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Collateral Damage

David Lefkowitz

The phrase “collateral damage” refers to harm done to persons, animals, or things that agents are not morally permitted to target in the conduct of war, as a side effect of attacks on persons, animals, or things that agents are morally permitted to target in the conduct of war. Call the first category – that is, those persons, animals, or things that agents are not morally permitted to target – illegitimate targets of war, and the second category legitimate targets of war. Collateral damage, then, refers to harm done to illegitimate targets of war as a side effect of attacks on legitimate targets of war. As this characterization indicates, a complete response to the question of when, if ever, acts of war that cause collateral damage are morally justifiable must address harm done to private and public property, domestic and wild animals, and the environment. In this essay, however, I will focus solely on harm done to persons who are illegitimate targets of war, as a side effect of attacks on legitimate targets. My reason for doing so is twofold. First, most historical and contemporary discussion focuses on the rightness or wrongness of this particular kind of collateral damage.¹ Second, rightly or wrongly, most people appear to be more concerned with harm done to persons than they are with harm done to animals, the environment, or inanimate objects.

Philosophers disagree over what makes a person a legitimate target of war. Some argue that only those who directly pose an (unjust) threat of harm may be targeted, while others argue that it is merely his or her

¹ For discussion of collateral damage to private property, see Colm McKeogh, *Innocent Civilians: The Morality of Killing in War* (New York: Palgrave, 2002); Whitley Kaufman, “What Is the Scope of Civilian Immunity in Wartime?” *Journal of Military Ethics* 2 (2003): 186–94.

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being morally responsible for an unjust threat of harm that justifies targeting a person, even if that person does not pose the threat.² On either view, the category of legitimate targets of war significantly overlaps the category of combatants, while the category of illegitimate targets of war significantly overlaps the category of noncombatants. Therefore, I will sometimes characterize collateral damage as harm done to noncombatants as a side effect of an attack on combatants (or a military target), a description commonly employed in public discussion. Nevertheless, it is important to remember that the categories of legitimate target of war and combatant and the categories of illegitimate target of war and noncombatant do not overlap completely.

We need not resolve the debate over what makes a person morally liable to attack in war in order to make significant progress in establishing the moral status of wartime acts that cause collateral damage. What such a discussion does seem to require, though, is that there be some categorical distinction between legitimate and illegitimate targets of war, since such a distinction appears to be essential to the very concept of collateral damage. As will become clear later, certain types of alleged justification for acts of war that harm noncombatants may find it difficult to justify treating this distinction as fundamental.

One last preliminary point remains before we turn to a moral assessment of collateral damage. Some theorists argue that combatants may justifiably kill only if they fight for a just cause, while others argue that combatants may justifiably kill even if the state they serve is morally unjustified in going to war. To avoid this debate, I will assume throughout that those combatants inflicting collateral damage are members of a state that acts permissibly in going to war.

The discussion of what, if anything, morally justifies collateral damage-causing acts of war proceeds as follows. In Section I, I criticize the most common argumentative strategy employed to defend such acts, namely, appeal to the doctrine of double effect. In Section II, I suggest that one prominent nonconsequentialist approach to moral theorizing, namely, social contract theory broadly construed, will also find it exceedingly difficult to demonstrate that collateral damage-causing acts of war are permissible. Finally, in Section III, I consider consequentialist justifications

² Michael Walzer, *Just and Unjust Wars*, 3rd Edition (New York: Basic Books, 2000); Robert Fullinwider, "War and Innocence," in *International Ethics*, ed. Beitz et al. (Princeton, NJ: Princeton University Press, 1985); Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114 (2004): 693–733; Richard Norman, *Ethics, Killing, and War* (Cambridge: Cambridge University Press, 1995).

for collateral damage. I argue that while such justifications may be more plausible than some writers in the just war tradition have thought, there are still some reasons to find them unsatisfactory. Thus this chapter points to a skeptical conclusion with respect to the moral justifiability of wartime acts that inflict collateral damage: given the elusiveness of a compelling moral justification for collateral damage, and its practically inevitable occurrence in modern armed conflicts, it appears impossible to wage war without acting immorally.

I. The Doctrine of Double Effect and Collateral Damage

Many contributors to the just war tradition attempt to justify military operations that produce collateral damage by appealing to the doctrine of double effect (henceforth the DDE).³ Applied specifically to acts of war, the DDE holds that harm done to noncombatants is morally permissible if and only if:

1. The combatant intends to attack a legitimate target of war, and to do so in a manner that conforms to the moral constraints on such acts.
2. The combatant does not intend to cause harm to noncombatants as a means to achieving his intended goal. Rather, the combatant merely foresees that his attack on a legitimate target of war will cause harm to illegitimate targets of war as a side effect.
3. There is a sufficient reason to warrant the combatants' acting in a way that can be reasonably expected to cause harm to noncombatants (or illegitimate targets of war, more broadly).

Conditions 1 and 2 reflect the distinction between legitimate and illegitimate targets of war central to the concept of collateral damage: combatants may not aim to harm noncombatants either as an end (condition 1) or as a means to an end (condition 2). A side effect of an outcome the combatant intends to bring about, however, is by definition one at which he or she does not aim: the combatant may foresee that his

³ Walzer, *Just and Unjust Wars*, pp. 151–59; Elizabeth Anscombe, “War and Murder,” in *Nuclear Weapons and Christian Conscience*, ed. Walter Stein (London: Merlin, 1960); Paul Ramsey, *The Just War: Force and Political Responsibility* (New York: Charles Scribner’s Sons, 1968). International law, specifically the Geneva Conventions as understood in the 1977 Protocols, also appears to reflect the DDE: see 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, at <http://icrc.org/ihl.nsf/WebCONVFULL?OpenView>.

action will result in harm to noncombatants, but he does not intend it. Such a combatant respects the distinction between those things he may and may not target while waging war.

