PROPORTIONALITY, DOUBLE EFFECTS, AND THE INNOCENT BYSTANDER PROBLEM IN WAR

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This Article challenges the conventional moral justification for the international humanitarian law (IHL) principle of proportionality and the collateral damage that this principle permits in war. It argues that the Doctrine of Double Effect—the moral theory on which the principle of proportionality is based—cannot justify attacks that will cause foreseeable harm to "innocent" civilians. A person must do something morally relevant to forfeit his or her right to life. Accordingly, collateral damage to civilians can be morally justified only with respect to civilians who are "non-innocent." The IHL principle of proportionality is thus morally flawed because it permits, as a legal matter, foreseeable harm to innocent and non-innocent civilians alike in certain circumstances.

At the same time, the principle of proportionality should not be entirely discarded. Despite its ethical shortcomings, it serves a broader humanitarian objective by limiting the scope of warfare. In particular, the principle helps to safeguard the expansive but fragile definition of "civilian" under existing IHL, as well as the related principle of distinction, which prohibits attacks directed against civilians. While the principle of proportionality provides only an intermediate degree of protection for civilians in armed conflicts, this protection is still an improvement over the total war paradigm that existed throughout much of the twentieth century. Responsible states, however, should understand that attacks considered lawful under the IHL principle of proportionality are not necessarily morally permissible, and these states should thus take additional measures to avoid causing incidental harm to innocent civilians.

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I. INTRODUCTION

U.S. forces have engaged in combat operations in at least six countries over the past decade: Afghanistan, Iraq, Syria, Yemen, Somalia, and Libya. According to the Department of Defense, in 2019 U.S. forces incidentally killed at least 132 civilians in these countries and injured at least 91.[1] The actual numbers are likely higher according to most experts.[2] Despite these casualties, the United States is not at war with any of these countries. The United States was not attacked by any of these states, and the civilians killed in these operations were not "enemy" civilians.

The Department of Defense states that the military operations that caused these casualties were conducted in compliance with the laws of war—the framework commonly known as international humanitarian law (IHL). The Department emphasizes that U.S. forces "routinely conduct operations under policy standards that are more protective of civilians than is required by the law of war."[3] U.S. troops "protect civilians because it is the moral and ethical thing to do."[4] It appears morally uncontroversial to protect civilians, but what about the civilians killed in U.S. military

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[1] DEP'T OF DEF., ANNUAL REPORT ON CIVILIAN CASUALTIES IN CONNECTION WITH UNITED STATES MILITARY OPERATIONS IN 2019 (2020), at 6 [hereinafter DoD CivCas Report].

[2] Annie Shiel & Chris Woods, *A Legacy of Unrecognized Harm: DoD's 2020 Civilian Casualties Report*, JUST SEC. (June 7, 2021), https://perma.cc/4P9B-HA8M (stating that the Department of Defense's reporting of civilian casualties represents "a gross official undercount"); Azmat Khan, *Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes*, N.Y. TIMES (Dec. 18, 2021), https://perma.cc/H73C-2PGA (concluding after an extensive review of Department of Defense records that the real number of civilian casualties in the fight against ISIS "is far higher than the Pentagon has acknowledged").

[3] DoD CivCas Report, *supra* note 1, at 4.

[4] *Id.*

operations? Is causing incidental harm to civilians, particularly in neutral or friendly countries, morally justified?

These questions have particular import today as we reflect on two decades of inconclusive conflicts. The United States incurred enormous losses during these military interventions, in both casualties and financial expenses. The loss to local populations has been even higher, with tens of thousands of civilians dead or injured over the course of the wars against the Taliban, Al Qaeda, and the Islamic State. The Taliban takeover of Afghanistan, an ignominious end to America's longest war, and the ongoing instability in Iraq and Libya will certainly lead to further reevaluation of military intervention as an instrument of foreign policy. Our national shortcomings over the course of the war, including the torture at Abu Ghraib, the failure to close Guantanamo, the pardoning of war criminals, and tragic bombings of civilians, require further reflection on the ethics of how the United States and our allies wage war.[5] The atrocities committed by Russia in Ukraine make these questions of urgent international concern.

Lawyers and moral philosophers have long struggled with the ethics of killing in war. Significant debate remains regarding who may justifiably be killed during armed conflict. The predominant justifications for killing in war are grounded in theories of self-defense. This is consistent with modern understandings of the legitimate aim of war, now limited to national or collective self-defense. Under the United Nations Charter, self-defense against an armed attack is the only legal basis for the resort to force (*jus ad bellum*) against another state absent Security Council authorization. Once war has commenced, traditional notions of individual self-defense are widely viewed as providing the moral basis—or at least the perceived moral basis[6]—for individual combatants to kill or harm the enemy.

Self-defense provides a justification for the use of lethal force, but it is an exceptional one. A central premise of all theories of individual self-defense is that all humans have a right to life. This means they have a right not to be attacked by other humans unless they forfeit that right. To relinquish her right not to be killed, a person must do something morally relevant that causes or poses a grave and unjust threat to another. We call such persons "non-innocent."[7] By contrast, individuals who have not forfeited their right to life are morally innocent.

The right of soldiers to target enemy combatants seems like a straight-forward application of individual self-defense. Combatants may kill enemy combatants because they pose a serious threat as the agents of their sovereign in its use of military force. Certainly, not all combatants pose an *unjust* threat. For this reason, many moral philosophers argue that only soldiers from a victim state may permissibly act in self-defense. Combatants from the aggressor state do not have a moral right to kill soldiers from the victim state since only one state may legitimately act in self-defense.

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[5] *See, e.g.*, Luke Hartig, *Reexamining the Fundamentals of the Drone Program After the Kabul Strike*, JUST SEC. (Nov. 10, 2021), https://perma.cc/Y4VL-7SE8 (arguing for a "fundamental review of the operations and procedures that underpin the drone program" following the strike in August 2021 that resulted in ten civilian deaths); Dave Philipps, Eric Schmitt & Mark Mazetti, *Civilian Deaths Mounted as Secret Units Pounded ISIS*, N.Y. TIMES (Dec. 12, 2021), https://perma.cc/J7MJ-DR2M.

[6] While both sides of a conflict cannot legitimately act in self-defense, in practice both sides of a conflict will claim, and perhaps believe, that they are acting in self-defense.

[7] This Article uses the term "non-innocent" to refer to individuals who are not morally innocent. There is a spectrum of non-innocence, and I do not suggest that every "non-innocent" person necessarily forfeits her right to life.

Soldiers from the victim state do not forfeit their right to life because the threat they pose is not unjust. While this argument has significant theoretical merit, I mostly set it to one side in this Article. My primary concern is how a state fighting a just war may do so morally.

It is more difficult to reconcile the incidental killing of civilians with the principles of individual self-defense. Civilians who have not forfeited their right to life are akin to "innocent bystanders" in moral philosophy. Most moral philosophers agree that it is morally prohibited to kill an innocent bystander, even where necessary to save one's own life.[8] Yet, the IHL principle of proportionality (PP), codified in the 1977 Additional Protocol to the Geneva Conventions, permits the incidental killing of civilians provided that the expected loss of civilian life is not excessive in relation to the military advantage anticipated. Under IHL, civilians cannot be directly targeted, but they may be lawfully killed as collateral damage. This Article attempts to reconcile this principle of IHL with the moral prohibition on killing innocent bystanders.

The PP is commonly understood to be based on a theory of moral philosophy called the Doctrine of Double Effect (DDE).[9] Put simply, the DDE permits acts that have unintended consequences provided that the good intended by the act outweighs the unintended harm. The validity of the DDE, however, has come under serious attack in recent years in the philosophical literature. Many moral philosophers argue that it needs to be substantially revised or discarded.[10] Surprisingly, these philosophical critiques and their implications have not been seriously considered in the legal literature on the laws of war. The DDE generally remains the predominant moral justification for the PP and the collateral damage it permits.

This Article, drawing from the literature on moral philosophy, argues that we should be deeply skeptical of the DDE as a moral rationale for the PP and the civilian harm it implicitly authorizes. Contrary to the DDE, the moral permissibility of an act should not depend on the subjective intentions of the attacker. The DDE's focus on the intentions of the attacker fails to account for the rights of the potential victims and can create inconsistent moral judgments for similar conduct. The DDE also presumes that intentions can be neatly compartmentalized and creates a false moral distinction between knowledge and intent. This Article argues that the objective facts of the situation, not the intentions on which one acts, justify an individual's actions. The permissibility of killing depends on the conduct of the enemy rather than the intentions of the attacker.

In rejecting the DDE as the moral justification for the PP, I do not argue that all civilian casualties in war are morally prohibited. Civilians, like combatants, can be non-innocent by virtue of their responsibility for an unjust threat or contributions to the war-fighting effort. Morally, non-innocent civilians should not be entitled to greater protection than non-innocent combatants, other circumstances being equal.

It is nevertheless important to distinguish between civilians and combatants, as the IHL principle of distinction does by prohibiting direct attacks against civilians and civilian objects. Whereas the threat (or non-innocence) of combatants is readily identifiable, distinguishing innocent civilians from the non-innocent, as well as

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[8] *See* discussion *infra* Part II.D.

[9] *See* discussion *infra* Part IV.A.

[10] *See infra* notes 118–21.

distinguishing varying degrees of non-innocence, is especially difficult in the fog of war. Basing civilian immunity on innocence would be unworkable on any large scale and thus subject to abuse, likely resulting in harm to civilians that would be entirely unjustified or disproportionate to their degree of non-innocence. The inability of states to assess individual innocence could lead to the unrestrained warfare witnessed throughout much of the twentieth century, in which states justified indiscriminate attacks and devastating economic blockades on the perceived culpability for or contribution to the war by the civilian population as a whole. IHL thus protects all civilians from direct attack, regardless of the degree of non-innocence of individual civilians.

This Article seeks to present a different, and perhaps unorthodox, moral narrative of the PP in traditional armed conflicts.[11] I argue that the PP itself is not a moral rule that will necessarily yield morally permissible outcomes. Attacks undertaken with the knowledge that innocent civilians will be killed cannot be morally justified, even if they may be lawful under the PP. Only principles of individual self-defense, rather than the DDE, can morally justify harm to civilians in war. Accordingly, any harm inflicted on civilians must be proportionate to their degree of responsibility or threat in war (i.e., their degree of non-innocence). The extent to which the PP can be morally justified depends on its success in confining harm to the most culpable civilians and preventing harm to innocent civilians.

The PP undoubtedly has a mixed record in this regard since its codification in 1977. Innocent civilians are regularly the victims of war. One might thus be tempted to dismiss outright the PP. We should be cautious, however. While the PP may sanction morally impermissible killings, its rejection could potentially result in even greater harm to innocent civilians. Significantly, the PP can limit the scope of war by helping to safeguard the brittle concept of civilian immunity and the IHL principle of distinction, which prohibits direct attacks against civilians. The incidental harm to civilians permitted in certain circumstances by the PP reduces pressure on the civilian/combatant distinction, which is susceptible to erosion as seen in the great conflicts of the twentieth century. Prohibiting attacks that may incidentally harm civilians would incentivize states to once again expand the class of persons who may be directly targeted. The PP helps to prevent this backsliding to total war.

This Article proceeds as follows. Part II provides an overview of three predominant theories of individual self-defense, focusing on the criteria for loss of immunity. It then discusses the moral prohibition on killing innocent bystanders in self-defense. Part III describes the two cardinal principles of IHL—distinction and proportionality—and their relationship to individual self-defense. Part IV critically examines the DDE and argues that it cannot morally justify the civilian harm that proportionality permits. Part V argues that concepts of innocence and non-innocence in individual self-defense remain relevant for assessing the permissibility of civilian harm in armed conflict, although there are significant practical challenges to such an

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[11] This Article is focused on the principle of proportionality as applied in international armed conflicts (IACs), which are conflicts between two or more states. As a matter of treaty law, the principle of proportionality is codified in several provisions of Additional Protocol I to the Geneva Conventions, which applies primarily to IACs. The principle has also been interpreted to apply to non-international armed conflicts, although its application in such conflicts presents different ethical and legal concerns that are beyond the scope of this Article.

approach. Part VI explains that while the PP often fails in confining harm to non-innocent civilians, it nevertheless plays an important role in limiting the scope of war.

II. MORAL THEORIES OF INDIVIDUAL SELF-DEFENSE

A moral or legal theory of killing in war must begin with the right to life.[12] The International Covenant on Civil and Political Rights declares, "Every human being has the inherent right to life."[13] This right "is the supreme right from which no derogation is permitted, even in situations of armed conflict and other public emergencies that threaten the life of the nation."[14] The Human Rights Committee adds that this right "concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death."[15] The right to life imposes a corresponding duty on others not to act in violation of this right. Your right to life implies my obligation not to kill you.

The right to life is not in general relinquished in war, unless we were to concede a moral nihilism in times of armed conflict. On the contrary, philosophers and lawyers have for centuries attempted to reconcile war and morality, including efforts to determine the legitimate objectives and means of war. States have historically argued the righteousness of their military campaigns, and militaries seek to instill a chivalric "warrior code of honor" among their soldiers.[16] Honor and humanity constitute foundational principles in the laws of war that regulate combatants' conduct.[17] States do not forsake morality in war. They crave it.

The international desire to place war on a moral footing, starting with the Just War tradition,[18] led to the conclusion that war could not be the policy prerogative of a sovereign. States, like individuals, have a right not to be attacked unless they forfeit that right. The prohibition on state aggression is now enshrined in international law, similar to the prohibitions in domestic laws on attacking other individuals.[19]

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[12] This right is reflected in various international instruments and treaties. *See* G.A. RES. 217 (III) A, Universal Declaration of Human Rights, art. 3 (Dec. 10, 1948); G.A. RES. 2200A (XXI), International Covenant on Civil and Political Rights, art. 6 (Dec. 16, 1966) [hereinafter ICCPR]; G.A. RES 45/158, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 9 (Dec. 18, 1990).

[13] ICCPR, *supra* note 12, art. 6.

[14] U.N. Hum. Rts. Comm., Gen. Comment No. 36, CCPR/C/GC/36, para. 2 (Sept. 3, 2019).

[15] *Id.* para. 3.

[16] Nicholas W. Mull, *The Honor of War: Core Value of the Warrior Ethos and Principle of the Law of War*, 18 CHI.-KENT J. INT'L & COMP. L. 1, 31 (2018).

