

APPLYING DOUBLE EFFECT IN ARMED CONFLICTS: A CRISIS OF LEGITIMACY

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INTRODUCTION

Assessing morality in armed conflicts raises a host of issues, not least of which is accounting for the loss of innocent life. For one, normative ethics presumes an absolute deontological proscription against harming the innocent. Yet, both just-war theory and post-war *lex scripta* affirm the doctrine of military necessity, which permits the loss of innocent life that is “*incidentally* unavoidable by the armed conflicts of the war.”¹ This qualification is informed by the doctrine of double effect (“DDE”), a product of Catholic theology that serves to legitimize an attack causing “incidental” or “unintended” civilian casualties, provided certain conditions are met.

This Article presents an indictment of the DDE as praxis in positive law. Specifically, it challenges whether the DDE as a legal rule is sufficient to legitimize the loss of innocent life, given the didactic presumptions upon which the doctrine rests, its historical development, and the environment within which it is now applied. Thus, this Article will proceed as follows: First, it will briefly discuss the DDE’s development as a principle of natural law. Second, it will discuss the principle’s positive development in the law of armed conflict (“LOAC”). Third, it will present a number of significant critiques and responses to the application of the DDE as both a means of moral accountability and its use in armed conflicts. Fourth, it will present the arguments against the DDE as a means of moral assessment of civilian casualties.

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¹ United States v. List (*Hostages Trial*) (Military Tribunal V 1948), in 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 757, 1253 (1950). (emphasis added).

I. THE DDE AS NATURAL LAW

Pieces of Thomas Aquinas's writings on the topic of self-defense are often said to have laid the groundwork for the DDE.² For one, "[n]othing hinders one act from having two effects, only one of which is intended, while the other is beside the intention."³ For Aquinas, this distinction bares moral significance, as "moral acts take their species according to what is intended."⁴ Germain Grisez expounds upon this distinction: Intention and foresight are distinguished according to those effects which serve to guide and shape behavior—intentional effects are those that do influence our behavior, while merely foreseen effects do not.⁵ Thus, when a person ("agent") confronts an assailant whom he kills in self-defense, the assailant's death is legitimate, provided the agent acts with the intention to save his own life, and the death was merely foreseen as a side effect of his otherwise good act.⁶

Aquinas's didactic rests on two critical presumptions. First, Aquinas presents the agent's inclination towards self-preservation to be a natural one; thus, an act that results as a manifestation of the intention is permissible.⁷ Second, the agent must not *intend* to kill his assailant in order to defend himself, as "it is unlawful to take a man's life, except for the public authority acting for the common good."⁸

These writings were used by Catholic theologians who, by the seventeenth century, fashioned a more general concept of casuistry.⁹ In short, an agent's act which has two effects, one "good" and the other "bad," is morally permissible if:

- (1) The act *itself* is good or neutral;
- (2) the agent *intends* the good effect and does *not* intend the bad effect;
- (3) the evil effect is not the *means* to the good effect; and

² See, e.g., Alison McIntyre, *Doctrine of Double Effect*, STANFORD ENCYCLOPEDIA OF PHIL., <http://plato.stanford.edu/archives/fall2011/entries/double-effect/> (last updated Sept. 7, 2011).

³ ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* Pt. II–II, q. 64, art. 7, ans. (Fathers of the English Dominican Province ed., Burns, Oates & Washbourne Ltd. 1916). (emphasis added).

⁴ *Id.*

⁵ Germain G. Grisez, *Toward a Consistent Natural-law Ethics of Killing*, 15 AM. J. JURISPRUDENCE 64, 74 (1970).

⁶ *Id.*

⁷ AQUINAS, *supra* note 3, at Pt. II–II, q. 64, art. 7, ans.

⁸ *Id.*

⁹ Grisez, *supra* note 5, at 78.