That the combatant does not intend to cause harm to noncombatants does not suffice to justify his conduct, however. As condition 3 indicates, only certain considerations justify causing even unintended harm to noncombatants. Most discussants of the DDE label this requirement the proportionality condition and describe it as requiring that the harm suffered by noncombatants as a result of a given act of war be proportional to the good achieved as a result of the same act.⁴ This formulation of the third condition of the DDE can be misleading, however, insofar as it suggests that the condition ought to be understood in consequentialist terms. That is, it appears to imply that a collateral damage-causing act of war is morally justifiable only if that act's good consequences (e.g., the prevention of harm to other noncombatants) outweigh its bad consequences (e.g., the harm done to noncombatants killed in the attack). Yet such consequentialist reasoning seems antithetical to the apparently nonconsequentialist distinction between legitimate and illegitimate targets of war essential to the concept of collateral damage, a point I discuss in greater detail later in this chapter.⁵ We do better, I suggest, to use the deliberately vague phrase "sufficient reason" when formulating this condition for the justifiability of acts under the DDE, since it leaves open the question of what counts as a sufficient reason for causing harm to noncombatants, as well as the question of what sort of moral reasoning ought to be used to justify treating a particular consideration as a sufficient reason. The question of how to interpret the third condition of the DDE, which for convenience sake I will continue to refer to as the proportionality condition, is taken up at greater length later. For now, the crucial point to note is that according to the DDE, the fact that the combatant does not intend to harm noncombatants is not enough to show that his conduct is morally permissible.

The attraction of the DDE to many just war theorists lies in the fact that it appears to reconcile a nonconsequentialist approach to the morality of

⁴ Walzer, *Just and Unjust Wars*, p. 153; Henry Shue, "War," in *The Oxford Handbook of Practical Ethics* (Oxford: Oxford University Press, 2003): 745-47; Robert L. Holmes, *On War and Morality* (Princeton, NJ: Princeton University Press, 1989): 194.

⁵ In anticipation of that discussion, consider the following question: if an act of war that harms people is morally justifiable as long as it is reasonable to expect that it will produce more good than bad, then why should it matter whether those harmed by the act are combatants or noncombatants?

warfare with the fact that modern war almost inevitably results in collateral damage. An essential element of a nonconsequentialist moral theory is the claim that in some cases it is not permissible to bring about the best consequences. People are entitled to be treated (or not treated) in certain ways, and no amount of good consequences, however understood, justifies the failure to treat them in the ways to which they are entitled. The right not to be unjustly killed or injured by others is among the most important and widely recognized of these entitlements, and the infliction of collateral damage in war appears to violate this right. The DDE, and in particular the alleged moral significance of the distinction between what a combatant intends and what he or she merely foresees, explains how combatants can engage in collateral damage-causing activities without violating others' rights. Though agents are never morally permitted intentionally to kill someone who has done nothing to forfeit his right not to be killed, morality does permit them to perform an act they merely foresee will result in the death of such a person, as long as it meets the proportionality condition.

The DDE purports to justify a collateral damage-causing act of war if and only if the harm inflicted on noncombatants is unintended and proportional to the good achieved by that act. But what reason do we have to think that collateral damage-causing acts of war are morally permissible if, but only if, they meet these conditions? To respond to this question, its defenders typically attempt to demonstrate that the DDE's prescriptions – that is, what it instructs moral agents to do – match most people's intuitive judgments regarding the rightness or wrongness of particular acts. Of special relevance here is the claim that the DDE accounts for the moral distinction many people intuitively draw between terror bombing and tactical bombing. Suppose that both bombers carry out attacks that have the same probability of causing the same number of noncombatant deaths. What distinguishes them, it is said, is that the terror bomber intentionally targets noncombatants in order to weaken her enemy's morale, while the tactical bomber merely foresees that his attack on a legitimate target of war will also cause collateral damage. Since the terror bomber intends the deaths of noncombatants, her act is morally impermissible. In contrast, because the tactical bomber merely foresees, but does not aim at, the deaths of noncombatants, his act is morally permissible (assuming that it meets the proportionality condition).

As Jonathan Bennett points out, however, the terror bomber need not intend the deaths of the noncombatants, but only the appearance of their deaths, since this will suffice as a means to her end of weakening

her enemy's morale.⁶ That these noncombatants appear dead is what she aims at; that they will in fact die as a result of her action is a foreseen, but unintended, consequence of making them appear dead. Thus neither the terror bomber nor the tactical bomber *intends to harm* the noncombatants her or his actions affect, though both foresee that their actions will result in such harm. It appears, therefore, that the DDE does not distinguish morally between terror and tactical bombings; insofar as it provides a justification for the latter, it also provides a justification for the former.