[17] *See* GEN. COUNS., DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 2.6.1 (rev. ed. Dec. 2016) [hereinafter DOD LAW OF WAR MANUAL] ("*Honor* has been vital to the development of the law of war, which was preceded by warriors' codes of ethical behavior."). In 1863, the U.S. Supreme Court, quoting Emer de Vattel, stated, "[I]t is very evident that the common laws of war—those maxims of humanity, moderation, and honor—ought to be observed by both parties in every civil war." The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 667 (1863) (citing EMER DE VATTEL, THE LAW OF NATIONS, bk. III, ch. 4, § 294 (1758)).

[18] The Just War tradition, which dates back to the Middle Ages, was initially an effort by theologians and philosophers to determine when and how war could be waged consistent with moral and religious principles. This tradition has greatly influenced the current international legal framework, particularly the rules of *jus ad bellum*. *See generally* John F. Coverdale, *An Introduction to the Just War Tradition*, 16 PACE INT'L L. REV. 221 (2004).

[19] Article 2(4) of the U.N. Charter states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in

Article 51 of the U.N. Charter, however, preserves the right for states to exercise "the inherent right of individual or collective self-defense if an armed attack occurs."[20] The international law framework governing the use of force among states mirrors domestic frameworks for personal self-defense, including the requirements of necessity and proportionality.[21] Today, self-defense provides the only legal and moral basis for states to resort to war, absent Security Council authorization.[22]

Soldiers also need a moral justification to kill in war.[23] The authority granted to combatants by the sovereign to wage war on its behalf affords them the legal privilege to kill but not the moral justification. A situation of armed conflict (a legal state of affairs between states) is not sufficient to overcome individuals' general immunity from attack. "If combatants in wartime are to kill without injustice . . . [w]e need an account of how the people they kill are liable to that fate."[24] Again, we turn to self-defense for this account. As Seth Lazar notes, principles of self-defense "are the only principles in ordinary morality . . . which seem capable of eliminating the whole wrong in killing a person."[25] The elements of individual self-defense require some analogizing for combatants in war. For example, the principles of necessity and proportionality in self-defense must be understood more flexibly in circumstances of prolonged, collective violence. Nevertheless, "[I]t must be acknowledged that the norms of international law rest on the premise that, to a considerable degree and with certain modifications, an analogy can be drawn between the norms of individual self-defense and the norms of armed conflict."[26] This is logical; the only legitimate aims of war itself are national or collective self-defense, and soldiers fight in defense of their nation, their fellow troops, and themselves. Thus, to understand the moral basis for killing in war, we must first examine the moral theories of individual self-defense.

All humans have a baseline immunity from attack. Consequently, every theory of self-defense must identify a "criterion of liability" to trigger the loss of this immunity.[27] Individuals who have not forfeited their right to life are generally referred to as morally "innocent" and thus cannot be attacked, even for the purpose of saving one's life.[28] There is no universally accepted criterion of liability, although we can identify three general theories in the philosophical literature.

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any other manner inconsistent with the Purposes of the United Nations." U.N. Charter art. 2(4). *See generally* OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS, at xv–xix (2017) (describing the shift from the Old World Order, in which war was a legitimate means of vindicating states' rights, to the New World Order, which prohibits aggressive wars).

20 U.N. Charter art. 51.

21 *See* Case Concerning Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J 4, para. 43 (Nov. 6) ("[T]he criteria of necessity and proportionality must be observed if a measure is to be qualified as self-defence . . . .").

22 Thomas Hurka, *Proportionality in the Morality of War*, 33 PHIL. & PUB. AFFS. 34, 38 (2005) ("As many writers have noted, the structure of just war theory closely parallels that of the morality of self-defense.").

23 Coverdale, *supra* note 18, at 224.

24 Seth Lazar, *Responsibility, Risk, and Killing in Self-Defense*, 119 ETHICS 699, 700 (2009).

25 *Id.*

26 Iddo Porat & Ziv Bohrer, *Preferring One's Own Civilians: May Soldiers Endanger Enemy Civilians More Than They Would Endanger Their State's Civilians*, 47 GEO. WASH. INT'L L. REV. 99, 104–05 (2015).

27 Lazar, *supra* note 24, at 703.

28 *See, e.g.*, Michael Otsuka, *Killing the Innocent in Self-Defense*, 23 PHIL. & PUB. AFFS. 74, 75 (1994) ("[I]t is wrong to kill an Innocent Bystander in self-defense . . . .").

A. Moral Culpability for Unjust Threat

Moral culpability theorists argue that an individual forfeits her right to life only if she poses a serious and unjustified threat to another person and is morally culpable in bringing about that threat.[29] Both conditions must be satisfied before it would be morally permissible to kill in self-defense. This theory places a high bar on the loss of immunity from attack. It recognizes that one may through happenstance pose an involuntary and unjust threat to another individual. Diminishment of the paramount right to life, however, must be based on "something distinctive about us as a moral subject—something beyond mere bad luck."[30] For an act to be morally relevant, it must be voluntary and "the result of the exercise of one's morally responsible agency . . . ."[31]

Consider the classic hypothetical of a large man who is shoved off a tall building. You are sitting on the ground floor patio, directly in the path of the falling man. Suppose the only way to save yourself is to vaporize the falling man with a laser gun. Michael Otsuka argues that the threat posed by the falling man is not sufficient for you to kill him. Although the falling man poses an unjust threat to you as you did nothing to cause his fall, he similarly did not take any action to precipitate this threat. Otsuka notes of the falling man, "[T]hat which endangers another's life is neither an action of [his] nor the consequence of any action of [his]."[32] The falling man does not forfeit his right to life because he is not morally responsible for the threat he poses. He was pushed off the building through no fault of his own and is not morally culpable for a threat that he did not intend, foresee, or cause.

The falling man is often referred to as an "innocent threat" because he is, many argue, morally equivalent to an innocent bystander.[33] It is not the man himself that poses the threat, but rather the physical mass of his body. The threat posed is the same as an inanimate object, like a meteor, and the falling man cannot be said to wrong you any more than the meteor can. Under this theory, you have no justification for shooting the falling man with your laser gun. The situation would be different if the man jumped or was engaging in reckless behavior when he fell, but in this case, the threat posed is not the result of any act he took as a moral agent.[34]

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[29] *See, e.g.*, Lazar, *supra* note 24, at 701 (describing the view "that the only plausible basis for liability to lethal defensive harm is blameworthy moral responsibility . . . for an unjustified threat").

[30] *Id.* at 701.

[31] Otsuka, *supra* note 28, at 84.

[32] *Id.* at 85.

[33] *Id.* at 84.

[34] Some ethicists argue that this theory of moral culpability is also applicable in war. Under this view, "[L]egitimate targets are available only for combatants on the side of a just war." Lionel K. McPherson, *Innocence and Responsibility for War*, 34 CAN. J. PHIL. 485, 486 (2004). Unjust combatants forfeit their right to life because they pose a serious and unjust threat. Just combatants pose a corresponding threat to the other side, but they are morally innocent because they do not contribute to an *unjust* threat. Combatants are thus asymmetrically situated. From a moral standpoint, only just combatants can attack unjust combatants. Unjust combatants can neither attack nor act in self-defense against just combatants. Similar to a thief who attempts to mug an innocent person, "[u]njust combatants have no right to self-defense . . . since they have no moral right to use violence against combatants fighting against unjust aggression using just means." *Id.* at 499.

B. Moral "Responsibility" for Unjust Threat

Jeff McMahan, a leading commentator on the ethics of war, shares the view that posing an unjust threat is not *sufficient* to make one liable to attack. He further argues, however, that posing an unjust threat is not *necessary*.[35] He writes, "It is possible to pose an unjust threat without being liable to attack and possible to be liable to attack without posing an unjust threat and, indeed, without posing a threat at all."[36] In McMahan's view, the criterion of liability is "moral responsibility for initiating or sustaining the [unjust] threat . . . ."[37]

McMahan illustrates his thesis with a hypothetical scenario he calls the "implacable pursuer." A villain kidnaps a woman, implants a device in her head, and programs her to pursue and kill you. The woman loses control over her body and sets out to attack you against her will.[38] McMahan argues that it would not be permissible to kill the implacable pursuer because she is not responsible for the threat posed. She took no voluntary action to initiate or perpetuate the threat and thus "has done nothing to lose any rights or to make herself morally liable to attack."[39] The fact that she is "causally implicated in the threat to you . . . is a wholly external fact about her position in the local causal architecture."[40] In this sense, the woman is an "innocent aggressor" and morally equivalent to both the innocent threat (falling man) and the innocent bystander.[41]

You would be permitted, on the other hand, to kill the villain (the "Initiator") who implanted the device, provided that such killing was necessary to save your own life.[42] While the villain does not pose an immediate threat, he is morally responsible for the unjust threat against you. "Because the Initiator is the one who is morally responsible for the fact that someone must die, he should, as a matter of justice, bear the costs of his own voluntary and culpable action."[43]

This theory of moral responsibility is broader than the moral culpability theory described in Subpart A. McMahan explains that "responsibility" does not necessarily entail moral "culpability" or "fault."[44] It is the "capacity for autonomous deliberation" that gives rise to moral responsibility. "If, for example, a person voluntarily engages in a permissible but foreseeably risk-imposing activity, such as driving a car, that person will be responsible, if contrary to reasonable expectation and through no fault on the part of the agent, that activity creates a threat or causes harm to which the victim is in no way liable."[45] Accordingly, X can be morally responsible for an

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35 Jeff McMahan, *The Ethics of Killing in War*, 114 ETHICS 693, 719 (2004) ("[P]osing an unjust threat is neither necessary nor sufficient for liability.").

36 *Id.* at 719.

37 *Id.* at 721.

38 *Id.* at 719–20.

39 *Id.* at 720.

40 *Id.*

41 *Id.* ("If you would not be permitted to kill the innocent bystander as a means of self-preservation, you are also not permitted to kill the Nonresponsible Threat in self-defense.").

42 Coming up with situations in which killing the "Initiator" is necessary to save your life requires some degree of imagination.

43 McMahan, *supra* note 35, at 721.

44 *Id.* at 723.

45 *Id.*

unjust threat to Y by voluntarily taking some permissible action that gives rise to the threat, even if X did not intend to impose such a threat.[46]

C. *Unjust Threat*

Judith Thomson, a pioneer in the ethics of self-defense, presents a more expansive framework of self-defense. She dismisses arguments that one may only act in self-defense against a person who is morally culpable, responsible, or otherwise at fault for the threat posed. Thomson starts with the premise that "[o]ther things being equal, every person Y has a right against X that X not kill Y."[47] This premise focuses on the right of the potential victim rather than the fault of the putative aggressor. Thomson writes, "[W]e should not take fault to be required for a violation of a right."[48] The falling man may not be at fault for posing a lethal threat to you because he was pushed, but he does not have a privilege or a right to kill you. Thus, he will violate your right not to be killed unless you act in self-defense.

Thomson argues that one may act in self-defense against both the innocent threat (falling man) and the innocent aggressor (implacable pursuer), even though neither is morally at fault for the unjust threat posed. "[W]hat makes it permissible for you to kill [these persons] is the fact that they will otherwise violate your rights that they not kill you, and therefore lack rights that you not kill them."[49] Accordingly, for Thomson, the liability criterion is the potential violation of another person's right not to be killed. If X has done nothing to forfeit his right to life, and Y poses a threat to X's life, then X may kill Y in self-defense, regardless of Y's responsibility for that potential violation.

This does not mean that X may act in self-defense solely because Y will otherwise kill her. If X first did something to forfeit her right not to be killed by Y, then X cannot justifiably kill Y even if Y would otherwise kill X. For example, if X attempts to rob Y at knifepoint, and Y pulls out a gun, X cannot proceed to stab Y in self-defense because X no longer has a right not to be killed by Y. Similarly, Y cannot kill bystander Z to protect her right not to be killed by X. If Z is not "causally involved" in the threat posed to Y, then Z has not forfeited her right to life and Y would thus be unjustified in harming Z to save her own life.[50]

The argument that it may be permissible to kill an innocent threat or innocent aggressor is also supported by the related, and morally intuitive, theory of "agent-relative permission." Under this theory, an individual has permission (but not the

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[46] McMahan's theory of moral responsibility appears driven, in part, by his view that many unjust combatants (i.e., those from the aggressor state) may not be morally "culpable" for their participation in an unjust war. McMahan acknowledges that unjust combatants often fight for various reasons—such as conscription, indoctrination, or a reasonable but mistaken belief in the justness of their cause—that may preclude moral *culpability*. He argues that these reasons are excuses rather than justifications for fighting for an unjust cause. Combatants remain *responsible* for the unjust threat they pose by virtue of taking up arms with free will. "Only the absence of a capacity for moral agency could absolve [an unjust combatant] of all responsibility for his action and thus make him innocent . . . ." *Id.* at 724. McMahan's theory of moral responsibility would permit just combatants to attack unjust combatants, although unjust combatants could not morally attack just combatants.

[47] Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFFS. 283, 299 (1991).

[48] *Id.* at 300.

[49] *Id.* at 302.

[50] *Id.* at 298.

right[51]) to prefer her own life over that of a similarly situated innocent person. In other words, if a situation arises in which either I or an innocent threat or aggressor will be killed, I may act in self-defense to save my life, provided that I have not forfeited my right to life.[52] The innocent aggressor/threat is similarly permitted to act in self-defense since she also has not forfeited her right to life and is morally permitted to prefer her life over mine.[53] Both individuals have the same moral status and thus the same moral permission to defend themselves.

D. Innocent Bystanders

While the above accounts may yield different outcomes on who may be deemed to forfeit their right to life, the prohibition against killing an "innocent bystander" is "widely accepted," even when necessary to save one's own life.[54] A person is an "innocent bystander" if she is not causally involved in or responsible for the threat posed to another person.[55] This moral prohibition is also reflected in domestic laws. As one commentator notes, "There is a general consensus that the killing of innocent bystanders is not permitted by the right to self-defense. In many jurisdictions the killing of innocent bystanders is totally prohibited."[56]

Consider a classic example by Thomson.[57] You find yourself in the path of a runaway trolley, a frequent peril in philosophical literature. The only way to save your life is to deflect the trolley onto another track. Unfortunately, diverting the trolley onto that track will kill an innocent bystander whose foot is caught in the rails. Thomson, as well as most philosophers, concludes that deflecting the trolley and killing the bystander would be unjustified, since it would make the innocent bystander a "substitute victim."[58] The same is true of any act that "use[s] a bystander as a piece of equipment" to save your life, such as shooting a bystander on an overhead walkway so that she falls in the path of the trolley and slows it down, as well as acts that "run rough-shod" over innocent bystanders.[59] Innocent bystanders have done nothing to forfeit their right to life, and they do not infringe on the rights of others. Thomson

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[51] This is due to the fact that, under this theory, the innocent threat or aggressor did not forfeit his right to life. I cannot thus have a right to kill another person if that person has a right not to be attacked.

