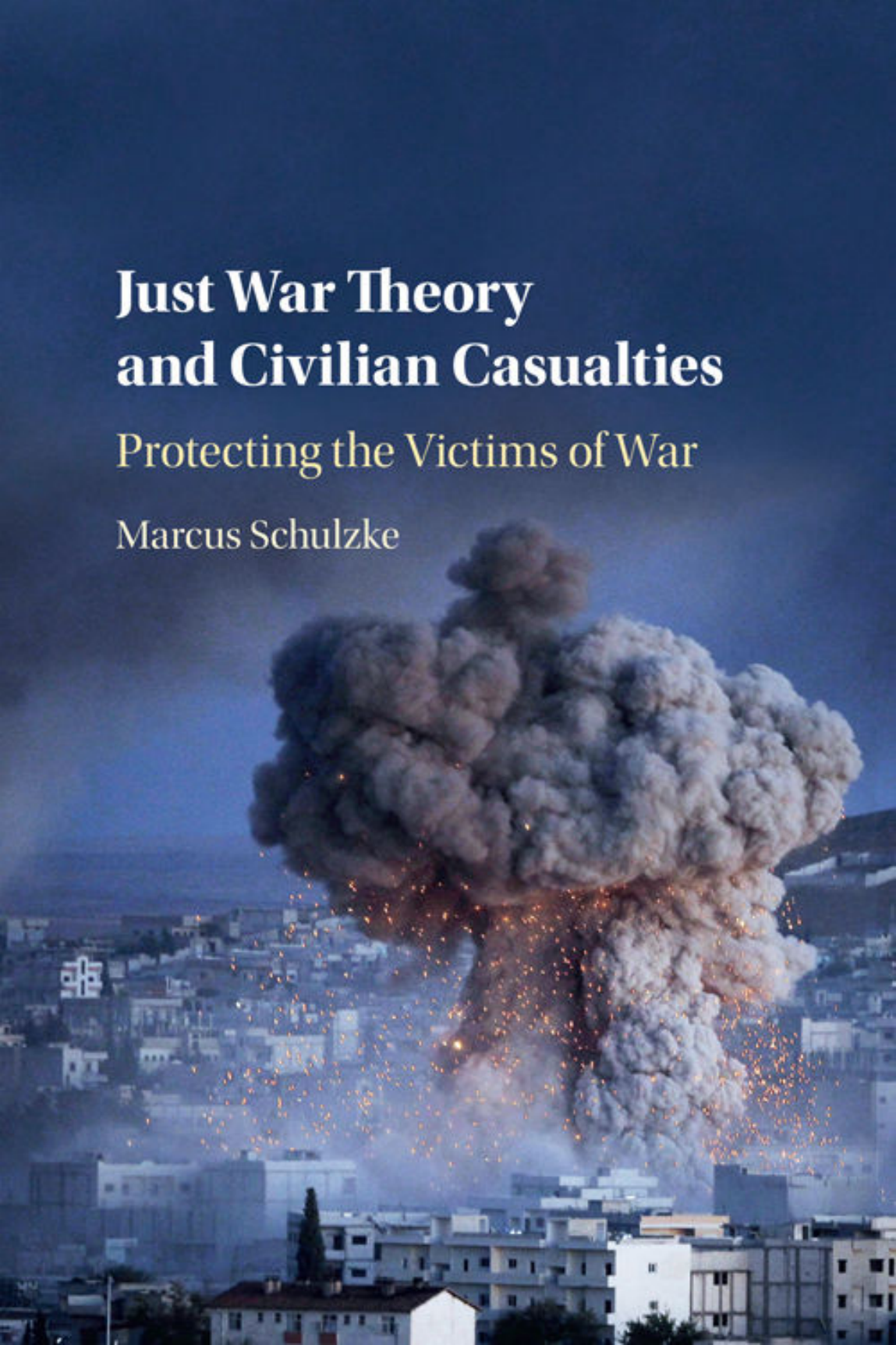
Just War Theory and Civilian Casualties

Protecting the Victims of War

Marcus Schulzke



Just War Theory and Civilian Casualties

There are strong moral and legal pressures against harming civilians in times of conflict, yet neither just war theory nor international law is clear about what responsibilities belligerents have to correct harm once it has been inflicted. In this book, Marcus Schulzke argues that military powers have a duty to provide assistance to the civilians they attack during wars, and that this duty is entailed by civilians' right to life. Schulzke develops new just war principles requiring belligerents to provide medical treatment and financial compensation to civilian victims, and then shows how these principles can be implemented in governmental, military, and international practice. He calls for a more individual-focused conception of international law and post-war justice for victims – as opposed to current state- or group-based reconstruction and reparation programs – which will provide a framework for protecting civilian rights.

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Introduction

If there is anything so fixed and unchanging that it can be regarded as inherent to war, then it is certainly that war causes immense human suffering. Countless soldiers who endure combat are killed or sustain debilitating wounds. Those who survive the ordeal without physical scars may be left with the psychological trauma that comes from watching friends die, being attacked, and killing others. Although civilians are spared the experience of killing, a burden that weighs heavily on soldiers,[1] they too suffer innumerable physical and psychological injuries. They are killed and incapacitated. They lose friends and family members. Their homes and workplaces are destroyed. They are tortured and sexually abused. And even those who escape these forms of intense suffering experience radical declines in their quality of life. They may lose their jobs, become malnourished, or live without important services like electricity and water. When hostilities cease, civilians must live in areas affected by the long-term consequences of fighting. They are exposed to unexploded munitions and land mines, higher levels of violence due to the easy access to military hardware, and the possibility of continuing violence caused by the disruption of the local society and governing institutions.[2]

Just war theorists have sought to impose restrictions on war that are aimed at minimizing the suffering of soldiers and civilians alike. They have proposed *jus ad bellum* restrictions on when wars can be initiated to prevent anyone from suffering in unnecessary or unjustified conflicts. They have created *jus in bello* restrictions on how wars may be fought to discourage the use of weapons or tactics that needlessly magnify the horrors of war. More recently, they have developed *jus post bellum* norms of conflict resolution to promote justice after a war has ended and prevent the resurgence of fighting. Among the restrictions

[1] For a description of the psychological costs killing can have on soldiers, see Jonathan Shay, *Achilles in Vietnam* (New York: Scribner, 1994); Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (New York: Back Bay Books, 2009).

[2] James A. Tyner, *Military Legacies: A World Made by War* (New York: Routledge, 2009), p. 40; Chris McNab and Hunter Keeter, *Tools of Violence: Guns, Tanks and Dirty Bombs* (New York: Osprey, 2008), p. 42; Michael J. Boyle, *Violence after War: Explaining Instability in Post-Conflict States* (Baltimore, MD: Johns Hopkins University Press, 2014).

that contemporary just war theorists have most consistently sought to establish is a prohibition against targeting civilians. Civilians are distinguished from those who fight and are, at least in principle, supposed to be spared from the horrors of war as much as possible.

The prohibition against attacking civilians, which is often called the principle of noncombatant immunity (PNCI) or the principle of civilian immunity (PCI), affirms that civilians cannot be intentionally targeted or recklessly endangered, although they may be justifiably accidentally or incidentally harmed under certain circumstances. The PNCI rests on the belief that civilians or noncombatants – terms that I will use interchangeably throughout the book – retain their right to life during war because they do not engage in activities that would make them liable to attack. The PNCI is therefore meant to affirm and protect the right to life during war by separating civilians from the combatants who forfeit that right.

There is widespread disagreement over why civilians are entitled to immunity and how this immunity should be understood.[3] There are also those who argue that the PNCI is misguided and that noncombatants should not be entitled to any special privileges.[4] However, even with this disagreement over exactly what class of people is protected during war, and with some challenges to the PNCI's relevance, noncombatant immunity remains a core value of just war theory, perhaps even *the* core value. Igor Primoratz says that the PNCI establishes "an almost absolute right of the vast majority of civilians."[5] Michael Gross argues that, "short of supreme emergencies, that is, genocidal threats, no one argues it is morally permissible to attack civilian targets directly."[6] Similarly, Martin Cook goes so far as to place the PNCI at the heart of the concept of just war, claiming that "the central moral idea of just war is that only the combatants are legitimate objects of deliberate attack."[7]

The strength of the PNCI is most evident in the *jus in bello* principles that govern the use of force during wars. The principle of discrimination (also known as distinction), which states that civilians cannot be targeted, is a direct manifestation of the PNCI. The principle of proportionality, which requires that belligerents only use the level of force necessary to achieve military objectives,

[3] Hugo Slim, *Killing Civilians: Method, Madness, and Morality in War* (New York: Columbia University Press, 2010).

[4] Michael Green, "War, Innocence, and Theories of Sovereignty," *Social Theory and Practice* 18(1) (1992), 39–62; Richard J. Arneson, "Just Warfare Theory and Noncombatant Immunity," *Cornell International Law Journal* 39 (2006), 663–668.

[5] Igor Primoratz, "Civilian Immunity in War: Its Grounds, Scope, and Weight." In *Civilian Immunity in War*, edited by Igor Primoratz (New York: Oxford University Press, 2007), 21–41, p. 39.

[6] Michael L. Gross, *Moral Dilemmas of Modern War: Torture, Assassination, and Blackmail in an Age of Asymmetric Conflict* (New York: Cambridge, 2010), p. 175.

[7] Martin L. Cook, *The Moral Warrior: Ethics and Service in the US Military* (Albany, NY: State University of New York Press, 2004), p. 33.

does not specifically protect civilians, yet one of its most important functions is to prohibit the kind of excessive violence that would inflict civilian "collateral damage." The principles of *jus ad bellum*, which govern the justice of initiating or continuing a war, and *jus post bellum*, which govern the resolution of war, likewise reflect the PNCI, albeit less directly. *Jus ad bellum* restrictions prohibit wars that are waged with the intent of terrorizing civilians, as well as wars that risk inflicting disproportionate harm on civilians. And *jus post bellum* is often interpreted as including obligations to build just political institutions and to repair infrastructure – measures that improve the quality of life for civilian populations.

The just war tradition's consensus about the necessity of protecting civilians is significant, as just war theory is increasingly accepted as the normative basis for regulating war, and this influences international norms regarding the treatment of civilians. Over the past half-century, just war theory has undergone a profound accession in its legitimacy and power to shape policy. Policymakers and members of the armed forces are expected to abide by the tenets of just war theory, and they are sometimes punished for failing to do so. As Walzer points out, "justice has become, in all Western countries, one of the tests that any proposed military strategy or tactic has to meet – only one of the tests and not the most important one, but this still gives just war theory a place and standing that it never had before."[8] Similarly, Coates notes that "[just war theory's] idiom has become the most popular moral idiom of war, an idiom frequently employed by those engaged either as practitioners of war or as media commentators upon it."[9] These comments are particularly apt when it comes to just war theory's recommendations about the treatment of civilians, as the PNCI is among the elements of just war theory that has been most effectively codified in international law.

The PNCI is affirmed by the Fourth Geneva Convention's prohibitions against deliberately attacking noncombatants, taking hostages, or abusing prisoners. Some of those violating that agreement have been brought to trial for, and convicted of, war crimes on the grounds that they have deliberately victimized noncombatants.[10] Support for the PNCI is also evident in the United Nations Development Program's (UNDP) 1994 report, which emphasizes the importance of human security.[11] Although there is extensive debate between proponents of broad and narrow conceptions of how human security should be

[8] Michael Walzer, *Arguing About War* (New Haven, CT: Yale University Press, 2004), p. 24.
[9] A. J. Coates, *The Ethics of War* (Manchester: Manchester University Press, 1997), p. 2.
[10] Ruti G. Teitel, "Humanity's Law: Rule of Law for the New Global Politics." *Cornell International Law Journal* 35 (2002), 355–387; Kingsley Chiedu Moghalu, *Global Justice: The Politics of War Crimes Trials* (Westport, CT: Praeger, 2006).
[11] United Nations Development Program (UNDP), *Human Development Report* (New York: Oxford University Press, 1994).

realized, advocates of human security share a commitment to protecting individuals from violence. This includes the enactment of substantive protections for civilians during armed conflicts.[12] The doctrine of Responsibility to Protect (R2P), which has recently become extremely influential in international law and moral theory, is likewise informed by the PNCI and its underlying assertion of the right to life.[13] R2P aims at protecting people who are victims of attacks perpetrated by domestic violent actors and can be seen as authorizing the defense of civilians even when this goal is at odds with state sovereignty.

With such a high level of agreement among multiple actors, including academics, policymakers, members of the military, and the general public, one might expect that civilians would be protected from the horrors of war. However, the pervasiveness of civilian victimization in contemporary conflicts provides clear evidence that this is not the case. The just war tradition's effort to establish norms discouraging civilian victimization has failed to give civilians the level of protection they require. This should lead us to question whether the just war theory framework that has become so widely accepted is adequate for theorizing civilian immunity.

Reassessing Just War Theory

The level of civilian victimization in wars over the past century, combined with an increasing commitment to just war thinking during that same time period, raises an imperative theoretical puzzle. Just war theory has greater legitimacy than ever, is widely invoked by policymakers and members of the military, shapes the development and implementation of new weapons and tactics, informs new programs for military ethics training, and serves as the basis of international humanitarian law, yet wars continue to inflict unimaginable devastation on civilians around the world. Moreover, as casualty figures and field reports from the wars in Iraq and Afghanistan attest, even armed forces that have made concerted efforts to reduce civilian casualties, like those of the United States and Britain, have been responsible for wounding and killing thousands of civilians.[14] The problem of persistent civilian victimization at a time when norms protecting civilians appear to be stronger than ever is my entry point into the discussion of noncombatant immunity.

[12] Mark Duffield, *Development, Security and Unending War: Governing the World of Peoples* (New York: Polity, 2001).

[13] Alex J. Bellamy, *Responsibility to Protect* (Malden, MA: Polity Press, 2009) and *Global Politics and the Responsibility to Protect: From Words to Deeds* (New York: Routledge, 2010); Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Washington, DC: The Brookings Institution, 2008).

[14] Colin H. Kahl, "In the Crossfire or the Crosshairs? Norms, Civilian Casualties, and US Conduct in Iraq." *International Security* 32(1) (2007), 7–46.

Initially, it may seem that violence against civilians is simply a problem of noncompliance with the laws and moral norms of war. And to some extent, this is true. There is ample evidence that armed forces intentionally target civilians.[15] Many of the worst atrocities inflicted on civilians over the past half-century, such as the genocides in Cambodia, the Balkans, and Rwanda, were deliberate mass killings.[16] Those responsible for these attacks showed little regard for civilians' right to life and clearly had no intention of complying with the legal and moral restrictions aimed at protecting that right. Noncompliance is also a problem on an individual level. Soldiers may disregard their rules of engagement and attack civilians against the orders issued by their superiors.[17] Such actions show that laws and norms sometimes fail to constrain combatants' behavior, regardless of whether the states or armed forces the combatants represent wish to abide by those laws and norms.

Although noncompliance with the PNCI is a serious problem that deserves more research, this explanation cannot account for all of the violence against civilians. The international consensus in favor of the PNCI is such that it seems implausible that the commitment to it is purely rhetorical or that all attacks on civilians can be explained in terms of noncompliance. More importantly, many of the signs of just war theory's growing influence are not merely superficial. Efforts to improve legislation protecting civilians, develop more precise weapons, and train more ethical soldiers suggest a genuine interest in waging wars that adhere to just war guidelines. There must therefore be some additional reasons for the persistence of high rates of civilian casualties during war and the civilian suffering that continues long after wars have ended.

I contend that some of the blame for civilian suffering in war lies with the just war tradition itself. And unlike the problem of noncompliance, just war theory's faults are conceptual errors that can be corrected on a theoretical level. Revising just war theory therefore offers a more manageable starting place for attempts to promote greater respect for civilian lives and can inform efforts to influence the conduct of war. As I will demonstrate, the just war tradition is guilty of two fundamental errors that make it an ineffective theoretical foundation for

[15] Alexander B. Downes, "Desperate Times, Desperate Measures: The Causes of Civilian Victimization in War," *International Security* 30(4) (2006), 152–195, "Restraint or Propellant? Democracy and Civilian Fatalities in Interstate Wars," *The Journal of Conflict Resolution* 51(6) (2007), 872–904, and *Targeting Civilians in War* (Ithaca, NY: Cornell University Press, 2008); Christopher Gelpi, Peter D. Feaver, and Jason Reifler, *Paying the Human Costs of War: American Public Opinion & Casualties in Military Conflicts* (Princeton, NJ: Princeton University Press, 2009).

[16] Eric D. Weitz, *A Century of Genocide: Utopias of Race and Nation* (Princeton, NJ: Princeton University Press, 2003); Adam Jones, *Genocide: A Comprehensive Introduction* (New York: Routledge, 2006).

[17] Devorah Manekin, "Violence against Civilians in the Second Intifada: The Moderating Effect of Armed Group Structure on Opportunistic Violence," *Comparative Political Studies* 25(10) (2013), 1273–1300.

protecting civilians. Each of these problems arises from a failure to recognize the implications of the civilian right to life, which is the theoretical foundation for the PNCI.

First, much of the harm inflicted on civilians falls within the scope of what is permitted by the PNCI. The PNCI, as it is commonly interpreted, is a surprisingly weak doctrine that allows many types of civilian victimization. There is a consensus among just war theorists that incidental and accidental violence against civilians is excusable and that such violence is an unavoidable fact of war. While just war theorists may be right in thinking that the perpetrators of incidental and accidental violence are not morally blameworthy, these theorists have failed to acknowledge that a permissive PNCI is inadequate for truly protecting civilians. Their right to life cannot function as a right if it can be easily revoked by those against whom it is supposed to offer protection.

Second, just war theory does not give enough attention to corrective justice for individual victims of war. None of the conventional principles of just war theory attend to the pressing need to repair the harm individual civilians sustain. Civilians are treated as a protected class up to the point when they are attacked, but then they are ignored by just war theory, which contains no requirements for assisting them as individual victims. Civilians are therefore left with little security when recovering from the horrors of war, which may result in the long-term persistence of suffering and in the aggravation of untreated injuries. At best, civilians may hope to receive some assistance from group-based forms of corrective justice, which are insensitive to individual needs and the demand of vindicating individual rights. Without a strong framework of corrective justice for *individual civilians*, the norms of just war theory have little internal capacity for discouraging violence against civilians and promoting corrective justice for civilian victims of war.

Protecting the Right to Life with a Positive Duty

The PNCI's weakness and just war theory's inadequate attention to corrective justice for civilians have a single underlying cause: a failure to recognize the implications of the right to life that just war theory assumes all civilians possess. The right to life is conventionally understood by just war theorists as *only* creating a first-order duty to not harm civilians. That duty is reflected in the PNCI and in the existing principles of just war theory that address civilians' protections. These are restrictive measures that are directed at ensuring compliance with the first-order duty by preventing belligerents from violating civilians' right to life with intentional or reckless violence. The first-order duty to not harm civilians and the restrictive principles that operationalize that duty are essential manifestations of the right to life, but they are inadequate. A first-order duty by itself is incapable of offering meaningful protection for those to

whom the duty is owed. If a first-order duty can be violated without penalty – without creating some additional duty for the violator – then it lacks the force needed to compel obedience or protect the right-bearer.

Whenever civilians are harmed during wars – regardless of whether the harm is intentional, incidental, or accidental – their right to life is breached. The circumstances of an attack, and particularly the attacker's intent, help to determine whether the attacker acted immorally. An attacker who intentionally harms civilians deserves moral condemnation, while one who harms civilians in an attack that falls within the scope of the principles of discrimination and proportionality may be excused. Nevertheless, regardless of the morality of the action that leads to the breach of a civilian's right to life, the result is the same: a belligerent has failed to abide by the first-order duty to not inflict harm. The breach of rights may or may not be morally wrong, but the moral status of a breach of rights does not alter the fact that any time a belligerent fails to respect a civilian's right to life, that belligerent has failed to perform the duty that is required.

My central argument in the first part of the book is that the logic of rights demands that belligerents must be held responsible for repairing the harm they inflict on civilians. The right to life is a claim right, which during war protects its bearers by creating a correlative duty for combatants to not harm civilians. This correlative duty is a first-order duty in the sense that it is a basic duty arising from the right to life. The duty to not inflict harm must exist alongside the right to life to give that right the force it needs to compel respect. I will describe this first-order duty as a "negative duty" because it is a duty that does not contain any *positive* steps that must be taken to assist civilians who are harmed. The duty specifies what combatants cannot do to civilians, without requiring that they take any steps to improve the condition of civilians. This much is assumed by the PNCI and explains why civilian protections have such an important place in just war theory. However, it is necessary to go further in exploring the implications of the right to life and its correlative duty to not harm civilians.

Any harm that is inflicted on a civilian wrongs that person by depriving him of the protection to which he is entitled as a bearer of the right to life. This harm may be inflicted immorally or in a way that is morally and legally excusable. The differences between immoral and excusable harm matter when determining the attacker's culpability, but they do not alter the underlying fact that any violence wrongs the right-bearer. Moreover, the attacker's moral culpability does not change the fact that any violence perpetrated by a duty-bearer constitutes a failure to abide by the first-order duty to not inflict harm. My contention is that any failure to perform the negative duty must give rise to a second-order duty to repair the damage resulting from that failure. This second-order duty is one that I describe as a "positive duty" because its aim is to repair harm that

has been inflicted, thereby restoring those who have been wronged, as nearly as possible, to their condition before being harmed. In most cases, the harms inflicted during war will be too serious to fully repair, but short of this we can hope for "morally adequate"[18] reparative justice that affirms the importance of victims' rights and promotes trust in those rights.

I argue that the positive duty is borne by any belligerent that is responsible for killing or wounding a civilian, or for causing damage to property that is essential to a civilian's survival. This duty is a form of corrective justice, as it is concerned with restoring justice by repairing harm that was sustained by a person who did not deserve it. Unlike forms of group-based post-war corrective justice that have been proposed by others,[19] the positive duty that I advocate here provides grounds for correcting the injuries of *individual victims of war*. This individualized form of corrective justice has greater potential for redressing injustices and vindicates individual rights that are too often neglected during war – even in purely theoretical accounts of the morality of war.

To be clear, belligerents do not take on the positive duty because of moral fault, and the positive duty is not meant to repair any moral infraction. Rather, belligerents have this second-order/positive duty when they harm a civilian despite having a first-order/negative duty to not inflict that harm. Thus, I argue that the demand of treating civilians justly during wars requires that just war theory undergo a radical shift in its understanding of what the right to life entails. Belligerents should not only be held to the negative duty to avoid harming noncombatants but should also be required to repair the harm that they cause. I argue that when belligerents, whether they are states or non-state actors, inflict harm on noncombatants, they become responsible for repairing that harm to the greatest extent possible, regardless of whether the harm is morally excusable.

The Principles of Restorative Care and Recompense

The existence of a second-order duty for belligerents to repair the harm they inflict on civilians does not entail a specific mechanism for providing assistance. One might imagine multiple different strategies for addressing civilian suffering that could be capable of vindicating individual rights. Thus, while the positive duty can be derived from the right to life, strategies for acting on that duty must be formulated with careful attention to the many competing moral and pragmatic considerations that arise during war. Any principles that are meant

[18] Margaret Urban Walker, "Restorative Justice and Reparations," *Journal of Social Philosophy* 37(3) (2006), 377–395, p. 384.

[19] Pablo Kalmanovitz, "Sharing Burdens after War: A Lockean Approach," *The Journal of Political Philosophy* 19(2) (2011), 209–228; James Pattison, "*Jus Post Bellum* and the Responsibility to Rebuild," *British Journal of Political Science* 45(3) (2015), 635–661.

to enact the positive duty must be framed to provide effective mechanisms for repairing the harm done to noncombatants without imposing demands so onerous that they make adherence to them a practical impossibility.

It is critical to avoid making too many concessions to the "necessities of war," as this can lead back to the problem of states and other violent actors escaping their moral duty toward civilians. Moral norms must be capable of acting as effective restraints on belligerents' conduct even when this prevents them from fighting as they might wish. However, it is equally important for the additional responsibilities to be ones that belligerents can reasonably be expected to follow in the midst of war.

I propose two new principles of just war that are capable of operationalizing the positive duty while still being practically realizable: the principle of restorative care and the principle of recompense. Although these are not the only possible ways of encouraging compliance with the positive duty, they hold the greatest potential as principles for repairing the damage caused by the breach of civilians' right to life.

The principle of restorative care establishes that belligerents must provide medical assistance to the civilians that they harm during military operations. This care is restorative because it is meant to restore those who are injured to the same level of health they had before being attacked, or at least to bring them as close to that level as possible. I argue that restorative care must be provided either directly by the state or violent non-state actor (VNSA) that inflicted the harm or with the help of a reliable intermediary contracted by the offending belligerent. I acknowledge that this assistance may be difficult to provide in practice, and respond to this by providing a framework for thinking about restorative care that is sensitive to the realities of war without losing its normative force.

The principle of recompense establishes that belligerents must pay pecuniary compensation to those who suffer serious injuries, the destruction of essential property, or the death of a family member as a result of actions taken by their security forces. Although this may seem to cheapen human life by placing a monetary value on it, framing compensation in this way is in the best interest of civilian victims of war for practical reasons. First, money is a fungible good that can be paid by any belligerent and that can be used to repair a broad range of harms. Second, using money as the medium of compensation facilitates the adjudication of claims for damages and makes it easier to ensure that civilians receive the payments they are owed.

Although the two principles I introduce are analytically separable, they are best seen as interlocking principles that can compensate for each other's limitations and that may often be applied in conjunction to repair civilians' injuries. The principle of restorative care is the more fundamental of the two and should therefore be given precedence whenever the principles come into conflict. This

is because restorative care plays an important role in minimizing and containing the harm inflicted on civilians. Medical care can prevent the wounded from dying, reduce the magnitude of injuries, and help to rehabilitate the injured so they do not suffer lasting harm.

The principle of restorative care's greatest limitation is that it will often be difficult to enact. First, it may be impossible for belligerents to provide medical care to civilians during intense wars when the injured are located behind enemy lines or when their injuries are not immediately evident. Second, many of those who are injured or killed in attacks are beyond medical assistance. No amount of restorative care can save those who are dead or can fix damage for which no medical treatments have been developed. This makes restorative care inappropriate for those civilians who sustain mortal or untreatable injuries. Finally, some types of harm cannot be addressed with any form of medical assistance. This is the case with damage to essential property, such as food, water, and other means of subsistence. When restorative care cannot repair the harm inflicted on civilians, it is necessary for the harm to be minimized with the financial assistance covered under the principle of recompense.

Financial compensation has the advantage of being a flexible method of repairing harm that can be used to help civilians recover from a broad array of injuries that may not be addressable under the principle of restorative care. Compensation is essential whenever the nature of an injury or the circumstances of war make it impossible to repair the injury with medical assistance. However, just as the principle of restorative care is much less effective if it is forced to stand alone, recompense is weakened if it is employed in isolation. In particular, recompense must be applied in conjunction with the principle of restorative care, because medical treatment can limit the extent of civilians' injuries.

Ideally, the two principles I propose should be applied sequentially to each injury inflicted on a civilian. Whenever a belligerent harms a civilian, that belligerent should first make an effort to repair the harm according to the principle of restorative care. If the harm is not fully repaired, the belligerent should then provide adequate financial compensation. Nevertheless, I acknowledge that the morality of war must remain within the boundaries of what is possible for belligerents to do in practice. In some instances the challenges of providing medical care may be so prohibitive that financial compensation after a war has ended may be the only route by which a civilian can seek reparation for a breach of rights. It is also important to note that although I link these principles to the positive duty of assisting civilian victims, they provide compelling mechanisms for promoting justice for civilians even when they are taken independently. Each principle is designed to protect civilian welfare to the greatest extent possible under the difficult circumstances of war – a goal that is worthwhile even for those approaching the morality of war from other theoretical traditions that do not assume that civilians have a right to life.

The Challenge of Revising Just War Theory

Making substantial revisions to just war theory is a difficult task, and is likely to provoke opposition from those who consider my suggestions impractical or who are content with existing norms of civilian protection. The just war tradition is relatively well-defined. Many of its core principles are centuries old, giving them the weight of tradition along with the extensive theoretical defenses they have received. Nevertheless, just war theory is evolving to contend with new problems. I agree with Bill Rhodes in thinking that just war theory must continually adapt to new circumstances: "Whatever else is clear, it is obvious that JWT addresses a moving target that will likely continue to develop."[20] I likewise agree with Fotion and others who have sought to identify the changes just war thinking must undergo to adequately respond to shifts in the conduct of war, although the challenges I take up are persistent theoretical difficulties, and a better solution to them is long overdue.[21]

There are good reasons for being skeptical of attempts to substantively alter just war theory. Such alterations may take just war thinking too far toward the alternative perspectives of realism and pacifism, against which just war theorists typically position themselves. Substantial revisions may also create conceptual difficulties, such as introducing new principles that conflict with existing principles or that are incompatible with the underlying goals of just war thinking. Jessica Wolfendale is probably correct in thinking that "[r]evisions of just war theory are only justified if they are consistent with the underlying moral principles of just war theory."[22] Thus, it is vital for revisionist works to show that they are, despite their aspirations for sweeping change, consistent with the most fundamental elements of just war theory.

As I will show, my proposal is not only consistent with just war theory but overcomes a deep and persistent inconsistency in the understanding of the PNCI that plagues other formulations of it. My principles are intended to supplement the orthodox principles of just war theory, not to replace them. The novel principles that I describe provide a way of realizing the positive duty to assist noncombatants without contradicting just war theory's existing restrictive principles. My critique of just war orthodoxy should therefore be seen as one arising from the just war tradition itself and as being consistent with just war thinking. In fact, I maintain that my own position is truer to the values of just war theory because it recognizes the implications of the PNCI and of the right to life.

[20] Bill Rhodes, *An Introduction to Military Ethics: A Reference Handbook* (Santa Barbara, CA: ABC-CLIO, 2009), p. 23.

[21] Nicholas Fotion, *War & Ethics: A New Just War Theory* (New York: Continuum, 2008).

[22] Jessica Wolfendale, "'New Wars,' Terrorism, and Just War Theory." In *New Wars and New Soldiers: Military Ethics in the Contemporary World*, edited by Jessica Wolfendale and Paolo Tripodi (Burlington, VT: Ashgate, 2011), 13–30, pp. 26–27.

Throughout the book I will show how my argument remains closely connected to established values and principles that are generally recognized by just war theorists even as I push just war theory beyond its current limitations.

I am also careful to acknowledge the range and diversity of contemporary just war theory while calling attention to shared assumptions about the status of civilians and the protections to which they are entitled. Some critiques of just war theory make the mistake of erroneously taking one theorist's statement of just war theory as being true of the entire just war tradition. A. J. Coates calls attention to this, saying that "[m]uch criticism of the tradition appears to arise from an identification of the tradition as a whole with a particular and, in some key respects, unrepresentative or bastardized version of it."[23] With this in mind, I try to map out some of the different positions within the just war tradition and show that my critique is not of a select group of just war theorists but rather of a fundamental problem in just war theory.

The Structure of the Book

Chapter 1 historicizes the norm of protecting civilians with an overview of the theory underlying it and an analysis of how the PNCI has been conceptualized by just war theorists over time. I show that the category of "civilian" or "noncombatant," the PNCI, and the duties that have been interpreted as following from the PNCI have changed substantially over the just war tradition's history. The range of people who qualify as noncombatants and the strength of noncombatant immunity have gradually expanded, leading to greater protections for a larger number of people. Even more significantly, modern just war theorists replaced earlier theological justifications of noncombatant immunity with a rights-based justification, according to which noncombatants are protected from attack because they have a right to life. This rights-based justification is vital for my argument, as I derive the positive duty to civilian victims of war from the right to life that all civilians have.

My historical overview of just war theory shows that the restrictions on the treatment of noncombatants are not fixed and unalterable elements of just war theory. Rather, these restrictions change in response to theoretical developments and new modes of warfare. My proposal to reinterpret the rights of noncombatants and duties of combatants represents another development in the rights-based theory of just war, and a shift that is necessary for just war theory to be consistent.

In Chapter 2, I discuss the principles that just war theorists have interpreted as following from the PNCI or otherwise protecting noncombatants' right to life. I argue that these principles are invariably framed negatively, in the sense

[23] Coates, *The Ethics of War*, p. 4.

that they impose constraints on how combatants may act in the interest of limiting violence against civilians. This negative framing of just war principles is essential for protecting civilians. However, negative principles are not sufficient for protecting the civilian right to life because they only embody combatants' first-order duty to avoid harming civilians. The negative duty protects the right to life from being breached, but does not provide guidance for repairing the breaches of that right that inevitably occur despite just war theory's restrictions. I go on to show that even theories of *jus post bellum*, which are meant to establish the basis for post-war reconstruction and reconciliation, have little to say about repairing the harm inflicted on individual civilians. Although some of these theories deal with issues of corrective justice, they are inadequate because they frame corrective responsibilities in terms of group rights and apply them asymmetrically.

I present my central argument in Chapter 3. The negative duty combatants have to avoid harming noncombatants is a first-order duty that is meant to prevent noncombatants from being wronged by breaches of their right to life. The right to life and its correlative negative duty are axiomatic assumptions in contemporary just war theory, and they entail an additional duty that has gone unrecognized by other just war theorists. According to the logic of rights, belligerents must have a positive duty to assist noncombatants that they harm. This is a second-order duty – a corrective duty that takes effect when combatants fail to perform the first-order duty of not inflicting harm. Any belligerent that is responsible for breaching a noncombatant's right to life, regardless of whether this was intentional or unintentional, has failed to adhere to the negative, first-order duty. The second-order duty is positive in the sense that its aim is restorative rather than restrictive. It is meant not to prevent harm but to repair harm that has been inflicted. In many cases during war, it will be impossible to truly repair the damage resulting from attacks. The goal of the positive duty must therefore be stated slightly differently when it is applied. In practice, it is the duty of restoring an injured person, as nearly as possible, to that person's condition before sustaining the injury.

I conclude Chapter 3 by arguing that the positive duty must apply to states, not to individual combatants. Because states are responsible for initiating wars and for determining the strategies and regulations that lead to or fail to prevent harm to civilians, states should be held responsible for taking corrective measures for attacks perpetrated by their security forces. Individual combatants may be guilty of misconduct that harms civilians and may be punished for such misconduct, but repairing the harm caused by individual combatants is ultimately the task of the state on whose behalf those combatants fight.

Chapter 4 considers two of the most influential arguments for excusing some types of violence against civilians: the doctrine of double effect (DDE) and utilitarianism. I show that these arguments can provide a basis for excusing

those who harm noncombatants from moral guilt, but that they generally fail to provide grounds for suspending or ignoring the positive duty I propose in Chapter 3. According to the DDE, it is permissible to harm noncombatants provided those noncombatants are not deliberately targeted, the violence against them does not facilitate military objectives, and the use of force is proportionate. The DDE provides grounds for excusing attacks that harm civilians, but only because the attacks are carried out in the service of military objectives that allow noncombatants' right to life to be superseded. This *excuse* for harming civilians is not a *justification* for doing so. Civilians do not lose their right to life when they suffer from morally defensible attacks. Rather, their right is only superseded, momentarily failing to provide protection from harm while still remaining in effect. The result is that any harm to civilians that may be excused according to the DDE still qualifies as a breach of the right to life and therefore still gives rise to the positive duty.

In the second part of the chapter, I shift focus to address the utilitarian perspective on the morality of war, which, like the DDE, can be used to excuse injuries inflicted on civilians. Utilitarians may not accept the premise that civilians have a right to life and may therefore avoid recognizing any positive duty that is derived from that right. Nevertheless, utilitarian reasoning implies that civilians must be afforded a much greater level of protection and corrective assistance than they are generally given. Civilians must receive assistance from belligerents whenever doing so promotes the greatest good for the greatest number (from an act utilitarian standpoint) or when it is consistent with a rule that promotes the greatest good for the greatest number (from a rule utilitarian standpoint). This shows that abandoning rights-based just war theory in favor of utilitarianism only creates some limited exceptions to the positive duty, without escaping it completely.

The second part of the book shifts focus to consider how the positive duty may be enacted in practice, with the help of two new principles of just war. Chapter 5 introduces the principle of restorative care, which affirms that states must provide medical assistance to noncombatants who are harmed as a result of actions by their military forces. As the name of this principle implies, medical assistance should have the goal of restoring those who were harmed to the same level of health they had before being attacked. That is to say, the medical care must be provided as a corrective for the breach of rights that noncombatants have suffered and does not have to extend to existing injuries. The principle of restorative care also introduces additional responsibilities for civilian politicians, military leaders, and soldiers at all levels. Those in the civilian and military chain of command must ensure that adequate medical resources are allocated for the treatment of civilian casualties and that those resources are used as effectively as can be reasonably expected in light of the practical challenges that invariably arise during war.

Chapter 6 discusses the principle of recompense. This principle establishes that combatants must provide financial compensation to noncombatants whose family members are killed, who suffer serious injuries, or who lose property that is essential for survival. Payments for deaths or property damage are vital for providing some relief for those suffering in ways that would be difficult or impossible to repair. In the case of injuries, financial compensation provides a way of rendering assistance to those noncombatants who have been prevented from receiving medical assistance or for whom medical assistance would be incapable of reversing the harm that was inflicted. There is some overlap between the duties of restorative care and recompense when it comes to assisting those who are injured. The former principle takes precedence over the latter, which means that belligerents cannot simply pay off injured noncombatants rather than attempting to heal their injuries, but it may often be necessary to provide financial compensation in addition to, or instead of, medical treatment. On the other hand, if a belligerent provides medical treatment for an injured person that succeeds in repairing the injury, then that state may not be liable for paying compensatory damages.

The third part of the book explores some of the practical considerations related to implementing the positive duty. Chapter 7 reconciles the negative duty to avoid harming noncombatants with the positive duty to repair the harm that is inflicted on them. I argue that the negative duty takes precedence over the positive duty for two reasons. First, the positive duty is a second-order duty that only arises when combatants fail to perform their first-order duty of not harming noncombatants. The positive duty is therefore derivative, only existing when the negative duty is inadequate for protecting noncombatants' rights. Second, preventing harm to noncombatants is preferable to repairing harm that has already been inflicted. This is especially true since many of the damages inflicted during wars, and death in particular, cannot be repaired.

Because of the precedence of the negative duty over the positive duty, I maintain that whenever the negative and positive duties associated with noncombatants' right to life come into conflict, the conflict must be resolved in favor of the negative duty. This leads to two important exceptions to the positive duty, which arise during wars against existential threats and in humanitarian interventions. These situations are special because they are cases in which large numbers of noncombatants are at risk of death, injury, or enslavement if there is no effort to protect them militarily.

States facing existential threats enter into a condition akin to Walzer's supreme emergency. Although I disagree with Walzer's claim that supreme emergencies can justify the suspension of the restrictions imposed by *jus in bello*, I do think that these conditions can provide grounds for allowing the negative duty associated with the PNCI to supersede the positive duty. In other words, when it is necessary for preventing harm to civilians, combatants may

temporarily abdicate their positive duty to civilians and refrain from following the two principles associated with it. I go on to argue that exceptions should also be made for belligerents fighting to protect other countries from existential threats, as in cases of interventions to prevent humanitarian crises. This is justified on the same basis as the first type of exception. Humanitarian interventions are an instance of the negative duty to prevent harm against civilians superseding the positive duty when the positive duty might interfere with efforts to protect noncombatants by discouraging military intervention.

Finally, in Chapter 8, I consider the legal mechanisms that are currently in place to allow civilians to seek compensation for harm they sustain during wars, the flaws in existing compensatory programs, and what new measures could be used to hold states responsible for adhering to the positive duty. Group reparations have been used to assist victims of wars, but they have several serious limitations: they are rarely implemented, tend to be made in extreme cases of systematic violence against minorities (such as after genocides),[24] and may not be distributed with sensitivity to individual needs.

Some countries allow foreign civilians to make claims for damages. The United States' Foreign Claims Act (FCA) and Alien Tort Claims Act (ATCA) are examples of this. However, foreign civilians who attempt to claim damages through these mechanisms are often unable to. The FCA and ATCA include exceptions that exclude payment for injuries inflicted during combat. Moreover, any national laws aimed at assisting civilian victims will face problems that cannot be avoided by merely reframing the legislation, such as the lack of a neutral arbiter to hear cases and the difficulties associated with foreign civilians accessing courts that may be far away.

Methods of direct payment are likewise flawed. The US government has implemented some informal mechanisms to give financial compensation, such as solatia and condolence payments, but these suffer from serious shortcomings. They are generally inadequate to cover the damages inflicted, lack an obligatory framework, and have little oversight. Thus, group reparations and existing means of providing financial compensation are poorly suited for carrying out the duty of recompense. My proposal establishes a clear duty to provide compensation and standards by which to judge whether this compensation is just.

The principle of recompense can be most effectively enacted when there is a neutral arbiter that can judge when states owe compensatory damages and what level of damages victims are entitled to. I argue that one of the best ways of making the positive duty associated with just warfare enforceable is with an

[24] Naomi Roht-Arriaza, "Reparations Decisions and Dilemmas," *Hastings International and Comparative Law Review* 27(Winter) (2004), 157–219; Bellamy, *Responsibility to Protect* and *Global Politics*.

individual cause of action under international law. An individual cause of action is a legal concept that refers to the text of the law that allows an individual to sue for cause. In this case, civilians would be able to take legal action against states for compensatory damages and have these claims heard in international courts. This proposal is consistent with recent developments in scholarship on international law, which have promoted the idea of a more humanistic approach to international law, as opposed to a state-centric approach.[25] An individual cause of action in international law would formalize the process for seeking damages inflicted during wars, thereby eliminating the arbitrariness and lack of transparency that mar direct payment systems.

[25] Teitel, "Humanity's Law" and *Humanity's Law* (New York: Oxford University Press, 2011).

1 The Evolution of Civilian Immunity and the Right to Life

The goal of just war theory is to restrict wars by identifying causes of war, methods of fighting, and ways of resolving armed conflicts that are morally objectionable and that should therefore be prohibited. Put slightly differently, the goal is to limit the frequency and intensity of wars while still acknowledging that wars will occur and that they may even be necessary or desirable as a means of guarding fundamental values. The protection of noncombatants is a vital part of just war theory's account of what makes war morally justifiable, without which it would be difficult to restrict the scope and intensity of wars. As Pauline Kaurin says, "the clarity of the combatant/noncombatant distinction is crucial since it preserves the essential moral difference between a soldier and a murderer."[1] The principle of noncombatant immunity (PNCI) operationalizes the conceptual difference between war and murder by requiring belligerents to distinguish those who are participants in war, and who are therefore justifiably subject to the violence that goes along with this activity, from those who are "innocent" in the sense of not participating directly in hostilities.

In contemporary just war theory the PNCI is generally interpreted as establishing that violent actors waging wars cannot deliberately or recklessly attack noncombatants, although they may be excused for inflicting incidental and accidental harm. This is one of the defining commitments that set just war theory apart from realism and pacifism. Pacifists consider war to be unjustified under any circumstances and advocate broader forms of immunity, such that no person is ever liable to attack. This form of immunity does away with the PNCI by replacing it with a universal immunity from violence. By contrast, realists tend to see the PNCI as an artificial limit on war that may at times be a useful convention but that has no real substance. Some realists may argue that the PNCI should be followed in practice because of the high costs of targeting civilians and the toll this takes on a state's legitimacy, but they would base this kind

[1] Pauline Kaurin, "When Less is Not More: Expanding the Combatant/Noncombatant Distinction." In *Rethinking the Just War Tradition*, edited by Michael W. Brough, John W. Lango, and Harry van der Linden (Albany, NY: State University of New York Press, 2007), 115–130.

of self-imposed restriction on strategic grounds, rather than on some kind of transcendental moral logic that is binding for all states.

Of course, the PNCI is not simply a way of distinguishing just war theory from pacifism and realism. The prohibition against attacking those who do not participate in war goes beyond the just war tradition and is part of it because of a deeper sense that people have a right to be protected against unwarranted violence. The PNCI embodies reasoning about how fairness and justice should prevail during war, as well as how rights should be protected outside of peacetime contexts. The PNCI is concerned with fairness in the sense that it acknowledges that those who do not wish to participate in war should be excluded from the destructiveness of war to the greatest extent possible. There is also a sense of fairness in the conviction that certain people should be protected because they are unable to defend themselves.

These notions of fairness have an intuitive appeal, as they cohere with some of the most basic and widely shared moral sentiments about what makes a person deserving or undeserving of attack. Slim captures this perfectly in his statement of the importance of the concept of the civilian as a limitation on war.

> Civilian is the word we now rely on to cradle and preserve the ancient idea that mercy, restraint and protection should have a place in war. The civilian label is thus the mark of a very important distinction between combatants and non-combatants in war, between the weak and the strong, those who are active and implicated in the fight and those who are passive and "caught up in it," as a popular saying would have it.[2]

Historical studies of the restrictions on war confirm the intuitive appeal of civilian protections, as prohibitions against harming civilians precede the just war tradition and can be found across multiple cultures.[3] However, just war theory is distinguished from other moral traditions by its efforts to systematically develop defensible secular moral principles that can sustain the prohibition against killing the innocent. This chapter explores how just war theorists have pursued this goal and how it led them to base civilian protections on a universal right to life.

The first part of this chapter provides a brief historical overview of how just war theorists have understood the protections offered by the PNCI since Augustine. I show that the PNCI's strength and scope, as well as the underlying rationale for protecting civilians, have changed substantially. What started as a conventional and theological protection evolved into the rights-based conception of civilian immunity that is part of contemporary secular just war theory. This history helps to clarify the meaning of noncombatant immunity and the criteria

[2] Slim, *Killing Civilians*, p. 1.

[3] Colm McKeogh, *Innocent Civilians* (New York: Palgrave Macmillan, 2002); Helen M. Kinsella, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Ithaca, NY: Cornell University Press, 2011).

for determining who is entitled to immunity. It also demonstrates that even as the PNCI has developed over time, it has remained a negative concept that fails to specify positive obligations toward noncombatants who are injured or killed.

In the second part of the chapter I turn my attention to the challenge of determining which classes of people should qualify as combatants and noncombatants in contemporary just war theory. I define the concepts of noncombatant and civilian (terms that I use interchangeably) broadly, to include anyone who is not an active member of a violent organization, who does not directly engage in combat activities in association with a violent organization, or who is physically disabled from fighting because of injury or imprisonment. This broad conception of civilian status is at odds with those who think that civilians in military support roles may be targeted. Nevertheless, I maintain that defining civilian status broadly is essential for reaching a consistent definition that limits the scope of permissible violence during war.

Changing Views of Civilian Immunity

Early Christian Just War Theory

Although just war thinking can be traced back to earlier Greek and Roman sources, Saint Augustine had a formative influence on establishing the just war tradition as a distinctive approach to theorizing normative restrictions on war.[4] The just war tradition's identity continues to be rooted in the Augustinian legacy, as he is often regarded as the founder of just war theory and the progenitor of some of its most important principles. Augustine also exemplifies the attitude toward civilians that prevailed in early Christian just war theory. He therefore provides the best starting place for tracing the evolution of conceptions of noncombatant immunity.

Augustine sought to demonstrate that Christianity does not prescribe pacifism, as many earlier theologians had maintained.[5] Reconciling war with Christian theology required finding conditions under which killing would not violate the Christian prohibition on murder. This led Augustine to consider how it could be possible to justifiably initiate and wage wars in service of some higher legitimating purpose. Augustine's writings on this problem are fragmentary and do not consist in a unified doctrine,[6] yet it is possible to identify three

[4] For a detailed discussion of this, see the first chapter of John Mark Mattox, *Saint Augustine and the Theory of Just War* (New York: Continuum, 2006).

[5] St. Augustine, "Letter 138: Augustine to Marcellinus (411/412)." In *Augustine: Political Writings*, edited by R. J. Dodaro and E. M. Atkins (New York: Cambridge University Press, 2001), 38–39.

[6] Robert L. Holmes, "St. Augustine and the Just War Theory." In *The Augustinian Tradition*, edited by Gareth B. Matthews (Berkeley, CA: University of California Press, 1999), 323–344.

Augustinian principles of *jus ad bellum* – proper authority, right intention, and just cause – that collectively identify when this higher purpose exists.

The most important of Augustine's principles, and the one that is most significant with respect to the PNCI, is just cause. Augustine argues that war is only justified when it is waged against the guilty as a means of punishing their immorality. This moral purpose elevates the status of killing during war, at least when it is carried out by the side with just cause, and distinguishes the violence of just combatants from immoral violence. One of the things that sets Augustine apart from contemporary just war theorists is that his conception of just cause provides no basis for distinguishing between enemy civilians and soldiers. As he sees it, a person's moral guilt or innocence has little or nothing to do with that person's status as a civilian or soldier. Any particular person's status is determined not with reference to characteristics that may make them liable to attack as an individual but based on whether that person is part of a community whose members are considered to be innocent or guilty. That is to say, the salient characteristic for determining whether a person may be attacked is group membership *not* individual status. As McKeogh aptly says, Augustine "condemns all on the side without just cause for their participation in a legal and moral wrong."[7]

Noncombatants exist in Augustine's view of just war, but only in a very restricted sense. They must be neutral parties who are free from the enemy population's collective moral guilt. These people are to be protected during war, as they cannot be justifiably subjected to attacks from either immoral unjust combatants or just combatants who are attempting to punish the guilty. However, an exception for neutral third parties offers little help for the members of hostile groups who, though not bearing arms, may nevertheless be subject to attack because of their membership in a community.

Furthermore, Augustine appears to have little sympathy for the victims of war, regardless of whether their suffering is deserved. He compares the plight of the citizens of Rome during its capture to the story of Job, who suffered as a test of his faith. He admonishes the Romans to bear their torment with equanimity. Their pain, he says, was less than the pain of disease that Job experienced. They should follow Job's example in accepting their divinely sanctioned pain without it inducing them to doubt or question God. Augustine even thinks that the Romans may be able to find some kind of moral purification in their experience, as he says that "anything a person has suffered here counts as amendment if he is reformed."[8] Thus, Augustine not only thinks that civilians may be attacked

[7] McKeogh, *Innocent Civilians*, p. 27.

[8] St. Augustine, "Sermon: The Sacking of the City of Rome (410/411)." In *Augustine: Political Writings*, edited by R. J. Dodaro and E. M. Atkins (New York: Cambridge University Press, 2001), 209.

but also suggests that any harms inflicted on them should be judged as deserving of compensation by God rather than by a terrestrial authority. Augustine's conception of noncombatant immunity therefore leaves little conceptual room for protecting enemy civilians from violence or repairing the harm they have sustained.

Augustine's view of guilt not only denies the immunity of those living in a hostile community but also provides grounds for protecting certain combatants. By describing just war as a way for the good to punish the guilty, Augustine elevates the moral status of combatants waging just war. Just soldiers are described as crusaders taking part in a morally good enterprise that sets them above others. This leads Augustine to establish a kind of combatant immunity, according to which those who are guilty cannot be justified in resisting their morally upright opponents. The effort to protect just combatants further distances Augustine from the dominant view of noncombatant immunity in contemporary just war theory and international law, though, as I will discuss later, some theorists have recently made a partial return to the Augustinian perspective.

Augustine does say that just combatants can act mercifully by sparing their opponents, which is especially desirable when they are unable to defend themselves.[9] For Augustine, treating enemy civilians well is supererogatory. It is praiseworthy for belligerents to act mercifully, but they are not required to do so.[10] This could be taken as creating some level of noncombatant immunity, but only in a diluted form. Immunity based on a just combatant's desire to display mercy is a discretionary immunity that depends on a subjective feeling. This does not impose any strong moral or legal duty to avoid harming civilians, much less to offer them assistance when they are injured. A purely subjective form of civilian protection that relies on combatants' attitudes deprives noncombatant immunity of any objective referent and makes it a property of those enacting violence rather than a property of those who require protection. Augustine thus denies that immunity is somehow inherent in the noncombatant status. This makes his view of civilian protection much different from a rights-based conception of immunity, according to which civilians are entitled to immunity by virtue of their own status and regardless of whether combatants want to act mercifully.

Writing almost 900 years after Augustine, Saint Thomas Aquinas faces the same basic problem as his predecessor: demonstrating that war can be consistent with Christian morality. And he reaches similar conclusions about how this problem can be overcome. Like Augustine, Aquinas maintains that war is justified if it is declared by a sovereign authority, has a just cause, and is

[9] Ibid. [10] Ibid.

carried out with the right intention.[11] Moreover, Aquinas maintains a guilt-based view of war, according to which a belligerent has just cause when engaging in war to punish the members of immoral communities. He compares killing the immoral to removing a diseased part of the body, saying that "if the health of the whole body requires the removal of some member, perhaps because it is diseased or causing the corruption of other members, it will be both praiseworthy and wholesome for it to be cut away."[12] As this passage indicates, Aquinas thinks that no person ever *deserves* death, but that sinners may have to be killed before they contaminate others. Aquinas explains that clerics are exceptions to this rule, but makes no general exceptions for the many classes of people who are treated as being immune from attack in contemporary just war theory.

Aquinas' most important contribution to just war theory, and to the theory of noncombatant immunity in particular, is the doctrine of double effect (DDE). Although the DDE will be dealt with in more detail in Chapter 4, it is useful to discuss it briefly here to clarify what this early formulation of the DDE contains and to consider its significance for the development of just war theory. The function of the DDE is to show that it is not only permissible to violently punish immorality but that it is even excusable to harm innocent people when that harm is not intended and is only a byproduct of a proportional use of force.

Aquinas raises the example of acting in self-defense against an attacker to make this point. He argues that it is permissible to defend oneself against an attack, but only if one's intent is self-defense and not to kill the attacker. Deliberately killing an attacker, even if doing so were the only way to prevent an attack, would violate the condition of right intention and would therefore qualify as murder. However, Aquinas argues that actions can have multiple effects, some intended and some unintended. Because acting to defend oneself and unintentionally killing an attacker in the process of achieving that objective does not involve any malicious intent, that effect has a different moral status than a deliberate killing. If one acts with the goal of defending oneself against an attacker and uses proportionate means of defense, then the effects of the defensive action are excusable even if the attacker is killed.[13]

The same logic can be applied to excuse harm that is inadvertently inflicted on innocent bystanders. Harming innocents is excusable, Aquinas thinks, when it is the unintended outcome of using proportionate force against an aggressor. Again, Aquinas uses the example of a person being forced to defend himself to substantiate this point. The victim of an unwarranted attack may do what is necessary to protect himself so long as he is *only* acting in self-defense and

[11] St. Thomas Aquinas, "War, Sedition and Killing." In *Aquinas: Political Writings*, edited by R. W. Dyson (New York: Cambridge University Press, 2002), 239–265.
[12] Ibid., p. 253. [13] Ibid., pp. 261–265.

does not intend to hurt anyone. If the victim unintentionally harms a bystander in the course of defending himself, then this effect is excusable because it is an unintended secondary effect and not what the defender intended to bring about.

The DDE is one of the most important ideas in just war theory. It reconciles the absolute prohibition against attacking civilians with the inevitability of inflicting unintended civilian casualties in some instances. McKeogh argues that the introduction of the DDE marks a dramatic shift in the pre-modern conception of noncombatant immunity. He characterizes this as a negative development that opens noncombatants to excusable violence.[14] This evaluation is accurate; a moral defense for harming civilians opens the conceptual space for considering violence against civilians acceptable in some circumstances. Nevertheless, it is difficult to see how just war theory could be sustained otherwise. Without some formulation of the DDE, it would be extremely difficult to maintain the PNCI at all. If civilian immunity were absolute, permitting no exceptions, then fighting within the scope of just war limitations would be virtually impossible. One who rejects the DDE would likely have to either become a de facto pacifist or discard noncombatant immunity entirely.

The DDE is simultaneously one of the most harmful developments in just war theory, from the perspective of civilian immunity, and one of the most valuable. Its effects on civilians are inescapably dualistic, and there is no simple way around this. Wars must sometimes be waged in the interest of protecting civilians and their rights, and wars inevitably result in civilian suffering. Nevertheless, as I will show in Chapter 4, the dangers of the DDE excusing violence against civilians can at least be mitigated if belligerents take on a positive duty to repair the harm they inflict.

As this brief overview of their work shows, Augustine and Aquinas are primarily interested in demonstrating that violence can sometimes be excused, despite the Christian prohibition of murder. They focus on showing that certain people can be killed – not on showing that some must be protected. This leaves them with weak conceptions of civilian immunity that generally permit violence against civilians who are part of immoral communities, who have acted immorally, or who are incidentally harmed in excusable acts of self-defense.

Other early Christian just war theorists approach noncombatants in much the same way and are therefore similarly reluctant to recognize anything akin to the contemporary understanding of noncombatant immunity. The position they take is one that I will refer to as a "guilt-based" conception of combatant status, because the determination of combatant status is made based on an opponent's moral qualities. As we have seen, this way of defining combatant status makes

[14] Colm McKeogh, "Civilian Immunity in War: From Augustine to Vattel." In *Civilian Immunity in War*, edited by Igor Primoratz (New York: Oxford University Press, 2007), 62–83.

it very difficult to extend protection to civilians. It leaves them at the mercy of just combatants, who are free to punish their immoral enemies without adequate objective normative constraints.

Modern Just War Theory

During the sixteenth century, just war theorists gradually replaced the guilt-based conception of combatant status with a rights-based alternative. Underlying this shift was a transformation in how theorists understood the nature of war and individual rights. Rather than interpreting conflicts as moral crusades in which the guilty could be punished for their sins, just war theorists came to see war as a political relationship between sovereigns. From this perspective, states could justifiably pursue limited foreign-policy objectives that did not necessarily implicate all of their citizens. This alternative way of thinking about war grew out of the natural rights tradition that emerged during the period. Natural rights theory assumed the existence of certain natural human rights that were more basic than political institutions and that governments were therefore bound to respect, even during war. This detached individual rights from particular political arrangements and suggested that wars between rival polities could not provide grounds for abrogating the natural rights of those who were not directly involved in the fighting. It was from this secular foundation that war could be justified as a political relationship between sovereigns that did not require the moral valuation of their subjects.

Distinguishing matters of state from matters of individual conduct, while also emphasizing the importance of individual rights, led just war theorists to develop principles of conduct that left the rights of ordinary people largely intact. This radical shift in just war theory's foundational assumptions made it possible to abandon notions of collective guilt and to urge greater care for those innocent people who were caught up in disputes that they had not instigated. But the shift only became possible once secular conceptions of war as a political struggle broke free from earlier conceptions of collective guilt. Francisco de Vitoria, a theologian and jurist writing in the sixteenth century, marks the first major shift from the guilt-based conception of just war to a rights-based conception. His status as a transitional figure is reflected in the deep inconsistencies that run throughout his writings. Although Vitoria's thoughts on war are well-developed and sophisticated in many respects, they suffer from internal contradictions that arise from his attempt to unite two distinct conceptions of morality and war. Like early Christian just war theorists, Vitoria thinks that wars can be justified as a mechanism by which the guilty may be punished and the innocent protected. This leads him to make strong pronouncements about collective guilt that seem to exclude the possibility of recognizing the immunity of enemy civilians. For example, he says that "anyone may lawfully be condemned

for the wrongdoings of his appointed,"[15] which is often read as meaning that an entire population can be punished for the actions of its leaders.[16]

Furthermore, Vitoria condones many tactics that contemporary just war theorists would consider indiscriminate or disproportionate. He considers siege warfare to be justified, even though it harms innocent people, because of the guilt shared by all who find themselves within the enemy's walls. He says that "in reality all adult men in an enemy city are to be thought of as enemies, since the innocent cannot be distinguished from the guilty, and they may all be killed."[17] Vitoria also defends the seizure of goods from noncombatants on the grounds that this is necessary for defeating opponents. "[W]e may take the money of the innocent, or burn and ravage their crops or kill their livestock all these things are necessary to weaken the enemies' resources. There can be no argument about this."[18] On this point, the reasoning seems to be more pragmatic than moral, but the result is the same: civilians can expect little in the way of special protections and their lives may be willfully endangered in the pursuit of victory.