The reader might object that the terror bomber must intend to kill the noncombatants she does, because their deaths are a necessary part of her plan to weaken enemy morale. There is no way for her to make these noncombatants appear dead except by doing something to them that will in fact cause them to die. In contrast, it might be suggested, the noncombatant deaths caused by the tactical bomber are not a necessary part of his plan to destroy the legitimate target of war. He can still achieve his goal even if, miraculously, his act results in no collateral damage. Yet the same is true of the terror bomber; if by some miracle she achieves her goal without killing any noncombatants, then this is fine with her. It might be objected that no miracle will happen, that the terror bomber knows with near certainty that she will achieve her objective only if she kills noncombatants, and that therefore she must intend their deaths. But similarly, no miracle will happen in the tactical bomber's case. He, too, knows with near certainty that achieving his objective will result in noncombatant deaths. Therefore, insofar as we are willing to say that the tactical bomber need not intend the noncombatant deaths his act will cause, so too we ought to say that the terror bomber need not intend the noncombatant deaths her act will cause.

Insofar as many contributors to the just war tradition rely on the DDE to distinguish terrorism from morally permissible forms of warfare, the foregoing argument already provides a significant challenge for theorists of just war. But, in fact, Bennett's argument threatens to undermine the practical relevance of the DDE entirely, insofar as it seems possible to describe any act in such a way that the bad consequences it produces are merely foreseen, but not intended. In principle, the DDE would still distinguish between morally permissible and impermissible acts. In practice,

⁶Jonathan Bennett, "Morality and Consequences," in *The Tanner Lectures on Human Values II*, ed. Sterling M. McMurrin (Salt Lake City: University of Utah Press, 1981): 110–11. See also Judith Lichtenberg, "War, Innocence, and the Doctrine of Double Effect," *Philosophical Studies* 74 (1994): 347–68.

however, agents would merely need to make sure that they never intended the bad consequences of their acts, and as long as they did so, they would not run afoul of the DDE.

Recognition of this fact may well lead to a deeper concern with the DDE, namely, the implication that an agent's intention can determine the rightness or wrongness of her act. As Judith Jarvis Thomson observes, even if an agent's intention is relevant to the question of whether she ought to be praised, blamed, rewarded, or punished for her act, it seems odd to claim that an agent's intention can determine an act's permissibility or impermissibility.⁷ Imagine a case in which a bomber pilot can carry out an attack on a military target that will collaterally kill 10 noncombatants, but that will swiftly bring to an end a long and bloody war. Suppose further, however, that while the bomber pilot knows his attack will have this consequence, he does not aim at it. Rather, he has a long-standing childish feud with one of the noncombatants and so carries out the attack with the sole intention of killing that person. Though the bomber's poor character may repel us, surely we do not think it makes his act, one that ends a long and bloody war, impermissible. Yet the DDE appears to have precisely this implication.⁸

Thus far we have identified two challenges to the use of the DDE to justify certain collateral damage-causing acts of war. First, it is not clear that we can characterize the idea of what an agent intends and the idea of what an agent merely foresees so that the DDE justifies all and only those acts of war we intuitively judge to be permissible. Second, it seems odd to think that an act that would otherwise be wrong can be made right simply because of what an agent intends to achieve by it, and vice versa. The philosopher Warren Quinn offers a response to each of these challenges.

Quinn suggests that a person can be properly described as intending harm to others when the harm comes to the victims "at least in part from the agent's deliberately involving them in something in order to further his purpose precisely by way of their being so involved."⁹ In contrast, an

⁷ Judith Jarvis Thomson, "Self Defense," *Philosophy and Public Affairs* 20, no. 4 (1991): 283–310; Thomson, "Physician Assisted Suicide: Two Moral Arguments," *Ethics* 109 (1999): 497–518.

⁸ In addition to Thomson's discussion of this objection to the DDE, see also T. M. Scanlon, "Intention and Permissibility I," *Aristotelian Society Supplementary Volume* 74 (2000): 304–5; F. M. Kamm, "Failures of Just War Theory: Terror, Harm, and Justice," *Ethics* 114 (2004): 666–69.

⁹ Warren S. Quinn, "Actions, Intentions, and Consequences: The Doctrine of Double Effect," reprinted in *Ethics: Problems and Principles*, ed. John Martin Fischer and Mark Ravizza (Orlando, FL: Harcourt Brace Jovanovich, 1992): 184.

agent merely foresees that his act will result in harm to others if he does not involve them in something for this reason, or his involving them in something for this reason does not contribute to the harm they suffer. Using Quinn's characterization of intending harm, it is possible to distinguish terror bombing from tactical bombing. The terror bomber involves those noncombatants she kills in the bombing precisely because doing so will further her goal of lowering enemy morale. This is so whether she aims to kill them or aims only to make them appear dead. Thus she can be properly characterized as intending the deaths of the noncombatants she kills. On the other hand, the tactical bomber does not involve those noncombatants he kills because doing so will further his goal; since this is not his reason for involving them, he can be properly characterized as merely foreseeing their deaths. Assuming the proportionality condition is met, the tactical bomber acts justifiably according to the DDE, while the terror bomber does not.

