
War, Innocence, and the Doctrine of Double Effect

Author(s): Judith Lichtenberg

Source: *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*, Vol. 74, No. 3 (Jun., 1994), pp. 347-368

Published by: [Springer](#)

Stable URL: <http://www.jstor.org/stable/4320501>

Accessed: 06/01/2011 18:15

Your use of the JSTOR archive indicates your acceptance of JSTOR's Terms and Conditions of Use, available at <http://www.jstor.org/page/info/about/policies/terms.jsp>. JSTOR's Terms and Conditions of Use provides, in part, that unless you have obtained prior permission, you may not download an entire issue of a journal or multiple copies of articles, and you may use content in the JSTOR archive only for your personal, non-commercial use.

Please contact the publisher regarding any further use of this work. Publisher contact information may be obtained at <http://www.jstor.org/action/showPublisher?publisherCode=springer>.

Each copy of any part of a JSTOR transmission must contain the same copyright notice that appears on the screen or printed page of such transmission.

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.



Springer is collaborating with JSTOR to digitize, preserve and extend access to *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*.

<http://www.jstor.org>

WAR, INNOCENCE, AND THE DOCTRINE OF DOUBLE EFFECT

(Received 16 February 1993)

FOUR QUESTIONS ABOUT KILLING THE INNOCENT IN WAR

Is it permissible to kill innocent people in war? The insistence that it is not stands as a central tenet of just war theory, guiding the rhetoric and sometimes the behavior of nations as well as the beliefs of ordinary citizens. It is partly the gap between theory and practice that forces us to look more closely at this principle. Innocent people *are* killed in war; in modern warfare it seems inevitable that large numbers of them will be killed. We may suspect that this fact reflects the paradox in the very idea that there could be rules of war, when war seems to signify the dissolution of rules.

To evaluate fully the principle that forbids the killing of the innocent requires answers to several questions. I shall be concerned here primarily with only one of them, but it is worth mapping the larger terrain, both because I shall touch on some of these other questions and because it is important to see just what issues we must resolve to decide whether or when it is permissible to kill innocent people in war.

1. First, what does "innocent" mean? Just war theory generally equates the class of innocent people with the class of noncombatants. So, in general, civilians are innocent and soldiers are not. Now it is obvious that this distinction is not sharp: there are soldiers in noncombatant roles and, perhaps more important, there are nonsoldiers, such as those who make or transport weapons, in roles that seem to qualify them as combatants and therefore as legitimate targets. Just how and where to draw the line may be difficult question, but like other borderline case questions it raises no intrinsic problems for the rule forbidding killing the innocent.

2. That the rule requires the solution of deeper issues becomes clear, I believe, once we try to say what about the class of combatants (many soldiers and some others) renders them noninnocent in the relevant sense – i.e. legitimate targets – and, conversely, what about the class of noncombatants renders them morally immune from attack. What seems to be the standard view today is that, despite the moral and psychological overtones attaching to talk of innocence, the crucial fact about combatants is that they are threatening their adversaries; that is what justifies attacking them.² I don't think things are as simple as that.

A soldier is not merely an “innocent threat” in the way a baby shot out of a cannon hurtling toward you would be. Nor, however, is he akin to the ordinary murderer, who is both threatening and “guilty.” Soldiers seem to fall somewhere between these two cases. But we must be able to say more precisely what it is that makes them legitimate targets.

The question is complicated by the fact that wars take place not between individuals but between nations. In many respects the soldier's relationship to his country is no different from that of ordinary citizens. He is no more responsible for the government than they; he is no more responsible for the war's having begun. In many if not most cases he has simply been unlucky – unlucky to be young and male and healthy. True, however, he came to be there, he is doing the shooting and others are not. In some sense he has consented to do it. (Does it matter whether he enlisted or was drafted? Whether his country is democratic or authoritarian?) Many people, myself included, will be made uncomfortable by the strong kind of responsibility these points suggest. For they push the soldier, at least the soldier on the wrong side, closer to the criminal than we ordinarily take him to be.³

Such reflections may undermine our confidence in the distinction between combatants and noncombatants. They lead us in the direction of George Mavrodes's idea that the distinction depends not on an intrinsic moral difference but on a pragmatic calculation that in the long run there will be less carnage and destruction if we limit battle to a circumscribed class of people.⁴

For the moment I shall assume that these considerations do not vitiate a distinction coinciding roughly with that between soldiers and civilians.