- (4) the act's intended good effect is *sufficiently good* to compensate for the act's foreseen bad effect.¹⁰

There is much debate over these conditions, and indeed their precise meaning has proven elusive. Joseph Boyle, for example, states that applying the DDE “presupposes that [it is] intelligible.”¹¹ For instance, the third condition strikes many theorists as rather contradictory. Specifically, theorists argue that this condition may exclude the possibility of killing in self-defense, as the force employed by the agent is effective “only in virtue of the fact that it *first* harms the attacker.”¹² Grisez responds to this critique by supposing agent activity to be a manifestation of both purported intention and a “unified performance” of that action, the result of which is to distinguish the means and ends “in the order of human action” with cause and effect in the “order of nature.”¹³ Thus, since human action is the sum of intention and performance, a good effect which in the order of nature is preceded in the performance by an evil effect is not necessarily a good end achieved by an evil means, so long as the act is “a unity and only the good is within the scope of intention.”¹⁴

Grisez's emphasis on intentionality lends credence to a second, equally poignant reservation concerning the DDE: Morality is assessed based on a distinction between effects that are intended and those that are merely foreseen. H.L.A. Hart, for example, argues that the foresight of a “probable consequence” is sufficient to deem that consequence as part of the agent's intention.¹⁵ John Austin goes further, arguing that the mere desire of a consequence of one's action is sufficient for intent.¹⁶ Responses to these arguments that seek to redefine, or even reject, the distinction between intention and foresight rely on particularly esoteric conditions which aim to

¹⁰ *Id.* In general, what an agent intends *as a means* may be limited to those effects which are precisely characterized by the descriptions under which they function in the agent's deliberation. These descriptions may include only what the agent believes is minimally necessary to achieve her end—what Jeff McMahan refers to as the “narrow conception” of an intended means. See Jeff McMahan, *Revising the Doctrine of Double Effect*, 11 J. APPLIED PHIL. 201, 202 (1994).

¹¹ Joseph M. Boyle, Jr., *Toward Understanding the Principle of Double Effect*, 90 ETHICS 527, 529 (1980).

¹² Grisez, *supra* note 5, at 79 (emphasis added).

¹³ *Id.* at 87–88.

¹⁴ *Id.* at 89–90.

¹⁵ H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 119–20 (2d ed. 2008).

¹⁶ JOHN AUSTIN, 1 LECTURES ON JURISPRUDENCE: OR, THE PHILOSOPHY OF POSITIVE LAW 450 (Robert Campbell, 3d. ed. 1869).

redraw the traditional demarcation line.¹⁷ Thus, while the scholarship surrounding the intention/foresight debate has done well to evaluate, and in some cases reshape the presumptions upon which the DDE rests, it has simultaneously weakened the DDE as a vehicle for an objective determination of moral action.

II. THE DDE AS POSITIVE LAW

The full spectrum of legal protections and prohibitions imposed during armed conflicts is a product of the post-war global consciousness, the result of which has been the transplantation of norms of natural and customary law into two sets of positive legal rules, known formally as the LOAC.¹⁸ Of these, a norm central to the LOAC is the absolute rule against the intentional killing of noncombatants, or “noncombatant immunity.” Codified in Article 51(1) of Additional Protocol I to the Geneva Conventions (“Additional Protocol I”), the positive law states: “The civilian population . . . as well as individual civilians, shall not be the object of attack.”¹⁹ A corollary of noncombatant immunity is the provision that parties to an armed conflict must conduct their operations in such a manner so as to *maximize* protection for civilians.²⁰

Yet, positive law qualifies these protections via the doctrine of military necessity. First appearing in the Lieber Code,²¹ the doctrine permits belligerent parties to conduct measures that are “indispensable for securing the ends of the

¹⁷ See generally Mark P. Aulisio, *In Defense of the Intention/Foresight Distinction*, 32 AM. PHIL. Q. 341 (1995).