Vitoria's support for collective punishment and willingness to accept indiscriminate methods of fighting make his understanding of civilian immunity fairly weak by contemporary standards, but he still shows a stronger interest in protecting civilians than his predecessors. Vitoria's view of civilian immunity is vastly stronger than that of Augustine and Aquinas because he acknowledges that enemy civilians should be exempted from attack under circumstances when harming them does not fall within his permissive understanding of the DDE. He says that "it is never lawful to kill innocent people, even accidentally and unintentionally, except when it advances a just war which cannot be won in any other way."[19] Statements like this, which suggest a deep desire to protect civilians from intentional violence, are difficult to reconcile with Vitoria's willingness to permit other harms to be inflicted on them.

Vitoria's contrary attitudes toward civilians indicate a struggle to reconcile old and new conceptions of war and individual rights. He attempts to preserve the justification of war based on moral guilt that he inherited from Augustine and Aquinas, while still claiming that civilians should usually not be targeted. This is a difficult position to sustain. It is unclear how moral guilt could be so strong as to permit the initiation of war, but still weak enough to justify killing certain people. This is an instructive problem, as it points to the irreconcilability of the early Christian and rights-based conceptions of just war.

[15] Francisco de Vitoria, "On the Law of War." In *Vitoria: Political Writings*, edited by Jeremy Larance and Anthony Pagden (New York: Cambridge University Press, 1991), p. 21.

[16] Anthony Pagden and Jeremy Lawrence, "Introduction." In *Vitoria: Political Writings* (New York: Cambridge University Press, 1991), xiii–xxx; Uwe Steinhoff, *On the Ethics of War and Terrorism* (New York: Oxford University Press, 2007), p. 48.

[17] de Vitoria, "On the Law of War," p. 317. [18] Ibid., p. 317. [19] Ibid., p. 316.

Although Vitoria's comments on noncombatant immunity are contradictory and provide an inadequate normative basis for regulating violent conflicts, they constitute an important development in the rights-based conception of just war. The expanded protections for civilians that Vitoria favors follow from this rights-based view and are often explicitly cast in the language of rights. Later just war theorists would only be able to resolve the contradictions of Vitoria's work by abandoning the guilt-based rationale for war and resituating the just war tradition in a rights-based understanding of civilian status.

Writing later in the sixteenth century, the theologian Francisco Suárez echoes many of Vitoria's judgments about when and how civilians may be attacked. In some ways, he appears to be even more willing to accept civilian victimization. Suárez defends retaliatory actions against civilians of defeated states, saying that "after victory has been achieved, a prince is allowed to inflict upon the conquered commonwealth such losses as are sufficient for a just punishment, satisfaction, and reparation for all losses suffered."[20] He likewise maintains that soldiers are permitted to take goods from conquered people, provided they are given permission by their leaders. This retributive action is limited to property – innocent people cannot be killed, even in an attempt to restore justice – but the authorization of property seizures gives belligerents some ability to punish civilians.

As with Vitoria, Suárez's attitude toward civilians reflects the continued dominance of a guilt-based conception of liability to attack and of the theological view of war as a mechanism for punishing sinners. Nevertheless, also like Vitoria, Suárez links just war theory to natural law theory and repeatedly refers to the existence of rights governing the treatment of innocents. Most important of all, he recognizes that innocent people have a right to not be intentionally subjected to physical harm. This provides rights-based grounds for respecting the lives of civilians, even though their property remains vulnerable to seizure or destruction. The challenge Vitoria and Suárez left their predecessors was to reevaluate the just war tradition's fundamental assumptions in an effort to reconcile the contradictions between two incompatible views of war and civilian status.

Rights-Based Conceptions of Civilian Status

It was through the work of the legal theorists Hugo Grotius and Emer de Vattel that the rights-based view of noncombatant immunity was most clearly separated from the guilt-based perspective inherited from Christian theologians.

[20] Francisco Suárez, "Justice, Charity, and War." In *The Ethics of War: Classic and Contemporary Readings*, edited by Gregory M. Reichberg, Henrik Syse, and Endre Begby (Malden, MA: Blackwell, 2006), 339–370, p. 362.

Grotius' contribution to developing noncombatant protections was particularly important. He played a decisive role in reestablishing just war theory on a secular foundation and in constructing a framework for theorizing the norms of war that has endured into the twenty-first century.[21]

One of Grotius' most important theoretical contributions was his decision to reject the idea of collective guilt that was at the heart of early Christian just war theory. He argues that "the law of retaliation, strictly and properly so called, must be directly enforced upon the person of the delinquent himself. Whereas, in war, what is called retaliation frequently rebounds to the ruin of those, who are no way implicated in the blame."[22] Elsewhere, he makes the same point in a slightly different form by saying that "nature does not sanction retaliation except against those who have done wrong. It is not sufficient that by a sort of fiction the enemy may be conceived as forming a single body."[23] Assertions like these leave little doubt that Grotius opposes the Augustinian view of collective guilt and seeks to find an alternative justification for war. And this fundamentally alters the status of civilians. Without collective guilt, there is no basis for the collective punishment of all members of a community.

By refusing to assign liability to attack based on collective guilt, Grotius is free to create a different standard for determining who may be attacked. He contends that only those who actively participate in wars are legitimate targets – a standard that exempts most noncombatants under ordinary conditions. Grotius only makes allowances for attacking civilians "in cases of extreme urgency and utility," and even in these cases he thinks that "humanity will require that the greatest precaution should be used against involving the innocent in danger."[24] This suggests that he considers violence against civilians to be excusable when it falls within the scope of a more restricted understanding of the DDE than Aquinas'.

Although Grotius does think that Christian charity should play a role in limiting violence against civilians, he argues that there must be a stronger norm governing the treatment of civilians – one rooted in international law, rather than in Christian theology. As he sees it, the customary law encompassed by *jus gentium* creates a legal basis for civilian immunity. It is this secular international law, and not religious doctrine, that guarantees civilian protection from violence. On this basis, civilians are entitled to protection because each innocent person has "the same right over his life, as over his property."[25] The right to life and right to property can only be sacrificed by some act of "express or implied consent" that transfers that right to a state waging war.[26] Only those

[21] Geoffrey Best, *War and Law since 1945* (New York: Clarendon Press, 1994), p. 26.
[22] Hugo Grotius, *The Rights of War and Peace: Including the Law of Nature and of Nations* (New York: Cosimo, 2007), p. 330.
[23] Quoted from Judith Gail Gardam, *Humanitarian Law* (Dartmouth: Ashgate, 1999), p. 37.
[24] Grotius, *The Rights of War and Peace*, p. 361. [25] Ibid., p. 364. [26] Ibid.

"who have originally resigned their own will to that of the public" can be justly punished for offenses committed by the state.[27]

Deriving noncombatant immunity from international law formed by states not only changes the protections afforded to noncombatants but also has procedural implications that affect how noncombatant protections are enacted. Grotius establishes secular political authorities, rather than subjective feelings of mercy or threats of divine retribution in the afterlife, as the guarantors of noncombatant immunity. Political authorities are endowed with an interest in protecting noncombatant immunity because this is one component of the international legal order that they have established and that is integral to preserving their power.

Finally, Grotius extends the range of people who qualify as civilians. Certain people are naturally civilians because they are disabled from participating in war – usually because of physical weakness. This class of people includes children, most women, and "men whose way of life is opposed to warmaking," such as scholars, clergy, farmers, and merchants.[28] The idea that certain people are naturally civilians has been rightly criticized for perpetuating gender biases and being empirically questionable.[29] Nevertheless, even with this fault, Grotius deserves credit for his attempt to exclude broad segments of the population from the horrors of war. He establishes a strong foundation upon which the contemporary, secular, rights-based conception of just war theory and civilian immunity can be constructed and refined.

Emer de Vattel makes further improvements to the noncombatant protections established by Grotius. He agrees with most of Grotius' central points and expands on them to take just war theory even further away from notions of collective guilt. The most important point of agreement is the belief that civilians have a right to life that they cannot lose unless they participate in wars. Vattel sees war as a matter of political convention that implicates opposing armed forces but not their populations. He says that people in a hostile state can be classified as enemies but that "it does not thence follow that we are justified in treating them like men who bear arms, or are capable of bearing them."[30] Vattel later condemns any use of force that is unnecessary for achieving military goals and violence against those who are not participants in fighting.[31] Vattel's aversion to harming civilians is central to his theory of war, as many of his judgments on specific weapons and strategies are heavily informed by the extent to which these may harm "innocent persons."[32] His use of the term "innocent"

[27] Ibid. [28] Quoted from McKeogh, "Civilian Immunity in War," p. 76.
[29] Kinsella, *The Image before the Weapon*.
[30] Emer de Vattel, *The Law of Nations* (Indianapolis, IN: Liberty Fund, 2008), p. 510.
[31] Ibid., p. 573.
[32] Examples include Vattel's thoughts on whether it is permissible to poison water, how sieges should be conducted, and why peace treaties must be announced publicly.

refers not to a lack of moral guilt, as it does when used by just war theorists who take a guilt-based view of combatant status, but to a person's abstention from hostilities.

Vattel's most original contribution to the theory of civilian immunity is that he casts further doubt on any attempts to link combatant status to moral guilt, thereby pushing Grotius' rejection of collective guilt even further. Vattel goes so far as to argue that guilt for the initiation of unjust wars lies with the sovereign alone and not with any of his subjects – even those subjects who choose to fight. This not only frees civilians from being implicated in the collective crime of aggression but soldiers as well. As Vattel says, "[t]he subject, and in particular the military, are innocent: they have acted only from a necessary obedience."[33] This makes it imperative to not permit violence against civilians on the basis of retribution for judgments of *ad bellum* injustice, especially group retribution of the sort countenanced by Augustine and other early theorists in the just war tradition.

The gradual shift from guilt-based to rights-based conceptions of status reflected changes in the conduct of war, coming at a time when military service was increasingly professionalized and subjected to centralized control by states.[34] With war becoming a prerogative of sovereigns, the many nobles who often had the capacity to fight independently during the Middle Ages were disempowered. Reasons of state took precedence over personal motives as grounds for war. This was strongly affirmed by the Treaty of Westphalia in 1648. In response to thirty years of devastating wars over religion, the leading powers of Europe decided to renounce their right to intervene in rivals' domestic politics and to interact with each other as holistic states, rather than as feudal assemblages. With the locus of political and military authority shifting to states and away from other actors, it was possible for just war theorists to plausibly claim that fighting between states did not implicate ordinary citizens.

Assessing the Development of Noncombatant Protections

As this brief history of the just war tradition shows, the class of people who qualify as civilians and the protections afforded to those people have become more expansive as the basis for determining liability to attack has shifted from a guilt-based view grounded in theology to a rights-based view grounded in secular rights theory and international law. Medieval and Early Modern Christian just war theorists thought that violence against those who would generally be

[33] de Vattel, *The Law of Nations*, p. 588.

[34] Martin Van Creveld, *The Rise and Decline of the State* (New York: Cambridge University Press, 1999), pp. 126–184; Jeremy Black, *European Warfare: 1660–1815* (London: UCL Press, 1994) and *Kings, Nobles, and Commoners: States and Societies in Early Modern Europe* (New York: I. B. Tauris, 2003).

classified as civilians by contemporary theorists was permissible if those people were members of groups that shared collective guilt. Civilian victimization was seen as being not only consistent with the principles of just war but an essential part of pursuing the just cause of punishing the guilty. Medieval and Early Modern just war theorists extended some weak protections to noncombatants by exempting neutral civilians from harm and by arguing that merciful warriors should spare some of their victims. Nevertheless, these protections were limited and capricious insofar as they were based on combatants' subjective feelings rather than on objective rights.

The rights-based view of just war established much stronger protections for civilians and expanded the class of people who qualified as civilians. Rather than treating all members of an opposing group as potential targets, Grotius and Vattel sought to show that only those directly participating in hostilities could be justifiably attacked. Thus, they replaced the guilt-based view of liability to attack with threat-based standards for determining who qualifies as a combatant. According to this view, combatants are distinguished from noncombatants because they pose a threat, or are capable of posing a threat, that authorizes their opponents to respond with force. This threat-based standard dramatically reduces the scope of permissible violence during war and, at least in principle, limits war by imagining it as a confrontation between members of armed forces who face each other on battlefields that are removed from the spaces of domestic life.

The stronger protections for civilians in rights-based theories are closely linked to the redefinition of civilian status. By arguing that all people should be considered innocent unless they directly participate in hostilities, Grotius and Vattel make civilian immunity an objective property of civilians. Resituating civilian immunity in this way establishes that noncombatants have a right to not be attacked that pertains regardless of whether belligerents wish to treat them mercifully and regardless of the guilt of their leaders or societies. By this view, people are entitled to immunity from attack by default and can only sacrifice their immunity through their own actions. This shifts the burden of proof from determining how certain groups of people can be granted immunity from attack to determining what it is about combatants that makes them *lose* immunity. And this is the way efforts to distinguish combatants from noncombatants are typically framed in contemporary rights-based just war theory.

Civilians in Contemporary Just War Theory

As I pointed out in the Introduction, the debate over whether noncombatants are entitled to immunity has been largely settled within the just war tradition and international law. The PNCI now stands as one of the most basic and important assumptions of both fields, shaping virtually every normative discourse about

the theory and practice of war. The conviction underlying the PNCI – that people have an inherent right to not be harmed by others – has likewise become generally accepted as a basic component of morality and law, and is usually called "the right to life." Before moving on to consider how the right to life and the PNCI shape contemporary just war thinking, it is important to say a bit about the right to life and its role in moral thought. Studies of just war theory frequently avoid discussing this right in detail, and sometimes fail to mention it at all. This reflects a general reluctance among contemporary just war theorists to interrogate some of the basic assumptions that underlie just war theory,[35] as well as a pervasive aversion to foundationalism that is evident throughout the social sciences and humanities. Nevertheless, the right to life upholds many of our moral norms and laws. It substantiates the PNCI and acts as one of the nodal points connecting just war theory and international legal theory to moral and legal theory more generally.

The right to life has nearly universal acceptance in and outside of just war theory because it reflects and supports some of our deepest moral intuitions. In moral theory, the assumption is so important that personhood is commonly defined, at least in part, in terms of the possession of a right to life.[36] The assumption of an inherent right to life is also evident in the way moral responsibilities toward people are formulated, including the beliefs that every person's security must be respected and that no person may be subjected to unwarranted aggression. It is possible to derive many other basic norms from this right, including the wrongness of murder or of any acts of aggression that contravene the right to life. The foundational position of the right to life and its role in sustaining norms relating to violence explains why so many debates over the morality of killing and death, such as the debates over abortion, euthanasia, and killing animals, are generally framed as disagreements about who qualifies as having the right to life that we attribute to persons.[37]

The right to life is likewise evident in the conviction that individuals have an indefeasible right to self-defense that permits them to respond to threats with proportionate levels of force. The right to self-defense is almost universally recognized, with only the most extreme pacifists opposing it, and is generally explained as existing because people must be able to protect their lives against aggression that would violate the right to life. These expressions of the right to

[35] Corey and Charles call attention to this tendency in David D. Corey and J. Daryl Charles, *The Just War Tradition: An Introduction* (Wilmington, DE: ISI Books, 2012), pp. 7–8.

[36] Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (Cambridge, MA: Oxford University Press, 2002), p. 303.

[37] McMahan, *The Ethics of Killing*, p. 303; Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1997); Elizabeth Wicks, *The Right to Life and Conflicting Interests* (Cambridge, MA: Oxford University Press, 2010); Manfred H. Vogel, *An Ethical Right to Life: A Formulation from a Buberian Diological Perspective* (Lanham, MA: Hamilton Books, 2004).

life are codified in many domestic laws, especially those protecting against violence. The wrongness of murder, assault, rape, and other violent crimes against a person's bodily integrity can be explained by showing that these acts constitute violations of the right to life. Each of these crimes is an instance of an aggressor breaching the victim's rights by inflicting physical and psychological harm.

The right to life is widely recognized as a basic fact by the most influential contemporary political ideologies, especially those that inform the political ideals, civic cultures, and political institutions of democratic states.[38] It is at the heart of liberalism, being reflected in the liberal respect for individual self-determination and the protection of individual liberties. The pervasiveness of this right in liberal philosophy is such that one can find affirmations of it in such varied places as Hobbes' comments on the right of self-preservation,[39] Locke's set of natural rights that exist prior to the establishment of political authorities,[40] and Rawls' list of basic human rights.[41] Moreover, the right to life is not unique to liberalism. It is commonly accepted by competing political ideologies, such as libertarianism[42] and conservatism.[43]

Finally, the right to life is frequently invoked in constitutions and other foundational documents, thereby providing ample evidence that the right is not simply an abstract theoretical construct. The American Declaration of Independence echoes Locke by referring to the existence of natural rights to "life, liberty, and the pursuit of happiness."[44] The Declaration of the Rights of Man and of the Citizen likewise invoked a universal right to security.[45] Efforts to establish protections for individuals in international law also rely heavily on the assumption of a universal right to life to provide the theoretical basis for establishing transnational standards for how people may be treated. The right to life is affirmed by the Human Rights Committee, the European Convention on Human Rights, the European Court of Human Rights, and the Universal Declaration of Human Rights. The International Covenant on Civil and Political

[38] Brian Orend, *Human Rights: Concept and Context* (New York: Broad View Press, 2002), pp. 104–111; Micheline R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley, CA: University of California Press, 2004).

[39] Thomas Hobbes, *Leviathan*, edited by Richard Tuck (New York: Cambridge University Press, 1996), pp. 91–92.

[40] John Locke, "The Second Treatise of Government." In *Two Treatises of Government*, edited by Peter Laslett (New York: Cambridge University Press, 2003), p. 323.

[41] John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), p. 65.

[42] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

[43] Ted G. Jelen, "Respect for Life, Sexual Morality, and Opposition to Abortion," *Review of Religious Research* 25(3) (1984), 220–231.

[44] Declaration of Independence (1776). https://www.archives.gov/founding-docs/declaration-transcript (accessed March 16, 2016).

[45] Declaration of the Rights of Man and of the Citizen (1789). http://avalon.law.yale.edu/18th_century/rightsof.asp (accessed March 16, 2016).

Rights, a treaty put forth by the United Nations General Assembly, is particularly clear in articulating this right and its importance. It affirms that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[46]

Thus, the right to life is a basic assumption that informs various domains of moral and legal theory and that influences national and international law at multiple levels. By assuming the existence of this right and relying on it to derive the PNCI, just war theorists' analyses of the combatant/noncombatant distinction are placed within the context of a much larger constellation of moral and legal discourses about what the right to life is and what additional rights and responsibilities it establishes. This is why contemporary just war theorists tend to give far more attention to demonstrating that war provides the conditions under which certain people temporarily renounce their right to life than they do to demonstrating that certain people should not be attacked.

The orthodox view in contemporary just war theory is that the critical distinction between combatants and noncombatants is that combatants pose a threat that forces their opponents to act in self-defense. By this view, combatants who fight each other reciprocally forfeit their right to life during wars, and in return for this sacrifice gain the ability to justly attack opposing combatants. Those who do not engage in hostilities retain the right to life because they do not pose a threat that would force others to act in self-defense. Thus, the right to life remains in place during war, applying to all people except those who have forfeited the right by threatening others.

With the protection of the right to life depending on whether a person belongs to the class of people who have given up that right or to the class of people who retain it, analyses of the combatant/noncombatant distinction typically focus on determining what kinds of actions lead a person to lose the right to life during war. This is evident in Walzer's pronouncement that "the theoretical problem is not to describe how immunity is gained, but how it is lost. We are all immune to start with; our right not to be attacked is a feature of normal human relationships."[47] To resolve this problem, Walzer argues "[t]hat right is lost by those who bear arms 'effectively' because they pose a danger to other people. It is retained by those who don't bear arms at all."[48] Walzer further explains that combatants are liable to attack even if they are not personally threatening or not threatening at the moment they are attacked. This is because all who are members of a military organization are engaged in a collective effort to threaten an opposing military.

[46] The International Covenant on Civil and Political Rights. https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf (accessed July 10, 2014).

[47] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), p. 145.

[48] Ibid.

> It is important to stress, however, that he [the combatant] has not been forced to fight by a direct attack upon his person; that would repeat the crime of aggression at the level of the individual. He can be personally attacked only because he already is a fighter. He has been made into a dangerous man, and though his options may have been few, it is nevertheless accurate to say that he has allowed himself to be made into a dangerous man. For that reason, he finds himself endangered.[49]

Thus, Walzer concludes that a person temporarily renounces the right to life and takes on combatant status by acting dangerously. This is an individual act that requires an *intent* to participate in war. A combatant "makes himself a dangerous man" and cannot be made into one by others. Even if someone is conscripted or coerced into fighting, that person can still be said to have "allowed himself to be made into a dangerous man," thereby demonstrating some free agency in becoming a combatant. As I will discuss in more detail later, this language reflects the underlying logic of how rights work. The right to life, like any right, can only be renounced by the bearer of the right and cannot be forcibly waived by another person.

Other theorists make roughly the same point as Walzer by calling attention to how combatants give up the right to life by threatening their opponents. Nagel argues that "we must distinguish combatants from noncombatants on the basis of their immediate threat or harmfulness."[50] Graham says that "[c]ombatants are those people the purpose of whose activity is to contribute to the threat; noncombatants are those people who do not actively contribute in this sense, although they may constitute part of the relevant causal chain."[51] Orend relies on a threat-based conception of combatant status when he says that "[c]ivilians, whatever their internal attitude, are not in any external sense dangerous people."[52] Finally, Rodin says "the non-innocent (those who may permissibly be killed in war) are not defined as morally non-innocent or at fault, but rather as something like 'presently harmful,'" thereby invoking the ability to threaten or to inflict harm as the critical distinction between soldiers and civilians.[53]

Despite Nagel's reference to an "immediate threat," the threat that combatants pose is generally understood in a broad sense. During wars, soldiers only immediately threaten others during the relatively short moments when they are actively fighting or when they are armed and ready to fight. They are not immediately threatening when they are unarmed, sleeping, eating, or too scared to fight. At any given time, a large proportion of combat arms personnel in any

[49] Ibid.
[50] Thomas Nagel, "War and Massacre," *Philosophy and Public Affairs* 1(2) (1972), 123–144, p. 140.
[51] Gordon L. Graham, *Ethics and International Relations* (New York: Blackwell, 1997), p. 67.
[52] Brian Orend, *The Morality of War* (Orchard Park, NY: Broadview Press, 2006), p. 113.
[53] David Rodin, *War and Self-Defense* (New York: Oxford University Press, 2003), p. 84.

military is likely to be out of action because they are in one of these conditions. Support personnel, who make up the bulk of most armed forces, are also not immediately threatening. They rarely act aggressively as individuals and may not even be armed. Rather, these soldiers perform the work necessary to ensure that combat arms personnel are able to fight.

Although they may not be immediately threatening, inactive combat arms personnel and support personnel are threats in an expansive sense. They are either potential threats or members of an armed collective who enable that collective to wage war. The collective participation in an organization that is directed at making war distinguishes these classes of combatants from noncombatants. Primoratz perfectly expresses the way inactive or unarmed combatants are indirectly threatening when he says that "[t]he soldier may be sleeping right now, but he will wake up later and resume his part in this business; therefore he is fair game even when asleep."[54] Walzer likewise says that though it is praiseworthy for soldiers to show restraint when facing vulnerable enemies that are not immediately threatening, those enemies may nevertheless be freely attacked so long as they are active participants in the war.[55]

According to the threat-based view, soldiers only lose their combatant status and revert to being civilians when they are incapable of posing a threat in the expansive sense. This occurs when soldiers are incapacitated by wounds, when they surrender and become prisoners of war, or when they withdraw from military service. These conditions either render former combatants physically unable to act threateningly or end their membership in a belligerent organization that is waging war.

Kaufman clarifies the nature of the threat combatants pose by emphasizing the importance of distinguishing between those who are threatening in ways that require defensive action and those who are only indirectly threatening because they incite violence. Kaufman says that:

> The editorial writer who advocates for the war does not pose a threat of harm, at least not directly. Unlike the teenage conscript he is not morally innocent, since he speaks out vigorously in favor of his country's war, but he is innocent in the sense that he does not directly threaten harm and is not a legitimate target for attack, at least according to just war thinking.[56]

Mayer raises a similar point, comparing civilians to fans at a sporting event. He argues that during a game, fans can provide moral support for their team by

[54] Primoratz, "Civilian Immunity in War," p. 28.
[55] Walzer, *Just and Unjust Wars*, pp. 138–143.
[56] Frederick Kaufman, "Just War Theory and Killing the Innocent." In *Rethinking the Just War Tradition*, edited by John W. Lango, Michael W. Brough, and Harry van der Linden (Albany, NY: State University of New York Press, 2007), 99–114.

doing things like cheering or verbally harassing the other team and its fans.[57] As Mayer correctly points out, no matter how much the fans cheer for their team, they are not participants in the game. "Even if your opponent's fans are cheering for their team and boosting their morale, you cannot harm these fans (even if this would help defeat your opponent)."[58] The fans' actions, like the actions of the editorial writer in Kaufman's example, are clearly meant to favor one side over another and can help to instigate or intensify a conflict. However, voicing support for war does not itself threaten someone to the point that they must defend themselves with force. Such support also falls short of implicating the speaker in a collective effort to wage war because it is largely rhetorical and does not substantially harm the enemy or contribute to combat arms personnel's ability to fight. Thus, Mayer argues that civilians may cheer for their side to win and may make an effort to provide material assistance for the war effort and still be civilians as long as they are not active participants in the fighting.

This is not to say that posing a threat is the only thing that matters when determining combatant status or that just war theorists always treat complicity as being irrelevant for determining one's status. In a partial return to the guilt-based view of liability to attack that was the dominant position before Grotius, Jeff McMahan and David Rodin argue that only those who pose unjust threats may be attacked. In contrast to Walzer and others who assume the Moral Equality of Combatants (MEC) – the view that all combatants have the same status regardless of whether they are fighting for a just or unjust belligerent – McMahan and Rodin consider wars to be morally asymmetrical such that only combatants who pose unjust threats can be regarded as giving up their right to life and making themselves liable to attack. They maintain that just combatants are, at least in principle, immune from justifiable violence.[59] Because the anti-MEC position attributes liability to attack in terms of posing an unjust threat, rather than some kind of deeper moral guilt associated with an entire community, its proponents generally argue that it is possible to maintain a distinction between combatants and noncombatants, and that the latter may not be targeted regardless of whether they are on the just or the unjust side. That is to say, one may accept that just and unjust combatants have different moral statuses while still claiming that civilians on either side of a conflict retain their immunity. Lazar thinks that this distinction is untenable and that any attempt to reject the MEC must result either in permitting the targeting of civilians on

[57] Chris Mayer, "Nonlethal Weapons and Noncombatant Immunity: Is it Permissible to Target Noncombatants?" *Journal of Military Ethics* 6(3) (2007), 221–231, p. 226.
[58] Ibid.
[59] Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009); Rodin, *War and Self-Defense*.

the unjust side or in prohibiting the targeting of all but the most threatening just combatants.[60] His reasoning is that many civilians who support the unjust side are complicit in manufacturing an unjust threat. Some civilians even play a more direct role in facilitating aggression than uniformed military support personnel who, though they are members of the military, do not participate in the fighting. As he explains, "If noncombatants escape liability, so should many unjust combatants; if all unjust combatants are liable, then the same must go for many noncombatants."[61]

There are two strategies available for responding to this "responsibility dilemma." First, critics of the MEC can accept that the morality of war and efforts to regulate war must remain distinct to some extent. McMahan says that the moral asymmetry between combatants is part of the deep morality of war and that it cannot be actualized in international law.[62] This makes it possible to retain civilian protections in practice even if civilians may have some degree of moral guilt. Most of those who reject the MEC see themselves as introducing a distinction between just and unjust combatants that does not threaten the protected status of civilians. This means that, despite their fundamental disagreements about the status of combatants, opponents of the MEC are in agreement with proponents of the MEC in accepting the civilian right to life as a basic value and attempting to construct the norms of just war in ways that protect that right.

The second option for resolving the responsibility dilemma is to accept that civilians supporting the war are liable to attack. This would deny that those civilians retain the right to life during war and make it permissible to harm them without taking any reparative measures. This approach shrinks the class of people who are immune from attack considerably.[63] Nevertheless, even revisionists who adopt this position have some stake in my thesis because civilians supporting just belligerents would retain the right to life and therefore have an entitlement to assistance when that right is breached.

[60] Seth Lazar, "The Responsibility Dilemma for Killing in War: A Review Essay," *Philosophy & Public Affairs* 38(2) (2010), 180–213.

[61] Ibid, p. 181.

[62] See Jeff McMahan, "The Morality of War and the Law of War." In *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, edited by David Rodin and Henry Shue (New York: Oxford University Press, 2008). Strawser advances another variant of this by arguing that the deep morality of war can be put into practice and used to shape the laws of war and rules of engagement that soldiers must follow while still preserving symmetrical civilian immunity. See Bradley Jay Strawser, "Revisionist Just War Theory and the Real World: A Cautiously Optimistic Proposal." In *Routledge Handbook of Ethics and War: Just War Theory in the 21st Century*, edited by Nicholas G. Evans, Fritz Allhoff, and Adam Henschke (New York: Routledge, 2013).

[63] For a more detailed discussion of the various strategies for overcoming the responsibility dilemma, see Bradley Jay Strawser, "Walking the Tightrope of Just War," *Analysis Reviews* 71(3) (2011), 533–544.

The Struggle to Clarify the Combatant/Noncombatant Distinction

The threat-based view of combatant status has paradoxical implications for civilians. On the one hand, it offers an alternative to the guilt-based view of liability to attack, thereby allowing civilians to escape collective guilt attributions and to qualify for immunity regardless of how their political leaders act. On the other hand, this view raises the possibility that civilians could be considered threatening in the same expansive sense as temporarily unarmed soldiers or military support personnel. One of the intractable controversies of contemporary just war theory is demarcating indirectly threatening people who qualify as combatants from indirectly threatening people who qualify as civilians.

There are good reasons for thinking that civilians could be complicit in the threats posed by their states. Industrialized warfare mobilizes entire populations against each other, making it possible for states to wage total wars in which the difference between victory and defeat rests heavily on how effectively the civilian population can be mobilized to produce war materials. Civilians may also be considered complicit in the war effort if they vote aggressive leaders into office or if they provide ideological support for soldiers in the field. Belligerents routinely attack civilians in an effort to disrupt opponents' industries, to undermine their will to fight, or to encourage domestic political changes.[64] Interstate wars have therefore become "people's wars"[65] in which noncombatants are participants to some degree.

Intrastate wars arguably include civilians to an even greater extent than interstate wars. In these wars, the effective mobilization of a civilian population in support of one side or the other is usually a primary objective. And when their support is a precondition for victory, as it is when belligerents compete for the governance of a territory, civilians are unavoidably implicated in the hostilities.[66] The quest for popular support leads belligerents to compete with each other to win over civilians, sometimes with rewards like social services and public works projects, and sometimes through the use of coercion.[67] As in interstate wars, this leads to the targeting of civilians and to nonlethal but

[64] Christopher Coker, *War and the 20th Century: A Study of War and Modern Consciousness* (London: Brassey's, 1994).

[65] Carl Schmitt, *The Theory of the Partisan: A Commentary/Remark on the Concept of the Political* (East Lansing, MI: Michigan State University Press, 2004).

[66] See Rupert Smith, *The Utility of Force: The Art of War in the Modern World* (New York: Knopf Doubleday, 2007) for a discussion of the increasing participation of entire peoples in contemporary wars.

[67] Jeremy Weinstein, *Inside Rebellion: The Politics of Insurgent Violence* (New York: Cambridge University Press, 2006); David Kilcullen, *The Accidental Guerrilla: Fighting Small Wars in the Midst of a Big One* (New York: Oxford University Press, 2009).

nonetheless violent and repressive tactics like forcibly resettling civilians. Nonuniformed fighters contribute to this challenge by undermining the visual signifiers that bring a sense of order to war, such as wearing uniforms, while also depending heavily on civilians for the kind of logistical support that conventional armed forces typically derive from military personnel.

With the heavy involvement of civilian populations in interstate and intrastate wars over the past two centuries, much of the discussion of civilians in just war theory has been directed at finding clear criteria for distinguishing those who are entitled to immunity from those who may be justly targeted according to the threat-based view of the combatant/noncombatant distinction. One of the dominant positions to emerge in this debate is the view that civilians producing certain types of war materials can be considered threats because they enable soldiers to fight. Those who make this point think that providing assistance that allows combatants to fight makes noncombatants accomplices to the threat posed by others and that these accomplices, though not threatening themselves, can be attacked because wars would be unsustainable without them.

Furthermore, the argument typically goes, those noncombatants producing goods that are exclusively for military functions, such as tanks and bullets, can be justly targeted, while those who produce nonmilitary goods, such as food, must be spared. Whereas the former produce goods that are inseparable from the activity of war, the latter produce goods that would be necessary in civilian life as well. Nagel offers one of the most influential versions of this argument:

> contributions to their arms and logistics are contributions to this threat; contributions to their mere existence as men are not. It is therefore wrong to direct an attack against those who merely serve the combatants' needs as human beings, such as farmers and food suppliers, even though survival as a human being is a necessary condition of efficient functioning as a soldier.[68]

Walzer makes the same point and builds on it by arguing that those who support soldiers in their military activities become akin to soldiers themselves, thereby abandoning their status as civilians to some extent and opening themselves to attack.

> 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, like all the rest of us. When it is military necessity, workers in a tank factory can be attacked and killed, but not workers in a food processing plant. The former are assimilated to the class of soldiers – partially assimilated, I should say, because these are not armed men ready to fight.[69]

Many other commentators have drawn similar distinctions between certain groups of noncombatants who retain their immunity during war and those who

[68] Nagel, "War and Massacre," p. 140. [69] Walzer, *Just and Unjust Wars*, p. 146.

lose their immunity by virtue of the jobs they perform. Anscombe says you can attack "supply lines and armament factories"[70] but not people who are involved in making food and clothes. Gross argues that "[t]hose who contribute to an armed threat are those who are themselves armed, those who arm them, and those who command them. Munitions workers lose their immunity; bakers and tailors do not."[71] Those outside the military who take on combatant status, according to this view, are said to be taking part in the "chain of agency" that makes war possible. This reasoning applies just as much in intrastate wars as it does in interstate wars and is therefore a basic challenge of war that persists even in an era when conflicts are increasingly asymmetrical.

It is certainly right to think that noncombatants may be able to act in ways that lead them to temporarily waive or forfeit their right to life. After all, this is the process by which noncombatants become combatants under any circumstances. Arguing that noncombatants make this type of status change by virtue of being in the logistical apparatus that supports a war is therefore a plausible position to take. The real difficulty is that inconsistencies arise when distinguishing between support operations that make civilians targetable and those that preserve their immunity. As the preceding examples illustrate, this distinction is usually made on the grounds that some support operations are more essential or more directly connected to the war effort than others. At first glance, there seems to be a clear difference between weapons industries and industries that provide the necessities of life, but this difference becomes unsustainable on closer inspection.

First, the argument for permitting attacks against certain classes of producers based on occupation wrongly treats the civilians involved in producing war materials as somehow being more necessary accomplices than food producers. This is clearly not the case. Food producers and others who supply basic necessities provide more essential services than those who make munitions or other military supplies. It is possible for a soldier, even a soldier in a modern conflict, to continue fighting without receiving a steady supply of ammunition or weapons. This is particularly true of unconventional fighters, who are adept at improvising or stealing weapons.[72] By contrast, no one can fight without basic necessities required for survival. A soldier well supplied with ammunition but lacking an infrastructure to provide food, water, clothing, medical equipment, and fuel would have trouble living long enough to even come into contact with the enemy. If military necessity ever justifies overriding civilian

[70] G. E. M. Anscombe, "War and Murder." In *The Collected Papers of G. E. M. Anscombe, Vol. 3, Ethics, Religion and Politics* (Minneapolis, MN: University of Minnesota Press, 1961), p. 53.
[71] Michael L. Gross, *Bioethics and Armed Conflict: Moral Dilemmas of Medicine and War* (Cambridge, MA: Massachusetts Institute of Technology Press, 2006), p. 38.
[72] Smith, *The Utility of Force*.

immunity, then it would presumably do so more easily for civilians who produce the most essential supplies – food, clothing, and shelter – than for those who produce supplies that are less important for ensuring the survival and combat effectiveness of soldiers in the field.

Second, it is difficult to determine how far the logic of targeting certain civilians should extend. As Coates points out, war materials are made out of more basic materials.[73] Factories that produce weapons and vehicles require supply from facilities that produce metal, machine parts, fuel, and the many other raw materials that are needed for manufacturing military hardware. There is no clear standard for why those who knowingly produce raw materials that go into weapons manufacturing should not be equally liable to attack as those who assemble the final products. For that matter, it is not clear why those who supply the financial capital to fund any stage of the production should not have the same liability to attack as those providing the raw materials for manufacturing. However, if all who supplied materials for war industries or who provided financial capital could be targeted, then virtually everyone engaged in productive labor would be liable to attack.

Third, and most importantly, the argument for targeting civilians who provide military goods while still protecting those who provide subsistence goods and raw materials relies on a dubious distinction between the roles that soldiers perform. The rationale for this argument is that civilians producing military goods may be targeted because they are assisting "soldiers as soldiers" while civilians providing other goods are only assisting "soldiers as humans." For example, Primoratz maintains that "workers in a food factory, even if all its produce goes to the front, may not be attacked. For they are providing for soldiers as human beings, rather than as soldiers. Workers in an arms factory, on the other hand, supply soldiers *as soldiers*; they make it possible for them to *fight*."[74] This distinction is unconvincing, as it is a distinction that cannot exist in practice. It should be obvious that soldiers are humans even when they perform their military roles and that they never cease to be human when they are fighting. Soldiers are humans who perform a particular role – a role they perform at all times when they are active combatants. This makes it impossible to separate their existence as humans from their performance of that role. Anything that sustains soldiers as humans sustains them in the role they perform and is therefore essential to that role.

For these reasons, attempts to suspend the PNCI for certain groups of noncombatants involved in war industries are unsatisfying. Consistency demands either grouping all civilians who provide support to soldiers among those who

[73] Coates, *The Ethics of War*, p. 237.
[74] Igor Primoratz, "Michael Walzer's Just War Theory: Some Issues of Responsibility," *Ethical Theory and Moral Practice* 5(2) (2002), 221–243.

may be targeted or prohibiting the use of force against all civilians, regardless of their occupations. Choosing the former option would create many new problems. Authorizing attacks on most civilians would make the PNCI and its associated *jus in bello* principles of conduct virtually meaningless. If anyone supporting a war effort were open to attack, then it could be judged militarily necessary to use even the most destructive weapons against large populations of enemies. Authorizing attacks on major segments of civilian populations would also raise the question of whether any use of force could be considered proportionate. The targeting of civilian support personnel naturally leads to total wars against entire populations, which are far more destructive than any reasonable standard of proportionality could condone. Given these problems and just war theory's goals of restricting the destructiveness of war and protecting those who are not threatening, it is preferable to treat people who produce war materials but who are not members of belligerent organizations or direct participants in combat as noncombatants who retain their right to life during war.

Alternative Taxonomies

Another significant challenge when applying the PNCI comes from attempts to transform the combatant/noncombatant binary into more nuanced taxonomies that allow for different degrees of participation in war. Gross proposes distinguishing between four different types of civilians: civilian combatants who take part in attacks as uniformed combatants, indirect civilian participants who provide logistical support to combatants, civilian noncombatants who are not involved in the war, and civilians who oppose the war and work to promote peace.[75] Kaurin proposes a five-level spectrum that covers different classes of combatants and noncombatants: uniformed military personnel, unconventional combatants who do not wear uniforms but who nevertheless present clear hostile intentions by virtue of being armed, those who are "provisionally hostile" because they are suspected enemies but lack weapons or uniforms, those who are neutral, and those who are vulnerable.[76] Strawser develops another categorization by imagining that a "conflict-by-conflict rubric could be constructed that tracks the varying levels of liability for a given set of unjust enemies."[77] Such a standard could distinguish between first, second, and third degrees of combatant status and establish "similar degrees for noncombatants."[78]

Taxonomies of the various types of combatants and noncombatants that may exist are helpful to an extent. They call attention to the degrees to which a person

[75] Gross, *Moral Dilemmas of Modern War*, p. 155.
[76] Kaurin, "When Less is Not More."
[77] Strawser, "Revisionist Just War Theory," p. 79.
[78] Ibid.

can participate in war and can therefore be a tool for making more reliable distinctions between combatants and noncombatants. They are also useful when it comes to making moral judgments about the various groups of people who are caught up in wars. Nevertheless, fine distinctions that make sense as theoretical abstractions cannot be applied directly to real military operations because they leave the problem of demarcation intact. No matter how many different subclasses of combatants and civilians one constructs, a final division must still be made between those who are entitled to immunity and those who are not when it comes time to employ lethal force. This pushes the taxonomies of different degrees of participation in war back to the simple binary of combatant and noncombatant when it comes to saying who can be targeted.

The elaborate categories of combatant and civilian statuses offered by Gross, Strawser, Kaurin, and others reflect the complexity of asymmetric conflicts.[79] These taxonomies are often framed with practical challenges in mind, yet I object to them because they are decidedly impractical. Tracing fine gradations between various types of combatants and civilians helps to clarify the moral status of the many actors who are involved in wars, yet soldiers rarely have the information they need to determine a person's status even when they are only employing a binary distinction. First-hand narratives and interviews reveal that American and British soldiers fighting in Iraq and Afghanistan often have little awareness of who their adversaries are when they make decisions about when to initiate combat or when they are in the midst of fighting.[80] Soldiers guarding traffic control points (TCPs), convoys, and forward operating bases (FOBs) or conducting patrols must repeatedly make decisions about whether to attack assailants who are hidden inside of vehicles or wearing civilian clothes. The soldiers endure an immense ethical burden of having to choose whether to engage vehicles when their occupants may be either civilians who innocently failed to see warning signs or suicide bombers preparing for an attack. The result is that attacks are frequently misdirected against civilians who are mistaken for enemy fighters.

Urban operations are especially hazardous. Buildings provide refuge for insurgents and civilians alike, forcing soldiers to fight against adversaries that they cannot see and raising the risk that civilians taking shelter may be struck by stray bullets or killed by bombs. The thousands of Iraqi and Afghan civilians killed and injured in such attacks are a testament to how difficult it is for

[79] In Strawser's case, the categorization is also meant to make it easier to distinguish between just and unjust combatants, regardless of the type of war being fought.

[80] Marcus Schulzke, "Ethically Insoluble Dilemmas in War," *The Journal of Military Ethics* 12(2) (2013), 95–110 and "The Unintended Consequences of War: Self-Defense and Violence against Civilians in Ground Combat Operations," *International Studies Perspectives* (forthcoming); Chris Hedges and Laila Al-Arian, *Collateral Damage: America's War against Iraqi Civilians* (New York: Nation Books, 2008).

soldiers in contemporary wars to clearly identify their opponents even when applying the simple civilian/combatant binary.[81] As I will discuss in Chapter 8, the incidence of accidental attacks on civilians who are misidentified as hostiles or who happened to be in the wrong place at the wrong time is so high and so threatening to counterinsurgency operations that the US military has introduced several ad hoc payment mechanisms to compensate victims. The prevalence of misdirected attacks and the inherent difficulties of clearly distinguishing between civilians and combatants suggest that we have little hope of soldiers reliably making more nuanced distinctions of status when they are in combat.

More nuanced taxonomies may be helpful for targeted killings that are directed against specific enemy fighters, such as the leaders of terrorist organizations. In these instances, it may be possible to determine the extent of a target's participation in hostilities and the degree to which nearby civilians may be complicit. Nevertheless, introducing a different system for governing air strikes and targeted killings from that used to govern the use of force by ground combat personnel, who face more onerous time and informational constraints, could create dangerous inconsistencies in the standards used to determine when violence is permitted. Furthermore, any fine-grained distinctions must still be applied with the goal of answering a question that is fundamentally binary in form: who may be attacked? Regardless of the number of different categories for organizing civilians and combatants into groups, from a practical perspective everyone must either be targetable or immune from attack. The struggle to distinguish civilians from combatants on the battlefield is intractable. Wars are complex, confusing events that are continually changing in response to new weapons, new theaters of war, and new methods of fighting. Clausewitz was right to claim that uncertainty is an ineliminable feature of conflict[82] – and this includes uncertainty when it comes to conclusively determining combatant status. It is extremely difficult to apply a rigid combatant/noncombatant binary that can organize all people into one group or the other, and it is misleading to think that this binary can be applied without some error. Because the PNCI applies to large classes of people who are distinguished by their participation in certain roles rather than by any essential characteristics they have as individuals, it is inevitable that theories of just war will be unable to draw a line of demarcation that includes every person who constitutes a threat while protecting the right to life of all those who do not. Nevertheless, the binary is essential for

[81] For reports of the many instances of mistaken attacks on civilians, see American Civil Liberties Union (ACLU), "Documents received from the Department of the Army in response to ACLU Freedom of Information Act Request" (2007). http://www.aclu.org/natsec/foia/log.html (accessed March 20, 2017).

[82] Carl von Clausewitz, *On War* (Rockville, MD: Wildside Press, 2009).

guiding the practice of war and must be clearly defined so that combatants can be reasonably expected to follow it.

Because the PNCI must be applicable in practice, by those who fight as well as by those who judge the moral and legal standing of those fighters, it is critical to come to terms with this definitional problem and to provide some criteria of demarcation, even if these criteria do not constitute an exhaustive list of everyone who should be included in one group or the other. Any distinction between combatants and noncombatants is bound to be a fallible line that will inevitably leave some people who occupy the grey area between combatant and noncombatant falling into one category or another. This fallibility must be taken into account when it comes to drawing that distinction between those who give up the right to life during wars and those who retain it.

Defining Civilian Status

I define combatant status narrowly to only include those who are members of state security forces, members of violent non-state organizations, or who independently take part in combat activities in temporary coordination with one of those types of organizations (for example, those who opportunistically fight alongside a violent organization even though they are not formally members of it).[83] Correspondingly, all who are not members of violent organizations, who do not directly engage in combat activities independently, or who are former combatants that have been disabled by being seriously injured or captured qualify as civilians/noncombatants.

My criteria for determining whether a person retains the right to life and qualifies for protection under the PNCI treat three characteristics as being salient. First, a person's formal membership in an organization that engages in combat activities, regardless of whether that person bears arms. Second, whether a person opportunistically takes part in a war by fighting on behalf of a violent organization that the person is not formally a member of. Third, whether a person who might otherwise qualify as a combatant under the first or second criterion has been rendered physically unable to be an active participant in, or combatant ally of, a violent organization through injury or capture.

Returning to the example of recent asymmetric wars in Iraq and Afghanistan, this definition would make all who are formally members of belligerent organizations such as the Taliban, al Qaeda, and the Mahdi Army liable to attack

[83] Although most combatants are members of organizations, it is important to leave combatant status open for opportunistic participants in war. These people tend to play a small role in conflicts, but they are endemic to war and should therefore not be forgotten. A prime example of an opportunistic participant is John Lawrence Burns, a civilian who temporarily took on the status of a combatant by fighting alongside Union forces during the Battle of Gettysburg.

regardless of whether they bear arms. It may be difficult to ascertain this membership in practice when the fighters do not carry arms openly, but this epistemic challenge does not alter the basic ontological fact that membership in a hostile organization can itself make someone an enemy. Membership in such an organization commits each person, whether armed or not, to the collective prosecution of a war and to performing roles that allow the organization to act hostilely. Moreover, the epistemic challenge is made much easier by retaining the binary combatant/noncombatant distinction over alternatives that would be far more demanding for soldiers to employ in practice. The "accidental guerrillas"[84] who are not formally members of armed groups but who take up arms opportunistically would likewise qualify as combatants, though only while they are actively fighting. This makes it possible for opportunistic combatants to slip between combatant and civilian identities, as befits these people's weak commitment to the fighting, and there is the possibility of resolving hostilities without killing these ancillary fighters. Many others may facilitate attacks by providing some form of logistical support, yet I contend that unless these people are formal members of militias, they should be immune from attack. Any effort to target these people would require a dramatic escalation of violence and hinder efforts to achieve peace through coopting civilian populations. Such widespread violence is morally questionable and has been shown to be counterproductive.[85]

One could argue that my definition creates a double standard with reference to support personnel. I treat those who are members of belligerent organizations as combatants and those who are not members as civilians even when they may perform the same roles. For example, my definition would mean that a cook who is a member of a military or insurgent group could be targeted, while a civilian cook preparing food for soldiers would be entitled to immunity. This apparent contradiction shows the importance of looking beyond a person's immediate role to how their group membership leads them to contribute to wars in distinctive ways. Support personnel who are members of armed groups are generally soldiers first and always potential combatants. That is to say, they are capable of fighting and show a greater commitment to the war effort by virtue of their membership. During the Battle of Mogadishu in 1993, the Americans mobilized cooks and secretaries to go into combat and were able to do this because these personnel were trained as infantrymen and able to fight, despite being temporarily assigned to support roles.[86] Uniformed support personnel were also armed and fought throughout the wars in Iraq and Afghanistan

[84] Kilcullen, *The Accidental Guerrilla.*

[85] Ivan Arreguín-Toft, *How the Weak Win Wars: A Theory of Asymmetric Conflict* (New York: Cambridge University Press, 2005); Robert Cassidy, *Counterinsurgency and the Global War on Terror: Military Culture and Irregular War* (Stanford, CA: Stanford University Press, 2008).

[86] Mark Bowden, *Black Hawk Down: A Story of Modern War* (New York: Atlantic Monthly Press, 1999).

because of the lack of clearly defined front lines. This led to instances in which support personnel were fighting as though they were in the infantry.[87] It is fair to target these support personnel as combatants when they could potentially pick up weapons and join the fight and would have the will to do so. Contractors performing these roles are usually civilians who lack military training, are forbidden from carrying weapons, and probably lack a strong commitment to physically threaten their enemies.[88]

Mine is a fairly restrictive conception of combatant status in the sense that it leads me to exclude civilians working in war industries or who provide moral support for a war from being targeted. Civilian status should be defined in this way to limit the potential for anyone who has not given up their immunity to be attacked. It is far more desirable to cast the protection of noncombatant immunity broadly, in order to protect all noncombatants, even if this also includes some people who might be considered just targets, than it is to narrow the scope of the PNCI at the risk of excluding those who would otherwise deserve this protection. In other words, when faced with the reality that any distinction between civilians and combatants will be fallible and prone to disruption by those who can exploit it for their benefit, it is essential to draw that line in a way that favors noncombatants and motivates the restrictive use of force.

My reasoning here is similar to that of criminal justice systems that assign the burden of proof in ways that are designed to prevent the condemnation of the innocent even at the expense of not punishing some of the guilty. It is better to restrict war in the interest of protecting the innocent, whose right to life must be respected, than it is to allow an overly permissive view of combatant status to put those people at risk, even if this comes at the expense of restricting the number of potential targets.

According to my conception of noncombatant immunity, it is not permissible to target or recklessly endanger civilians who participate in a war by producing war materials or by providing moral support for soldiers in the field. It would, for example, be unjustified to bomb a munitions factory with the intent of destroying the factory and killing its workers. However, I also contend that attacking a munitions factory in a way that conforms to the strictures of the DDE should be excused. Because the DDE provides an excuse for harming civilians when the harm is unintended, inflicted in pursuit of military objectives, and proportionate, it leaves open the possibility that belligerents may carry out attacks on munitions factories or other infrastructure targets even when such attacks may result in small numbers of civilian casualties. The DDE therefore makes it

[87] The attack on the 507 Maintenance Company in 2003 is one of the most famous examples of this.

[88] See Gerald Schumacher, *A Bloody Business: America's War Zone Contractors and the Occupation of Iraq* (St. Paul, MN: Zenith Press).

possible to maintain that a broad range of people should be entitled to immunity during conflicts without their immunity preventing belligerents from attacking critical military targets. I will revisit this point later to clarify that though some acts of violence against civilians are *morally excusable*, they may still produce obligations to assist the victims.

The positive duty toward noncombatants that I explore in later chapters, and the principles that operationalize that duty, are framed as protections that apply to anyone who is a member of the class of noncombatants as I define it. Nevertheless, it is important to point out that, while I favor a particular conception of civilian/noncombatant status, my argument for a positive duty to civilian victims of war is not essentially connected to that definition. My central argument is addressed to the principle of noncombatant immunity as such and to the right to life that sustains that principle, no matter who may qualify as a noncombatant. Regardless of its exact definition, the concept of civilian/noncombatant refers to that class of people who are not liable to attack. It is possible to disagree with my definitions while still accepting my claim that combatants should be held to a positive duty toward noncombatants.

A revisionist who thinks that certain civilians assisting in an unjust war effort are liable to attack may deny that the positive duty should pertain with respect to those people while still agreeing that the civilians on the defending side (who retain their immunity) are owed compensation for any injuries they sustain. Our disagreement over who is liable to attack sets a boundary around the class of people who are protected by the right to life and who are potentially eligible for assistance if that right is breached. Efforts to redraw membership do not affect the underlying theory of rights that promise immunity for those who are classified as civilians. Similarly, efforts to redraw membership transform the class of people to whom reparative duties are owed, but without challenging my core argument that civilians retaining the right to life (however that class is defined) are entitled to redress.

Conclusion

The scope of noncombatant immunity has grown considerably since Augustine. The concept of civilian status, as it is now generally understood in secular just war theory, has its origins in the radical shift from a guilt-based conception of liability to attack to a rights-based conception of liability to attack, which happened gradually between the fifteenth and eighteenth centuries. As the basis for defining civilian status shifted to a rights-based standard, the range of people classified as civilians and the strength of the protections afforded them increased considerably. Moreover, civilians received much stronger protections from the recognition of a right to life than they previously had from subjective feelings of mercy. Rights have a special moral status. They are supposed to be

nearly inviolable protections that individuals hold against others. Unlike subjective attitudes, rights are meant to offer objective protection in all but the most extreme situations when some other competing right or value may supersede them.

As I have shown, much of the debate over the civilian status in contemporary just war theory is framed around the right to life. Just war theorists seek to demonstrate that acting threateningly constitutes a temporary forfeiture of the right to life by combatants and that civilians' immunity must be respected during wars because they retain a rights-based protection. Just war theorists continue to disagree about exactly where to draw the line of demarcation that separates combatants from civilians; they disagree about *who* retains the right to life in a particular conflict. Nevertheless, efforts to draw and redraw the distinction reveal a shared belief that there is a class of people whose members' right to life remains intact even during wars.

The historical character of civilian status demonstrates that this status is alterable. The concept of the civilian as well as the protections that civilians are afforded can change, and have changed substantially. My proposal to acknowledge the hitherto unrecognized implications of the right to life assumes the malleability of civilian protections and is an effort to deliberately reconstruct those protections to bring them into closer alignment with the theory of rights that is at the foundation of contemporary just war theory. Before turning to my proposal for rethinking civilian protections in Chapter 3, I will first explore why new protections are necessary by calling attention to the limitations of existing formulations of just war theory.

2 Just War Theory's Restrictive Orientation

In this chapter I turn my attention to just war theory's restrictive or "negative" orientation. Just war theory is preoccupied with setting limitations on when wars are waged, how force is used, and how belligerents may act once a war has ended. This restrictive orientation is usually stated explicitly as the just war tradition's guiding objective. Johnson asserts that "[t]he just war tradition represents the coalescence of the major effort Western culture has made to regulate and restrain violence."[1] Coady says that "just war theory is essentially restrictive, and strongly so."[2] Lee emphasizes that just war theory's restrictive task is one that is valuable no matter how terrible war might be: "As bad as any war is, it could always be worse, and the limitations that the parties at war often recognize when they restrict when and how they fight keep war from being worse."[3] Finally, Coates not only agrees with Coady, Lee, and Johnson in characterizing just war theory as being primarily restrictive but also warns against attempts to go beyond this framework because of the risk of inadvertently celebrating war. "In its authentic form, however, the aim of just war thinking is not justification (and certainly not glorification) of war, but containment . . . A just war is more a matter of preventing or curbing evil (one's own as well as that of an adversary) than it is of promoting good."[4]

As I will show in this chapter, the restrictive character of contemporary just war thinking is evident in the principles just war theorists defend. The principles of *jus ad bellum* and *jus in bello* impose negative obligations by prohibiting certain types of war and methods of fighting. Principles of *jus post bellum*, which address the tasks of rehabilitation and reconstruction once wars are concluded, are broader in scope. They not only establish restrictions but also provide guidelines for creating more secure and lasting peace. Yet even the principles of *jus*

[1] James Turner Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton, NJ: Princeton University Press, 1981), p. 41.
[2] C. A. J. Coady, *Morality and Political Violence* (New York: Cambridge University Press, 2007), p. 15.
[3] Steven Lee, *Ethics and War: An Introduction* (New York: Cambridge University Press, 2012), p. 3.
[4] Ibid., p. 3.

post bellum that have been proposed thus far are largely framed as limits on how victorious states may treat their enemies. This has led the scholarship on *jus post bellum* to maintain the just war tradition's restrictive orientation or to formulate some limited corrective principles, which are undermined by their subordination to existing just war principles.

Just war theory's restrictive orientation is understandable, and in many ways desirable. Any attempt to theorize the morality of war risks glorifying war and making it out to be an end in itself. By setting out clear prohibitions on immoral conduct, just war theorists are able to show that war can sometimes be a necessary means of promoting justice while still acknowledging that war is a destructive and undesirable activity that must be regulated. Nevertheless, I argue that just war theory's restrictive orientation leads it to overlook many of the forms of suffering that civilians endure, as well as the challenges of rehabilitating civilians affected by violence. My goal in this chapter is to show that restrictions on the use of force are *necessary* but not *sufficient* for protecting civilians' right to life during armed conflicts.

I start by considering the *jus in bello* principles of discrimination and proportionality, which are just war theory's most important restrictive principles when it comes to ensuring that belligerents abide by their negative duty to avoid harming civilians. I discuss several interpretations of each of these principles to show that, despite their variation, each version maintains a restrictive orientation. Next, I discuss the principle of due care, which establishes stronger protections for civilians that go beyond those contained in discrimination and proportionality. Throughout my discussion of these principles, I stress their incompleteness when it comes to establishing effective protections for civilians. Because these principles are exclusively restrictive, they fail to provide any guidance on how to repair the harm inflicted on civilian victims.

In the second part of the chapter I consider some of the most influential theories of *jus post bellum*. Here I focus on the efforts just war theorists have made to introduce theories of corrective justice, with programs such as requiring aggressive states to pay reparations and allowing some groups that are targeted for abuse to claim compensation. These proposals constitute a significant advancement of the just war tradition, yet they suffer from several debilitating limitations that prevent them from effectively protecting individual civilian victims. Theories of *jus post bellum* tend to describe forms of collective assistance that are inappropriate for repairing breaches of individual rights, only acknowledge the need for programs of corrective justice under fairly narrow circumstances, and base their reasoning too heavily on restrictive guidelines borrowed from the other domains of just war theory. Worst of all, existing theories of *jus post bellum* are usually framed asymmetrically, in the sense that corrective justice is only applied to just belligerents and their populations, rather than to civilian victims of war in general.

The Principle of Discrimination

The restrictive character of just war theory, especially with respect to civilians, is evidenced by how civilians are protected – as well as neglected – by the *jus in bello* principles of discrimination and proportionality. The principle of discrimination, which is also known as the principle of distinction, is particularly important because it is the most direct manifestation of the negative duty to not harm civilians. Although the PNCI is embodied in several just war principles, it is the principle of discrimination that most clearly operationalizes belligerents' negative duty.

The principle of discrimination includes two restrictions on violence against civilians. First, it affirms that belligerents cannot intentionally target civilians and requires that force must be directed solely at enemy combatants. This precludes the use of tactics such as bombing populated areas to undermine an opponent's will to fight, holding civilians hostage, or killing civilians who may potentially join the war effort in the future. Second, discrimination forbids reckless violence that may endanger civilians. That is to say, belligerents are not only forbidden from targeting civilians but also from using force without attention to who qualifies as a combatant and who does not. It is not enough for belligerents to simply not intend to attack civilians. They also have an obligation to attempt to determine the identity of their targets before carrying out an attack and to use force in ways that are reasonably assured of not harming civilians. This sense of discrimination is commonly invoked by those who object to mass economic sanctions, sieges, and blockades.[5] Although these tactics may not be designed to harm civilians, they typically violate the principle of discrimination because they show a reckless disregard for civilians' health and safety.