3. Should we take the rule that prohibits killing civilians noncombatants in war to hold under all circumstances, or only for the most part? The rule against killing civilians is ordinarily put in an exceptionless form, but even among those seriously committed to just war theory, it is not uncommon to make exceptions for certain unusual or emergency situations.⁵

4. We shall return to some of these issues below, but here I want to concentrate instead on a fourth question that is also central to the rule prohibiting the killing of innocents in war, namely, what does it mean to *kill* innocents? This sounds at first like a scholastic question, for “killing” does not strike us as a particularly vague or imprecise term. But in fact it contains an ambiguity that is of the first importance for deciding the permissibility of killing innocents in war. The ambiguity reveals itself when we realize that some civilians are inevitably killed in the course of warfare, especially in modern warfare. And those who conduct military operations often know that their actions will kill some civilians. It follows that either the killing of civilians is sometimes morally permissible or at least not impermissible (perhaps amoral, if war itself, as the political realists would have it, is beyond the realm of morality); or else war is morally unjustifiable and one must become a pacifist.⁶

For those who find pacifism unacceptable but who at the same time refuse to conclude that war is “beyond” or “outside” morality, it is common to distinguish two general categories of killing and to argue that only killing in one of those categories is forbidden. This is the argument implicit in the doctrine of double effect (hereafter the DDE), originally articulated by Catholic theologians in the Middle Ages to justify the conduct of warfare. According to the DDE, it is never permissible to kill innocents directly – that is, one may never *aim at* or *intend* their deaths. (The assumption that we can distinguish innocents and noninnocents – challenged in the second question – is granted here.) You may kill innocents neither as an *end*, as you might if you were malicious, nor (the more likely alternative in war) as a *means*, as you might if you saw their deaths as a way of winning the war. But you have not necessarily done something impermissible or immoral, on this

view, if in the course of a legitimate military operation – that is, one aimed at and intended only to destroy a military target – some civilians are killed, even if you know or foresee that they will be killed.

It is easy to see the difference that the DDE is driving at, although the germ idea has been expressed in different ways. For those who are inclined to say that there are some things you may not *do* (with the implicit or explicit rider “no matter what will happen if you don’t”), it has seemed important to ensure that the DDE track the distinction between what you do on the one hand, and on the other what you merely allow, or what happens as a result or a byproduct or a side effect of what you do. Such people will say that in the relevant sense you do not kill a person if you foresee her death, even if you foresee it with certainty, unless you also aim at it or intend to bring it about. So the prohibition on killing innocents can stand, because, according to this view, you do not (in cases of collateral bombing, for example) kill innocents. Others may not put the emphasis on doing versus allowing, and thus may acknowledge that you do kill innocents in these cases, but they deny that killing them is forbidden in the way it would be if you intended to kill them.

For our purposes it doesn’t matter very much how we speak, as long as we keep the relevant distinction in view. We can appreciate the difference between aiming at or intending to bring about someone’s death, and aiming at or intending something else, while recognizing that someone’s death will occur as a consequence or side effect or byproduct of the act one intends. We can appreciate the difference – that is, we can see that there is a difference – without assuming an answer to the question whether that difference is morally significant. It is this latter question that renders the DDE controversial; it is this question I want to address.

BENNETT’S ANALYSIS

The usual means of analyzing the DDE is through examples. The examples come in pairs, because the point is to test our intuitions about

whether two cases, alike except that one involves the intention to bring about a certain result A while the other involves an intention to do something else with the knowledge and foresight that A will result, are morally equivalent.

This pair of examples about the targeting of innocent people in war is commonly taken as providing strong intuitive support for the DDE:⁷

Tactical bombing – the tactical bomber attacks a military target (a munitions factory, say) in a densely populated area, knowing that civilians in the surrounding neighborhood will be killed.

Terror bombing – The terror bomber drops his weapons on a civilian neighborhood, hoping thereby to lower enemy morale and force or hasten a surrender.

But the argument for a moral difference between these two cases has been severely eroded in an analysis given by Jonathan Bennett.⁸ Bennett's argument is worth examining in detail.

Bennet asks what the difference is between the tactical bomber and the terror bomber, beyond the fact that the terror bomber intends the civilian deaths and the tactical bomber does not. One might initially think that the tactical bomber doesn't want the civilians to die, while the terror bomber does. Indeed, a good deal of the general plausibility of the DDE comes from the thought that one who intends something desires it, and thus in the difficult cases that the DDE raises is psychologically committed in some way to an evil, while one who merely foresees the evil need not be psychologically committed in this way. Thus the common association of intending to kill with malice; mere foresight of death does not have the same association.

As Bennett argues, however, neither the tactical bomber nor the terror bomber need regard civilian deaths as intrinsically desirable; at the same time, both foresee them and are willing to accept them. The tactical bomber, recognizing that an inevitable consequence of his raid will be civilian casualties, "would rather have civilian deaths than not have his raid."⁹ We can appreciate Bennett's point easily by conceiving

the choice in each case as a package deal: just as the terror bomber must kill civilians to achieve his aim of lowering enemy morale, to destroy his military target the tactical bomber must also accept civilian deaths.¹⁰ To get one thing that you want, you must take something else that you may not want. The terror bomber need not, and probably does not, “want” civilian deaths any more than the tactical bomber does.

Perhaps we should say – Bennett continues – that the terror bomber is *motivated* by his belief that the raid will produce civilian deaths, while the tactical bomber is not. Bennett argues that the crucial question is how their respective behavior would have differed had their beliefs differed in given ways. What, in other words, do their different intentions amount to?

To answer this question, we ask each “If you had believed that there would be no civilian deaths, would you have been less likely to go through with the raid?” But there are different ways to understand this question. Let us consider the possible interpretations:

- (a) If no civilians were to die, but all else remained the same.