¹⁸ Generally speaking, the LOAC is compartmentalized into two legal regimes: (1) *jus ad bellum*, which governs the right to go to war, and (2) *jus in bello*, which governs the means and methods of the conduct of hostilities. Robert Kolb, *Origin of the Twin Terms Jus Ad Bellum/Jus In Bello*, 37 INT’L REV. RED CROSS 553, 554 (1997). *Jus ad bellum* defines the “legitimate reasons” a state may resort to force, while *jus in bello* seeks to limit the suffering caused by armed conflicts by “protecting and assisting its victims as far as possible.” *IHL and Other Legal Regimes—Jus Ad Bellum and Jus In Bello*, INT’L COMMITTEE RED CROSS (Oct. 29, 2010), <http://www.icrc.org/eng/war-and-law/ihl-other-legal-regimes/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello.htm>. These legal provisions apply to armed conflicts, regardless of whether or not the “cause” by either party is just. See Kolb, *supra*, at 553 n.1.

¹⁹ Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Conflicts (Protocol I), U.N. Doc. A/32/144 (August 15, 1977) Annex I, *reprinted in* 16 I.L.M. 1391, 1413 (1977) [hereinafter Additional Protocol I].

²⁰ LAURIE R. BLANK & GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICT: FUNDAMENTAL PRINCIPLES AND CONTEMPORARY CHALLENGES 44–45 (2013).

²¹ Instructions for the Government of Armies of the United States in the Field art. 14, Apr. 24, 1863 [hereinafter Lieber Code], available at <http://www.icrc.org/ihl/INTRO/110?OpenDocument>; DAVID BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 227 (2001). Prepared by Francis Lieber and promulgated by President Lincoln during the U.S. Civil War, the Lieber Code presents the first formal codification of the laws of war. Bederman, *supra*, at 227.

war.”²² This permission is expounded to include “all direct destruction of life or limb of ‘armed’ enemies, and of other persons whose destruction is incidentally ‘unavoidable’ in the armed contests of the war.”²³ However belligerent parties are not given *carte blanche*: “Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge.”²⁴

This view of military necessity continues to be operative. In the *Hostages Trial*, the International Military Tribunal at Nuremberg was presented with the issue of whether military necessity permitted German generals to kill civilians as reprisal during occupation of conquered territory.²⁵ In reaching its decision that the killing of civilians were not permitted by military necessity, the Tribunal reaffirmed military necessity to the precise language in the Lieber Code.²⁶ Thus, positive law seeks an “equitable balance” between humanity and military necessity—those who do not “directly participate” in the fight are immune from direct attack, however innocent loss of life when incidentally unavoidable is permissible.²⁷

For Geoffrey Corn, this balance has worked to manifest another canonical principle of the LOAC: the principle of distinction, which requires belligerent parties to “constantly distinguish” between lawful and unlawful targets.²⁸ Specifically, the only legitimate purpose of armed conflict is to “weaken the

²² Lieber Code, *supra* note 21, art. 15.

²³ *Id.* art. 16.

²⁴ *Id.*

²⁵ United States v. List (*Hostages Trial*) (Military Tribunal V 1948), in 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 757, 1253 (1950).

²⁶ *Id.* (“Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money. . . . It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war”).

²⁷ See INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 683 (1987). It remains unclear what kind of activity *specifically* amounts to direct participation in hostilities. As an attempt to clarify, the International Committee of the Red Cross has published an interpretative guide on the matter. NILS MELZER, INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009). The guidance posits that several forms of civilian participation in hostilities may amount to direct participation in hostilities, to be determined by the degree of intensity, within the context of a wide variety of geographical, cultural, political, and military contexts. *Id.* Direct participation is to be distinguished from “indirect participation”—the kind of conduct that is not the *immediate* causation of the harm, and *may* be characterized as indirect support for the war effort. *Id.* at 52–53.