[52] Laurence Alexander, *Justification and Innocent Aggressors*, 33 WAYNE L. REV. 1177, 1177 (1987).

[53] Jonathan Quong, *Killing in Self-Defense*, 119 ETHICS 507, 519 (2009).

[54] *See, e.g.*, *id.* at 508; Otsuka, *supra* note 28, at 78 ("[T]he intentional or foreseen killing of an innocent in self-defense is unjustifiable when the innocent is a Bystander . . . ."); Reid Fontaine, *An Attack on Self-Defense*, 47 AM. CRIM. L. REV. 57, 76 (2010) ("[O]ne is not entitled or justified to kill an innocent bystander in order to defend (or, more accurately, preserve) his own life."); Adil Ahmad Haque, *Killing in the Fog of War*, 86 S. CAL. L. REV. 63, 85 (2012) ("[I]t is not morally permissible to kill one innocent person either as a means or as a side effect of preventing another innocent person from being killed."); Coverdale, *supra* note 18, at 224 ("Virtually every ethical system reflects the basic principle that deliberately taking the life of an innocent human being is wrong.").

[55] *See, e.g.*, Otsuka, *supra* note 28, at 75. An innocent bystander is distinct from an "innocent threat" (like the falling man) in that the bystander does not pose an involuntary threat.

[56] Shlomit Wallerstein, *Justifying the Right to Self-Defense: A Theory of Forced Consequences*, 91 VA. L. REV. 999, 1002 (2005).

[57] Thomson, *supra* note 47, at 289–90.

[58] *Id.* at 290.

[59] *Id.*

explains, "[T]he fact that you can save your life only by killing [innocent bystanders] . . . does not make them lack rights against you that you not kill them."[60]

Other ethicists argue that it is equally impermissible to "initiate a sequence of events that you know will kill" the innocent bystander to save your own life. For example, Otsuka argues it would be prohibited to hurl a bomb at an incoming projectile if you know the bomb will kill an innocent bystander. Killing a bystander similarly cannot be justified by the number of lives potentially saved due to the moral asymmetry between killing and letting die.[61] Killing someone is worse than letting one die.[62] It would, for example, be morally prohibited to drive over a bystander with your car to rescue a family trapped in a burning vehicle. And in reverse, it is permissible to let two people die if rescuing them would require causing grave harm to an innocent bystander.

This Article does not seek to determine which theory of self-defense is the most persuasive. It is enough to note their areas of convergence.[63] Common sense morality tells us that it is prohibited to use force against another person unless they pose an unjust threat.[64] Few would think that a violent criminal has a moral right to attack a police officer engaged in a lawful arrest. While many people likely share Thomson's intuition that we may defend ourselves against an innocent threat, like the falling man, such cases are largely confined to the realm of the hypothetical. In general, we believe that responsibility (however defined) for an unjust threat is relevant to our understanding of moral innocence. The notions that an individual must do something morally relevant to lose his or her right to life and that killing an innocent bystander is morally prohibited are likely shared by most people.

III. THE LAWS OF WAR

The laws of war, or IHL, are grounded in ethical theories of individual self-defense but they do not overlap entirely. This Part describes two cardinal principles of IHL, distinction and proportionality.[65] The principle of distinction requires combatants to direct their attacks only against combatants and other military objectives. The principle of proportionality prohibits attacks against military objectives expected to cause incidental harm to civilians or civilian objects that would be excessive to the military advantage anticipated from the attack. By implication, the PP permits, and

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[60] *Id.* at 299.

[61] *See* Haque, *supra* note 54, at 84–88; *see also* Edward C. Lyons, *Slaughter of the Innocents: Justification, Excuse and the Principle of Double Effect*, 18 BERKELEY INT'L L.J. 231, 287 (2013) (noting a provision in the Model Penal Code that provided a necessity and duress defense to intentional homicide has been universally rejected and never adopted).

[62] *See, e.g.*, Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing*, 98 PHIL. REV. 287, 287–312 (1989).

[63] For the purposes of this Article, it is not necessary to determine which of these theories is the most persuasive.

[64] Joshua Greene, an evolutionary psychologist, notes that a crucial feature of our moral brain is aversion to violence against innocent people. JOSHUA GREENE, MORAL TRIBES 37 (2013).

[65] The principles of distinction and proportionality, along with the principle of military necessity, constitute the "'holy triad' of cardinal principles of the *jus in bello* . . . ." Robert D. Sloane, *Puzzles of Proportion and the "Reasonable Military Commander": Reflections on the Law, Ethics, and Geopolitics of Proportionality*, 6 HARV. NAT'L SEC. J. 299, 310 (2015).

renders lawful under IHL, incidental harm to civilians and civilian objects under certain circumstances.

This Part explains how these principles are animated by moral theories of individual self-defense, including notions of responsibility and innocence. It also explains how these two principles differ from such moral theories and the trade-offs that influence those divergences. Subpart A argues that the principle of distinction incorporates a threat-based criterion of liability, although one based on class characteristics. Subpart B turns to the PP and seeks to determine how it can be reconciled with the moral prohibition on harming innocent bystanders. This question will be examined more closely in Parts IV–VI.

A. The Principle of Distinction

The principle of distinction, a customary rule of IHL codified in several articles of Additional Protocol I (1977) to the Geneva Conventions, establishes a bright-line rule regarding who may be targeted in war.[66] The principle divides all persons into two categories: "combatants" and "civilians." Combatants include all members of the armed forces, except medical and religious personnel.[67] Civilians, by contrast, include all those that are not members of the armed forces.[68] Only combatants are liable to direct attack. Article 48 of Additional Protocol I provides: "[T]he Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[69] Civilians are immune from attack. Article 51(2) states: "The civilian population as such, as well as individual civilians, shall not be the object of attack."[70]

There are only two exceptions to this bright-line rule. A civilian can forfeit his immunity under IHL if he "directly participates in hostilities," but immunity is restored once he ceases hostile acts against the enemy.[71] Similarly, soldiers who are *hors de combat* due to injury or captivity regain their immunity from attack.[72] These two exceptions recognize that threat is not static and that legal protections should be commensurate with the general threat posed. Civilians generally do not pose a direct threat and are thus immune from direct attack, but they can lose that immunity by taking up arms. Combatants are *prima facie* threats and therefore not immune, but

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[66] *See* Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I), June 8, 1977, arts. 48–51 [hereinafter AP 1].

[67] *Id.* art. 43(2) ("Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants . . . ."); Jean-Marie Henckaerts et al., *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED CROSS 175, 198 (2005). Medical and religious personnel are often called "non-combatants" and are protected from direct attack. They lose immunity, however, if they engage in hostilities.

[68] *See* AP 1, *supra* note 66, art. 50.

[69] *Id.* art. 48. The United States is not a party to AP 1 but recognizes the principle of distinction codified in this Article as a rule of customary IHL.

[70] *Id.* art. 51(2).

[71] *Id.* art. 51(3).

[72] *Id.* art. 41(1) ("A person who is recognized or who, in the circumstances, should be recognized to be hors de combat shall not be made the object of attack.").

they can regain immunity if the circumstances make clear that they no longer pose a threat.

There are clear overlaps between the principle of distinction and theories of individual self-defense. First, the principle of distinction is premised on the notion that all individuals have the right not to be attacked unless one does something to forfeit that right.[73] Civilian immunity is not a special privilege granted in war, but rather it reflects the baseline immunity of all individuals. Combatants forfeit this immunity by joining the military and taking up arms. While individuals may at times be coerced in making this decision, enlistment generally entails a deliberate and voluntary act.[74] Second, like individual self-defense, the principle of distinction reflects a threat-based criterion of liability. Combatants—as well as civilians who directly participate in hostilities—may be attacked because they pose a threat to their enemy.[75] While individual combatants may pose varying degrees of threat to the enemy, they form part of an integrated organization that plainly poses an existential threat to the opposing side in war. Once a combatant no longer poses a threat by virtue of injury or detention, he regains his baseline immunity from attack.[76]

The principle of distinction also differs from the moral framework of individual self-defense in two important respects. First, the principle of distinction does not require that combatants pose an objectively unjust threat as a condition to losing immunity. IHL, and its principle of distinction, assumes the moral equivalency of combatants, a feature of IHL often criticized by ethicists.[77] IHL separates the reasons for states' initial resort to war (*jus ad bellum*) from the conduct of hostilities (*jus in bello*). Once hostilities commence, IHL assumes that neither side is at fault for the war and that each side has a right to engage in lawful acts of war against the enemy.[78] Combatants have the same rights, obligations, and liabilities under IHL, irrespective of whether their nation was the victim or aggressor state. Michael Walzer, the preeminent expositor of the moral equivalence theory, writes: "We draw a line between the war itself, for which soldiers are not responsible, and the conduct of the war, for which they are responsible . . . ."[79] We do not blame soldiers for honoring their legal

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[73] As Michael Walzer notes, "[N]o one can be threatened with war or warred against, unless through some act of his own he surrendered or lost his rights." MICHAEL WALZER, JUST AND UNJUST WARS 135 (2d ed. 1992).

[74] Even in cases of conscription, the decision is arguably voluntary insofar as an individual chooses enlistment over the consequences of not enlisting. Hundreds of thousands of Russians were faced to make such a decision after Putin ordered compulsory military conscription in September 2022. Tens of thousands of Russian men chose exile and potential legal consequences over fighting in Putin's war of aggression against Ukraine. *See, e.g.*, Yan Matusevich, *Central Asia Faces a Russian Migrant Crisis*, FOREIGN POL'Y (Oct. 4, 2022, 12:30 PM), https://perma.cc/N85M-5BR6.

[75] The same is true for objects. IHL limits attacks to "military objectives," which are defined as "those objects which by their nature, location, purpose or use make an effective contribution to military action" and whose partial or total destruction offers a concrete military advantage. AP 1, *supra* note 66, art. 52(2).

[76] *See id.* art. 41(1).

[77] *See, e.g.*, Hurka, *supra* note 22, at 45 ("[I]f we consider the morality of war rather than its legality, the independence of [*jus ad bellum* and *jus in bello*] cannot be maintained.").

[78] WALZER, *supra* note 73, at 131. This moral equivalency is set forth clearly in Additional Protocol I to the Geneva Conventions, which codified many of the customary rules governing the conduct of hostilities. The preamble to AP 1 reaffirms that the "Protocol must be fully applied in all circumstances to all persons . . . without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict . . . ." *See* AP 1, *supra* note 66, pmbl.

[79] WALZER, *supra* note 73, at 38–39.

or patriotic duty to fight for their country. We also recognize that soldiers generally believe that they are fighting for a just cause. Combatants thus face each other as moral equals on the battlefield, similar to boxers in the ring, each with the same right to kill the other. This right is known as the combatant's privilege. A combatant who kills an enemy soldier consistent with the laws of war does not commit murder and cannot be prosecuted for his act, even if he fights for the aggressor state.[80]

Second, the principle of distinction is based on class characteristics (i.e., combatants and civilians), rather than individualized and contextualized assessments. Combatants may be targeted with lethal force at any time, regardless of whether such force is necessary to prevent a grave and imminent harm (as is required in individual self-defense). Combatants may be targeted even when engaged in non-hostile activities, such as eating or sleeping. Walzer justifies this on the ground that "[s]oldiers as a class are set apart from the world of peaceful activity; they are trained to fight, provided with weapons, required to fight on command."[81] Every combatant is a potential threat because "he has allowed himself to be made into a dangerous man."[82] Civilians as a class, by contrast, are assumed to pose little direct threat to the enemy. This assumption is reinforced by the fact that civilians do not have the legal privilege to engage in hostilities, a right which is granted only to combatants.[83]

IHL's principle of distinction is thus more protective in some respects than what many moral philosophers would demand. As noted in Part II, moral philosophers like Jeff McMahan argue that "[a] person becomes a legitimate target in war by being to some degree morally responsible for an unjust threat . . . ."[84] IHL, however, prohibits the targeting of all civilians though not every civilian is non-threatening or innocent. "[M]oral innocence is a question of conduct and intentions," rather than a quality based on membership in a class.[85] Some civilians may bear significant responsibility for their state's decision to wage war or contribute to the prosecution of it. In most cases, for example, it is the civilian leadership that decides to initiate war and thus bears responsibility for the (unjust) threat posed by it.[86] Civilians' roles in warfare have thus led some moral philosophers to argue that the distinction between civilians and combatants is morally arbitrary.[87]

In other respects, the principle of distinction permits what many ethicists would assess to be unjust killings. It makes all combatants liable to attack, regardless of their moral responsibility or threat. A conscripted cook may not be morally responsible for the war or pose any immediate threat to the enemy. Yet, he is just as

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80 *See* DOD LAW OF WAR MANUAL, *supra* note 17, § 4.4.

81 WALZER, *supra* note 73, at 144.

82 *Id.* at 145.

83 *See* AP 1, *supra* note 66, art. 43(2) (noting that combatants have "the right to participate directly in hostilities"); DOD LAW OF WAR MANUAL, *supra* note 17, § 4.18.3.

84 McMahan, *supra* note 35, at 724.

85 Aaron Xavier Fellmeth, *Questioning Civilian Immunity*, 43 TEX. INT'L L.J. 453, 460 (2008) ("The assertion that civilians as a class are 'innocent' cannot be more than a figure of speech. Nobody could reasonably believe that mere membership in the class of civilians constitutes automatic exoneration from moral blame for the state's wartime conduct.").

86 McMahan, *supra* note 35, at 725 (noting that the United Fruit Companies executives that convinced Eisenhower to overthrow the democratic government in Guatemala bore more responsibility for the unjust war than the soldiers who fought in it).

87 *See* George Mavrodes, *Conventions and the Morality of War*, 4 PHIL. & PUB. AFFS. 117, 124 ("[T]he alleged moral immunity of noncombatants seems to be left as an arbitrary claim.").

liable to attack as a volunteer sniper with dozens of kills.[88] Similarly, due to the separation of *jus ad bellum* and *jus in bello*, soldiers fighting a just war receive no greater protection than soldiers fighting a war of aggression. To the contrary, they waive their right to life solely by defending their country against unlawful attack.