On a practical level, the principle of discrimination imposes far-reaching demands on how military forces wage wars that go beyond simply requiring that they target the right people at the moment of attack. What weapons they use, what strategies and tactics they employ, and how they train their personnel all play a role in determining whether armed forces and their members will be able to apply force narrowly against military targets or whether uses of force will threaten civilians. Militaries may arm their personnel with indiscriminate

[5] For examples, see Coates, *The Ethics of War*, pp. 197–199; John Mueller and Karl Mueller, "Sanctions of Mass Destruction," *Foreign Affairs* 78(3) (1999), 43–53; Anthony E. Hartle, "Discrimination." In *Moral Constraints on War: Principles and Cases*, edited by Bruno Coppieters and Nick Fotion (New York: Lexington Books, 2008); Bruno Coppieters and Nick Fotion, "Preface." In *Moral Constraints on War: Principles and Cases*, edited by Bruno Coppieters and Nick Fotion (New York: Lexington Books, 2008); Trudy Govier, "War's Aftermath: The Challenges of Reconciliation." In *War: Essays in Political Philosophy*, edited by L. May (New York: Cambridge University Press, 2008); Joy Gordon, "A Peaceful, Silent, Deadly Remedy: The Ethics of Economic Sanctions." *Ethics & International Affairs* 13(1) (2006), 123–142.

weapons, fail to establish adequate rules of engagement, or fail to provide soldiers with ethics training, thereby establishing the structural conditions that increase the likelihood of violence against civilians. On the other hand, they may strive to develop less destructive weapons, impose strict rules of engagement, create internal norm enforcement mechanisms, and provide soldiers with extensive ethics training in an effort to promote adherence to the principle of discrimination.

Because the structural conditions that armed forces establish affect whether their members will be able to act without harming civilians and whether they will be prepared to resolve ethical dilemmas in which civilians' lives are at risk, these structural conditions fall under the scope of discrimination. This implicates a broad range of actors in any particular attack against civilians. An indiscriminate attack may not only be the fault of the soldier who personally initiates it but also the fault of the commanding officers or peers who failed to adequately train the soldier, who failed to notice his propensity for engaging in immoral violence, or who failed to prevent the attack. Thus, as Cook says, "[m]ilitary planners are morally obligated to choose weapons and tactics that as far as possible allow attack on the military targets while avoiding damage and destruction to the civilian populace."[6] This encourages members of the military to think about discrimination long before they actually encounter civilians on the battlefield. It also establishes a collective responsibility for all members of the military who play a role in making decisions about the use of force to guarantee that their decisions show adequate consideration for civilians. Later I will argue that this collective responsibility for violence against civilians generally makes it impossible to assign blame for civilian victimization to individual combatants and that responsibility generally lies with armed forces as organizations.

Discrimination and Civilian Property

If the goal of the principle of discrimination is to protect those who retain their right to life during war, then it must not only prohibit direct attacks against civilians but also attacks on property that is essential for their survival. After all, an attack that deprives a person of vital resources is just as much a threat to that person's life – and just as much a violation of the negative duty – as an attack directed against that person's body. The clearest examples of essential property that must be protected by the principle of discrimination are food production and storage, water treatment, waste treatment, and medical facilities. Other types of property may also be included depending on what can be considered necessary for survival in a given context. Electricity for heating could

[6] Cook, *The Moral Warrior*, p. 111.

be classified as essential in an extremely cold area where civilians might be injured by the weather, but it might not be essential in a warmer climate. A vehicle could be considered essential if it is needed to reach food or water, but not if these resources are accessible by other means.

Just war theorists who have addressed the importance of protecting civilian property and infrastructure generally make their case by showing how damage to the material environment can threaten civilians' lives, thereby breaching the right to life. Walzer argues that in addition to protecting civilians from direct physical harm, they must also be protected from indirect harms that may arise from property damage or deprivation. His reasoning is that depriving noncombatants of essential goods, such as food and water, can be just as fatal as attacking them directly.[7] Walzer maintains that any tactic designed to withhold, destroy, or limit civilians' access to vital goods is not permissible. This leads him to oppose sanctions and other strategies that resemble siege warfare.[8]

Others echo Walzer's point that civilians cannot be deprived of goods that are essential for survival. Kaufman argues that "[s]ince illegitimate military targets include inanimate objects such as places of worship, crops, hospitals, cultural artifacts, and so on, as well as innocent people, the principle of discrimination is broader than the combatant/noncombatant distinction."[9] Hartle likewise favors extending the principle of discrimination to protect material goods. He says of discrimination that "[i]n the broadest sense, the principle maintains that warring parties have an obligation to discriminate between appropriate and inappropriate targets of destruction, a distinction based on the nature of the targets themselves."[10]

Of course, interpretive difficulties persistently arise when attempting to apply moral principles in practice, and careful judgments have to be made about exactly what types of property have to be protected. Just as it is extremely challenging to distinguish non-uniformed combatants from civilians, it is difficult to determine when it is permissible to target dual-use facilities, which have military and civilian functions. Transportation networks are a prime example of dual-use targets, as these give armed forces mobility while also permitting food, water, and other essential materials to reach civilians. There are good reasons for thinking that dual-use facilities may be justly targeted in some instances. Attacks on roads, bridges, and power systems can disable or immobilize enemy military forces without incurring heavy casualties on either side. Destroying dual-use targets to disable opponents may permit a quicker resolution of hostilities, thereby saving the lives of civilians and soldiers in the long run. Attacks on these targets, unlike attacks on water treatment plants and hospitals, can therefore sometimes qualify as a matter of military necessity. One could argue

[7] Walzer, *Just and Unjust Wars*, p. 86. [8] Ibid., pp. 161–174.
[9] Kaufman, "Just War Theory." [10] Hartle, "Discrimination," p. 141.

that attacking these targets is even preferable to attacking enemy soldiers, even if some civilians are inadvertently harmed, because of the potential for saving lives by not striking people.

The conflicting demands generated by the principle of discrimination and the need to quickly and decisively resolve armed conflicts make it necessary to critically evaluate the civilian and military importance of dual-use targets. From a utilitarian standpoint, this might call for a fairly straightforward effort to weigh the potential costs and benefits of attacking a target in terms of the amount of suffering that would be caused by destroying it or leaving it intact. However, for just war theorists, the demand of protecting civilians presents a more complex challenge. Any attack that seriously endangers civilians may violate the principle of discrimination, regardless of whether some overriding military objective is achieved.

It is particularly important to be sensitive to how indirect attacks threaten civilians now, at a time when the world's most powerful militaries frequently seek to disable or degrade opponents by destroying their infrastructure. Some commentators have rightly criticized strikes against dual-use targets and called for a more expansive understanding of the principle of discrimination that can account for the human suffering inflicted via property destruction. Der Derian argues that, when it comes to indirect strategies "[c]ollateral damage might be minimized but human suffering is not avoided. It is just deferred, as is any immediate ethical accountability for deaths later recorded as higher rates of infant mortality, untreatable diseases, and malnutrition."[11] This is an important insight – one that hints at the limitations of a purely restrictive or negative conception of the duty toward civilians. Attacking dual-use targets under the guise of military necessity may inflict serious harm on civilians, and nothing in the principle of discrimination or other existing principles of just war is able to offer any recommendations for how this suffering should be alleviated.

The Scope of Discrimination

As we saw in Chapter 1, the principle of discrimination has changed substantially over the just war tradition's history. The initial formulations of just war doctrine focused on matters of *jus ad bellum* and left the proper treatment of civilians *in bello* seriously underdeveloped. Moral concern for the seizure or destruction of civilian property has followed roughly the same trajectory as concern for attacks on civilians' bodies, though it has developed more slowly. Medieval and Early Modern just war theorists generally showed little regard for civilian property and infrastructure. As I discussed in Chapter 1, some thought

[11] James Der Derian, *Virtuous War: Mapping the Military-Industrial-Media-Entertainment Network* (New York: Routledge, 2009), p. 147.

that civilian property could be taken as a punishment or to pay for reparations. The extension of the principle of discrimination to cover multiple forms of civilian suffering, rather than direct physical violence alone, is a promising sign of increasing sensitivity to civilians' needs. The possibility that indirect suffering may breach civilians' right to life makes it essential for attempts to limit violence against civilians to go beyond protecting them from direct physical violence by also addressing other forms of suffering.

Although the principle of discrimination has become more powerful over the just war tradition's history and has been extended to cover a broader range of harms against civilians, it provides an incomplete normative basis for protecting civilians' rights. The principle of discrimination establishes very strong prohibitions against certain types of violence against civilians, but it does not set out any requirements for how belligerents must respond to civilian suffering once it has been inflicted. Even when just war theorists have extended discrimination's protection to property, they have maintained the principle's restrictive focus; they have decried the destruction of civilian property, but have said little about what obligations might exist to repair or replace the things that are destroyed.

As I will show in Chapter 3, my proposal for a positive duty toward civilians overcomes the limitations associated with a purely restrictive conception of discrimination without revising the principle of discrimination itself. The positive duty I propose builds on and advances the same goal as the principle of discrimination – the protection of civilians during war – in a way that can more effectively limit civilian suffering and guard the right to life. Thus, my proposal leaves the principle of discrimination intact and maintains its restrictive focus, but overcomes discrimination's inherent limitations by laying the foundation for additional principles of just war that are directed at repairing or compensating harm inflicted on civilians.

The Principle of Proportionality

The principle of proportionality urges belligerents to act with moderation and restraint by requiring that they only use the minimum force needed to achieve a given objective. Enemies may be overwhelmed and destroyed, yet the level of force used to do this cannot be excessive. In fact, the use of force may even be prohibited when it is possible to secure an objective without it. Thus, proportionality aims to restrict wars by limiting the intensity of violence, regardless of who it is directed against. Proportionality is a relativistic standard that must always be judged in light of the circumstances in which a given military operation is carried out. It cannot be stated as a definite rule, especially when the capriciousness of modern warfare makes it impossible to predict what form future wars will take. Massive aerial bombardment of enemy forces may be

proportionate in a total war against an extremely powerful enemy. The same tactic would be disproportionate in a limited war fought for fairly modest objectives. And the complete annihilation of enemy forces may be immoral, even if no civilians are harmed, when a war could be won with more circumscribed attacks. The extent of violence that can be considered proportionate may also change over the course of a conflict. The weapons and tactics that are appropriate for overwhelming a powerful and threatening opponent may be excessively violent near the end of a war when that opponent is weak and contemplating surrender.

Proportionality's relativism contrasts with discrimination's absolute restriction on targeting or recklessly endangering civilians, which is inviolable and unaffected by contextual considerations. It also makes proportionality challenging to apply and judgments of proportionality highly contentious. As Coady points out, despite proportionality's importance in just war thinking "its employment is often a curious combination of the natural and the theoretically opaque."[12] Judgments of proportionality force us to carefully weigh the good that a violent act does against the harm that it causes, with the benefits and harms usually being incommensurable effects that do not permit easy comparison. When applied to prospective actions, proportionality also requires the ability to reliably predict the potential outcomes of various courses of action. This is difficult under ordinary circumstances, and it becomes all the more burdensome when the myriad forms of uncertainty that reign over the battlefield conspire to limit the information available and frustrate commanders' predictions.

Proportionality is sometimes mistakenly interpreted as only requiring the minimization of one's own casualties. In this sense, the principle appears as an obligation to not sustain more casualties than are justified by the objective being sought, thereby making it simply a statement of the strategic imperative of force protection. Alternatively, the principle might be understood in a broader sense of applying to one's own forces and to civilians, but not to members of the opposing military force. Proportionality certainly encompasses allied forces and civilians, but it should apply even to enemies. No matter how intense and total a conflict, restraint must be exercised when attacking enemy forces if there is any hope of ultimately restoring peace between the belligerents. And the moral defensibility of war disappears when needless destruction is inflicted, even when it is directed against those who are liable to attack.

Some of the clearest cases of disproportionate force are instances in which armies have achieved their objectives and yet continued to attack defeated enemies. Many pre-modern battles ended in a rout, with one army mercilessly

[12] Coady, *Morality and Political Violence*, p. 96.

pursuing fleeing opponents.[13] As Gross correctly notes, "ancient wars might have been relatively bloodless except for the impulse to annihilate one's enemies."[14] Although attacks on retreating opponents were made more difficult as the use of gunpowder weapons increased the distance between opposing sides, they continue to occur in contemporary wars when the winning side has significant advantages in mobility and firepower. During the First Gulf War the US military arguably acted disproportionately when it destroyed retreating Iraqi Army units on what became known as "the Highway of Death." Yet even these examples cannot be generalized into a rule, as sometimes attacks on a retreating enemy may be necessary to prevent the enemy from surviving to fight another day. Pursuing a fleeing enemy may actually be required in some instances if this will bring about a quicker and less violent resolution of hostilities. Except in the most extreme cases of excessive force, judging proportionality demands careful analysis of the circumstances in which an attack is carried out and the objectives it is meant to achieve.

Proportionality and the Protection of Civilians

Although it is not as clear a manifestation of the PNCI and the right to life as the principle of discrimination, proportionality does assist the principle of discrimination in limiting violence that may be directed against civilians. Disproportionate uses of force threaten to harm civilians, who may become 'collateral damage' in attacks on military targets. A restriction on disproportionate force therefore helps protect civilians in or near targets that might be attacked, even if those people would not otherwise be protected under the principle of discrimination. For example, it would not violate the principle of discrimination to bomb an enemy military outpost, but by insisting that the number and power of the bombs dropped be limited to what is necessary to destroy the base, proportionality helps to minimize the chances that a bomb will inadvertently injure or kill a civilian bystander.

There is a great deal of debate about how exactly proportionality should be calculated, and the extent to which proportionality addresses civilian suffering depends on which of the competing conceptions of proportionality one accepts. The later divergence is particularly important for my purposes, as it gets at the critical issue of how the principle of proportionality instantiates the duty to respect civilians' right to life. Theories of proportionality vary between those that take a strong view of civilian protection by treating proportionality as being

[13] A number of sources discuss the practice of killing fleeing enemies in detail. Some of the best discussions of it are in the following sources: John Keegan, *A History of Warfare* (New York: Vintage, 1994); J. E. Lendon, *Soldiers and Ghosts: A History of Battle in Classical Antiquity* (New Haven, CT: Yale University Press, 2005).

[14] Gross, *Bioethics and Armed Conflict*, p. 4.

one facet of the PNCI along with the principle of discrimination, and those that describe proportionality as only indirectly protecting civilians.

Van Damme and Fotion gauge proportionality based on net suffering, without addressing civilians specifically. According to them, proportionality "refers to the total calculus of the balance of goods and evils associated with a particular operation or action in the course of a war."[15] By their reasoning, proportionality calculations rest on three assumptions. First, "[o]nly consequences count in determining whether an action or kind of action is in accordance with the principle."[16] Second, "[a]mong the consequences, only welfare consequences count." Foremost in mind here are "actions affecting directly or indirectly the lives of humans," though Van Damme and Fotion go on to say that "[i]nanimate objects such as religious buildings and historical sites are included in this calculus, as humans give them special meaning."[17] Finally, they say that "[i]t is possible to measure welfare consequences,"[18] which commits them to judging proportionality based on measurable indicators such as lives lost and religious or cultural sites destroyed. As these conditions indicate, this standard of proportionality may indirectly limit civilian suffering but does not have this as one of its goals. It does not privilege civilians' lives over soldiers' lives.

Elsewhere, Fotion presents a slightly different version of proportionality that rests on the distinction between excessive and overwhelming force.[19] He argues that excessive force is disproportionate because it is characterized by violence on a scale that inflicts casualties – to military forces or civilians – that are beyond what is required to achieve a mission and that are therefore superfluous. Overwhelming force is destructive and may inflict a great deal of harm, but it does not go beyond what is necessary to secure the objective at hand. "Using overwhelming force may actually save lives" because it may permit a quick and decisive victory.[20] Fotion is right to point out that proportionate attacks may help to lower the overall suffering inflicted during wars. However, this way of framing proportionality not only omits civilians but also suggests that proportionality may come into conflict with discrimination by failing to account for civilians' special status. In instances when overwhelming force could quickly resolve a war while also putting civilians at risk, Fotion's conception of proportionality could be seen as excusing some violence against civilians.

Johnson's conception of proportionality shows more awareness of the need to limit violence against civilians. He argues that proportionality is primarily a matter of preventing the use of excessive force but says that "proportionality also has implications for noncombatant immunity."[21] His example of this is that

[15] Guy Van Damme and Nick Fotion, "Proportionality." In *Moral Constraints on War: Principles and Cases*, edited by Bruno Coppieters and Nick Fotion (Plymouth, UK: Lexington Books, 2008), p. 159.
[16] Ibid. [17] Ibid. [18] Ibid. [19] Fotion, *War & Ethics*, p. 21.
[20] Ibid. [21] Johnson, *Just War Tradition*, p. xxiii.

"a weapon might be disproportionate in a given situation because it cannot be used discriminatingly against combatants without harming noncombatants in the vicinity."[22] This example suggests that proportionality not only affects civilians indirectly by regulating the level of force being used but also incorporates the principle of discrimination. A weapon or method of fighting may become disproportionate because of its propensity to be used indiscriminately. Johnson's view of proportionality acknowledges that civilians have a special status and therefore assigns them a different weight than combatants when judging whether the demands of this principle have been met.

These competing conceptions of proportionality have important implications for just war theory's sensitivity to civilian victimization. Standards that weight civilians' lives and combatants' lives equally fail to note the morally significant difference between harming members of these two groups. They equate civilians who have a right to not be harmed with combatants who have forfeited that right. Standards that recognize the special status of civilians are more compelling because they acknowledge that combatants and noncombatants are not the same; the latter have a right to not be attacked. Any excessive violence should be regarded as unjust, but excessive violence that harms civilians is a greater injustice because they are in principle supposed to be exempted from violence of any kind. In other words, disproportionate attacks that harm civilians are wrong not simply because they are more destructive than necessary but also because of who the excessive destruction is inflicted on.

Whatever standard of proportionality one favors, the principle remains constrained by the same restrictive focus that was evident in the principle of discrimination. Proportionality sets limits on the use of force without compelling belligerents to take action to address misuses of force or to control the damage inflicted in proportionate attacks. Proportionality offers moral grounds for opposing excessive uses of force and for condemning those who are guilty of acting excessively, yet it provides no basis for specifying how those who are harmed should be treated afterwards. Thus, because it is only restrictive, proportionality embodies the negative duty that belligerents have to avoid harming civilians without also including any corrective obligations.

Improving Just War Theory's Civilian Protections

Some just war theorists attempt to improve protections for civilians by imposing stronger restrictions on the use of force or by limiting the instances in which civilian victimization can be excused. Walzer deserves special attention on this point, as he goes further than many other commentators in attempting to reinforce the protections afforded to civilians during war without making those

[22] Ibid.

restrictions so strong as to preclude military action. Walzer's position can be best described as a strong negative conception of noncombatant immunity. He seeks to intensify the restrictions on how belligerents use force, but does this without introducing any obligations to provide assistance to noncombatants. There are several facets of Walzer's strong conception of the negative duty: the extension of discrimination beyond prohibiting immediate physical harm to civilians' bodies to include certain types of property, the principle of due care, and a strict formulation of the DDE. I already discussed Walzer's advocacy for extending the principle of discrimination to cover property earlier in the chapter, and I will now consider the second and third of these additional civilian protections.

Walzer presents the principle of due care as an additional restriction on how civilians can be treated during wars that closes some of the loopholes that could conceivably be left open by the principles of discrimination and proportionality. In *Just and Unjust Wars*, Walzer describes due care as requiring that belligerents attempt to minimize the risks their actions impose on civilians. It is not enough to simply abide by discrimination and proportionality; combatants must take precautions to avoid harming civilians even when they could do this without violating either principle. Walzer explains that this requirement applies to "common soldiers and their immediate superiors,"[23] meaning that it is operationalized at a fairly low level in the chain of command. His reasoning seems to be that it is at the lowest level of the military hierarchy – the level at which the abstract moral principles of just war are most directly threatened by practical demands – that due care is especially pertinent.

Walzer develops the concept of due care with the help of a domestic analogy. He argues that belligerents have the same obligations of due care that a person would ordinarily have during peacetime, though with a relaxed standard because of the dangerous nature of war. However, in *Just and Unjust Wars* Walzer provides little clear guidance on what due care means in a civilian context and how this requirement should be interpreted by just war theorists or members of the military. He also fails to explain how the standard could be relaxed while still improving civilian protections. This leaves what is otherwise a plausible addition to just war theory underdeveloped and makes it difficult to say exactly how Walzer sees this principle being enacted.

Walzer expands on his concept of due care in *Arguing about War*. Here he says that "[c]ivilians may be put at risk by attacks on military targets, as by attacks on terrorist targets, but the risk must be kept to a minimum, even at some cost to the attackers."[24] Although brief, this comment provides a much clearer standard of what due care means in a wartime context by highlighting three of its important characteristics. First, due care requires that attacks

[23] Walzer, *Just and Unjust Wars*, p. 319. [24] Walzer, *Arguing about War*, p. 61.

be directed at military targets. This reiterates the principle of discrimination. Second, Walzer invokes proportionality by saying that "the risk must be kept to a minimum." Finally, Walzer's most radical claim, and the point at which due care most clearly goes beyond what is already included in discrimination and proportionality, is that belligerents must take on a greater degree of risk in order to limit harm to noncombatants. This is not required by most standards of discrimination and proportionality, and is extremely controversial.

Opponents of Walzer's concept of due care think that combatants are not obliged to accept greater levels of risk after they have already made themselves liable to attack by taking on their combatant status. Benvenisti argues that soldiers have a duty of due care but that this duty "does not entail an obligation to assume personal life-threatening risk."[25] Kasher and Yadlin maintain that states have a stronger obligation to protect their soldiers than they do to protect foreign civilians.[26] By these accounts, civilians are potentially at heightened risk of being attacked because of how risks to combatants and civilians are balanced.

Walzer's assertion that combatants are obliged to take greater risks to protect noncombatants reflects a strong commitment to limiting violence against civilians. Nevertheless, the principle of due care is only a way of strengthening the negative duty that belligerents have toward civilians. Although due care requires combatants to put themselves at greater risk, this risk is borne only to prevent noncombatants from being harmed and not to in any way repair harm that has already been inflicted. As Walzer's description of due care shows, this requirement does not change the meaning of discrimination or proportionality, nor does it raise the possibility of incorporating corrective justice into just war theory. The same can be said of other formulations of due care that impose tighter restrictions on the use of force without venturing away from just war theory's negative orientation.

Orend agrees that combatants should exercise due care to avoid inflicting harm on noncombatants. And like Walzer, he describes due care as a way of improving *jus in bello* restrictions without creating any new responsibilities to assist or compensate civilians for the harm they sustain. However, Orend offers a slightly different version of due care by making this requirement asymmetrical. "What the due care principle implies, above all else, is this: offensive tactics and maneuvers must be carefully planned, in advance, with a keen eye towards minimizing civilian casualties."[27] By arguing that this requirement

[25] Eyal Benvenisti, "Human Dignity in Combat: The Duty to Spare Enemy Civilians," *Israel Law Review* 39 (2006), 81–109.

[26] Asa Kasher and Amos Yadlin, "Military Ethics of Fighting Terror: An Israeli Perspective," *Journal of Military Ethics* 4(1) (2005), 3–32 and "Assassination and Preventive Killing," *SAIS Review* 25 (2005), 41–57.

[27] Orend, *The Morality of War*, p. 117.

only applies to offensive actions, Orend suggests that belligerents conducting defensive operations are exempt from due care. This would mean that a force protecting a stationary line of defense or conducting a fighting retreat would face a lower standard for protecting civilians than a force attacking a defensive line. This is likely intended to place an additional burden on belligerents acting aggressively so as to limit offensive actions, but it comes at the expense of tacitly sanctioning defensive tactics that might put civilians at heightened risk of being attacked.

Lee also endorses due care, which he defines as "constant care in military operations to avoid civilian casualties, including gathering adequate intelligence, choosing the least harmful means and methods of attack, and timing the attack to minimize risk to civilians."[28] This definition avoids the narrow focus on offensive operations, and is potentially more useful than Orend's standard for that reason. It is also a much clearer definition than those provided by Walzer or Orend because it establishes that due care is an ongoing process of selecting methods of fighting with civilian welfare in mind. Nevertheless, as with Walzer and Orend's definitions of due care, Lee's fails to go beyond the restrictive orientation of discrimination and proportionality. This leaves due care as a plausible additional restriction on how force is used, but one that is incapable of providing guidance when it comes to determining whether belligerents have any obligations to the civilians that they harm.

One could argue that the puzzle I raised at the outset – the persistence of violence against civilians at a time when the normative constraints seem to be stronger than ever – only exists because heavily restrictive elements of just war theory like the principle of due care have been inadequately realized in practice.[29] Noncompliance with the strong statements of the negative restrictions on the use of force is certainly a problem, and we should continue just war theory's ongoing project of developing these to prevent attacks against civilians from occurring in the first place. I agree that these restrictions are essential. My point is only that they are not sufficient. Even if it were perfectly applied, the principle of due care could not eliminate violence against civilians. Incidental and accidental harm to civilians is an inevitable result of combat, especially in the urban environments that are increasingly the focus of operations.[30] Reducing civilian victimization requires us to work on both the negative and positive sides of civilian protection. Just war theorists have done excellent work theorizing stronger restrictions, with the principle of due care standing out as one of the most potentially beneficial restrictions on the use of force. But

[28] Lee, *Ethics and War*, p. 157.
[29] Thanks to one of the anonymous reviewers for raising this objection.
[30] David Kilcullen, *Out of the Mountains: The Coming Age of the Urban Guerrilla* (New York: Oxford, 2013).

developing norms relating to victims' assistance is an essential next step for ensuring that any civilian casualties receive the assistance they are owed, regardless of whether belligerents are bound by weak or strong conceptions of negative duty.

Theories of *Jus Post Bellum*

Of the three categories of just war theory, *jus post bellum* is the least developed. This is not because of any conceptual weakness but because this subset of just war theory, which pertains to the resolution of conflicts and restoration of peace, was frequently neglected in studies of just war theory until fairly recently. *Jus post bellum* received relatively limited attention from writers before Kant,[31] and continued to be marginalized until the late twentieth century. Even in the twenty-first, many books on just war theory give little or no attention to belligerents' obligations at the conclusion of wars. However, this trend has begun to shift. With the increasing prevalence of post-conflict operations over the past two decades, a number of theorists have taken up the problem of post-conflict justice and are making noteworthy efforts to build a set of principles to provide moral and legal guidance.

Theories of *jus post bellum* offer the greatest potential for expanding just war theory beyond its current negative orientation, but they require far more development. Generally speaking, existing theories of *jus post bellum* tend to be highly derivative. They rely heavily on reasoning about *jus ad bellum* and *jus in bello*, which are taken to be more fundamental and as providing first principles for the extrapolation of additional restrictions on war. Much of the *jus post bellum* analysis is therefore oriented toward showing how principles of *jus ad bellum* and *jus in bello* either continue to apply after hostilities have ended or reemerge in a new form.

There are some advantages to the derivative approach toward formulating principles of *jus post bellum*. As Lee points out, this strategy helps to integrate this domain of just war analysis with those that are more firmly established in order to create a fairly coherent unified approach to theorizing the morality of war. "The continuity between *jus ad bellum* and *jus post bellum* allows the same moral principles to be applied whatever the state of the war."[32] The downside of this parsimonious addition to just war theory is that theories of *jus post bellum* tend to add temporal range to *jus ad bellum* and *jus in bello* criteria without substantially changing the scope of the protections they offer.

[31] Brian Orend, *War and International Justice: A Kantian Perspective* (Waterloo: Wilfrid Laurier University Press, 2000) and "Kant's Ethics of War and Peace," *Journal of Military Ethics* 3(2) (2004), 161–177.

[32] Lee, *Ethics and War*, p. 292.

With a few important exceptions, principles of *jus post bellum* do not establish mechanisms for assisting civilians who have been harmed during wars.

Relying heavily on established domains of just war theory has given work on *jus post bellum* a strong foundation, but this has come at the expense of maintaining the focus on belligerents' negative duty toward noncombatants. Studies of *jus post bellum* tend to assume the negative duty and explore its implications for a different stage of war without critically evaluating whether justice demands that civilians be given additional assistance. The negative duty then appears in a new form as a restriction on how victorious states can treat their opponents. As with the addition of due care qualifications, the extension of the negative duty to post-conflict situations helps to protect civilians but does not substantively alter the restrictive character of just war theory or improve just war theory's sensitivity to civilians' rights.

Post Bellum *Corrective Justice*

Brian Orend[33] and Gary Bass[34] are among the just war theorists who have offered the most comprehensive and influential statements of *jus post bellum*, which makes them deserving of special attention. Both writers' theories of post-war justice serve as prime examples of the scope of the obligations imposed by principles of *jus post bellum*, as well as those principles' relationship to the other areas of just war theory. The limitations of their theories call attention to the necessities of going beyond the principles of *jus post bellum* that have been proposed thus far and of giving greater attention to protecting individuals' rights during war.

Orend's analysis of *jus post bellum* starts from the stipulation that a conflict can only be justly resolved if it was waged for a just cause and fought justly. By Orend's reasoning, any war that ends with an unjust belligerent's victory must produce an unjust outcome that cannot be solved by *post bellum* moral precepts and that will likely give rise to another war aimed at correcting that outcome. With this stipulation in mind, Orend outlines six principles that just belligerents must satisfy to conclude a war morally.[35]

First, "proportionality and publicity," states that the peace must be publicly announced and there must be a proportional settlement of the conflict.[36] This prevents a war's winner from placing excessive demands on its loser. Second, "rights vindication," holds that "the settlement should secure those basic rights

[33] Brian Orend, "Justice after War," *Ethics & International Affairs* 16(1) (2002), 43–56, "*Jus Post Bellum*: The Perspective of a Just-War Theorist," *Leiden Journal of International Law* 20(3) (2007), 571–591, *War and International Justice*, "Kant's Ethics," and *The Morality of War*.

[34] Gary J. Bass, "Jus Post Bellum," *Philosophy & Public Affairs* 32(4) (2004), 384–412.

[35] Orend, "Justice after War," p. 55. [36] Ibid.

whose violation triggered the justified war."[37] Third, the principle of discrimination, when imported into the post-war period, requires that any post-war punishments must target those responsible for waging the war and avoid imposing a burden on civilians. Fourth, punishment must be administered against those who were guilty of the aggression that initiated the war and against those on both sides who were guilty of misconduct during the fighting. Fifth, the aggressor owes the victim some compensation for the expenses of waging the war. Finally, the defeated government should be rehabilitated to prevent a reemergence of the conditions that led to the conflict. This may include measures such as disarmament or the restructuring of political institutions.

Orend's formulation of *jus post bellum* criteria is a useful starting place for thinking about how belligerents can justly conclude hostilities and prevent the resurgence of fighting. His goals of compensation and rehabilitation show that theories of *jus post bellum* may be concerned with corrective justice and that they could even be read as establishing some kind of positive duty to offer assistance to noncombatants. Orend's principles of corrective justice are therefore extremely important additions to the theory of *jus post bellum*, which help to suggest a new dimension of the moral valuation of war. However, the elements of corrective justice that Orend and other theorists of *jus post bellum* offer are fairly narrow in scope and fall far short of reaching the kind of positive duty that I will develop.

There are several general problems with group reparations of any type, and several problems with Orend's formulation. The first general problem affecting group reparations is that these apply to states or to collectives, not to individuals. This means that while group reparations may be used for corrective justice, they fail to account for the point that I will develop in the next chapter: that individuals have a right to life and that individual rights should therefore be of central concern for rights-based theories of war. Proposals for group reparations often draw strength from individual rights; the case for group reparations tends to be made based on the extent to which individual members of a certain group have been victimized because of some shared identity. And this seems to be unavoidable, as it is not groups as such that suffer during wars but individuals who share salient characteristics that motivate attacks against them. Focusing on groups, rather than individuals, is important in some contexts, such as genocides. However, in many instances, attention to group reparations comes at the high cost of directing attention away from the suffering of individuals and the need to protect individuals' rights.

Second, because they are not focused on individuals, group reparations are apt to be insensitive to individual needs when they are employed in practice. Some civilians may be excluded from the groups that receive compensation,

[37] Ibid.

while others may be part of those groups and able to receive money even when they personally endured little suffering.[38] There is a high risk of some civilians being left out by group reparations and others wrongly being given compensation because group membership is usually defined by citizenship, nationality, race, ethnicity, or religion – characteristics that are unlikely to ever perfectly match up with the population of civilian victims.

Finally, even within a group it is essential to account for the different degrees of harm individuals sustain. It would be inappropriate to provide assistance equally to all group members without respect to what individuals need or are entitled to. Providing fair assistance within a group demands an account of why specific individuals are owed assistance and how claims to assistance can be judged. This is best accomplished with a theory of corrective justice that directly confronts the individual entitlements to assistance.

Orend's conception of corrective justice also has several specific weaknesses that make it poorly suited to helping civilians even as a form of group reparation. First, as Orend describes it, the goal of compensation is to assist states that are victims of violence, rather than individuals or even sub-state groups. States might be expected to redistribute some or all of this money to individual civilian victims of war, but Orend's compensation scheme does not require this. This leaves Orend's theory of compensation open to abuse by states that want to redirect reparations to projects other than that of assisting the victims of war. This kind of misappropriation of funds is particularly likely in states that are corrupt or that are unresponsive to citizens.

Second, and even more seriously, the corrective principles Orend proposes are asymmetric. They only aim to assist citizens of states that are victims of aggression. Orend neglects the citizens of neutral states or citizens of states that wage unjust wars, even though these civilians may likewise suffer and should not lose the protection of their right to life because of political circumstances that are beyond their control. A theory of corrective justice during war should acknowledge that civilians may be victimized regardless of which state they belong to. Orend's corrective principles are also asymmetric in the sense that they only take effect when just belligerents win, which is by no means an assured outcome. He does not prescribe any corrective obligations for wars with unjust outcomes, even though civilian victims in such wars would have as strong a rights-based claim for corrective justice as they would if there were a just outcome.

Although Orend develops a promising starting place for thinking about the just resolution of wars, the principles he outlines ultimately fall short of

[38] For more detailed discussions of this problem, see Eric Posner and Adrian Vermeule, "Reparations for Slavery and Other Historical Injustices," *Columbia Law Review* 103 (2003), 689–748, pp. 721–723.

reaching what he considers to be the fundamental goal of just conflict resolution. Orend says that the aim of war should be "rights vindication," and that this should also be the goal of post-war settlements. However, the only rights violations he seems to have in mind are those that established a just cause for war, which leads him to overlook the need to vindicate the countless breaches of rights that occur *during* war. Specifically, he overlooks the need to vindicate the rights of noncombatants who were adversely affected by the fighting. If wars are waged with the goal of rights vindication, then surely any just resolution of hostilities must address the rampant violation of civilians' right to life. This type of rights vindication highlights the importance of the positive duty that I will describe in the next chapter.

Jus Post Bellum *and Proportionality*

Bass' thoughts on post-war justice are, like Orend's, derived from principles of *jus ad bellum* and *jus in bello*.[39] Also like Orend, Bass thinks that *jus post bellum* should be concerned with theorizing the proper conduct of belligerents that already satisfied the demands set out by *jus ad bellum* and *jus in bello*. He contends that post-war moral guidance is needed because victorious states must not act in ways that contradict the cause that justified their resort to war. "If a state wages war to remove a genocidal regime, but then leaves the conquered country awash with weapons and grievances, and without a security apparatus, then it may relinquish by its postwar actions the justice it might otherwise have claimed in waging the war."[40]

Bass relies heavily on the *jus in bello* principle of proportionality when formulating his post-war moral norms. As he sees it, the resolution of war should be governed by the same considerations of proportionality that are demanded before and during war. This precludes actions that could be seen as excessive, such as imposing harsh punishments on a defeated enemy. Bass' theory of *jus post bellum* is thus a description of a post-war settlement that reflects the same kinds of restraints that are called for under *jus ad bellum* and *jus in bello*. By deriving his theory of *jus post bellum* from these restrictive elements of just war theory, and by leaving those restraints largely unaltered, Bass remains even more securely fixed within the negative view of *jus post bellum* than Orend.

Bass only goes beyond the moral principles embodied in other domains of just war theory when addressing the demands of rebuilding defeated states after hostilities have ended. Bass addresses the importance of reconstruction in saying that "*jus post bellum* must permit foreigners to interfere in the defeated country's affairs."[41] However, his discussion of reconstruction is framed in a way that does not account for the assistance of civilians. Bass qualifies his claim

[39] Bass, "Jus Post Bellum," p. 387. [40] Ibid., p. 386. [41] Ibid., p. 396.

by saying that reconstruction must take place "in ways that can reasonably be expected to prevent a new outbreak of an unjust war."[42] In other words, reconstruction is done with the goal of preventing war and not out of an interest to limit the extent of injustices committed against civilians. This means that reconstruction could potentially help civilian victims, but only indirectly and not as the goal of reconstructive efforts.

Jus Post Bellum *and Transitional Justice*

Larry May develops a comprehensive theory of *jus post bellum* that is based on six principles: rebuilding, retribution, reconciliation, restitution, reparation, and proportionality. He starts by pointing out that the boundaries between *jus post bellum* and the other phases of war are blurry, making it difficult to determine exactly when a war goes from one phase to another. He is correct in thinking that any principles of just war should account for this problem with an effort to show how the underlying reasoning can apply across temporal distinctions that may be artificial. *Jus post bellum* is therefore conceptualized as an integral part of the larger just war edifice that not only comes into effect once hostilities have ended but also eases the shift from war to post-war recovery. I bear this concern in mind later when I formulate the two principles that are designed to enact the positive duty by framing these as creating continuous obligations that have implications across the various temporal categorizations of just war theory.

The principles of retribution and reconciliation, and of proportionality, are related to overcoming the conditions that initially caused the hostilities. Retribution is concerned with punishing those who were responsible for aggression and preventing them from instigating another conflict. Here the aim is to restore the rule of law, which sometimes requires bringing heads of state to trial and other times demands working through them to restore security. Reconciliation aims to rebuild relations between belligerent groups, and in particular to affirm that both sides are entitled to some degree of basic respect. May defends the moral equality of soldiers, saying that "Treating soldiers, who basically do the same job regardless of which side they serve on, as equals is a way to reinforce this idea that similarities rather than differences are the most important thing to focus on."[43] Proportionality takes the role of a kind of master principle that spans each temporal stage of just war theory and informs the application of other principles by requiring that none should inflict more harm than the good it aims to achieve. When applied in a *jus post bellum* context, it cautions against

[42] Ibid., p. 396.
[43] Larry May, *After War Ends: A Philosophical Perspective* (New York: Cambridge University Press, 2012), p. 91.

any post-war actions that would exacerbate suffering or provoke resurgent violence.

The most pertinent of May's principles when it comes to corrective justice are the principles of rebuilding, restitution, and reparation. As May understands it, "transitional justice demands that victims receive their due, even if victors may have to provide the majority of the compensation for victims to achieve their due, and even though victors will thus not get what is their due."[44] Rebuilding should be undertaken to restore the defeated state's ability to function and to provide services for its citizens. This may apply to rebuilding material infrastructure, but is primarily meant to ensure that governmental institutions are able to function. "Restitution is the restoring to the rightful owner what has been lost or taken away. Reparation is the restoring to good condition of something that has been damaged."[45] These are closely related. The former is an act of returning something that has been taken, preventing anyone from benefiting from wrongdoing and minimizing the victim's suffering. The latter is meant to ensure that the victim does not suffer even when property cannot be retrieved.

Although the three corrective principles May develops reflect a high degree of sensitivity to post-war suffering, they nevertheless lack the power needed to assist individual victims of war or vindicate their rights. Each principle is framed asymmetrically, usually helping the victim recover or establishing conditions to prevent the aggressor from reoffending.[46] The focus is also on collectives, rather than individuals. Rebuilding is meant to restore state capacities. This is an essential element of post-war settlements, especially following total wars or wars involving failed states, yet this does not directly suggest that any improvements will be made in the lives of civilian victims. A rehabilitated state is one that may be able to provide basic services, but that does not necessarily have the means or motive to compensate civilians for breaches of their rights. Restitution and reparation are more directly concerned with correcting a victim's suffering, though they only pertain to property damage, rather than bodily harm.[47] They are also punitive guidelines that are meant to prevent a wrongdoer from benefiting as much as to assist victims. These principles therefore fail to address the suffering sustained by individual civilians or the need to redress violations of individual rights and do not reflect the wrongs that can be suffered by civilians on both sides in a conflict.[48] As with Orend and Bass, this is informed by paying much greater attention to the *jus ad bellum* wrongs that provide grounds for war than to the *jus in bello* breaches of civilians' rights.

[44] Ibid., p. 9. [45] Ibid., p. 183. [46] Ibid., pp. 19–21. [47] Ibid, p. 185.

[48] May maintains this focus on property in other writings on post-war repair. For example, see Larry May, "Reparations, Restitution, and Transitional Justice." In *Morality, Jus Post Bellum, and International Law*, edited by Larry May and Andrew Forcehimes (Cambridge: Cambridge University Press, 2012), 11–31.

The Limitations of Post Bellum *Corrective Justice*

Other writings on *jus post bellum* generally follow the same patterns evident in Orend's, Bass', and May's work by either staying wholly within the negative conception of belligerents' obligations toward civilians or only going a bit beyond this framework with the introduction of group-based or state-based reparations. Research directed at restricting how belligerents may act in the aftermath of wars is an essential element of protecting civilians. However, as in other domains of just war theory, focusing on restrictions fails to account for the possibility that belligerents may have a positive duty to repair harm inflicted on noncombatants. This omission is especially problematic for *jus post bellum*, as it is after war that belligerents have the greatest opportunities to provide assistance and to ensure that the civilian costs of war do not persist into the future.

Even more concerning than the lack of attention to corrective justice for individuals is that theorists typically frame *jus post bellum* principles asymmetrically. *Post bellum* principles are either concerned with how the winner should treat the loser or with the obligations the loser has in submitting to the post-war settlement. The winning and losing belligerents are therefore described as having distinct sets of obligations. Most of the proposed principles of *jus post bellum* are addressed to the winner. To the extent that the loser's obligations are considered at all, they are concerned with when and how they have to cooperate with the winner. The result of this asymmetry is an inconsistent approach to corrective justice that is poorly suited to protecting the rights held by all civilians, regardless of nationality.

Framing *post bellum* principles asymmetrically obscures the fact that all belligerents should have equal obligations to correct injustices that they have committed against civilians. As I demonstrate in the next chapter, regardless of whether a belligerent wins or loses, or whether it acted justly or unjustly in waging war, it must be accountable for the breaches of rights it has inflicted. A belligerent's status as a winner or loser, or as a just or unjust participant in war, does not alter the rights civilians have against being attacked, and therefore cannot be held up as a condition that makes it permissible to harm civilians without providing some type of corrective assistance. This means that whatever form *jus post bellum* obligations take, the reparation of harm inflicted on civilians must be symmetrical.

Finally, theories of jus *post bellum* are temporally restricted. They are, as the name suggests, directed at promoting justice after a war has ended. This prevents these theories from having much to say about how to redress civilian victimization while wars are in progress. This is a critical omission, as much of the harm that civilians sustain is fatal over the long term and may therefore be irreparable by the time principles of post-war corrective justice take effect. This

is a limitation I will overcome by not framing my positive duty or its associated principles as being restricted to any particular phase of war. The positive duty I advocate can arise at any point in a war, thereby spanning *jus in bello* and *jus post bellum*.

Conclusion

As I have shown, the principles of *jus in bello* that pertain to the treatment of civilians are framed as negative restrictions on the use of force. These restrictions are essential for prohibiting violence against civilians, yet they fail to account for the moral challenges that arise from allowing civilian suffering to go unaddressed and allowing the perpetrators of that suffering to shirk their restorative obligations. Existing theories of *jus in bello* are unable to consider the possibility that civilian suffering should be repaired with some kind of corrective justice. By extension, these theories fail to establish any mechanisms for assisting civilians who have been victims of violence. This is true even when theories of *jus in bello* are modified to provide stronger civilian protection, such as with the due care requirement.

Some theories of *jus post bellum* come closer to addressing the problem of civilian suffering. They recognize the need for post-war reconstruction and for the post-war vindication of rights. Nevertheless, even with these improvements on just war theory's purely restrictive principles, theories of *jus post bellum* fall far short of recognizing the implications of the right to life and the duty belligerents have to repair the harm they inflict on civilians. These theories even hinder efforts to promote corrective justice for individual civilians insofar as they suggest that post-war obligations should be group-based and framed asymmetrically to create distinctive sets of obligations for winners and losers, or for just and unjust belligerents.

The inability of the existing theories of just war to establish adequate protections for civilians has received some attention. Critics of just war theory often cite the high number of civilian casualties in contemporary wars and the opportunistic use of just war concepts by aggressive politicians as evidence of the just war tradition's ineffectiveness.[49] Nel Noddings points out that "[j]ust war theory and modern war conventions state that noncombatants may not be deliberately attacked, and yet the escalation of civilian deaths in the 20th century was dramatic."[50] Even those within the just war tradition, who generally describe the triumphant ascent of just war theory's influence with

[49] Andrew Fiala, *The Just War Myth: The Moral Illusions of War* (Lanham, MD: Rowman & Littlefield, 2007); David K. Chan, *Beyond Just War: A Virtue Ethics Approach* (New York: Palgrave Macmillan, 2012).

[50] Nel Noddings, *Peace Education: How We Come to Love and Hate War* (New York: Cambridge University Press, 2012), p. 21.

enthusiasm, have expressed some doubts about its effectiveness in protecting civilians. Reflecting on the fate of civilians during twentieth-century wars, Lee notes that attempts to constrain civilian suffering within the scope of the existing just war framework were ultimately insufficient: "Despite IHL, wars became ever more destructive, and attention began to return to *jus ad bellum*. In the efforts to effectively limit war, *in bello* measures by themselves, however helpful, were proving inadequate."[51] Even with this concern for civilians in and outside of the just war tradition, the norms of war have not advanced beyond those that currently fail to grasp the implications of the right to life and fail to establish mechanisms of corrective justice that can help to alleviate civilian suffering. What is needed is a reconsideration of belligerents' moral obligations to individual civilian victims of war, and this is what I will provide in the next chapter.

[51] Lee, *Ethics and War*, p. 64.

3 The Positive Duty to Alleviate Civilian Suffering

As the previous chapters showed, the right to life and the PNCI that is supposed to protect that right during war can be interpreted in various ways and have given rise to competing accounts of the responsibilities that combatants have toward civilians. Whatever their differences, the divergent accounts of civilian protections during war generally share two characteristics. First, they agree that the civilian right to life and the principles of just war that are meant to protect it are vital moral constraints on war. Even those theorists who think that workers in the arms industry or citizens in democratic states are liable to attack generally acknowledge that civilians have a right to life. They contend that the right to life fails to protect certain people whose level of participation in war constitutes a forfeiture of that right, but they rarely question the right itself. Second, when it comes to protecting civilian immunity, theories of just war are almost entirely restrictive. Theorists say virtually nothing about belligerents' obligations to repair the suffering they inflict on individual civilians. This omission leaves the commitment to protecting civilians during war incomplete. When taken together, the first shared characteristic establishes a broad commitment to protecting civilians and upholding the right to life, while the second reveals a surprising failure to explore the right to life's implications.

Just war theorists' inattention to the costs of war borne by civilians is related to a limited temporal perspective on the acts of violence that are carried out during wars. When just war theorists describe attacks that affect civilians, they consistently focus on the decision to attack and the means used to conduct an attack. Consequences only matter indirectly. The consequences of an attack may help to determine whether an attack was discriminate and proportionate, but these consequences are not treated as moral problems in themselves. Any suffering inflicted on civilians reflects on whether an attack was justified, yet somehow without raising additional questions about whether the response to the aftermath of the attack was appropriate.

According to existing theories of just war, once civilian suffering is inflicted, it is treated as a fixed and unalterable fact that cannot compel any further action on the part of the combatants responsible for it. Once a civilian's right to life has been breached, this fact ceases to have any normative force, except to

retrospectively vindicate or impugn the attacker. There are no grounds for compelling anyone to take steps toward helping the victims. Thus, conventional just war theory is unable to confront the ultimate fate of civilian victims of violence. Any assistance provided is supererogatory and left up to the subjective whims of belligerents – just as the negative duty to avoid harming civilians once was. This leads just war theory to show a strange mixture of concern for civilians before they are attacked and almost total disregard for their fate afterwards.

In this chapter and the next I will make the case for recognizing that all belligerents have a positive duty to repair the harm they inflict on noncombatants. Specifically, belligerents must repair any harm that constitutes a breach of a noncombatant's right to life. The positive duty exists whenever a civilian is killed or injured, or when a civilian suffers the loss of property that is so vital to a person's health that it can be considered a material extension of the right to life. The positive duty that I propose is one that all belligerents have regardless of their status as violent actors or their relationships in war; it applies to states and to violent non-state actors alike, and symmetrically to aggressors and defenders. The positive duty also applies regardless of whether an attack is morally justified. This is because the logic of rights dictates that belligerents must be held responsible for any breach of rights they perpetrate, regardless of whether it is morally excusable.

I focus on explaining why belligerents must have a positive duty according to the logic of the rights-based framework of contemporary just war theory, though near the end of the chapter I go beyond the rights-based argument to offer additional reasons for a positive duty to assist noncombatant victims of war. These reasons are independent of the rights-based argument, but they show that there are ways of reaching the same conclusion about belligerents' responsibilities toward civilians from other theoretical perspectives. The rights-based justification that I focus on can therefore be seen as the most theoretically sound way of reaching a conclusion that is overdetermined by various independent reasons for recognizing a positive duty toward civilian victims of war.

The Meaning of the Right to Life

As I pointed out previously, the right to life is one of the most basic assumptions of modern moral and political thought. Some conception of this right underlies virtually every contemporary discussion of the morality of killing, whether in war or in domestic contexts. The intuitions that human life is intrinsically valuable, that there is a prima facie commitment to protecting it, and that people have a right to not be harmed unless they take some actions that make them liable to attack are among those that have come the closest to being universally shared moral values. The concept of a right to life provides a way of expressing

these intuitions as basic moral commitments and of establishing that the protections afforded by them should be extended to all people. Of course, like all things in philosophy, the exact meaning of the right to life is a matter of dispute.

Some commentators propose fairly narrow versions of the right to life, according to which it is primarily a protection against death. For example, Feinberg defines the right to life as "the right not to be killed" and "the right to be rescued from impending death."[1] Thomson similarly describes it as "[t]he right to not be killed."[2] Wellman finds that the right to life "is really a rights-package consisting of a number of distinct rights concerning one's life. The least controversial of these is the human right not to be killed."[3] Koch contends that the right to life entails a right to medical assistance.[4] Others consider it to be a more substantial right that goes beyond physical security. Bedau argues that the right to life establishes an entitlement to "a life sufficient for self-respect, relief from needless drudgery, and opportunity for the release of productive energy."[5]

Just war theorists tend to favor weak conceptions of the right to life by linking it to physical security. Feinberg's belief that it includes "the right to be rescued from impending death"[6] goes beyond what most just war theorists think belligerents owe to civilians of neutral or opposing states. The obligation to save or protect civilians is usually only seen as a duty that states have only to their own citizens, and not one that they have to civilians in general. This is evident from interpretations of discrimination, proportionality, and due care, which, as I showed in the previous chapter, only use the right to life to derive an obligation to avoid harming civilians. Conceptions of the right to life in just war deviate even more starkly from what Bedau describes, as just war theorists give virtually no attention to how belligerents might promote such abstract goods as self-respect and opportunities for productive work.

Just war theorists' minimalist conceptions of the right to life may explain why they consider civilians to have weak protections that do not create demands relating to corrective justice. After all, if states do not have a responsibility to save civilians who are not their citizens or to promote values like "self-respect" and "relief from drudgery," then it may not be evident why they should owe those civilians anything at all beyond not killing them. If just war theorists were to endorse a conception of the right to life that was as strong as Bedau's,

[1] Joel Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," *Philosophy & Public Affairs* 7(2) (1978), 93–123, p. 94.
[2] Judith Jarvis Thomson, *Rights, Restitution, and Risk: Essays in Moral Theory*, edited by William Parent (Cambridge, MA: Harvard University Press, 1986), p. 44.
[3] Carl Wellman, *The Moral Dimensions of Human Rights* (New York: Oxford University Press, 2011), p. 42.
[4] Ida Elisabeth Koch, *Human Rights as Indivisible Rights: The Protection of Socio-economic Demands under the European Convention of Human Rights* (Danvers, MA: Brill, 2009).
[5] Hugo Bedau, "The Right to Life," *The Monist* 52(4) (1968), 550–572, p. 567.
[6] Feinberg, "Voluntary Euthanasia," p. 94.

or even just as strong as Feinberg's, then they would be forced to admit that the right to life requires far more of belligerents than what is contained in the existing restrictive principles of just war.

One could convincingly argue that civilians are entitled to stronger protections, and even that belligerents have a duty to repair harm inflicted on civilians, by showing that the just war tradition is wrong to define the right to life as narrowly as it has. It is possible to conceptualize the right to life in a more substantive form that includes strong responsibilities toward civilians, then to apply this to war. However, I will not pursue that type of argument here. Instead, I will follow the just war tradition in employing a minimal conception of the right to life in an effort to show that even this weak conception has unrealized implications for how belligerents must treat civilians. I assume that the right to life is only a right to not be injured, killed, or deprived of property that is essential to survival. According to this view, the right to life does not include any additional entitlements, such as those Feinberg and Bedau mention. It is simply a protection against being physically harmed, either through direct attacks or through the indirect violence of life-threatening material deprivation.

It is useful to consider the right to life in terms of what it means to have a right of any kind, as this will elucidate what protections and duties it entails. In terms of the Hohfeldian language that is commonly used to examine the meaning of rights, the right to life must, at a minimum, include a claim right and an immunity right. A claim right is a right that establishes a duty for others to act in a certain way or to refrain from acting in a certain way toward the right-bearer. Claim rights specify how others can or must treat the right-bearer. A claim right can therefore only exist between a right-bearer and others, whose actions must conform to the right. A right cannot exist for the right-bearer alone. Given this relational character, rights must be understood not only in terms of what they mean for those who have them (right-bearers) but also in terms of what they mean for those who are obliged to respect them (duty-bearers).

In Hohfeldian language, this relation is expressed by acknowledging that every claim right entails a correlative duty and every duty is informed by a correlative claim right. Claim rights and duties are necessarily correlative. A right must impose a duty on others to respect the content of the right, otherwise it would lack the force it needs to compel others to act in particular ways. And a duty to respect a right presupposes that a right exists. As Raz puts it, "[t]o assert that an individual has a right is to indicate a ground for a requirement for action of a certain kind, i.e. that an aspect of his well-being is a ground for a duty on another person. The specific role of rights in practical thinking is, therefore, the grounding of duties in the interests of other beings."[7] Thus, wherever there is

[7] Joseph Raz, *The Morality of Freedom* (New York: Clarendon Press, 1986), p. 180.

a bearer of a claim right, there are also duty-bearers who are obliged to respect that right.

In the case of the right to life, the duty created is the negative duty that is embodied in the existing restrictions imposed by the principles of *jus in bello*. It is the duty that combatants, as well as other civilians, have to not harm civilians. The right to life is universal in two senses: as a claim right and as a duty. First, it is a universal entitlement possessed by all people regardless of their nationality or other forms of group membership. This sets the right to life apart from other types of rights, such as those associated with citizenship, which only pertain in a particular location, or those attached to a particular status, such as a person having the right to vote upon reaching a certain age. The right to life is therefore a right that does not have to be given by a political authority and that no political authority can be morally justified in abrogating. Second, because the right is universal, the correlative duty it creates is binding for all people regardless of their nationality or group membership. Every person has a duty to not inflict harm on the bearer of the right to life, which is to say, each person has a duty to not harm any other person. As with the right, this duty transcends political boundaries and cannot be discarded by any of the individuals or corporate entities that are obliged to respect it.

Thus, the right to life simultaneously establishes that every person has a claim right against being harmed by others and that every person has a duty to not harm any other person. This means that every person is simultaneously a right-bearer and a duty-bearer with respect to every other person. When it is put this way, it becomes clear that analyzing the right to life in Hohfeldian language corresponds to our intuitive sense that we are naturally entitled to not be harmed by others without cause, regardless of where we are or who might wish to harm us, and that we are equally prohibited from harming others without cause.

Claim rights must also include immunities, which prevent others from redefining or waiving them. An immunity means that authority over the right belongs solely to the right-bearer. If Person A has a claim against being harmed, Person B does not have the ability to waive or alter Person A's claim because of the immunity. Only Person A can waive the right. An immunity must exist alongside any claim right to prevent those who have a duty to respect a right from waiving it without the right-bearer's consent. If immunities did not accompany claim rights, then claim rights' correlative duties would be optional requirements that duty-bearers could freely disregard without penalty. This would render rights powerless. The immunity component of the right to life establishes that only the bearer of a right to life may waive that right and that duty-bearers can only be released from their duty at the right-bearer's behest. Duty-bearers are disabled from waiving or altering the substance of others' right to life. Thus, the right is not a capricious protection that can change or

be denied without the right-bearer's consent; it is a stalwart guard of the right-bearer's interests.

The Right to Life and Its Associated Duties

The existence of a right to life explains the prima facie wrongness of killing, but, like any right, it is not absolute. Bearers of a right to life can act in ways that lead them to temporarily waive or forfeit that right, making themselves liable to attack by others. In a domestic context, this is exemplified by acting aggressively and forcing others to defend themselves. Willfully threatening another person waives or forfeits the aggressor's right to life because an aggressor wrongly forces the other person to defend his own right to life in a way that may require harming the aggressor. This forfeiture of the right to life opens the attacker to morally-justifiable acts of violence that would, in the absence of a threat, violate the right to life.

What makes war exceptional is that it is an activity that allows people to waive their right to life en masse. Entire groups of people who are participants in war make themselves liable to attack by other groups that have engaged in the same collective renunciation of their right to life and that in turn lose their duty to not inflict harm on opposing combatants. A noncombatant becomes a combatant by giving up the claim right against being harmed by others, thereby absolving others of the duty that they would normally have to not inflict harm. Giving up the right to life in this way is consistent with the immunity component of the right as long as the right to life is forfeited by the person who holds it. That is to say, a person who has a right to life must in some sense decide to forfeit that right by willfully becoming a combatant. This is true even if that person only chooses to join the war effort when pressured or coerced into doing so. Volunteer soldiers and conscripts have the same status as combatants because they have made the same decision to waive their right to life, even though the latter's decision to do so may have been heavily influenced by the threat of punishment.

In just war theory, waiving or forfeiting the right to life by participating in war is often seen as an extension of self-defense in a domestic context and as fitting in with the threat-based view of combatant status. By this account, combatants willfully threaten other individuals, entire communities, or states by acting hostilely toward them. This leads all who act threateningly to forfeit the right to life and to only regain it when they renounce hostilities, whereupon they no longer constitute a threat. Just war theorists disagree somewhat on exactly how liability to attack should be assigned and whether combatants on both sides of a war waive the right to life.

According to the symmetric view of *jus in bello*, combatants on both sides of a conflict have the same moral status regardless of whether they are participants in a just or an unjust war.[8] This moral symmetry entitles all combatants to the same protections and liabilities regardless of why they are fighting. All combatants give up the right to life and all combatants gain the ability to carry out morally justifiable attacks on enemy combatants. By entering into this arrangement combatants may also gain special protections under international law, such as an entitlement to prisoner of war status if they are captured, as well as protections or rewards from their own governments.