Suppose, for the sake of argument, that Quinn provides a satisfactory account of the difference between intending harm to others and merely foreseeing that one's act will cause harm to others as a side effect. It remains necessary to explain why this distinction makes a difference to the moral permissibility of an agent's act. Holding all else equal, why does the fact that an agent involves others in something precisely in order to further his purpose by doing so render that act morally wrong? Why is it that were this not the reason why the agent involved those others, his act would be morally permissible? Quinn responds to these questions as follows. The terror bomber sees the noncombatants as "material to be strategically shaped or framed by his agency," an opportunity to be exploited in the pursuit of victory in the war.¹⁰ The tactical bomber, on the other hand, does not have this attitude toward the noncombatants he kills; he does not view them "as if they were then and there for his purposes."¹¹ Quinn claims that taking this attitude to noncombatants – seeing them (and their deaths) as merely then and there for his purposes – constitutes a wrong done to them distinct from any other harm they suffer.¹² He concludes, therefore, that there is a greater moral presumption against

¹⁰ *Ibid.*, 187.

¹¹ *Ibid.*

¹² Quinn writes, "This aspect of direct agency [people being involved in something at the cost of something protected by their independent moral rights (such as their life, their bodily integrity, or their freedom)] adds its own negative moral force – a force over and above that provided by the fact of harming or failing to prevent harm" (Quinn, "Actions," 187).

actions like that of the terror bomber than actions like that of the tactical bomber.

But why does adopting a certain attitude toward noncombatants count as a wrong done to them distinct from, and in addition to, any wrong they suffer in virtue of their treatment at the hands of the terror bomber?¹³ Unless some sense can be made of the claim that merely by thinking of the noncombatants as “then and there for his purposes,” the terror bomber wrongs them, Thomson’s point about the evaluative significance of an agent’s intention (or attitude) applies. Because the terror bomber views noncombatants as mere strategic opportunities to be exploited, we may judge him to be a worse person than the tactical bomber. Yet on the assumption that both bombers inflict the same harm, in the same way, on the same number of noncombatants, nothing appears to distinguish the actions themselves. In both cases, the noncombatants enjoy a right not to be killed unjustly. Unless they have done something to forfeit that right, or they have voluntarily waived it, their deaths at the hands of a combatant who can (or should) reasonably foresee that his action will have this consequence violates those noncombatants’ rights. Indeed, Quinn may recognize this, for he does not use the DDE to show that tactical bombing is permissible, while terror bombing is not, but rather to show that the latter is morally worse than the former. It appears, therefore, that even if we accept Quinn’s claim that in adopting the attitude he does, the terror bomber commits a distinct wrong to the noncombatants he involves in his action, we are still no closer to a justification for collateral damage-causing acts of war.

Quinn does characterize people’s rights as *prima facie*, meaning that in some cases they may be overridden or defeated by other (moral) considerations. The proportionality condition of the DDE might then be understood to state when this happens: that is, what sorts of moral reasons defeat the right in question. Perhaps, then, when Quinn states that the terror bombers’ attitude makes his action morally worse than the tactical bomber’s, he means to claim that the terror bomber must have a weightier or stronger reason to justify his action than is required of the tactical bomber. Such a view has much in common with one interpretation

¹³ It may be that the attitude of a person who causes harm to another can affect the amount of harm caused; for instance, the same physical harm done from hatred may inflict a greater psychological harm than if it were done recklessly. But Quinn does not appear to have this sort of thing in mind in his discussion of the moral relevance of an agent’s attitude toward the person he harms.

of Aquinas's understanding of the DDE.¹⁴ An agent's intention in carrying out a normally prohibited act does not figure in the justification of that act. Rather, an agent's intention serves as a condition on that act's permissibility. In other words, the agent's intention is not what makes the act right (permissible); the presence of some other factor, call it X, does so. The agent's intention can make the act wrong (impermissible), however, even if X is present. For example, though killing people is normally wrong, Aquinas believes it to be justifiable in self-defense. The justifiability of such a killing does not require that the agent merely foresee, but not intend, the death of her unjust assailant. It does require, however, that in killing her unjust assailant, the agent intend only to protect her life; if she acts with the intention of trying out her new gun, then her act is not permissible. For Aquinas, a bad intention absolutely prohibits certain otherwise justifiable acts, while on the preceding interpretation of Quinn's claim, it merely makes such acts harder (but perhaps not impossible) to justify. In both cases, though, the agent's intention does not justify the action, but instead serves as a condition on its permissibility.

The same consideration that makes many people doubt that an agent's intention can affect the justifiability of an act also serves to undermine the claim that an agent's intention provides a condition on an otherwise permissible act. If an agent kills an unjust assailant because she wants to try out her new gun, most will think her character suspect, but many will also think her act justifiable. (Of course, knowledge of her intention may lead us to examine more carefully her claim that she was under unjust assault.) Perhaps a virtue ethicist such as Aquinas would argue that having the right intention is an essential ingredient of doing the right action (as the notion of a sin seems to combine both acting wrongly and having a bad intention). But it is not clear that virtue ethicists must make such a claim: they might define a right action as one that a virtuous person would do, without requiring that a person have the mental state necessary to count as virtuous. In any case, given our task of examining the conditions under which collateral damage-causing acts of war are morally justifiable, whether an agent's intention serves as a condition on the permissibility of an act is a less pressing issue than determining the grounds of the justification itself. Thus far, however, we have yet to do so.¹⁵

¹⁴ See Alison McIntyre, "Doing Away with Double Effect," *Ethics* 111 (2001), 247–50.

