

Given the agent-centered view of permissibility, one could add two steps to the Liability Argument as given above: (5) Each side in the conflict is not unreasonable to think it is just and the other side unjust. (6) Therefore, each side's citizens are liable to costs as a result of the other side stopping what it believes is the other country's injustice to

47. See Thomson, *The Realm of Rights* (Cambridge, Mass.: Harvard University Press, 1990).

48. Scanlon, "Moral Assessment and the Agent's Point of View" (presentation at Boalt Hall Law School, University of California, Berkeley, February 28, 2002).

it. Even on the objective view, if one had excellent reason to think one's cause was just even when it was not, one's impermissible overriding of Principle X might still be excusable, though, of course, not justifiable. But if it was not reasonable for leaders of a state to think their side was in the right, or they knew it was in the wrong, on both views of permissibility, their killings are impermissible and may well be punishable.

2. *The Shifted Responsibility Argument.*—There is a second argument that might be offered to override prohibitions supported by Principle X. I call it the Shifted Responsibility Argument. One form of shifted responsibility occurs when A may permissibly transfer its moral responsibility for negative effects of its acts to B. A recognized example is when a country itself puts bystanders in the way of what would otherwise be a just response to its threat. In that case, the moral responsibility for deaths caused by A's permissible bombing is attributable to B who moved people into harm's way. The moral option of redirecting the threat discussed in Car Case 3 also suggests that we could develop a device that conforms to Principle X and shifts responsibility to an unjust agent. It is a defensive screen that would deflect threats to A noncombatants from an aggressor back to his own population, if the numbers of non-combatants thus killed would be minimized. (Recall that Principle X is neutral as between one's own noncombatants and one's opponents; hence minimizing is required. If Principle X is combined with a violability ratio favoring A noncombatants when A acts, a threat could be redirected even to a greater number of B people while still shifting responsibility for what A does to B.)

But the Shifted Responsibility Argument I will now consider has a different focus: suppose the bystander in a new case, Car Case 4, supports the unjust agent in his threat to A and those in the car with A. Then is he not an innocent bystander but at least in part causally responsible for the threat? It is in this sense that responsibility is shifted to him. Does this not diminish the bystander's immunity from harm? The Shifted Responsibility Argument does not merely insist that it is permissible for the just side to wrong a bystander, with moral responsibility for the wrong going to the evildoer. Rather, it insists that the so-called bystander is not wronged because at least causal responsibility for the evildoing is, in part, his. In essence, it is an argument against the Principle of Discrimination. Some of his activities would make him part of the threat. Even moral innocents, such as children, can be causally responsible in virtue of their activities, and then, arguably, they may be subject to harm. However, if someone made the threat possible in virtue of carrying out a superior duty, his liability to harm might not increase—for example, if a doctor saves combatants, he makes possible the continuation of the war. But suppose the combatants' acts are justified by some principle in a two-level moral theory or by an agent's point of

view theory of permissibility.⁴⁹ Then the doctor who saved these lives (if not the lives of clearly malicious aggressors) may not have reduced immunity just because of making possible the unjust threat.⁵⁰ This doctor is more like the doctor of one prizefighter during a boxing match; he may not be punched by the opposing boxer.

Suppose someone was previously a supporter of the combatants. Might their immunity be significantly lowered because of their causal responsibility for the threat? Only, I believe, if they were not morally innocent threats. That is, it is in lowering the immunity of past threats that reasons for their being a threat seem most relevant. (By contrast, a current part of a threat who is morally innocent may be entitled to only minimal changes in how we react to his threat.) This is a reason why conscripted soldiers who were threats but are sleeping now, unlike previously malicious aggressors, are not subject to being used in terror-bombing just because of their previous acts. Having moral fault for activities unrelated to the current war also does not lower immunity. Hence, criminals serving sentences for civilian crimes do not, in virtue of these characteristics, have lowered immunity. But retired volunteer combatants for a clearly unjust cause might have lowered immunity for purposes of ending that very injustice.⁵¹ Can we deny that there is diminished immunity simply by saying that it has been decreed that, in the “game” we are playing, only those who actually pursue a victim along with the primary threatening agent have diminished immunity? I do not think so.

However, a moral objection to threatening even a bystander supplying an evil aggressor arises if he is among other bystanders who have not supported the unjust acts of the evildoer and if these bystanders would also be harmed. The protection that Principle X affords these other bystanders is not overridden by the presence among them of an evildoer or by the evildoer’s supporters. Hence, I believe the Shifted Responsibility Argument fails to justify strategic bombing of type *a* in which nonthreatening, nonsupporting children are killed, even though doing this might sometimes be justifiable. Another argument, such as the Liability Argument, is needed.

49. As discussed on p. 677 and p. 688 above.

50. Discussion with members of Ethical and Legal Philosophy (ELF) helped in reaching this conclusion.

51. These are central claims of Jeff McMahan’s “Innocence, Self-Defense, and Killing in War,” *Journal of Political Philosophy* 2 (September 1994): 193–221. The possibility that people in the last class might be legitimate targets of terror-bombing was also suggested by Gertrude Ezorsky.