In that case, neither would call off the raid, because the tactical bomber would still have destroyed the factory, and the terror bomber would still have lowered enemy morale.

- (b) If no civilians were to die, together with whatever follows from that causally.

In that case, both would call off the raid, because the tactical bomber would not have destroyed the factory, and the terror bomber would not have lowered morale.

- (c) If no civilians were to die, “together with whatever follows from that, by virtue of his [i.e. the tactical or terror bomber’s] causal beliefs, through a causally *downstream* inference.”¹¹

In this case the tactical bomber will carry out his raid, because he thinks the factory will be destroyed (although no civilians will die), but the

terror bomber will not carry out his raid, because he thinks morale will not be lowered. So the only necessary difference between the two cases beyond the difference in intention seems to be the downstreamness of the causal process: killing civilians causes the lowering of morale, while it is caused by the raid on the munitions factory. Bennett argues that downstreamness is not morally significant, and that therefore there is no moral difference between the cases.

Now against this view it might be argued that downstreamness, while perhaps not in itself morally significant, correlates with a factor that many have taken to be highly significant: namely, whether one has used another person as a means. So one might say that the terror bomber uses civilians to achieve his end; their deaths are a means of lowering morale and winning the war. But the tactical bomber does not seem to use civilians to achieve this end.¹²

It's difficult to decide whether the two are morally the same or different without begging the question. On the one hand, it's given to us that in the one case the bad effect is upstream and in the other case downstream, so insofar as using as a means requires being a temporally prior causal precondition, then only the terror bomber uses civilians as a means; it is impossible for the tactical bomber to do so. But when we conceive of the choices as package deals, as I believe we ought to, and see that the tactical bomber, like the terror bomber, chooses a package containing civilian deaths, the relevance of temporality seems highly questionable. Doesn't the choice of a package that harms or kills people come to the same thing morally as using them as a means? It's not that the tactical bomber wants them to die, it's just that he would rather destroy the factory than not, and civilian deaths are a necessary concomitant of that. But similarly, it's not that the terror bomber wants civilians to die, it's just he would rather lower enemy morale than not, and their deaths are required for that to happen.

Perhaps one could explicate the notion of "using as a means," and thereby drive a wedge between the two cases, by arguing that a kind of necessary connection links the terror bomber's aim to the deaths of civilians, but that no such connection links the tactical bomber's aim with civilian deaths. You can't be a (successful) terror bomber without

killing civilians – that's what terror bombing is all about – but this is not so with tactical bombing.

Let me offer two replies to this argument. First, although it is true that if we consider the general class of tactical bombings then, in contrast to terror bombings, no necessary connection links the aim with the deaths of civilians. Below I will consider the significance of this general difference between tactical and terror bombing. But the crucial point here is that in the example as it is given to us, the tactical bomber *knows* that in carrying out his raid he will kill civilians; there is no way of prising apart this effect from the one he intends.

Second, although considered in itself it is clear that terror bombing essentially involves the killing of civilians,¹³ it is important to put the terror bomber's aim in context. Unless he is malicious, he is not interested in killing civilians *per se*. Doing so is a means to another end – lowering morale and thereby ending the war. So the attitude toward terror bombing waxes or wanes depending on its importance (i.e. its effectiveness, and its irreplaceability) in realizing this end. The point is not that you can't succeed at terror bombing without killing civilians – which is obvious. It is that your aims require terror bombing only in certain very specific circumstances. But so too, in the case we are considering, does the tactical bomber's aims require killing civilians.

I do not think, then, that Bennett's analysis is undermined by the argument that only the terror bomber uses civilians as a means or involves them in an essential way in his plan. But although I am persuaded that the two cases as described are morally equivalent, this is not the end of the matter. That two such cases are morally alike does not mean that aiming at civilians is always or even usually on a par with aiming at soldiers or military targets. Nor does it mean necessarily that the doctrine of double effect ought to be rejected. We need to examine the cases more carefully. What is it about them that convinces us of their moral equivalence? How do they compare with other examples that have been offered of double effect? And what, if anything, do they have to do with situations in the real world?

CERTAINTY AND PREDICTABILITY

What presuppositions make it plausible to think that Bennett's tactical and terror bomber cases are morally equivalent? The strategy of testing the DDE is to choose two cases parallel in every respect that in one the bad effect – here, the killing of civilians – is intended, while in the other it is foreseen but not intended. For the theoretical question is whether intention per se makes the moral difference, as the DDE claims. Thus, in keeping with this strategy, we must be supposing that the probability and number of deaths is the same in both cases. It is only on this assumption, which Bennett makes explicit at one point but does not adequately emphasize, that we dispel the initial sense that the cases are morally different.