According to the asymmetric view of *jus in bello*, which has gained ground over the past decade, the right to life is only waived by those who pose unjust threats.[9] Combatants who participate in unjust wars forfeit the right to life because they are unjustly threatening in a way that is akin to a criminal threatening a police officer.[10] By contrast, combatants who wage just wars retain the right to life even when they act threateningly, just as the police officer does when attempting to stop a criminal by force. This means that combatants waging just wars retain their right to life just as civilians do, while unjust combatants are the only class of people who truly forfeit the right to life. Correspondingly, unjust combatants retain a duty to not harm their opponents and may be punished for failing to abide by that duty.

Although the differences between the symmetric and asymmetric views of *jus in bello* can have some implications for noncombatants, the disagreement between these perspectives is primarily one about the status of combatants and does not directly affect my argument about the proper treatment of civilians.[11] Those on both sides of the debate over the symmetry of combatant rights tend to regard the civilian right to life as being inviolable and unchanged regardless of whether a war is just. As we saw in Chapter 1, these competing views of *jus in bello* share a concern with showing how the right to life can be lost by those who pose a threat, either any threat at all (the symmetrical view) or an unjust threat (the asymmetrical view). The corollary of the view that combatants

[8] Michael Walzer, "Response to McMahan's Paper," *Philosophia* 34(1) (2006), 43–45 and *Just and Unjust Wars*; Orend, *The Morality of War*.

[9] McMahan, *Killing in War*; David Rodin, "The Moral Inequality of Soldiers: Why *Jus in Bello* Asymmetry Is Half Right." In *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, edited by David Rodin and Henry Shue (New York: Oxford University Press, 2008), 44–68 and *War and Self-Defense*; Bradley Jay Strawser, "Moral Predators: The Duty to Employ Uninhabited Aerial Vehicles." *Journal of Military Ethics* 9(4) (2010), 342–368.

[10] McMahan, *Killing in War*, p. 14.

[11] A proponent of the asymmetric view of *jus in bello* could argue that just combatants are entitled to the protection of my positive duty, just as civilians are, because they retain the right to life during war. This would be consistent with the asymmetric position, but because I do not consider the asymmetric position to be convincing, it is not a possibility that I explore.

forfeit the right to life, whether they do so symmetrically or asymmetrically, is that civilians retain that right so long as they refrain from participating in war in any way that would cause them to lose their civilian status and become combatants.

Despite the important differences between symmetrical and asymmetrical views of combatant status, just war theorists generally agree that there is no sense in which civilians ever lose the right to life during war. As long as a person meets the definition of being a civilian, whatever that definition may be, that person retains a rights-based protection against harm. The right to life's corollary duty entails that combatants, whether they are judged according to the symmetrical or asymmetrical standards, are obliged to not inflict harm on civilians.

Deriving the Positive Duty

To put it simply, my rights-based argument for recognizing that belligerents have a duty to repair the harm they inflict on civilians goes as follows: the negative duty belligerents have to avoid harming noncombatants is a first-order duty that follows necessarily from noncombatants' right to life. It is a correlative duty that must exist for the protection of the right to life – a duty without which the right to life would be meaningless. I maintain that the logic of rights demands that belligerents also have a second-order duty to assist noncombatants whose rights they breach in contravention of the negative duty to not inflict harm. The duty I propose is a corrective duty that takes effect when a belligerent does not perform the first-order duty of not inflicting harm. That is to say, combatants who fail to perform the first-order duty of not harming civilians receive a second-order duty to repair the suffering they inflicted. I call the second-order duty a "positive duty" to emphasize that its aim is restorative rather than restrictive. It is not meant to prevent harm to civilians but to repair harm that has been inflicted. With this basic structure in mind, I will turn to each of the components of this argument to explore them in detail.

As I discussed in the previous section, duties that correlate with claim rights forbid or require certain actions from duty-bearers. In the case of the right to life, the claim right against being harmed generates a duty for all others to respect the right-bearer by not inflicting harm. This negative duty is one that all people have at all times and toward all who bear the right to life. During war, the right to life continues to give civilians a claim against being harmed by combatants because civilians retain the right to life. This in turn means that even though combatants may be able to justifiably kill opposing combatants, they have the same duty to not harm civilians as they would have in peacetime.

My account of the negative duty to not harm civilians should be fairly uncontroversial, as it is assumed by rights-based theories of just war, as well as rights-based moral theories more generally. As I have pointed out in the previous chapters, contemporary just war theorists generally recognize that civilians have a right to life and acknowledge that this creates a correlative duty to avoid harming them. This duty is the basis of the PNCI and the *jus in bello* principles that are directed at protecting civilians. Without the right to life and its correlative duty to not harm right-bearers, just war theory would have no objective rationale for protecting civilians during war. It would be left with only the subjective feeling of mercy that served as the basis for some limited civilian protections during the Middle Ages. Moreover, without the right to life, just war theory would be cut off from the other domains of moral and legal theory that accept the right.

My contention is that the analysis of rights in just war theory is correct at the level of the first-order duty, but that it cannot stop at that level. To do so would contradict the way rights work – the way they must work if they are to have any power at all. By themselves, first-order duties are inadequate protections of claim rights. A first-order duty by itself may be breached without penalty to the duty-bearer, thereby enabling the duty-bearer to ignore the first-order duty whenever it is convenient to do so. For rights to provide meaningful protection for those who bear them, they must be supported by second-order duties that arise when a person or group that has a first-order duty fails to abide by it.

The claim right to not be harmed is one that civilians can only lose through their own actions; they can only lose the right if they waive or forfeit it by acting in a way that transforms them into combatants. Unless the right to life is forfeited by its bearer, it remains in place and must be impervious to alteration by the duty-bearers who are obliged to respect it. The right may be superseded by some competing rights or interests, but it cannot be taken away by the duty-bearers against whom it is held. Retracting a right without the bearer's consent would violate the immunity component of that right. In other words, no matter what a duty-bearer's reasons for breaching a civilian's right to life are, and no matter how morally justifiable those reasons are, they cannot constitute grounds for waiving the right without the bearer's consent.

Any harm inflicted on a civilian, even when it can be justified by appeal to some higher moral purpose, contravenes the right to life and constitutes a failure to abide by the first-order duty to not inflict harm on the bearer of that right. A combatant may have good reasons for failing to perform the first-order duty, yet these reasons belong to the duty-bearer. The reasons may be good or bad, moral or immoral, reasonable or unreasonable. These qualities of the duty-bearer's reasons for failing to perform the negative duty matter; they are

morally significant when judging whether the duty-bearer has acted wrongly. However, because no reason the duty-bearer provides can unilaterally retract a noncombatant's right to life without also violating the immunity component of that right, the right itself and its corollary negative duty remain intact. The duty-bearer is at fault for the breach of rights – at fault for failing to act in accordance with a first-order duty – regardless of the reasons for failing to adhere to the duty. Nothing about the duty-bearer's intentions in harming a noncombatant or in the moral status of the actions that lead to a breach of rights can alter the right to life or deny the noncombatant the protection afforded by that right.

Combatants are responsible for breaching the right to life and for failing to perform that right's first-order correlative duty to not inflict harm whenever they attack civilians. As duty-bearers, combatants fail to perform the first-order duty and should therefore bear the costs imposed on the right-bearer in contravention of the right to life. Attempting to pass these costs on to the right-bearer would not only amount to permitting the breach of a right but also commit the additional fault of imposing the cost of that breach on a right-bearer who has already been wronged. If duty-bearers were free to disregard the first-order duty or duties that a right imposes without any obligation to repair the harm resulting from that failure, then rights would have virtually no power to compel obedience. This is especially true of dangerous or unpredictable activities like war, in which duty-bearers have strong incentives to shirk their duties in an effort to protect themselves or limit the extent to which they must pay for the costs of their actions.

The current practice of allowing combatants to fail in performing a first-order duty without incurring any additional obligations to repair the harm inflicted on the right-bearer amounts to allowing duty-bearers to waive civilians' right to life by simply not performing the duty that correlates with it. As I already showed, this is inconsistent with the immunity that rights must include. If bearers of the right to life have no more guarantee of protection than that they will not be harmed unless someone has a reason to inflict harm, then they are at the whim of duty-bearers' attitudes and actions, which is precisely what a right is supposed to protect its bearer against. As McMahan points out, "[a] right is waived when the possessor of the right consents to allow another person or persons to do what he has a right that they not do."[12] And there is no sense in which the noncombatants who are the victims of aggression consent to being harmed, regardless of whether the harm is morally excusable.

When a combatant fails to perform a first-order duty to not inflict harm, that combatant must take on a second-order duty to correct the adverse consequences, both in the figurative sense of repairing the breach to the right-bearer's

[12] McMahan, *Killing in War*, p. 9.

right to life and in the literal sense of repairing the physical damage that the right-bearer sustained as a result of that breach. The second-order duty is a "positive duty" because it aims at repairing damage. It is meant to elevate a person or property to the same status held before the event that wronged the right-bearer. Because this second-order duty arises directly from the duty-bearer's failure to perform a first-order duty, it must fall on the duty-bearer who is at fault and not on any other person or organization.

Although my argument does not rest on analogies to domestic contexts, such analogies can help to make my point intuitively clear. Domestic contexts provide most of our ordinary experience of how rights are protected and reveal many situations in which second-order "positive" duties emerge. Under ordinary circumstances, if a person attacks you, that person has breached your right to life and has failed to discharge his duty to not harm you. The attacker may be morally or criminally blameworthy for the assault, or may escape moral or criminal condemnation by showing that the assault was somehow excusable given the circumstances. Nevertheless, regardless of the attacker's guilt, that person must generally perform the second-order duty of repairing the harm inflicted on you. It would be unfair for anyone breaching your right to life to pass the costs associated with that breach on to you as the right-bearer if you did not waive or forfeit that right.

Suppose the next time you are crossing the street a driver who is obeying all traffic regulations skids across an imperceptible sheet of black ice and strikes you. The driver inflicts serious physical harm on you – harm that you had a rights-based protection against. The driver's conduct is excusable given the circumstances, making him morally blameless. Yet the driver's blamelessness does not change the fact that you had a right to not be harmed and that he had a duty to not inflict harm. It would be inappropriate to punish the driver for inflicting this kind of excusable harm, but it would also be fair to expect the driver who caused your injuries to bear some or all of the financial costs for repairing those injuries. That is to say, the morally blameless driver would take on a positive duty to compensate you for injuries that were inflicted in contravention of the right to life and its corollary negative duty.

Scenarios like this one occur regularly in domestic contexts and typically give rise to second-order duties. The existence of second-order duties is well established in legal theory,[13] and provides a basis for allowing people to claim financial damages from others even in cases where there is no criminal misconduct. War is not analogous to a car accident, or to any other domestic context for that matter. Nevertheless, because the right to life is assumed to be a universal right, unconfined by any domestic political arena, the logic that dictates the

[13] Jules Coleman, *The Practice of Principle* (Oxford: Oxford University Press: 2001).

emergence of a second-order duty in the domestic context provides grounds for recognizing the same duty in an international context.

The Positive Duty and Moral Guilt

The positive duty arises from the logic of rights and is independent of the moral status of acts that breach the right to life. Civilians can be subjected to many types of direct, incidental, and accidental violence, and these types of violence can vary considerably from a moral perspective. It is extremely important for just war theory to be able to draw careful moral distinctions between the ways in which civilians are harmed. However, these differences do not affect the existence of the positive duty. The moral statuses of the various ways in which civilians are harmed must be determined with reference to the restrictive elements of just war theory. By contrast, the positive duty is one that takes effect after a breach of rights and without regard to how the breach occurred. The positive duty comes into existence simply because of a duty-bearer's failure to abide by a first-order duty. Any type of harm inflicted on civilians is inflicted despite the fact that civilians have a claim right against being harmed and that combatants have a correlative duty to not inflict harm. It therefore carries with it the same obligation to perform the positive duty regardless of the moral status of the attacker's actions.

Of course, a combatant's adherence to the positive duty can be subject to moral judgment in its own right. Combatants can and should be praised or blamed for abiding by or failing to abide by the demands of the second-order duty to repair the harm they inflict. However, this type of moral judgment is distinct from the judgment of the actions that breached the right to life. Judgments of a belligerent's adherence to the positive duty relate to whether and how the positive duty is discharged, so they can be made judged independently from moral valuations of the actions that led to the failure to abide by the first-order duty. Since few violent organizations recognize any duty to repair civilians' injuries, especially when those civilians are citizens of hostile states, most should be judged as acting unjustly with respect to the positive duty.

Just as the positive duty does not arise because of the morality of the actions performed by belligerents, it is not meant to repair a moral harm. Some theories of corrective justice advocate reparation of damages to repair moral harm or restore what Feinberg calls the "moral equilibrium."[14] One could plausibly defend the positive duty to civilians on the grounds that it restores moral equilibrium, but the positive duty as I have described it does not depend on this concept. I do not assume that there is any moral harm to be repaired or that

[14] Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton, NJ: Princeton University Press, 1970).

there is anything like a moral equilibrium that can be restored during war. I make the more modest point that failure to perform a duty gives rise to reparative duties toward individual civilians that must be carried out to the greatest extent possible.

The positive duty I advocate is one that belligerents have in almost all circumstances. The only exceptions that the logic of rights permits are cases in which adherence to the first-order duty to not inflict harm precludes the performance of the second-order duty. These types of cases will be discussed in Chapter 7, when I consider some of the practical obstacles to implementing the positive duty. For now, the positive duty can be considered nearly absolute because exceptions to it only arise in extraordinary circumstances and, like the duty itself, do not depend on the moral status of the action that inflicted the harm.

The Protective Function of Rights

The necessity of a positive duty to repair breaches of the right to life can be further substantiated by considering why second-order duties are essential for giving rights force. In order to function, a claim right must be able to impose constraints on how duty-bearers act. Duty-bearers may not always wish to respect a person's rights, and in many instances they will have a desire to contravene them. The first-order duty associated with a right persists despite, and perhaps even because of, other people's wishes to ignore it. After all, duty-bearers' desires to ignore or breach a right is what makes the right necessary in the first place. To be respected, a right must have the power to coerce duty-bearers, forcing them to treat right-bearers in particular ways.

As I discussed in the Introduction, one of just war theory's most fundamental limitations is that the right to life has insufficient force to compel respect during wars. If the negative duty to not harm civilians can be breached without penalty or without generating a second-order duty, then it is hardly a duty at all. By itself, the negative duty is far too weak to protect civilians' rights, and the right to life hardly qualifies as a right because it can be easily disregarded.

Martin succinctly explains why obligations to provide compensation for rights violations must exist for a system of rights to function:

> When a right is violated, the way of acting or of being treated is unjustifiably infringed and, more often than not, the relevant benefit is lost, in whole or part, to someone. A particular action of that person is not allowed or an injury is inflicted or a service is denied. And this may count as loss of benefit or may itself cause such a loss for that individual. Some response to this loss of the relevant benefit is necessary, for the whole point in a system of rights is to maintain rights.[15]

[15] Rex Martin, *A System of Rights* (Oxford: Oxford University Press, 1993), p. 260.

He goes on to explain that violators should be responsible for repaying the victims of rights violations. "For these violators are the agent, the party most directly responsible for their victims' loss of benefit."[16]

Rights theorists often describe the force of a right in terms of Dworkin's idea of rights acting as trumps that right-holders have against others. According to Dworkin:

> Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.[17]

This passage perfectly captures the need for rights to have sufficient power to compel other individuals, and even collectives, to respect them. To elevate something to the status of a right is to give it a coercive power that can be deployed in the right-bearer's interests. In the case of the right to life, this coercive power must be able to offer some protection against being subjected to an unwarranted attack.

As it is conventionally understood in contemporary just war theory, the right to life does not function as a trump. And this is deeply problematic. If the right to life truly is a right, then it cannot cease to exist or to have force simply because someone does not wish to obey it or because there are grounds for superseding it. Even when combatants have a good excuse for breaching the right to life, this can only mean that it is breached without incurring moral guilt. The right must still be in effect for it to have force as a trump, and consequently, its correlative negative duty must likewise be in effect.

It is important to be clear that my point is not that the existing conceptions of the PNCI and the right to life are not sufficiently effective in informing existing conventions of war or international law. That is, I am not simply saying that there is a disjuncture between the theory and practice of war. While it is true that the PNCI and right to life are imperfectly translated from theory into practice, my point here is not about the practical mechanisms of enforcing rights. Rather, my contention is that the right to life and the PNCI, which is meant to protect it, are insufficient *even at a purely theoretical level*. The accepted view of just war theory fails to include a conception of the civilian right to life that is consistent with the requirement that a right should have enough force to compel obedience by those who are supposed to have a duty to respect it.

If the right to life has insufficient force when it is considered on a purely theoretical level, then it is hard to imagine how just war theory could offer

[16] Ibid., p. 263.
[17] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978), p. 6.

much protection to right-bearers when it is put into practice. If it were possible to completely solve the problem of implementing just war theory and to ensure that all participants in armed conflicts showed complete obedience to the PNCI as it is currently framed, then the PNCI and existing restrictive elements of just war theory would still lack the capacity to protect right-bearers.

The positive duty offers a theoretical foundation for overcoming the problem of civilian suffering in war. It cannot prevent civilians from being harmed, nor can it ensure complete obedience to the negative duties imposed by the existing elements of just war theory. Nevertheless, the addition of the positive duty allows just war theory to overcome its serious theoretical shortcoming of offering inadequate protection of the right to life. With the addition of the positive duty, the protection of noncombatants under just war theory is such that if the theory were perfectly translated into practice, it would be able to provide an effective framework for minimizing the harm resulting from breaches of civilians' rights.

Infringements and Violations

Rights are not absolute. They come into conflict with each other, with other values, and with practical demands. In some circumstances a right must be limited or one right permitted to supersede another in certain ways. Limitations and orders of precedence are essential for resolving conflicts between competing rights and for preventing rights from being misused. An important part of any account of rights is therefore an explanation of how a right should be limited and of the circumstances in which it may be changed or superseded. This is particularly important when considering how rights function during wars, as wars invariably involve a number of competing rights that may conflict with the civilian right to life.

The typical narrative about the violability of the right to life in just war theory is that combatants act wrongly when they intentionally breach a civilian's right to life, but that there are circumstances under which breaching a person's right to life is excusable. When talking about the status of rights in situations where rights may be superseded or justifiably ignored, philosophers often invoke Judith Jarvis Thomson's distinction between violating a right and infringing on a right. This distinction has become a fixture of just war accounts of how violence against civilians can at times be permissible.[18]

According to Thomson, a right is infringed on when one prevents it from being realized in a particular situation, and a right is violated when one infringes

[18] For examples, see Kaufman, "Just War Theory"; Uwe Steinhoff, "Rights, Liability, and the Moral Equality of Combatants," *The Journal of Ethics* 16(4) (2012), 339–366; Lee, *Ethics and War*, pp. 145–146.

on it in a way that is immoral. This draws a moral distinction between breaching a person's right in a morally excusable way and breaching a person's right in a way that makes the duty-bearer blameworthy and potentially deserving of punishment. As Thomson says:

> suppose that someone has a right that such and such shall not be the case. I shall say that we infringe a right of his if and only if I bring about that it is the case. I shall say that we violate a right of his if and only if *both* we bring about that it is the case *and* we act wrongly in so doing.[19]

To put this in terms of the right to life, one could say that combatants infringe on the right to life when they produce a state of affairs in which right-bearers are harmed and that they violate the right to life when they bring about this state of affairs by acting wrongly.

The most compelling examples of how a right may be infringed on but not violated are those in which two competing rights come into conflict, forcing one to take precedence over the other. Feinberg offers a helpful example of how a right can be justifiably infringed on, which shows why we must permit infringement on rights even though this causes some harm to right-bearers.

> Suppose that you are on a backpacking trip in the high mountain country when an unanticipated blizzard strikes the area with such ferocity that your life is imperiled. Fortunately, you stumble onto an unoccupied cabin, locked and boarded up for the winter, clearly somebody else's private property. You smash in a window, enter, and huddle in a corner for three days until the storm abates. During this period you help yourself to your unknown benefactor's food supply and burn his wooden furniture in the fireplace to keep warm.[20]

In Feinberg's example there is a clear conflict of rights: the hiker must choose between his own right to life and another person's property rights. In light of the competing demands these rights establish, the act of breaking into the cabin and using the cabin's contents to survive is excusable. The hiker's life is far more valuable than the food and furniture stored in the cabin. It is also understandable that the hiker would want to do whatever is necessary to survive, even if this means contravening another person's property rights.

Thomson provides many similar examples, some of which involve the far more difficult challenge of weighing one person's right to life against another's. She even introduces a series of thought experiments involving attacks by a tank, which are particularly insightful because they move beyond the domestic context to explore how the right to life functions during war. One such thought

[19] Judith Jarvis Thomson, "Some Ruminations on Rights." In *Rights, Restitution, and Risk: Essays in Moral Theory*, edited by William Parent (Cambridge, MA: Harvard University Press, 1986), p. 51.

[20] Feinberg, "Voluntary Euthanasia," p. 102.

experiment, which is meant to show when self-defense against innocent threats is permissible, features figures analogous to two combatants ("Third Aggressor" and "you") and a civilian bystander (a baby):

> Third Aggressor is driving his tank at you. But he has taken care to arrange that a baby is strapped to the front of the tank, so that if you use your anti-tank gun, you will not only kill Third Aggressor, you will kill the baby. Now Third Aggressor, admittedly, is in the process of trying to kill you; but that baby isn't. Yet you can presumably go ahead and use the gun, even though this involves killing the baby as well as Third Aggressor.[21]

Thomson's example is an extreme one, but it is not as far removed from the realities of war as it may initially appear to be. Analogous cases, in which bystanders are used as human shields, are fairly common.[22] And even when civilians are not directly used in this way, combatants may expose them to myriad dangers by fighting in populated areas and opportunistically concealing themselves as civilians.

Thomson argues that her example shows that the victim of an attack infringes on, rather than violates, the innocent threat's right to life by destroying the tank. The victim kills a baby by attacking the tank, but the victim's breach of the baby's right to life is only an infringement, not a violation, because of the circumstances under which the attack takes place. The victim has no choice but to kill the baby in the act of self-defense and must therefore be excused. Thomson shows that the same reasoning applies in other circumstances when a civilian poses "an innocent threat" by being exposed to danger by the actions of an opposing combatant.

Thomson's point is similar to Feinberg's, only in her example the conflict of rights cannot be resolved by weighing the rights to life and property against each other. Instead, Thomson's thought experiment involves the more difficult balancing of competing rights to life. This leads Thomson to conclude that conflicts between competing rights to life of equal status should be resolved by acknowledging that victims of attack may be excused from moral guilt when defending themselves using proportionate means.

The distinction between violating a right and infringing on a right is helpful when assessing the morality of actions taken during war. It helps to identify the cases in which the breach of a civilian's right to life is immoral and those in which the duty-bearer should be excused from moral guilt because of extenuating factors. However, Thomson's argument is frequently misinterpreted by just war theorists. Those who invoke her distinction generally interpret it as

[21] Judith Jarvis Thomson, "Self-Defense and Rights." In *Rights, Restitution, and Risk: Essays in Moral Theory*, edited by William Parent (Cambridge, MA: Harvard University Press, 1986), p. 38.

[22] Michael Skerker, "Just War Criteria and the New Face of War: Human Shields, Manufactured Martyrs, and Little Boys with Stones," *Journal of Military Ethics* 3(1) (2004), 27–39.

providing grounds for not only infringing on the rights of noncombatants but also doing so without any consideration for how this affects those civilians who lose the protection to which they are entitled.[23] Just war theorists who cite Thomson's argument seem to think that rights can be infringed on with absolutely no consequences for those who cause the breach. However, this is not part of Thomson's argument. The distinction between violation and infringement only speaks to the issue of whether the person who causes the breach of rights is morally blameworthy. It does not demonstrate that the person who causes the breach is completely free from any responsibilities thereafter.

It is surprising that just war theorists who rely on Thomson's distinction, or on some similar reasoning, have failed to take note of the need for the positive duty that combatants owe to civilians, as Thomson herself says that those who infringe on the rights of others are generally obliged to provide compensation. Thomson reasons that even excusable infringements on rights warrant compensation: "If you are an innocent threat to my life (you threaten it through no fault of your own), and I can save my life only by killing you, and therefore do kill you, I think I do owe compensation, for I take your life to save mine."[24] She also clarifies the general nature of compensation, saying that compensation is due whenever an infringement on rights wrongs the right-holder: "The fact that compensation is owing shows (and it seems to me, shows conclusively) that I did something you had a right that I not do."[25] As these statements indicate, Thomson only means for her distinction between violating rights and infringing on them to account for how breaches of rights can sometimes be excused on moral grounds; she maintains that anyone who breaches another person's rights, whether this is a violation or an infringement, may owe compensation.

Feinberg makes a similar point with reference to his hiker example. As he correctly points out, "almost everyone would agree that you owe compensation to the homeowner for the depletion of his larder, the breaking of his window, and the destruction of his furniture."[26] Although the right to life superseded a property right in Feinberg's example, and therefore excused an infringement on that right, the property right was nevertheless breached by someone who had a duty to respect it. The extenuating circumstances that led the hiker to break into the cabin provide a rationale for excusing the hiker's failure to perform a first-order duty, but do not release the hiker from his second-order duty of repairing the damage he caused once his life is no longer threatened. The property owner who suffered from an infringement on the property right was not wronged in

[23] Kaufman, "Just War Theory"; Steinhoff, "Rights, Liability"; Lee, *Ethics and War*, pp. 145–146.
[24] Thomson, "Some Ruminations on Rights," p. 41.
[25] Ibid. [26] Feinberg, "Voluntary Euthanasia," p. 102.

a moral sense, yet because that person did not waive the property right, he is owed some effort to repair the costs he sustained.

My insistence that just war theory recognize that belligerents have a positive duty to the noncombatants they harm coincides with Thomson's and Feinberg's assessments of the corrective duty that follows from breaches of rights even when these are excusable infringements. Thus, the distinction between infringing on a right and violating a right not only fails to provide a way out of the positive duty that I advocate but actually supports my argument by offering a rationale for excusing some failures to perform first-order duties while still recognizing that such incidents must give rise to second-order duties of repair.

Because the positive duty to repair the harm done to civilians does not make any assumptions about whether the harm was inflicted wrongly or excusably, this duty pertains regardless of whether a person's right to life was violated or infringed on. This is why I generally avoid using the terms "violate" and "infringe" with reference to rights and instead speak about "breaches" of rights, with this term referring to instances in which a right may have been violated *or* infringed on. Breaches are cases in which a right simply fails to offer protection from another person's actions, regardless of the morality of those actions.

One potential objection to treating violations and infringements together is that this fails to account for whether the offender is negligent or reckless in harming civilians, thereby marginalizing intent and foreseeability in assigning culpability. I will return to this issue in Chapter 8 when discussing the appropriate tort standards for determining what compensatory damages civilian victims are owed, to show that these standards do not pertain to civilian victimization during wars. Wars are inherently dangerous activities insofar as the potential dangers are always foreseeable and foreseen by belligerents. Given the near certainty that civilian casualties will result from uses of force, belligerents must be held strictly liable for their actions. That is to say, they must be responsible for repairing civilian suffering regardless of whether it was inflicted negligently.

Additional Grounds for Recognizing the Positive Duty

The positive duty is overdetermined in the sense that it can be derived from multiple sources. I argue that there are at least three strong reasons to support the positive duty, aside from the logic of the right to life. A positive duty to assist civilian victims of war promotes justice, advances the substantive goals of just war theory, and supports civilians' expectations of being protected in exchange for nonparticipation in hostilities.

Promoting Objective and Subjective Justice

The first additional reason for recognizing that violent actors have a responsibility to repair the harm that they inflict on civilians is that this promotes

justice for the innocent victims of war, in both an objective sense and a subjective sense. A civilian who suffers an injury during war suffers from an injustice in an objective sense because that person is the victim of unwarranted violence. Many, perhaps even most, of the civilian victims of war do not act in ways that invite hostile treatment. They may simply be in the wrong place at the wrong time when they are struck by shrapnel from a bomb or artillery shell that lands nearby. Or they may be targeted by combatants and shot, even though they are not armed or acting threateningly. It is often a matter of bad luck that a civilian is attacked, and no person can deserve to suffer simply because of the luck of the circumstances in which they find themselves.

In some cases, civilians may act in ways that make them appear threatening. They may even be blameworthy in doing so. A civilian might, for example, carry a toy gun in a combat area or attempt to speed past a military checkpoint. These are threatening actions that may make a violent response from military personnel more understandable, especially when the military personnel feel that their own security is at risk.[27] It can be excusable, both morally and legally, for a soldier to attack a civilian who seems to pose a threat. Nevertheless, even in these cases, the civilians who are harmed generally suffer disproportionately to the threat they pose. By definition, any threat that is posed by a civilian must be a merely apparent threat or a fairly low nonlethal threat. If a civilian posed a lethal threat to combatants, then that person would change status and become a combatant. A civilian does not deserve to be subjected to lethal violence simply for appearing threatening. Lethal violence against an apparent threat is therefore disproportionate and constitutes an injustice against the victim.

A civilian is also likely to have a subjective feeling of being wronged by an unwarranted attack, regardless of the attacker's justification. It is possible that a civilian might feel more wronged by an enemy who undertakes a policy of deliberately targeting civilians than by one who makes a sincere attempt to limit this violence as much as possible. However, for a person whose family member has been killed or who has suffered from a debilitating injury, the fact that the actor who committed the injury was not acting immorally is secondary to the fact that the harm was undeserved. Any injured civilian is apt to feel a subjective sense of injustice that corresponds to the objective injustice of being attacked when there was a right protecting against this. As Walker notes, victims "will value and seek re-assurance, safety, recognition of suffering, and appropriate placement of blame. Victims of grave wrongs are likely to feel they deserve this from both offenders and others, whether or not they desire to see offenders punished."[28] Failing to promote a subjective sense of justice on the part of victims that confirms the victims' sense of wrong "is itself another

[27] Schulzke, "Ethically Insoluble Dilemmas in War" and "The Unintended Consequences of War."
[28] Margaret Urban Walker, *Moral Repair: Reconstructing Moral Relations after Wrongdoing* (Cambridge: Cambridge University Press, 2006), p. 18.

wrong. It violates the morally essential trust that there are recognized, shared rules by which we live and which we can count on to protect and guide us."[29] It is desirable to mitigate these subjective feelings of injustice both because they are bad in themselves and also because they may increase a person's willingness to engage in retaliatory violence,[30] which may intensify a war or provoke future conflicts. It is extraordinarily difficult to prevent violence against civilians. Even when belligerents avoid targeting them, civilians will invariably be incidentally and accidentally victimized.[31] War will inevitably result in objective injustices being committed against civilians who have a right to not be attacked, which will in turn lead them to feel a subjective sense of being wronged. Just war theory's interest in promoting both forms of justice provides grounds for seeking mechanisms of corrective justice that are aimed at assisting civilians. The positive duty I propose is a form of corrective justice that can reduce the magnitude of the injustices inflicted on civilians. Repairing the harm that is inflicted on noncombatants addresses justice in an objective sense by correcting bodily injuries and the destruction of property. It can also help to address subjective feelings of injustice. Even though corrective measures will invariably fall short of perfectly repairing an injury, they constitute an acknowledgment that a belligerent failed to perform its negative duty and that the harm it inflicted wronged a person who had a rights-based protection against it.

Advancing Just War Theory's Goals

Recognizing a positive duty to repair harm inflicted on noncombatants advances the substantive goals of just war theory. As I discussed earlier, just war theorists generally say that the just war tradition's goal is to restrict wars while still acknowledging that wars are sometimes unavoidable and that wars that achieve just goals may be preferable to unjust peace. A centerpiece of this restrictive project is the protection of civilians, which is reflected in the status civilians are granted by the PNCI and the *jus in bello* principles of discrimination and proportionality. The restrictions imposed by just war theory are, as I have argued, framed in terms of a negative duty and principles derived from that negative duty, which offer inadequate protection to civilians, both in theory and in practice.

[29] Ibid, p. 20.

[30] For example, critics of American drone strikes have sought to show that drones cause such a strong sense of outrage that they may provoke retaliation. See Michael J. Boyle, "The Costs and Consequences of Drone Warfare," *International Affairs* 89(1) (2013), 1–29. Faisal Shahzad, who attempted to detonate a bomb in Times Square, said that he carried out the attack because of a feeling of subjective injustice generated by American drone strikes killing Pakistani civilians. For a more general discussion of the consequences of subjective injustice, see Evelin Linder, *Making Enemies: Humiliation and International Conflict* (Westport, CT: Praeger, 2006).

[31] Schulzke, "Ethically Insoluble Dilemmas in War."

The positive duty I propose does not challenge the established just war orthodoxy, which affirms that there are grounds for excusing violence against civilians under some circumstances, especially those covered under the DDE. Moreover, the positive duty does not alter the existing restrictive elements of just war theory (though it may encourage greater compliance with those restrictions by providing an additional disincentive for attacking civilians). What the positive duty does is extend civilian protections in a way that brings just war theory closer to realizing the goal of limiting the extent of violence preventing attacks on civilians. Without the positive duty, just war theory's ostensible concern for limiting violence against civilians, combined with its lack of attention to alleviating civilian suffering, threatens to make it internally inconsistent. With the addition of the positive duty, the theoretical statements of just war theory provide a much stronger basis for protecting civilians and demonstrate a more serious concern for civilians' welfare.

Maintaining Civilians' Expectations of Immunity

Enacting the norms of just war theory and the laws of war depends on trust between the people and institutions that engage in war.[32] There must be trust that all parties involved in a war will abide by the same basic rules, otherwise there would be a strong incentive to defect from the rules when it is strategically advantageous. Ideally, belligerents treat enemy prisoners properly with the expectation that their own captured personnel will be treated properly, they avoid targeting enemy civilians with the expectation that their own civilians will not be attacked, and they avoid employing weapons of mass destruction with the expectation that enemies will also avoid doing so. Just war restrictions rely heavily on this sense of reciprocity, and they are threatened whenever violent actors deviate from the norms governing war.[33]

Civilians are part of this arrangement of reciprocal adherence to the norms of war. They have an expectation that the norms will generally be followed. Above all, civilians have an expectation of not being targeted if they avoid fighting. They forgo the opportunity to become participants in war with the confidence that combatants on both sides will recognize their civilian status and conform to restrictions on the treatment of civilians. This expectation of appropriate treatment is grounded in a tenuous trust that is violated when civilians are attacked.

Denying civilians the protection of a right when they have reason to believe that it will be respected is a serious injustice. As David Miller explains, "[i]f

[32] George I. Mavrodes, "Conventions and the Morality of War," *Philosophy & Public Affairs* 4(2) (1975), 117–131.

[33] Mark Osiel, *The End of Reciprocity: Terror, Torture, and the Law of War* (Cambridge: Cambridge University Press, 2009).

A can show that B has led him to believe that a benefit will be forthcoming, then A has a right to that benefit, and B has a duty to give it to him."[34] During war, A may be any civilian who is harmed and B the combatant who harms A. B wrongs A in this scenario not only by breaching A's right but also by violating an expectation that such a breach will not occur. The expectation of protection has become particularly strong in recent decades, as the language of just war theory has become more pervasive. Virtually every military, as well as many violent non-state actors, affirms a commitment to protecting civilians. This gives civilians stronger grounds than ever for thinking that their status will be respected and magnifies the injustice of contravening the expectation of immunity.

The risk of civilians developing incentives to participate in wars when their expectations of protection are violated is also a serious problem. When civilians' expectations of immunity are not satisfied, the incentives for remaining a civilian erode. If civilians cannot count on their rights being protected, then they lose their incentives for remaining civilians and take on new incentives to participate in hostilities. People lose their right to life when they take part in war – a significant disincentive for fighting – but they also receive new rights. As Walzer points out, combatants "gain war rights as combatants and potential prisoners."[35] If civilians' rights are not respected, then some of the people who choose to remain noncombatants may decide that, if they might be attacked regardless of their status, they would be better off fighting than standing idly by and waiting to be attacked. Taking part in the hostilities at least offers greater prospects of acting in self-defense and would come with the protections that Walzer mentions.

Low participation in wars is generally desirable as a way of limiting the magnitude of violence. Low rates of participation are consistent with the principle of proportionality, in both the *jus ad bellum* and the *jus in bello* sense. When fewer people fight, fewer people are liable to attack and fewer people are able to carry out attacks. The potential costs of individual attacks and of entire wars are correspondingly lowered. This provides grounds for thinking that it will generally be desirable to discourage civilians from becoming combatants, especially if they do so in large numbers because of a crisis of confidence in civilian protections. Moreover, if civilians decide to participate in wars by engaging in paramilitary activities, they threaten to blur the often tenuous distinction between combatants and civilians. This makes it morally advantageous for many people to remain civilians.

The promise that combatants will respect the PNCI generates an expectation of immunity, which in turn creates a strong incentive for civilians to not take

[34] David Miller, *Social Justice* (Oxford: Oxford University Press, 1976), p. 70.
[35] Walzer, *Just and Unjust Wars*, p. 136.

part in the fighting. This incentive is only effective to the extent that civilians' rights are protected during wars. Rampant violence against civilians and civilians' inability to seek redress for attacks undermine the expectation of immunity. The negative duty to avoid harming noncombatants offers some protection of civilians' expectations to be exempt from fighting, but as I have pointed out, the negative duty by itself is too weak to offer meaningful protection. For a civilian living in a contested area, the frequency with which the negative duty is breached undermines the motive to not participate in a war. As more violence is directed against civilians, the security offered by the PNCI becomes increasingly hollow and the barriers against participating in war are lowered. The positive duty is a means of more faithfully protecting the expectation that the decision to remain a civilian during war will provide some protection. It gives greater security to those who choose to not participate in wars by discouraging violence against civilians and providing a basis for repairing it.

Who Bears the Positive Duty?

The positive duty that I propose applies to all states or violent non-state actors that are responsible for ordering or authorizing the actions that lead to breaches of civilians' right to life, regardless of whether the belligerents involved acted morally or immorally. The duty applies to organizations, rather than individuals, even when the failure to perform the first-order duty can be traced to a specific person or group of people within the organization. If a combatant shoots a civilian, it is the state or violent non-state actor (VNSA) that the combatant represents, and not the combatant himself, that is responsible for repairing the resulting harm. This may seem counterintuitive, especially given my emphasis on duty-bearers being responsible for repairing the harms resulting from their failures to act according to a duty. Requiring compensation to come from organizations rather than individuals may also go against the natural inclination to assign blame directly to those who have committed an action that causes an injury. However, holding organizations rather than individuals responsible for performing the second-order duty is appropriate because of the collective character of military organizations and war itself.

Wars are collective enterprises, carried out by groups of people who share an intention to wage war against each other. Combatants do not engage in wars as individuals but as members of belligerent organizations that give combatants the skills, material resources, and institutional support structure necessary to fight. These belligerent organizations generally represent, or at least claim to represent, larger political, ethnic, or religious communities that legitimize the acts of the belligerent organizations and their members. The act of fighting as part of a collective gives war its distinctive political character and distinguishes killing in war from murder.

War must be a collective activity for it to make any sense as a distinctive form of violence. Soldiers rarely attempt to kill each other because of any personal animosity – they are enemies by convention. Few ever know the opponents that they attempt to kill and who attempt to kill them in return. It is common for soldiers to have feelings of profound respect for their enemies and even to express regret about being placed into circumstances that required them to fight to the death.[36] In some conflicts, especially civil wars, members of opposing militaries may even have personal attachments that create an aversion to killing those on the opposing side.[37]

Combatants attempt to kill their opponents, whether they are strangers, friends, or even family members, because those opponents are part of the collective enemy force that must be defeated through individual acts of killing. It is opponents' membership in a hostile group, and not any individual characteristics, them makes them enemies and potential targets. This is why efforts to demonize opponents typically focus on depriving enemy combatants of their individuality. Demonization depends on constructing a corporate identity of the enemy that can more plausibly be the target of intense enmity than the individual enemy soldiers, who could evoke feelings of empathy.[38] This may also be why there is so much controversy surrounding efforts to individuate enemy combatants with practices like targeted killing.[39] Targeting opponents as individuals arguably threatens war's collective character.

The collective nature of war is one of just war theory's basic assumptions. It is most clearly encapsulated in the *jus ad bellum* principle of right authority, according to which wars can only be justifiably initiated by legitimate political authorities, which excludes violence initiated by lone individuals. As Coates points out, just war theory also prohibits individuals from waging wars for private reasons, even if they have the assistance of militaries. "In the strict sense, the 'private' use of force, whether by individuals or by states, is never permissible."[40] War must serve public functions in order for it to be considered

[36] John Bierman and Colin Smith, *War Without Hate: The Desert Campaign of 1940–43* (New York: Penguin, 2004); Yvonne Friedman, *Encounter between Enemies: Captivity and Ransom in the Latin Kingdom of Jerusalem* (Leiden: Brill, 2002), p. 33; Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (New York: Routledge, 2007), p. 238.

[37] James McPherson, *Battle Cry of Freedom: The Civil War Era* (Oxford: Oxford University Press, 2003), p. 297; Silvia Pedraza, *Political Disaffection in Cuba's Revolution and Exodus* (Cambridge: Cambridge University Press, 2007), p. 22.

[38] Philip M. Taylor, *Munitions of the Mind: A History of Propaganda from the Ancient World to the Present Day* (Manchester: Manchester University Press, 1990).

[39] Steven David, "Israel's Policy of Targeted Killing," *Ethics & International Affairs* 17(1) (2003), 111–127; David Kretzmer, "Targeted Killing of Suspected Terrorists: Extra-judicial Executions or Legitimate Means of Defence?" *European Journal of International Law* 16(2) (2005), 171–212; Nils Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008).

[40] Coates, *The Ethics of War*, p. 127.

legitimate. The collective character of war is also evident from other just war principles. Judgments of just cause and right intention are not supposed to be made based on the personal interests of those in control of the government but rather in the interest of an entire political community. It is not any particular individual who has a just cause for war or a right intention to engage in war but a community.

Given the collective nature of war, the actions of individual soldiers or of groups of soldiers must be understood within a larger group context and in terms of the hermeneutical circle that this creates. On the one hand, because combatants act as members of military units that are part of belligerent organizations and that are waging war on behalf of some kind of political community, combatants' actions can only be fairly understood in terms of what those individuals are doing as members of collectives. On the other hand, the actions of the collectives must be understood with reference to how individual combatants act. After all, these collectives can only operate through the actions of their individual members. This gives combatants' actions a dual character. As Challans says, "[w]hen individuals in an institution act, they act as individuals but they also act as agents of the institution."[41] The individual and collective roles are performed at the same time and are interdependent, making them impossible to disentangle.

When an individual combatant harms a civilian or destroys civilian property in the course of performing military duties, that person is acting both as an individual and as a member of a belligerent organization that is waging war. He chooses to pull the trigger at a particular moment, but his weapon, training, and rules of engagement (or lack thereof), as well as the role that he is performing and the conflict he is engaged in, are given by the collective that he is a member of. The chains of responsibility extend out in various directions from the soldier who is immediately responsible for an attack, going all the way to the leaders who decided to put that soldier in a position to use lethal force in a particular instance.

Further complicating matters, the prevalence of crew-served weapons in modern wars means that even a single decision to attack tends to be shared by multiple people who are acting cooperatively. Heavy machine guns, tanks, bombers, missiles, artillery pieces, and myriad other weapons are operated by teams of individuals who are all essential to carrying out a particular attack. As weapons become more sophisticated, the sizes of the groups maintaining and operating them tend to grow. The unmanned aerial vehicles (UAVs) that are widely considered to be the future of air power are operated by dozens of

[41] Timothy L. Challans, *Awakening Warrior: Revolution in the Ethics of Warfare* (Albany, NY: State University of New York Press, 2007), p. 20.

pilots and support personnel who form a "kill chain" that must be in place for UAVs to carry out an attack.[42]

It is possible for combatants to go beyond the scope of their orders, performing actions that are either not authorized or expressly forbidden. For example, combatants can violate rules of engagement by carrying out deliberate attacks on noncombatants. They can also act recklessly, inflicting "collateral damage" on civilians even when their commanders take precautions to prevent this. One might argue that individual decisions to attack civilians against orders fail to implicate entire organizations. However, even in cases of individuals acting without orders or against orders, there are usually grounds for shared responsibility among members of organizations waging war. When combatants carry out what seem to be personal acts of violence against civilians, they still do so as agents of their organizations. They are placed in a position to harm civilians because of their roles. Those in the offending soldiers' chains of command may also be guilty of creating inadequate rules of engagement, failing to monitor their subordinates, or issuing orders that were open to misinterpretation.[43]

This characterization of shared responsibility for performing the positive duty does not excuse individual soldiers from any fault for their actions or show that they cannot be subject to disciplinary action. Combatants can and should be disciplined as individuals even as their actions reflect on the organizations they represent. It is especially important that soldiers be held morally and criminally liable for any deliberate or negligent harm they inflict on civilians. Shared responsibility also does not rule out imposing the burden of performing positive duties on the soldiers who are directly responsible for wronging civilian victims. Some states or violent organizations may wish to force their soldiers to bear the costs associated with performing the positive duty when these can be traced back to a single person's decisions.

Organizations waging war should have the discretion to impose some or all of the costs of the positive duty on to individual members, especially in cases when members act outside the scope of their authorized roles, such as when they contravene orders or rules of engagement. However, in the first instance the positive duty is one that belongs to collectives. It belongs to belligerent organizations and the political institutions they represent, rather than to the individual members of those institutions. The decision to displace responsibility for compensation on to individual soldiers or to punish the guilty soldiers must rest with the military forces that take on the duty to assist civilians.

[42] For more on UAV "kill chains" and how responsibility is shared among various UAV operators, see Derek Gregory, "From a View to a Kill: Drones and Late Modern War," *Theory, Culture, & Society* 28(7–8) (2011), 188–215.

[43] Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline and Law of War* (New Brunswick, NJ: Transaction Publishers, 1999).

Aside from these theoretical reasons for attributing the positive duty to organizations, rather than to individuals, there are also compelling practical reasons. First, as I already pointed out, it is often extremely difficult, even impossible, to attribute individual responsibility for many of the harms inflicted during war. Civilians are often injured or killed under circumstances that do not permit a clear determination of who is to blame. When they are struck during gunfights, by bombs, or by artillery, it may be impossible to identify who fired the bullet or dropped the bomb that breached their right to life. Judging fault will also raise problems when determining which side inflicted the harm, though at least this task will be lightened by opposing sides operating in different areas, using different munitions, and attacking different targets.

Second, a positive duty applied to individual combatants would be virtually meaningless, as few combatants would have the ability to discharge this duty. Repairing the harm caused by violence is resource-intensive and may depend on specialized knowledge. I contend that performing the positive duty requires the provision of medical care and pecuniary compensation, thereby necessitating medical expertise and financial resources that most combatants will lack. It would be pointless to assign a reparative duty to people who are incapable of performing it. Of course, the duty can exact a high price on organizations as well. As I will discuss later, the practical demands of the positive duty will sometimes exceed belligerents' capacities to repair. Nevertheless, these organizations are in a much stronger position to manage the expenses associated with the positive duty and to allocate their resources appropriately. Even when organizations' resources are inadequate to comply with all corrective demands, they can at least make more significant steps toward reaching that goal than individual combatants would be able to.

Conclusion

As I have argued, just war theory should acknowledge that belligerents have a second-order "positive duty" to repair the harm they inflict on noncombatants. This duty is required by the logic of rights, as a right to life that is only protected by a first-order "negative" duty to not inflict harm lacks sufficient force to protect bearers of that right. The positive duty is a radical proposal in the context of war, but as I have demonstrated, the necessity of extrapolating a positive duty from the right to life is generally recognized among rights theorists. Moreover, the positive duty is not only entailed by the logic of rights but is also supported by additional independent rationales. The most important of these are the demands of promoting justice for civilians, advancing just war theory's substantive goals, and maintaining civilians' expectations of immunity.

I have also argued that, because war is a collective action in which individuals may harm civilians as members of warmaking organizations, the positive duty

is one that should belong to organizations rather than to individuals. Organizations, like individuals, are bound to respect rights and therefore have a negative duty, so in principle either might have the second-order duty to repair breaches of rights. However, when it comes to war, individuals are so heavily integrated into organizations that it is far more appropriate to treat organizations as the bearers of the positive duty.

In the following chapters I will develop the positive duty and its implications by defending it against some potential objections, explaining how belligerents should be required to act on the positive duty in practice, explaining how the positive duty can be balanced against the negative duty, and discussing some of the implications this duty has for international law. This will provide a framework for translating the fairly abstract rights-based argument I developed in this chapter into practical guidelines.

4 Efforts to Excuse Civilian Suffering

In this chapter I explore some of the strategies that a critic might take to contest the positive duty that I introduced in Chapter 3 and respond to these potential objections. Two responses seem especially likely. First, one might claim that the doctrine of double effect (DDE) offers a way of defeating the positive duty. Because the DDE provides grounds for excusing some harm to civilians, it may also seem to establish a basis for denying the existence of a positive duty toward civilians – at least when the initial injury falls within the scope of what is permitted by the DDE. Countering my thesis with the help of the DDE is an attractive strategy because this may appear to be a parsimonious way of defeating the positive duty without altering other elements of just war thinking.

I acknowledge that the DDE provides grounds for excusing infringements on civilians' rights under certain conditions, in the sense that it explains how belligerents may deviate from their first-order duty by harming civilians without being guilty of a moral fault. However, I argue that because the civilians whose right to life is infringed on retain this right even when they are attacked, they are entitled to compensation for the damages they sustain. The DDE only establishes grounds for exonerating attackers from moral guilt for certain types of violence. It does not provide grounds for denying civilians' rights, even momentarily, nor can it be the basis for claiming that breaches of civilians' rights should not be repaired.

Second, a critic might reject the right to life and the principle of noncombatant immunity entirely and argue that wars should be judged based on some other standard. Utilitarianism is one of the most promising alternatives to just war theory and the most likely candidate for an alternative normative basis for evaluating wars. Utilitarianism can impose normative constraints on war without accepting the right to life and can therefore reject both the negative and the positive duties associated with that right. A utilitarian response to my positive duty is not open to just war theorists, for whom the right to life is a basic assumption of the rights-based view of just war theory. Nevertheless, utilitarianism does have a strong following among moral theorists. Utilitarian reasoning is also frequently invoked by politicians and military commanders as a

rationale for attacking civilians, which gives it some measure of intuitive appeal as an alternative normative language of war.

I show in this chapter that utilitarianism does offer a way of denying the positive duty that I propose, but that in many instances utilitarian reasoning will lead to much the same conclusions as the positive duty. Even though utilitarianism may not provide grounds for establishing a moral duty to assist all civilian victims of war, its goal of maximizing happiness and minimizing suffering will, in many instances, require that civilian casualties be assisted in the kinds of ways that I will describe in later chapters. Therefore, while utilitarians can circumvent my rights-based argument in favor of a positive duty, they must also take up the task of repairing the harm inflicted on civilians.

The Doctrine of Double Effect

The DDE is one of the most important elements of just war theory. It is a concession to the practical realities of war, which explains why violence against civilians may sometimes be excusable despite its prima facie wrongness. Without the DDE, just war theorists would have great difficulty explaining how certain actions carried out by belligerents may be permissible when these clearly deny civilians the protection the right to life is supposed to guarantee. Just war theorists would have to either restate the PNCI in a much weaker form to give civilians less protection or admit that there are no grounds or only very weak grounds for overriding the PNCI. The former option would bring just war theory much closer to realism. And given the destructiveness of modern weaponry, the latter option would make it so difficult to wage a just war that it would have to be considered morally unjustifiable under almost any circumstances.

Although the reasoning that is embodied in the DDE can be found in earlier sources, Saint Thomas Aquinas is generally credited with being the first person to clearly formulate the DDE. It is also through Aquinas that the DDE became an integral part of the just war tradition. As I discussed in Chapter 1, Aquinas developed the DDE as a way of distinguishing between immoral killing and morally justifiable killing. As the name suggests, the DDE does this by recognizing that actions have multiple effects and that an action that is directed at producing a good effect might also produce an unavoidable and unintended bad effect.

There are three components to Aquinas' formulation of the DDE. First, he argues that it is wrong to *intentionally* kill a person for any reason. Any intentional killing qualifies as murder, even if one intends to kill an attacker in self-defense.[1] An attacker may be killed, but this must be an *unintended* outcome of defensive actions. Second, the goal must either be good or indifferent. It

[1] Saint Thomas Aquinas, *Summa Theologica, Volume 3* (New York: Cosimo, 2007), qu. 64, art. 7.

would be impermissible to harm a person, even unintentionally, in pursuit of an immoral purpose like stealing that person's wallet. Self-defense is a legitimate goal, as is defending another person, but greed or hatred would clearly fail to qualify as legitimate motives for any action that might harm another person. Third, actions taken in self-defense or in pursuit of some other just aim must be proportionate to the level of threat an opponent poses. It would be immoral to shoot and kill an unarmed mugger, even if the defender's intention were self-defense or the defense of property and not murder. Killing someone is an extreme response that is unwarranted when resisting an unarmed adversary who is only attempting to steal money and not posing a serious threat. Lethal force would even be excessive against a murderer when nonlethal resistance is an effective deterrent.

One of the DDE's greatest advantages is that it combines deontological and consequentialist reasoning. It affirms a deontological requirement to act based on good intentions, yet still acknowledges that the consequences of an action matter. This mixture of moral reasoning styles makes it possible to maintain an absolute prohibition on murder while allowing people to be killed in pursuit of just causes. The DDE likewise makes it possible to maintain an absolute prohibition against harming civilians while still admitting that some harm to civilians should be excused when intentions and proportionality are taken into account. Thus, it "may resolve hard cases for those who acknowledge exceptionless norms and for those who take a middle path between consequentialism on the one hand and an ethics including such norms on the other."[2] The DDE's ability to reconcile competing moral demands makes it ideally suited as a normative constraint on an activity like war, which will invariably be carried out in ways that fall short of any ideal standard of perfect adherence to the PNCI.

Aquinas' version of the DDE provides a starting place for thinking about the morality of violence that inflicts incidental harm, but it leaves many unanswered questions. Among these are whether the intention requirement permits the infliction of foreseeable harm or only unforeseeable harm, whether it is necessary to take any additional precautions to prevent actions from having unintended consequences, and the point at which the harm that is incidentally inflicted becomes disproportionate. The DDE also needs serious reevaluation to be applied in wartime circumstances. Contemporary formulations of the DDE generally retain Aquinas' requirements of having good intentions and acting proportionately, but most impose additional constraints on the use of force or reevaluate existing elements of Aquinas' DDE.[3]

[2] T. A. Cavanaugh, *Double-Effect Reasoning: Doing Good and Avoiding Evil* (Oxford: Oxford University Press, 2006), p. xxii.

[3] Steven Lee, "Double Effect, Double Intention, and Asymmetric Warfare," *Journal of Military Ethics* 3(3) (2004), pp. 233–251; Carl J. Ficarrotta, "Double Effect Reasoning: Doing Good and Avoiding Evil," *Journal of Military Ethics* 6(3) (2007), 255–256.

Many commentators have expressed concern that the DDE's intention and foreseeability requirements are too weak.[4] If inflicting intentional harm is all that is forbidden, then it is possible to carry out attacks that are certain to produce noncombatant casualties if these are directed primarily against military targets. According to Aquinas' version of the DDE, it might be permissible to bomb a military installation on the roof of a hospital and claim that this satisfies the intention requirement so long as those bombing the hospital do not intend to kill any of the patients inside. Such an attack might even meet the proportionality standard if the bombers only use the amount of ordinance required to destroy the target. However, this type of attack still seems morally problematic because it is certain to inflict terrible harm on those inside the hospital. As Bennett points out in an even more extreme example, the intention and foreseeability requirements lead to the conclusion that an attacker could bomb innocent people and foresee that they will be killed as long as the attacker only intends to knock them down.[5]

The DDE can be improved by distinguishing between different degrees of prior awareness and degrees of intent. If harm inflicted by an attack must not only be unintended but also unforeseen, then the standard belligerents must meet for the harm they inflict to be excusable is much stronger. If it is immoral to inflict any foreseeable harm on civilians, then combatants would be prohibited from attacking any target when there is a known risk to civilians – even when the target has military value and any civilian casualties are unintended. Making the DDE stricter in this way could help to prevent combatants from manipulating the DDE by disingenuously attacking civilians under the pretext of having a different goal in mind.

Nevertheless, even specifying that harm to civilians cannot be foreseen may be insufficient to offer civilians meaningful protection, as this standard would permit belligerents to inflict harm recklessly. Returning to the previous example of an attacker bombing a military installation on the roof of a hospital, it might be the case that the attacker does not know that the building being attacked is a hospital or that they wrongly think that the hospital is abandoned. The attacker's ignorance might lead the attacker to destroy the building under the false belief that no civilians are inside. If the attacker deliberately avoids discovering whether there are civilians in the building or does not make any attempt to assess the attack's potential impact on civilians, then the attacker

[4] Philippa Foot, "The Problem of Abortion and the Doctrine of Double Effect," *Oxford Review* 5 (1967), 5–15; Jonathan Bennett, *Morality and Consequences* (Salt Lake City, UT: University of Utah Press, 1981) and *The Act Itself* (Oxford: Oxford University Press, 1995); Nancy Davis, "The Doctrine of Double Effect: Problems and Interpretations," *Pacific Philosophical Quarterly* 65(2) (1984), 107–123; Alison McIntyre, "Doing Away with Double Effect," *Ethics* 111(2) (2001), 219–155; Cavanaugh, *Double-Effect Reasoning*.

[5] Bennett, *Morality and Consequences*, p. 110.

could be guilty of recklessness. The DDE can be made still more demanding to prevent it from excusing reckless violence by requiring that harm to civilians must not only be unforeseen but also unforeseeable. This stricter standard prevents combatants from remaining willfully ignorant or failing to carefully consider the potential consequences of their actions.

This is only a brief overview of the DDE and of some of the ways it has been revised by just war theorists. Much more could be said about this subject and the various alternative formulations of double-effect reasoning that have been offered by just war theorists and philosophers applying the same reasoning in other domains. The key point is that the DDE provides grounds for thinking that unintended consequences of actions may, under certain circumstances, be excusable even when they involve violence that would usually be considered immoral. And this could seem to provide a way around the positive duty by potentially exempting attackers from that duty when they satisfy the DDE. The differing levels of strictness of the intentionality requirement further suggest that using the DDE to overcome the positive duty may be more or less plausible depending on which standard the attacker satisfies.

Applying the Doctrine of Double Effect against the Positive Duty

A critic of the positive duty could argue that civilians are only entitled to protection from immoral attacks that cannot be excused by the DDE. According to this reading, the right to life would not establish absolute immunity from attacks but only immunity from attacks that are intentional, reckless, or disproportionate, or which otherwise fail to meet the standards established by the DDE. If the right changes in this way, then the negative duty that correlates with the right to life will be transformed from a duty to avoid harming civilians into a duty to avoid inflicting inexcusable harm on civilians. Limiting the right to life and its corollary negative duty would mean that combatants are not guilty of failing to abide by a duty when they unintentionally cause civilian suffering. This would in turn mean that civilians have no rights-based grounds for claiming compensation, or at least no grounds for claiming compensation based on a second-order duty arising from combatants' failure to discharge the first-order duty.

This line of reasoning based on making the right to life and its correlative duty DDE-dependent may be appealing to those who would like to reject the positive duty I advocate. And there is precedent for this response, as some have interpreted the DDE in ways that limit the right to life. Arneson contends that "[t]he right of noncombatant immunity forbids inflicting harm on noncombatants as either an end in itself or as a means to an end. In other words, noncombatants have the right not to be deliberate targets of attack."[6] This reframes

[6] Arneson, "Just Warfare Theory," p. 102.

the right to life as a protection against intentional harm, substantially reducing its protective force. Arneson's narrowing of the right to life reflects his goal of challenging the traditional understanding of the combatant/noncombatant distinction by showing that members of the latter group can at times be more justifiably attacked than those of the former. However, this line of argument might appeal to those who wish to reject my positive duty, regardless of whether they agree with Arneson's larger challenge to the combatant/noncombatant distinction.