IV. CONCLUSION

My conclusion is that just war theory based on the DDE and the distinction between combatant and noncombatant deaths fails in many ways. A further conclusion is that any other general moral principle, such as Principle X, will also fail as a sufficient basis for just war theory. If it is true that such acts as tactical bombing *a* are justifiable in non-horrific circumstances, what justifies them must seem to be factors specific to war that override the applicability of general moral principles. Hence such factors, as identified by Principle Y, would be necessary in order to justify much conduct that is commonly thought to be part of *jus in bello*. Terror-killing which is not commonly thought to be part of *jus in bello* can be most easily justified when it is done either to (1) those who are currently or were previously morally responsible for organizing the threats on behalf of the unjust cause that one is currently opposing, (2) those who are now in fact threats whom one can terror-kill for purposes of self-defense, or (3) noncombatants whom we either would have permissibly harmed or have the capacity to permissibly harm as badly for nonterror purposes. The inviolability of neutrals, however, seems to be even greater than ordinary bystanders in a “domestic analogy.”

Appendix

So far, this overview of considerations gives rise to the following checklist (or decision tree, if used by the agent itself) in figure A1.

This checklist is tentative and preliminary to further discussion. I shall assume throughout that the means would be useful in eliminating the injustice. This is because standard just war theory holds that sufficient just cause and legitimate agency are insufficient to justify use of harmful means that are not necessary and useful to achieve the just cause. While I make the assumption of efficacy, I do not agree that it is required. For suppose a single guilty aggressor is attacking you and nothing you do will stop him and you know this. Is it not still permissible to do whatever damage you can to him while he is attacking (so long as it is proportional to his attack), even if this has no further good consequences for anyone? I believe so.⁵²

52. It was Peter Graham who emphasized this point to me. I do not deny that more would have to be said to justify this claim.

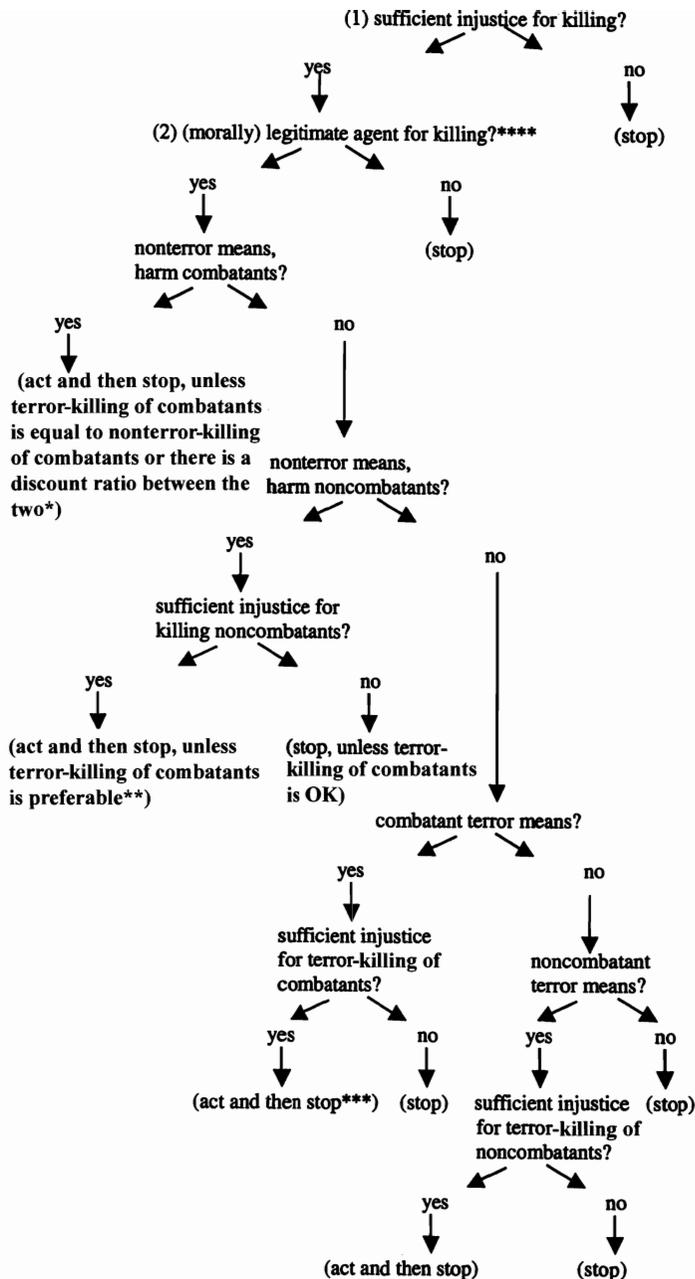


FIG. A1.—*As will be argued later, we might add “or there is a discount ratio between combatant and noncombatant deaths.” **As will be argued later, we might add “or there is a discount ratio between nonterror-killing of non-combatants and terror-killing of noncombatants.” *** As will be argued later, we might add “unless there is a discount ratio between terror-killing of combatants and terror-killing of noncombatants.” ****Perhaps we should ask: Legitimate agent for each type of killing of each type of victim? If so, I am simplifying.