²⁸ Geoffrey Corn, *Targeting, Command Judgment, and a Proposed Quantum of Information Component*, 77 BROOK. L. REV. 437, 441 (2012).

enemy forces.”²⁹ Thus, attacks must be “proportionate”: Article 57 of Additional Protocol I forbids an attack which may be “expected to cause incidental loss of civilian life . . . which would be *excessive* in relation to the concrete and direct military advantage anticipated.”³⁰

So, while the historical purpose of the DDE may have been theological, the doctrine has evolved to become a secular condition of both just war theory and its positive counterpart.³¹ Indeed, double effect forms the “moral rationale” for the principle of noncombatant immunity, and also informs the standard of proportionality as provisioned in Additional Protocol I.³²

III. CHALLENGES TO THE ADEQUACY DOCTRINE OF DOUBLE EFFECT

An evaluation of the DDE as it applies to armed conflicts has been onerous. Indeed, the doctrine packs a powerful moral punch—so long as certain conditions are met, it is morally permissible to kill noncombatants.³³ Thus, there has been much written in either defense of, or in opposition to, the DDE as a means of assessing morality within a wartime environment.

The following five critiques of the DDE are relevant for our discussion: (1) that the DDE relies too heavily on an agent’s intentions as a means to assess permissibility; (2) that the DDE purports to produce objective statements of morality, yet it relies on subjective determinations; (3) a worry about whether the DDE, which is derivative of natural law, is in any way altered as it is manifested in a positivist legal regime; (4) whether the conditions of wartime demand a “more flexible” assessment of agency-action; and (5) whether, and to what extent, an affirmation of all or some of these critiques strikes a fatal blow to the DDE’s operative function. This last critique will be discussed in a later section.

The first critique is concerned with the agent’s expression of intentionality. The specific points here vary, but one example is that it may be difficult to

²⁹ *Id.*

³⁰ Protocol I, *supra* note 19, art. 51 (emphasis added). For more on “the direct military advantage anticipated,” see Kenneth Watkin, *Assessing Proportionality: Moral Complexity and Legal Rules*, 8 Y.B. INT’L HUMANITARIAN L. 3, 19 (2005) (“[T]he expression ‘military advantage’ refers to the advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack.”).

³¹ See Michael L. Gross, *Killing Civilians Intentionally: Double Effect, Reprisal, and Necessity* □ in *The Middle East*, 120 POL. SCI. Q. 555, 558 (2006).

³² See Watkin, *supra* note 30, at 6 (“The legal proscriptions regarding proportionality reflect the secularisation of older ‘just war’ principles.”).

³³ *Id.*

ferret out what an agent actually intends.³⁴ That is, an agent might say that he intends *A*, but actually intends *B*. If both *A* and *B* produce equal outcome *C*, it may be impossible to ever learn the agent's "true" intentions.³⁵ This critique also encompasses the intention/foresight debate, which challenges the traditional fault line between effects that are intended, and those that are merely foreseen.

The second critique concerns what Michael Gross refers to as the "subjective determination."³⁶ In the DDE analysis, the agent is prohibited from using evil means to attain a good end. Yet, as one might imagine, there is great difficulty in formulating an objective "good end." Here, Gross reintroduces Hart's "Irish Nationalist" example: An Irish Nationalist (IN) inadvertently kills civilians while blowing out a wall to free fellow nationalists.³⁷ The IN is convicted of murder, and perhaps rightfully so—"an agent should be liable for the harmful effects of an intended action, however unintended the effects may be."³⁸ Gross contrasts the case of the IN with that of the "strategic bomber"—a popular reference in scholarship concerning the DDE.³⁹ In the latter, the strategic bomber (SB) targets an enemy munitions factory with the intention of destroying its productive capacity. The SB foresees that noncombatants will be harmed or killed as a result of the strike, as some are located within the blast radius. The DDE would morally permit the SB to conduct such a strike. For Gross, it is troublesome that the SB would escape moral culpability for the killing of civilians, while the IN may not.⁴⁰ In particular, both the IN and the SB have "pure" intentions: Neither one intends to kill civilians. So, one might conclude that the IN violated the DDE merely through "the eyes of those who judged him."⁴¹

³⁴ Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Double Effect*, 18 PHIL. & PUB. AFF. 334, 339 (1989). ("A strategic bomber might have as his mission the bombing of automotive factories. This would not make him a terror bomber, for he would still not aim at civilian casualties. But, for obvious reasons, no automobile factories have ever existed completely apart from civilian populations. So the kind of thing the bomber strictly intends immediately and invariably results in some innocent deaths."). This critique is particularly indicting, as the "key element" of the DDE is that the agent's intentions dictate the act's legitimacy. See McMahan, *supra* note 10, at 201.