B. Proportionality

Civilians are immune from direct attack under the principle of distinction, but IHL does not eliminate the risks to civilians. In many conflicts, a disproportionate number of casualties are civilians. The ratio of civilian to combatant deaths has increased over the past century, particularly with the advent of aerial warfare, the development of more destructive weapons, and the urbanization of societies.[89] Although statistics on civilian casualties are often disputed, numerous studies have found that over seventy-five percent of casualties in recent wars have been civilians.[90] The rise in civilian deaths does not mean that soldiers are intentionally targeting more civilians, although such violations of IHL certainly occur. Under the IHL PP, civilians may be lawfully killed as collateral damage under certain circumstances.

The PP, a rule of customary IHL, is codified in Article 51 of Additional Protocol I.[91] It prohibits "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[92] Thus, civilians cannot be targeted directly, but they may be killed as collateral damage in attacks against military objectives. This rule is framed as a restraint on the use of force in armed conflict, but it also acknowledges and "implicitly authorizes" the incidental killing of civilians given a sufficient military rationale.[93]

Several aspects of the PP are important to highlight. First, it permits the foreseeable or knowing, not just the merely accidental, killing of civilians as collateral damage. Second, no numerical limit exists on the number of civilians that may be killed in an attack. As Yoram Dinstein notes, "Even extensive civilian casualties need not be 'excessive' in light of the concrete and direct military advantage anticipated."[94] The greater the importance of a military objective, as determined by those planning

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[88] This outcome is not problematic for some commentators. As John Coverdale states, "Individual enemy soldiers may be killed because being a combatant in an army which is waging an unjust war makes a man dangerous and harmful to the community against which he is fighting, and therefore 'non-innocent' in the relevant sense, *independent of personal moral guilt or innocence*." Coverdale, *supra* note 18, at 227 (emphasis added). In this sense, conscripted soldiers can be viewed as innocent aggressors or threats, discussed in Part II, and opposing combatants have agent-relative permission (if not a right) to kill them.

[89] *See, e.g.*, Valerie Epps, *Civilian Casualties in Modern Warfare: The Death of the Collateral Damage Rule*, 41 GA. J. INT'L & COMP. L. 307 (2013).

[90] Fellmeth, *supra* note 85, at 455.

[91] *See* William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 96 (1982). Fenrick provides an excellent overview of the development of the PP, the negotiating history of Article 51, and state practice.

[92] AP 1, *supra* note 66, art. 51(5)(b).

[93] *See* Charles P. Trumbull IV, *Re-Thinking the Principle of Proportionality Outside of Hot Battlefields*, 55 VA. J. INT'L L. 521, 541 (2015). See Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49 (1994), for an excellent overview of how the laws of war have legitimized violence.

[94] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 131 (2d ed. 2010).

the attack, the greater the civilian harm permitted by the PP.[95] Third, there is no agreed upon metric for determining how much civilian harm would be excessive in light of the expected military advantage, a test which requires balancing dissimilar values. In practice, combatants have a "wide margin of appreciation" in making such assessments.[96]

A moral theory of the PP must thus explain how its implicit authorization of collateral damage is consistent with the moral prohibition against killing innocent bystanders.[97] Why is it permissible in war to foreseeably kill civilians to gain some military advantage, but impermissible to kill innocent bystanders in peacetime to save one's own life? The remainder of this Article addresses that question.

IV. MORAL JUSTIFICATIONS FOR THE PRINCIPLE OF PROPORTIONALITY

The predominant moral justification for the PP, particularly in the legal literature, is the Doctrine of Double Effect.[98] The DDE, like the PP, addresses the question of when it is permissible to cause unintended harm, and the analysis undertaken under the DDE is similar to that required by the PP in determining whether the collateral damage expected from an attack would be considered lawful. Jens Ohlen argues that "core IHL principles are based on the Doctrine of Double Effect" and that it is "also normatively correct, thus adding urgency to any legal interpretation that fails to respect the doctrine."[99] Adil Haque similarly notes that the "DDE occupies an important place in international humanitarian law . . . ."[100] The DDE's revered status is largely unquestioned in the legal literature.

This Part begins with an overview of the DDE and then describes the significant overlap between the DDE and the PP. Subpart B critically examines the DDE as the moral justification for the PP, drawing on the widespread objections to the

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[95] Hays Parks wrote that the PP only prohibits "collateral civilian casualties so excessive . . . as to be tantamount to the intentional attack of individual civilians, or the civilian population, or to a wanton disregard for the safety of the civilian population." W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 174 (1990).

[96] Stefan Oeter, *Methods and Means of Combat*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 178–79 (Dieter Fleck ed., 1995); WILLIAM H. BOOTHBY, THE LAW OF TARGETING 126 (2012).

[97] It is not sufficient to argue in response that the PP is framed as a prohibition on certain attacks rather than an explicit authorization. Regardless of how the principle is framed, its effect is to render lawful under IHL attacks that incidentally kill civilians. The principle thus gives such attacks a degree of legitimacy and shields them from criticism. Af Jochnick & Normand, *supra* note 93, at 57.

[98] *See* F.M. Kamm, *Terror and Collateral Damage: Are They Permissible?*, 9 J. ETHICS 381, 382 (2005) ("The doctrine that is typically relied on to explain what one may or may not do to noncombatants, when one has not been able to proceed by harming only combatants, is known as the Doctrine of Double Effect (DDE)."); Hurka, *supra* note 22, at 36 (noting the permissibility of collateral damage in war "turns on the doctrine of double effect, which says it is more objectionable to intend evil as one's end than merely to foresee that evil will result from what one does"); Jens David Ohlin, *Targeting and the Concept of Intent*, 35 MICH. J. INT'L L. 79, 84–85 (2013) (stating that the "rule of collateral damage was modeled" on the DDE).

[99] Ohlin, *supra* note 98, at 123.

[100] Adil Ahmad Haque, *Torture, Terror and the Inversion of Moral Principle*, 10 NEW CRIM. L. REV. 613, 635 (2007); *see also* R. George Wright, *Noncombatant Immunity: A Case Study in the Relation Between International Law and Morality*, 67 NOTRE DAME L. REV. 335, 336 (1991) (noting that the DDE is the foundation for IHL).

DDE in the moral philosophical literature. Subpart C offers some additional reasons to be concerned that the PP sanctions civilian harm that cannot be morally justified.

A. The Doctrine of Double Effect

The DDE, which dates back to Thomas Aquinas, is based on the idea that acts can have two effects, one intended and one only foreseen.[101] These effects can have different or conflicting moral values. The DDE allows us to distinguish between the intended and unintended effects when assessing the morality of an act. For example, a doctor may cause a patient significant pain (i.e., the unintended effect) in order to set her broken leg (i.e., the intended effect). While intentionally causing harm is generally prohibited, actions that incidentally (but unintentionally) cause harm may be morally permissible under certain circumstances.[102]

While the precise elements of the DDE are debated, it states in general terms that an act may be morally permitted, despite causing bad consequences, provided that (1) the act itself is directed at achieving a moral good; (2) the actor intends solely to achieve that moral good; (3) the bad consequence is not a means to produce the moral good; (4) and the positive intended effects of the act outweigh the unintended negative ones.[103]

Proponents of the DDE argue that the doctrine, which incorporates key elements of Kant's categorical imperative, coheres with our moral intuitions. It explains why most people reach different moral conclusions in two similar hypothetical scenarios and provides a rational basis for these divergent conclusions. In the first case (the "switch case"), another runaway trolley is barreling towards five people unable to get out of its way. A bystander sees a switch that would divert the trolley to a sidetrack but doing so would cause the trolley to run over a railway employee working on that sidetrack. The vast majority of people surveyed say that it is permissible to flip the switch so that the trolley kills the one person rather than the five.[104]

The second scenario (the "backpacker case") has the same premise: A trolley is careening toward five people. In this scenario, the bystander does not have the option of pulling a switch. The only way to save the five people is to push a man with a large backpack onto the track, killing the man but stopping the trolley before it

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[101] Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Double Effect*, 18 PHIL. & PUB. AFFS. 334, 334 n.3 (1989).

[102] W.R.P. Kaufman, *The Doctrine of Double Effects and the Trolley Problem*, 50 J. VALUE INQUIRY 21, 22 (2015); Lyons, *supra* note 61, at 287 ("Double effect proposes that under certain circumstances, it is permissible to unintentionally bring about harmful effects by one's conduct that would be impermissible if intentionally caused.").

[103] *See* Sophie Botros, *An Error About the Doctrine of Double Effect*, 74 PHILOSOPHY 71, 72–73 (1999); Thomson, *supra* note 47, at 292; Ohlin, *supra* note 98, at 119; Kaufman, *supra* note 102, at 22.

[104] Kaufman, *supra* note 102, at 23; *see also* GREENE, *supra* note 64, at 116 (noting that in studies, "people all over the world agree" with this course of action). There is admittedly some tension between this scenario and the general prohibition on killing innocent bystanders. Thomson emphasizes that "[i]t is not generally morally open to us to make one die to save five." Judith Jarvis Thomson, *The Trolley Problem*, 94 YALE L.J. 1395, 1408 (1985). She seeks to distinguish the trolley case, however, by noting that it involves an existing threat that is merely being shifted from more persons to fewer persons. She concludes, "[I]t is not morally required of us that we let a burden descend out of the blue onto five when we can make it instead descend onto one *if* we can make it descend onto the one by means which do not themselves constitute infringements of rights of the one." *Id.* at 1409. Thomson argues further that the bystander in the trolley scenario does not infringe the rights of the worker merely by pulling a switch. *Id.*

collides with the five individuals. In this scenario, the vast majority of respondents say it is impermissible to push the backpacker onto the track, even though the consequence is the same: One person dies, and five people are saved.[105]

The relevant moral difference, according to proponents of the DDE, is that the bystander in the "switch case" does not specifically intend to kill the one railway worker when she flips the switch. Nor does she use the unlucky worker to further her intended outcome. The worker's death is merely a foreseen consequence of the bystander's intent to save the five individuals. The bystander can save the five people by flipping the switch, regardless of whether the worker is on the side-track. By contrast, in the second case, the bystander must intend the death of the backpacker to save the others, as his falling in front of the trolley is the only way to achieve that result. The bystander's decision is contingent on the presence of the backpacker, who is used "as a means to save the five lives."[106] This intentional use of another individual without consent as a means to achieve a utilitarian outcome transgresses Kant's categorical imperative and prevents the DDE from justifying the action.

The PP closely resembles, and is likely modeled on, the DDE.[107] The PP (combined with the principle of distinction) and the DDE both prohibit intentional attacks against civilians as a means to achieve a military advantage. Thus, it would be prohibited to intentionally bomb civilians with the goal of spreading terror and convincing the opposing side to surrender—a frequent practice in World War I[108]—even if the good achieved by the surrender outweighed the civilian casualties. Terror bombing of civilians is prohibited because the civilian deaths are specifically intended. The bombed individuals are the means for achieving the good rather than the unintended consequence of an otherwise permissible act.

On the other hand, the DDE and PP permit combatants to inflict foreseeable, but unintended, harm to civilians under certain circumstances. The PP provides that an attack causing collateral damage may be justified so long as the attack is directed at lawful military objectives, the commander intends only to destroy the military objectives, and the expected military advantage of the attack outweighs the expected civilian harm.[109] For example, it would be permissible under the DDE and the PP for a fighter pilot to bomb a munitions factory and incidentally kill the workers inside, so long as the pilot does not specifically intend to kill the workers, and the benefit of destroying the munitions factory outweighs the loss of those workers' lives.[110]

In *Just and Unjust Wars*, Walzer defends a revised version of the DDE, stating that "[d]ouble effect is a way of reconciling the absolute prohibition against

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[105] Joshua Greene acknowledges that most people intuitively think it is wrong to push the man onto the track but argues that pushing the man would be a legitimate action from a utilitarian perspective. GREENE, *supra* note 64, at 114.

[106] Kaufman, *supra* note 102, at 23.

[107] Ohlin, *supra* note 98, at 118 (calling the principle of proportionality a "direct outgrowth" of the DDE).

[108] *See* af Jochnick & Normand, *supra* note 93, at 80 ("During World War I, each belligerent . . . adopted similar policies of deliberate 'morale bombing'—attacking populated areas to sow terror in the population and discourage its support for the war.").

[109] *See* Rogier Bartels, *Dealing with the Principle of Proportionality in Armed Conflict in Retrospect*, 46 ISR. L. REV. 271, 273–74 (2013) (noting that the PP essentially incorporates the principle of distinction, which requires that the commander intend to target only military objectives).

[110] Botros, *supra* note 103, at 74 ("[B]ombing enemy munitions plants next to civilian dwellings is now standardly held to be justifiable under the DDE in so far as its intended good effects outweigh its unintended bad effects.").

attacking non-combatants with the legitimate conduct of military activity."[111] He argues, however, that the doctrine must be strengthened in armed conflict since it is easy merely to not intend civilian casualties. Combatants, he argues, owe civilians a greater duty of care. When confronted with the possibility of civilian harm, soldiers must also intend "that the foreseeable evil be reduced as far as possible."[112] Soldiers must not only lack the intention to harm civilians; they must also affirmatively intend not to harm civilians. This affirmative intention can be manifested by taking concrete steps to mitigate civilian harm. Walzer thus proposes an additional element of the DDE, namely that the attacker must seek to minimize the harm to civilians and accept a corresponding risk to himself in doing so.[113]

Walzer's addition to the DDE is generally reflected in the rules of customary and treaty IHL. Additional Protocol I requires parties to a conflict to take "constant care" to spare the civilian population.[114] Those who plan or decide upon an attack must "do everything feasible to verify that objectives to be attacked are neither civilians nor civilian objects" and "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimizing, incidental loss to civilian life, injury to civilians and damage to civilian objects . . . ."[115] This includes providing "effective advance warning" to civilians who may be affected by an attack, unless the circumstances do not permit.[116] Parties to a conflict must also take defensive precautions to protect "individual civilians and civilian objects under their control against the dangers arising from military operations."[117] For example, parties shall, to the extent feasible, "avoid locating military objectives within or near densely populated areas . . . ."[118]

B. Critiques of the DDE

This Subpart critically examines the DDE as a moral justification for the PP and the incidental killing of civilians in armed conflict. Despite the DDE's general acceptance among IHL scholars, it is much more controversial in the literature on moral philosophy.[119] F.M. Kamm, for example, writes, "[W]e have known for many years that the DDE is problematic in its justification of side effect deaths."[120] Joshua Greene, a psychologist and neuroscientist, similarly concludes, "[T]he venerable Doctrine of Double Effect has no justification beyond the fact that it's supported

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[111] WALZER, *supra* note 73, at 153.