Although Lee appears to support just war theory's existing combatant/noncombatant distinction, his reading of the DDE is similar to Arneson's. Lee argues that the DDE revises the PNCI, changing the PNCI from an absolute prohibition against harming civilians into the looser rule that "civilians are immune from intentional attack in war."[7] He reasons that civilians therefore lack an absolute immunity to any attack whatsoever, only having a conditional immunity to attacks that fall outside the scope of the DDE.[8] Elsewhere Lee seems to reach a different conclusion. In one article devoted to the DDE he says that "[t]he moral right of civilians not to be harmed results from their status as human beings, irrespective of their nationality."[9] This indicates a more conventional view of the right to life, which is not limited by an attacker's intent, yet because this is an earlier statement of Lee's view of the DDE it seems likely that he came to disagree with this interpretation.

Revising the right to life and its correlative duty based on the reading of the DDE provided by Arneson and Lee is deeply problematic, and any effort to circumvent the positive duty based on their interpretations of the DDE would be unsuccessful. To start, it is important to note that even if the DDE could provide a way of excusing belligerents from the positive duty, it would only work to circumvent the positive duty when the DDE applies. It would not be effective for escaping the positive duty in cases when the DDE fails to excuse attacks on civilians. Depending on the strictness of the intentionality condition of the DDE – whether it excuses unintentional, unforeseen, or unforeseeable harm to civilians – the circumstances in which this response could provide a way around the positive duty would be further limited. However, the DDE cannot provide a way of escaping the positive duty even in instances when it clearly applies.

Arneson's and Lee's arguments might be taken in two different ways. The first possibility is that civilians are not protected from all harms, only those inflicted deliberately, because the right to life is only a right to be unaffected by deliberate or negligent harm. According to this reading, the right to life may be in place at all times and not subject to any change at the moment of attack, but simply does not cover the types of attacks that are excusable under the DDE because the right to life is defined narrowly as only being a right against certain

[7] Lee, *Ethics and War*, p. 175. [8] Ibid. [9] Lee, "Double Effect, Double Intention," p. 238.

specific types of harm that are beyond what the DDE can excuse. This seems to be what Arneson and Lee have in mind and is therefore the way I characterized their arguments when introducing them.

A second possibility is that the right to life does offer protection against all types of harm, but that it temporarily ceases to exist or that it becomes a more limited right when attacks that fall under the scope of the DDE are carried out. This would make the existence of the right to life partly dependent on how others act toward the bearer of that right. Whereas the first strategy hinges on the assertion that the right to life always exists but that it is a more limited right than is commonly recognized, the latter variation of the argument leaves the right to life unchanged but holds that this right does not pertain in all situations. Each of these possibilities conflicts with the concept of the right to life and the concept of rights more generally. Most seriously, each leads to the untenable conclusion that it is possible to waive claim rights held by others.

The first strategy for applying the DDE against the positive duty would make the scope of the right to life contingent on the intentions of people other than the right-bearer. If the right to life is a protection from deliberate harm, then it is only possible to determine when the right offers its bearer protection by considering the intentions of those duty-bearers who might harm the right-bearer. This is untenable, as it makes the strength of the duty correlating with the right to life contingent on the duty-bearer's subjective feelings. If the substance of a right depends on a duty-bearer's mental states, then that right would hardly qualify as a right at all. A right so capricious and easily altered by others could not provide protection against harms that others might inflict and would fail to protect its bearer's interests as a right is supposed to. Although this conception of the right to life would not violate the immunity condition in principle, it would do so in practice because virtually any harm inflicted on civilians could be unilaterally excused simply by invoking the excuse that the harm was unintended.

The second way of interpreting the case for restricting the PNCI based on the DDE is even more seriously flawed because it would violate the immunity requirement in principle and in practice. Claim rights are meant to offer individuals protections against actions taken by others or to require that others treat the bearer in a particular way. A right-bearer may waive a right, such as a person does when becoming a combatant, but a right cannot be waived by a duty-bearer. It would be incoherent to say that an individual's right can be taken away, even temporarily, simply because this is convenient for another person, particularly when the other person is a duty-bearer whose actions are supposed to be constrained by the right. If it were possible for a right to be temporarily retracted in this way, then that right would offer no meaningful protection. A right that can be retracted by an outside party, especially one that is hostile, is not a right at all.

If the right to life offers the level of protection that would allows it to qualify as a right, then we can conclude that no matter what actions combatants take to minimize the harm they may inflict or what intentions they have when carrying out an attack, they lack the authority to alter noncombatants' rights. This invalidates any attempt to escape the positive duty by appealing to duty-bearers' intentions or the precautions they take when attacking. The material fact of harming a civilian is itself sufficient grounds for establishing a failure to adequately respect the right to life and for thinking that duty-bearers should take on the additional responsibility of repairing the kind of harm that civilians are supposed to be protected against.

Reconciling the DDE and the Positive Duty

The DDE provides a basis for excusing harm inflicted on noncombatants, but not because it permits duty-bearers to redefine or suspend the right to life. The DDE is not a rationale for limiting the right to life or for showing that it ceases to offer protection under certain conditions. Rather, the DDE establishes that there are times when the right to life can be superseded because of competing demands. A right that is superseded does not cease to exist, nor does it have to be limited. Such a right is certainly not left to the whims of a duty-bearer's subjective attitudes. The right is only temporarily overruled by competing demands in such a way that a duty-bearer may be excused from moral guilt for not performing the right's correlative negative duty in a particular instance. And as Edmundson explains, a right that is overruled remains in effect and may generate second-order duties like the one I advocate: "[w]hen overridden, rights do not simply vanish, however. The right-holder will normally be owed residual consideration, which may take various forms, such as apology, compensation, and so forth."[10]

Allowing a right to be superseded is much different from limiting its protections or suspending it, as this does not imply any changes to the substance of the right or the duty-bearer's obligations. Admitting that rights can sometimes be superseded only requires us to acknowledge that there may be more important rights or other considerations that have to take priority in a particular instance. The reasoning behind the DDE is similar to the reasoning Feinberg invokes in his example of the lost hiker, which I discussed in Chapter 3. As Feinberg explains, the lost hiker's right to life supersedes the cabin owner's property right when the hiker must break into the cabin to save his life. But as Feinberg also shows, the prioritization of rights in this way does not eliminate

[10] William A. Edmundson, *An Introduction to Rights* (Cambridge: Cambridge University Press, 2012), p. 120.

or alter the cabin owner's property right. The property right and the hiker's correlative duty to respect that right, continue to exist as the hiker breaks into the cabin. The hiker can be excused for not performing his duty because his life is threatened, but the hiker may still have to pay compensation to the cabin owner because the cabin owner never waived his property right.

The same reasoning is evident in Thomson's example of destroying a tank that is protected by a human shield. That example raises a more difficult problem because the right to life is at stake on both sides and therefore cannot be resolved by simply saying that one right is more important than another. However, Thomson manages to resolve the dilemma she presents in this scenario by arguing that the rights of an innocent threat (the human shield) can be infringed on by a victim who is authorized to act in self-defense. The human shield never loses the right to life because the right is never waived. The human shield may therefore be owed some compensation even though the person responsible for attacking this innocent threat can be excused from moral guilt.

Cavanaugh, whose book on double-effect reasoning is one of the most detailed and comprehensive analyses of it, reaches the same conclusion. He says that double-effect reasoning "justifies one's acting notwithstanding one's harming those not deserving harm. While one harms, one does no wrong; one acts permissibly . . . One injures without doing injustice. Nonetheless, such injury calls for repair. Double-effect cases will often require one to make reparations to the victim."[11] Cavanaugh's reasoning becomes even more poignant when he applies it to war. "In the case of tactical bombing . . . maimed victims can be helped. Moreover, the relatives of dead non-combatants will be harmed in their loss, for example, of a provider. Here one finds injuries for which one has full responsibility. Clearly, while justice does not prohibit one's act, because of one's complete responsibility, it does require repair."[12] Thus, Cavanaugh concludes that double-effect reasoning fails to establish grounds for excusing combatants from duties of repair and acknowledges that some kind of reparation is required.

As I established in Chapter 3, there is a morally significant difference between violating a right and infringing on it, but this is not a difference that affects the positive duty. When a right is infringed on that right is not somehow modified or temporarily waived. The right remains in effect. It only fails to offer protection because it is superseded. Those who are harmed in attacks that are excusable under the DDE retain their right to life. That right is, and must be, undiminished and unaltered by the attacker's intentions. Civilians are wronged when they are attacked and suffer a breach of the right to life regardless of whether the attacker may be excused from moral guilt.

[11] Cavanaugh, *Double-Effect Reasoning*, p. 165. [12] Ibid.

Conversely, because the right to life continues to exist even when civilians are harmed, belligerents who inflict harm must have a duty to not do this. The right to life prohibits them from harming civilians, and they are bound to respect that right at all times except when it is waived. Belligerents fail to perform their duty regardless of whether an attack that harms civilians is permissible by the standards of the DDE. Because the function of the DDE is only to decide when the failure to perform the duty is morally excusable and when it is not, the DDE does not offer grounds for erasing the negative duty that correlates with the right to life. And with the duty to respect civilians' right to life in effect at all times, the DDE does not circumvent the positive duty. Civilians are therefore entitled to have the harm resulting from infringements repaired regardless of whether the attack that causes it satisfies the DDE.

Rethinking the DDE's Biases

The DDE not only fails to offer a way around the positive duty but also needs some reconsideration in light of the demands of preventing and repairing civilian victimization. The DDE suffers from a negativity bias, a temporal bias, and a potential for misuse, all of which conspire to detract from the imperative of assisting civilians. These biases pose a serious problem for double-effect reasoning in any context, but they are particularly significant during war. They are symptomatic of just war theory's general lack of attention to civilian suffering and serve as further evidence that a positive duty like the one I describe must be introduced to supplement the restrictive components of just war theory. The positive duty is not only necessary for the protection of civilians' rights but also as a mechanism for protecting civilians when they are harmed through actions that are excused based on double-effect reasoning.

As my discussion of the DDE showed, competing interpretations of the DDE differ in the kinds of obligations they establish for those who use violence, but they rarely have much to say about addressing the costs associated with the attacks that the DDE excuses. Aside from Cavanaugh, few who discuss the DDE raise the possibility of giving reparations to victims, and no one within the just war tradition appears to consider this. This reflects the overall negative/restrictive orientation of the DDE, especially in just war theory. The DDE is almost exclusively concerned with limiting violence at the moment of attack, rather than repairing harm once it has been inflicted. And this orientation is consistent with the broader trends in just war thinking that I have noted in previous chapters. The DDE, like other elements of just war theory, is primarily negative or restrictive in its framing. It addresses when infringements on rights can be excused, but fails to include requirements that address the steps necessary for repairing the consequences of these infringements.

Walzer's statement of the DDE offers a prime example of its negativity bias. Walzer formulates a far more demanding version of the DDE than those defended by most just war theorists and yet still remains constrained by the negative orientation. This is because Walzer maintains the core elements of the DDE and only makes it more restrictive by strengthening the intentionality requirement. According to Walzer, the DDE should not only require that combatants exercise restraint but also that they exercise due care by making "a positive commitment to saving civilian lives."[13] This goes beyond simply demanding that combatants do not intend to cause harm to civilians or requiring that they cannot foresee such harm resulting from their actions. It asserts that combatants have a duty to protect civilians – even those of enemy states.

Walzer's statement of the DDE reflects the strength of the civilian right to life by avoiding any intimation that the right might be temporarily suspended or altered by duty-bearers at the moment of attack. This effort to establish stronger civilian protections is praiseworthy, yet this conception of the DDE fails to address the issue of how the civilians who are harmed in excusable attacks should be dealt with. It therefore retains a negative orientation toward civilians that cannot account for how civilian suffering could be mitigated.

The DDE's negativity bias is closely linked to its temporal bias. It is only possible to frame the DDE as purely negative in scope because the DDE is temporally limited to the moments before and during an attack. None of the prominent statements of the DDE invoked by just war theorists include a rationale for exempting attackers from dealing with the undesirable secondary effects that attacks have. The time after an attack has been carried out simply fails to enter into the moral calculations relating to the DDE. Once the bombs have been dropped or the bullets have been fired, the effects of violence are not registered. This narrow temporal scope detracts attention from the moral questions that arise following an attack. And it seems that many take this limitation as implying that there is nothing more to be said about violence against civilians after an attack is carried out.

My proposal for a positive duty amounts to extending civilian protections in time and seeing them diachronically (occurring over time), rather than synchronically (occurring at a single point in time). My contention is that just war theory should not only consider how best to prevent civilian suffering when attacks are carried out but also how to respond to civilian suffering after attacks. Moreover, by introducing the positive duty I mean to demonstrate that this diachronic consideration of civilian suffering is not simply a theoretical preference. Because the positive duty is a duty that arises from a fundamental right, the diachronic perspective on civilian suffering must govern the way belligerents act in practice. It must hold them responsible for thinking about the best

[13] Walzer, *Just and Unjust Wars*, p. 156.

ways to mitigate the costs their actions impose on civilians before, during, and *after* attacks.

A final and well-known limitation of the DDE is that it is fairly easy to use disingenuously to rationalize reckless attacks on civilians. Unlike the previous problems, which are inherent in existing formulations of the DDE, this problem arises from how the DDE is used in practice and may therefore be dismissed as being the fault of those who misuse the DDE, rather than of the DDE itself. Nevertheless, the DDE's capacity to be invoked as a way of rationalizing wrongful attacks is concerning and makes it worth considering why the DDE seems to be so open to misuse.

Because the DDE offers a way of superseding the right to life, it is prone to abuse by those who wish to carry out attacks on civilians without giving up the appearance of being just combatants. Some attempt to employ what Anscombe calls "double think about double effect,"[14] which is an effort to get around the intention requirement by claiming to act with a legitimate intention while causing foreseen effects that would ordinarily be prohibited. This can be fairly characterized as double think because it is an effort to manipulate the DDE without appearing to do so by hiding behind the language of intentionality and foreseeability. Coady finds that this kind of double think is a serious barrier to applying the DDE in military operations and cites the practice of attacking dual-use targets that can be used by soldiers or civilians as evidence of dishonesty.[15] Attacks on dual-use targets allow belligerents to punish civilians, or to simply avoid taking precautions to protect them, while still maintaining the appearance of obeying the norms of just war. This results in the DDE acting as a shield for the kinds of attacks that just war theory is supposed to condemn.

To some extent, disingenuous applications of the DDE are a reflection of the influential readings of the DDE as a negative and synchronic principle. It is, after all, easy to misapply the DDE when the costs of doing so are entirely borne by the civilian victims of violence and do not raise new moral obligations for their attackers. This type of double think would become even more appealing if the DDE were not only able to provide the grounds for exempting combatants from moral responsibility but also for avoiding the positive duty.

On the other hand, disingenuous uses of the DDE lose much of their appeal if those who manipulate the DDE are forced to confront the consequences of their actions. If belligerents are required to repair the suffering they inflict on civilians, then using the DDE as a pretext for attacking civilians would lose its usefulness. Such attacks could demand a great deal of reparative work that would draw resources away from military uses, thereby making them militarily counterproductive. Alternatively, those exploiting the DDE as a cover for attacking civilians could have their true intentions and their lack of concern

[14] Anscombe, "War and Murder." [15] Coady, *Morality and Political Violence*, p. 146.

for civilian suffering exposed if they refused to provide the required assistance to their victims. In either case, applying the positive duty alongside the DDE would transform that duty into a mechanism for promoting more honest efforts to adhere to the DDE.

Utilitarian Evaluations of War

Although my focus in this book is on just war theory, there are several reasons why it is important to also address the utilitarian perspective on the morality of war. First, just war theory is the most popular and influential normative discourse on war, but it is not the only one. Some philosophers have advanced compelling utilitarian accounts of the morality of war that compete with just war theory or that are used to create hybrid theories that combine utilitarianism with just war reasoning.[16] Second, though just war theory is often employed by, or at least invoked by, policymakers and military commanders, consequentialist theories of morality also appear to be very influential for these practitioners of war. Politicians and members of the military rarely defend explicit moral theories, but they often employ consequentialist language when justifying their actions. This is especially true when they carry out mass-casualty attacks, deliberately attack civilians, or use torture.[17] Strategies that fall outside the bounds of what is permissible according to just war theory can sometimes find support from utilitarianism or other types of consequentialism if they seem to provide the best way of minimizing the overall suffering a war might cause.

Certain versions of utilitarianism may be able to account for the existence of rights and may even recognize a right to life or some equivalent to it.[18] For those who accept this reasoning, my rights-based argument in favor of recognizing a positive duty toward civilians may be persuasive. After all, my argument assumes the right to life, but does not depend on a particular way of establishing

[16] Among the many examples of utilitarian accounts of the morality of war are: R. B. Brandt, "Utilitarianism and the Rules of War," *Philosophy and Public Affairs* 1(2) (1972), 145–165; Nicholas Fotion and Gerard Elfstrom, *Military Ethics: Guidelines for Peace and War* (New York: Routledge, 1986); Jeffrey Whitman, "Utilitarianism and the Laws of Land Warfare," *Public Affairs Quarterly* 7 (1993), 261–275; Douglas P. Lackey, *The Ethics of War and Peace* (Englewood Cliffs, NJ: Prentice Hall, 1998); Stephen Nathanson, *Terrorism and the Ethics of War* (New York: Cambridge University Press, 2010); William H. Shaw, "Utilitarianism and Recourse to War," *Utilitas* 23(4) (2011), 380–401; Antony Lamb, *Ethics and the Laws of War: The Moral Justification of Legal Norms* (New York: Routledge, 2013).

[17] For comments on how consequentialist arguments are made in support of mass casualty attacks and civilian targeting, see A. C. Grayling, *Among the Dead Cities: The History and Moral Legacy of the WWII Bombing of Civilians in Germany and Japan* (New York: Walker & Company, 2006); John Ray Skates, *The Invasion of Japan: Alternative to the Bomb* (Columbia, SC: University of South Carolina Press, 2000), pp. 77–79.

[18] For example, see Allan Gibbard, "Utilitarianism and Human Rights," *Social Philosophy and Policy* 1(2) (1984), 92–102.

that the right exists. A utilitarian theory that admits the existence of a right to life would have to acknowledge the positive duty for the same reasons as my own account that is based in just war theory.

The challenge created by utilitarianism, and consequentialism more generally, is that it can provide avenues for escaping the rights-based account of the positive duty for those who are prepared to reject the existence of rights or the right to life specifically. One could endorse utilitarianism as the best normative standard for regulating warfare while also maintaining that civilians do not have a right against being harmed and that duties cannot, therefore, be extrapolated from that right. Such a position would escape the logic of my rights-based argument while still not drifting into the realist denial that war can be governed by moral norms.

I maintain that even if the positive duty is rejected in favor of some kind of utilitarian standard that does not acknowledge a right to life, the consistent application of utilitarian logic will still lead to a conclusion that is similar to my own. Variants of utilitarianism that do not recognize the existence of rights may not be able to establish an absolute duty to repair harm inflicted on noncombatants. However, they would have to acknowledge that belligerents are required to provide assistance for civilians they harm under most circumstances. The utilitarian goals of promoting happiness and minimizing suffering lead to a de facto duty to repair harm inflicted on civilians even if this duty is not formalized or linked to a right. Moreover, the utilitarian responsibility for providing assistance to civilians may be even more expansive than the one I propose because such a responsibility would have to apply to all states and not only to the one that inflicted the harm.

Thus, though utilitarianism can escape the rights-based argument for the positive duty, utilitarian reasoning is of limited value when it comes to actually rejecting the positive duty. Utilitarianism is best seen as leading to an alternative formulation of the responsibility to help civilians harmed by war that overlaps with the rights-based positive duty. The rest of this chapter will be devoted to showing how utilitarianism leads to this conclusion and not only fails to offer an effective strategy for rejecting the positive duty but actually establishes a de facto positive duty.

Variants of Consequentialism and Utilitarianism

In its most basic form, consequentialism is the belief that the morality of an act should be determined, either wholly or primarily, based on the act's consequences. This makes consequences, rather than intentions or rights, the most salient consideration when passing moral judgment on an act. The priority given to consequences sets consequentialism apart from just war theory, which incorporates some elements of consequentialist reasoning (especially in

calculations of proportionality) while still accepting the primacy of rights and taking intentions into consideration.

In itself, the label "consequentialist" does not assume that any particular consequence is morally significant. The term can apply to a number of different theories that may disagree substantially when it comes to their moral referents. Some forms of consequentialism may be biased in favor of particular groups, in the sense that the only consequences that are treated as being morally significant are those that affect a particular group. Alternatively, all people may be treated as morally significant, but members of a privileged group may count disproportionately when it comes to determining which course of action produces the best consequences. Consequentialist theories that take these forms are best seen as instances of "partisan consequentialism," in the sense that they inscribe the interests of particular groups into their moral language.

Partisan consequentialism is frequently invoked by political and military elites attempting to legitimize actions that privilege their own soldiers or civilian populations.[19] Its influence is evident when the use of questionable tactics like torture or high-altitude bombing is rationalized on the grounds that they will help to save the lives of people from a particular country. In some accounts of military ethics and the morality of war, this kind of consequentialism is even mistaken for utilitarianism, thereby giving the erroneous impression that utilitarianism establishes grounds for giving preferential treatment to particular groups.[20] Partisan consequentialism is not only distinct from utilitarianism but is actually difficult to describe as a moral theory at all. Variants of consequentialism that privilege one group over another contravene some of the most basic and compelling premises of moral theory: that people are morally equal by default, that moral standards apply equally to everyone, and that moral norms should not be framed to serve particular interests.

Partisan consequentialism offers little basis for regulating war, except insofar as reciprocal conventions of war might limit violence against one's own group. Moreover, it can give a sense of moral legitimacy for belligerents that wage unrestricted or barely restricted wars, which may discredit efforts to impose moral boundaries on violence or inspire feelings of self-righteousness and moral exceptionalism. For these reasons, I will focus on utilitarianism, which is a far more defensible position and has some prominent advocates who have offered it as an alternative to just war theory.

[19] Igor Primoratz, "Can the Bombing Be Morally Justified." In *Terror from the Sky: The Bombing of German Cities in World War II*, edited by Igor Primoratz (New York: Berghahn Books, 2010), 113–133, pp. 126–129; George Cotkin, *Morality's Muddy Waters: Ethical Quandaries in Modern America* (Philadelphia, PA: University of Pennsylvania Press, 2010), pp. 35–112; Alex J. Bellamy, *Massacres and Morality: Mass Atrocities in an Age of Civilian Immunity* (New York: Oxford University Press, 2012).

[20] Sidney Axinn, *A Moral Military* (Philadelphia, PA: Temple University Press, 2008), pp. 12–24.

The most basic feature of utilitarianism is the claim that acting morally requires promoting the greatest good for the greatest number of people. But even clarified in this way, the consequentialist referent is unclear. This seemingly simple precept leaves room for substantial disagreement about what qualifies as a good, how goods should be weighted, and how they should be promoted. In Bentham's classic formulation, the greatest good is decided according to the hedonistic standard of maximizing pleasure and minimizing pain.[21] Bentham advocates the maximization of pleasure of any sort, regardless of what qualitative merit it may seem to have, thereby reducing all types of pleasures to quantifiable and commensurate units. Mill famously objects to Bentham's hedonistic framing of utilitarianism and revises utilitarianism to take some account of qualitative differences.[22] As he sees it, we should prefer higher pleasures, such as intellectual achievements, over lower pleasures, such as physical gratification, even if the former are less intense. This maintains the basic logic of utilitarianism, but nevertheless constitutes a significant divergence from Bentham because of this much different conception of what kinds of goods moral conduct must promote.

Later utilitarians continued exploring alternative conceptions of what kinds of goods are morally relevant. G. E. Moore makes one of the most substantial changes in utilitarian theory by arguing that some things, such as beauty, are intrinsically good apart from their capacities for producing pleasure or pain.[23] He further argues that something might be good even if it is not pleasurable, and that pleasure is not intrinsically good because it depends on some other stimuli.[24] This clearly distances Moore from Bentham's hedonistic utilitarianism, and even from those like Mill or Sidgewick, who developed more nuanced and qualitatively sensitive accounts of morally significant consequences. Much more could be said about the history of utilitarianism and the many different forms that it can take. For my purposes, what matters is that there are many different strands of utilitarian thinking but that these various perspectives will generally agree about how utilitarian reasoning should apply during wars.

First, despite the disagreement about what type of goods must be maximized and which evils should be avoided, it is possible to find some level of agreement about what these goods and evils should be in a wartime context. Whether the good is simply pleasure or whether it admits variations in quality or in form, it depends on minimizing the physical harm inflicted on individuals. That is to say, regardless of whether utilitarians favor Bentham's reasoning, Mill's,

[21] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Mineola, NY: Dover Publications, 2007).
[22] John Stuart Mill, *Utilitarianism* (New York: Bantam Books, 1993).
[23] G. E. Moore, *Principia Ethica* (New York: Barnes & Noble, 2005). [24] Ibid., p. 76.

Sidgewick's, Moore's, or someone else's, they should generally agree that wars ought to be waged in ways that will inflict the least amount of physical harm. This is why Brandt argues that a utilitarian theory of war will generally include strong protections for civilians except when there are overriding benefits for attacking them.

> There are some things that troops may be tempted to do which are at best of negligible utility to their nation but which cause serious loss to enemy civilians, although not affecting the enemy's power to win the war. Such behavior will naturally be forbidden by rules designed to maximize expectable utility within the understood restriction.[25]

Brandt goes on to say that this same reasoning applies when civilians live in occupied territories, in which they are subject to violence and property seizures from occupying forces. "[U]tility is maximized, within my indicated basic limitations, by a strict rule calling for good treatment of the civilian population of an occupied territory."[26] Thus, though Brandt does not endorse the PNCI or claim that civilians have a right to life, he does think that civilians will nevertheless be entitled to strong protections because the harm inflicted on them is an evil that does not usually produce any overriding good.

Nathanson reaches a similar conclusion. He interprets utilitarianism as being deeply averse to war and concerned with the fate of all who might be harmed by fighting. "[U]tilitarianism was devised, promoted, and embraced by humanitarian reformers whose chief aim was to improve the conditions of human life by reforming social and political institutions. For utilitarians, war, even though sometimes justifiable, is always a great evil."[27] This suggests that, whatever differences of opinion utilitarians may have when determining what goods should be promoted, the protection of human life must be among them. Thus, like Brandt, Nathanson finds utilitarian grounds for establishing fairly strong restrictions on war that include protecting civilians against needless suffering.

Second, in contrast to partisan variants of consequentialism, utilitarianism treats people as being morally equivalent, subjecting all people to the same moral calculus without making adjustments based on nationality or other considerations that might introduce bias. Utilitarians likewise assume that people generally agree on what basic goods should be maximized, making those goods universally valued. Utilitarianism therefore implies that war should be regulated according to a uniform standard that is binding for all participants, and that combatants should be treated as having a universal desire to minimize the suffering that war produces and maximize the good that it may achieve. By this reasoning, war is always a tradeoff between the suffering and

[25] Brandt, "Utilitarianism and the Rules of War," p. 154.
[26] Ibid., p. 155.
[27] Nathanson, *Terrorism and the Ethics of War*, p. 191.

the good that it produces and must always be judged in terms of the balance between these. Brandt says in his defense of utilitarian reasoning about war that "substantial destruction of lives and property of enemy civilians is permissible only when there is good evidence that it will significantly enhance the prospect of victory."[28] The critical point here is that belligerents must not only minimize the suffering of their own citizens and allies but also minimize the suffering of their enemies.

Because utilitarianism judges the good in a universal sense, there is no select group of people, such as noncombatants or a national community, that can be treated as having greater moral weight. As Ellis points out, "all that matters is that welfare be maximized and, if that is true, it cannot matter how this occurs, or fails to occur."[29] Utilitarians may think that this makes it permissible to harm civilians in principle, and perhaps even to do so deliberately, if such attacks are a means of ending a war with less suffering overall.[30] Utilitarian reasoning also leads to the conclusion that civilians have to be protected from harm when their suffering would be superfluous – which it is in most circumstances.[31] Harm is superfluous when inflicting it does not promote some greater good, regardless of what good is chosen as the referent. Whatever view of utilitarianism one endorses, it should be clear that attacks on children or on adults who do not contribute to a war effort will generally be excessive and that civilians should usually be spared. The only exceptions to this might be civilians who play an important role in facilitating the war effort, such as those in the government or those giving logistical support.

Because civilians do not participate in wars and contribute little to the war effort, harm inflicted on them can do little to advance war aims. Attacks on civilians inflict a great deal of suffering, which in most cases will exceed whatever good attackers may hope to achieve. Primoratz captures this perfectly when he says that "the consequentialist position on civilian immunity, as on everything else, is quite simple: we should go by consequences, and by consequences only. Civilian immunity ought to be respected, for respecting it has, on balance, good consequences."[32] Thus, though utilitarianism makes civilian victimization permissible when it promotes a higher good, it also implies that civilians should ordinarily be exempt from being targeted. This leaves civilians in a more tenuous position than just war theory's right to life, yet it does offer them some degree of protection.

[28] Brandt, "Utilitarianism and the Rules of War," p. 156.
[29] Anthony Ellis, "Utilitarianism and International Ethics." In *Traditions of International Ethics*, edited by Terry Nardin and David R. Mapel (Cambridge: Cambridge University Press, 1992), p. 175.
[30] Brandt, "Utilitarianism and the Rules of War"; Lackey, *The Ethics of War and Peace*.
[31] Nathanson, *Terrorism and the Ethics of War*, pp. 191–228.
[32] Primoratz, "Civilian Immunity in War," p. 25.

Utilitarianism and Civilian Victims

So far my analysis of utilitarian views of war should be fairly uncontroversial. Those who employ utilitarianism as an alternative to just war theory generally arrive at some account of de facto noncombatant immunity according to the reasoning I have described, though they differ on how easily that immunity can be overridden. What is missing from utilitarian accounts of war is the same thing that is missing from work on just war theory: consideration of how civilians should be treated after they have been attacked.

Utilitarianism is generally applied synchronically when evaluating actions taken during war. It is used to assess the morality of an attack based on whether it seems to promote a good that is greater than the harm it inflicts at a single point in time – the moment the attack is carried out. An attack's repercussions are considered morally relevant, but only insofar as they reflect on the morality of the decision to attack.[33] The repercussions are not treated as events that raise new moral challenges and that demand the reapplication of utilitarian reasoning. Rather, they are only seen as consequences that help to determine whether the initial attack was justified. The utilitarian calculation is therefore made for a single decision at a single moment in time, with the consequences of that decision only being relevant for the purposes of judging the decision made in that moment.

The synchronic application of utilitarianism mirrors just war theory's tendency to only consider civilian's rights before and during attacks, and not once those rights have been breached. This narrow temporal perspective reveals the same limited perspective on civilian suffering – the same disregard for how civilian suffering after an attack raises distinctive moral challenges that belligerents must address – under the guise of a different moral theory. The flaw in this type of reasoning, whether it comes from the just war tradition or utilitarianism, is that war is not a series of discrete decisions culminating in a single attack. Rather, every event and every act of violence changes the course of an ongoing struggle and gives rise to a new universe of moral considerations that call for a reapplication of norms. Moral judgments during war must be made continuously, which is to say, diachronically. They must respond to changing circumstances, and in particular, to the effects of belligerents' actions.

If utilitarianism is to account for the dynamic nature of warfare and the way each decision creates a new moral landscape, then it must be applied diachronically. It must treat the consequences of each action as raising new moral challenges that may require renewed application of the utilitarian calculus. An

[33] Marcus Schulzke, "The Doctrine of Double Effect, Utilitarianism, and the Treatment of Civilian Casualties." In *Military Medical Ethics for the 21st Century*, edited by Michael L. Gross and Don Carrick (Burlington, VT: Ashgate, 2013).

attack may be justified on the grounds that it harms civilians in pursuit of some greater good, but this does not excuse an attacker from disregarding the welfare of those who are harmed after the greater good has been achieved. If an attack has served its purpose and secured the greater good that was its aim and that justified the initial violence against civilians, then any additional suffering that does not contribute to that purpose, or to some other good that outweighs the continued suffering of those who were attacked, is superfluous and morally objectionable on utilitarian grounds.

It may be helpful to think of this in terms of an example. A utilitarian could argue that it is justifiable to bomb a city and kill its civilian residents if this will achieve the greater good of ultimately saving more lives than are lost. The attack might be a way of destroying the enemy's infrastructure or terrorizing the enemy population into surrendering. If there is good reason to believe that killing some civilians will avert greater suffering, even if it does not immediately end the war, then there is a utilitarian rationale for carrying out such an attack. An attacker invoking this reasoning to justify an attack may even appear to be thinking diachronically by judging the permissibility of the attack based on its long-term consequences. However, this appearance is illusory. The attacker may be forecasting future considerations by judging the morality of the attack in terms of its prospective consequences, yet he fails to act morally if he avoids reapplying the utilitarian calculus after the attack, when the moral considerations may have changed substantially.

If we apply utilitarianism diachronically then analysis of an attack cannot stop at the moment the bombs fall, nor can it be based on conjectures about an attack's effects that are not reevaluated in its aftermath. Once the attack has been carried out, there may be a number of civilian casualties who are seriously wounded or who have lost their homes and who therefore continue suffering into the future. Whatever conditions existed before the attack that justified violence against these civilians may not exist afterwards. Thus, the civilian suffering inflicted by an attack, even an attack that was justified by utilitarian standards, raises a new moral challenge: whether to take steps to alleviate that suffering. This new challenge should require the perpetrators of the attack to reapply utilitarian reasoning and to choose a new course of action.

In the aftermath of an attack that causes civilian suffering, utilitarian reasoning dictates that the attacker should determine the extent to which it can assist those who were harmed in a way that promotes the greatest good for the greatest number. If the continued suffering of the civilian casualties is essential for achieving the greater good envisaged as the justification for the initial attack, then it may be necessary to allow that suffering to persist. However, if the goal of the attack was achieved or if the attack has opened a new route to achieving that goal that does not require harming civilians, then utilitarianism tells us that it is wrong to allow any additional suffering. Thus, while utilitarianism may be

able to justify some attacks on civilians, it also demands that harm to civilians be repaired as soon as it ceases to be a means to a greater end.

The utilitarian account of omission and commission heightens the importance of applying utilitarianism diachronically. Utilitarianism does not distinguish between acts of omission and acts of commission, which means "that there is no *intrinsic* moral difference between killing and allowing to die."[34] Murdering someone or failing to prevent a murder that is within one's power to stop are equally blameworthy. In a wartime context, harming civilians and allowing them to be harmed are likewise equally blameworthy. This implies that the initial decision to carry out an attack and the subsequent decisions of whether and how to help the victims of the attack must be treated as equally significant, even though the former pertains to an act of commission and the latter to an act of omission. It would be just as wrong to kill a dozen civilians in an attack as it would be to allow a dozen civilians to die of their injuries afterwards.

The moral equivalence of omission and commission also ensures that the responsibility to help civilians is widely distributed. It affirms that there is no moral difference between allowing civilians to suffer from an attack conducted by one's own forces and allowing them to suffer from an attack conducted by someone else. This makes belligerents responsible for any failure to help civilians who are exposed to unnecessary suffering. Any harm caused by a failure to provide assistance is equivalent to inflicting that harm directly.

Furthermore, this indicates that anyone with the power to intervene on behalf of civilians whose suffering persists past the point when it serves some greater good ought to do whatever they can to alleviate that suffering, even if they had no direct involvement in the attack or actively worked to prevent it from happening. Opposing belligerents and neutral parties must remain constantly attentive to excessive suffering inflicted by any participant in the war. And they must take steps to repair the harm, unless doing so in some way causes more extensive suffering. This leads to a more expansive obligation toward civilians than the positive duty I favor, since the utilitarian obligation to help civilians would apply to those who are not at fault for inflicting the suffering and who may have even opposed it. Utilitarianism would create a duty for all individuals and organizations to help civilian victims in all instances when they have the capacity to provide assistance and when the civilian suffering does not contribute to some greater good.

One could attempt to avoid this conclusion by maintaining that when utilitarian logic initially justifies inflicting civilian casualties, allowing the continuation of civilian suffering will also be necessary. In some instances this might be true. If an attack is meant to terrorize opponents into submission and

[34] Peter Singer, *Practical Ethics*, 3rd edn. (Cambridge: Cambridge University Press, 2011), p. 183.

this will help to avert some greater evil, then allowing civilians to suffer may help to achieve that goal. Nevertheless, as a general response this line of argument would be unconvincing. Most civilians contribute very little to a country's war effort. The vast majority only assist wars indirectly, by providing financing through their taxes or by supporting the political and military leadership ideologically. Because of their minimal contribution to hostilities, it is extremely difficult to justify any attacks on civilians at all, let alone the continuation of suffering when the victims of an attack have already been terrorized and possibly incapacitated to the extent that they cannot provide further material assistance for the war effort.

This is borne out in research on the effects of civilian victimization in wars over the past century. Attacks on civilians have repeatedly been shown to be ineffective as a means of ending wars more quickly or achieving other goals that utilitarians might take to be benefits of civilian victimization. To take just a few of the many examples one could cite, the United States' indiscriminate bombing of civilians during the Vietnam War was not only ineffective but may have been counterproductive, causing more civilians to support the Vietcong.[35] The Soviet Union had the same experience during its wars in the Caucuses, where it employed various forms of state terrorism that only hardened its opponents' resolve and gave them less incentive to seek peaceful methods of conflict resolution.[36] Attacks on civilians in other wars and in terrorist campaigns have likewise produced little visible result or caused a backlash.[37] The evidence showing that violence against civilians can be justified according to utilitarian logic is so weak that Nathanson convincingly argues that utilitarianism cannot actually justify attacks on civilians except in simplistic thought experiments.[38] Although the debate over the utility of civilian victimization is not settled, the most compelling evidence available demonstrates that even the initial targeting of civilians is hard to justify on utilitarian grounds.

If attacking civilians who contribute little to a war effort is difficult to justify, then allowing them to suffer after an attack is even more so. Once they are seriously wounded, deprived of essential property, or displaced, civilians' abilities to contribute to the war effort will be seriously degraded. Allowing a person

[35] Matthew Adam Kocher, Thomas B. Pepinsky, and Stathis N. Kalyvas, "Aerial Bombing and Counterinsurgency in the Vietnam War," *American Journal of Political Science* 55(2) (2011), 201–218.

[36] Matthew Evangelista, *The Chechen Wars: Will Russia Go the Way of the Soviet Union?* (Washington, DC: The Brookings Institution, 2002); Emma Gilligan, *Terror in Chechnya: Russia and the Tragedy of Civilians in War* (Princeton, NJ: Princeton University Press, 2010).

[37] Max Abrahms, "The Political Effectiveness of Terrorism Revisited," *Comparative Political Studies* 45(3) (2012), 366–393; Luke N. Condura and Jacob N. Shapiro, "Who Takes the Blame? The Strategic Effects of Collateral Damage," *American Journal of Political Science* 56(1) (2012), 167–187.

[38] Nathanson, *Terrorism and the Ethics of War*.

who is no longer capable of performing productive labor to continue suffering will amount to permitting superfluous pain that does not contribute to ending a war or minimizing its destructiveness.

Thus, utilitarianism does offer a way of escaping the rights-based argument for the positive duty, but it generates a similar duty to repair the harm inflicted on civilians. The logic of utilitarianism leads to a de facto positive duty toward civilians that applies in all circumstances except those exceptional cases in which the prolongation of civilian suffering might plausibly serve some greater good. Utilitarianism may in some circumstances be able to excuse neglect for civilian suffering, but such circumstances will be very rare. Moreover, by treating omissions and commissions as morally equivalent, utilitarianism establishes a nonspecific demand to help civilians that applies to all people, not just those belligerents who caused the harm. This general responsibility creates an obligation to help civilians that is far more demanding than the narrow fault-based duty I propose.

There are grounds for a utilitarian duty to assist civilians regardless of whether one applies act utilitarianism or rule utilitarianism. Put simply, the former demands that utilitarian logic be applied on a case-by-case basis to all moral challenges, while the latter permits the formulation of rules that usually promote the general welfare. According to act utilitarianism, every act that harms civilians and every opportunity to either alleviate or ignore civilian suffering must be subjected to utilitarian calculations. The result is that all or almost all instances of civilian suffering will generate a responsibility for all belligerents and neutral parties to provide assistance. For act utilitarianism, the de facto responsibility to help civilians will apply in the vast majority of instances of civilian suffering, if not in all such instances. And because of the near universality of this obligation, any rules generated by rule utilitarianism will have to create a rule that civilian victims of war be given assistance. Providing assistance to civilians is therefore not merely a de facto responsibility but actually be a rule of conduct to be applied even in the unlikely event that permitting civilian suffering could serve a higher purpose in some instances.

Conclusion

This chapter has addressed two strategies that opponents of a positive duty to assist civilians might pursue to circumvent that duty. The former involves mobilizing the DDE as a basis for arguing that the positive duty should not apply in instances when attackers harm civilians in ways that are morally excusable. The argument from this perspective is that civilians' right to life is either temporarily suspended or that it does not apply when civilians are victims of violence that satisfies the DDE. As I have shown, either interpretation of this strategy is ineffective as an objection against the positive duty. Claiming that civilians

temporarily lose their right to life without waiving it themselves, either because the right is suspended or because it does not protect them from unintentional harm, contravenes the immunity component of the right to life. Allowing rights to be waived by duty-bearers would constitute a serious injustice against civilians and would undermine the protections that rights are supposed to provide for their bearers. We should therefore conclude that the right to life cannot in any way be altered by the subjective intentions of the duty-bearers who are bound to respect it.

The second argument I discussed involves employing utilitarian reasoning as an alternative to the rights-based standard of just war theory. This strategy provides a way of circumventing just war theory, and my rights-based derivation of the positive duty along with it, while still retaining a normative framework that can be applied to war. However, when it is interpreted diachronically, utilitarianism creates a de facto responsibility to assist civilian victims of war. The basis for this responsibility is much different from the positive duty, so these two independent grounds for deriving the obligation to help civilians do not match up perfectly. Still, they lead to similar obligations when civilians are typically neglected by belligerents. This makes utilitarianism largely ineffective as a means of bypassing the positive duty. Moreover, by equating acts of commission and acts of omission utilitarianism transforms the obligation to help civilian victims of war into a general responsibility that would apply to anyone with a capacity to provide assistance, regardless of their fault in causing the harm.

Now that I have explained the theoretical basis for the positive duty and explored some of the limitations of the potential objections that critics may raise, it is possible to move beyond describing the duty in the abstract language of rights to discuss how it should apply in practice. The following chapters will address the practical implications of the positive duty, focusing on the two new principles of just war that follow from it. I will also consider how the positive duty can be weighed against combatants' other duties. These chapters will help to clarify the positive duty's meaning and address some of the modifications that must be made in order to operationalize it.

5 The Principle of Restorative Care

In this chapter I shift from the theoretical discussion of why belligerents are obliged to assist the civilians that they harm to the problem of how that obligation should be operationalized. The positive duty to assist civilian victims does not entail the performance of a specific action or set of actions, nor for that matter do the alternative deontological and utilitarian grounds for helping civilians. Like most duties, there are many different ways that the positive duty could be performed. Nevertheless, because it is a duty to provide assistance, rather than a duty to avoid inflicting harm, the scope of the action required is somewhat narrower for the positive duty than for the negative duty. There are, after all, a nearly infinite number of ways that one might avoid harming someone but a much smaller number of ways that harm could be meaningfully repaired. It is best to determine what specific principles of just war should follow from the positive duty by determining what actions are most suited to repairing the harm inflicted on civilians, which have the best prospects of promoting justice, and which have the greatest chances of being implemented.

I argue that two additional principles of just war should follow from the positive duty and that these principles will be sufficient to promote a high degree of compliance with it. These principles also cohere with the alternative grounds for promoting civilian welfare that I discussed in Chapter 3 and with the utilitarian rationale for improving the treatment of civilians. They are therefore principles that may be attractive from various different moral perspectives aside from just war theory and rights theory more broadly.

The first principle, and the focus of this chapter, is restorative care. According to this principle, belligerents must provide medical treatment for civilians who they injure with the goal of restoring their health, as nearly as possible, to pre-attack levels. Chapter 6 will introduce the second principle, the principle of recompense, according to which belligerents must give financial compensation to civilians who are harmed in ways that constitute a breach of the right to life. These principles are analytically distinguishable and require much different types of actions, yet they are complementary. They work together, each compensating for the other's limitations and performing part of the extremely demanding work of repairing harm inflicted on civilians. When taken together,

these principles constitute a strong normative framework for determining what specific actions follow from the positive duty. They may be used both as standards by which belligerents may determine what they ought to do and as standards by which the morality of belligerents' corrective actions can be assessed.

The principle of restorative care operationalizes the positive duty by establishing that belligerents must provide medical care to any civilian they harm, regardless of the civilian's nationality or the attacker's moral culpability. Because the demand for restorative care results from a belligerent's failure to comply with the negative duty to avoid harming civilians, that care must be directed at repairing any physical harm that follows directly from the offending belligerent's failure to perform the duty. Compliance with the principle of restorative care can therefore be judged in terms of whether any medical treatment is given to civilian victims and how effective that treatment is in returning them to their pre-attack health.

The guiding ideal when providing treatment should be perfect restoration of health, but of course, practical limitations prevent this from being a viable goal in practice. Much of the harm belligerents inflict on civilians will be impossible to perfectly repair given the current levels of medical technology and the availability of medical resources. The principle of restorative care must therefore strike a balance between the goal of repairing physical harm and the practical limitations that will inevitably prevent injuries from being completely healed. In this chapter I discuss how this balance can be achieved in a way that offers protection to civilians while not being so demanding that it leads to a de facto prohibition of war – a conclusion that would make the principle irreconcilable with just war theory.

I begin by describing the principle of restorative care as an ideal standard and discussing the limitations that it can admit when being implemented in practice. I devote special attention to the problem of establishing a standard of care that can vary according to contemporary levels of medical technology and belligerents' capacities for providing treatment. After discussing this standard, I contrast it with existing duties of care set out by the Geneva Conventions, as well as the standards that armed forces tend to provide on their own initiative. I then consider the implications of the principle of restorative care for individuals at various levels of the chain of command and the responsibilities of medical providers, who have the most direct role to play when providing treatment. I conclude by discussing how this new principle of just war theory can overcome some of the most serious challenges that are likely to arise when it is implemented in practice.

Defining the Principle of Restorative Care

The goal of the principle of restorative care is, as the name indicates, to repair physical harm that has been inflicted on civilians and to do so in such a way that

injured civilians are restored to the same level of health they had prior to being attacked. To act in accordance with this principle, belligerents that violate or infringe on a civilian's right to life in a way that causes physical injury must provide timely and effective medical assistance to the civilians they injure. The principle of restorative care thus transforms the positive duty to assist civilians from a fairly abstract idea that does not call for a specific remedy for civilian suffering into a clearer and more actionable requirement. The principle simultaneously provides a mechanism for vindicating civilians' rights and an evaluative criterion for determining when belligerents have satisfied the positive duty.

Ideally, the principle of restorative care should create an absolute duty to provide treatment that completely repairs any harm a civilian sustains – and in practice medical treatment should be given with this ideal in mind as a guiding objective. Belligerents should always seek to completely repair the harm they inflict on civilians in order to perfectly satisfy the positive duty. However, this standard of care is clearly far too demanding for any belligerent to consistently adhere to in the real world. The goal of completely repairing all injuries will often exceed what is possible given the current level of medical technology. It will certainly exceed what can be reasonably achieved during wartime, when medical resources are strained and may be difficult to allocate. Even the most sophisticated medical technologies available to belligerents in contemporary wars regularly fall far short of completely repairing injuries, as evidenced by the plight of wounded American soldiers, who can expect the best medical treatment of any armed force in history and yet who may nevertheless suffer from long-term debilitating injuries.[1]

The inevitable limits on what medical treatment can accomplish make it necessary to theorize the principle of restorative care as an ideal that must be carefully moderated in light of practical considerations. At the same time, the principle cannot be weakened to the extent that it offers civilians inadequate help or loses its ability to meaningfully enact the positive duty. The realistic goal of the principle of restorative care should therefore be to repair civilians' injuries to the greatest degree possible in light of unavoidable practical impediments, such as the availability of medical resources and the accessibility of the civilians who require treatment. The standard of restorative care must also recognize the historical variability of medical technologies and acknowledge that modes of warfare will differ in the extent to which they permit belligerents to gain access to civilian casualties. The principle of restorative care is much weaker when framed in light of practical necessities than it is when stated in its ideal form, but it remains fairly demanding. Even when it is relativized in light of practical impediments, this principle places demands on how belligerents

[1] Martin Kantor, *Uncle Sam's Shame: Inside Our Broken Veterans Administration* (Westport, CT: Praeger Security International, 2008).

allocate their medical resources, on the acceptable level of resources, and on how belligerents attempt to provide treatment.

Balancing the principle of restorative care against practical necessities precludes the formulation of a single standard of care that can be applied in all circumstances and during all conflicts. The principle of restorative care is therefore akin to just war principles that permit degrees of ambiguity and that must be interpreted in light of contextual considerations, such as the *jus in bello* principle of proportionality and the *jus ad bellum* principles of proportionality, last resort, and reasonable chance of success. As with these other principles, allowing the principle of restorative care to be adjusted depending on the circumstances makes it more difficult to apply, especially when it comes to determining the threshold of care past which the principle has been satisfied. However, this problem can be alleviated somewhat when we consider the types of concessions that have to be made to reconcile restorative care with practical necessities and the protections that can be put in place to prevent belligerents from escaping their responsibility to care for civilian casualties.

Differing Medical Capacities

The first concession to practical demands must come by way of acknowledging that belligerents will inevitably have much different capacities to provide medical treatment. It is useful to remember the maxim that when making normative statements "ought implies can." It is unreasonable and usually pointless to establish rules of conduct that are too demanding to be followed. A person cannot be morally required to do something that person lacks the power to do. Even if such a thing were possible, the unreachable moral imperative would be useless for informing that person's actions unless restated in a more modest form. The same is true for principles of just war that may be applied to states and other violent actors. Ideal principles like the one I stated are a useful starting point, but these principles must make some concessions to practical demands if they have any hope of being operationalized.

From the prerequisite that moral responsibilities must be within an actor's capacity to perform, we can infer that the standard of medical treatment required by the principle of restorative care will vary somewhat according to a given belligerent's capacity to provide it. It is important to note that this relativism distinguishes the corrective principles I propose from just war theory's negative restrictions. With a limitless number of possible ways to not cause civilian casualties, all belligerents have the ability to avoid harming civilians and can therefore be fairly assigned the same duty to not inflict such harm. Medical treatment demands more specific remedies and may be ineffective against some kinds of injuries. And as I will show in Chapter 6, the same is true of financial compensation.

The available medical technology, resources, and expertise place insurmountable limits on the extent to which care can achieve the aim of repairing civilians' injuries. It would clearly be impractical to hold belligerents fighting a century ago responsible for providing the same level of medical care that can be provided now, given the revolutionary developments in battlefield medicine over the past century.[2] It would likewise be impossible for underdeveloped countries to provide the same level of care as advanced industrial countries. Expecting commensurate treatment across time and cross-nationally would either require that the standard of care be set low enough to be easily achieved under virtually any circumstances, which would give belligerents far too much freedom to provide inadequate care, or it would require a standard that exceeds the capacities of many belligerents. By contrast, a variable standard of care could be sensitive to the radical differences in medical capacity across time and cross-nationally.

Employing a variable standard of care that is sensitive to changes in medical competence across time means that civilians harmed during different periods are entitled to different types of treatment. Those harmed in ongoing wars may be able to receive much better care than those harmed in past conflicts because of developments in medical treatment. Those in future conflicts may expect still better treatment as battlefield medicine becomes more sophisticated. Correspondingly, belligerents that harm civilians in future wars may be obliged to provide more sophisticated medical assistance than can be provided now.

The temporal variance in the quality of care belligerents have to give the civilians they harm may be considered unjust in a sense. After all, this temporal relativism makes a civilian's entitlement to care contingent on factors that are beyond that person's control. One might even think that this conflicts with the immunity component of the right to life, which, as I showed earlier, prevents anyone aside from a right-holder from waiving the right or altering its character. Relativizing restorative care is an unfortunate necessity, but it is consistent with the right to life and the positive duty that is derived from it. Although the immunity component of a right prevents duty-bearers from waiving a right they are required to obey and prevents duty-bearers from escaping the second-order duties they may incur, the immunity component of a right does not make the untenable demand that all duty-bearers must discharge duties of either type in identical ways. Immunity guards against the manipulation of a right by other people, but not against the structural constraints that are imposed by historical context.

Relativizing the principle of restorative care across time may further lead to concerns about intergenerational justice, with civilians suffering from the same

[2] Richard A. Gabriel, *Between Flesh and Steel: A History of Military Medicine from the Middle Ages to the War in Afghanistan* (Washington, DC: Potomac Books, 2013).

injuries at different periods in time gaining an entitlement to different levels of care. However, relativizing restorative care in this way is not only a necessity for operationalizing that principle but an excusable necessity. Temporal variance in medical capacity is not imposed because of any deliberate effort to disadvantage some generations. It is a consequence of the non-moral fact that this capacity varies over time in response to much larger shifts in medicine and in the government resources available to provide treatment.

The standard of restorative care must also be relativized cross-nationally because individual belligerents will have differing capacities to provide medical treatment at a given time. Although the reason for cross-national relativism is the same as for temporal relativism, the former is apt to seem far more objectionable. It may seem unfair to hold states to different standards of restorative care based on their differing capacities when the same medical technologies and treatments that are routine in some states are potentially available to others, but these other states have chosen to avoid investing in medical resources to the same degree. It may likewise seem unfair that civilians suffering similar injuries would receive different treatments depending on who inflicted those injuries. Asymmetries of medical capacity could lead to situations in which belligerents fighting each other end up owing the civilians they harm much different levels of care. Civilians might suffer or be repaired to different degrees depending on who inflicted their injuries. In cases of radical asymmetry, such as in civil wars between states and domestic insurgencies, a civilian harmed by the state may be entitled to far better treatment than one harmed by the insurgents even if they were harmed during the same battle and sustained identical injuries.

Unequal obligations to provide care, and especially unequal civilian entitlements to care, are an unfortunate outcome of relativizing the principle of restorative care. Nevertheless, making this consolation to practical considerations is unavoidable if the principle of restorative care is to account for the fact that belligerents will invariably differ in their capacities. Restorative care must be sensitive to ineliminable inequalities that necessarily shape the application of moral norms, even if there is no good moral basis for those inequalities. Thus, we are left with the choice between requiring belligerents to provide as much restorative care as they are able to and setting a standard of care that is so low that any belligerent would be able to satisfy it. Since the latter option could lead to civilians receiving little or no assistance in many circumstances, the former is clearly preferable. It would be better to have civilians' health restored inconsistently, but to the greatest extent possible, than to reduce standards in an effort to promote equality.

The relativized standard of restorative care must be protected against opportunistic belligerents that may hope to give the appearance of abiding by the principle of restorative care without actually helping wounded civilians. The

most serious potential problem with a relativistic standard of care is that it risks giving belligerents an incentive to minimize their obligations toward civilians by appealing to practical considerations. One might imagine belligerents deliberately failing to develop medical treatment capabilities in an attempt to evade the positive duty. They could even intentionally degrade their medical capacities in anticipation of an upcoming war. Although a variable standard of care raises the risk of this kind of abuse, the principle of restorative care can be protected with the help of fairly clear reference points that can distinguish between excusable and opportunistic variance in medical capacities. Thus, the principle of restorative care should be supplemented with two additional requirements when it is put into practice.

First, the level of care that injured civilians receive must be commensurate with that received by soldiers in the military inflicting the harm or members of that country's civilian population at the time the injury is inflicted. A given belligerent should not have unequal standards of care for combatants and civilians or for civilians of different nationalities. This requirement establishes a base standard of care that can vary depending on the circumstances. Including the stipulation "at the time the injury is inflicted" even accounts for the fact that belligerents' capacities are likely to change over the course of a war. States' medical capacities may increase or decrease as a war develops. They may also suffer relatively brief but sharp declines in treatment capacities when resources are strained by a particularly intense battle. Non-state actors' capacities may fluctuate even more. Although many non-state actors may lack the ability to provide anything but the most rudimentary care, those that succeed in establishing their own governments or in taking over existing governmental institutions during revolutionary wars may become empowered to offer civilians much better medical assistance.

This first requirement for determining the acceptable standard of care establishes that, for example, if wounded soldiers are quickly evacuated from the battlefield and taken to high-quality medical facilities with good doctors, then wounded civilians must also be quickly evacuated from the battlefield and taken to high-quality medical facilities with good doctors. By contrast, if wounded soldiers can only be evacuated by being carried from the field, enduring an arduous journey to medical facilities, and receiving care from untrained medical personnel, then any wounded noncombatants are entitled to at least receive this level of care. This does not guarantee that civilians will always receive the best treatment available or even that their injuries will be fully repaired, but it does provide a fairly objective way of determining whether belligerents are following the principle of restorative care to the best of their abilities.

Second, belligerents must make a good-faith effort to come as close to perfectly repairing the health of civilians they harm as can be reasonably expected given their medical capacities. This requirement plays a role similar to what

the principle of right intention does with respect to just cause. As Coates points out when discussing right intention, "an appropriate moral disposition" is an essential precondition for satisfying other demands set out by just war theory.[3] In *jus ad bellum*, right intention helps to protect against the opportunistic use of just cause for war as a pretext for aggression by requiring that belligerents always intend to fight wars in pursuit of a just cause. In the context of the principle of restorative care, this right intention requirement helps to guard against attempts to shirk responsibility for repairing harm inflicted on civilians.

Individual intentions can be difficult to judge because they are subjective states, yet when it comes to judging the intention underlying collective activities such as the conduct of war, there is often ample objective evidence from which to draw reliable inferences. The requirement to provide commensurate levels of care is one way of determining whether efforts have been made to assist civilians, but other indicators are also available. Policymakers' intentions are manifest in myriad ways, from how they allocate resources, to the orders they give to their armed forces, to their rhetoric about the norms of war. It would, for example, not be permissible for a state to invest all of its resources in offensive power while not taking any precautions for the treatment of casualties. A state that did this would fail to show that it had made a good-faith effort to ensure that it could provide medical treatment and would fall short of what efforts could be reasonably made to develop a capacity to care for injured civilians. Such a state would therefore violate the principle of restorative care, even if its own soldiers and civilians were likewise denied medical attention.

Once the principle of restorative care is moderated in light of practical necessities and its variable standard is protected from abuse with the two additional requirements just discussed, it can be stated as follows: belligerents that violate or infringe on a civilian's right to life must provide medical assistance to that person with the aim of restoring that person's health, as nearly as possible, to its pre-attack level. In practice, treatment may fall short of completely repairing the harm inflicted, but it must at a minimum (1) be commensurate to what belligerents' own combatants and civilians receive, and (2) reflect a good-faith effort on the part of the offending belligerent to take all reasonable steps toward providing restorative care.

Supererogatory Care

Thus far, I have addressed the minimal standard of care that belligerents must meet to comply with the principle of restorative care. Establishing a clear minimum is critical given the likelihood that some belligerents will attempt to avoid

[3] Anthony Coates, "Is the Independent Application of *Jus in Bello* the Way to Limit War?" In *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, edited by David Rodin and Henry Shue (New York: Oxford University Press, 2008), 176–192, p. 191.

providing medical treatment, but this is not the principle's only boundary. The principle of restorative care is also limited in the sense that it only holds belligerents responsible for harm inflicted by them and not for pre-existing injuries or injuries inflicted by other belligerents.[4] Some medical assistance may go beyond what is necessary to satisfy the principle of restorative care. Examples of this include treating civilians for injuries caused by other belligerents, treating them for pre-existing conditions, and treatment that not only repairs an injury but that also elevates the patient beyond their level of health before sustaining the injury. I will call medical assistance that is not required by the principle of restorative care "supererogatory care," as it goes beyond what a state or other violent actor is morally obliged to provide.