³⁵ To be sure, a determination of "true" intentions is in this case less troublesome when the agent is a known terrorist, or commits an act under the auspices of a known terrorist group.

³⁶ Gross, *supra* note 31, at 560.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

The third critique turns on what happens when a principle of natural law is transformed into a positive legal rule. Specifically, Watkin wonders whether “the weighing” of the value of a life takes on a different connotation when a moral doctrine is transformed into a legal rule.⁴² Watkin is drawn particularly to the relationship between the agent and doctrine. That is, while “rules of law apply to conscience as much as morality,” legal rules are enforced by some “external,” rather than “internal” power—the conclusion being that the DDE’s use as a legal test will in some way alter its determination.⁴³

The fourth critique concerns the environment within which agents in armed conflicts are expected to produce moral outcomes. Two arguments are worth noting here: First, behavior in such conflicts is influenced by, and in turn influences an innumerable set of conditions which agents cannot foresee, much less control.⁴⁴ This point is referenced by Gary Brown, who states that during an armed conflict it is possible, and “indeed likely,” that the environment will materially change.⁴⁵ Thus, both the causes justifying the entrance into an armed conflict and the military objectives once thought permissible can weaken and/or expire over time, rendering capricious a static modality which aims to objectively determine the legitimacy of agency-action within a particularly fluid context.⁴⁶

A response to these four critiques has been to craft an “acid test” of sorts, which serves to assess the morality of action via a richer and more objective criterion than that which has traditionally been employed. In this respect, particular attention has been paid to Warren Quinn, who argues that the critical question for intentionality should be whether an agent profits from the evil effect.⁴⁷ Here, the counterpart to the case of the SB is worth noting: In the case of the terror bomber (TB), an agent targets a civilian center with the intention of killing civilians, as a means of demoralizing the enemy. For Quinn, the TB’s

⁴² Watkin, *supra* note 30, at 28.

⁴³ *Id.* Watkin posits that the effect of the doctrine as a legal test will necessitate a notion of accountability akin to *mens rea*, or criminal intent. *Id.* As such, he wonders whether the grafting of a positive construct will in some way alter the DDE’s method of moral assessment. *Id.*

⁴⁴ These externalities often fall under the idiom “fog of war.” That is, the uncertainty in situational awareness experienced by those who plan and execute military operations.

⁴⁵ Gary S. Brown, *Proportionality and Just War*, 2 J. MIL. ETHICS 171, 176 (2003).

⁴⁶ *Id.* at 178.

⁴⁷ See Quinn, *supra* note 34, at 344. Quinn’s focus is on “direct” versus “indirect” agency. *Id.* Direct agency encompasses a harm which comes to some victims, at least in part, from the agent’s deliberately involving them in something in order to further his purpose a result of the victims’ involvement. *Id.* In contrast, direct agency is an act wherein nothing is intended for the victims, or that which is intended does not contribute to the victims’ harm. See also McIntyre, *supra* note 2; Quinn, *supra* note 34, at 344.

intentions are bad precisely because the death of civilians “serves his goal.” The SB, on the other hand, “can honestly deny” that the death of civilians contributes anything to his purpose.⁴⁸ Quinn’s argument has been criticized in part because it serves to condemn acts that intentionally involve a person in the agent’s plans in ways that are harmful, even when those acts ought not to be condemned by the DDE.⁴⁹ Quinn responds by asserting that, for an act to be constrained under the intention condition of the DDE, it must be opposed by a right *independent* of the intentions with which it is done.⁵⁰