[112] *Id.* at 155.

[113] *Id.*

[114] AP 1, *supra* note 66, art. 57(1).

[115] *Id.* art. 57(2)(a).

[116] *Id.* art. 57(2)(c).

[117] *Id.* art. 58.

[118] *Id.* art. 58(b).

[119] *See, e.g.*, Kaufman, *supra* note 102, at 22 (noting the "much larger debate about the validity of Double Effect both as explanation of our moral beliefs and practices and as a plausible normative principle"); Peter Singer, *Ethics and Intuitions*, 9 J. ETHICS 331, 348 (2005) (arguing that responses to the different trolley scenarios are driven by evolutionary emotional responses rather than considered moral judgments and that there is likely no moral difference between the scenarios). *See generally* Judith Lichtenberg, *War, Innocence, and the Doctrine of Double Effect*, 74 PHIL. STUD. 347 (1994); Camillo C. Bica, *Another Perspective on the Doctrine of Double Effect*, 13 PUB. AFFS. Q. 131 (1999).

[120] Kamm, *supra* note 98, at 396.

(imperfectly) by some of our intuitions."[121] Richard Hull concludes that "moral philosophy should dispense with the doctrine."[122] This Subpart assesses the primary objections to the DDE and argues that they provide good reasons to be skeptical of the DDE as a moral foundation for the PP.

1. Intentions Are Not Dispositive

A primary criticism of the DDE is that it gives undue weight to the intention of the actor. This "special emphasis on intent at the heart of the principle of double effect"[123] can, given the indeterminacy of intent, lead to moral ambiguity or conflicting moral assessments for similar conduct. Robert Holmes writes that the DDE "violates a fundamental requirement . . . that one be consistent."[124] Consistency "requires that we judge similar cases similarly, or, better, that we judge cases similarly unless there are relevant dissimilarities between them. One cannot perform virtually identical acts and judge them differently unless they differ in morally relevant respects."[125] Judith Thomson similarly notes, "It is a very odd idea . . . that a person's intentions play a role in fixing what he may or may not do."[126]

Consider a fighter pilot pondering whether it would be morally permissible to drop bombs on an enemy munitions factory, an action which he knows will also kill ten children in a nearby school. Thomson asks rhetorically, "Can anyone really think that the pilot should decide whether he may drop the bombs by looking inward for the intention with which he would be dropping them if he dropped them?"[127] Imagine that two pilots are ordered to separately drop ordnance on this same munition factory to maximize the chance of mission success. One pilot is concerned that his bombs might result in civilian casualties, but the other bomber is secretly pleased that children, whom he views as future combatants, will be killed in the attack. We would not say that the mission is both morally permitted and morally prohibited. Thomson argues it is "irrelevant to the question whether X may do alpha what intention X would do alpha with if he or she did it."[128] It is the objective facts of the situation, rather than the intentions on which one acts, that justify one's actions.[129]

A modern twist on a scenario developed by Thomson further illustrates this point.[130] A man's elderly wife is in a coma. The doctor asks for the husband's authorization to give her a Covid-19 vaccine as she is at a heightened risk of contracting the potentially lethal virus. The husband secretly hopes that his wife will die but also believes vaccines are poisonous. He authorizes the doctor to give her the vaccine, thinking it will hasten her death. The husband clearly acted with bad intent, but it was

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[121] GREENE, *supra* note 64, at 223 (arguing that "our sensitivity to the much beloved means/side-effect distinction is bound up with our not beloved sensitivity to personal force").

[122] Richard Hull, *Deconstructing the Doctrine of Double Effect*, 3 ETHICAL THEORY & MORAL PRAC. 195, 195 (2000).

[123] Wright, *supra* note 100, at 344.

[124] ROBERT L. HOLMES, ON WAR AND MORALITY 196 (1989).

[125] *Id.* at 196–97.

[126] Thomson, *supra* note 47, at 293.

[127] *Id.*

[128] *Id.* at 294.

[129] Kamm, *supra* note 98, at 391.

[130] Thomson's original scenario is set forth at *supra* note 47.

also morally permissible for him to authorize the vaccine. We might even think he has a duty to do so. The husband's ill intentions reflect poorly on his character, but it would be wrong to conclude that it is morally prohibited to authorize the vaccine based on his malevolent intention.[131]

This objection to the DDE does not deny that intentions are both morally (and legally) relevant. The argument is that intentions are not dispositive in determining whether a specific act is morally permissible. As T.M. Scanlon observes, "What an agent takes as counting in favor of a course of action does seem to bear on a moral assessment of that person in a way that it may not bear on the permissibility of what the agent does."[132] In other words, intentions concern the moral culpability of an individual rather than moral permissibility of an act.

This same distinction is reflected in the common law criminal doctrines of "justifications" and "excuses." The Model Penal Code explains: "To say that someone's conduct is 'justified' ordinarily connotes that the conduct is thought to be right, or at least not undesirable; to say that someone's conduct is 'excused' ordinarily connotes that the conduct is thought to be undesirable but that for some reason the actor is not to be blamed for it."[133] Intentions may thus provide an *excuse* for prohibited conduct, such that we do not think the defendant should be punished for his impermissible act. For example, we should not blame a person for certain bad acts if he acted with good intentions or under a reasonably mistaken belief of fact. In these cases, the *conduct* itself is still undesirable or impermissible, but we do not hold the *person* responsible.[134] Intentions alone, however, do not make specific acts morally good or morally wrong, and thus cannot provide a moral compass for future conduct.[135]

2. *The False Distinction Between Intention and Knowledge*

Other philosophers critique the DDE's differentiation between harm intended (prohibited) or merely foreseen (potentially permitted).[136] There are two related strands to this objection. The first is that there is no meaningful moral distinction between acting with intent and acting with foresight. Consider the example of the "terror bomber", who bombs one hundred civilians hoping that the resulting terror will convince the enemy to surrender, and the "tactical bomber," who bombs a

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[131] Thomson, *supra* note 47, at 295 ("[T]hat he will be at fault if he gives [the medicine] to her with this intention does not mean that he may not give it to her."); T.M. Scanlon, *Intention and Permissibility*, 74 PROC. ARISTOTELIAN SOC'Y 301, 312 (2000) (noting it would be "a mistake to treat the fact that in acting in a certain way we would be acting on certain reasons as the consideration that we should take as counting decisively against so acting").

[132] Scanlon, *supra* note 131, at 305.

[133] MODEL PENAL CODE AND COMMENTARIES art. 3, intro. at 3 (AM. L. INST. 1985).

[134] *See* Lyons, *supra* note 61, at 287 ("An excuse defense . . . while maintaining the objective wrongfulness of some specific conduct, concludes that imposition of punishment is inappropriate due to the particular state of mind or volitional considerations of the actor at the time."); HOLMES, *supra* note 124, at 198 ("[Intentions] are relevant to the assessment of *persons*, but that requires a different sort of judgment. Conduct we judge to be right or wrong, obligatory or prohibited; persons we judge as good or bad, praiseworthy or blameworthy.").

[135] Scanlon, *supra* note 131, at 307 (stating that moral criticism, which assesses the reasons an individual acted, is primarily retrospective, while moral principles are in the first instance prospective).

[136] *See, e.g.*, Hull, *supra* note 122, at 197 ("Essential to the doctrine of double effect is the idea that what we foresee is in some way different from what we intend.").

munitions factory knowing that it will kill the one hundred civilian workers inside. Per the DDE, the terror bomber would be committing a morally prohibited act since he intended to cause the civilian deaths, while the tactical bomber may be justified since the intention was to destroy the factory.

Many philosophers argue that there is no moral difference between these two cases. As one commentator notes, "There is a great difficulty . . . in explaining where the line is to be drawn between what our intention is and what we foresee as a further consequence."[137] If the tactical bomber knows that destroying the munitions factory will result in one hundred civilian deaths, and he proceeds anyways, "there is no way of pri[z]ing apart this effect from the one that he intends."[138] Hull writes that if the tactical bomber "sets about a course of action (or inaction) whereupon he knows that a certain harm will result, he must intend that harm will result."[139] The civilian deaths and the destruction of the factory are a package deal, a deal which is either intended or not intended in its entirety.[140] To give another example, I know that drinking a bottle of wine will make me feel ill in the morning. Assuming I proceed to drink the wine, I cannot credibly claim that my hangover was unintentional. If I know that X act will lead to Y and Z consequences and I voluntarily do X, it follows that I intended both Y and Z to happen.

A related objection is that one's intentions cannot be determined with the specificity that the DDE requires. One commentator notes that "the concept of an 'intended' killing is too plastic and manipulable to be of much service, as one's ends can always be favorably or unfavorably recharacterized."[141] We can, for example, ascribe multiple intentions to the terror bomber in the above hypothetical. His primary interest may be a laudable one of bringing a quick end to a horrific war, thus saving many more civilians in the long-term, and he may be sickened by the thought of causing civilian harm.[142] We might even say that the civilian deaths are unintentional. The intended consequence of his terror bombing may be to cause some psychological effect (terror) among the general population rather than the death of a certain number of civilians. He may be indifferent as to how this effect comes about. Killing one hundred civilians would probably cause the intended terror, but a widespread belief that civilians died would be just as effective. As causing terror is itself a means to another end, the terror bomber would be happier if the population is terrorized (with no civilian deaths) than not (with one hundred civilian deaths).

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[137] *Id.*

[138] Lichtenberg, *supra* note 119, at 354.

[139] Hull, *supra* note 122, at 200.

[140] Lichtenberg, *supra* note 119, at 353.

[141] Wright, *supra* note 100, at 345.

[142] Colonel Paul Tibbets, a U.S. Air Force pilot, captained the B-29 bomber that dropped the atomic bomb over Hiroshima, killing between seventy and one hundred thousand people. He described his motivation for the mission as follows: "I thought to myself, 'Gee, if we can be successful, we're going to prove to the Japanese the futility in continuing to fight because we can use those weapons on them. They're not going to stand up to this thing. After I saw what I saw I was more convinced that they're gonna quit. That's the only way I could do it.'" Lorrie Grant, *Enola Gay Pilot Paul Tibbets, 92 Dies*, NPR (Nov. 1, 2007, 2:16 PM), https://perma.cc/49HD-H8RE. Another crew-member from the plane penned a letter to his young son on the flight back, writing, "What regrets I have about being a party to killing and maiming thousands of Japanese civilians this morning are tempered with the hope that this terrible weapon we have created may bring the countries of the world together and prevent further wars . . . ." Michael E. Ruane, *Hiroshima's Enola Gay Carried 12 Men, Hope and the World's Deadliest Weapon*, WASH. POST (Aug. 5, 2020), https://perma.cc/DJG3-R9XZ.

Accordingly, the terror bomber need not specifically intend to kill civilians when he drops the bombs, even if he knows this result is almost certain to occur. His intent is solely to cause public panic, and killing civilians is merely one means (albeit the most likely means) to achieve this objective.

A counterargument is that the intention of the actor is not the key distinction under the DDE between permissible and prohibited action. What animates the DDE is the Kantian principle that every person has "an independent right not to be made to serve others' purposes without one's consent."[143] The terror bombing is morally prohibited because the civilians are used to further the bomber's purpose (regardless of whether he intends for them to die), and the tactical bombing may be permitted because the civilians are not used to further the bomber's plans.[144] This reformulation avoids the inherent messiness of parsing the intentions of the actor by focusing on the rights of the potential victims. This revised explanation of the DDE seems unsatisfactory. The potential victims of the terror and tactical bomber have a right not to be used as a means to further another's purpose, but they have a stronger right not to be killed unless they forfeit that right. It does not matter whether the victims are used as a means or whether their death would be purely incidental to another end.

The following example also casts doubt on the DDE's distinction between killing as a means (prohibited) and killing as a side effect (permitted under certain circumstances). Imagine two co-pilots receive authorization to bomb the munitions factory noted above, after headquarters has assessed that the importance of destroying the factory outweighs the deaths of ten civilians. One co-pilot remains uncomfortable with the prospect of incidentally killing ten children in the nearby school. The second co-pilot knows that another bomber will finish the job if they abort, but he wants to complete the mission. He thus proposes that they first drop a small bomb on the school. This bomb will likely kill one child, but it would cause the remaining children to evacuate and seek shelter away from the munitions factory. The two co-pilots may then bomb the munitions factory without causing any further collateral damage. In this hypothetical, the pilots' intentional killing of one child (who would die regardless, since another bomber would complete the job) results in nine fewer children being killed. This course of conduct seems morally preferable to the alternative,[145] even though the second co-pilot uses the child and his death as a means to achieve his goal of completing the mission to bomb the munitions factory.

3. *Additional Concerns with the Principle of Proportionality*

Even if we accept the DDE as a viable moral foundation for the PP, the PP still raises moral concerns. Significantly, the PP can allow for attacks that would not be morally justified under the DDE. While the PP is modelled after the DDE, the PP deviates from it in key respects. Accordingly, the PP may legally sanction harm that could not be morally justified even under the DDE.

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[143] Dana Kay Nelkin & Samuel C. Rickless, *Three Cheers for Double Effect*, 89 PHIL. & PHENOMENOLOGICAL RSCH. 125, 133 (2014).

[144] *Id.* at 146.

[145] I do not claim that such an attack would be morally permissible since it would involve the knowing or intentional killing of an innocent child. I only argue that this action would be preferable to the knowing killing of ten innocent children.

First, whereas the DDE balances good and bad consequences and requires that the good outweigh the bad, the PP compares civilian harm and military advantage. This balancing of two incomparable values significantly exacerbates the original sin, for many ethicists, of the separation of *jus ad bellum* and *jus in bello*.[146] For a state fighting a just war, we can assume that military advantage constitutes some moral good, even if it is difficult to quantify that good. For the aggressor state, it is quite the opposite. The PP permits an aggressor state to commit one evil (causing unjust harm to civilians) in furtherance of a second evil (waging unjust war). Attacks that advance more evil objectives, such as those carried out in Russia's war of aggression against Ukraine, may be used to legally justify greater harm to civilians. This makes the balancing of good and evil that is "essential to the DDE"[147] entirely perverse.

Second, even when states have a just cause for war, it is not clear that the DDE can justify the extent of civilian harm that often occurs. Thomas Hurka writes, "If 'military advantage' justifies killing civilians, it does so only because of the further goods such advantages will lead to, and how much it justifies depends on what those goods are."[148] In other words, military advantage is not a moral good in itself, but rather it is a means of promoting some moral good. Thus, the good that military advantage produces and the corresponding harm that it could justify are directly connected to the aims of the war.