At the same time there is an artificiality in the assumption that the probability and number of deaths is the same in cases where one intends them and cases where one merely foresees that they will occur. In real life, it is plausible to think that tactical bombers are ordinarily able to avoid civilian casualties in a way that terror bombers are not. For killing civilians is not what the tactical bomber is trying to do; indeed, if he is a good or even a minimally decent person then he is trying *not* to do it. This is at least part of what makes Michael Walzer's added proviso on the DDE attractive. Walzer argues that it's not enough that tactical bombers not intend civilian deaths; they must take active steps to avoid or minimize them, even if this means accepting risks to themselves.¹⁴

This idea is given further support when we consider that, particularly for someone whose actions impose great risks on other people, the sort of attitude captured by "not trying to harm them" – as against trying not to harm them – may seem morally indistinguishable from aggressively trying to inflict harm. Imagine someone who likes to race his car down suburban streets where children are playing – someone who can sincerely say he isn't intending or trying to hurt anyone, but who couldn't care less if he did and who drives as if he were on a racetrack. At best, his act is morally a hair's breadth from trying to run the children over.

To return to the central point, Bennett has shown, I believe, that insofar as the probability and number of deaths is the same, the question

whether you have intended or merely foreseen them is morally insignificant. This analysis helps explain why some of the cases used to buttress the DDE seem to most people utterly sophistical. I have in mind this standard pair of examples, often set forth by Catholic thinkers:

Hysterectomy – A doctor must perform a hysterectomy to remove a cancerous tumor from a pregnant woman in order to save her life. Performing the hysterectomy, the doctor knows, will kill the fetus.

Craniotomy – A doctor must perform a craniotomy to save a pregnant woman from dying in childbirth. The doctor knows that performing the craniotomy – the crushing of the fetus's head – will kill it.

The traditional Catholic interpretation of the DDE says that the first is permissible while the second is not, for in the first, it is said, the death of the fetus is a byproduct of one's intended act (the removal of the uterus), while in the second one intends to kill the fetus.

Opponents of this conclusion have argued that one can construe the intention in the craniotomy case differently. The intention is not, they say, to kill the fetus but merely to crush its head; the fetus's death is simply a byproduct. This move renders explicit something that arouses our suspicions of the whole doctrine. We are suspicious because it seems sophistical to argue that in performing a craniotomy you are not fully responsible or answerable for the death of the fetus; but likewise it seems sophistical to argue that in performing a hysterectomy you are not fully responsible. The reason is that you can be certain that the hysterectomy will kill the child, and you can be certain that the craniotomy will kill the child.¹⁵ If hysterectomy is permissible, so is craniotomy; if craniotomy is forbidden, so is hysterectomy.

The DDE is vulnerable, then, when the agent believes that the probabilities and magnitudes of harm are the same in both cases of the pair. And so we may want to say that other things being equal, intention alone doesn't matter; foresight and probability matter. These equivalences are easy to devise in artificial cases, but they also occur sometimes in the

real world. As we saw during the Gulf war, one might be faced with such a case if one knew that one's enemy had put civilians in a military installation, so that it would be impossible to hit one's target without striking civilians.

MEDIATED AND UNMEDIATED CONSEQUENCES

Those persuaded by the argument so far may still find examples that cannot be comfortably accommodated. If I perform (or refuse to perform) an action knowing that I will go to prison as a result, no one would say either that I intended to go to prison or that I am responsible or answerable for my going to prison in the way the authorities who sentence me are.¹⁶ If I fail a student who has threatened suicide if I fail him, and in fact he commits suicide, no one would say that I intended to kill him or that I am responsible or answerable for his death in the way I would be if I actually killed him.¹⁷

Now part of what distinguishes these cases (particularly the second) from the two sets of examples I have discussed so far is that we attach a smaller probability to the consequences than to those in the earlier cases. I may be fairly certain that if I do or don't do X I will go to prison, but I am not as certain as I am that if I perform a hysterectomy the fetus will die. I can be even less confident that a person will carry out a threat to commit suicide, especially for such a flimsy reason as failing a course. To the extent that the consequences in these cases are less than certain, we can explain them on the analysis just given.

But it's worth asking why the consequences might be less certain in these cases. Unlike the tactical bombing and hysterectomy cases, in both the prison and suicide cases the undesired consequence is mediated by the act of another human agent. Following Robert Holmes, we may distinguish mediated consequences, "those that depend upon the mediation of some choice, decision, or judgment – some cognitive response, let us say – on the part of other persons to the act in question," from unmediated consequences, which are not dependent in this way on other agents.¹⁸ The tactical bomber knows that his bombs will directly kill

civilians; the doctor knows that the hysterectomy will directly result in the death of the fetus. In neither case is any further human intervention necessary to produce the effect. But the disobedient's going to prison involves the intervention not simply of one other agent but of a complex institutional structure; for the teacher's failing the student to result in the student's death also requires another person's choice.

In general, causal chains weaken – become less certain and predictable – when their links consist partly of human choices rather than just physical laws. But it is plausible to think that an agent's responsibility for bad consequences ordinarily declines when other agents' actions are required to produce those consequences, even apart from the decline in probability.¹⁹ So, it may be said, I am answerable for the death of the fetus in a way I am not answerable for the death of the student precisely because the student made a choice to end his life, while no choice after mine was required to kill the fetus.

To say that the disobedient and the teacher are not answerable for the bad consequences in the way they would be if they intended them and acted so as to bring them about is, of course, not to say they bear no responsibility at all. The teacher is no murderer, but at least on some stories we could tell about the events she might bear some responsibility, and would almost certainly suffer some guilt feelings.