Gross agrees with Quinn that a reformulation of intentionality may produce a “more fruitful” assessment of agency-action.⁵¹ That is, the evil is not so much in the killing of noncombatants, but rather in using their death for a distinct, gainful purpose.⁵² Yet, Gross ultimately concludes that Quinn’s version of the DDE is incorrect. Whereas the SB can honestly deny that civilian deaths contributed to his purpose, Gross argues that in the conduct of hostilities, such a determination can rarely be made.⁵³ This is emblematic of the fourth point, which is greatly concerned with the application of an ostensibly rigid test in an environment of radical uncertainty.⁵⁴

IV. ARGUMENTS AGAINST THE DOCTRINE OF DOUBLE EFFECT AS IT APPLIES TO THE LAW OF ARMED CONFLICT

This Article presents the conclusion that the DDE does not adequately account for the deaths of noncombatants, despite the intention/foresight debate and the reformulations proffered by Quinn and Gross. Second, even if the

⁴⁸ Quinn, *supra* note 34, at 342. It may be worth noting that for Quinn, the harm caused by harmful direct agency need not itself be a strictly intended effect in order for the act to be impermissible under the DDE.

⁴⁹ McMahan, *supra* note 10, at 204–05.

⁵⁰ *Id.* at 207–08. In short, Quinn’s reformulation of the DDE applies only to acts that would violate a right of the innocent, regardless of whether the agent acted with intent to disrupt that right. *Id.* So, an agent’s act which treats a noncombatant as a mere means treats the noncombatants as though he were available to “further” the agent’s purposes, when in fact the agent should have received the noncombatant’s consent beforehand. *See id.* at 208.

⁵¹ Gross, *supra* note 31, at 561.

⁵² *Id.* at 562.

⁵³ For Gross, the unintended killing of noncombatants can produce immeasurable foreseen, or unforeseen “good” effects. *Id.* at 563. This complicates the assessment of whether an act is moral under the DDE, as agency-intention and foresight is perhaps too limited in the determination of whether an act’s “good” effect is sufficient to outweigh the bad.

⁵⁴ Gross, *supra* note 31, at 566. Thus, Gross agrees with Quinn in theory, but in practice proposes something quite distinct: The application of the DDE in wartime requires an assessment of an agent’s intended benefits or expected utility—those benefits that planners “think or hope” will occur when civilians are unintentionally harmed. *Id.*

evidence presented is unpersuasive, this Article concludes that the DDE as it applies to the positive legal regime is insufficient as means of assessing moral action.

To begin, the DDE presupposes that human life is intrinsically a good to be protected.⁵⁵ For Aquinas, killing of the innocent, or “the upright,” is “never allowed.”⁵⁶ By contrast, the killing of the wrongdoer is legitimate, “by reference to the common good.”⁵⁷ Thus, in the context of killing an aggressor in self-defense, the effect is justified more directly because the threatened agent does not intend to kill the assailant, but rather to save his own life. Indirectly, the assailant has transgressed, thus he has placed his right to life in jeopardy.

This point is significant, as it is Aquinas’s writings which inform the moral justification of the DDE.⁵⁸ So, while we may accept that the assailant in the example above has transgressed, thus placing his right to life in jeopardy, it is troublesome to analogically affix the same “right deduction” onto the noncombatant within the context of an armed conflict. After all, the assailant has acted in such a way so as to place an agent’s life in danger. The noncombatant, on the other hand, is presumably innocent of transgression. To be sure, the absolute prohibition against harming the innocent has long been subject to “qualification.”⁵⁹ In the context of war, however, Aquinas never makes an attempt to show that killing the innocent is morally justified. Rather, he merely clarifies the “necessary conditions without which it would surely be unjustifiable.”⁶⁰

Second, the conditions of contemporary armed conflicts also preclude the DDE from adequately accounting for the deaths of noncombatants. This is partly owed to the fact that the DDE in wartime assesses morality in the context of a vacuum, without regard to either: (1) the externalities which materially alter an agent’s thought processes; or (2) as Gross rightly argues, the ripple effects of action in war that renders an inadequate assessment of moral action based solely on agent-intentionality.⁶¹

⁵⁵ Grisez, *supra* note 5, at 72.