¹⁵ I regret that space does not permit me to discuss F. M. Kamm's multiple objections to the use of the DDE to justify collateral damage, or the various rationales she offers to defend causing (intended or unintended) harm to noncombatants in certain sorts of cases. Those interested in exploring these issues in greater detail are strongly encouraged to

II. Social Contract Arguments and Collateral Damage

The arguments set out in the previous section suggest that the proportionality condition of the DDE does all of the justificatory work, for it is this condition that establishes (or, perhaps better, reflects) the extent to which people are morally required to limit their conduct so as to avoid causing harm to others.¹⁶ The crucial issue, then, does not concern the combatant's state of mind when he carries out a particular collateral damage-causing act, but rather whether in doing that act he exceeds the bounds of what he is morally at liberty to do (or, to use a more contentious phrase, whether he violates the rights of those he collaterally kills).

I suggested in the previous section that the proportionality condition is best formulated as requiring that a combatant have a sufficient reason to warrant doing an act that can be reasonably expected to cause harm to noncombatants. What sorts of considerations can provide such a reason? The usual formulation of the proportionality condition suggests a consequentialist response to this question: the fact that a given act of war inflicts harm on noncombatants proportional to the good achieved as a result of that same act provides a reason sufficient to justify it. Upon closer inspection, though, most of those who employ this formulation of the proportionality condition do not adhere very closely to consequentialism.¹⁷ For example, they tend to assume that the good achieved by an act of war must be *significantly* greater than the evil that same act causes in order for the act to be justifiable. Likewise, only certain sorts of goods or evils ought to figure in the calculation: the economic benefits of a particular act of war that harms noncombatants do not count toward that act's justifiability (except insofar as they contribute to a swifter victory in the war). A purely consequentialist approach would not accept these sorts of constraints on the justifiability of acts of war.¹⁸ The fact that many

read Kamm, "Failures of Just War Theory," as well as Kamm, "Justifications for Killing Noncombatants in War," *Midwest Studies in Philosophy* XXIV (2000): 219–28.

¹⁶ Because of the DDE's focus on the combatant's state of mind when he carries out an attack, its defenders often emphasize that the proportionality condition requires combatants to exercise reasonable or due care to avoid even unintentionally causing harm to noncombatants. But to exercise due care is simply to (make a good faith effort to) conform to certain standards setting out the extent to which people are morally required to limit their conduct so as to avoid causing harm to others.

¹⁷ Walzer, *Just and Unjust Wars*; A. J. Coates, *The Ethics of War* (Manchester, UK: University of Manchester Press, 1997) 245–46.

¹⁸ For those unclear as to why this is so, see the discussion of consequentialism in the following section.

discussants of proportionality in the context of the DDE do assume them provides one reason to think that the proportionality condition is not merely the ad hoc addition of a consequentialist moral principle to an essentially nonconsequentialist moral theory.

Suppose that these philosophers are right to forgo using consequentialist moral reasoning to determine what counts as a sufficient reason for causing collateral damage. What sort of nonconsequentialist argument might a theorist employ to illuminate the idea of a sufficient reason for causing harm to noncombatants? One possibility, recently discussed by David Rodin, involves an appeal to agents' exercise of autonomous choice.¹⁹ Rodin begins his discussion of collateral damage by first considering what generally justifies acts that impose a risk of harm on people other than the actor. He suggests that two conditions must be met to justify them: first, "the party assuming the risk [must also be] the beneficiary of the risk-producing activity," and second, the risk must be "autonomously assumed either individually or collectively by those who bear [it]."²⁰ Thus a doctor is morally justified in performing a risky operation on a patient if he gives his free and informed consent to it, but not otherwise. Likewise, rules permitting police cars to speed or ambulances to run red lights are morally justifiable when they are the result of collective decisions that produce benefits for the community as a whole, on the condition that the risk of harm is distributed fairly across all members of the community. Thus, in a community with rules regulating the driving of ambulances that meet these conditions, an innocent bystander killed by an ambulance running a red light will not necessarily be wronged.²¹ In sum, the fact that the relevant agents exposed to a certain risk of harm from others' activities also benefit from those activities, and the fact that they have autonomously assumed that risk, entails that these agents have no claim not to suffer the harm they do when the risk is realized. That they have no such claim entails that the person who does the risky activity is morally free to act as he does; for example, the ambulance driver enjoys a moral liberty to run

¹⁹ David Rodin, "Terrorism without Intention," *Ethics* 114 (2004): 752–71.

²⁰ *Ibid.*, 766–67.

²¹ I say not necessarily be wronged because there will likely be specific constraints on ambulances running a red light, and an ambulance driver who does not adhere to those constraints will wrong the person he kills. Note, too, that the community may make it a condition for ambulances running red lights that those harmed as a result be compensated by the ambulance company, the hospital, or the community as a whole. But when justified in this manner, such civil liability is not indicative of a moral wrong, and assuming that the ambulance driver obeyed the specific constraints on running a red light, he should not (and likely will not) be convicted of a crime.

red lights. It is this moral liberty, and the value of autonomous choice from which it is derived, that provides a sufficient reason for doing acts that, in some cases, cause harm to innocent parties (i.e., people who have done nothing that makes them liable to being harmed by this actor in this particular manner).