Now against this it might be argued that whether the consequences in question are mediated or not is morally irrelevant. If you *know* that if you do X then Z will happen, then even if Z requires the intervening decision of another agent to do Y, you are fully answerable for the occurrence of Z. So, on this view, the only important question concerns the degree of certainty connecting X and Z. I shall not attempt to resolve this question here; it raises a host of central issues dividing consequentialists from deontologists.

For my purposes here, the crucial point – and the only one I am relying on – is that where the bad consequence in question is *unmediated* by human agency, one is answerable for it in the way one would be if one intended it (tactical bomber, hysterectomy). Where the bad consequence is mediated, the DDE appears more plausible (disobedient, teacher), and perhaps only the staunchest consequentialist will argue for the complete answerability of the original agent.

FROM THEORY TO PRACTICE

Anybody who has thought about the DDE (or related issues, like the distinction between acts and omissions, or between doing and allowing) knows how subject our responses and views are to the vagaries of the cases we focus on. It's not surprising. We learn what the doctrine *is* essentially through examples, but the examples guide our thinking in ways that must lead us, if we are thoughtful, to be suspicious. The experience is familiar: in focusing on a particular pair of cases, you become convinced that there's something to the doctrine. You think of a different pair, and you're ready to conclude that it's a piece of specious reasoning. Some examples produce ambivalence, and sometimes we just don't know what we think. Moreover, it's always difficult to tell what conclusion to draw from a response to a given pair of cases. Since different pairs of intendings and foreseeings typically have other features associated with them (as above: certainty/uncertainty of consequences, mediated/unmediated consequences), it's hard to find a pure test for the distinction that is supposed to be in question. Is it intending/foreseeing, or something else, that is actually driving our responses in a particular case? How can we ever draw a general conclusion about the validity of the DDE?

Since my interest here is not so much in the validity of the DDE itself, but rather in its application to just war, I shall not do much more to answer this question than I already have. But even if we limit our inquiry to the significance of the DDE with respect to just war, it's more difficult than one might think to draw conclusions from our theoretical investigations. I have been analyzing in some detail a pair of artificial examples, leading to the conclusion that where all else remains the same there is no difference between tactical and terror bombing. But what does this have to do with genuine cases of tactical and terror bombing, where often little else remains the same?

Practically speaking, one of our main interests must be in setting out in advance the permissible rules of war. Preferably they will be set out in a way that is accessible to the ordinary person, the ordinary soldier. How then should we describe those military actions that are permissible? May one legitimately kill civilians? We are inclined to

answer: if this means may one in the course of legitimate military activity (the meaning of which must of course be specified) take actions that have the consequence that civilians die, the answer must sometimes be yes, if modern warfare is to be permissible at all. But aren't there some limits on what one may do to civilians? It seems plausible to think that those limits are captured in the DDE's distinction between tactical and terror bombing: one may not aim at civilians, one must even take steps to minimize civilian casualties, but one is not always prohibited from doing things that have civilian deaths as a foreseen result.

The foregoing argument has shown, I believe, that it is not the mere difference between intending and not intending that makes the moral difference. But one might nevertheless think that in general this difference is correlated with other morally relevant factors. At the very least, one is in general less likely to kill civilians if one is not *trying* to kill them. A related point might be put in terms of personal character and virtue: the sorts of people who don't intend to kill civilians (or any other bad consequence in question) will in general be better people than those who do. (The road to hell is paved mainly with bad intentions.) So one might argue that, the equivalence of the two bombing cases above notwithstanding, if we draw the moral line where the DDE draws it, between tactical and terror attacks, we will do a better job of avoiding evil than if we fail to refuse to draw such a line.

There's something to be said for this view. In general, people who don't intend the bad are better than those who do. But notice how different this perspective is from the one usually invoked in connection with the DDE. It has a rule-utilitarian (or motive-utilitarian, or perhaps virtue-ethical) flavor, and does not imply the absolutist/deontological view that aiming at an evil effect and foreseeing it as a consequence of one's action are from a moral point of view altogether different.²⁰ And like rule-utilitarian rules, it raises the question what an agent should do who realizes both that in a particular case utility is not served by the rule, and that her own character may not be harmed by its breach.

So the view that the DDE is a useful rule of thumb already involves a crucial shift away from the perspective generally associated with it. Nevertheless, let us follow up on this way of conceiving the DDE. It is clear that the prohibition on intending civilian deaths is a necessary

condition on acceptable action, not a sufficient one. Sometimes one *will* be prohibited from doing otherwise legitimate things that have civilian deaths as a foreseen consequence. To decide whether a military action is permissible depends, I believe, on our answers to three other questions. These questions we can take as implicit in the DDE's proportionality requirement, according to which, in Walzer's terms, "the good effect [must be] sufficiently good to compensate for allowing the evil effect."²¹

First, how great is the (unintended but foreseen) damage to nonmilitary targets, i.e. how much injury and death will occur to how many civilians?