⁵⁶ *Id.* at 67.

⁵⁷ *Id.*

⁵⁸ Boyle, *supra* note 11, at 530.

⁵⁹ Grisez, *supra* note 5, at 65.

⁶⁰ *Id.* at 71.

⁶¹ Gross, *supra* note 31, at 563.

As to the first point, agent action in contemporary armed conflicts is complicated by myriad “new” conditions, the result of which is to render illusory the hypothetical distinction between SB and TB. In other words, a hypothetical SB may in practice produce outcomes akin to TB, such as population displacement, internal dissent, and broken morale. This is in large part due to the fact that the role of civilians, or noncombatants, has become increasingly amorphous, as the character of armed conflicts has changed. Specifically, non-state groups now take center stage in armed conflicts, and as a result civilian centers are a frequent host of active hostilities. The effects are significant: Noncombatants are being used as “cover” from enemy attack, schools and hospitals are being converted for military purposes, and noncombatants may “pick up arms” for a limited time, thus complicating the assessment of who is, and who is not, a legitimate target of attack. Indeed, belligerents actively seek out new and creative ways to “take advantage” of noncombatant deaths.⁶²

Second, the praxis of DDE as a positivist doctrine does not adequately account for these new conditions. Two points in particular are worth noting here: First, the “compensation condition” of DDE, reflected in Article 57 of Additional Protocol I, is “notoriously difficult to apply.”⁶³ The International Tribunal for the Former Yugoslavia referred to this article as a “loose” international rule, with a “wide-margin” of discretion owed to belligerents.⁶⁴ Second, armed attacks during the course of these conflicts produces ancillary outcomes which the DDE is ill equipped to address. Consider the following example:

Country A issues an airstrike against a group of insurgents camped in a schoolhouse in a remote village in country B. The attack is legitimate under positivist and natural law—the cause is just, noncombatant deaths were minimized and proportionate, etc. It is unintended, yet foreseen, that the airstrike will inspire a group of noncombatants to take up arms against A. It is not foreseen that one of these men will commit an act of terror against the citizens of A, which has the effect of killing hundreds of innocent people.

⁶² *Id.* at 566.

⁶³ Watkin, *supra* note 30, at 31. Michael Schmitt’s statement on this issue is illuminating: “It is impossible to relate objectively the value of military advantage to collateral damage and incidental injury; they are dissimilar values that cannot be compared meaningfully. . . .” *Id.*

⁶⁴ *Prosecutor v. Kuprešić*, Case No: IT-95-16-T, Judgment, ¶ 524 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

The DDE would find the radicalized noncombatant to be an unfortunate, yet permissible effect of the otherwise legitimate attack. Yet, it is striking that, simply because that specific bad effect is neither intended nor foreseen, the airstrike is morally permissible. This point is an increasingly difficult one to ignore, and its consequences have become the subject of extensive critique.⁶⁵

This Article's second indictment of the DDE as it applies to the LOAC hinges on the positivist compartmentalization of *jus ad bellum* and *jus in bello*. That is, the cause for the resort to force falls under a separate legal regime than does the legitimate means of conducting hostilities, the result of which is to employ the DDE in a context too narrow to uphold the doctrine's *raison de d'être*. Consider the following example:

Country *A* enters into an unjust war with country *B*. Agent *Y* is a combatant for *A*; agent *Z* is a combatant for *B*. Agent *Y* receives word that agent *Z* and his company of 100 men are embedded in a nearly abandoned civilian center, within range of an airstrike, and has also been provided with sound intelligence that agent *Z* is planning a ground attack on agent *Y* and his men. Agent *Y* orders the airstrike, killing agent *Z*, his entire company, and three noncombatants.