As the DDE requires unintended consequences to be outweighed by the intended good consequences, attacks causing collateral damage become morally impermissible under the DDE when the aggregate harm to civilians exceeds the overall good a state sought to achieve by resorting to war. Drawing this line is difficult, but it is clear that the degree of acceptable harm might vary significantly with the underlying objectives of war. Even just wars may provide vastly different degrees of moral good. A war fought to re-claim a sliver of disputed territory will not provide the same amount of good as a war fought to prevent genocide.[149] The PP's myopic view of military advantage—without consideration of the *jus ad bellum* considerations—thus entails significant risk that it will legitimize harm that is morally impermissible.

V. PROPORTIONALITY, RESPONSIBILITY, AND INNOCENCE

Part IV argued that we should reject, or at least be deeply skeptical of, the idea that the DDE can justify the collateral damage that the PP permits. This does not mean, however, that the PP is necessarily or entirely indefensible, although certain applications of the PP may be morally problematic. Nor do I argue that all incidental harm to civilians in war is morally impermissible, an argument that would not be

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[146] *See* Hurka, *supra* note 22, at 45 (arguing that the separation of *jus ad bellum* and *jus in bello* cannot be maintained because "[w]hether an act in war is *in bello* proportionate depends on the relevant good it does, which in turn depends on its *ad bellum* just causes").

[147] Botros, *supra* note 103, at 83.

[148] Hurka, *supra* note 22, at 45.

[149] Ethiopia and Eritrea went to war in 1998 over the border town of Badme. The town had no apparent value, but the two-year war left tens of thousands dead or injured. Neither side could plausibly claim that the objective of this war (i.e., seizing a "dusty market town") could morally justify the civilian harm caused. Tesfalem Araia, *Remembering Eritrea-Ethiopia Border War: Africa's Unfinished Conflict*, BBC (May 6, 2018), https://perma.cc/HT3L-AJ94.

supported by public opinion.[150] Some civilian harm may be morally permissible in war. Under traditional principles of self-defense, civilians can forfeit their right to life. They can become non-innocent by virtue of their responsibility for or contributions to an unjust war. It is the innocent/non-innocent distinction, not the combatant/civilian distinction, that is morally relevant when assessing the permissibility of harm to civilians.

This Part argues that attacks expected to cause collateral damage may be morally permissible only insofar as they are not anticipated to harm innocent civilians.[151] Subpart A argues that non-innocence as a justification for civilian harm in war is firmly rooted in moral philosophy and modern military history. Psychological scholarship further shows its continued relevance in shaping societal views on who may be killed in war. Subpart B explores two factors that influence (though not necessarily justify) perceptions of civilian non-innocence in war: individual and collective responsibility. While connecting civilian immunity to innocence has theoretical appeal due to its foundation in the ethics of individual self-defense, Subpart C discusses the serious practical challenges and drawbacks to this approach during war. In particular, there will inevitably be a spectrum of non-innocence among civilian populations at war. We cannot say that any degree of non-innocence entails a forfeiture of the right to life given the self-defense requirements of necessity and proportionality. Yet, the practical and epistemic difficulties during war in distinguishing between the partially non-innocent and the fully non-innocent can create a race to the bottom. In the absence of easily identifiable bright-line rules regarding civilian immunity, military considerations would likely cause states to consider any degree of non-innocence as a forfeiture of immunity, much as they did in the major conflicts of the twentieth century. This risk of largely unrestrained warfare is heightened as civilians play greater roles in the war-fighting efforts of their nations. Part VI will discuss how the PP can serve to mitigate those risks.

A. Civilian Immunity and Innocence

Civilian immunity from attack is based in the philosophical literature on moral "innocence."[152] Walzer writes that we call individuals who are immune from attack "*innocent* people, a term of art which means that they have done nothing, and are doing nothing, that entails the loss of their rights."[153] As noted in Part II, much debate exists regarding who should be considered innocent in war, on how to draw the line between moral innocence and non-innocence, whether a bright line is possible, and how to handle borderline cases. Moral philosophers have generally focused

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[150] *See, e.g.*, ERIC V. LARSON & BOGDAN SAVYCH, MISFORTUNES OF WAR, PRESS AND PUBLIC REACTIONS TO CIVILIAN DEATHS IN WARTIME 4, (RAND Corp. ed., 2006) ("Americans generally have not responded to high-profile incidents of civilian casualties during U.S. military operations by withdrawing their support for the operation.").

[151] This Article is focused on direct and foreseeable physical harm to civilians, including injury and death, as these are the types of harm that must be assessed under the PP. Attacks that may cause solely economic injury, or that cause unanticipated harm, are outside the scope of this Article as they may raise different moral and legal considerations.

[152] *See, e.g.*, Mavrodes, *supra* note 87, at 120 ("The crucial argument proposed by the immunity theorists turns on the notions of guilt and innocence.").

[153] WALZER, *supra* note 73, at 146; *see also* McMahan, *supra* note 35, at 695 ("Those who do nothing to lose their right against attack are commonly said to be 'innocent.'").

on some combination of threat,[154] responsibility,[155] or contribution to the war[156] as bases for loss of immunity in armed conflict. According to Hugo Slim, "The two main criteria for making such [immunity] distinctions have centered on the fact that some members of the enemy are unarmed and so may be recognized as unthreatening noncombatants, while others are somehow intrinsically innocent, and so sanctified as being beyond war in some way."[157]

Most moral philosophers readily acknowledge that the civilian/combatant divide enshrined in the IHL principle of distinction does not correspond to the innocent/non-innocent distinction that determines who may be attacked from the ethical standpoint.[158] Civilians, like combatants, can be non-innocent in war. McMahan writes that a "person becomes a legitimate target in war by being to some degree morally responsible for an unjust threat, or for a grievance that provides a just cause for war."[159] Similarly, McPherson writes, "Persons are noninnocent insofar as they bear some moral responsibility for wrongdoing through war . . . ."[160] Walzer describes the distinction as "those who have lost their rights because of their warlike activities and those who have not."[161] On one side of the line are those "who make the weapons for the army or those whose work directly contributes to the business of war."[162] On the other side are those who are "not fighting and are not engaged in supply[ing] those who are with the means of fighting."[163]

In the major international armed conflicts of the twentieth century, there is ample evidence that societies justified harm to enemy civilians based on their perceived non-innocence.[164] General Curtis LeMay, the former chief of staff of the U.S. Air Force who commanded the carpet bombings of Tokyo, reportedly stated: "There are no innocent civilians. It is their government and you are fighting a people, you are not trying to fight an armed force anymore. So it doesn't bother me so much to

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154 *See generally* Fellmeth, *supra* note 85 (describing both moral innocence and threat as criteria for liability in war).

155 *See* Lawrence A. Alexander, *Self-Defense and the Killing of Noncombatants: A Reply to Fullinwider*, 5 PHIL. & PUB. AFFS. 408, 415 (1976) (noting that "the right to kill in self-defense requires only that the person killed be a necessary or sufficient cause of a danger" and that "noncombatants are not necessarily more remote causes of danger than are combatants").

156 WALZER, *supra* note 73, at 146 ("The relevant distinction is not between those who work for the war effort and those who do not, but between those who make what soldiers need to fight and those who make what they need to live . . . ."); *id.* at 153 ("[Y]et it is not proximity [to a military objective] but only some contribution to the fighting that makes a civilian liable to attack.").

157 Hugo Slim, *Why Protect Civilians? Innocence, Immunity and Enmity in War*, 79 INT'L AFFS. 481, 486 (2003).

158 *See, e.g.*, Mavrodes, *supra* note 87.

159 McMahan, *supra* note 35, at 724.

160 McPherson, *supra* note 34, at 490.

161 WALZER, *supra* note 73, at 145.

162 *Id.*

163 G. E. M. ANSCOMBE, MR. TRUMAN'S DEGREE 5 (1958), available at https://perma.cc/K28F-2S2E.

164 The American public, for example, embraced the firebombing of Tokyo that gruesomely killed between 80,000 and 130,000 Japanese civilians in just 48 hours because it viewed much of the Japanese population as non-innocent with respect to its war of aggression. Charles S. Maier, *Targeting the City: Debates and Silences About the Aerial Bombing of World War II*, 87 INT'L REV. RED CROSS 429, 438 (2005); *see also Firebombing of Tokyo,* HISTORY (Nov. 16, 2009), https://perma.cc/7MTU-86WA (stating that "between 80,000 and 130,000 Japanese civilians were killed in the worst single firestorm in recorded history").

be killing the so-called innocent bystanders."[165] Perceptions of moral guilt and innocence may have even played a significant role in shaping military strategy. Military historian Louis Manzo argues that the United States was more cautious in bombing German cities than Japanese ones because "Americans distinguished between the Nazis, who were the real enemy, and the German people, who were at least partly victims."[166] Americans viewed the entire Japanese population, on the other hand, as morally culpable by virtue of their perceived unconditional support for the emperor and the war.

Recent psychology studies show how influential perceptions of innocence are in people's willingness to justify harm to civilians. In one study conducted in the United States, participants were presented with a scenario in which the U.S. military learned that the Taliban's top military leaders were meeting in the basement of a dormitory occupied by an international mining corporation.[167] In the scenario, the military has a narrow window to strike and eliminate the Taliban leadership, but this strike would also cost the lives of forty unwitting civilians in the upper floors of the building. Participants were then asked whether they would approve the strike under three scenarios in which the civilians were American, Indian, or Afghan.

The participants were much more likely to approve the missile strike and deem it ethical when the victims were Afghans, as opposed to Americans or Indians.[168] In testing why participants were more comfortable with Afghan than Indian deaths, the study found that, despite information to the contrary in the hypothetical scenario, participants were "more likely to assume that Afghans were . . . collaborating in some way with the enemy because they share a national identity with most Taliban members."[169] In other words, the participants perceived the Afghan civilians as non-innocent and the American and Indian civilians as innocent.

The concept of innocence also shapes how societies discuss civilian casualties in war. Department of Defense statements often refer to the need to protect "innocent" civilians and express remorse for the incidental death of "innocent" civilians.[170] Media reporting on war often uses similar morally-laden language.[171]

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[165] Clive Irving, *The President Isn't the Only Hothead Who Could Start a Nuclear War*, DAILY BEAST (Apr. 13, 2017, 3:07 PM), https://perma.cc/C8ND-MCZK.

[166] Louis A. Manzo, *Morality in War Fighting and Strategic Bombing in World War II*, 39 AIR POWER HIST. 35, 45 (1992).

[167] Scott D. Sagan & Benjamin A. Valentino, *Weighing Lives in War: How National Identity Influences American Public Opinion About Foreign Civilian and Compatriot Fatalities*, 5 J. GLOBAL SEC. STUD. 25, 32 (2019).

[168] *Id.* at 34.

[169] *Id.* at 38.

[170] In responding to a question about civilian casualties in the conflict against ISIS, U.S. Central Command Spokesperson stated, "We work diligently to avoid such harm. We investigate each credible instance. And we regret each loss of innocent life." Khan, *supra* note 2; *see also* Lloyd J. Austin III, U.S. Sec'y of Def., Statement on the Results of Central Command Investigation Into the 29 August Airstrike (Sept. 17, 2021), https://perma.cc/URB2-H8XF ("When we have reason to believe we have taken innocent life, we investigate it and, if true, we admit it.").

[171] *See, e.g.*, Stephen Collinson, *Why Ukraine's Battle for Survival May Be far from Over*, CNN (Mar. 17, 2022, 5:41 AM), https://perma.cc/T9CL-9N9J (referring to the need to save "innocent lives" in Ukraine).

B. Individual and Collective Responsibility

While innocence is the morally relevant factor in determining immunity from attack, it can also undermine the civilian/combatant distinction which is important in limiting the scope of war. The traditional view of civilians as innocent victims of war shifted as civilians' roles in warfare evolved over the past two centuries. As civilians started to play a more prominent role in war, the moral and legal distinctions between civilians and combatants also started to erode. Parties to a conflict started to view much of the enemy population as non-innocent. Two primary reasons exist for this blurring.

1. Individual Responsibility and Civilians' Contributions to the War

As societies became more industrialized and militarized, civilians increasingly played more visible and vital roles in the war-fighting efforts of their states. In the twentieth century, militaries relied upon civilian populations for equipping, arming, financing, and sustaining the military.[172] Civilian production of arms and transport of supplies like oil became vital to the war effort, and thus a target for the enemy.[173] War became "as much an economic as a military activity."[174] Economic weapons, such as embargos and blockades, were seen as critical to military success during World War I and World War II, causing hundreds of thousands of deaths due to hunger and disease.[175]

Civilian contributions to war eroded the notion of civilian immunity, exposing civilians and civilian property to greater risk during war.[176] "The growing dependence of warfare on society as a whole—especially the role of labour in arming a nation—rendered the civilian-combatant distinction questionable."[177] Civilians—or at least civilians working in war-related industries—were viewed as at least partially non-innocent by virtue of their contributions to the war enterprise.[178]

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[172] *See* Fellmeth, *supra* note 85, at 467 (noting the "indispensable role" played by civilians in armed conflict).

[173] The U.S. embargo on oil to Japan in 1941 was a "devastating blow" to Japan and a significant motivation for the attack on Pearl Harbor. HATHAWAY & SHAPIRO, *supra* note 19, at 179.

[174] WALZER, *supra* note 73, at 145.

[175] *See* NICHOLAS MULDER, THE ECONOMIC WEAPON 5 (2022) (stating that in World War I, between three hundred thousand and four hundred thousand people died of blockade-induced starvation and illness in Central Europe, with an additional five hundred thousand deaths in the Ottoman provinces).

[176] According to Hugo Slim, "The civilian idea was seen by many to have been eroded by the civilian's inevitable connection with 'the war effort' by his or her production of the moral or material resources for war." Slim, *supra* note 157, at 490–91; *see also* MULDER, *supra* note 175, at 4 ("Long-standing traditions, such as the protection of neutrality, civilian noncombatants, private property, and food supplies, were eroded or circumscribed.").

[177] Charles S. Meier, *Targeting the City: Debates and Silences About Aerial Bombing of World War II*, 87 INT'L REV. RED CROSS 429, 432 (2005); *see also* af Jochnick & Normand, *supra* note 93, at 77 ("The cornerstone of the humanitarian project, the need to distinguish non-combatants from combatants, ran counter to sweeping social changes toward industrialization and militarization.").