Second, how important and nonsubstitutable is the military action in question to achieving one's aim? This is a complex and thorny question. We might take the typical aim of a military action to be contributing to the winning of the war. A different action might do the job but at a higher price in casualties to one's own side.²² Is it realistic, or right, to expect military decisionmakers to trade off noncombatant enemy casualties against casualties to their own soldiers? If they take the prohibition on killing the innocent seriously, it is clear that they must.

Third, how important is it that one win the war? Not every war is equally weighty, and a serious commitment to proportionality requires weighing the end against the means.

Taken seriously, then, the DDE constrains even tactical attacks with complex qualifications – qualifications involving the extent of noncombatant casualties, the necessity of the attack to the end, and the moral importance of the end itself. What follows? We were considering the argument that the DDE, although flawed in theory, will serve in practice – because in general it will roughly track a morally legitimate distinction between tactical and terror attacks, thereby resulting in fewer civilian deaths. But it is now clear that a morally serious adherent of the doctrine can never rest content with the mere assertion that one may not aim at civilians.

This is particularly true in modern warfare. Despite claims about "smart" weapons, bombs and other technologically advanced weapons do not much respect the line between combatants and noncombatants. We don't have to look far to find military actions that abide by the

letter of the DDE's rule not to intend civilian deaths, but that through indifference, recklessness, or insufficient care run afoul of Walzer's proviso and the proportionality requirement.

No one knows just how many Iraqis died during the Gulf war. Estimates of military deaths range wildly from a high of 100,000²³ to a low of 1,500.²⁴ As for noncombatants, a November 1991 report by the human rights organization Middle East Watch estimates 1,000 to 3,000 civilians killed directly by Allied attacks.²⁵ Even assuming the lower figure, given Iraq's population of roughly 18,000,000 and the length of the war, this is a large number – comparable to a United States loss of 13,000 civilians in six weeks. Twenty-five hundred civilian deaths in Iraq would be comparable to the U.S. losing more than 32,000 people. These figures do not resemble the image of a few scattered civilian deaths conjured up by military talk of “collateral damage” and by the DDE's language of “side effects.”

It is worth adding here a point about foreseeability. For it might be said that these casualties – some or many or most of them – were not foreseen and thus do not even belong in our discussion. Anscombe, who while defending the DDE is much concerned with its abuse, rails against those who under the sway of Cartesian psychology think of an intention as an interior mental act that can be produced at will. On this theory, “a marvellous way offered itself of making any action lawful. You only had to ‘direct your intention’ in a suitable way.”²⁶ The same point goes for foreseeability: we should not excuse people when they don't foresee what is right before them, because they have averted their eyes.

What conclusion should we draw about the utility of the DDE as a rule of thumb in military decisionmaking? On the one hand, if Allied conduct during the Gulf war is compatible with the DDE – because noncombatant deaths were not strictly intended – the doctrine reveals its weaknesses, and the suspicions raised by artificial examples turn out to be warranted even for real cases. On the other hand, if the DDE requires serious attention to the proportionality requirement and to Walzer's proviso, then it demands just as much reflection, calculation, and agonizing as we would need without it. It provides no shortcut to difficult decisions. I have already argued that its worth, if any, is not

intrinsic but heuristic; it now shows itself to be of limited value even as a rule of thumb.

COMBATANTS AND NONCOMBATANTS: AND WHO IS INNOCENT?

I have argued that there is no intrinsic moral difference between intending civilian deaths and foreseeing them, and that even in “the real world” the two are sometimes equivalent. But arguments abolishing a distinction are always double-edged. Should we conclude that all modern warfare is immoral, or that women and children are fair game? For many people, neither seems an attractive alternative.

The principle that in war some people are legitimate targets and some are not – whether framed in terms of the distinction between the noninnocent and the innocent, soldiers and civilians, or combatants and noncombatants – exerts a powerful hold on our intuitions and our responses. One who believes that it is always or absolutely wrong to kill the innocent, and who accepts my arguments against the DDE, will feel driven to pacifism. For if it is inevitable that modern warfare kills civilians, and that the DDE cannot explain away these deaths, then modern warfare is morally forbidden.

But another path is open to us: to question more closely the distinction between combatants and noncombatants. If there is no moral difference between directly killing the innocent and foreseeing that they will be killed as a result of what one does, it doesn't follow that one may not engage in tactical attacks that cause their deaths; one might instead conclude that it is *sometimes* permissible to kill them directly. The conclusion sounds chilling. But it is a tempting one for anyone who believes that, even if wars usually squander human life and other resources unnecessarily and unjustly, occasionally a war comes along that morally must be fought.

How should we then explain the permissibility of killing the innocent? One strategy taken by some just war theorists employs the “dirty hands” perspective. On this view, although extreme circumstances may sometimes warrant killing innocent people, a moral stain remains because in killing them you have still done wrong; you have wronged

them. This is the kind of account Walzer offers to justify the bombing of German cities early in World War II (he thinks the terror bombings later in the war were unjustifiable).²⁷

But this way of looking at the matter fits soldiers as well as civilians. You are not at war with the soldier personally; he's just the unlucky person who's been sent to do a job. Often he has little choice; sometimes, as with the Iraqi soldiers during the Gulf war, he has virtually none. If it's morally important to fight against his side, then you are justified in killing him, even though it is tragic that this ordinary guy has to die. It's not so much that civilians are guilty as that soldiers are innocent.