Rodin's general justification for risky activities suffers from a number of shortcomings.²² For example, it seems implausible to claim that authoritarian political communities such as China, North Korea, and Zimbabwe *collectively* decide that the benefits of allowing ambulances to run red lights warrant the risk of harm to each member created by such a practice. Yet it also seems implausible to claim that the absence of such a collective decision necessarily renders the risk created by ambulances running red lights in those states morally unjustified. This difficulty with Rodin's argument can be met by shifting from a focus on actual consent to, or assumption of, risk, to some sort of hypothetical consent to, or assumption of, risk. It is because suitably specified agents *would* agree to a rule permitting ambulances to run red lights (at least under certain conditions) that these practices are morally justifiable even in states like China or Zimbabwe, despite the fact that the actual rules governing the driving of ambulances in those states are not the product of a collective decision.

Our concern, however, is not with the risk of harm to innocent parties created by ambulances running red lights, but rather with the risk of harm to noncombatants caused by acts of war. Drawing on his general account of what justifies risky activities, Rodin concludes that with the possible exception of humanitarian intervention, collateral damage-causing acts of war are morally unjustifiable. In most military conflicts, Rodin asserts, "there is no sense in which the party who bears the risk of harm benefits from the risky activity. Neither have they autonomously chosen, either individually or collectively, to bear the risks of the bombardment."²³ The conclusion we ought to draw, then, is that collateral damage-causing acts of war are morally unjustifiable.²⁴ Noncombatants have a claim not to be exposed to the risk of harm that is a practically unavoidable concomitant of combat. It follows that combatants are not morally at liberty to impose the risk of harm on noncombatants that they do impose

²² I discuss these in greater detail in Lefkowitz, "Collateral Damage and Dirty Hands," unpublished, on file with author.

²³ Rodin, "Terrorism," 767.

²⁴ Strictly speaking, Rodin claims only that the standards of due care for waging war are much higher than what is required by existing international humanitarian law. However, I believe that his argument actually entails the stronger conclusion set out in the text.

when they wage war. The absence of such a liberty means that combatants do not have a sufficient reason to justify the harm they cause to noncombatants.

It is not clear whether the move to hypothetical consent sketched here enables us to avoid the conclusion Rodin draws with respect to the moral justifiability of collateral damage. Whether it does so depends on how we ought to conceive of the agents negotiating the hypothetical agreement that establishes what sorts of risky activities are justifiable (in what circumstances, with what conditions, etc.), and perhaps also the circumstances in which they negotiate. Though space does not permit me to pursue that investigation here, it is worth noting some of the ways in which the conception of the agents' negotiating this hypothetical agreement will significantly influence the case for or against the justifiability of collateral damage. For instance, the relative importance the hypothetical negotiators assign to (their own) life and liberty will affect their willingness to assume the risks involved in the conduct of war. If, properly conceived, these agents assign life a far greater value than liberty, then they will place very narrow constraints on, and perhaps even absolutely forbid, acts of war that impose a risk of harm to noncombatants when undertaken in order to attain or protect individual liberty or political sovereignty. Consider, too, the claim made by one prominent defender of the hypothetical consent approach to moral justification (broadly construed) that "the justifiability of a moral principle depends only on various *individuals'* reasons for objecting to that principle and alternatives to it."²⁵ That is, agents are to appeal only to the impact a particular principle and the alternatives to it will have on their own pursuit of a good life. This individualist restriction may well rule out the argument that often seems to be lurking in the background in many discussions of collateral damage, namely, that collaterally killing some noncombatants is permissible if it is necessary to prevent some greater number of noncombatants from being killed. If true, the individualist restriction entails that no individual member of the larger group can point to the fact that more noncombatants will die if the collateral damage-causing act is forgone, since each may only appeal to his or her own death as a reason to reject a principle that forbids collateral killing. It may be, then, that any hypothetical contract moral theorist committed to the individualist restriction will find it extremely difficult to justify collateral damage-causing acts of war.

²⁵ T. M. Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1998): 229.

At this point, I think it safe to draw the following conclusions. First, the DDE does not provide a compelling justification for collateral damage. Even apart from any difficulties there may be in specifying the concepts of intended harm and merely foreseen harm (or harm as a side effect), it remains unclear why we should view the agent's intention as relevant to the rightness or wrongness of his act. Moreover, we do not yet have a convincing account of the proportionality condition: that is, of what sorts of considerations provide a sufficient reason to justify acts of war that it is reasonable to expect will cause collateral damage. Contrary to what some of their remarks might suggest, most of those who discuss the proportionality condition do not appear to be employing consequentialist moral reasoning. Yet as we have just seen, one of the most common forms of nonconsequentialist reasoning, namely, appeal to actual or hypothetical agreement, may not yield a justification for collateral damage. Importantly, this is so regardless of whether the agent's intentions matter to the moral justifiability of his acts (i.e., whether the DDE is a true moral principle, or not). Barring further argument, therefore, it appears that nonconsequentialist moral theorists ought to conclude that collateral damage-causing acts of war are morally unjustifiable.

III. Consequentialism and Collateral Damage

On the one hand, it appears that consequentialist moral theories can easily justify collateral damage. Despite the fact that they inflict harm on noncombatants, a particular collateral damage-causing act of war is morally justifiable insofar as it produces a net increase in social utility or welfare, for instance, if that act prevents an even greater amount of harm to (an even greater number of) other noncombatants. On the other hand, given a consequentialist account of the just conduct of war, there is no reason to be concerned specifically with the justification of collateral damage (at least as defined at the outset of this chapter), for if we ought to be concerned only with the overall consequences of an act, and in particular with whether that act produces a net increase in total welfare, then it should make no difference whether those harmed by the act are legitimate or illegitimate targets of war, or whether the harm done to noncombatants is intended or merely a foreseen side-effect. Indeed, once we adopt a consequentialist approach, it seems that the very distinction between legitimate and illegitimate targets of war disappears. A consequentialist justification for acts of war appears to entail that no person or category of persons is necessarily such that targeting him (i.e., intending

to do him harm) is morally impermissible. While the consequentialist might still distinguish between the harm a combatant aims to cause and that which he merely foresees he will cause, this distinction will not be viewed as having any moral significance in itself.