[178] William Arnold-Forster, a British blockade administrator during World War I, later acknowledged, "[W]e tried, just as the Germans tried, to make our enemies unwilling that their children should be born; we tried to bring about such a state of destitution that those children, if born at all, should be born dead." MULDER, *supra* note 175, at 4.

Some military theorists in the early twentieth century went further, arguing that the industrialization of societies rendered the civilian/combatant distinction irrelevant. Guilio Douhet, an Italian brigadier general who greatly influenced Western thinking on the use of airpower, wrote, "The prevailing forms of social organization have given war a character of national totality—that is the entire population and all the resources of a nation are sucked into the maw of war."[179] He argued that in future conflicts it would not be feasible or warranted to distinguish between civilians and combatants.[180]

Other influential theorists in the early twentieth century, such as U.S. Brigadier General Billy Mitchell, believed that aerial bombardment of cities was justified on the ground that all persons contributing to war were liable to attack.[181] British military strategists "argued that bombing industrial centers—even working-class residential areas—did not amount to terror bombing because these were military targets, thanks to the contribution that industry made to the enemy's war effort."[182] During World War II, while certain powers paid lip service to the idea of civilian immunity, the aerial raids of London, Dresden, and Tokyo indicated an intent to cause widespread civilian casualties.[183] As Boyd van Dijk writes, "[T]he civilian/combatant distinction came under increasing pressure, and eventually broke down entirely . . . ."[184]

The total war paradigm of World War I and World War II has since been rejected,[185] but international law now permits states to punish civilians who contribute to unjust wars in other ways. Economic sanctions, once a tool available only to belligerents during armed conflict,[186] have replaced military force as the preferred weapon for targeting non-innocent civilians. Following Russia's invasion of Ukraine in 2022, for example, the United States and other countries imposed severe sanctions on Russian officials and oligarchs who enabled Russia's war of aggression.[187] These

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[179] Manzo, *supra* note 166, at 42 (quoting GIULIO DOUHET, THE COMMAND OF THE AIR 8 (Dino Ferrari trans., 1942)).

[180] *Id.*

[181] *Id.* at 43.

[182] A.J. Bellamy, *The Ethics of Terror Bombing: Beyond Supreme Emergency*, 7 J. MIL. ETHICS 41, 49–50 (2008).

[183] Bellamy writes that the initial reluctance to engage in area bombing was due primarily to pragmatic, rather than moral, calculations. *Id.* at 51. As the war progressed, the Allies, and particularly the United Kingdom, saw greater utility in area bombing, even though they generally refrained from acknowledging a policy of targeting civilians. The firebombing of Dresden, however, could not plausibly be explained as anything but an intentional terror bombing. In forty-eight hours, three waves of aerial bombers killed up to fifty thousand persons, even though Dresden contained relatively few military targets. *Id.* at 57.

[184] BOYD VAN DIJK, PREPARING FOR WAR: THE MAKING OF THE GENEVA CONVENTIONS 218 (2022) (noting that during World War II, "[a]ttacking enemy civilians and combatants with fire bombs or hunger blockade came to be seen as permissible").

[185] Even in the aftermath of World War II, the Allies sought to prevent new rules protecting civilians from indiscriminate bombings or blockade. In the drafting of the 1949 Geneva Conventions, the United States, France, and the United Kingdom successfully opposed proposals that would codify the principle of distinction or prevent indiscriminate bombings of civilian populations. *Id.* at 197–251.

[186] *See* MULDER, *supra* note 175, at 83 (stating that "the possibility of using economic coercion against a state without being at war with it" was an innovation of international law created by the Covenant of the League of Nations, adopted after World War I).

[187] The U.S. Department of the Treasury stated that it was targeting "Russia's political and national security leaders who have supported Russian President Vladimir Putin's brutal and illegal invasion of Ukraine." Press Release, U.S. Dep't of Treasury, Treasury Sanctions Kremlin Elites, Leaders, Oligarchs, and Family for Enabling Putin's War Against Ukraine (Mar. 11, 2022), https://perma.cc/7FUW-A8ZK . The sanctioned individuals include the Russian Federation's spokesperson and his family, oligarchs with

sanctions were punitive in nature, blocking hundreds of millions of dollars of the sanctioned individuals' personal assets.[188] Treasury Secretary Yellen commented that "Treasury continues to hold Russian officials to account for enabling Putin's unjustified and unprovoked war."[189] After sanctioning over four hundred additional Russian individuals and entities on March 24, 2022, President Biden explained his decision on social media: "They personally gain from the Kremlin's policies, and they should share in the pain."[190]

2. *Collective Responsibility*

The increased dependence on civilians in warfare coincided with the emergence of the idea of collective responsibility. Civilians were increasingly viewed as morally responsible for the belligerent acts of states as government institutions became more sophisticated and democratic. The eighteenth century Rousseau-Portalis doctrine—which asserted that war was a relationship between states, rather than peoples, and that military operations should only be directed against enemy soldiers[191]—gave way in the nineteenth century to a broader conception of war, in which entire populations were transformed into enemies in war.[192] This was due in large part to the rise in nationalism, the democratization of European states, and the corresponding belief that a "[g]overnment is the representative will of all the people, and acts for the whole society."[193] Decisions to wage war were no longer made by a single monarch. War required the coordinated effort of government institutions, representing the general will of the people. Similarly, nations did not fight wars only to enrich the sovereign but rather to promote the broader interests of their citizens. Francis Lieber, a central figure in the modern development and codification of IHL, wrote, "It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, suffer, advance and retrograde together, in peace and in war."[194] Lieber concluded, "The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war."[195]

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close ties to Putin, the management board of Russia's second largest bank, and members of the Russian State Duma.

[188] President Biden made clear that these sanctions were intended to punish rather than deter. He stated, "I did not say that in fact the sanctions would deter [Putin]. Sanctions never deter . . . ." Alexander Ward & Joseph Gedeon, *What Biden Means by 'Sanctions Never Deter'*, POLITICO (Mar. 25, 2022, 4:37 PM), https://perma.cc/BK7J-Y5N2.

[189] U.S. Dep't of Treasury, *supra* note 187.

[190] @POTUS, TWITTER (Mar. 24, 2022, 6:27 AM), https://perma.cc/SE7P-F8AR.

[191] Eyal Benvenisti, *The Origins of the Concept of Belligerent Occupation*, 26 LAW & HIST. REV. 621, 624–26 (2008) (describing the evolution and substance of the Rousseau-Portalis doctrine); MULDER, *supra* note 175, at 16.

[192] This was not an entirely new concept. Hugo Grotius also viewed war as a clash of nations, in which the entire hostile nation, including its citizens, was considered the enemy. Grotius believed that only those classes of citizens that did not contribute to the war—such as women, the elderly, children, and merchants—should be protected from attack. *See* Manzo, *supra* note 166, at 40.

[193] Trumbull, *supra* note 93, at 546.

[194] U.S. Dep't of War, General Orders No. 100, Instructions for the Armies of the United States in the Field, art. 20 (Apr. 24, 1863).

[195] *Id.* art. 21. Lieber does express some need for restraint against the civilian population, stating that "the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit." *Id.* art. 22; *see also* Mark Chinen, *Complexity Theory and the Horizontal Vertical Dimensions*

This idea of collective responsibility for state conduct is now reflected in both international law and ethics. While largely anathema to criminal law,[196] collective responsibility is an inherent feature of international law, which generally regulates the collective action of a state rather than the specific conduct of individuals.[197] The state alone represents and exercises the rights of its citizens in the sphere of international relations. This has two important, related implications. First, with certain exceptions, an individual acting under the authority of a state is not legally responsible for a violation of international law. The wrongful act is attributed to the state. Second, the entire population is ultimately responsible for wrongful conduct attributed to the state. As Hans Kelsen wrote in 1943, "[A]ccording to international law . . . the subjects of the State are collectively responsible for the acts of the organs of the State . . . ."[198]

Similar to legal responsibility, "[m]oral guilt might be attributed to an entire nation when that nation has engaged in egregious historical wrongs, such as launching an aggressive war without cause or persecuting a minority."[199] One commentator writes that since war is fought on behalf of a public who may benefit from that enterprise, "[m]oral responsibility cannot easily be shifted away from ordinary civilians so as to leave them innocent of unjust actions taken in their name and with their acquiescence."[200] Collective moral responsibility for state conduct, like responsibility under international law, is generally based on the Hobbesian theory of the principal-agent relationship between a population and its government.[201] Populations choose (with varying degrees of freedom) their governments and authorize (with varying degrees of consent) those governments to represent their interests. The citizens of a state, Hobbes wrote, are "but many Authors, of everything their Representative saith, or doth in their name; Every man giving their common Representer, Authority from

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of State Responsibility, 25 EUR. J. INT'L L. 703, 715–21 (2014) (describing ethical views on moral collective responsibility).

[196] Criminal law accepts some degree of collective responsibility in offenses such as conspiracy, in which all members of a conspiracy are held liable for the actions of a single individual. Nevertheless, these theories still require that the defendant take some voluntary step to further the criminal enterprise, even if that defendant did not have the specific intent to commit the particular offense.

[197] HATHAWAY & SHAPIRO, *supra* note 19, at 269 ("[I]nternational law operates according to the principle of collective responsibility."); Antti Korkeakivi, *Consequences of "Higher" International Law: Evaluating Crimes of State and* Erga Omnes, 2. J. INT'L L. STUD. 81, 85 (1996) ("[E]ven the classical authors of international law considered some type of collective responsibility inevitable in the international legal system.").

[198] Hans Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CAL. L. REV. 532, 534 (1943).

[199] George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L. CRIM. JUST. 539, 547 (2005).

[200] McPherson, *supra* note 34, at 504; *see also* Kamm, *supra* note 98, at 400 ("[C]itizens are liable for bearing certain costs imposed by their government in order to stop the injustices of their own country, even though they are not personally responsible for its policies.").

[201] Avia Pasternak, *The Collective Responsibility of Democratic Publics*, 41 CAN. J. PHIL. 99, 99–100 (2011) ("[T]here is a common underlying assumption, both in academic writings and in popular perceptions of democracy, that a people living under a democratic government is ultimately responsible for that government's policies."). Pasternak argues that a people bear collective moral responsibility for a state's policies only under certain circumstances where they exert some influence over government action. Attributing collective responsibility for state conduct to citizens of an autocratic or illiberal state may thus be less justified if there is no meaningful principal-agent relationship between the government and the people.

himselfe [sic] in particular; and owning all the actions the Representer doth . . . ."[202] This is particularly the case with certain functions such as national security, regarding which populations cede to their government the exclusive power to act on their behalf. The population of a state thus bears some moral responsibility for the wrongs committed by their government in exercising this authority.[203]

The collective responsibility of a population may be debated or negligible with respect to state policies over which the general population has little interest or knowledge, such as an environmental policy that endangers some bird species. This cannot be said of decisions to wage war, where a nation's collective responsibility is perhaps the clearest. Steve Sheppard writes, "The circumstances in which this guilt is most clearly collective upon the group of the whole citizenry of a state are when the wicked acts are of a form that requires a state to commit them. States alone can enact laws, enter treaties, and most importantly, engage in most forms of war."[204] War is inherently a collective effort, involving the mobilization of large segments of the population.[205] Civilians directly support war through, among other activities, manufacturing armaments and supplies, writing propaganda, attending rallies, giving blood, donating to military charities, or displaying signs of support for the troops. Civilians also indirectly support war by paying taxes and participating in political processes. Wars, even unjust ones, often unify populations around a common cause and a common flag.[206]

Citizens are thus liable to collectively suffer the consequences of their state's involvement in an unjust war. As a legal matter, this can entail reparations, economic sanctions, trade tariffs or restrictions, the expulsion of diplomats or closure of diplomatic facilities, and other counter-measures that affect the general population of the offending state.[207] From the moral or political standpoint, Avia Pasternak argues that "other agents in the world (e.g. other political communities) may subject [the public

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[202] THOMAS HOBBES, LEVIATHAN 126 (W. G. Pogson Smith ed., Oxford Univ. Press 1958) (1651). There are various theories of collective responsibility. Some ethicists argue that a people can only be collectively responsible for state conduct in countries where there is legitimate democracy. Others argue that collective moral responsibility for state action is based on individual conduct, such as citizens' commitment to and support for the state. Others believe that collective responsibility is based on the social connections shared by citizens of a state. The idea of collective responsibility for state action is also disputed by some. *See* Jan Narveson, *Collective Responsibility*, 6 J. ETHICS 179 (2002) (arguing that moral responsibility must be based on individual conduct or intent).

[203] *See, e.g.*, John M. Parrish, *Collective Responsibility and the State*, 1 INT'L THEORY 119, 128 (2009) (arguing for an "authorized state account" of collective responsibility based largely on the Hobbesian social contract); Gabriella Blum, *The Crime and Punishment of States*, 38 YALE J. INT'L L. 57, 100 (2012) ("In the case of democracies, especially, there is reason to suggest that the collective citizenry is responsible for its leadership's actions.").

[204] Steve Sheppard, *Passion and Nation: War, Crime and Guilt in the Individual and the Collective*, 78 NOTRE DAME L. REV. 751, 770 (2003).

[205] *Id.* ("[F]or the last two centuries, the maintenance of wars to effect political change or satisfy other strategic objectives has required the commitment of a permanent or nearly permanent structure capable of mobilizing a sizable portion of a nation's wealth and, often, manpower.").

[206] Joshua Greene describes the profound effect that tribalism has on societies' moral beliefs. Citing a study by historian by David Hackett, Greene notes that the southern states in the United States have "strongly supported every American war no matter what it was about or who it was against . . . ." GREENE, *supra* note 64, at 78. Similarly, Russia's occupation and purported annexation of Crimea was very popular among the Russian people. *See* Steven Pifer, *Crimea: Six Years after Illegal Annexation*, BROOKINGS INST. (Mar. 17, 2020), https://perma.cc/KX2W-5EBM.

[207] Fletcher & Ohlin, *supra* note 199; *see also* Blum, *supra* note 203, at 102 (noting that it is the population of a state that bears the brunt of consequences for international law violations, such as sanctions or reparations).

expressing support for an unjust war] to a range of reactions, such as anger, resentment, maybe even collective punishment . . . ."[208] These reactions are evident not only in the government sanctions imposed against the Russian economy,[209] but also in the tide of anti-Russian sentiment in many countries following Putin's widely condemned aggression against Ukraine in 2022. Russian citizens living abroad, many of whom were opposed to the war in Ukraine, nevertheless "fac[ed] a wave of generalized hostility."[210] Governments stopped giving visas to most Russian nationals, business refused to serve Russian citizens, landlords raised the rents of Russian tenants, and many Russians received verbal abuse in the streets or hate mail in their homes.[211] In many Western countries, Russians were collectively seen as culpable by virtue of their nationality, regardless of their individual contributions or personal beliefs about the war.