Supererogatory medical treatment is fairly common in modern wars, especially in counterinsurgency operations. States fighting insurgencies may provide medical treatment as a means of earning the support of people living in the contested area or of stabilizing conflicts by eliminating any medical causes of insecurity. For example, the US military established the Medical Civic Action Program (MEDCAP) during the Vietnam War to support South Vietnam and legitimize its government in the eyes of the country's civilian population. The program was meant to train Vietnamese medical personnel – thereby improving their ability to care for the civilian population – while also building trust between Vietnamese and American personnel who operated together.[5] Whatever the motives for this type of care, even if they are strategic rather than benevolent, it goes beyond what is required and is therefore not governed by the same standards as medical treatment covered under the principle of restorative care.

Giving supererogatory care is often praiseworthy, and it in no way contravenes the principle of restorative care. My point in calling attention to it is only to clarify that belligerents are under no obligation to provide it – at least not according to the principle of restorative care. Supererogatory care should be encouraged, but it cannot be required by the logic of the positive duty because that duty only arises when belligerents must mitigate civilian suffering resulting directly from their actions. Belligerents providing supererogatory care also lack the same obligation to continue providing medical treatment to civilians as they would the treatment of injuries they have a rights-based duty to repair. To some extent, those providing supererogatory care may be seen as giving

[4] One of the central differences between my positive duty and the duty implied by utilitarianism is that utilitarianism would not exempt belligerents from the responsibility to repair pre-existing conditions or harm inflicted by others.

[5] David S. Kauvar and Tucker A. Drury, "Military Medical Assets as Counterinsurgency Force Multipliers: A Call to Action," *Small Wars Journal*, November 28, 2008. http://smallwarsjournal.com/jrnl/art/military-medical-assets-as-counterinsurgency-force-multipliers-a-call-to-action (accessed March 20, 2017); Robert J. Wilensky, *Military Medicine to Win Hearts and Minds: Aid to Civilians in the Vietnam War* (Lubbock, TX: Texas Tech University Press, 2004), pp. 48–77.

themselves an obligation to continue treatment if they create an expectation among those receiving it that it will continue into the future. This is especially true if treatment in any way undermines the capacities or legitimacy of indigenous healthcare providers.[6] Nevertheless, arguments for an obligation to provide treatment that I consider to be supererogatory would have to come from some source other than the positive duty and the principle of restorative care.

Existing Standards of Treatment

Belligerents already face some demands to provide medical treatment apart from the principle of restorative care. Articles 55 and 56 of the Geneva Conventions describe the responsibilities that occupying powers have to protect people living in the territories under their control. Article 55 states that occupying powers must ensure that those living in the occupied area have access to adequate levels of basic necessities, including "medical stores." It also forbids requisitioning these goods except where the demands of the local population are adequately met.[7]

Article 56 addresses medical treatment more directly and is the most important part of the Geneva Conventions with respect to the principle of restorative care:

> To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties.[8]

Articles 91 and 92 also provide some guidelines for healthcare, as they address the importance of maintaining adequate medical treatment in detention facilities. These may be considered an extension of civilians' medical entitlements in a sense, since prisoners of war regain the protection of the right to life when they are captured.

The Geneva Conventions and the principle of restorative care are complementary, but the latter goes far beyond the responsibilities established by the former. First, the medical requirements included in the Geneva Conventions

[6] For more about the possibility that medical treatment from counterinsurgency forces might undermine indigenous healthcare providers, see Matthew W. Rice and Omar J. Jones, "Medical Operations in Counterinsurgency Warfare: Desired Effects and Unintended Consequences," *Military Review* May–June (2010), 47–57.

[7] International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), August 12, 1949, 75 UNTS 287.

[8] Ibid.

only apply to occupying powers, thereby failing to establish any duty to help civilians who are harmed by uses of force within an enemy's territory. By contrast, the principle of restorative care applies to all belligerents and extends to protect any civilians who suffer a breach of their right to life, even when they are outside the territories occupied by the belligerent that inflicted the harm. This makes the principle of restorative care a much broader protection of civilians' rights, and one that pertains in a wider variety of conflict scenarios.

Second, the Geneva Conventions are primarily framed to prevent belligerents from interfering with medical treatment, rather than to require that they provide it. This is an important component of the larger goal of ensuring that civilians are adequately cared for, but non-interference is a reflection of the negative duty to avoid inflicting harm rather than a positive duty to repair harm that has been inflicted. As with other expressions of the negative duty, the positive duty is a necessary supplement to the prohibition on interfering with medical services that would give victims of such interference a stronger guarantee of their rights. Thus, while the Geneva Conventions provide an important starting place for implementing rules regarding the treatment of civilians, they fall short of some of the demands that have to be met by principles that enact the positive duty.

The Additional Protocols of the Geneva Conventions, which were drafted in 1977 and came into effect in 1979, provide more guidance on the treatment of civilians. Protocols I and II are primarily concerned with protecting the victims of war and devote much of their attention to the provision of medical care. Protocol I calls for medical treatment for all "wounded, sick, and shipwrecked"[9] military personnel and establishes provisions for the protection of medical personnel. It also affirms that occupying powers have "a duty to ensure that the medical needs of the civilian population in occupied territory continue to be satisfied."[10] As part of this duty, military forces are forbidden from disrupting the operations of, or seizing equipment from, civilian medical personnel when these are necessary for helping the indigenous population. Civilians are likewise granted permissions to provide medical treatment without interference, to bury the dead, and to receive assistance from humanitarian organizations.

The civilian protections described by the Additional Protocols go beyond what was set out previously by the Geneva Conventions and establish some obligations that fall within the scope of the principle of restorative care. This is particularly true when it comes to the Additional Protocols' duty for occupying powers to care for indigenous civilian populations. Still, the Additional

[9] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977. https://www.law.upenn.edu/live/files/3897-additional-protocol-i–excerptredacted.pdf (accessed March 20, 2017). Article 10(1).

[10] Ibid., Article 14(1).

Protocols fall short of fully satisfying the demands imposed by the positive duty. Their framing is largely negative, having to do primarily with prohibitions against interfering with medical treatment in various ways or inflicting additional harm via medical experimentation. These are essential measures for preventing civilian victimization, yet as I have repeatedly pointed out, these types of restrictions are insufficient protections of civilians' rights. The principle of restorative care builds on these insights and strengthens them with more demanding standards of care. Moreover, the positive duty that informs that principle provides a compelling rights-based rationale for thinking that more substantial medical treatment for civilians is required.

Realizing the Principle of Restorative Care

With the standard of treatment required by the principle of restorative care established, it is possible to say more about how the principle should be put into practice and to discuss some of the challenges that it may encounter. Although the positive duty to assist civilians who have suffered a breach of their right to life belongs foremost to states and non-state actors waging wars, those organizations will have to enact this duty by delegating specific tasks to their members. The principle of restorative care must be realized at multiple levels, extending from the highest ranks of the civilian government and military down to enlisted soldiers. The actions that lead to a belligerent succeeding or failing to satisfy the principle of restorative care must be delegated to individuals, and it is based on the effectiveness of that delegation and the performance of those individuals that belligerents will ultimately be judged as succeeding or failing to satisfy the principle's demands.

Unlike the principle of recompense, which will be discussed in the next chapter, medical treatment cannot be the purview of a special administrative apparatus – at least not exclusively. Although medical professionals should be the ones primarily responsible for treating injured civilians, soldiers at all levels will have to facilitate those efforts. Medical treatment is frequently an urgent requirement that must be provided immediately by personnel in the field. It also requires careful coordination between military and medical personnel at various levels and who are performing much different roles.

The principle of restorative care will impose different demands depending on how a person's status and roles allow them to influence the provision of care. Because the exact apportionment of responsibilities is up to each belligerent and should be framed in a way that best allows them to provide treatment without interfering with their combat effectiveness, it is only possible to say roughly what types of responsibilities will have to be disbursed. Those at the highest levels of the chain of command will generally be involved in establishing the structural conditions that allow medical treatment to be given, such as

allocating resources, ensuring that adequate numbers of medical personnel are available, and delegating specific responsibilities. Those lower in the chain of command, as well as medical personnel outside the chain of command, will primarily be responsible for evacuating and treating civilian casualties.

Starting at the highest levels of the chain of command, civilian politicians and high-ranking members of the military must determine whether a war can be waged in accordance with the principle of restorative care at all, both before it is initiated and while it is in progress. They must, as I stated earlier, take reasonable steps to ensure that they will be able to give restorative treatment to civilians who are injured and that this care will be commensurate with the treatment given to their own soldiers and citizens. This calls for careful attention to what resources are on hand and how effectively they can be allocated. Sufficient numbers of medical personnel, as well as supplies and finances, must be available to provide all allied personnel and civilians with commensurate levels of treatment and to sustain a level of medical care that reflects the belligerent's overall capacity. If inadequate medical resources are available to wage a war or to provide treatment during a particular operation, then those in command positions must avoid initiating the war or carrying out that operation.

Exactly what resources are needed will depend on the context and the kind of war that will be waged. Deciding this will require careful planning and the management of resources based on plausible risk assessments. Anticipating the number of civilians who may need medical treatment will likely prove difficult. This is a problem that plagues *jus ad bellum* principles of proportionality and probability of success, which require similar judgments about the possible costs of a potential war. Nevertheless, it is a problem that can be partially resolved by applying the principle of restorative care diachronically.

Judgments about potential casualties should not be formed in a single moment but rather made and remade continually as circumstances change and new information becomes available.[11] This means that belligerents may have to adjust the way they fight over the course of a war in response to changes in their medical capacities, and that they may even be morally obligated to end a war if they are no longer able to provide treatment. Of course, the negative duty to avoid inflicting any civilian casualties will also urge commanders to choose actions that comply with the principles of discrimination and proportionality and that will therefore minimize the number of casualties that require assistance.

Many different types of resources are necessary for providing medical care, and these should be accounted for when belligerents are preparing for war or

[11] For more about employing predictive just war criteria diachronically, see Schulzke, "The Contingent Morality of War: Establishing a Diachronic Model of *Jus Ad Bellum*," *Critical Review of International Social and Political Philosophy* 18 (2015), 264–284.

for individual operations. First, it is essential to have trained medical personnel. This includes not only doctors and nurses but also field medics and soldiers trained in basic first aid, who can help to stabilize seriously injured civilians and ensure that they are evacuated. Second, a broad range of material goods are needed to treat casualties. These include goods drugs, surgical equipment, prosthetics, and monitoring devices, as well as the money required to procure those goods.

Civilian politicians also face a more demanding requirement in addition to their responsibility to allocate resources. They must not only prepare to treat casualties as they are inflicted but also make preparations for the long-term care of those who suffer serious injuries that require ongoing treatment. This may necessitate continuing treatment after a war has ended. I will say more about long-term treatment later in this chapter, since it poses special problems that go beyond those related to wartime medical treatment.

The responsibility for a belligerent's adherence to the principle of restorative care belongs primarily to those who can make policy decisions about whether and how a war is waged. They are in the best position to allocate medical resources or to alter the conduct of the war when they lack adequate resources. They are also in a position to monitor the competence of those subordinates who must implement the policy decisions. Nevertheless, individuals at other levels are also obligated to act as allocators of medical resources or as the providers of medical treatment.

Mid-level commanders, including officers at the field-grade level and junior officers who are able to make operational decisions, must act within the scope of policies established by those higher in the chain of command. They are primarily responsible for allocating the medical resources that have been made available for their operations and ensuring that these will be properly used to help civilian casualties. This responsibility mirrors that of civilian politicians and high-level military commanders on an operational or tactical, rather than a strategic or theater, scale. Officers at this level may fail to adhere to the principle of restorative care if they have adequate resources available to care for civilian casualties but do not allocate those resources properly. They should also be accountable for operational policies and rules of engagement that may influence whether and how their subordinates aid civilian casualties.

Commanders at the small-unit level must ensure that their subordinates are trained in basic lifesaving techniques and that sufficient numbers of soldiers are designated to provide medical assistance and carry out medical evacuations. They will also be in a position to directly oversee the initial assessment of civilian casualties and their evacuation from the battlefield, which gives them the most direct responsibility for ensuring that civilian casualties are located and brought to safety. All soldiers who are present on the battlefield and able to personally assist civilian casualties are obliged to do so as members of the

organizations that inflicted those casualties, though soldiers who are designated as medics have a greater obligation to do this because of their role. Soldiers who encounter civilian casualties should be expected to provide basic lifesaving care and to evacuate the casualties to areas where they can be treated by medical professionals, just as they would for wounded soldiers. Their adherence to the principle of restorative care can be gauged in terms of whether they take reasonable efforts to repair minor injuries or to stabilize and evacuate more seriously injured civilians.

It is a matter of contention whether soldiers should be required to undergo personal risk in order to protect civilians when it comes to following the negative duty of not inflicting harm on them. Some commentators argue that soldiers are justified in shifting the burden of risk on to civilians by prioritizing their own defense over civilian protection.[12] Others maintain that soldiers are obliged to avoid harming civilians even if this requires them to take greater risks.[13] The principle of restorative care raises a similar difficulty with respect to the positive duty: what risks are soldiers morally obligated to take when attempting to treat or evacuate civilian casualties during combat or in hazardous areas?

It would be a mistake to think that soldiers have lower obligations to endure risk when it comes to enacting the positive duty than the negative duty. The positive duty arises because belligerents are at fault for failing to abide by the negative duty, and because of this fault members of belligerent organizations should be expected to endure some risks to provide medical care. At the same time, soldiers cannot be fairly expected to undertake extreme risks that would conflict with their own right of self-defense. Such efforts might be counterproductive in any case. Soldiers cannot help civilian casualties if they are themselves injured or killed and may further strain medical resources. Given these competing impulses, it seems reasonable to conclude that soldiers should be required to treat or evacuate civilian casualties when they would face a level of risk roughly equal to or less than the level of risk they ordinarily face in combat. By this standard, soldiers could enact the principle of restorative care without being in greater danger of being harmed than they are when performing their other military duties.

Military personnel at any level may find themselves with inadequate medical resources to treat all the civilian casualties that they inflict. This will force them to make challenging ethical choices, such as weighing the importance of mission objectives against the necessity of caring for civilians. Military personnel may even be put in the difficult position of being morally obligated to call off offensive operations because they have insufficient medical resources to treat

[12] Kasher and Yadlin, "Military Ethics of Fighting Terror."
[13] Jeff McMahan, "The Just Distribution of Harm between Combatants and Noncombatants." *Philosophy & Public Affairs* 38(4) (2010): 342–379.

civilian casualties. This may seem to be an undesirable outcome of the principle of restorative care, but it is absolutely necessary in order to protect civilians' rights and limit civilian suffering. Just as the goal of protecting civilians' right to life has led to the widespread acceptance of restrictions on the use of military force even when these restrictions limit military effectiveness and prevent armed forces from achieving objectives that would inflict high civilian casualties, so it should lead us to accept that helping civilian casualties will influence how wars are waged.

Doctors and Other Medical Personnel

The most important actors when it comes to operationalizing the principle of restorative care are the medical professionals who are tasked with treating civilians' injuries, and there may be some concern that their dual allegiances could create ethical dilemmas. Medical personnel may owe personal loyalty to a particular side in a conflict, yet they have a professional responsibility to assist any who require treatment. In principle, these obligations are complementary because they urge medical personnel to provide the best possible treatment for everyone. However, many commentators on military medical ethics have suggested that there may be a "dual loyalty problem" that arises when these demands come into conflict.[14]

There are grounds for doubting that the dual loyalty problem will affect efforts to abide by the principle of restorative care. Although it has received limited empirical analysis, the available evidence indicates that medical professionals' obligations rarely come into conflict in practice. Military medical professionals generally report that they treat casualties based on need, without considering how their treatment decisions may affect the war effort.[15] Moreover, the most serious instances of the dual loyalty problem arise when medical personnel facilitate torture or help to build new weapons, not when medical personnel are providing treatment.[16] This suggests that the dual loyalty problem is

[14] Solomon R. Benatar and Ross E. G. Upshur, "Dual Loyalty of Physicians in the Military and in Civilian Life," *American Journal of Public Health* 98(12) (2008), 2161–2167; Fritz Allhoff (ed.), *Physicians at War: The Dual-Loyalties Challenge* (New York: Springer, 2008); Michael L. Gross, "The Limits of Impartial Medical Treatment during Armed Conflict." In *Military Medical Ethics for the 21st Century*, edited by Michael L. Gross and Don Carrick (Burlington, VT: Ashgate, 2013), 71–84.

[15] Aine Donovan, "Military Physicians: The Myth of Divided Loyalties," *International Journal of Applied Philosophy* 24(1) (2010), 87–91.

[16] Fritz Allhoff, "Physician Involvement in Hostile Interrogations," *Cambridge Quarterly of Healthcare Ethics* 15(4) (2006), 392–402; Jonathan H. Marks, "Dual Disloyalties: Law and Medical Ethics at Guantanamo Bay." In *Physicians at War: The Dual-Loyalties Challenge*, edited by Fritz Allhoff. (New York: Springer, 2008), 15–38; Michael L. Gross, "Is Medicine a Pacifist Vocation or Should Doctors Help Build Bombs?" In *Physicians at War: The Dual-Loyalties Challenge*, edited by Fritz Allhoff (New York: Springer, 2008), 151–156.

not a serious threat to enacting the principle of restorative care.[17] Nevertheless, it is essential to consider the possibility that medical professionals' dual loyalties may generate conflicting demands when it comes to prioritizing treatment and allocating finite medical resources in extreme circumstances, such as when there are inadequate resources to care for all casualties or when the number of casualties is so high that effective treatment of all of them is impossible.

One response to the dilemma of prioritizing treatment is provided by Michael Gross, who discusses triage procedures at length in *Bioethics and Armed Conflict*. He argues that decisions about how to provide care and who should receive it should be primarily made by commanders, not doctors, and that medical demands should be subordinated to military necessity.[18] When wounded soldiers can be returned to service, military necessity suggests that they should be given priority for treatment. Similarly, if vaccines against biological weapons or common diseases are available, military necessity dictates that the vaccines be given to soldiers first. "When resources are scarce, any attempt to provide civilians or POWs with the same medical facilities one provides military personnel is, at the very least, counterproductive."[19] Gross goes on to say that, "[a]t the very least, salvage-based macroallocation policies require a clear distinction between soldiers and civilians, favoring the former to the detriment of the latter."[20] He qualifies this by saying that because severely wounded soldiers revert to civilian status, they should not receive priority treatment for reasons of military necessity. However, he contends that even those wounded soldiers who cannot return to military service have a stronger entitlement to receive care than civilian casualties.

Elsewhere Gross summarizes his case for subordinating medical treatment to military necessity into two points.

> First, the obligation to treat those who can contribute best to the war effort may override the duty to save lives when resources are scarce. Second, medical personnel may apply an ethic of camaraderie or ethic of care and treat their own soldiers first, regardless of the severity of their wounds, because of a special obligation they owe compatriots.[21]

These are good reasons for giving high priority to medical treatment for soldiers, especially when they can return to military service. These reasons could plausibly grant soldiers treatment priority over wounded enemy personnel and even civilians who were harmed by other belligerents. Nevertheless, I maintain that Gross' argument is insufficient to show that civilians who are entitled to treatment according to the principle of restorative care should have a lower treatment priority than soldiers.

[17] Donovan, "Military Physicians." [18] Gross, *Bioethics and Armed Conflict*, p. 66.
[19] Ibid., p. 151. [20] Ibid., p. 153.
[21] Michael L. Gross and Don Carrick (eds.), *Military Medical Ethics for the 21st Century* (Burlington, VT: Ashgate, 2013).

Providing medical treatment for injured civilians, especially civilians who are citizens of neutral or hostile states, is rarely advisable as a matter of military necessity. If anything, such treatment will ordinarily be contrary to military necessity because extra resources must be channeled into medical purposes and could lower the burden the injured civilians would place on the medical infrastructure in their home country. Treatment only seems to advance military goals when it is used to build indigenous support for counterinsurgency missions. However, I argue that military necessity cannot serve as the guiding norm for treating civilian casualties and that it cannot be allowed to supersede the right to life when it comes to determining what kind of care civilian casualties receive.

Gross links military necessity to "reasons of state" and says that on the tactical level, which is the level at which it applies to the treatment of individual soldiers and civilians, military necessity "justifies any measure that is efficient and allows a state to attain its military objectives."[22] He qualifies this by acknowledging that military necessity must be balanced against other norms, yet he insists that military necessity can override the right to life and other fundamental moral values.[23] This is a potentially dangerous line of argument. Giving military necessity primacy over the right to life threatens to undermine some of just war theory's most basic commitments. Just war theory is premised on the assumption that rights and fundamental moral values should constrain reasons of state and that military objectives must always be pursued within the confines of moral and legal boundaries. Gross' decision to give military necessity precedence over the right to life and his claim that military necessity calls for preferential treatment for soldiers is therefore far too strong and threatens the entire just war project.

The guidelines for treating civilian casualties should be defined in a way that leaves the underlying normative framework of just war theory and international law intact. If the right to life has any meaning – if it provides any substantive protection to civilians at all – then military necessity cannot provide grounds for neglecting to treat civilian victims of war. It would be inappropriate to allow military necessity to override the positive duty to repair injuries inflicted on civilian victims of war, just as it would be inappropriate to allow military necessity to override the negative duty to avoid harming civilians. We should regard any proposal to allow military necessity to interfere with the treatment of civilian casualties as just as much an affront to civilians' rights as using military necessity as an excuse for disregarding the principle of discrimination and deliberately targeting civilians.

Military necessity should be rejected as a reason for superseding civilians' rights-based entitlements to treatment, but doing so raises the question of how priorities of treatment should be determined instead. One possibility suggested

[22] Ibid., p. 60. [23] Ibid., p. 27.

by my argument is to appeal to the various types of rights that different groups of injured people have and to rank these rights against each other to determine the correct order of treatment. However, this potential solution would raise its own problems. The right to life is not the only right that matters when determining a person's entitlement to medical assistance in emergency situations. States and violent non-state actors have a fiduciary obligation to help those who fight on their behalf, and they have obligations to protect their civilian citizens.

Employing rights entitlements as a triage method would force one to weigh competing and incommensurable rights against each other. This is something that could be done in theory, but medical professionals are not in a position to make judgments about which patients have rights-based claims to treatment or to balance rights against each other when performing triage. It is unrealistic to expect doctors and nurses to make such determinations given their lack of background knowledge about how their patients were injured and the time pressures they face when attempting to treat a number of casualties that is beyond their capacity to help.

Contrary to Gross, I maintain that decisions about the priority of treatment should be made based solely on medical considerations. Medical personnel should treat civilians and soldiers as having equal entitlements to assistance and should conduct triage without attempting to account for competing rights to care. This also seems to be the most viable solution to the challenge of determining treatment priorities in practice. Leaving this decision to medical personnel, without holding them to any nonmedical criteria for determining priority, would free them from any conflicting obligations. They would be left to treat casualties in a way that coheres with their professional responsibilities and that will help to ensure that limited medical resources are invested where they will be most effective for repairing injuries.

Special Challenges for Restorative Care

Now that I have discussed the general form of the principle of restorative care and its implications for actors in various roles and at different levels of the chain of command, I will turn to some of the special problems that may arise when applying it in practice. Three problems stand out as being especially likely: cases in which belligerents unknowingly injure civilians, cannot get access to civilian casualties, or have to provide long-term care that continues after a war has ended. Although these are certainly not the only practical barriers to treating civilians, they are some of the most urgent. Resolving these challenges also helps to indicate how other practical challenges might be addressed.

Locating Civilian Casualties

There are many instances in which civilian casualties inflicted during an attack might not be immediately visible. Attacks on targets within populated areas

carry a clear risk of harming civilians and should therefore be followed by efforts to locate and evacuate civilian casualties as a matter of course. However, attacks against military targets in remote areas might produce unforeseen civilian casualties that go unnoticed. Consider a case in which Military A launches an artillery barrage against a remote outpost operated by Military B. With no populated areas nearby and civilians generally avoiding the front lines, Military A's commanders might reasonably think that the attack will not inflict any civilian casualties. Even so, Military A should make an effort to discover if any civilians were inadvertently harmed in the attack. This may be accomplished as part of the damage assessment that generally follows attacks with indirect weapons. Although these assessments are ordinarily used to determine whether a target has been destroyed, they could also account for civilian casualties.

Of course, civilian casualties may go unnoticed, especially if the damage assessment is conducted from the air and the target area is obscured. This is where the problem of locating civilians becomes more challenging. We might imagine that Military A launches its artillery strike and that its reconnaissance aircraft carry out a damage assessment, but that it still fails to notice that a hiker happened to be walking near Military B's outpost and was wounded by shrapnel. It would be excusable for Military A to fail to provide immediate restorative care for the hiker in this case because it has no cause for believing that a civilian was harmed in the attack and because reasonable efforts were made to assess the damage inflicted. The burden of claiming an entitlement for medical care and confirming that the injury was inflicted by Military A would have to fall on the wounded hiker.

This puts an undesirable burden on someone who was harmed and not discovered through no fault of his own, but this is the only plausible course of action during war. It would be unreasonable to expect anything more from Military A. Thus, as a general rule, I propose that the responsibility for locating civilian casualties falls first on the belligerent that inflicted the harm but shifts to the victims if the belligerent takes reasonable steps to locate casualties and is unable to do so.

The hiker's ability to seek care would also depend on the type of war being waged. If the injuries are inflicted during an occupation, in which Military A has nominal control over the territory in which the attack occurred, then the hiker may be able to contact Military A and request assistance. However, during a conventional war in which the hiker is within territory controlled by Military B, the hiker may not be able to communicate with Military A. If Military A makes reasonable efforts to locate civilians that it might have harmed and does not receive notification of the injury from the victim, then Military A bears no fault for failing to provide care. In such a case, the victim's inability to seek treatment is due to the structural conditions of the war, which are not solely under Military A's control and were not put in place for the purpose of denying civilians medical treatment.

Military B may carry out routine actions that end up interfering with the hiker's attempts to contact Military A, such as disrupting Military A's communications or making Military A's territory inaccessible to the hiker because it lies on the other side of Military B's defensive perimeter. Military B's actions are not blameworthy for interfering with civilians' claims for treatment if these activities are undertaken as part of the war effort and not intended to prevent civilians from receiving care. In other words, Military B is blameless if it inadvertently prevents the hiker from receiving medical attention that is owed by Military A.

Finally, the hiker is also not at fault for failing to claim treatment if he is disabled from doing so. If he suffers an unwarranted breach of rights and was prevented from receiving care by circumstances outside his control, and not because of his own negligence or failure to pursue treatment, then he can hardly be blamed for not contacting Military A. In this case the hiker will not be able to receive medical assistance, but will also not waive all claims to having the injury repaired. The hiker will therefore have grounds for seeking financial compensation after the war or once the circumstances of war have changed in a way that makes this feasible.

Of course, this all assumes the model of a conventional conflict between two state military forces. Based on the proliferation of asymmetric conflicts since the Second World War, it seems that the more plausible scenario will be one in which states have to provide medical assistance during conflicts with violent non-state actors. For example, for American and British forces operating in Iraq and Afghanistan, there were no clearly defined front lines that had to be crossed before wounded civilians could be reached. The lack of territorial boundaries in asymmetric conflicts strengthens the case for providing medical treatment by facilitating the evacuation of casualties. Fighting against enemies that had limited anti-aircraft weaponry and without being impeded by clearly defined lines of combat, Coalition forces in Iraq were relatively free to evacuate casualties. The lack of serious impediments from the enemy, improvements in medical technology, and organization of airmobile medical assistance made it possible to provide unprecedented care for soldiers and civilians alike.[24] Only in rare instances, such as when insurgents were given control over Fallujah in 2004 or Basra in 2007, were the Coalition forces prevented from evacuating the wounded who were effectively inside of enemy territory. Other states waging asymmetric wars may lack the technological sophistication of the American and British militaries, yet they still benefit from a preponderance of conventional military force that allows them to search for and evacuate casualties.

There are also cases in which operations are conducted inside foreign states that the attacker is not at war with. Over the past decade the United States and

[24] Eric Savitsky and Brian Eastridge (eds.), *Combat Casualty Care: Lessons Learned from OEF and OIF* (Falls Church, VA: Office of the Surgeon General, 2012).

United Kingdom have launched dozens of drone strikes against insurgents in Pakistan, Yemen, and Somalia. Although the precise number of civilian casualties inflicted is heavily debated, it is clear that many of the victims have been innocent bystanders.[25] These civilians are entitled to treatment based on the positive duty I advocate, yet attempting to reach them would require sending military personnel into dangerous areas inside of countries that are not considered active war zones. In these instances, it is important to look at how the attacks are authorized. The drone strikes in Yemen and Somalia have been launched at the behest of local governments,[26] while those in Pakistan have either been requested or at least tacitly approved.[27] States making these arrangements should be expected to also come to some agreement about how the casualties will be treated. States explicitly requesting foreign support could authorize the intervening military to evacuate casualties. Alternatively, an intervener may insist that it will not carry out strikes unless the local government bears the burden of providing treatment. For Pakistan, which usually seeks to conceal its reliance on Western support, the only viable arrangement might be for the local government to treat the wounded. Various different arrangements may be needed depending on political and military demands, yet some established procedures for treating the wounded are essential. Strikes should not be considered permissible when no arrangements have been made, especially when the states involved clearly have the resources to provide assistance.

Interfering with Restorative Care

Another potential barrier against providing medical treatment is the possibility that one belligerent might deliberately prevent an opponent from reaching civilian casualties. This type of problem is especially likely during conventional wars waged along clearly defined front lines. Militaries waging conventional wars have a strong interest in maintaining the integrity of their lines, and this may lead them to deny medical personnel from the opposing force the ability to cross into their territory. Concern about territorial integrity would not be unwarranted. Medical personnel could be used to collect intelligence. And even if medical personnel were purely neutral, persistent traffic through the front lines might cause confusion for the soldiers stationed there. Mistakes identifying those crossing the lines could allow combatants to infiltrate their opponent's

[25] Boyle, "Costs and Consequences."

[26] Greg Miller, "Yemeni President Acknowledges Approving US Drone Strikes," *Washington Post*, September 29, 2012. https://www.washingtonpost.com/world/national-security/yemeni-president-acknowledges-approving-us-drone-strikes/2012/09/29/09bec2ae-0a56-11e2-afff-d6c7f20a83bf_story.html?utm_term=.cd9e54a79a8c (accessed March 20, 2017).

[27] Jon Boone and Peter Beaumont, "Pervez Musharraf Admits Permitting 'A Few' US Drone Strikes in Pakistan," *Guardian*, April 12, 2013. http://www.theguardian.com/world/2013/apr/12/musharraf-admits-permitting-drone-strikes (accessed March 20, 2017).

territory, or it could lead to sentries firing on medical personnel misidentified as enemy combatants.

There are two ways of complying with the principle of restorative care when one side denies the other access to its territory for the purpose of locating and treating civilian casualties. The first recourse for a belligerent that cannot provide medical care directly is to attempt to work through a neutral intermediary. Nongovernmental organizations (NGOs) such as the Red Cross and Red Crescent, which have established reputations for giving disinterested treatment to the victims of wars, may be able to work on both sides of the front line without raising a risk of assisting one side or disrupting military operations. NGOs like these may therefore act as intermediaries through which offending belligerents can direct medical services toward civilian casualties. Belligerents doing this may furnish the equipment and funding for treatment, or NGOs may choose to take all of the burdens of helping civilians upon themselves. In either case, it is important that belligerents and the NGOs are aware that the latter are taking on the former's duty of care and that they coordinate their activities to avoid overlooking any victims. It is also vital that belligerents only delegate this duty to trustworthy organizations that can be expected to provide assistance that is comparable or superior to what the belligerent could offer.

Of course, some states and other violent actors may forbid NGOs from operating within their territory, thereby preventing NGOs from being a viable alternative to the direct provision of care. This makes it necessary to find a second way around the problem of territorial access. A belligerent that not only prohibits the direct provision of restorative care but also prevents NGOs from reaching civilian victims of war makes it extremely difficult for its opponent to follow the principle of restorative care, short of mounting armed missions to claim civilian casualties. This level of interference makes it unreasonable to expect the belligerent that inflicted the casualties to treat them, and should therefore exempt it from the principle's demands so long as civilian casualties are unreachable. At the same time, because this interference with medical intervention wrongs those civilians by denying them something that they have a right to receive, the belligerent that is responsible for this wrong should be the one to rectify it. In other words, belligerents that block medical assistance coming from an opponent or from NGOs should take on the responsibility for helping victims recover from their injuries and therefore become subject to the principle of restorative care with respect to those victims.

Long-term Medical Treatment

Some civilian casualties may require years of medical treatment and physical therapy. Some may also need occupational training to return to work or some type of living assistance if they are unable to continue working. The provision of these kinds of serious long-term treatment is challenging for three reasons.

First, belligerents that must provide medical treatment may wish to withdraw their forces from the region in which the civilian casualties were inflicted. It would be far too demanding to say that military forces are obligated to station medical personnel in all formerly contested areas indefinitely. And in any case, such a demand might conflict with the wishes of other states and undermine the sovereignty of states in which the recovering victims live. Second, post-war care creates a long-term burden for belligerents, which have to continue paying the costs of treatment for years or even decades. Such a burden may be unjust if it leaves those who were not responsible for the conduct of the war paying for its costs. Third, the high costs of long-term medical treatment could divert attention away from other important government programs or create lasting resentment between former enemies.

On the other hand, it is extremely difficult to determine when belligerents can terminate medical treatment without contravening the positive duty. Restorative care may not be able to completely heal injuries that are inflicted or provide treatment for the duration of long-term treatment, but it should allow those who are harmed to become self-sufficient to roughly the same degree as they were before they were attacked. If restorative care fails to do this, then it fails to vindicate civilians' rights and leaves the victims of unwarranted attacks to pay the costs for someone else's transgressions. Protecting civilians' rights will frequently make it necessary for medical treatment to continue for some time after hostilities are concluded.

The best way of overcoming the conflict between the entitlement to restorative care and the practical challenges of giving long-term treatment is to again acknowledge that the responsibilities imposed by the principle of restorative care will sometimes have to be delegated. Once a war has ended it may be necessary for long-term care to be taken up by NGOs or local organizations that can continue treatment without requiring the state responsible for causing the injury to maintain a lasting military presence. The belligerent that inflicted the injury should continue paying the costs of treatment even when it is not directly involved in helping patients, except when another organization voluntarily assumes that burden. The belligerent that is obliged to provide care must also take reasonable steps to ensure that the party assuming that role is capable of performing it. It would be impermissible for a state to delegate the treatment of wounded civilians to a NGO or foreign state that lacks the capacity to provide it. Moreover, preventing the abuse of delegation demands that the organization continuing treatment should be able to offer roughly the same quality of assistance as the belligerent that caused the harm.

Conclusion

As I have argued, the most basic way belligerents may fulfill their positive duty to repair the harm they inflict on civilians is by following the principle of

restorative care. This principle establishes a responsibility to give medical treatment to civilian casualties with the aim of repairing the harm they are supposed to be protected against. This principle is subject to some practical limitations, which reflect circumstantial differences in what level of medical care may be given. However, as I have argued, a basic standard of care can be ensured if civilian casualties are given treatment that is commensurate with what friendly military personnel would receive and reflects a good-faith effort to take reasonable steps toward assisting civilian casualties.

The most likely objections to the principle of restorative care are that it is impractical and that it creates an excessive burden on those waging wars. I have responded to several of the practical difficulties associated with the principle in this chapter, and I will take up this more substantial objection in Chapter 7. For now it is important to remember that the responsibility created by the principle of restorative care is by no means a fixed burden that all belligerents have to endure in equal measure. It may be mitigated when precautions are taken to limit the extent of civilian harm. Because the principle of restorative care pertains to repairing civilian suffering, the best way to avoid assuming the burden of care is to avoid causing civilian casualties in the first place. Those actors who are involved at each level of decision-making should be held to the normal restrictive standards that are specified by the principles of discrimination and proportionality, and may exercise additional precautions in order to further reduce the likelihood of civilian casualties beyond what may be required by these principles.

Although the principle of restorative care is essential for protecting civilians' right to life by limiting the extent of the harm they endure, it is not sufficient for enacting the positive duty. This principle cannot offer much assistance to those whose family members are killed in attacks or who suffer the loss of essential property. As I have shown, there are also circumstances in which it may be prohibitively difficult for belligerents to abide by this principle, such as when they are unaware that they have inflicted civilian casualties or when they are prevented from reaching those casualties. Because of these and other challenges, it is essential to supplement the principle of restorative care with the principle of recompense, which I will describe in the next chapter.

6 The Principle of Recompense

Along with the principle of restorative care, the principle of recompense is a mechanism for enacting the positive duty of repairing harm inflicted on civilians that contravenes their right to life. As I pointed out in the previous chapter, restorative care and recompense are complementary, each repairing harm that the other is unable to fully address. Providing medical treatment to repair physical harm is an essential part of correcting breaches of a person's right to life. Medical treatment can limit the extent to which a person's life is threatened by injuries. Nevertheless, medical assistance is inadequate for addressing many of the types of civilian suffering that constitute a violation of or infringement on the right to life. The inability of medical treatment to repair all types of injuries that civilians may sustain makes it necessary to use financial compensation as a secondary mechanism for helping civilians.

The principle of recompense requires belligerents to pay pecuniary compensation to civilians who they injure or kill, as well as to civilians who suffer the loss of essential property. The use of financial compensation as the medium of corrective justice allows this principle to provide a more flexible response to the many different types of injuries that civilians may sustain during war. Money can be given to any civilian who is harmed, it can be easily transported to victims, its liquidity makes it useful for correcting the heterogeneous mixture of injuries that civilians sustain, and it can be easily monitored.

The principle of recompense differs significantly from some of the other forms of reparation that theorists have advocated, which are generally limited in scope, asymmetrical, and group-based. As I explain, using financial compensation to repair civilian victimization will require payments that are sensitive to individual need and that apply to all civilian victims of war – not just those who are represented by just belligerents or who are members of marginalized groups. All civilians who are attacked are entitled to compensation and all belligerents that fail to adhere to the negative duty are obliged to provide it, regardless of whether their cause is just.

Recommending this type of comprehensive financial assistance for civilian victims of war may appear to be unrealistic. One could argue that belligerents would resist the demands imposed by this duty or that the practical difficulties

associated with providing payments would be insurmountable. To this I would first respond by pointing out that just war principles are prescriptive demands, not descriptions of how belligerents really act. The principle of restorative care is one that belligerents should be expected to follow and it should be used to judge their conduct even if it is never perfectly enacted. Moreover, my proposal is not as radical as it may initially appear to be. In Chapter 8, I will discuss efforts that the US government has made to compensate civilian victims of war as evidence that there is a precedent for the kind of compensatory scheme I advocate. At the same time, I use this case study as evidence that existing compensatory programs are insufficient and that more work needs to be done to ensure that claims for compensation are heard by neutral judges, that payment amounts are increased, and that civilians are not prevented from receiving payment for injuries inflicted during combat.

The first section of this chapter provides an overview of the principle of recompense. It discusses the uses of financial compensation and the types of harm it is meant to address. The second section explains why money is the best medium for repairing the harm inflicted on civilians and how it should be disbursed. The third section defends the principle of recompense against existing theories of post-war reparations. In the fourth section I show that the duty to pay compensation to civilians should be symmetrical, applying to all combatants regardless of their adherence to the principles of *jus ad bellum* and *jus in bello*. In section five I respond to Brian Orend's concern that the kind of compensatory payments I propose could be indiscriminate because of the tax burden they would impose on civilians. Finally, the last section discusses several of the potential objections that could be made against the principle of recompense.

The Principle of Recompense

Rex Martin says of compensation as a general approach to repairing breaches of rights that: "Compensation addresses the failure to maintain rights which each violation implies. It does so by making up the loss or restoring the benefit to the individual involved. Thus, the reason for having rights is satisfied in the case at hand; and the right in question is maintained, as much as practicable, fully for all."[1] The principle of recompense is designed to apply this same reasoning in a wartime context to help civilian victims. It is a reparation in the sense Margaret Walker uses the term, as it is concerned with making those who caused a wrong repair it by providing goods in a way "that expresses acknowledgement of the wrong, responsibility for the wrong or its repair, and the intent of rendering just treatment to victims in virtue of wrongful treatment."[2]

[1] Martin, *A System of Rights*, p. 260.
[2] Margaret Urban Walker, *What is Reparative Justice?* (Milwaukee, WI: Marquette University Press, 2010), p. 19.

According to the principle of recompense, states and violent non-state actors that violate or infringe on a civilian's right to life are responsible for paying compensatory damages to repair that harm, provided it has not already been repaired through restorative medical care or some other type of assistance. Payment must be made by belligerents to any civilians their forces directly harm, regardless of whether those inflicting the harm acted justly or unjustly in either an *ad bellum* or *in bello* sense. The payment is not an admission of moral guilt, as it may be inflicted in ways that are morally defensible. It is only an enactment of the positive duty to repair civilian suffering. Because the goal of payment is to repair the damage inflicted through a belligerent's failure to abide by the negative duty to avoid inflicting harm, the level of payment must be appropriate to repair the breach of the victim's right to life.

It is impossible to set a precise amount of money that would be appropriate to repair all injuries under all circumstances. Payments must reflect the extent of the harm inflicted and the cost of repairing that harm in a given place. A person who suffers a minor injury would generally be entitled to a smaller settlement than one who loses a limb or is paralyzed. The latter sustains a more serious injury – a more serious breach of the right to life – and will probably need more money to repair it. Similarly, victims in countries where the cost of living is high will require more money to recover from a breach of rights than those in places with a lower cost of living. After all, it is not the amount of money that is important but rather how that money can be used to repair a particular person's injuries.

Those who judge claims for compensation will have to determine the amount of compensation due to each person by weighing these factors and other relevant circumstantial details, such as whether the person seeking compensation has already received other forms of assistance or whether that person is guilty of any contributory negligence. The processes for adjudicating claims and determining the appropriate amount to be paid will be covered in more detail in Chapter 8 when I discuss the institutional changes that have to be made in response to the positive duty. For now I will focus on demonstrating that some type of compensatory payment system should be enacted.

The caveat that compensatory payments should only be made when the harm has not been repaired in some more direct way is meant to leave open the possibility that belligerents could find alternative means of assisting civilians that would be more immediately beneficial than payment. I already explored the reasons for this when discussing the principle of restorative care, and while medical care is the most important type of direct assistance, it is not the only type. Military forces should be permitted to seek alternatives to financial compensation whenever this might provide a faster and more effective way of performing the positive duty. For example, soldiers who destroy a person's home could rebuild it instead of giving financial compensation. This would repair the

harm that was inflicted in a more direct way than money, which would have to be used to hire contractors. In this type of scenario, the victim would not be entitled to seek monetary damages for property loss because the home was directly repaired. The same reasoning could be applied in similar cases of belligerents directly repairing the harm they inflict.

The principle of recompense is an important manifestation of the positive duty because it covers a much broader range of harms than the principle of restorative care. Recompense can be used to help civilians who are unable to receive medical treatment or whose injuries cannot be completely repaired. Compensatory payments can also be made to the families of those who were killed and to those who suffered the destruction of essential property. Each of these harms would go unaddressed by the principle of restorative care if it were treated as the sole obligation arising from the positive duty. Aside from some types of property damage, these injuries are likewise ones that would go unaddressed by any form of direct assistance that belligerents might be able to provide.

Three classes of individuals are entitled to financial compensation based on the positive duty: those whose injuries were not repaired through medical treatment, those who suffered the loss of essential property, and those who were killed. I already discussed giving payments to those who are injured and unable to receive medical treatment or who only received partial treatment in Chapter 5. Recall that payment to these civilians is warranted because the breach of their right to life is not fully repaired by medical treatment, leaving residual damage that demands correction.

Although they may not be physically injured, civilians who have been deprived of essential property are entitled to compensatory payments that are used to enact the positive duty. I define essential property as property that is necessary for a person's survival, the damage or destruction of which would seriously threaten a person's physical well-being and constitute a breach of the right to life. It is imperative to repair or replace this type of property as a protection of civilians' rights and to do so in a timely manner to prevent civilians from being physically harmed as a result of their deprivation.

What exactly qualifies as essential property depends on the context. Different goods are required for survival in different places, and even in a single location individual civilians may require different material resources. A farmer who relies on his crops for subsistence would be entitled to compensation if those crops were destroyed in an artillery strike or crushed by a tank. The offending belligerent may not harm the farmer directly but nevertheless threatens the farmer's right to life by endangering his capacity to provide for himself. By contrast, if a large agribusiness were to lose some of its farm land and some of its profits, though not to such an extent that its employees' lives were threatened, then the damage would not constitute a breach of the right to life.

The resulting damage would not require compensation under the principle of recompense, though it would certainly be desirable for the belligerent inflicting the damage to voluntarily provide some assistance to the company that owned the farm.

In the latter scenario it is possible that the loss of crops could threaten those who would have purchased them in the future. The large farm might be the primary supplier of food in the region, and its destruction could cause a famine. Ideally, belligerents would provide some assistance in this type of scenario to prevent civilians from starving, and it would certainly be wrong for them to attack food supplies intending to indirectly harm civilians. Nevertheless, I maintain that assistance for those who might potentially depend on property in the future cannot be required by the principle of recompense. It would be far too demanding to expect belligerents to be aware of how property may change hands in the future and how its status might be altered by changes of ownership. Such an extended conception of recompense would also raise insurmountable practical problems, as it is doubtful that any armed forces would be able to compensate civilians not only for the loss of essential property but also for limiting their opportunities to obtain essential property in the future.

Finally, compensation is owed to those whose family members are killed and who cannot personally claim compensation. Those who are killed clearly suffer a breach of their right to life, yet the problem that emerges when addressing their harm is that payment must go to someone other than the person who suffered the injury. If a civilian is dead, then compensatory payments cannot repair them; the breach of the right to life is total and irrevocable. This leads to a contentious issue in the theory of corrective justice. As L. W. Sumner says, "[t]he issue of whether posthumously satisfied desires can benefit their erstwhile holders is a hotly debated one. Some people find it just obvious that the dead can be neither benefitted nor harmed, while others find it equally obvious that lives are capable of retroactive prudential improvement."[3]

When civilians are killed, there are strong grounds for providing compensatory payment to family members who claim damages on their behalf. First, payments to the family members of decedents can benefit those decedents, even though they cannot feel the effects of compensation themselves. The most immediate benefit is that payments can cover funeral expenses and any outstanding debts or financial obligations that the victim may have. This would allow the decedent's body to receive the appropriate burial rites and protect their reputation. These things may not directly benefit a person who is dead and unable to take any comfort in material or social rewards. However, because these uses of compensatory payments affect the decedent's reputation, they have an interest in them even after death.

[3] L. W. Sumner, *Welfare, Happiness, and Ethics* (New York: Oxford University Press, 1996).

Second, and even more importantly, compensatory payments can help decedents' family members and friends in their absence. A civilian who is killed is apt to have many associational links to others who depend on them for support and who have made investments in them. When a civilian who cares for others is killed, the breach of that person's right to life adversely affects the dependents. They suffer lasting harm from the breach of rights sustained by the deceased and may even be physically threatened by that person's absence. This is particularly true in instances when the decedent is a parent caring for children, a child caring for an elderly parent, or the main provider for a family. Family members also invest in each other, sharing time and money and thereby developing a material interest in their mutual well-being.

Third, compensatory payments can help to advance what Hannon Williams calls the decedent's "life project." As Williams points out, "[p]art of the tragedy of death stems from the way it cuts off my ability to affect the world. This is a tremendous loss because everyone has goals and aims that require affecting the world."[4] Williams cites many examples of life projects that could be advanced using posthumous compensation, including raising children, creating art, and promoting a business' success. Financial compensation is an imperfect remedy that cannot revive victims of war, but it can be paid to the victim's estate and used in ways that support the decedent's life project. Thus, "[p]roviding money to the estate of the victim is a partial or imperfect way of mitigating at least part of what makes death tragic."[5]

Finally, requiring compensatory payments to be made to the family members of civilians who are killed helps to reinforce the negative duty by ensuring that combatants do not have a reason to prefer killing civilians to wounding them. As Williams points out, failing to recognize compensatory obligations to family members creates an incentive to kill victims who could be entitled to compensation, or to at least to allow them to die.[6] If a person is wounded but not killed, then the belligerent responsible for inflicting the wound would have to pay compensation. Yet if the same person is killed and there is no obligation to pay family members, then the belligerent would have no corrective duty. This would give belligerents a reason to kill civilians instead of wounding them, or to allow civilians to die of serious injuries instead of rendering assistance. Compensatory payments must be framed so as to avoid creating any incentive to cause additional harm, which suggests that payments must be due regardless of whether an injured civilian lives or dies.

[4] Sean Hannon Williams, "Lost Life and Life Projects," *Indiana Law Journal* 86 (2012), 1745–1789, p. 1744.
[5] Ibid., p. 1775. [6] Ibid., p. 1746.

The Utility of Money

Financial assistance may initially seem inappropriate as a means of repairing breaches of rights. Paying civilians who have been attacked could appear to cheapen civilians' lives or to underestimate the magnitude of civilian suffering. It could be especially upsetting when recompense is due following attacks that violated *jus in bello* principles. Giving money to the victims of unjust military actions might even seem like a way for combatants to buy their way out of moral guilt. I admit that using financial compensation to repair civilian suffering is, in many ways, uncomfortable and unfortunate. It can be upsetting to put a price on people's lives and their injuries. Moreover, many of the harms that are inflicted during war cannot fully be repaired by any amount of money. Payment for a lost limb may ease the pain of living without the limb or pay for a prosthesis, but it cannot repair the limb itself. And those whose family members are killed endure an emotional cost that cannot be repaid by any amount of money.

There are, nevertheless, good reasons for using money as a medium for alleviating civilians' injuries. The foremost advantage of financial compensation is that it is parsimonious. The class of civilians whose suffering must be addressed under the positive duty comprises a heterogeneous mixture of people who have sustained myriad incommensurable types of harm. Assisting these people with multiple different mechanisms that are aimed at fixing the specific types of harms the victims suffered would create serious practical challenges, such as determining what type of assistance is appropriate and monitoring the provision of multiple different types of aid. Money, by contrast, can act as a single medium through which people with a broad range of harms can be helped. It can even be used for those who suffer in unforeseen ways and who might be left out of a more rigid framework for repairing injuries with nonfinancial mechanisms. A principle that requires compensatory payments is therefore strongly positioned to ensure that no breach of rights goes unrepaired.

Using money as the medium of compensation has the benefit of making assistance more transparent. When the positive duty is manifest in compensatory payments, its demands are visible to civilian victims, the actors involved in the war, and third-party audiences. Money acts as a clear metric that allows members of each of these groups to determine whether the positive duty is being adequately performed. This is in the best interest of civilian victims of war, as well as all who may potentially become victims. These people would benefit from knowing exactly what amount of assistance they are entitled to and the extent to which a belligerent has failed to perform the positive duty if payment is not forthcoming. Belligerents would gain from knowing the exact level of assistance they must provide to satisfy the positive duty. Their payments would also be evidence of the belligerents' sensitivity to civilian

suffering and of their willingness to comply with the normative constraints on war. Third-party audiences lack a direct stake in the payments, yet they could benefit from being in a position to evaluate belligerents' conduct and to more effectively punish or reward belligerents based on their compliance with the positive duty.

Compensatory payments may deter or punish violent organizations that harm civilians. If belligerents know that they will have to pay for the harm they inflict, then they may be more inclined to act cautiously when there is a risk of inflicting civilian casualties. They may also feel punished when they are required to provide payments to victims of their attacks. However, deterrence and punishment should not be seen as the primary reasons for extracting compensatory payments. The guiding rationale behind making payments is the demand of repairing breaches of civilians' rights and the harms caused by such breaches. Any beneficial side-effects are ancillary to that goal. Payments should not be used as a proxy for war crimes prosecution or other efforts to punish violent organizations when they are guilty of wrongdoing, as using them in this way would detach them from their underlying moral foundation and could also compromise the payments' legitimacy among belligerents, whose assent is essential for creating compensatory payment schemes.

One could imagine extracting punitive damages in addition to reparative payments in an effort to encourage combatants to show greater restraint around civilians. However, punitive damages would be inappropriate or counterproductive under most circumstances. It would be inappropriate to demand punitive damages when harm is accidental or inflicted in accordance with the DDE. Such attacks may breach civilians' rights, but because these breaches are not inflicted immorally, punishing belligerents in addition to charging them for reparations would be excessive. This leaves open the possibility of exacting punitive damages in cases of wrongdoing, such as attacks that target noncombatants, yet even in these cases I maintain that punitive damages should not be applied. Fines are too weak a punishment for those who intentionally or negligently use violence against civilians. Such reprehensible actions call for moral condemnation and harsher punishments, such as the imprisonment of the guilty parties.

Any type of punitive damages would increase the practical challenges of enforcing the principle of recompense and could end up threatening civilians' security more than helping it. It would be far more difficult to hold states accountable for punitive damages than for compensatory damages. The latter can be justified by the suffering incurred, but the former are more likely to be viewed as illegitimate because the punitive damages go beyond what is necessary to repair civilian suffering. This is a generally recognized problem in international law, which has led "to the emergence of a rule that prohibits the

indiscriminate punishment of a people through excessive reparation claims or sanctions."[7] Punitive damages would also have to be far more burdensome than compensatory damages, especially when applied to wealthy states. This poses a further threat to compliance and raises the additional risk of potentially compromising a state's capacities to provide for its own post-war reconstruction.

Existing Theories of Post-War Reparation

As we saw in Chapter 2, several just war theorists have developed plans for making post-war reparations. These theorists have made important contributions to exploring the possibilities of corrective justice after war, yet their proposals tend to suffer from limitations that make them inadequate for repairing civilian suffering and protecting civilians' rights. First, existing theories of reparation usually describe repayment as a means of promoting justice for groups, rather than for individuals whose rights are breached. Second, reparations are usually asymmetrical. They are extracted from unjust aggressors and given to just combatants or the victims of unjust wars. That is to say, payments are demanded because of the *ad bellum* injustice of initiating an aggressive war. Third, payments and other reparative efforts are described as being given after a conflict, with little if any attention being given to the problem of assisting civilians *during wars*.

Walzer's theory of post-war payment serves as a prime example of these tendencies, and is particularly important to consider because his work is so often the starting point for other just war theorists. According to Walzer, reparations should be given to "the victims of aggressive war" by their attackers.[8] This kind of post-war payment is meant to reduce the reconstructive burden on states that are drawn into war by an aggressive rival and that have therefore not acted wrongly from a *jus ad bellum* standpoint. Walzer acknowledges that compensation for aggressive wars can be difficult, especially when a defeated state is destroyed and many of those personally responsible for initiating the war are killed. His solution is that a post-war tax should be imposed on the citizens of the country that initiated the war and that this tax should be used to fund reconstruction.

Orend shares Walzer's interest in using financial compensation as a way of punishing aggressive states. As I discussed in Chapter 2, Orend argues that aggressive states can be forced to pay compensation to the states that they attack. The basis for demanding this payment is, as in Walzer's account, that

[7] Carsten Stahn, "'Jus Ad Bellum,' 'Jus in Bello' . . . 'Jus Post Bellum'? – Rethinking the Conception of the Law of Armed Force," *European Journal of International Law* 17(5) (2006), 921–943.
[8] Walzer, *Just and Unjust Wars*, p. 167.

the aggressor has inflicted unjust harm on its victim and that this aggression should be repaired because it is unjust.

> Since aggression is a crime which violates important rights and causes much damage, it is reasonable to contend that, in a classical context of inter-state war, the aggressor nation, "Aggressor," owes some duty of compensation to the victim of the aggression, "Victim." This is the case because, in the absence of aggression, Victim would not have to reconstruct itself following the war, nor would it have had to fight for its rights in the first place, with all the death and destruction that implies.[9]

Orend goes on to summarize this duty by saying that, "to put the compensation issue bluntly, Aggressor has cost Victim a considerable amount, and so at least some restitution is due."[10] Thus, like Walzer, Orend thinks that compensation is owed by one political community to another, that it is required because of an aggressor's moral guilt, and that it should be paid after a war.

Although most just war theorists who consider the problem of post-war justice generally agree with Walzer and Orend, at least when it comes to their contentions that payments should be group-based, assigned based on immoral conduct, and paid after a war, some have raised alternative theories of reparation.

Pablo Kalmanovitz calls attention to two central issues that must be addressed when considering the scope of post-war civilian assistance: who should have to contribute to reconstruction funds and who should be entitled to assistance. Like Walzer and Orend, he thinks that "[i]t is natural to think that those responsible for an unjust war should stand first in the input line."[11] He reasons that this is warranted because the unjust aggressor has acted wrongfully by waging war and is responsible for the resulting injustices. Kalmanovitz sides with Walzer in thinking that unjust states are liable for helping the victims of their wars and disagrees with Orend's reasons for thinking that only those individuals who were directly responsible for the unjust war should have to pay. Nevertheless, he argues that unjust belligerents will often be unable to pay for the damage that they cause and that additional resources may therefore have to be extracted from other states.

Kalmanovitz argues that states other than the unjust aggressor may be forced to pay for reconstruction based on "a duty of humanitarian aid – or a Lockean duty of charity."[12] There are grounds for providing assistance to civilians as an act of charity whenever those civilians' subsistence is threatened. Victims of war must be sustained at or above a basic level of well-being by other states that have available resources. "Legally speaking, the effect of charity is to mandate transfers of goods from the affluent to those in dire need, who are *entitled* to

[9] Orend, *The Morality of War*, p. 166. [10] Ibid.
[11] Kalmanovitz, "Sharing Burdens after War," p. 210. [12] Ibid.

them on grounds of deprivation."[13] With civilians' entitlement to assistance being grounded in a right to have the goods necessary for survival, Kalmanovitz reasons that the obligation to provide assistance should go to affluent states that are in possession of the required goods. Those with a property surplus are obliged to give the excess to those who are in need. Other considerations, such as proximity to the civilians in need, may also be taken into account for practical reasons.

Kalmanovitz provides a strong rationale for thinking that affluent states may sometimes have a duty to assist those who are in need, yet he fails to note that the belligerents that harm civilians have a special duty to correct that harm. He only expresses a general concern for civilian welfare as grounds for thinking that some efforts at assistance should be made. As he says, "[i]f we accept that in general wars hit civilians undeservedly and unequally, it seems clear that efforts should be made to reallocate the burdens of loss more equitably."[14] I maintain that Kalmanovitz is correct in thinking that there may be a general responsibility for affluent states to help the needy when no one else is able to do so, but that he is mistaken in neglecting the more fundamental duty belligerents have to assist civilians. Moreover, Kalmanovitz makes the same mistake as Walzer and Orend by thinking that states waging just wars are free from any responsibility to pay for the harm they inflict.

James Pattison objects to what he calls the "belligerents rebuild thesis," which is the view that the belligerents involved in a war should be responsible for post-war reconstruction. It is, he argues, often impossible or inappropriate for belligerents to take on reconstruction duties. Pattison thinks that the responsibility to rebuild should go to the state with the greatest ability, which will generally not be a belligerent involved in the war. As he puts it, "the international duty to rebuild should be assigned to the agent that can most justifiably discharge this duty according to the conditions that I outline. In practice, I will argue that this often means that the UN has the duty to rebuild."[15] Although Pattison discusses post-war reconstruction as a general problem and does not give much attention to the plight of civilians in particular, it seems likely that he would apply his argument to efforts at civilian compensation, such as my own.

Pattison's first objection to the belligerents rebuild thesis is that requiring a belligerent to fund reconstruction "seems unfair when the belligerent has fought a just war." Pattison raises the problem of why a belligerent staging a humanitarian intervention should have to pay the costs of rebuilding after becoming involved in a war for benevolent purposes. Humanitarian interventions are an important counterargument to the belligerents rebuild thesis, which I will discuss at length in the next chapter. But aside from purely benevolent

[13] Ibid., p. 218. [14] Ibid., pp. 209–210. [15] Pattison, "*Jus Post Bellum*," p. 636.

humanitarian interventions, which are exceptional and account for a tiny minority of the wars that have been waged throughout history, it is unclear how it could be unfair to require belligerents to correct the destruction that they have caused.