While consequentialism clearly can provide a moral justification for collateral damage, some readers may find deeply unsettling the implication that, under the right conditions, combatants may intentionally harm noncombatants. That is, a strong conviction that combatants ought not to target noncombatants, even if doing so will produce better overall consequences, may lead some to reject the use of consequentialist moral reasoning to justify acts of war, including those that cause collateral damage. In response, a sophisticated consequentialist will likely adopt one of the following two strategies. Either she will argue that despite the appearances to the contrary, consequentialism does absolutely forbid targeting noncombatants. Or she will argue that consequentialism forbids targeting noncombatants in all those cases where, intuitively, most people believe it would be wrong to do so, but also argue that in a few cases most people will conclude that it is permissible to harm noncombatants intentionally, and that consequentialism justifies these beliefs. I briefly describe each of these strategies in turn.

The claim that consequentialism cannot justify an absolute prohibition on targeting noncombatants assumes that an act's consequences are what make a particular act right or wrong.²⁶ Specifically, act-consequentialism identifies an act as wrong if and only if it produces less good overall than would have been produced by some alternative act the agent could have done. However, some consequentialists reject this criterion for the rightness or wrongness of an act. Instead, they argue that while consequences alone provide the justification for moral rules or principles, what makes a particular act wrong is that it violates one or more of these moral rules or principles. This account of right action is called rule-consequentialism.²⁷ Suppose that, of all the possible rules for regulating acts of war that affect non combatants, the following rule produces the best consequences:

²⁶ Such a claim also assumes that it is not necessarily true that targeting noncombatants will always produce worse consequences than those that will result from only targeting combatants.

²⁷ A reader familiar with the details of consequentialism will recognize that the descriptions in the text of both act and rule consequentialism are very rough. For example, no effort is made to distinguish between actual and expected versions of either criterion for right action, or between full and partial compliance versions. I set aside these important details in the interest of providing greater accessibility to a wide audience.

combatants may never carry out acts of war that target noncombatants, but they may carry out acts of war that they foresee will result in harm to noncombatants as a side effect, as long as that harm is proportional to the good achieved by those acts of war. According to rule-C, only those acts that conform to this rule are morally permissible, and what makes them permissible is that they conform to this rule. What makes the rule one to which combatants ought to conform is that no other rule produces better consequences. Thus rule-C reconciles many people's conviction that noncombatants ought never to be a target of war with the consequentialist claim that the rightness or wrongness of an act is ultimately a matter of its consequences. Indeed, if rule-C does in fact justify the rule set out previously, then it provides a consequentialist justification for the DDE.²⁸

Whether rule-C provides a convincing justification for some collateral damage-causing acts of war depends ultimately on its plausibility as a general account of right and wrong actions.²⁹ But even if rule-C ultimately proves to be indefensible, a consequentialist may adopt the second strategy noted previously in order to defend the justifiability of killing in war, including in some cases intentionally or unintentionally killing noncombatants.

She will begin by noting that, in general, act-consequentialism does not justify intentionally causing harm to noncombatants. This is so for a number of reasons. First, at least in the near term, noncombatants typically pose much less threat of future harm than do combatants. Therefore, killing the typical noncombatant will do little to prevent future harm, though it will cause substantial harm in the present. Second, the belief that an opposing state's military is trying to harm their compatriot noncombatants appears to strengthen the commitment to continuing the war on the part of both combatant and noncombatant members of the victim state. During World War II, both the British and the German air forces carried out massive attacks against each other's urban noncombatant populations, allegedly from the belief that it would so demoralize the general population that they would press their governments to sue for peace. In fact, these bombing campaigns may well have had exactly

²⁸ Note that given a rule consequentialist justification for the DDE, whether an agent intends or merely foresees that he will harm noncombatants has no importance in itself. Rather, what justifies adherence to a rule that prohibits intending harm while allowing merely foreseen harm (that is proportional) is that it produces the best consequences.

²⁹ For one defense of a rule C approach to the just conduct of war, see R. B. Brandt, "Utilitarianism and the Rules of War," *Philosophy and Public Affairs* (1971/72): 145-65.

the opposite effect. Given the view that what justifies particular acts of war is that they produce less harm than would result from alternative acts open to the agent, and given that in most cases intentionally attacking noncombatants tends to prolong the war, and so increases the harm it produces, the act-C will conclude that deliberate attacks on noncombatants are rarely justifiable.³⁰ Finally, one party's decision to adopt a policy of intentionally targeting or recklessly endangering noncombatants may lead other parties involved in the war to adopt a similar policy. Such a chain of events will almost certainly result in worse consequences than if the parties to the conflict generally make their behavior conform to a rule like the DDE.