What about the argument raised in the first section, that the soldier, unlike the civilian, is *threatening* you, and that it's this fact that justifies your aggression against him? This argument will take us only so far, for the sense in which all enemy soldiers (and it is all enemy soldiers who are generally taken to be legitimate targets) are threatening you is quite attenuated. Most of them aren't threatening *you* directly; at most they are threatening someone else on your side. If your side loses as a result of the successful threats against enough of your fellow-soldiers, that doesn't necessarily threaten your life or the lives of your compatriots. Sometimes it does, in which case the self-defense model may hold up, assuming we can make the relevant connections between you and your compatriots, between you and your nation; but when it doesn't we must say that the threat in question is not to life itself but to something else worth fighting for – perhaps to a way of life.

This is not to say that the only thing that justifies war and the killing of other people is self-defense narrowly defined. Most people think that war is justified to defend some ways of life against others; most people think it is justified to defend not just ourselves personally but our compatriots or even our fellow human beings. But in that case we might find an image less misleading than that of the threat. We might instead say that the soldier or the enemy army *stands in the way* of your victory. The image of standing in the way is preferable to the image of the threat because it lacks the (on my view) misleading connotations of positive action.

So we might say that where your victory is morally important enough, you are justified in killing the soldier *if necessary*. But likewise, where your victory is morally important enough you may be justified in killing civilians *if necessary*. Under the current conventions and practices of war it will not generally be necessary to kill civilians, and in that case you may not do so. But if it is necessary to the end of victory, if no other morally preferable means is available, and if your side's victory is morally pressing, then, on this view, you are justified in killing civilians.

I began this section by claiming that my conclusions about the DDE could lead us either toward pacifism or toward a conception of warfare unrestrained by the apparently civilizing distinction between soldiers and civilians. But this either/or formulation is misleading. In fact, I believe, our conclusions should lead us in both directions at once.

On the one hand, we should be extremely cautious about going to war, because war inevitably involves the shedding of an enormous amount of innocent blood. The idea that war is a last resort plays a role in just war theory, but it is hardly ever taken seriously. Once we come to view soldiers as in crucial respects innocent, the human costs of war are that much greater. Considering the reasons for most wars, few seem worth the price.

On the other hand, on those occasions where war is justified, something very important must be at stake; and in such cases attacks on civilians may, sometimes, be necessary and justifiable (as perhaps they were in World War II, although certainly not to the extent they were employed). Where the end is sufficiently important and no other means are available, we may sometimes kill the innocent.

What underlies this conclusion is not simply a kind of realism or pragmatism that says that if things get bad enough, you are permitted to do what would ordinarily be forbidden. It is also the belief that the distinction between soldiers and civilians has much more of the conventional about it than we usually think.²⁸ It's a very useful convention, because it prevents war from infecting the whole of every life and destroying all that we value. And as long as the convention is in place, the circumstances in which killing civilians might be necessary

and justifiable are much rarer than those making military decisions might be inclined to believe. It may be all to the good if they are restrained by the thought that a sharp line separates combatants from noncombatants. We should not aim to abolish the distinction altogether, then, only to understand its nature and limits.

NOTES

¹ I am grateful to members of the philosophy departments at the University of Melbourne and Sydney, to students in my Fall 1991 Ethical Theory class at the University of Maryland, especially John Watts, and to David Luban for useful discussions.

² See, e.g., Thomas Nagel, "War and Massacre," *Philosophy & Public Affairs* 1 (1972); Robert Fullinwider, "War and Innocence," *Philosophy & Public Affairs* 5 (1975), and Lawrence A. Alexander, "Self-Defense and the Killing of Noncombatants: A Reply to Fullinwider," *Philosophy & Public Affairs* 5 (1976), all reprinted in Charles R. Beitz et al., *International Ethics* (Princeton: Princeton University Press, 1985). See also Jeffrie Murphy's interesting account in "The Killing of the Innocent," *The Monist* 57 (1973), which argues that what legitimate targets have in common is that they are "engaged in an attempt to destroy you."

³ A soldier's culpability can be diminished, of course, by the excuses of coercion and ignorance, and given the exigencies of war these will often be effective. Nevertheless, on the assumption that the efficacy of the excuse declines as the seriousness of the offense increases, such excuses will go only so far to diminish a soldier's responsibility, where the act in question is likely to be killing or serious harming. I am grateful to Tony Coady for this point.

⁴ See "Conventions and the Morality of War," *Philosophy & Public Affairs* 4 (1975), reprinted in Beitz et al., *International Ethics*.

⁵ See, e.g., Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), chapter 16. See below, p. 25.

⁶ The latter path is taken by Robert Holmes in *On War and Morality* (Princeton: Princeton University Press, 1989).

⁷ See, e.g., Elizabeth Anscombe, "War and Murder," in Richard Wasserstrom, ed., *War and Morality* (Belmont, CA: Wadsworth, 1970), and Michael Walzer, *Just and Unjust Wars*, pp. 151–59 and passim.