Contrary to Pattison, my proposal for a "belligerents rebuild" positive duty could hardly be fairer, since it only requires belligerents to repair the harm that they have inflicted and that others have a rights-based protection against. Compensation in this kind of scenario is generally seen as being eminently fair, otherwise it would not be the standard form of repairing breaches of rights in most domestic and international contexts. As Williams correctly points out, "[a]ll corrective justice accounts impose duties of repair on the wrongdoer. Further, they do so because of the normative link between victim and wrongdoer. This link serves as the justification for imposing duties of repair."[16]

Pattison's second argument is that "the warring parties may not be the most suitable agents to rebuild."[17] He raises four problems that are meant to demonstrate this. First, belligerents may cease to exist when they are defeated and may consequently lack the capacity to engage in post-war reconstruction. Second, "it may be difficult to trace causally which agents were the belligerents and so owe reparative duties, and the degree to which they owe reparations."[18] Third, "tracing culpability (or minimal responsibility), when used as the basis for assigning reparative duties to pay for the rebuild, may be even trickier, given that it may be very hard to accurately assess who did what before and during the war."[19] Finally, there must be a way of assigning the responsibility to rebuild if belligerents fail to do so.

Pattison is correct in thinking that defunct states will sometimes be unable to discharge their corrective obligations. Nevertheless, there is good reason to endure this challenge when attempting to repair civilian suffering. As I pointed out in Chapter 3, the logic of rights demands redress by the offender, and not by a third party. It is the offender who has failed to abide by the first-order duty and therefore the offender who takes on the second-order duty to repair the resulting harm to the greatest extent possible. Furthermore, any punitive side-effects of repayment, such as discouraging future misconduct, would be severely weakened if the responsibility for payment were assigned collectively.

Another important consideration is framing compensation in a way that will promote subjective feelings of justice on the part of victims, and this will be facilitated by holding the offending belligerent responsible for repairing harms. As Walker argues, "[m]oral repair is served by placing responsibility on wrongdoers and others who share responsibility for wrongs. Moral repair is served by acknowledging and addressing wrong, harm, affront, or threat to victims and

[16] Williams, "Lost Life and Life Projects," p. 1757.
[17] Pattison, "*Jus Post Bellum*," p. 637. [18] Ibid., p. 642. [19] Ibid.

communities."[20] Although the core function of the positive duty is to vindicate victims' rights, doing so in a way that promotes feelings of justice is desirable whenever possible. This feeling may help to repair the psychological trauma of injury and promote peace by encouraging victims to forgo opportunities for violent retribution.

Failing to hold offenders responsible can even have the corrosive effect of calling shared norms into question. "To fail to reprove wrongdoers or to fail to hold responsible those to whom responsibility reasonably falls is to cast doubt on the authority of norms, to authoritatively if implicitly mark exceptions to them, or to indicate that wrongdoers are beyond the reach of the community or its norms."[21] Conversely, this failure may indicate that certain victims are beyond the norms' protection. Once again, holding specific belligerents responsible for their actions helps to minimize this moral injury by identifying the responsible parties and forming part of a process of collective recognition that individuals' rights were breached. This does not mean that other payment mechanisms may never be used, only that the offender must (1) be identified as responsible for the harm and (2) make the largest contribution that is feasible.

It is also important to point out that the practical challenges associated with recompense are not decisive in displacing this burden. I agree with Walker in thinking that:

> Arguments from practical difficulty and social discord are not conclusive arguments against undertaking sustained and systemic repairs where moral relations have been denied, distorted, or repeatedly damaged. On the contrary, if repair is owed, then repair must be attempted. If it has not been attempted, then wounds are still open and injuries and insults continue.[22]

Walker goes on to point out that failing to make the guilty party redress injuries, even if redress is woefully inadequate, magnifies the initial injury by failing to address the victim's sense of being wronged and suggesting that no reparative duty is owed. "Too little is better than nothing, and small gestures can carry larger meanings or can be a starting point for a broader reconsideration of relationships between individuals and within societies."[23] The practical concerns Pattison raises certainly matter, yet they must be regarded as logistical issues that should be managed throughout the process of arranging payments and not as grounds for rejecting the responsibility to repay. I will return to these practical challenges later in the chapter to show that they can be mitigated in various ways once we accept the underlying moral logic.

Pattison's second and third objections are closely related and call attention to the challenges of determining who has actually inflicted the harm that must

[20] Walker, *Moral Repair*, p. 28. [21] Ibid., p. 32. [22] Ibid., p. 36. [23] Ibid., p. 37.

be repaired. Because Pattison is talking about general responsibilities to repair, and not about assisting civilian victims of war, he may be right in thinking that responsibility is difficult to assign. It may be unclear which belligerent should be blamed for certain types of damage, especially when the damage is fairly abstract, such as economic or environmental degradation. It is much easier to determine fault for actions that directly harm individual civilians. Opposing belligerents typically wear different uniforms, use different types of munitions, operate in different areas, and attack different targets – characteristics that help to identify which attacker is to blame in a particular instance. Moreover, militaries typically track their forces' deployments and keep detailed operational reports that can also assist efforts to determine culpability.

There will doubtless be instances in which responsibility for harming a civilian is contested, and some in which it is impossible to know who is at fault. In those cases it will be essential to have independent arbiters like the ones I describe in Chapter 8, who will be able to judge claims based on the available evidence. These arbiters could even be given the power to decide that fault for a civilian's injuries must be shared when no available evidence can reveal which belligerent inflicted them.

Pattison's final problem, that some belligerents will refuse to perform their reparative obligations, is another reasonable concern that nevertheless fails to provide grounds for thinking that belligerents should not be held to any reparative demands. When a belligerent is unable or unwilling to pay compensation, some alternative way of providing assistance to civilians will be necessary. In such cases, the reparative efforts called for by Kalmanovitz or Pattison may be appropriate. I do not disagree with their contentions that there may need to be additional responsibilities for post-war construction. My point is only that the responsibility to repair civilian victimization belongs, in the first instance, to those who caused it. Any additional responsibilities should take effect when belligerents fail to perform the positive duty or when it is necessary to repair the types of harm that fall outside the scope of that duty.

Some difficulties in providing payments and attributing responsibility are inevitable, but these challenges do not establish grounds for abandoning the positive duty. The principles of just war are routinely ignored and violated by belligerents, yet these principles continue to be affirmed by just war theorists, as well as many policymakers, members of the military, and civilians who are concerned with restricting war. These principles retain their appeal, despite some violations of them, because they provide useful normative guidance and identify when immoral conduct has occurred. The same is true of the positive duty and its associated principles. I acknowledge that the principles of restorative care and recompense will not be applied faultlessly, but this should not allow belligerents to escape responsibility for the civilian suffering they cause.

Making Symmetrical Payments Based on the Positive Duty

The principle of recompense must, in most cases, be applied symmetrically, without consideration of which side is just and which is unjust. As I have established, the positive duty pertains whenever civilians are harmed and is not attached to moral guilt. This makes it critical to separate judgments about guilt from efforts to protect civilians' rights. Theorists who advocate asymmetrical payments make the mistake of conflating punishment and corrective justice by attempting to accomplish both of these ends with a single mechanism. The result is that their theories of payment are poorly suited for either purpose – they are neither strong enough to effectively constrain the actions of aggressive belligerents nor sufficiently comprehensive to address civilian victimization.

Civilians who are citizens of an aggressive state are, by virtue of their citizenship alone, no more deserving of the harm that is inflicted on them than are citizens of the defending state. If civilians on both sides of a conflict are bearers of the right to life who refrain from acting in ways that compromise their status as civilians, then they have equal rights-based claims to compensation. The civilians' citizenship is irrelevant when determining whether they, as individuals, have a right to life that combatants are duty-bound to respect. This cannot be otherwise, unless one is willing to argue that citizens of aggressive states lose their right to life during war and may be justifiably attacked. This is an argument that few just war theorists seem to be prepared to make, and for good reason. An asymmetric right to life and corresponding asymmetric duty to respect civilian rights would almost certainly serve as a pretext for escalating wars and engaging in mass-casualty attacks. Just combatants – or at least those claiming to have justice on their side – would be free to disregard the PNCI and to terrorize civilians.

Contrary to Walzer and Orend, I maintain that people who are not participants in a conflict (i.e., people who meet the definition of "civilian," whether it is mine or another one) are equally entitled to damages regardless of which side they are on because they have a right to life. If the rationale for payment is the right to life, as I argue that it is, then the payment must apply equally to all who have suffered a breach of that right, regardless of their group affiliations. Any kind of asymmetric standard of payment is either inherently unjust because it neglects the rights of civilians on one side of a war, or it must be supplemented by some grounds for thinking that just combatants should be allowed to attack enemy civilians.

One could attempt to defend asymmetric reparations by arguing that civilians on both sides of a conflict may have equal protections according to the right to life but that citizens of unjust states may nevertheless be denied compensation because the states involved in a conflict are not under equal obligations to pay compensation. In other words, one could say that it would be unfair

to extract payment from the country that is fighting in self-defense and that payment should be denied to the citizens of unjust states on the basis of this unfairness. This would allow one to acknowledge that the right to life exists for civilians on both sides of a conflict while still claiming that payment should be unilateral.

It is unfortunate that a state drawn into a war would have to pay for the costs associated with fighting, but it is critical to bear in mind that *ad bellum* justification does not provide grounds for ignoring or breaching the negative duty to avoid harming civilians. Even states that are completely justified based on *ad bellum* criteria are obliged to avoid harming enemy civilians. Just belligerents are duty-bearers with respect to civilians' right to life, and as such must also take on the positive duty when they wrong civilians by denying them the protection of that right. In other words, because a belligerent cannot have license to carry out attacks on civilians simply because it is waging a just war, it must be bound by the positive duty when it harms civilians. As I will explain in Chapter 7, there are a few exceptions to this, but symmetrical payments will be appropriate under most circumstances.

Discrimination and Moderating Payments

In his response to Walzer's plan for post-war reconstruction, Orend raises several concerns that could be deployed against my principle of recompense. First, Orend disagrees with Walzer's proposal to tax all citizens of an aggressive state to fund reparations on the grounds that this violates the principle of discrimination.[24] As Orend sees it, the principle of discrimination excludes civilians from the war effort, thereby excluding them from liability to pay for reconstruction. If Orend is correct in thinking that taxing citizens of unjust states is indiscriminate in Walzer's account of post-war justice, then my proposal to distribute the responsibility to pay compensation would also appear to be indiscriminate. Second, Orend argues that any compensatory payments must be moderated by the demands of allowing aggressive states to care for their own people and repair themselves. Bankrupting an aggressive state may violate the *jus post bellum* demand of establishing a lasting peace by creating grievances that it will seek to redress in a future conflict.

Instead of extracting the funds for compensatory payments from an entire population, Orend thinks that payment should only come from those who are morally culpable for causing the harm that is being repaired. As he says, "any monetary compensation due to Victim ought to come, first and foremost, from the personal wealth of those political and military elites in Aggressor who were most responsible for the crime of aggression."[25] This, Orend maintains,

[24] Orend, *The Morality of War*. [25] Ibid., p. 116.

is consistent with the principle of discrimination because it does not place an unjustifiable burden on those citizens who were not responsible for the war. He acknowledges that payment will be further limited to those among the guilty who can afford to pay for compensation.[26] After all, the money can only be extracted from those who have the ability to pay.

Although Orend raises some reasonable concerns about the threat of destabilizing fragile states with heavy tax burdens, his solution to the problem of funding post-war reconstruction is inadequate. First, any compensatory program that is only funded with money seized from those directly responsible for initiating a war will surely be inadequate to repair the harm inflicted on civilians in a typical war. A viable system of compensation must have far more substantial support.

Second, Orend is incorrect in thinking that there is something indiscriminate about collecting taxes to fund reconstruction projects. Demanding that an entire population pay into compensatory programs does not violate the principle of discrimination any more than citizens' normal obligations to pay taxes would.[27] Defense is a collective good that benefits all members of a state. Citizens are under equal obligation to pay for that collective good during war and are equally entitled to the benefits of defense, regardless of whether they are members of the armed forces or otherwise participate in a war. Citizens should likewise be equally obliged to pay for the damages that result from military operations that are waged by their armed forces. It would be inconsistent to say that extracting tax money to pay for a new warship does not violate the principle of discrimination but that extracting tax money for the compensation of foreign civilians who are wronged by an attack carried out by that warship does. Whether taxes are used to pay for a new warship or to pay civilian casualties the underlying rationale is the same: the funds are extracted to pay for the state's war effort. The different uses of the funds are simply two different manifestations of how money goes toward supporting a war.

Third, compensatory programs do not fall under the scope of discrimination as that concept is conventionally understood in just war theory and international law. As I discussed in Chapter 2, the principle of discrimination prohibits intentional or reckless acts of violence directed at civilians. It does not, as Orend suggests, assert that civilians must be exempt from financial obligations. It has nothing to say about taxation or finance. If discrimination were as demanding as Orend thinks, then taxation to fund other programs – especially international development programs that transfer funds to foreign

[26] Ibid., p. 167.

[27] For a good discussion of why states may conscript or tax citizens, which also provides grounds for thinking that states can tax citizens to pay for the compensatory payment demands that war creates, see Thomas Nagel, *Mortal Questions* (New York: Cambridge University Press, 1979), pp. 75–90.

states – would also be indiscriminate. Applying Orend's conception of discrimination consistently would lead to strict constraints on when civilians may be forced to support governmental programs of any type. This conception of discrimination is untenable, at least within the framework established by just war theory, as prohibiting civilians from funding wars would result in de facto pacifism.

Potential Problems for the Principle of Recompense

Efforts to enact the principle of recompense are likely to raise three problems: deciding on a statute of limitations for claims, extracting payment from defunct states, and determining when claims are false or when injuries are deliberately sustained as a way of earning money. As in my discussion of the principle of restorative care, these are but a few of the many challenges that have to be overcome when applying this new principle of just war theory. Nevertheless, resolving these challenges will help to establish the principle's structure and provide guidance for addressing other problems that might arise.

Statute of Limitations

A statute of limitations for claiming injuries during war must exist, just as it does in domestic contexts, to prevent those who may have to pay from enduring a permanent threat that more claims may be made in the future and to reduce strain on the institutions that adjudicate claims. Those who may be forced to pay compensation might also lose exonerating evidence or redirect funds set aside for compensation to other projects if claims are not made in a timely manner. The statute of limitations on claims for recompense should be framed with two considerations in mind. First, it must specify how long after sustaining an injury a person may seek compensation. Second, it must establish a time period for claiming damages for injuries that are inflicted after a war has formally ended. Here the concern is that land mines, unexploded ordnance, and other hazardous materials that continue to exist in a formerly contested area may inflict new injuries that merit compensation.

In domestic contexts the time given by a statute of limitations typically starts either when an injury is inflicted or, in some cases, when the injury is discovered. While this is generally appropriate in a domestic context, in which those presenting claims typically have the opportunity to bring their claims to trial, it is inappropriate for wartime contexts in which those seeking damages may face myriad impediments that are beyond their control. The statute of limitations on seeking recompense has to take into account the difficulties civilians in war zones are certain to have in collecting evidence, finding legal counsel,

and traveling to a place where cases are heard. During conventional wars, or unconventional wars in which opponents compete for control of territory, certain areas may be inaccessible or impassable because they are active combat areas or because of their military functions. During unconventional wars that lack a clear front line there may be no formal restrictions on areas of travel, but movement may be hazardous because of checkpoints, roadside bombs, and kidnappings.

A statute of limitations must be attached to claims for compensation for injuries inflicted during wars, but it should be sensitive to the many practical impediments that can be expected to delay claims. Time limits should therefore start at the end of a war, rather than at the time an individual injury is sustained or discovered. The end of war marks a time when hostilities should subside to an extent that those who were harmed may prepare and present their claims. Fighting may continue in the post-war period and there may be new barriers to presenting claims, but these barriers will likely be lower than those that exist during war.

Attaching the statute of limitations for raising claims for financial compensation to the formal resolution of a conflict creates an incentive for belligerents to seek a quick resolution of hostilities. The longer a war continues, the longer civilians have to claim damages and the more claims a belligerent may have to pay. As with the other beneficial side-effects of the principles of restorative care and recompense, this one should not be seen as a goal. The principles that manifest the positive duty should not be deployed in an effort to strengthen the restrictive import of just war theory, as this could risk compromising or detracting from their corrective functions. Nevertheless, these beneficial side-effects help these principles to fit coherently within the just war tradition.

A special challenge that emerges with statutes of limitation comes from instances in which a person is harmed after a war has officially ended, but in some way that is directly causally related to actions taken by belligerents during a war. The most obvious case of this is when people are injured by the land mines or unexploded ordnance that are frequently left behind following major combat operations. Those responsible for creating the hazards that cause these injuries may have no medical personnel in the area when a war is over and may no longer have the capacity to provide care for those who are injured because of post-war demilitarization. In cases of post-war injuries, pecuniary compensation will often be the only method of repairing harm. Belligerents should be expected to give payment whenever these injuries are inflicted, even if they come long after a conflict has ended. After all, belligerents that cause these injuries not only fail with respect to their negative duty but are also guilty of establishing the conditions for violence to be continually inflicted against innocent people.

Defunct States and Non-State Actors

A second problem is that some wars end with the destruction of the states or non-state actors that were involved in the fighting. The entities that are obliged to assist noncombatants may be unable to do so simply because they no longer exist to make payments. Even when some of the institutions of defunct states or non-state actors survive they may lack the power or legitimacy to extract the funding needed to give compensation. This is one of the problems that Pattison raises against the belligerents rebuild thesis.

My proposal that the positive duty and its associated principles take effect immediately after a civilian's rights have been breached, and not after the war has ended, partially overcomes this problem. A belligerent that is destroyed by war may still exist during the war, and indeed must exist during dyadic wars between two opponents. That belligerent can provide assistance to civilians for as long as it exists, and any representatives of that state or organization who live on after it is destroyed may be held personally responsible for failing to provide compensation when they had the ability to do so. Of course, even with this caveat in mind, there will be instances in which civilian victims only make their claims after a war has ended, are harmed in the final days of fighting, or are unable to receive payment from the belligerent before its destruction. This raises the need for alternative reparative actions.

The first recourse for providing compensation when the bearer of the positive duty ceases to exist is to use whatever money remains in a state or non-state actor's treasury for compensatory purposes and to sell its assets for additional financing. There is some precedent for doing this. The US military seized funds from Saddam Hussein's government following its destruction in the 2003 Iraq War and used that money to create the Development Fund for Iraq, which paid for reconstruction projects and compensation for individual civilian victims of the war. Coalition forces also seized Hussein's palaces for use as public buildings, which suggests that property could be taken and sold to make compensatory payments.

If no resources are available for making payments or these are exhausted before payment can be made, then the responsibility should pass to any successor institutions that are in some way continuous with the actor that inflicted the harm. For example, if a state is destroyed during a war and reestablished in the aftermath with its institutions, leadership, or membership largely unchanged, then the successor should be responsible for payment. Determining when there is sufficient continuity for the responsibility to pay to pass from one state or non-state actor to its successor should be left up to the legal bodies responsible for arbitrating claims, which will be discussed in Chapter 8.

Finally, if no remaining funds or assets are available, and there are no successor institutions, then compensatory payments cannot be made – at least not

based on the grounds established by the positive duty. Leaving some civilians without compensation is unfortunate, but it may at times be an unavoidable consequence of wars in which all rights-based obligations for compensation are exhausted. No moral principle can guarantee that a duty-bearer will survive long enough to discharge its duty. Ideally, some other rationale might be found for asking other belligerents or neutral states to assist civilians, though it would have to be based on something other than the right to life or based on a much stronger conception of what protections that right entails.

Manipulating Payments

A third potential problem is that some civilians could manipulate the compensatory payments in various ways. Any amount of money large enough to provide meaningful compensation for serious harms might also be large enough to encourage fraud. Some could make false claims, which they would be particularly apt to do against an enemy state. Similarly, awarding victims of war large amounts of money could lead some people to instigate attacks. A person could deliberately become a victim by pretending to be a combatant or by staying in close proximity to military targets, as a way of earning the compensatory payments from an attack.[28] Most disturbing of all is the possibility that some civilians could be coerced into becoming victims by those who wish to claim pecuniary compensation. For example, a person could deliberately expose a family member to attack, then claim the resulting payments.

These are serious concerns, but they can be guarded against if a fair system of adjudicating claims is established. Such a system would need to be capable of evaluating whether any claims are falsified or when they are deliberately sustained. This is an issue I will return to in Chapter 8, when I discuss the legal mechanisms that should be used for adjudicating requests for recompense. False claims and instances of civilians intentionally sustaining injuries can also be minimized by avoiding the use of punitive damages. If damages are only high enough to repair the harm inflicted, and not inflated to punish those who inflict the harm, then there would be a much weaker incentive to exploit the compensatory efforts.

Of course, no legal systems are perfect, and even a well-designed system will be incapable of detecting all wrongful claims. Although the goal should be the perfect administration of justice, the realistic standard that should be met is a fallibilistic system that *usually* promotes justice for belligerents and civilians alike. We should, in other words, expect that there will be some abuse of the compensatory payments by those on both sides and seek to minimize it as much

[28] Steve Fainaru, *Big Boy Rules: America's Mercenaries Fighting in Iraq* (Philadelphia, PA: Da Capo Press, 2008), p. 166.

as possible. Even if some false claims are made or some harm is intentionally sustained, this should not be a rationale for denying assistance to those who have legitimate claims for damages and who need financial assistance to recover from their injuries.

Conclusion

As I have argued, one of the most effective means of addressing the problem of civilian suffering and repairing the damage caused through breaches of civilians' right to life is to require that belligerents pay financial compensation to the civilians they harm. Payment is warranted when civilians are injured, killed, or deprived of vital property. Those who are injured should be compensated if they have any injuries that did not receive medical treatment or that medical treatment was inadequate to fully repair. Those who lose essential property should receive compensation commensurate with their loss to prevent their deprivation from inflicting any serious physical harm. Finally, family members of civilians who are killed should receive financial compensation to assist with funerary expenses and to help the family recover from its loss.

As I showed, the principle of recompense improves on existing accounts of post-war reconstruction and corrective justice. The reparations Walzer and Orend favor are far too narrow in scope, only addressed to certain civilians, insensitive to individual need, only take effect after war, and are more concerned with punishing unjust belligerents than with assisting civilians. Kalmanovitz calls attention to the problem of civilian victimization and offers a more convincing argument for a responsibility to rebuild that is based on wealth, yet he neglects the possibility that belligerents that harm civilians may have a more fundamental duty to assist them. Pattison's rejection of the belligerents rebuild thesis raises some important concerns with requiring payment based on the positive duty, and he provides a convincing argument for thinking that there may be an international responsibility to rebuild when belligerents are unable to. Nevertheless, his concerns with requiring belligerents to rebuild are largely based on practical considerations that will not pertain in all situations and that fail to provide grounds for abandoning a moral duty that is required by the right to life.

7 Reconciling the Positive and Negative Duties

My proposal for recognizing a positive duty toward civilian victims has called attention to the inadequacy of the existing principles of just war and the unacknowledged implications of the civilian right to life, yet I have left many unanswered questions about how the positive duty may apply alongside the other elements of just war theory. In this chapter I turn to the task of reconciling the positive duty and the two principles that operationalize it with the commonly recognized principles of just war. My goal here is to show that the negative and positive elements of just war theory can form a coherent ethical system.

The first theoretical challenge that emerges when attempting to reconcile negative and positive elements of just war theory is that the positive duty and its associated principles defy the temporal restrictions imposed on existing just war principles. The categories of *jus ad bellum*, *jus in bello*, and *jus post bellum* are typically interpreted as corresponding to the moral decisions that must be made before, during, and after a war.[1] This temporal framing is unfortunate, as many of the moral decisions relating to war must be made across multiple time periods, and some cannot be accurately described as discrete decisions that are made in a single instant. Restricting just war principles temporally is particularly disruptive when it comes to the corrective principles that have been included in some theories of *jus post bellum*. As I have pointed out previously, restricting corrective justice to the post-war period leaves civilians to suffer extensively during wars, and potentially to sustain more serious harms because of the lack of assistance. In contrast to accounts of post-war corrective justice, I maintain that the positive duty must be in effect at all times and that civilians who have been harmed should not be forced to wait until the conclusion of hostilities to receive assistance unless practical considerations make assistance impossible.

[1] Orend, *The Morality of War*; Larry May and Emily Crookston, "Introduction." In *War: Essays in Political Philosophy*, edited by Larry May and Emily Crookston (New York: Cambridge University Press, 2008), 1–10; David Rodin and Henry Shue, "Introduction." In *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, edited by David Rodin and Henry Shue (New York: Oxford University Press, 2008).

Adding the positive duty to the other elements of just war theory also requires balancing this duty against just war theory's restrictive elements. There may be cases in which the demands imposed by existing just war principles – even those that are meant to protect civilians from violence – come into conflict with the corrective principles that I have developed. From a *jus ad bellum* perspective, two of the most important instances of potential conflict between negative and positive dimensions of just war theory are humanitarian interventions and wars against existential threats. From a *jus in bello* perspective, the negative and positive duties may come into conflict whenever combatants encounter situations that require them to weigh competing demands associated with limiting violence that could inflict civilian casualties and providing assistance to civilian casualties. Combatants may, for example, have to decide whether to risk inflicting additional civilian casualties when attempting to reach injured civilians in contested areas.

I acknowledge that the duties established by just war theory may come into conflict with each other, leading to dilemmas that can only be overcome when one duty is given priority over another. As a general rule the negative duty and the principles that operationalize it should take precedence over the positive duty and its associated principles. The reason for this can be found in the rights-based derivation of the positive duty. The positive duty is a second-order duty that only emerges when combatants fail to abide by the first-order negative duty to avoid harming civilians. The negative duty is therefore logically prior to, and more basic than, the positive duty. Moreover, it makes sense to think that efforts to avoid inflicting civilian casualties will be more beneficial for civilian welfare than efforts to mitigate the suffering of civilians who have already been attacked. By giving the negative duty precedence over the positive duty when the two come into conflict it is possible to resolve disagreements between these two modes of just war thinking, and to do so in ways that will help to protect civilians.

In the first section of this chapter I critique the temporal constraints that are typically imposed on just war principles and show that the positive duty and its resultant principles apply across the various temporal domains of just war theory. I argue that the positive duty arises whenever civilians are harmed and that corrective justice should not be relegated to the post-war period. In the second section I turn my attention to *jus ad bellum* conflicts between the positive and negative duties. I show that the negative duty should take precedence over the positive duty and explore two cases in which this might occur: humanitarian interventions and wars against existential threats. The third section takes up the *jus in bello* conflicts between the positive and negative duties. These are situations in which measures to protect civilians may preclude the performance of the positive duty, such as when additional civilian casualties may be inflicted during attempts to reach wounded civilians. Finally, the last section considers

three additional challenges that might arise when applying the positive duty alongside other elements of just war theory: how the positive duty relates to states' rights of self-defense, how the positive duty should apply to non-state actors, and how the positive duty can be framed in a way that avoids creating an incentive to harm civilians.

The Positive Duty's Place in Just War Theory

The positive duty to repair civilian suffering and the two principles that operationalize that duty are difficult to categorize within the traditional tripartite division of just war principles. *Jus ad bellum*, *jus in bello*, and *jus post bellum* are, as their names suggest, generally understood as applying to distinct time periods: before, during, and after war.[2] The positive duty and its associated principles are concerned with repairing civilians' injuries and providing compensation for those injuries that cannot be repaired. This corrective orientation makes the positive duty I describe fit most closely with the *jus post bellum* category of just war theory, which is likewise directed at repairing the harms inflicted by war and establishing the basis for a just peace. However, interpreting the positive duty as a post-war obligation would seriously limit its scope and prevent it from effectively addressing civilian suffering.

Although the positive duty and its associated principles are concerned with corrective justice, they do not belong to *jus post bellum* in a temporal sense. The principle of restorative care has implications for belligerents' conduct during war, in addition to their post-war conduct. The medical treatment demanded according to the principle of restorative care cannot be postponed until a war has ended. It must be provided as soon as possible after injuries are inflicted if there is any hope of containing and repairing them. In a temporal sense, restorative care is more a principle of *jus in bello* than of *jus post bellum* because of the need to attend to civilian casualties as they are inflicted. The principle of restorative care transcends temporal categories, yet it imposes different demands in the *in bello* and *post bellum* contexts. In the former, emergency lifesaving care will be the most important type of treatment. This is essential for limiting the damage inflicted by acts that breach civilians' right to life. In the latter, the demands for emergency care will be largely replaced by demands for long-term solutions to civilians' medical needs. The victims of war will require rehabilitative care that is directed at restoring those who survived their injuries to return to their normal lives.

The duty of recompense fits more easily into the *jus post bellum* framework, and is similar to principles calling for post-war group reparations or post-war

[2] Orend, *The Morality of War*; May and Crookston, "Introduction"; Rodin and Shue, "Introduction."

reconstruction projects. Much of the compensation to be provided for the victims of war will have to be given after the cessation of hostilities, when those claiming damages have freedom of movement and the circumstances surrounding their injuries can be more easily investigated. This is particularly true for conventional wars, during which there could be practical challenges associated with arbitrating cases when the parties involved are on different sides of the front lines. Nevertheless, it is critical to avoid imposing temporal limits on compensatory payments. Practical considerations may force these payments to be delayed, but payments should ideally be given as quickly as possible following an injury. Civilians will often need compensation before a war has reached its conclusion. Waiting until hostilities have ended could endanger civilians' lives and should not be done unnecessarily. I therefore argue that pecuniary compensation to victims ought to be provided as quickly as possible, except in those cases covered by the exceptions that I discuss later in this chapter. Belligerents should be prepared to make compensatory payments at any point during a war and should take reasonable steps toward ensuring that all civilians residing in territories that they control are able to report their injuries. This will be demanding for belligerents that are fighting and that must devote their resources to military expenses, but timely compensatory payments are vital for effectively responding to the needs of civilians whose rights have been violated or infringed on.

Any delay in providing financial compensation to civilians must be made only for the most urgent practical reasons. Belligerents may be excused when the circumstances of war prevent civilian victims from making claims or prevent the investigation of incidents. There also must be time for the belligerent that is required to pay to assemble the funds and transfer them. States that are bankrupted by an unexpected war or that are suffering from severe economic devastation may be unable to assist the victims of war as quickly as states that made preparations for war or whose infrastructure is intact. However, practical considerations should not be allowed to interfere excessively with performing the positive duty. Belligerents should not be excused if they fail to have adequate funds available to pay for foreseeable harms, and they should not be allowed to divert money into military expenditures when doing so would deprive civilians of the finances they need to recover from breaches of the right to life. Civilian victims of war who are entitled to compensation have already suffered considerably. It would be excessive to demand that they wait for a war to end before receiving compensation, especially if this waiting requires them to endure additional hardships or puts them at risk of dying.

The principles that I propose also have implications for *jus ad bellum*. When deciding whether to go to war, a belligerent must ensure that it has the capacity to abide by the principles of restorative care and recompense. This requires the belligerent to predict what the potential costs of war may be based on the goals

that it seeks to achieve and the means that it will use to fight. Making such predictions is already an important part of *jus ad bellum* calculations, being required by the principles of proportionality and the probability of success. Proportionality, in the *jus ad bellum* context, demands that the goods a war is intended to produce outweigh the potential harms that may be inflicted. This urges belligerents to judge the permissibility of war based on calculations about the prospective costs and benefits. Probability of success is likewise judged based on expected outcomes. This principle states that a belligerent initiating a war must have a reasonable chance of achieving its aims. This is meant to prevent belligerents from waging unwinnable wars, as wars that are unlikely to lead to a successful resolution will result in needless loss of life.

The predictions required by the principles of proportionality and probability of success provide some sense of the harms that a war may inflict, and therefore also anticipate belligerents' obligations according to the positive duty. Proportionality is especially pertinent, since it must take estimates of civilian harm into account. When making these *ad bellum* predictions, belligerents should ensure that they are able to adequately care for and compensate the civilians who may be harmed by their actions. Moreover, belligerents' capacities for providing restorative care and recompense will affect judgments of proportionality. Performing the positive duty helps to mitigate a war's destructiveness and may therefore facilitate efforts to ensure that a war's costs do not exceed its anticipated benefits.

Of course, preparations for assisting civilians will never be perfect. Predictions about the future course of a war are notoriously difficult to make. History is replete with examples of wars that were begun with the intention of achieving a quick and decisive victory but that unexpectedly lasted years or even decades. Wars also give rise to unanticipated technological innovations, sometimes with revolutionary advances in weapons' destructiveness. This is evident from the First and Second World Wars, which saw the rapid development of many new weapons that greatly magnified the ferocity of the fighting beyond what could have been reasonably expected before the wars began. Further adding to the mercurial nature of war is that belligerents' aims frequently change over the course of a conflict.[3] They may expand and contract as victories and defeats alter the strategic landscape. The unexpected changes that may occur during a war make it necessary for belligerents to continually assess the extent to which they may be able to comply with the positive duty. That is to say, belligerents' *ad bellum* judgments about whether they can perform the positive duty should be made diachronically.[4]

[3] Robert Gilpin, *War and Change in World Politics* (New York: Cambridge University Press, 1981).
[4] For more on the diachronic application of *jus ad bellum* principles, see Schulzke, "The Contingent Morality of War."

The *jus ad bellum* application of the positive duty permits some exceptions. When a state is defending against an unexpected attack, it may not be able to prepare for fulfilling the positive duty. The victims of aggression may have to defend themselves, even when they have not prepared for providing medical care and recompense to those who they harm. Victims of aggression should be excused for making inadequate preparations when they are drawn into war involuntarily, and they should be allowed to defend themselves. Nevertheless, defending belligerents are still obliged to abide by the principles of restorative care and recompense as quickly as possible. After all, being drawn into a conflict unexpectedly does not provide grounds for depriving civilians of their fundamental rights.

Conflicts between the Negative and Positive Duties

The positive duty and its associated principles will generally cohere with the commonly accepted principles of just war. The positive duty is derived from the same basic commitments – protecting civilians, upholding fundamental rights, and limiting wars' destructiveness – as the other just war principles. This establishes a theoretical affinity between the positive duty and other principles of just war, as well as strong complementary incentives for combatants to follow both types of duties. This is particularly true of the principles of discrimination and proportionality, which urge combatants to limit the harm they inflict, especially on civilians. The better combatants are at abiding by these negative demands, the more effectively they can minimize the burdens of providing medical treatment and financial compensation. Combatants that most effectively follow the *jus in bello* guidelines will be able to devote more of their resources to fighting and will improve their prospects of winning. By contrast, the positive duty has the advantageous side-effect of punishing combatants that fail to act according to the principles of discrimination and proportionality. Combatants that act unjustly *in bello* will be required to shift more resources into correcting their mistakes, thereby reducing their capacities for fighting.

There may be instances in which the negative and positive duties come into conflict with each other – cases in which the organizations waging wars or individual members of those organizations have to decide between preventing harm to civilians and assisting civilians who have already been harmed. As a general rule, disagreements between negative and positive duties should be decided in favor of the former. The negative duty to avoid harming civilians is more basic than the positive duty to assist civilians who have been harmed. The former is a first-order duty that is created by the right to life, while the latter only arises when there is a failure to perform the first-order duty. Furthermore, giving precedence to the negative duty will usually be in civilians' best interests. For civilians, not being attacked is clearly preferable to being attacked and having

the resulting injuries repaired. Civilians will be best served if efforts to avoid inflicting harm are prioritized over corrective measures.

In some instances, the same individuals' interests will be at stake when the negative and positive duties come into conflict. This is true of humanitarian interventions in which belligerents must decide whether to protect the lives of foreign civilians even if this might involve harming some of the civilians receiving protection. In this type of scenario the negative and positive duties can generate conflicting incentives because the belligerent intervening risks taking on a positive duty toward any civilians who it inadvertently harms even though it is attempting to protect them from a more certain threat. Put slightly differently, the concern the positive duty raises when applied to humanitarian interventions is that it might be unfair to think that benevolent interveners should have to give medical or financial assistance to civilians who are unintentionally harmed when the civilians would have been killed, mutilated, or enslaved if the intervention had not taken place.

In other instances, the negative and positive duties can generate conflicting demands even though they are owed to different people. Combatants might, for example, face a situation in which providing medical assistance to injured civilians would require them to carry out a rescue mission in a populated area. Such a mission could produce additional civilian casualties – possibly in greater numbers and of greater severity than the original casualties – and would therefore put the positive duty toward the injured civilians at odds with the negative duty to avoid inflicting harm on other civilians who are in the area.

As these examples indicate, disagreements between the negative and positive duties arise in exceptional circumstances. The *jus ad bellum* disagreements occur in particular types of conflicts and *jus in bello* disagreements tend to be short-lived, disappearing as conditions on the battlefield change. The negative and positive duties will provide complementary guidance for combatants. Nevertheless, it is essential to consider how disagreements might arise under exceptional circumstances and how the positive duty should be adjusted under those circumstances to prevent it from interfering with the negative duty.

Humanitarian Interventions

In the case of humanitarian interventions, the positive and negative duties can best be reconciled by acknowledging that no belligerent should have to take on the positive duty when (1) it unintentionally harms civilians in attacks that satisfy the principles of discrimination and proportionality and (2) it is likely that the civilians who were harmed would have suffered serious breaches of their right to life if the intervention had not occurred. This exception to the positive duty may at first seem difficult to justify in light of the points I have made previously. After all, most wars are fought with the protection of some civilians in

mind. States typically seek to defend their citizens and violent non-state actors relying on civilian support networks may make efforts to do the same.[5] The critical difference between humanitarian interventions and other types of wars is that the civilians in question are almost certain to be victimized if not for the intervener's efforts. The reason for relaxing the positive duty is that the civilians would be harmed without the intervener's assistance and would therefore have suffered the same or a worse fate than if the intervener did attempt to help.

Imagine a situation in which Country A intervenes to prevent genocide in Country B when Country B is being invaded by Country C. Country C is in the process of carrying out mass executions and seems poised to kill every resident of Country B unless its forces are stopped. Although Country A might be responsible for harming some civilians in Country B when it intervenes, Country A is only in a position to cause this harm because it is attempting to save those same civilians from a more certain threat from Country C. Thus, while Country A might be the proximate cause for harming some civilians during the intervention, it only inflicts that harm because Country C is already threatening the civilians.

It is important to be clear that in this type of scenario Country C is not merely an unjust aggressor but one that is deliberately violating civilians' right to life. The citizens of Country B are almost certain to sustain worse injuries at the hands of Country C than from Country A's intervention force. Unjust aggressors may not always pose this level of threat. A country lacking a just cause for war could fight in ways that do not create the kind of serious threat to civilians that would require a humanitarian intervention. Country C might, for example, only wish to seize some territory from Country B, or it might wish to degrade Country B's military – objectives that do not necessarily pose a significant threat to civilians. The positive duty should not be suspended in all instances of unjust aggression, but only if the aggressor poses a serious threat to civilians that might cause the negative and positive duties to come into conflict.

Relaxing the positive duty in this scenario is also in the interest of the civilians being protected. It would be much less likely for states to intervene if they were obliged to repair any harm caused to civilians. If Country A intervenes in this conflict to prevent the genocide it takes on an enormous risk. Its soldiers may be killed or wounded, it will lose large amounts of money funding the war, it may make enemies by siding with Country C, and its leaders may lose popularity or be removed from office if the war goes poorly. The civilians who are at risk of being harmed by the intervening forces are the direct beneficiaries of the intervention. They have an overriding interest in the intervention taking place and in absolving the intervening forces from responsibilities that could

[5] Weinstein, *Inside Rebellion*.

prevent them from acting benevolently. Their interests are better served by the intervention taking place than by being left defenseless against attackers.

There is no way to be absolutely certain about what level of threat civilians may face in the future, especially at a war's outset. This may make it difficult to say definitively when a war qualifies as a humanitarian intervention. Nevertheless, it is possible to make reasonable judgments about the potential for systematic civilian victimization and, by extension, about when combatants that harm civilians may be excused from the positive duty. To trigger the humanitarian intervention exception to the positive duty, the belligerent against which the intervention is directed would need to either have stated an intention to exterminate, torture, or enslave civilians or have given some indication that this was likely based on its prior conduct. It would be permissible to intervene against an unjust aggressor in the absence of these conditions, but there would not be grounds for suspending the intervener's positive duty without a serious threat to civilians' safety.

It is important to be clear that my argument *only* provides an exception to the positive duty. It does not absolve interveners of their negative duty, and indeed could not because the positive duty is only suspended to prevent it from conflicting with the negative duty. The intervening forces should be held to the *jus in bello* requirements that usually pertain during war. This goes against the reasoning of commentators who favor reducing the *in bello* demands on intervening forces. For example, Gerhard Overland argues that humanitarian conflicts require a shift of the burden of risk from those fighting to those who are the beneficiaries of the intervention.[6] His reasoning is that intervening soldiers fight on behalf of those who are being assisted and should therefore be allowed to minimize the risks associated with their benevolent actions. Those who are being helped can be exposed to higher risk because they are being assisted and are in less danger from being harmed in fighting than they would be if they were left without help. Because they are the ones who are asking for assistance or who require it for survival, Overland reasons that it is fair for them to bear the greatest risk.[7] As he says, "in a humanitarian intervention the to-be-liberated civilians are already under threat and are therefore not really third parties."[8]

Overland is right to be concerned about the potential of discouraging humanitarian interventions and correct in thinking that some of the demands on intervening forces must be relaxed, but it would be dangerous to take this as grounds for thinking that belligerents may deviate from their *jus in bello* responsibilities. It would violate the spirit of an intervention if those ostensibly attempting

[6] Gerhard Overland, "High Fliers: Who Should Bear the Risk of Humanitarian Intervention." In *New Wars and New Soldiers: Military Ethics in the Contemporary World*, edited by Jessica Wolfendale and Paolo Tripodi (Burlington, VT: Ashgate, 2011), 69–86.
[7] Ibid. [8] Ibid., p. 73.

to protect civilians were allowed to terrorize them under the guise of being protectors. This is particularly true since those intervening will probably have other motives, aside from civilian protection, that will induce them to take military action. As Lee correctly points out, "pure benevolence is unlikely; a state will generally aid victims abroad only if it also foresees some resulting benefit to its national interest."[9] The likelihood of ulterior motives should discourage us from idealizing humanitarian interventions and from making any allowances that could provide cover for interveners that are not primarily motivated by protecting innocent people.

If humanitarian interventions extend beyond their original objectives, then the positive duty may reemerge. It would not be permissible for a country staging a humanitarian intervention to extend the war into other theaters without resuming the obligation to repair the harm inflicted on civilians who were not previously threatened. Returning to my example, if Country A decides to punish Country C by invading it after the threat to civilians in Country B has subsided, then Country A will be responsible for assisting any civilians who are harmed. This is not only consistent with the positive obligations I have described but also desirable as a restriction on the scope of humanitarian interventions. I consider humanitarian interventions to be grounds for a just resort to war, but only insofar as the aim of the intervention is primarily defensive. Humanitarian wars become problematic if they are used as a pretext for expanding a conflict. If an intervening force were completely exempted from positive obligations, rather than simply being exempted when harm is inflicted on the population being protected from extermination, then this would create a loophole in the positive duty that could be exploited by those initiating an otherwise just intervention and then expanding it in pursuit of other objectives.

One may wonder how excusing intervening forces from the positive duty can be reconciled with the logic of rights that I introduced earlier. The civilians who are under threat of extermination or some other humanitarian disaster have not done anything to waive or forfeit their right to life when an intervention takes place. They retain their rights-based protection from harm and are immune from having that right altered based on the good intentions of the intervening forces alone. The reason is that the right to life is not breached by those who are intervening to protect the civilians, even though they may be the proximate cause for some civilians' injuries. Rather, the breach is caused by the belligerent that threatens them. That belligerent brings about a state of affairs in which civilians' rights are certain to be breached unless there is outside interference. It should be seen as the bearer of the positive duty regardless of whether it or the intervening forces harm the civilians because it intended to harm the civilians and would have inflicted if it had not been stopped.

[9] Lee, *Ethics and War*, p. 133.

Of course, it is unlikely that any belligerent that hopes to commit genocide would voluntarily attempt to repair the harm inflicted on civilians. The failure to assist civilians might have to be added to its list of moral and criminal offenses and would provide additional grounds for taking legal action against those responsible for creating the humanitarian crisis. Any direct assistance from that belligerent to those who were harmed would probably have to come from seized assets. Ideally, additional assistance would also be provided by other states and international organizations, but this would not be compelled by the positive duty. It would have to be based on some other obligation or be supererogatory.

Defending Against Existential Threats

Wars against existential threats create a much different type of challenge when it comes to balancing the demands associated with the negative and positive duties. A war qualifies as being a struggle against an existential threat whenever a belligerent is defending against an opponent that is attempting to commit some type of atrocity against it. Atrocities may include mass killings, enslavement, rape, or mutilation. The critical difference between humanitarian interventions and wars against existential threats is that in the former the civilians who may be harmed are the beneficiaries of the intervention while in the latter the defenders carry out attacks that may threaten enemy civilians who would not otherwise be in any danger.

Some just war theorists think that defensive wars against existential threats call for some relaxation of *jus in bello* restrictions. Walzer argues that the presence of an imminent and serious threat gives rise to a "supreme emergency."[10] This is a condition under which the defender may be excused for suspending *jus in bello* constraints and resisting the aggressor using any means necessary. The defender may even employ tactics that would ordinarily be deeply immoral, such as attacking enemy civilians.

> Can soldiers and statesmen override the rights of innocent people for the sake of their own political community? I am inclined to answer this question affirmatively, though not without hesitation and worry. What choice do they have? They might sacrifice themselves in order to uphold the moral law, but they cannot sacrifice their countrymen. Faced with some ultimate horror, their options exhausted, they will do what they must to save their own people.[11]

As this passage indicates, Walzer's conception of supreme emergency and the permission to do whatever is necessary in this condition are shaped by his view of the political community. He places a high value on the strong communitarian

[10] Walzer, *Just and Unjust Wars*, p. 253. [11] Ibid., p. 254.

attachments that motivate people during wars and defends efforts to preserve political communities – even when those efforts call for morally questionable actions.[12]

Walzer cautions readers against taking this authorization as an excuse for carrying out revenge attacks and maintains that the authorization to deviate from the rules of war only exists so long as there is an existential threat. He also notes that states sometimes act as though they were faced with a supreme emergency even when that condition has passed. Britain's bombings of German civilians serve as the prime example here, since these began when the existential threat to Britain was passing and continued until the end of the war. He stresses that "[i]f we are to adopt or defend the adoption of extreme measures, the danger must be of an unusual and horrifying kind,"[13] and uses Nazis as his example of such a threat because "of all those people who believed at the time and still believe a third of a century later that Nazism was an ultimate threat to everything decent in our lives."[14]

Primoratz develops a slightly different version of the supreme emergency argument in an effort to improve on Walzer's. He takes issue with Walzer's concern over threats to morality or to ways of life, as well as with Walzer's bias in favor of states. However, he supports Walzer's underlying point by arguing that civilian immunity may be disregarded when belligerents are involved in "moral disasters" in which their populations face extermination. Distinguishing his position from Walzer's, Primoratz says that "The moral disaster view refers to peoples, rather than states or political communities; therefore it cannot be charged with pro-state bias."[15] Although he refuses to give the state a special status, Primoratz maintains that there is something special about large numbers of people that makes the threat of their extermination warrant suspending *jus in bello* restrictions when a threat to a smaller number of people would not.

I disagree with Walzer's and Primoratz's arguments for suspending *jus in bello* restrictions during supreme emergencies and moral disasters and maintain that these proposals suffer from serious theoretical and practical problems. Coady provides one of the best responses to Walzer's position and raises objections that I concur with. He rejects the supreme emergency argument and maintains that the PNCI should be absolute to reflect its status as one of just war theory's fundamental commitments. Furthermore, he maintains that "[t]he

[12] See also Michael Walzer, "Political Action: The Problem of Dirty Hands," *Philosophy and Public Affairs* 2(2) (1973), 160–180.

[13] Walzer, *Just and Unjust Wars*, p. 253. [14] Ibid.

[15] Igor Primoratz, "Civilian Immunity as an Almost Absolute Moral Rule." In *Protecting Civilians during Violent Conflict: Theoretical and Practical Issues for the 21st Century*, edited by David W. Lovell and Igor Primoratz (New York: Ashgate, 2012), 37–52, p. 50.

primacy of the political community that Walzer sees as validating the special role of (most) states is highly suspect."[16] As he correctly points out, there is no reason to think that political communities should have special authorization to act in self-defense beyond what might be given to other types of groups facing existential threats.

There is also a deeper theoretical inconsistency in the reasoning that Walzer and Primoratz rely on. They raise the specter of extreme violence against civilians as an excuse for engaging in violence against civilians. The violence they want to excuse is ostensibly defensive in nature, but it is difficult to accept this claim when the permission being granted by the supreme emergency and moral disaster arguments is to attack civilians. The exception to *jus in bello* restrictions that they propose is one that would be responsible for authorizing the evil that it is supposed to protect against. One could argue that the type of violence perpetrated by the defending polity is different from the aggressor's because it is defensive. However, to the extent that military force is directed against civilians – against people who are not personally threatening – it goes beyond what is required to defend against a threat.

One could attempt to defend supreme emergency reasoning by arguing that it will sometimes be necessary for states protecting themselves from existential threats to carry out some limited attacks against certain classes of enemy civilians, such as those involved in war industries, and that these limited attacks are not akin to the atrocities being defended against. This would weaken Walzer's and Primoratz' positions considerably by acknowledging that *jus in bello* restrictions are only relaxed with respect to certain classes of civilians. It would also raise new problems. Limited attacks against civilians are almost certain to fail as a deterrent against an existential threat. Attacks on civilians rarely succeed in ending wars and may even be counterproductive insofar as they direct a belligerent's military resources against the wrong targets and harden the enemy's resolve.[17] It is only when civilian victimization reaches astronomical levels, such as it did when the United States bombed Japan into submission during the Second World War, that it seems to be effective as a means of ending conflicts. Thus, while suspending *jus in bello* restrictions could result in atrocities akin to those being committed by the enemy, only relaxing them somewhat could undermine the status of fundamental moral norms while also failing to have the intended result.

[16] Coady, *Morality and Political Violence*, p. 291.

[17] Robert A. Pape, *Bombing to Win: Air Power and Coercion in War* (Ithaca, NY: Cornell University Press, 1996); Kocher et al., "Aerial Bombing and Counterinsurgency"; Alexander B. Downes, "Draining the Sea by Filling the Graves: Investigating the Effectiveness of Indiscriminate Violence as a Counterinsurgency Strategy." *Civil Wars* 9(4) (2007), 420–444.

Finally, supreme emergencies provide a dangerous excuse for misconduct. As Kaufman correctly notes, states have a strong incentive for overstating threats to their own security and for declaring supreme emergencies as a way of escaping moral duties that they should be bound by. "[T]ypically each side thinks that it is in the right and that losing a war will be a terrible catastrophe, so supreme emergency appeals are bound to be abused."[18] One could raise Walzer's own example of the continued use of strategic bombing during the Second World War past the point at which there was an existential threat as evidence that even just belligerents are apt to abuse an authorization to attack civilians.

Jus in bello restrictions on the use of force should not be suspended or relaxed when existential threats arise. However, because existential threats produce a conflict between the negative and positive duties, they can bring about the suspension of the positive duty. Fulfilling the positive duty will often force belligerents to devote resources to medical assistance and financial compensation programs, thereby diverting resources away from the military. Under ordinary circumstances this diversion of resources is usually justified because belligerents must fulfill their moral obligations even when those obligations create constraints on the use of force. The diversion of resources may lead to reduced military effectiveness, or it may even compromise a state's ability to win a war, yet it does this without directly endangering civilians. Although civilians may be harmed in a war waged for political objectives, harming them is only a means to an end or a side-effect of the fighting. It is not the objective.

Existential threats are directed against all members of a group, without respect to their combatant status. Civilian victimization is the objective being pursued, and it is almost certain to occur if the offending belligerent is not defeated. Thus, when there is an existential threat, any diversion of resources away from military purposes could result in more civilian victimization. Any efforts the defending belligerent makes to provide medical assistance or financial compensation to civilians, even its own, could raise the risk of more civilians being harmed in the future by impairing its fighting abilities. This brings the negative and positive duties into conflict and establishes grounds for suspending the latter in the interest of minimizing civilian victimization.

If State A faces an existential threat from State B and has limited resources to counter that threat, then any effort to fulfill the positive duty toward the civilians in State B could degrade State A's military effectiveness. As State A loses military effectiveness it also places its citizens (and potentially those of other states as well) in greater danger of falling victim to the indiscriminate violence perpetrated by State B. State A therefore acts in the best interest of the

[18] Kaufman, "Just War Theory," p. 106.

endangered civilians by prioritizing military efforts above all else and by not taking any reparative measures until the existential threat has passed.

It is worth noting that the conflict between the negative and positive duties takes a somewhat different form in this example than in humanitarian interventions. As we have seen, the beneficiaries of humanitarian interventions are the same people who lose the entitlement to having their injuries repaired. In the existential threat scenario, a threat to State A's citizens provides grounds for suspending the positive duty in general, whether it is toward State A's citizens, State B's, or some other state's. In other words, the potential beneficiaries of the negative and positive duties may be different. This may make it possible for those who were not beneficiaries of the defensive effort, but who were harmed by the defensive war effort, to claim compensatory damages once the existential threat has passed and there is no longer a conflict between the negative and positive duties.

Negative and Positive Duties *In Bello*

Disagreements between the negative and positive duties may arise at a tactical or operational level, just as they do at the strategic level. Here the disagreements involve considerations of *jus in bello* and require the positive duty to be balanced against the demands imposed by the principles of discrimination and proportionality. *Jus in bello* disagreements between the negative and positive duties are not as enduring as those relating to *jus ad bellum*. They tend to be relatively short-lived and only provide grounds for not performing the positive duty in particular instances and with respect to specific civilians who have been harmed. When disagreements arise, it may be impossible to act according to one of the principles that follow from the positive duty (usually the principle of restorative care). *Jus in bello* disagreements may disappear in time for civilians to receive some kind of assistance (usually financial compensation). It is therefore important to bear in mind that even though a belligerent may be temporarily disabled from discharging the positive duty and therefore excused for any failure to help civilian victims, they are still bearers of that duty and may have to act on that duty when circumstances change.

The most likely *in bello* scenario in which the negative and positive duties could come into conflict is one in which soldiers acting on behalf of a belligerent that harmed some civilians have to evaluate the potential for additional casualties being inflicted by attempting to reach the wounded civilians to provide medical treatment. Consider a scenario in which State A launches an artillery barrage against one of State B's bases, only to discover that several of the shells missed the target and struck a residential area. Based on the principle of restorative care, State A is obliged to make a reasonable effort to reach the civilians hit to provide medical treatment. If the residential area is free of enemy forces

and the civilians can be evacuated, then satisfying the principle of restorative care is fairly straightforward. By contrast, if there are enemy forces in the area, State A could have to act offensively to suppress or destroy them before reaching the wounded civilians. The problem that arises is that State A's use of force to reach wounded civilians in an effort to provide medical care could inflict further civilian casualties.

In this scenario State A faces a clear dilemma in which it must decide whether to give priority to helping wounded civilians or to avoiding further bloodshed. The precedence of the negative duty indicates that this demand should usually be prioritized and that a rescue mission should *not* be attempted if it is likely to cause additional civilian casualties. A high risk of incurring further civilian casualties that would contravene the negative duty would make State A justified in not attempting to reach the wounded civilians. In practice, State A would need to have some evidence that further harm to civilians is likely, and it would still need to make efforts to provide medical assistance in another way, such as with the help of an NGO. In the absence of some alternative way of safely treating the civilians, the principle of restorative care would lapse.

It is important to note that the grounds for suspending the positive duty or the principles associated with it when efforts to obey the positive duty may cause more civilian casualties are highly contingent. A belligerent's inability to reach wounded civilians in a particular instance would not create a general authorization to ignore civilian casualties. It would also fail to exempt the belligerent from providing financial compensation at some later date.

A related *jus in bello* concern is that improvements to the treatment of civilians could have the perverse effect of leading to an intensification of hostilities, thereby putting more civilians at risk of being attacked. This problem has been raised to critique efforts to increase sensitivity for civilians' rights during counterinsurgency operations and could be adapted to apply to my even more stringent demands for respecting civilians' rights. Ralph Peters says that "[t]he paradox is that our humane approach to war results in unnecessary bloodshed."[19] Commenting on Afghanistan and Iraq, he says that "[h]ad we been ruthless in the use of our overwhelming power in the early days of the conflict . . . the ultimate human toll – on all sides – would have been far lower."[20] From this Peters concludes that wars could be less destructive if they were waged with fewer restrictions on the use of force, as this would bring them to quick and decisive conclusions. If presented with my own proposal, Peters might say that the positive duty is a further step toward imposing counterproductive restrictions on how wars are waged that may extend the fighting.

[19] Ralph Peters, *Endless War: Middle-Eastern Islam vs. Western Civilization* (Mechanicsburg, PA: Stackpole Books, 2010), p. 297.
[20] Ibid., p. 257.

Peters' argument calls attention to the importance of being alert to adverse unintended consequences of well-intentioned policy decisions. It is important to be aware that the norms of war could be counterproductive in some ways and to abandon any moral restrictions that cause an intensification of hostilities. Nevertheless, Peters' reasoning is extremely weak and largely based on conjecture. There does not appear to be any empirical evidence showing that efforts to restrict violence and show greater respect for civilians' rights are likely to cause or exacerbate violence, and Peters fails to provide any. He only cites the American military's failures in Iraq and Afghanistan as evidence of his point, and his discussion of these is misleading. The level of restraint exercised by American forces and their respect for civilians' rights varied considerably over time and across units. Those studying these shifts generally conclude that a more ethically sensitive style of fighting was more suitable for accomplishing US political objectives and for lowering the numbers and intensity of insurgent attacks.[21] This also appears to be the dominant view among the US military's leading strategists, as they have increasingly extolled the virtues of being more sensitive to civilians' rights.[22]

Thus, the apparent disagreement between negative and positive duties seems to be illusory in this instance. There is no reason to think that enacting the positive duty will cause an intensification of wars or that it will have any perverse side-effects that would bring it into conflict with the negative duty. The positive duty will therefore only have to be temporarily suspended in those instances when efforts to follow it could endanger civilians.

Practical Considerations

I devote the rest of the chapter to addressing three practical challenges relating to the types of entities that will be required to perform the positive duty. These do not involve a disagreement between the positive and negative duties or with either of the principles that operationalize the positive duty. Rather, they are general practical problems relating to whether the duty would interfere with states' rights to self-defense and how violent non-state actors may be held responsible for attacks on civilians.

[21] See, for example, Thomas E. Ricks, *The Gamble: General David Petraeus and the American Military Adventure in Iraq 2006–2008* (New York: Penguin, 2009); Jason Lyall and Iaiah Wilson III, "Rage Against the Machines: Explaining Outcomes in Counterinsurgency Wars," *International Organization* 63 (2009), 67–106.

[22] David H. Petraeus, "Learning Counterinsurgency: Observations from Soldiering in Iraq," *Military Review*, January–February (2006), 2–12; Department of the Army, *FM 3-24/MCWP 3-33.5: Counterinsurgency* (Washington, DC: Department of the Army, 2006); Kilcullen, *The Accidental Guerrilla*.

The Positive Duty and State Self-Defense

Just war theorists generally accept that states, like individuals, have a right to self-defense and that a similar logic applies when thinking about how individuals and sates are authorized to defend themselves. Rodin says that "[t]he idea of an explanatory analogy between persons and states is one of the oldest and most pervasive images of political philosophy and international law. Since at least the early Middle Ages there has been a persistent assumption that the right of states to engage in defensive war is intimately connected with the right of personal self-defense."[23] As Rodin correctly points out, the right of state self-defense is what justifies states engaging in defensive wars. One might imagine that the positive duty could conflict with states' right to defend themselves by creating a new duty that could force states to divert resources away from immediate military needs. Alternatively, the positive duty could be seen as discouraging defensive actions for fear of incurring a large debt to the civilians who might be harmed in the fighting.