The reader will surely have noticed that all of the preceding claims contain qualifiers like "in general," "typically," and "usually." The act-C may endorse something like the DDE as a rule of thumb, a useful heuristic device for determining whether a particular act of war is morally permissible. But since what justifies a particular act are its consequences, and not its conformity to a rule such as the DDE, the act-consequentialist must acknowledge that circumstances may arise in which it is permissible, indeed even obligatory, to act contrary to the rule. Thus while the act-consequentialist's analysis of the DDE as a rule of thumb entails significant constraints on the just conduct of war, it will not satisfy those convinced that morality absolutely forbids intentionally killing noncombatants.

The act-consequentialist may challenge this conviction, however, using the following example. Suppose that a general must choose between strategies A and B for capturing a militarily crucial city. Both of these strategies have the same probability of success, but strategy A will involve the death of 10,000 combatants, but no noncombatants, while strategy B will involve the death of 10 noncombatants, and no combatants. Is it really the case that the general must choose strategy A, and so the death of 10,000 people, over strategy B, and the death of only 10 people? Reflection on this case, or something like it, may lead many people to the conclusion that in rare cases, morality permits or even requires intentional attacks against noncombatants. If so, then the conviction that must be accounted for is not "morality never permits intentionally killing

³⁰ This same reasoning may figure as well in a consequentialist account of why, in general, even merely foreseen harm to noncombatants is permissible only if the good achieved is significantly greater than the harm done. The perception that an opposing state's military forces care nothing for the harm they cause to noncombatants, though they do not intentionally target them, may also deepen the commitment of members of the victim state to prosecuting the war.

noncombatants” but rather “morality rarely permits intentionally killing noncombatants.” Act-consequentialism not only accommodates the latter intuition, it also provides a rationale for it.

Yet awareness of the fact that under certain conditions act-consequentialism permits the targeting of noncombatants may lead combatants to do so even when these conditions are not met. Indeed, given the uncertainties endemic to warfare, and the likely biases of those engaged in them, combatants will almost certainly err when making such judgments. It may be, then, that act-consequentialism will require combatants to adhere strictly to a rule like the DDE, since by doing so they are more likely to act as morality requires – understood here in terms of producing the best overall consequences – than if they try to determine in each particular case whether targeting noncombatants is morally permissible.³¹ Thus both act-consequentialism and rule-consequentialism may entail that when deliberating, combatants ought to abide by a rule like the DDE.³²

Though the preceding discussion suggests various ways in which a consequentialist might justify collateral damage-causing acts of war, several concerns with such an argumentative strategy remain. First, I have simply assumed that consequentialism will justify a rule like the DDE, or at least a rule that corresponds to most people’s intuitions regarding which acts of war are, or are not, morally justifiable. Yet this assumption may well be false; consequentialism may condone far more killing of noncombatants, intentionally or unintentionally, than I have suggested here. Second, though the act-consequentialist may concede that instrumental-epistemic considerations entail that combatants ought to adhere strictly to a rule like the DDE, she will regret this fact. That is, she will lament the fact that in some cases, though we know not which ones, combatants

³¹ Note that this argument justifies adherence to the DDE even in those cases where the combatant would have produced better consequences in that particular instance had he acted contrary to the rule.

³² Act consequentialists may not be the only ones who will defend adherence to the DDE on instrumental/epistemic grounds, even though they think that such a rule sometimes fails to reflect what morality truly requires. For example, a nonconsequentialist might argue that only those who bear (a certain degree of) moral responsibility for an unjust war may be targeted. This may well entail that, in many wars, it is not morally permissible to kill certain combatants, while it is permissible to kill certain noncombatants. However, this nonconsequentialist may also argue that in light of various facts about human nature and the circumstances of war, combatants will best approximate what morality truly requires if they adhere to the DDE, rather than seeking to determine in each case the legitimacy or illegitimacy of a potential target.

did not intentionally target noncombatants. Some of those convinced that targeting noncombatants is never morally permissible will find such an attitude troubling, and so find an act-consequentialist justification for the absolute prohibition on intending harm to noncombatants unsatisfactory. The act-consequentialist's regret points to a third concern with consequentialist accounts of just conduct in war, namely, that they do not take the separateness of persons seriously. Many philosophers argue that there are certain things you cannot do to a person, even if it will produce a substantial increase in overall welfare. Given its commitment to social or total welfare as the ultimate criterion for right action, consequentialism cannot provide a principled justification for this claim. Thus, even if consequentialism can provide a contingent justification for never targeting noncombatants, it cannot justify this absolute prohibition on the grounds that noncombatants have a fundamental claim not to be used for the benefit of others (at least without their consent).

IV. Pacifism in Practice?

More might be said in defense of each of the alleged moral justifications for collateral damage that I have discussed. Suppose, however, that even upon further consideration no defense proves to be satisfactory. If so, then it appears that in practice the moral person ought to become a pacifist, for it will be nearly impossible for him or her to wage war without acting immorally. Two responses to this conclusion are worth considering, though I cannot discuss them in detail here. First, one might claim that it is absurd to think that the use of armed force to resist genocide is morally justifiable only as long as it inflicts no collateral damage. We have more confidence in this judgment than in the theoretical argument against the permissibility of collateral damage-causing acts of war. Therefore, though at present we may lack a justification for collateral damage, we ought not to conclude that morality requires us to be pacifists. Second, even if all collateral damage-causing acts are wrong, might it still be a good thing (in some sense) that some of them are done? Making sense of this idea – namely, that collateral damage can be an instance of dirty hands – may prove impossible, but it seems worthy of further exploration.