The purpose of this Subpart is not to argue that collective responsibility for state wrongdoing can justify any particular consequence or punishment, but rather to explain its legal underpinnings and modern manifestations. Furthermore, to say that a population is collectively responsible for a transgression by its state is not to say that all people are equally responsible. Collective responsibility "must be measured and distributed in relative degrees of participation."[212]

C. A Slippery Moral Slope

The idea that civilians can be non-innocent for significant contributions to an unjust war should not be controversial. From the ethical standpoint, the idea that civilians with sufficiently high degrees of non-innocence can forfeit their right to life in war is well-established in the philosophical literature and traditional theories of self-defense. And, as demonstrated in Subpart A, perceptions of non-innocence strongly influence societal views on killing in war. Looking to non-innocence to determine who may permissibly be harmed in war also addresses the innocent bystander problem in a way that the DDE cannot.

In practice, however, there are substantial challenges for a rule of immunity based on moral innocence. First, the problem of degree. In any war, civilians will perform myriad functions that contribute to their state's war effort in varying degrees, and there will inevitably be a spectrum of non-innocence among the civilian

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[208] Pasternak, *supra* note 201, at 110.

[209] Following Russia's illegal invasion of Ukraine in 2022, for example, the United States and European Union imposed massive sanctions on Russia "with the explicit aim of damaging Russia's economy, cutting it off from international finance and barring it from importing key technologies." Paul Hannon, *Russia Set for Steep Slump and Long Stagnation in Wake of Ukraine War*, WALL ST. J. (Mar. 31, 2022, 8:50 AM), https://perma.cc/7EQU-DTNN. These sanctions not only affect the individuals and corporations directly fueling the military campaign, but they will harm the entire population, causing the Russian economy to constrict by an estimated ten percent. *Id.*

[210] Karla Adam et al., *Anti-Russian Hate in Europe is Making Chefs and School Children Out to Be Enemies*, WASH. POST. (Mar. 7, 2022, 11:38 AM), https://perma.cc/4QDD-QZEY.

[211] *Id.*; *see also* Sophia Ankel, *Russians Who Fled Their Homes Over the Ukraine Conflict Say They're Getting Heckled and Charged Higher Rent in Other Countries*, BUS. INSIDER (Mar. 21, 2022, 9:27 AM), https://perma.cc/R7GU-AT3L.

[212] George Fletcher, *The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1538 (2002). In this Article, I do not argue that collective responsibility can justify the military practices that resulted in the deaths of millions of civilians over the past century.

population.[213] Civilians who directly and voluntarily contribute to the military campaign or who were involved in the decision to go to war will have more responsibility than civilians who contribute indirectly. We cannot say that every civilian with some degree of individual or collective responsibility forfeits her right to life, as harm inflicted in self-defense must be proportionate to the threat posed or responsibility for such threat.[214] A patriotic citizen who donates blood for a military blood bank may further the war effort to a minor degree, but few would think that she should forfeit her right to life due to such a minor contribution. The lack of any metric to distinguish among degrees of non-innocence or a bright line to inform who may permissibly be harmed creates a dangerous slippery slope. It increases the risk that states will deem all enemy civilians equally culpable and thus equally subject to attack. This can result in unrestrained warfare and mass civilian harm, as "the partially non[-]innocent make up a much larger class than the fully non[-]innocent."[215]

Second, there is an epistemic problem. It would be nearly impossible in combat to determine which civilians are non-innocent, much less the degree of an individual's non-innocence. Militaries have no way of assessing the moral culpability of thousands or millions of individuals among the opposing population. Sophisticated surveillance assets, such as unmanned aerial vehicles, can sometimes provide information that could inform determinations in discrete cases. These capabilities, however, are limited and primarily used to collect information on military targets, not the civilian population.[216] Further, they may not be available in "dynamic targeting" situations or in enemy-controlled territory.[217] The nature and exigencies of war require soldiers to act with incomplete information. Confining civilian harm only to those individuals determined to be non-innocent would thus be practically impossible on any large scale under the current realities of war.

In sum, using non-innocence as the criteria for determining who may be harmed in war has theoretical advantages over the DDE and is generally consistent with how people view the morality of inflicting civilian casualties. At the same time, it suffers from practical problems that can, if unchecked, lead to total war and mass civilian harm. The challenge is distinguishing the most non-innocent from the rest of the population and then confining harm to the former rather than the latter.

VI. A Revised Narrative of the Principle of Proportionality

This Part proposes a revised narrative of the PP, including its moral and humanitarian shortcomings as well as its potential benefits. Importantly, the PP, like the principle of distinction, is not itself a moral rule. A faithful application of the PP will not necessarily yield morally permissible results, as the principles of IHL do not overlap entirely with the ethical principles of self-defense. The laws of war necessarily

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213 Fellmeth, *supra* note 85, at 471.

214 Betsy Perabo, *The Proportionate Treatment of Enemy Subjects: A Reformulation of the Principle of Discrimination*, 7 J. Mil. Ethics 136, 139 (2008) ("In wartime, individuals should be subject to harm proportionately according to the extent to which they have taken actions or made threats . . . and the degree to which they are guilty for the initiation or prosecution of the war.").

215 McPherson, *supra* note 34, at 486.

216 *See generally*, Joint Chiefs of Staff, Joint Pub. 3-84, Joint Air Operations, at III-7, -9 (2016) (discussing surveillance assets, dynamic targeting, and resource allocation).

217 *Id.*

entail some moral trade-offs because the enterprise it seeks to regulate will never be perfectly moral.[218] The PP is no different. While the PP sanctions the immoral killing of innocent civilians in certain circumstances, it also has a systemic moral benefit. Importantly, as discussed below, the PP limits the scope of war by buttressing the concept of civilian immunity and the principle of distinction. These are critical but brittle safeguards in preventing unrestrained war.[219]

The primary moral shortcoming of the PP is that it can legally sanction knowing or foreseeable harm to innocent civilians. IHL prohibits direct attacks against all civilians not participating directly in hostilities, but the PP permits attacks against military objectives that are expected to cause civilian harm, provided that such harm is not greater than the military advantage anticipated.[220] The considerations that determine whether collateral damage is lawful under the PP are the intentions of the attacker and the expected military advantage of the attack. Military advantage and good intentions, however, cannot justify the killing of civilians who have not forfeited their right to life. The moral prohibition on killing innocent bystanders, even in self-defense, applies in war just as in peace. For the reasons articulated in Part IV, the DDE cannot overcome this categorical prohibition. Combatants who launch attacks with the knowledge that civilians will be killed or harmed run the risk that they may engage in morally prohibited conduct if innocent civilians are injured or killed.

It is tempting to conclude that we should thus reject the PP and prohibit all attacks that are expected to cause civilian harm. The risks that soldiers will incidentally kill innocent civilians is simply too great. Indeed, rejecting the PP would theoretically be possible. States could still engage in warfare in a world in which foreseeable collateral damage is prohibited, although they would likely need to fight on battlefields where there are few civilians. Combatants would still be able to distinguish legitimate targets (other combatants) from illegitimate targets (civilians). We can reasonably contemplate war in which neither side may permissibly cause foreseeable harm to civilians. If rejecting the PP would lead to such an outcome, then surely it would be a welcome moral and humanitarian development.

Unfortunately, such a radical shift in warfare will not likely materialize. Wars are becoming more—not less—urbanized, placing civilians at greater risk. Granting civilians full immunity would create strong incentives to abuse such protections, including by embedding military objectives within the civilian population and using civilians as human shields, or to ignore these protections all together. As previous efforts to restrain warfare have shown, states are unwilling to elevate humanitarian considerations beyond those of military necessity.

A complete prohibition on causing harm to civilians in war would also be overly restrictive and morally arbitrary, given that certain classes of civilians may contribute more to the war effort than certain classes of combatants.[221] This sense of arbitrariness, combined with military interests, could cause states to expand the definition of "combatant" to include anyone who contributes to the war, thereby exposing vast segments of the population to direct attack. Indeed, many moral philosophers

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[218] Understanding these divergences between law and morality, however, can help promote more ethical decision-making on the battlefield.

[219] Slim, *supra* note 157, at 487 ("While strong in rhetoric and law, the civilian idea continues to be as weak in the theory and practice of war in the modern era as it has always been.").

[220] *See supra* notes 92–93 and accompanying text.

[221] Mavrodes, *supra* note 87, at 123–24.

propose a more expansive definition of combatant, or the category of persons liable to attack, to include persons whose activity is "immediately and directly related to the war effort."[222] This risk of expansion was made explicit by Dwight F. Davis, the former United States secretary of war, who in 1923 stated: "If there should ever be another war, we must realize that it is not only the Army and the Navy which may be on the firing lines. We must realize that there may be no non-combatants."[223] These words were prophetic of the aerial bombing campaigns of World War II, which were often justified on the grounds that civilians supporting the war were liable to direct attack.[224]

The PP helps to prevent this reversion to total war by reconciling two conflicting moral intuitions: (1) the moral imperative of protecting innocent life in war requires certain bright-line rules, such as a prohibition against harming civilians; and (2) some or many civilians are non-innocent and may be permissibly attacked. A rule intended to identify who should be immune from harm based on either of these moral intuitions alone would risk going down the slippery slope towards unrestricted warfare. A bright-line rule that fully immunizes civilians from incidental harm would almost certainly define that class of persons narrowly, rendering many non-combatants subject to direct attack.[225] A rule based on innocence would similarly expose much of the civilian population to direct attack for the epistemic and degree problems described in Part V.

The PP can thus be understood as a legal compromise that helps to limit the scope of war. It permits IHL to maintain a broad definition of civilian (i.e., essentially anyone who is not in the armed forces or similar organized armed groups), thereby protecting civilians from direct attack, because it does not grant absolute immunity to civilians. It permits incidental harm to civilians under certain circumstances. Civilians cannot be targeted directly, but they are not exempt from the hardships or risks of war. Civilians working in or near military objectives are particularly exposed to these risks. This intermediate degree of protection afforded to civilians under the PP helps to maintain both the broad definition of civilian in IHL, as well as the bright-line distinction between combatant and civilian. The PP's acceptance of collateral harm to civilians is a release valve, reducing the pressure to further restrict the definition of civilian or expand the definition of combatant.

In sum, the PP can promote ethical and humanitarian objectives at the systemic level in war by preventing the erosion of the historically fragile combatant/civilian distinction. Nevertheless, at the micro level, attacks that are considered lawful under the PP may nevertheless be deemed morally impermissible to the extent that they cause foreseeable harm to innocent civilians. Militaries can, however, take steps to reduce the likelihood of committing immoral attacks. The fact that certain attacks are lawful does not mean that they are ethical. It is thus essential that we distinguish the factors that might render an attack lawful under the PP from the factors that might

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[222] *Id.* at 119.

[223] Trumbull, *supra* note 93, at 547 (quoting Dwight F. Davis, Assistant Sec'y of War, Speech at St. Louis, Mo. (Oct. 1, 1923)).

[224] Af Jochnick & Normand, *supra* note 93, at 78.

[225] Throughout history, efforts to define the class of persons immune from attack were narrowly tailored. For example, in the thirteenth century, canonical law identified only eight classes of protected non-combatants, including "clerics; monks, friars and other religious [sic]; pilgrims; travellers [sic]; merchants; peasants cultivating the land; and those who are naturally 'weak'—women, children, widows and orphans." Slim, *supra* note 157, at 493.

render an attack morally permissible. In the planning and execution of attacks, commanders must keep in mind the prohibition on killing innocent bystanders and take all efforts to avoid such incidental harm, even when it may be legally permitted under the PP.[226]

Before concluding, it is important to emphasize that this narrative of the PP is limited to international armed conflicts (IACs), meaning conflicts between two or more states. Civilians in areas affected by non-international armed conflicts (NIACs) (i.e., conflicts between a state and a non-state armed group such as the conflict between the United States and Al-Qaeda) are often differently situated from civilians in IACs. Civilians in NIACs, for example, are often neutrals and do not contribute to the war or bear responsibility for the acts of non-state armed groups operating within their country. Furthermore, nonstate armed groups frequently seek to embed their fighters and equipment within the civilian population, thus exposing innocent civilians to greater risk. Accordingly, in NIACs, there is a greater risk that attacks causing collateral damage will impermissibly harm innocent civilians. While this discussion is beyond the scope of this Article, the morality of civilian harm in NIACs is a topic that warrants much more analysis and discussion.

VII. CONCLUSION

This Article addresses the question of how collateral damage permitted under IHL can be reconciled with the moral prohibition on killing innocent bystanders. All individuals have a right to life, in both war and peace, and are immune from attack unless they forfeit that right. The Doctrine of Double Effect cannot justify collateral damage in war, as neither the good intentions of the attacker nor the good consequences of an attack can overcome individuals' immunity. Persons must do something to forfeit their immunity from attack, such as directly contributing to an unjust war or being responsible for such a war. Accordingly, attacks expected to result in harm to innocent civilians cannot be morally justified. Any collateral damage must be confined to non-innocent civilians.

The PP is morally flawed because it fails to distinguish between innocent and non-innocent civilians, and thus allows combatants to lawfully kill innocent civilians in certain circumstances. Nevertheless, we should be cautious in categorically rejecting the PP. War will never be an entirely ethical enterprise. The PP, like other rules of IHL, may therefore need to sacrifice deontological purity to promote broader humanitarian objectives, such as limiting the scope of and suffering caused by war. The PP does this by helping to safeguard the expansive (but fragile) definition of civilian under current IHL and the related principle of distinction, which prohibits direct attacks against all persons who are not part of the armed forces. The PP provides only an intermediate degree of protection to civilians, but this intermediate protection is an improvement over the form of total war waged throughout much of the twentieth century. At the same time, ethically minded states need not be satisfied with

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[226] This exceeds what is currently required under the obligation to take "feasible precautions" to avoid or minimize incidental loss of civilian life. *See* AP 1, *supra* note 66, art. 57. Feasible precautions are generally understood to mean "those that are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations." *See* DOD LAW OF WAR MANUAL, *supra* note 17, § 5.2.3.2. Military considerations cannot ethically justify the foreseeable killing of innocent bystanders.

the moral shortcomings in the PP. Removing the illusion that the DDE can justify all the collateral damage authorized by the PP will hopefully prompt greater discussion on how to implement more ethical methods of warfare.