It is critical to remember that the positive duty is a second-order duty. No belligerents have this duty automatically. They only incur a positive duty if they fail to perform the first-order duty of not harming civilians. The positive duty only emerges when belligerents wrong civilians by inflicting harm that civilians have a rights-based protection against, and nothing in the act of self-defense requires belligerents to harm civilians in any way that would trigger a second-order duty. Thus, there is no inherent tension between states' rights to defend themselves and the positive duty. Logically a belligerent could defend itself without the positive duty ever emerging.

Despite the logical possibility of acting defensively without triggering the positive duty, one could argue that it is practically impossible for any belligerent to avoid inflicting some civilian casualties and that any type of defensive fighting will therefore produce some civilian casualties. This may be true, yet it is also true that the degree to which belligerents harm civilians – and by extension, the degree to which belligerents take on the positive duty – depends on strategic decisions that belligerents make for themselves. The circumstances of modern warfare may force belligerents into situations that make it difficult to avoid harming civilians in some ways, but belligerents still retain a high degree of control over how they wish to employ modern weapons and how they respond to situations in which they may cause civilian suffering.

Belligerents that wish to defend themselves without incurring reparative obligations are free to make greater efforts to avoid inflicting civilian casualties. This is clearly desirable for moral and practical reasons; it would prevent harm from being inflicted in the first place and would free up more resources for

[23] Rodin, *War and Self-Defense*, p. 6.

use in defensive efforts directed against enemy military forces. Belligerents can seek technological solutions aimed at reducing the number of civilian casualties by developing more precise and less destructive munitions. They may also implement new institutional constraints, such as changing tactical doctrines to show greater sensitivity to *jus in bello* principles or introducing more stringent norm-enforcement mechanisms to help identify soldiers who are careless in their use of force.[24] These and other efforts to increase compliance with the negative duty can help to lower a state's reparative burdens without limiting its capacities for fighting in self-defense.

The two principles I propose are framed to avoid preventing states from acting defensively. The principle of restorative care bases the requisite standard of medical treatment on the level that is available to combatants and demands that a good-faith effort be made to help civilians. It does not assume that a belligerent has any basic level of medical resources before going to war and would not, therefore, disable a belligerent from acting in self-defense for lack of medical resources. The principle of recompense is less flexible, as it holds that the amount of money paid should be determined based on the victim's needs, and not the belligerent's ability to pay. Nevertheless, claims for compensation would have to be heard by some institution that could make fairly disinterested judgments about the level of payment that is due. Those judging claims could be enabled to allow for reasonable delays for the start of compensatory payments when there is an urgent defensive need that prevents immediate repayment.

Finally, it is important to note that research on state self-defense actually lends support to my positive duty. The typical strategy for explicating that right is to do so based on analogies drawn between it and individual self-defense. And, it is well established that individuals acting defensively may be required to pay compensatory damages for the harms they inflict on innocent bystanders, even though the defensive violence may be warranted. For example, Rodin acknowledges that "[a] person whose right is justifiably overridden deserves some compensation, apology, or redress."[25] Rodin does not extend this reasoning about the necessity of compensation to states, but he should if state and individual self-defense are two manifestations of the same right as he claims they are.

Violent Non-State Actors as Bearers of the Positive Duty

As I have argued, the positive duty and the principles that enact it apply to all violent actors, not only states. This is why I generally refer to the organizations that may bear the positive duty as "belligerents" rather than as "states." This

[24] Kahl, "In the Crossfire." [25] Rodin, *War and Self-Defense*, p. 71, n. 84.

calls for some explanation, as just war theorists have a tendency of treating violent non-state actors (VNSAs) as exceptional belligerents that either have more stringent or less stringent rules than states. As we have seen, Walzer gives states and the political communities they represent a special status and holds them above all other types of violent actors. From this, Walzer concludes that states have special abilities that VNSAs lack, such as the ability to declare supreme emergencies. Others think that just war theory must become more permissive to govern VNSAs' conduct. Nicholas Fotion even goes so far as to propose two distinct systems of just war theory: one for states and one for VNSAs. Although many of the same principles apply to each, Fotion interprets them differently for different types of actors and makes less stringent demands on VNSAs. For example, he thinks that VNSAs do not have to meet the *jus ad bellum* requirement of having a likelihood of success, even though states must.[26]

I oppose applying different moral standards to states and VNSAs, especially in this context. Civilians have a rights-based protection against being harmed by any individual or organization. From the right-bearer's perspective, there is no reason to think that harm inflicted by a VNSA is somehow different from harm inflicted by a state. Exempting VNSAs from the positive duty would be morally inconsistent, as this would deny civilians the protection afforded by the right to life even when they must be entitled to it. It would wrong the civilians who were disabled from claiming compensation, as well as states that were weakened by the obligation of assisting civilians when their VNSA adversaries did not face similar burdens.

Applying different moral standards to different types of actors could also discourage compliance with the positive duty. The perceived inconsistency of the moral norms applied to states and VNSAs is already routinely criticized by writers and members of the military.[27] If the perception of moral inconsistencies is aggravated further, it could drive some states or their military personnel to use it as a pretext for noncompliance with the norms of just war theory. This would threaten any efforts to enact the positive duty, particularly as the duty is not yet recognized as a part of just war theory or international law.

It is also important to recognize that belligerents' ontological status is not always as clear as the state vs. non-state binary implies, especially during war. Many entities are difficult to locate within this binary, such as states that are recognized by some states but not by others, quasi-states that have some of the characteristics of states but that lack recognition,[28] and weak states that

[26] Fotion, *War & Ethics*, p. 119.

[27] Peters, *Endless War*; Marcus Luttrell, *Lone Survivor: The Incredible True Story of Navy SEALs Under Siege* (London: Sphere, 2014), pp. 35–37.

[28] Robert H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (New York: Cambridge University Press, 1990).

have recognition even though they lack some of the capacities that are associated with states and may even be less powerful than VNSAs operating within their territory.[29] The typology of non-state actors is even more diverse, and includes many international organizations that act on behalf of states and that may arguably have similar standing to state military forces. Moreover, many VNSAs aspire to become states and may make the transition to state status, or at least to quasi-state status, during a war.[30] Given the profusion of different types of states and non-state actors, as well as the changes that a particular organization may undergo during a war, it would be exceedingly difficult to come up with any criteria that could reliably distinguish those types of entities that have moral duties to civilians during war from those that do not.

There are, then, good reasons for thinking that all entities that wage war should be held to the positive duty when they harm civilians. The difficulty is determining how this could be done in practice, when these organizations may be difficult to hold accountable or lack the ability to pay. As with other practical difficulties, the challenges of applying the positive duty to VNSAs do not alter the fact that the positive duty is something that violent actors *should* have to follow. The challenges only indicate the need for greater attention to developing mechanisms that can promote norm compliance. At present, there are several strategies that could be employed to hold VNSAs accountable for the civilian suffering they cause.

Perhaps the most useful strategy for pressuring VNSAs aspiring to become states to perform their reparative obligations is for states and international organizations to refrain from recognizing any entity that shirks its reparative obligations as a state. Performance of the positive duty certainly cannot be the only criterion for recognition, but it could be introduced alongside those that are already used when making this judgment as an additional necessary condition. There would be good moral grounds for doing this, as any entity that is unable or unwilling to assist civilians, or that inflicts such high levels of suffering that they are impossible to repair, may not be an entity that should be recognized as a state. After all, states should be expected to abide by moral and legal norms when they are at war, and their legitimacy should partially rest on how reliably they do so.

VNSAs can also be subjected to asset seizure if they refuse to voluntarily comply with the positive duty and are particularly vulnerable to this because they are often forced to rely heavily on financing from state sponsors, charities,

[29] Joel S. Migdal, *Strong Societies and Weak States: State-Society Relations and State Capabilities in the Third World* (Princeton, NJ: Princeton University Press, 1988).
[30] Weinstein, *Inside Rebellion*.

businesses, and diaspora communities.[31] It could be possible to intercept some of this money and channel it into compensatory payments. Efforts to intercept terrorist organizations' financing would provide a precedent for this and a guide for future efforts at seizing assets to assist civilians.[32]

Creating the Wrong Incentives

Another potential concern with the additional principles I proposed is that these may be seen as incentivizing wealthy states to deviate from *jus ad bellum* or *jus in bello* constraints. The principle of recompense could be especially problematic in this respect. Unlike the principle of restorative care, it does not impose varying demands that are adjusted to a belligerent's capacities and would allow belligerents to pay directly for the effects of violence. From a *jus ad bellum* standpoint, this could arguably lower the threshold for initiating wars for states that can afford to bear the associated financial burden.[33] Similarly, from a *jus in bello* standpoint, there may be an incentive to harm civilians, or at least to disregard their safety, if belligerents feel secure in the knowledge that they will be able to pay off the victims.

First, I disagree that compensatory payments would provide an incentive to go to war. Rich states will have an easier time bearing the financial burden of recompense, but the burden is still real. The principle imposes an additional cost on any state that will add to the overall costs of fighting. This will be an impediment to war regardless of a country's wealth. Even in the United States, the high cost of war is a cause for concern and a common complaint from anti-war voices. Raising the financial burden of inflicting civilian casualties will increase the overall costs of war and highlight civilian suffering, neither of which will be popular. I contend that the positive duty and its associated principles provide a disincentive to fight wars that are not vital to national security because the added expense will reduce the potential gains.

Second, rich states certainly would find it easier to fight than poor states, but this is already the case without the principle. Wealthier states tend to fight more and engage in more aggressive deterrence. The principle of recompense reflects existing wealth disparities; it does not create them or encourage them.

[31] Daniel Byman, *Deadly Connections: States that Sponsor Terrorism* (New York: Cambridge University Press, 2005); Michel Hess, "Substantiating the Nexus between Diaspora Groups and the Financing of Terrorism." In *Terrornomics*, edited by Sean S. Costigan and David Gold (Burlington, VT: Ashgate, 2007), 49–64; Juan C. Zarate, *Treasury's War: The Unleashing of a New Era of Financial Warfare* (New York: Public Affairs, 2013).

[32] For more information about financial warfare against terrorist organizations, see Martin S. Navias, "Finance Warfare as a Response to International Terrorism," *The Political Quarterly* 73(S1) (2002), 57–79.

[33] I would like to thank one of the anonymous reviewers for raising this concern.

Attempting to embed restrictions on rich states or some kind of distributive justice would undermine the positive duty and its associated principles by distracting from the task of civilian compensation and giving rich states, whose support is essential for bringing the principle of recompense into international law, reason to oppose it. Thus, the real issue is not that these additional principles are creating any new reasons for deviance but that they reflect existing disparities of resources. These disparities are cause for concern, not only for military reasons but also for deeper matters of distributive justice, yet they are best managed with principles that are addressed to differences in resources specifically and not to norms designed to help individual victims of war.

Conclusion

The positive duty should not be relegated to the domain of *jus post bellum*, which would risk giving belligerents tacit permission to ignore civilian suffering during wars. The positive duty and the principles of restorative care and recompense impose demands on belligerents that span the temporal dimensions of war. Belligerents contemplating the initiation of hostilities must take steps to ensure that they are able to assist the civilians whose right to life they violate or infringe on. Victims of aggression may be excused from the requirement of making pre-war preparations, since they are forced into a defensive war against their will, yet they remain responsible for providing medical treatment and financial compensation as soon as they are able to during and after that war. Just and unjust belligerents face the same obligations during and after a war: to perform the positive duty to the best of their abilities, and to do so as quickly as possible. Thus, when it is integrated with the other elements of just war theory, the positive duty and its associated principles extend across the domains of *jus ad bellum*, *jus in bello*, and *jus post bellum*.

The positive duty is not absolute. It and its associated principles exist alongside the many other demands imposed by just war theory and international law. And when the negative duty comes into conflict with the positive duty, such that belligerents have a clear choice between preventing harm to civilians or correcting harm that has been inflicted, the negative duty should take precedence. Such a conflict can occur during humanitarian interventions, wars against existential threats, and medical evacuations that would put additional civilians at risk. In each of these instances the demands imposed by the negative duty should take priority, but efforts should still be made to repair any resulting harm to civilians to the greatest extent possible.

The positive duty and the principles that operationalize it will inevitably encounter many practical challenges as they are put into practice. I have considered these throughout the book and called attention to some additional practical

considerations that may affect how the positive duty applies in particular conflicts or to particular actors. More practical challenges could certainly arise in addition to those that I consider here, and one of the goals of future research on belligerents' corrective obligations should be to anticipate and respond to those challenges. In particular, it will be important to develop mechanisms for promoting compliance with the positive duty in an effort to ensure that civilians' rights are given the highest degree of protection possible.

8 Positive Duties under International Law

Thus far I have focused on the moral duty that belligerents have to assist civilians who they injure, kill, or threaten through the deprivation of essential goods. I have discussed the new responsibilities that this would create and outlined some of the institutional changes that may be necessary to ensure compliance with the positive duty. My central goal has been to demonstrate that a positive duty toward civilians exists and to explore the implications that this duty has *as a moral norm* that operates apart from any specific legislation. The existence of this moral norm raises questions about the proper link between theory and practice, which speak to the larger ambitions of just war theory and other efforts to theorize normative constraints on war. What is the appropriate relationship between moral norms and the laws of war? Should norms be translated into law or is there an insurmountable gap between theory and practice?

Many just war theorists seem to think that the success of the just war tradition can be measured in terms of how effectively norms are codified in law,[1] while others are concerned that linking morality and law too closely could lead to a degradation of moral standards in pursuit of practical expediency. Those who propose substantial revisions to orthodox views of just war theory tend to be especially skeptical about whether the laws of war can reflect moral norms. For example, McMahan says that "[f]or various reasons, largely pragmatic in nature, the law of war must be substantially divergent from the morality of war."[2] This leads him to develop a two-tiered approach to just war theory that is sensitive to moral norms and to the best instantiations of those norms based on what is feasible in practice. He goes on to say that "the law cannot simply restate the requirements of morality. It has to be formulated to take account of the likely effects of its promulgation, institutionalization, and enforcement."[3] McMahan is probably correct in thinking that there is an insurmountable divide between moral ideals and the laws of war. States may resist legislation that undermines their security and contentious moral ideals present a moving target for anyone hoping to use them as a basis for law. Nevertheless, we should continually make

[1] Coates, *The Ethics of War*, p. 2; Walzer, *Arguing About War*, p. 24.
[2] McMahan, "The Morality of War," p. 19. [3] Ibid., p. 33.

efforts to bridge this divide, especially when practical considerations are built into the moral norms themselves, as in my formulation of the principles of restorative care and recompense.

The grounds for legislating morality are particularly strong when it comes to the positive duty. First, the right to life upon which the positive duty is based is not merely a moral norm but is also embedded in the charters of some of the world's most influential international organizations. It would be hypocritical for these institutions to refrain from recognizing the implications of the right to life. Truly respecting the right to life requires that they attempt to operate according to their own principles, which in turn suggests that they should support efforts to enact the positive duty. Second, as I discussed in Chapter 3, obligations to provide corrective assistance to the victims of attacks is already recognized in domestic law in most countries. Domestic legal systems therefore provide a body of precedent that can inform the creation of international laws relating to the treatment of civilians while also suggesting that such laws must exist for the sake of consistency. Third, there is precedent for improving the treatment of civilian victims, which can help to develop customary international law. Because this precedent has been primarily set by the United States, which has one of the world's most active militaries, it is in a particularly strong position for being accepted as custom. This suggests that bridging the divide between morality and law is not simply a matter of helping law catch up to morality but that, at least in this instance, the customs that inform international law seem to be ahead of moral theory.

Perhaps the most important reason of all for attempting to translate the normative protection of civilians into law in this instance is that the right to life is only a pale reflection of what it should be if it fails to provide more substantive protection for civilians. I agree with Wicks' assessment that the right to life must have far more power to protect people during war.

> None of the classic enactments of the right to life . . . seem designed for application in times of war or armed conflict. Instead, they seem to envisage a peacetime context when the greatest state-sanctioned threat to human life comes in the form of criminal justice penalties and enforcement. But in reality, the threat to human life in peacetime usually fades into insignificance compared to the threat posed by armed conflict.[4]

As Wicks points out, war is the context in which protections of the right to life are most desperately needed, and therefore the context in which we should be most eager to develop additional safeguards of that right. The positive duty that arises from the right to life should become the basis for legal protections that can help to ensure that civilian victims of war receive the medical assistance and financial compensation that they are entitled to.

[4] Wicks, *The Right to Life*, p. 79.

I start this chapter by discussing how the positive duty and the mechanisms for enacting it could become part of international law by gaining recognition as a general principle, becoming entrenched in custom, or being formally adopted in treaties. Although each of these strategies may be viable, customary international law provides the most promising route to promoting compliance with the positive duty. I recognize that many states may be unwilling to support treaties aimed at transforming the positive duty into law and developing the institutional structure needed for protecting civilians' rights. In the second section, I therefore discuss some of the reasons why states should recognize the positive duty, aside from their moral obligation to do so. States have some compelling strategic incentives for recognizing the positive duty because it can provide advantages over opponents, maintain their legitimacy, and help to cultivate popular support in contested areas. The third section builds on this with a case study of how the United States has recognized elements of the positive duty by providing financial compensation to civilian victims. This provides a promising example of how states may be induced to support the positive duty, as well as demonstrating that the duty is already on its way to becoming a customary international law.

I devote the rest of the chapter to several of the practical challenges that arise when developing an institutional framework for judging claims for compensatory damages. I consider the use of domestic tort law as a source of inspiration for just war theory and international law. Although I do not think that tort law can be simply transplanted into wartime contexts, I maintain that it can provide a useful analogy that can assist in the development of international laws that promote compliance with the positive duty. I end the chapter by discussing some of the practical challenges that would have to be addressed when it comes to bringing claims to trial and adjudicating them, such as collecting evidence, assigning the burden of proof, and determining how much money should be given for recompense.

Transforming the Positive Duty into Law

Throughout the book, I have sought to show that the positive duty is grounded in the right to life and that it is essential for protecting that right. And because it arises from fundamental norms that are already at the heart of domestic and international law, the positive duty can be recognized as a "general principle of law." The Statute of the International Court of Justice affirms that "general principles of law recognized by civilized nations"[5] are a valid source of international law. Domestic law is particularly important for demonstrating that a norm has the status of a general principle, as the concurrence of domestic legal

[5] Article 38 paragraph 1(c).

codes is evidence of a widespread agreement on basic values.[6] The right to life and a second-order duty to repair breaches of that right are deeply entrenched in domestic legal systems around the world.[7] Thus, as a potential general principle of law, there are grounds for thinking that the positive duty is already part of international law and that it has only failed to achieve recognition as such.

Because general principles of law are heavily contested and the positive duty has failed to achieve recognition thus far, it is important to also consider what other sources of international law could be used to provide civilians with more substantive protections of their rights. Two additional sources of international law, customs and treaties, may also help to create legal manifestations of the positive duty. Customary international law emerges from states' established practices. These practices may or may not be intended to create binding arrangements, yet they do so because they create patterns of interstate politics and expectations that those patterns will continue to structure interactions in the future. This type of international law may emerge from any custom, even when there is no clear accompanying norm motivating the behavior. However, customary international law is especially powerful when the customs reflect deeply held values on the part of those who participate in the practices. As Kennedy notes, "[i]n the court of world public opinion, the laws in force are not necessarily the rules that are *valid*, in some technical sense, but the rules that are persuasive to relevant political constituencies."[8] This highlights the importance of the theoretical project of articulating the moral basis for the positive duty, which can help to persuade constituencies that they are obliged to abide by the positive duty even though it is not yet formally recognized as law.

The principles of *jus in bello* provide a useful precedent for efforts to extend the legal protection of civilians to include belligerents' corrective obligations. Those principles were customarily upheld long before they were codified in the Geneva Conventions and other agreements, and they provided a customary basis for the rules that were adopted in treaties that formally established the laws of war.[9] Although the principles of *jus in bello* imposed restrictions on

[6] M. Cherif Bassiouni, "Functional Approach to General Principles of International Law," *Michigan Journal of International Law* 11 (1990), 768.

[7] This is clear from work on comparative tort law, which shows that the structure of compensatory systems may vary cross-nationally, but that the entitlement to compensation for breaches of rights is generally agreed upon. Mauro Bussani and Anthony J. Sebok (eds.), *Comparative Tort Law: Global Perspectives* (Cheltenham: Edward Elgar, 2015); Mads Andenas and Duncan Fairgrieve (eds.), *Courts and Comparative Law* (Oxford: Oxford University Press, 2015).

[8] David Kennedy, *Of War and Law* (Princeton, NJ: Princeton University Press, 2006), p. 96.

[9] Noelle Higgins, *Regulating the Use of Force in Wars of National Liberation: The Need for a New Regime* (Leiden: Martinus Nijhoff, 2010), pp. 7–52; Michael Newton and Larry May, *Proportionality in International Law* (Oxford: Oxford University Press, 2014).

how belligerents could act and limited the strategies available for waging war – just as my additional principles do – they became widely accepted in custom because of a general desire to impose some limits on war that could be mutually beneficial for belligerents. That is to say, belligerents were amenable to imposing restrictions on their own conduct even in the absence of formal agreements and external law-enforcement bodies because they recognized moral and strategic imperatives for doing so.

Building compliance with the positive duty to provide a basis for recognizing that it is customary international law is apt to be a long and gradual process, just as it was for the principles of *jus in bello* to gain compliance and ultimately formal adoption in treaties. It will depend on clearly articulating the reasons why states should establish practices of acting according to the positive duty, and certain states may refuse to comply even as this duty gains more widespread recognition. Nevertheless, we should have some optimism about the prospect that civilians' rights will receive greater protection in the future. The principle of restorative care probably has the best chance of being formally recognized. As I showed in Chapter 5, states have already recognized an obligation to provide medical treatment to civilians under certain circumstances. This provides the basis for extending civilian protections and strengthening the requirement to give medical assistance. And as I discuss later in this chapter, the United States has implemented payment programs for civilian victims, which could provide a basis for promoting the principle of recompense.

Ultimately, the goal should be for the positive duty to gain formal recognition in a treaty, as this would provide the strongest legal basis for enforcing it. This would also make it possible to create institutions that are capable of providing oversight and neutral adjudication. To some extent, the institutions necessary for enacting the principle of restorative care are already in place. International organizations, such as the Red Cross, provide medical assistance during wars and evaluate belligerents' compliance with laws pertaining to the treatment of civilians. Those same organizations could be empowered to oversee compliance with the principle of restorative care and officially recognized as intermediaries through which care can be provided. However, the principle of recompense raises more significant problems. There are currently no institutions that are capable of ensuring that states pay their financial obligations, and even a customary law to provide recompense might be inadequate without the creation of a neutral body that has the power to hear cases when civilians claim compensation. Gaining ascent to a treaty recognizing the positive duty and international institutions that are capable of monitoring compliance with it must start with efforts to show states that they have incentives to support such an arrangement, even though it will increase the burdens of waging wars.

Developing State Incentives

States and policymakers are motivated by a diverse range of incentives, which are apt to include desires to act morally (or at least to be seen as acting morally), to protect their own civilian populations, and to leverage normative and legal restrictions on wars for strategic advantage – all of which may provide grounds for promoting compliance with the positive duty. Although elites would ideally abide by the norms of war for their own inherent value, we cannot assume that this will be sufficient motivation for compliance, especially given the other pressures leaders must contend with, such as the demands of successfully prosecuting wars and achieving benefits for their constituents. We must identify compelling incentives, aside from the need to act morally, that can be used to urge states to voluntarily abide by the positive duty.

It is important for belligerents to recognize that the law can work to their advantage or disadvantage depending on the circumstances. As Kennedy points out, "[l]aw is a strategic partner for military commanders when it increases the perception of outsiders that what the military is doing is legitimate. And of course, it is a strategic partner for the war's opponents when it increases the perception that what the military is doing is not legitimate."[10] Laws that are directed at promoting compliance with the positive duty may restrict the range of actions open to belligerents and impose a heavy burden of assisting civilians, yet they would do this for all belligerents, thereby ensuring that the constraints could be experienced as a hindrance or a benefit depending on how belligerents conduct themselves. Laws that apply to all belligerents would generate a strategic interest in showing heightened respect for civilians and calling attention to the other side's missteps. Belligerents would be able to compete with each other through efforts to achieve higher levels of compliance and to more effectively police their opponents.

Military competition that is manifest through efforts at reducing violence against civilians would be particularly advantageous for the advanced industrial countries whose support is most needed when enacting treaties. It would therefore give these states reason to take the lead in developing legislation based on the positive duty. First, these countries have greater capacities for paying the costs of medical treatment and financial compensation, which gives them the ability to sustain these costs as weaker opponents are bankrupted. Stronger states could take advantage of their financial superiority by bearing the burdens of civilian assistance without having to siphon money from military expenditures when opponents may be forced to do so. Second, for decades the world's most advanced military powers have made greater investments in technologies that can reduce the risk of inflicting civilian casualties – technologies such as

[10] Kennedy, *Of War and Law*, p. 41.

nonlethal weapons, precision-guided munitions, and drones.[11] The advantages these weapons present in terms of limiting the destructiveness of war could be even more effectively mobilized if opponents faced legal constraints forcing them to bear the human costs of failing to use these types of weapons.

Some belligerents may refuse to comply with the positive duty, thereby disrupting any symmetrical incentive structure and the strategic benefits that might follow from it. However, even in instances of unilateral noncompliance with the positive duty, there are still strategic incentives that make compliance advantageous. First, belligerents that comply with the positive duty in wars against belligerents that do not would have far more compelling grounds for claiming moral superiority. This is a critical advantage. Belligerents devote considerable energy to framing conflicts in ways that legitimize their own efforts and vilify opponents.[12] This framing can be crucial to maintaining international support, protecting alliances, and preventing domestic backlash. Showing sensitivity to civilians is particularly important, as evidenced by the ongoing debate over the legitimacy of the US drone program, which is largely a debate over the extent to which drone strikes have caused unnecessary civilian casualties. Belligerents would be able to make more plausible claims about waging just wars if they follow the norms that I have developed. In the case of drone strikes, the United States would be able to make a more compelling case that it is minimizing the risks to civilians if it were to accept responsibility for assisting civilian casualties.

Second, providing assistance for civilians fits with strategic efforts to cultivate public support for states and their military operations. In recent decades strategic theorists have called attention to the increasing importance of concepts like "soft power," "public diplomacy," and "nation branding."[13] These concepts all refer to different strategies for building legitimacy among domestic and foreign constituents as a means of achieving political objectives without the use of direct coercion or military force. These efforts are facilitated when states are seen as abiding by normative constraints, particularly when it comes to the fair treatment of innocent people. States therefore have compelling

[11] David A. Koplow, *Non-lethal Weapons: The Law and Policy of Revolutionary Technologies for the Military and Law Enforcement* (Cambridge: Cambridge University Press, 2006) and *Death by Moderation: The US Military's Quest for Useable Weapons* (New York: Cambridge University Press, 2010).

[12] Ron Schleifer, "Jewish and Contemporary Origins of Israeli *Hasbara*," *Jewish Political Studies Review* 15(1–2) (2003), 123–153 and "Psychological Operations: A New Variation on an Age Old Art: Hezbollah versus Israel," *Studies in Conflict & Terrorism* 29 (2006), 1–19; Eytan Gilboa, "Searching for a Theory of Public Diplomacy," *The ANNALS of the American Academy of Political and Social Science* 616(1) (2008), 55–77.

[13] Joseph S. Nye, *Soft Power: The Means to Success in World Politics* (New York: Public Affairs, 2004); Craig Hayden, *The Rhetoric of Soft Power: Public Diplomacy in Global Contexts* (Plymouth: Lexington Books, 2012).

reasons to think that the ideological benefits of complying with the positive duty may outweigh the financial and material costs.

In some circumstances, protecting civilians may not only be a means to an end but also an end in itself. This is true even if we assume that belligerents are solely interested in achieving their strategic and political objectives. Much of the contemporary research on counterinsurgency suggests that winning the support of local populations is essential to building legitimacy in contested areas and depriving insurgents of support.[14] If medical treatment and financial assistance to civilian victims are used as one method of building support, then they could be a pragmatic means of achieving victory. These forms of assistance could also be less expensive than the protracted wars that might ensue if occupying forces were to neglect civilians' rights. As I will discuss in the next section, this strategic rationale for providing compensation has informed US policies during its wars in Iraq and Afghanistan.

Finally, states and non-state actors that fail to comply with the positive duty, either as a moral norm or as a component of international law, run the risk of censure from other states. As Coates correctly notes, this type of pressure provides a vital mechanism by which just war principles can be put into practice. "Sustaining and developing a moral culture of war that encourages its more limited use and conduct (and that perhaps leads to the ostracism of states that ignore moral constraints) is a prime objective of just war theory."[15] Moreover, according to Kalshoven and Zegveld, norms regarding the treatment of civilians do not require universal support to be universally binding. "[R]ules in these treaties that already belonged to customary law, or that have developed into rules of customary law after the conclusion and entry into force of the treaty, are also binding on states that are not parties to the treaties as well as on armed opposition groups."[16] Thus, states and non-state actors that refuse to voluntarily submit to new laws protecting civilians' rights could nevertheless be punished for failing to provide restorative care or recompense.

Civilian Compensation in American Wars

Some mechanisms for distributing financial assistance to individual civilian victims already exist. These are established by domestic laws that allow foreign citizens to sue states for damages and by direct-payment programs that are designed to cultivate popular support in contested areas. During the wars in Iraq and Afghanistan, the United States allowed civilians in those countries

[14] Department of the Army, *Counterinsurgency*; Kilcullen, *The Accidental Guerrilla*; Ricks, *The Gamble*.

[15] Coates, *The Ethics of War*, p. 155.

[16] Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War* (New York: Cambridge University Press, 2011), p. 4.

to seek damages for injuries inflicted by US military personnel using both of these types of mechanisms. The US payment programs are evidence that compensating individual victims of war is practically feasible and that belligerents may be receptive to providing such payments. The payments used in Iraq and Afghanistan also show how existing compensatory mechanisms must be improved. Specifically, they demonstrate that the arbitration of claims must be institutionalized at an international level, that claims must be heard by neutral judges, and that payments should be increased.

US law offers two main legal mechanisms that allow foreign civilians to make claims for damages inflicted by American soldiers: the Foreign Claims Act (FCA) and the Alien Tort Claims Act (ATCA).[17] The FCA was enacted in 1942 with the goal of allowing foreign civilians to sue the US military for injuries, wrongful death, and property damage. The damages it covers are even broader in scope than those covered by the principle of recompense, as the FCA allows compensation to be paid for the loss of any real property or personal property – not just property that is essential for survival. The ATCA was introduced as part of the Judiciary Act of 1789. Its scope is less clear than the FCA's, but it is commonly interpreted as providing grounds for claiming damages from the US government when it contravenes customary international law.

Although some civilians have sought compensation under the FCA and ATCA, it can be very difficult for them to do this because of the daunting practical barriers. Both the FCA and ATCA require that foreign civilians file claims in US courts, yet foreigners are often unaware of their rights under foreign legal systems, unable to present their claims, and unable to pay an American lawyer's fees.[18] Even more seriously, the FCA and ATCA include a combat exception, which denies payment for any damages that were inflicted during combat. A civilian killed by a stray bullet fired at insurgents or by fragments of a bomb that was dropped during an engagement has no right to compensation, regardless of other contextual factors or the individual's right against being harmed. The combat exception defines combat very broadly, even allowing perceived hostilities to qualify as initiating combat. For example, opening fire on a civilian who is misidentified as an enemy combatant can be interpreted as initiating combat, thus exempting the victim of the mistaken attack from damages even if no enemy combatants or weapons were actually present.[19]

Recognizing the limitations of the FCA and ATCA, the US military introduced solatia and condolence payments during the wars in Afghanistan and

[17] 28 USC § 1350.

[18] Louise Doswald-Beck, "The Civilian in the Crossfire," *Journal of Peace Research* 24(3) (1987), 251–262.

[19] Minako Ichikawa Smart, "Compensation for Civilian Casualties in Armed Conflicts and Theory of Liability." In *Economics of War and Peace: Economic, Legal and Political Perspectives*, edited by Jurgen Brauer (Bradford: Emerald Publishing Group, 2010), 243–262, p. 249.

Iraq. These are ad hoc payments that allow commanders in the field to make direct payments to foreign civilians by redirecting funds from other sources. Condolence payments are made from the Commander's Emergency Response Program (CERP), though most CERP money is used for infrastructure-building projects.[20] Solatia payments are drawn from unit Operations and Maintenance (O&M) accounts, which are primarily used for logistical expenses, such as hiring civilian contractors or purchasing and servicing equipment.[21] Solatia and condolence payments mark a significant improvement in the protection of civilian rights and have provided much-needed support for civilians affected by war. Between 2003 and 2006 approximately $1.9 million were distributed through solatia payments and $29 million through condolence payments to civilians in Iraq and Afghanistan.[22] The payments demonstrate that compensatory payment programs can be practically viable and accepted by states, that states are able to provide more effective forms of compensation than those called for by existing theories of just war, and that there is customary precedent for requiring states to pay compensatory damages.

Solatia and condolence payment programs suffer from several serious limitations, which make it important to treat them as a useful starting place, but one that falls short of what the principle of recompense demands. First, the processes for making and adjudicating the claims are arbitrary and unfair. Seeking compensation demands knowledge, access, and resources that people may lack during wartime. The programs are not widely known by foreign civilians and claims for injuries can only be presented at certain processing areas. Once they are filed, the claims must be substantiated based on high standards of evidence and judged by military personnel. As Zucchino explains, "the burden of proof is on Iraqis, the final decision is made by a U.S. commander, and there is no appeal."[23] Although I will argue that placing the burden of proof on the civilians making claims is probably a practical necessity, it is essential for disinterested authorities to judge claims for compensation.

Second, payment amounts are extremely low, even when they are adjusted for the local context. During the Iraq War, the maximum award was set at $1000

[20] Mark S. Martins, "The Commander's Emergency Response Program," *Joint Force Quarterly* 37 (2005), 46–52.

[21] Ibid.

[22] United States Government Accountability Office, *Military Operations: The Department of Defense's Use of Solatia and Condolence Payments in Iraq and Afghanistan, GAO-07–699* (Washington, DC: United States Government Accountability Office, 2007). More recent figures for solatia and condolence payments are not available.

[23] David Zucchino, "US 'Condolence Payments' Translate Iraqis' Losses to Cash," *Seattle Times*, March 12, 2005. http://www.seattletimes.com/nation-world/us-condolence-payments-translate-iraqis-losses-to-cash/ (accessed March 20, 2017).

for an injury and $2500 for a death or property damage.[24] The American Civil Liberties Union (ACLU) has collected data on thousands of attacks, and these reveal that amounts are consistently much lower than what would be needed to repair the harm that was inflicted. For example: "Condolence payment for Iraqi [Redacted]. [Redacted] was shot and killed as he crossed the concertina wire outside a Forward Operating Base. [Iraqi] was carrying a 'suspicious' satchel, which turned out to be full of books . . . Condolence payment: $500 US for 'death.'"[25] In another case, a man was awarded $6000 when his wife, sister, and six children were killed.[26] Some reports suggest that civilians in Afghanistan and Iraq are insulted by the low amounts offered and by the fact that death and property damage receive similar amounts of compensation.[27]

Third, the payments do not seem to represent a lasting change in the norms of just war or the American military's counterinsurgency strategy. Official documents explicitly deny that these payments have a moral dimension. They rightly note that the payments may be due regardless of the attacker's moral culpability, yet they also fail to recognize that civilians have a rights-based entitlement to compensation. The payment programs are described as only being strategic tools that can build indigenous support for counterinsurgency operations.[28] Given the ad hoc nature of the direct payments and the absence of any underlying moral reasoning that would compel the US military to compensate its victims, it is unclear whether payments will be offered to civilians harmed in future wars.

Fourth, because solatia and condolence payments are made using money that can be spent on a broad range of different projects, the needs of civilians have to be weighed against other spending needs that may be given priority. Reconstruction projects and the maintenance of military equipment are routinely given precedence over civilian compensation in Iraq and Afghanistan, and this can lead claims for damages to be denied because of insufficient funds.[29] This limitation further demonstrates that an obligation to assist civilians is only weakly felt and that it needs to be stated more formally.

Solatia and condolence payments are praiseworthy attempts to assist civilians harmed during wars. They indicate that states are amenable to providing financial assistance to civilians, even though this imposes a financial burden.

[24] Jeffrey Gettleman, "For Iraqis in Harm's Way, $5000 and 'I'm Sorry,'" *New York Times*, March 17, 2004. http://www.nytimes.com/2004/03/17/international/middleeast/17CIVI.html?8hpib (accessed March 20, 2017).
[25] ACLU, "Documents received from the Department of the Army."
[26] Gettleman, "For Iraqis in Harm's Way."
[27] Jonathan Tracy, "Responsibility to Pay: Compensating Civilian Casualties of War," *Human Rights Brief* 15(1) (2007), 16–19.
[28] Martins, "The Commander's Emergency Response Program."
[29] Tracy, "Responsibility to Pay."

The use of direct payments shows that the US military is in some ways ahead of many just war theorists in recognizing the need for civilian compensation. Nevertheless, these methods of payment are inadequate and suffer from fairly clear defects that have to be overcome to improve on these initial steps toward recognizing the positive duty. Most of the shortcomings are rooted in the same fundamental problem as those in the literature on just war theory: the lack of a clear sense of what civilians' rights entail. Because the US military does not recognize a positive duty toward civilians, there is little demand to establish fairer standards and processes for hearing noncombatants' claims for damages.

America's wars are also instructive because they indicate that payments could be a way of bridging cultural divides. Kilcullen points out that issuing compensatory payments for injuries is an established part of Islamic culture, and one that Western forces could embrace to both demonstrate cultural respect and build stronger links with local allies.[30] In Iraq, payments (*diya*) are organized through a mediation process called the *sulh*, which is conducted by tribal leaders.[31] Kilcullen suggests linking the United States' existing payment programs to local customs like this one. For example, payment amounts could be negotiated by tribal leaders, rather than simply being determined by American officers, to increase the prestige of leaders who ally with the United States and reinforce cultural practices that might otherwise be at risk from the reforms that come along with nation building. This merger of interests promotes repayment for injuries and establishes it as an effective tool of counterinsurgency that states have an interest in adopting.

On a more general level, the existence of compensatory payment programs across cultures suggests that the corrective norms embodied in the positive duty and its associated principles could have broad appeal beyond the just war tradition's Western roots. As Kilcullen points out, building assent for this depends on effectively linking reparative mechanisms to existing cultural practices. I have framed the principles of restorative care and recompense with this in mind. Both admit a large degree of contextual variation, provided the underlying goals of assisting civilian victims physically or financially are achieved. For example, the principle of recompense's neutrality about which specific actors arbitrate payment amounts opens the possibility that victims and offenders could leave this to a binding decision by tribal leaders rather than an international organization. Such a decision would need to be made at the discretion of the parties involved, but could be permissible if the victims agree on the procedures.

[30] Kilcullen, *The Accidental Guerrilla*, pp. 168–170.

[31] George E. Irani, "Islamic Mediation Techniques for Middle East Conflicts," *Middle East Review of International Affairs* 3(2) (1999), 1–17; Gettleman, "For Iraqis in Harm's Way"; Keith Brown, "'All They Understand is Force': Debating Culture in Operation Iraqi Freedom," *American Anthropologist* 110(4) (2008), 443–453.

Standards of Liability

The principle of recompense establishes obligations between belligerents that are similar to those that exist in tort law. As Darwall explains it, the logic behind tort law is similar to the logic that underlies the positive duty. "Tort law defines duties to refrain from injuring others, duties that are directed or bipolar in the sense that they are owed to others. When these duties are breached by an action, that action constitutes a wrong to the obligee; it wrongs him."[32] Significantly, torts need not be crimes and tort law may therefore provide the basis for providing assistance to a victim even when the perpetrator has not done something that would warrant criminal punishment. This means that it is possible for tort law, like the positive duty, to place demands on those who inflict harm on civilians even when they have not acted in a way that is morally blameworthy or that violates international law.

Tort law is difficult to apply directly to war because war is exceptional. It is a state of affairs in which actions that would usually be considered criminal are the norm and may even be obligatory. War is typically seen as creating its own distinctive normative and legal domain, with people taking on the special categories of "combatant" and "civilian," with their own sets of responsibilities that may not exist in other contexts. Applying theories of domestic tort liability is inherently fraught with problems, if for no other reason than because they were not developed to work in such scenarios. Tort case law has developed through incidents that have occurred outside of the war context, usually in domestic settings that do not involve entities that are akin to state military forces. However, tort law can still serve as the basis for understanding the standards of liability that may be used to assess damages inflicted during war. Tort law often informs just war theorists' evaluations of moral liabilities that could potentially become codified in law, and it is possible to build on this literature to set the foundations for a new legal paradigm that would be able to assist civilian victims.

Borrowing from tort law, Walzer argues that "civilians have a right that 'due care' be taken" in determining when it is excusable to infringe on a civilian's immunity.[33] To illustrate the concept of due care and its special meaning during war, he draws on an example from domestic life. He argues that when the gas company makes repairs on the gas lines outside of someone's home, it must meet a relatively high standard of due care and avoid doing anything that would create unnecessary risk for bystanders. In the case of an emergency, by contrast, the standard of due care is relaxed because the repairs are needed urgently to protect people from a serious risk that they may fall victim to if the repairs

[32] Stephen Darwall, *Morality, Authority, and Law: Essays in Second-Personal Ethics I* (New York: Oxford University Press, 2013), p. 187.
[33] Walzer, *Just and Unjust Wars*, p. 156.

are not carried out. It is this emergency situation that Walzer compares with a time of war. He argues that soldiers in war should have a relaxed standard of due care, just as the workers conducting emergency repairs on a gas line do.[34] Walzer maintains that combatants should take the utmost care to minimize civilian casualties, even to the extent that they may be required to take on additional risks of being killed or injured. Nevertheless, Walzer's discussion of due care is limited to the steps that combatants should take to minimize harm to civilians and therefore falls into the same problem we have seen so many times of failing to confront the implications of this concept after civilians have been attacked.

Steven Lee reaches a different conclusion about how the standard of due care should apply during war. He contends that Walzer's analogy relies on the concept of negligence, but that recklessness is more appropriate during war. As Lee sees it, the key difference between these two concepts is foreseeability. Someone is guilty of negligence when failing to foresee the harm that would be inflicted by a particular action. Because the harm should have been foreseen, and actions altered accordingly, the actor should have to pay compensation to the victim. Someone is guilty of acting recklessly if that person could foresee the harm that would be inflicted *and did foresee it*, but performed the harmful behavior anyway. Lee maintains that recklessness is a better standard to apply during war because soldiers usually do foresee the harm that they will inflict on civilians: "Generally, combatants who violate the principle of discrimination, like the reckless and unlike the negligent, are aware that their actions impose risks on civilians."[35] This leads him to suggest the application of a "reasonableness" standard that requires combatants to "reduce civilian risk to the point where it is not unreasonable."[36]

I contend that theories of negligence and recklessness are inadequate to account for attacks on civilians during wars because war is intrinsically dangerous for civilians. There are ways of fighting that increase or decrease the risk to civilians, but even when the utmost care is taken to avoid harming civilians, war is clearly not a safe activity. When an activity puts people at risk, even when it is performed with the utmost care, it is classified as an inherently dangerous or ultrahazardous activity in tort law. The origins of this concept can be found in the common law of torts in both US and British law. It has also been included in the Restatement of Torts Second, sections 519 and 520, which include some proposed guidelines for determining when an activity should be classified as inherently dangerous.[37]

Only a limited number of situations have been interpreted as constituting inherently dangerous activities. Some examples of these are storing or using

[34] Ibid.
[35] Lee, "Double Effect, Double Intention," p. 244.
[36] Ibid.
[37] Restatement of Torts §§ 519–524 (1938).

certain chemicals, dynamite, and hazardous waste and keeping violent animals. What these activities have in common is that the courts have ruled that even if the reasonably prudent person performs them with the utmost care, they present a degree of risk for which the person performing them should be held liable. That is to say, these activities are so dangerous that people performing them should be liable for those dangers at all times. This is a stronger standard than negligence or even recklessness, which is why it is rarely applied, yet it is the appropriate standard to apply when considering what obligations belligerents owe to civilians.

As Lee points out, the risk to civilians during war is foreseeable and foreseen by those who fight.[38] To this extent I agree with his argument for rejecting the standard of negligence. However, recklessness is inadequate because war is so dangerous for civilians that, even when it is performed with the utmost care, the foreseeable risk remains extremely high. Like the person who stores dynamite, combatants engaging in war are aware of the risks they impose on civilians, but must impose these risks on others if they wish to fight.

Inherently dangerous activities are special and only recognized as existing under a fairly narrow range of circumstances because strict liability attaches to them. Those who carry out inherently dangerous activities are held strictly liable for any resulting harm, regardless of whether the harm was intentional or whether reasonable steps were taken to prevent the harm. According to this standard, requiring belligerents to repair harm to a civilian would only require proof that they were responsible for causing the harm. It would not be necessary to demonstrate that there was any malice, and the attacker could not be exonerated by having exercised due care. This is an extremely demanding standard, yet it is a fair standard to apply during war because of the existence of foreseen risks to civilians that could breach their right to life.

An Individual Cause of Action

Another important step toward promoting compliance with the positive duty is to recognize an individual cause of action in international law. A cause of action grants an actor the ability to take legal action within a jurisdiction. To bring suit in a court of law a person must have been wronged in a legal sense; there must be some legal basis for the person to claim that a wrong has been committed. A person who has been robbed cannot simply go to court and assert the facts surrounding the robbery. Instead, the victim must find a cause of action in statutes or case law that can provide the basis for suing, while asserting the facts to prove that the elements of the cause of action are met.

[38] Lee, "Double Effect, Double Intention," p. 244.

At present, individuals lack the ability to claim damages under international law. They must make their claims to the states that are responsible for the breach of rights or attempt to receive some assistance from their own government. This is a byproduct of the Westphalian system of international relations and its strong conception of state sovereignty, which have shaped the development of international law.[39] The treaties of Westphalia established that states had the sole right to sign treaties and to possess international legal personality.[40] Over the past 300 years, the Westphalian system has become the dominant model of international politics, ensuring that states have retained their status even as regional and international organizations have grown in importance.

The Westphalian assumptions embedded in international law are deeply problematic. They make it difficult to apply the law consistently during conflicts involving non-state actors and hinder the protection of civilians from abuses by non-state actors and by states. This has been evident throughout the War on Terror, as the legal status of suspected terrorists and of counterterrorism operations that seem to fall short of conventional war has been heavily contested.[41] The War on Terror has also demonstrated the costs of maintaining the law in its present form. Ambiguities in how international law should apply to individuals and non-state actors have made it possible for states to exploit legal grey areas and to disregard the rights of suspected terrorists and civilians.[42]

The inadequacy of the Westphalian system has become increasingly evident and has inspired alternative conceptions of the law that are less state-centric. The development of International Criminal Law and the strengthening of International Humanitarian and Human Rights Law together with this changing model have led some to argue that a paradigm shift in international law is underway. At the heart of this transformation is an interest in developing a more "human oriented" approach.[43] This "Humanity's Law" represents the changing focus of international law from states to "peoples."[44]

As we saw previously, one of the most serious challenges for enacting the principle of recompense is that the existing institutional framework and dominant understandings of international law would force states to judge claims for

[39] Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (New York: Oxford University Press, 2005).

[40] Vienna Convention on Diplomatic Relations, April 18, 1961. 23 UST 3227, TIAS No. 7502, 500 UNTS 95.

[41] William E. Scheuerman, "Carl Schmitt and the Road to Abu Ghraib," *Constellations* 13(1) (2006), 108–124; Jason Ralph, "War as an Institution of International Hierarchy: Carl Schmitt's *Theory of the Partisan* and Contemporary US Practice," *Millennium: A Journal of International Studies* 39(2) (2010), 279–298.

[42] Gilbert Guillaume, "Terrorism and International Law," *International and Comparative Law Quarterly* 53(3) (2004), 537–548.

[43] Teitel, "Humanity's Law," p. 357. See also Teitel, *Humanity's Law*.

[44] Teitel, *Humanity's Law*.

compensation themselves. Thus, the United States and other states that provide compensation to civilian victims may judge cases involving their own military forces and are free to impose stricter understandings of the principle of recompense that may include things like combat exceptions. The fact that thousands of payments have been made by the US military suggests that judges and military officials who make discretionary payments are frequently capable of overcoming nationalistic biases to act in the interest of foreign civilians' welfare. Nevertheless, the numbers may fail to show how many cases are not fairly adjudicated or how often the amounts paid fall short of what is necessary to repair the injuries. And there is an even deeper concern that this system is unfair in principle simply because it does not involve neutral judges.

I propose that three individual causes of action are needed, which correspond to the three ways in which civilians' right to life can be breached: wrongful death, bodily injury, and property damage. These individual causes of action in international law would help civilians make their claims for damages to an institution that is capable of providing a more neutral judgment. They would make it possible for the civilian victims of war to make their claims to a third party that is entrusted with administering the law not on behalf of the United States or any other state that is responsible for harming civilians but on behalf of the international community.

Judging Claims

Enacting the principle of recompense as a law would require the creation of institutions that are capable of hearing cases and passing fairly neutral judgments on them. These institutions would also need to develop practices that are informed by the moral reasoning that underlies the positive duty. Ideally, claims for compensation would be heard by an organization that is akin to the International Criminal Court (ICC). The ICC became active in 2002 as a result of the Rome Statute of 1998 and works to prosecute war crimes and other atrocities. It has sought to hold individuals responsible for actions that would have been previously assigned to collectives, which can easily escape punishment. As Schiff says of the ICC's influence, "[l]egalization has arrived . . . at the doorstep of individual responsibility."[45] It is significant that the ICC hopes to identify individual responsibility, as this makes it even more helpful as a model for a legal regime that is directed at protecting individual rights.

Another noteworthy step was taken in 2006, when the UN General Assembly passed Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights

[45] Benjamin N. Schiff, *Building the International Criminal Court* (New York: Cambridge University Press, 2008), p. 2.

Law and Serious Violations of International Humanitarian Law ("Basic Principles and Guidelines"), which was framed as "an international bill of rights of victims."[46] The Basic Principles and Guidelines define victims as "persons who individually or collectively suffered harm, including physical or mental injury . . . through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law."[47] This acknowledgment of individual need is another step toward recognizing the importance of assisting individual victims of war, though it needs to be strengthened with the recognition that individuals' rights may be breached even when they are not victims of the kind of intentional attacks that would constitute violations of the laws of war.

One of the most serious potential problems for any international body that is tasked with hearing cases for compensatory damages and ruling on them is that they may face a very high caseload. Even comparatively small wars can result in tens of thousands of civilian casualties. It is unlikely that any international organization that would be able to hear claims for compensation would have the resources needed to collect evidence regarding each case. For this reason, I recommend that the burden of proof when claiming compensatory damage should rest with the person making the claim. It should be up to that person to collect evidence that can demonstrate that the claimant suffered an infringement of rights and that compensation is owed. Two types of evidence would be needed. First, the claimant would have to establish that the victim of the attack was a civilian and therefore had a rights-based claim against being attacked. Second, the claimant would need to provide compelling evidence that the harm was inflicted by the belligerent that is being accused and not by another party to the conflict.

The difficulty of demonstrating civilian status will vary depending on the claimant and the type of war being fought. Those who are too young or too old for military service, as well as those who are in some way physically or mentally disabled from performing service, will generally have an easier time establishing their status than men and women in good health and of an age when they can take part in hostilities. During conventional wars, the latter may demonstrate that they were civilians by producing official documents that confirm that they were not members of the military, that they were occupied in other capacities, or that they were disabled from acting as combatants. The challenge of demonstrating civilian status is greater during unconventional wars, as these conflicts tend to blur the line between civilians and soldiers. Civilians harmed

[46] M. Cherif Bassiouni, "International Recognition of Victims' Rights," *Human Rights Law Review* 6(2) (2006), 203–279, p. 203.

[47] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res, 147, March 21, 2006. A/RES/60/147; 13 IHRR 907, Art. 5, para. 8.

during unconventional wars may not have any official documentation to show that they were not combatants, and may not be able to demonstrate that they were civilians simply by having a nonmilitary occupation, since this does not rule out part-time engagement in irregular fighting. The increased difficulty of proving civilian status during unconventional wars must therefore be taken into account.

The means of gathering evidence of responsibility will also vary considerably depending on the type of conflict. During conventional wars, it may be fairly easy to say which side is responsible for indirect attacks involving artillery or air strikes, as these attacks tend to be launched against territories controlled by the opposing side. Determining responsibility will be more difficult when harms are inflicted during combat between opposing ground forces, whether in conventional or unconventional wars. Nevertheless, the challenges can be surmounted. Armed forces and VNSAs may use different weapons that leave characteristic damage, they may use distinctive methods of fighting, such as improvised explosive devices or air strikes, and they may conduct attacks in different geographical areas. Judgments of fault may be facilitated by granting judges access to military records that provide the details of when engagements took place and what weapons were involved.

Assigning the burden of proof to the claimants would have the undesirable effect of further burdening people who may have suffered considerably, yet it is unavoidable to ensure that an organization charged with hearing claims for compensation is able to rule on a large number of cases without long delays. Moreover, because belligerents would be strictly liable for the harm they inflict, it is important to set a fairly high bar for demonstrating the facts of a case in an effort to discourage wrongful claims and to prevent belligerents from bearing the costs of attacks that were launched by another party to the conflict. That said, it would be useful for an organization hearing the claims to have some assistance from representatives of the belligerents and from local authorities when hearing the facts of the case. These people may in some instances be able to find more reliable evidence than what is available to the claimants.

Although it will be essential for representatives of the belligerents and local authorities to be involved in judicial hearings, it is also critical for the claims to be arbitrated by neutral parties. Judges must not be drawn either from the same country of residence as the civilian presenting the claim or from the country that is charged with inflicting the harm. As in a domestic context, true neutrality is illusory; it is impossible to completely eliminate bias in the judges, as any judges will come to cases with their own interpretations of how claims should be resolved and preconceptions about the conflicts in which they were inflicted. Nevertheless, neutrality can be reasonably protected by relying on judges from countries that were not involved in the conflict.

Conclusion

The positive duty to repair the harm that is inflicted on civilians should be recognized as a norm of war, regardless of its legal status, yet we should seek ways of transforming international law to formally impose this duty on belligerents and to establish an institutional structure that can help to protect civilians' rights in practice. This chapter has provided a rough overview of how the norm could be codified in law. Far more work must be done to develop a more substantive account of this process and to establish legal precedent. And it is likely to be a gradual process, just as gaining legal recognition for the principles of *jus in bello* has required decades of consensus building that is still ongoing. Seeking this kind of transformation in international law, especially when it deviates from the Westphalian system, is a major undertaking, but as I have shown, it is consistent with the ongoing trends in international law and can draw strength from existing customs of providing assistance to civilians. Thus, the change required fits into a broad shift in legal sensibilities toward increasing recognition of the needs of individuals, and it will reinforce these changes.

It is also important to again note that transforming the positive duty and the principles that operationalize it into law is not simply a matter of helping the law catch up with just war theory. On the contrary, domestic and international frameworks have been relatively progressive when it comes to developing greater protections for civilians. In some ways, such as in the United States' payment of compensatory damages, the law is ahead of just war theory and has made major steps toward providing civilian assistance. What just war theory can provide is a stronger theoretical case for why these measures should exist and why they should continue to be refined – particularly measures directed at producing a broad international consensus on civilians protections, creating neutral judicial processes, and establishing individual causes of action in international law.

Conclusion

Just war theory is engaged in a perpetual effort to theorize plausible normative constraints on war with the aim of discouraging the outbreak of unjust wars, imposing limits on how wars are waged, and articulating the conditions for resolving conflicts in a way that establishes the foundations for a lasting and just peace. Although wars continue to be fought for objectionable reasons and deviate considerably from the principles stipulating how they should be conducted, just war theory has had remarkable success in establishing a useful body of principles for making moral claims about war. Even when wars are at their most terrible and immoral, just war theory provides concepts that can articulate the nature of the moral faults and identify the actors responsible for them. Just war theory's growing influence is particularly clear when it comes to developing international law and informing the normative language of policymakers and members of the military. This success in bridging the divide between theory and practice is encouraging, yet it is also an incomplete achievement that raises considerable challenges for the future.

My goal in this book was to call attention to one of the most serious moral problems arising from wars: the persistence of incalculable civilian suffering, despite a widespread commitment to civilian immunity among policymakers, soldiers, academics, activists, and members of the general public. The problem I identified is not simply an inability to translate theory into practice. Noncompliance with norms is, no doubt, one of the reasons why civilian victimization occurs, yet this is not the only reason. I have argued that just war theory faces a more fundamental problem than noncompliance with its principles – a problem that should prompt critical introspection. There is inadequate respect for civilians' rights in just war theory itself. This problem goes to the heart of just war theory's evaluation of civilians and sets just war theory behind advancements in laws pertaining to civilian victims of war. Unlike noncompliance, which is fairly easy to identify because it contravenes clear norms and laws, the failure to assist civilian victims receives comparatively little attention because it falls outside the scope of our existing normative framework for evaluating wars.

Civilian protections have made remarkable advances over the history of just war theory, yet the norms of war remain fixated on the restrictive measures that

are needed to prevent violence against civilians and have failed to give adequate thought to the importance of assisting those who are attacked. Greater attention to corrective justice is necessary for many reasons, not least of which is the inherent desirability of promoting the welfare of innocent people who are adversely affected by violence. I have shown that there is a case to be made for grounding a duty to assist civilians in the right to life, which is one of the foundational concepts in just war theory, as well as in countless other moral and legal doctrines. The right to life does not cease to protect civilians simply because belligerents do not always respect it. As a fundamental right that can only be waived or forfeited by its bearer, the right to life continues to protect civilians even when they are the victims of violence. Those who breach civilians' right to life by inflicting harm that civilians have a right to be protected against must be held morally – and, potentially, legally – responsible for repairing the harm inflicted to the greatest extent possible.

This is a radical proposal for just war theory. For centuries it has failed to give much thought to the protection of civilians' rights after they have become victims of violence. And it has generally remained stuck in a synchronic view of moral decision-making in war that is focused on the moment of attack at the expense of theorizing the moral demands that arise in the aftermath. The positive duty is best operationalized and integrated into the larger just war project via the principles of restorative care and recompense. The former calls on belligerents to provide medical assistance to civilians they injure or kill, while the latter speaks to the importance of providing financial assistance to civilians who are physically injured or who suffer the loss of essential property. Together these principles can help to protect civilians' rights and introduce a new dimension to our understanding of the morality of war.

The principles of restorative care and recompense do not fit neatly into the temporal division of just war theory. They place demands on belligerents before, during, and after war. Nevertheless, these principles fit comfortably with the spirit of just war thinking and with the other principles that are conventionally recognized as being part of just war theory. They help to ensure that belligerents are prepared to limit the magnitude of civilian suffering, extend the civilian protections that are set out in the principles of *jus in bello*, and lay the foundations for vindicating civilians' rights after they have been breached. They are, therefore, important additional principles that should inform just war reasoning both as a moral discourse and as a conceptual schema for regulating wars in practice.

Many theoretical and practical challenges arise when introducing the positive duty and its associated principles into the theory and practice of war. I have sought to address some of the most urgent ones by moderating the demands associated with the positive duty and by theorizing ways of adjusting it to the unique contexts in which it may arise. Further work is certainly needed when it

comes to developing the details of the proposal. Of particular importance will be, first, exploring additional ways in which the overall framework that I have developed here will need to be modified to apply to different types of conflicts involving different types of actors, and, second, developing a more concrete strategy for legislating the positive duty. The positive duty and its associated principles can therefore best be understood not as a finished project but as a new domain of just war theorizing that can be usefully developed and revised as just war theory continues to refine the norms of war and works to achieve greater influence over belligerents' conduct.

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