⁸ See "Morality and Consequences," in *The Tanner Lectures on Human Values 1981 II*, Sterling McMurrin, ed. (Salt Lake City and Cambridge: University of Utah Press and Cambridge University Press, 1981), part III, "Intended as a Means."

⁹ *Ibid.*, p. 99.

¹⁰ The idea of a package deal is employed by Michael Bratman, *Intentions, Plans, and*

Practical Reason (Cambridge: Harvard University Press, 1987), ch. 10, and by Gilbert Harman, *Change in View* (Cambridge: MIT Press, 1986), ch. 9.

¹¹ Bennett, p. 101.

¹² This is the gist of the argument made by Warren Quinn in defense of the DDE. In "Actions, Intentions, and Consequences: The Doctrine of Double Effect," *Philosophy & Public Affairs* 18 (1989), Quinn distinguishes "agency in which harm comes to some victims, at least in part, from the agent's deliberately involving them in something in order to further his purpose precisely by way of their being so involved . . . and harmful agency in which either nothing is in that way intended for the victims or what is so intended does not contribute to their harm" (p. 343).

¹³ I am ignoring here the possibility raised by Bennett and others that the terror bomber doesn't really need civilians to die, he only needs them to seem dead for a while.

¹⁴ *Just and Unjust Wars*, pp. 151–156.

¹⁵ But here is a possible difference that might explain diverging responses to the two cases. We can imagine a hysterectomy being performed late enough in pregnancy that the fetus might be viable, and so might survive (why not do a Caesarean first, we want to know), but we can't imagine circumstances in which the fetus will survive a craniotomy. So the causal connection between hysterectomy and the death of the fetus is looser, when considered in a general way, than the connection between craniotomy and the death of the fetus; although in any given case it might be equally tight.

In addition, any time a craniotomy would be necessary, the fetus would presumably be well along in development; not so with hysterectomy. So on the assumption that the more developed the fetus the more morally problematic its death, the fetus threatened with craniotomy would have a stronger claim to life than the average fetus threatened with hysterectomy. This difference wouldn't matter to one who believed that fetuses are persons or have a full-blown right to life from the moment of conception, but it might make a difference, even if not a conscious one, to others responding to the cases.

¹⁶ This example is adapted from Anscombe in "War and Murder," p. 46. Anscombe puts it in terms of intention – we shouldn't say I intended to go to prison – but this isn't the issue. I agree that the tactical bomber doesn't *intend* to kill civilians; the question is rather whether he is as responsible or answerable for these consequences as if he did. I acknowledge the conceptual difference; the question is whether this makes a moral difference.

¹⁷ I owe this example to Mary McCloskey.

¹⁸ Interestingly, Holmes employs this distinction not in the context of a discussion of the DDE, which he criticizes on other grounds, but to argue against the view that one ought to kill innocents in order to prevent other people from killing more innocents. These issues are related but distinct. See *On War and Morality*, pp. 193–211.

¹⁹ This is a complicated issue; thus the "ordinarily." The military superior who orders his troops to shoot is surely responsible for the resulting deaths – more responsible, we would probably say, than the soldiers. The person who hires a contract killer is also responsible for the resulting murder.

²⁰ It would be impossible, for example, to mistake this consequentialist account for Anscombe's in "War and Murder."

²¹ Walzer, *Just and Unjust Wars*, p. 153.

²² See Walzer's discussion of the decision to drop the bomb on Hiroshima, where the alternative was thought to be a prolonging of the war that would involve many more casualties both to Allies and (even more) to the Japanese – casualties totalling in the millions. We may, of course, wonder whether the thought of Japanese casualties played any role in the American decision (*Just and Unjust Wars*, pp. 263–68).

²³ By the Pentagon's own Defense Intelligence Agency in a May 1991 report. The DIA allowed for an "error factor" of fifty percent or higher and later disavowed the figures altogether. Cited in John G. Heidenrich, "The Gulf War: How Many Iraqis Died?," *Foreign Policy* 90 (Spring 1993), p. 109.

²⁴ Estimated by Heidenrich, a former DIA military analyst, in *ibid*. The House Armed Services Committee estimated 9,000 killed in the air campaign; a U.S. Census Bureau employee estimated 40,000 soldiers killed (and 13,000 civilians). Both reports are cited in Heidenrich's article.

²⁵ These figures "do not include the substantially larger number of deaths that can be attributed to malnutrition, disease and lack of medical care caused by a combination of the U.N.-mandated embargo and the allies' destruction of Iraq's electrical systems . . ." *Needless Deaths in the Gulf War: Civilian Casualties During the Air Campaign and Violations of the Laws of War*, A Middle East Watch Report (New York: Human Rights Watch, 1991), p. 19. Heidenrich believes that "the evidence points to less than 1,000" civilians killed (p. 124).

²⁶ "War and Murder," p. 51.

²⁷ *Just and Unjust Wars*, chapter 16, and pp. 232–27. See also Nagel, "War and Massacre."

²⁸ See Mavrodes's persuasive argument in "Conventions and the Morality of War."

Department of Philosophy
University of Maryland at College Park
College Park, MD 20742
USA