The DDE as it applies to the LOAC would not condemn agent *Y*'s action. As a theological construct, one may argue that agent *Y* acted in self-defense. As a positive one, agent *Y* ordered a lawful strike against a military target. Either way, agent *Y* did not intend to cause the deaths of the noncombatants—they were merely foreseen. Yet, this does not resolve what I argue to be an equally important fact: Agent *Y* ought not to have been in combat to begin with.

Aquinas presents three conditions for just war: First, it must be waged under “public authority.”⁶⁶ Here, protection of the community is the objective.⁶⁷ Second, there must be a “just cause”—the enemy has wronged the state, “deserving opposition by force.”⁶⁸ Third, the intention of those in the fight must be upright.⁶⁹ It is important to note that these conditions presume

⁶⁵ There has been much debate, for example, over the relationship between the United States' unmanned aerial vehicle (“drone”) program and the radicalization of militants in areas where such vehicles are employed. For an extensive look into the particularities of contemporary armed conflicts briefly mentioned in this Article and its relationship with the unintended consequence of radicalization, see Sikander Ahmed Shah, *War on Terrorism: Self Defense, Operation Enduring Freedom, and the Legality of U.S. Drone Attacks in Pakistan*, 9 WASH. U. GLOBAL STUD. L. REV. 77 (2010).

⁶⁶ AQUINAS, *supra* note 3, q. 40, art. 1; *see also* Grisez, *supra* note 5, at 71.

⁶⁷ AQUINAS, *supra* note 3, q. 40, art. 1; *see also* Grisez, *supra* note 5, at 71.

⁶⁸ AQUINAS, *supra* note 3, q. 40, art. 1; *see also* Grisez, *supra* note 5, at 71.

⁶⁹ AQUINAS, *supra* note 3, q. 40, art. 1; *see also* Grisez, *supra* note 5, at 71.

another conclusion presented by Aquinas: It is evil to kill a man who has preserved his dignity.⁷⁰ For Grisez, and indeed many others, this statement demands that just cause be a resort to force in order to repel a transgressing state.⁷¹ In other words, a just cause is an act of “community self-defense.”⁷² Positive international law similarly prohibits states from “the threat or use of force,” yet recognizes “the inherent right of individual or collective self-defence.”⁷³

Yet, the DDE as it applies to the LOAC operates *jus in bello*, without regard to just cause. Indeed, modern legal scholars and theorists criticize the DDE as an “exculpatory power” of good intentions.⁷⁴ Specifically, the DDE is “excessively lax,” allowing the killing of noncombatants so long as their deaths are in tandem with a lawful military objective.⁷⁵ As the radicalized civilian in the example above illustrates, the intention of an agent may serve to redeem the wrongness of his act, without regard to what the agent “actually did.” Here, agent *Y* “actually” killed 104 people as a direct effect of country *A* entering into an unjust war. Indeed, it is striking that the positivist conduit for moral accountability for agent *Y*’s act does not at all consider country *A*’s unjust act. To be sure, agent *Y* may have a legitimate claim of self-defense now that hostilities have begun; but by separating the cause for resort to force and the means by which that cause is actualized, the LOAC in practice employs Aquinas’s casuistry to justify agency-action in a setting which may at times be unjust at the outset.

CONCLUSION

The DDE as it applies to the LOAC does not sufficiently reconcile the absolute prohibition against harming the innocent and the doctrine of military necessity. As has been shown, the DDE assesses agency-action via conditions which are antithetical to the underlying purpose of the doctrine. First, the conduct of hostilities requires a situation-based approach to a determination of whether an agency-action is morally permissible. Purposeful behavior is dependent on the conditions within which agents find themselves in—to

⁷⁰ AQUINAS, *supra* note 3, q. 40, art. 1 (“[A]lthough it be evil in itself to kill a man so long as he preserved his dignity, yet it may be good to kill a man who has sinned”); *see also* Grisez, *supra* note 5, at 71.

⁷¹ Grisez, *supra* note 5, at 91.

⁷² *Id.*

⁷³ U.N. Charter arts. 2, para. 4, art. 51.

⁷⁴ Gross, *supra* note 30, at 559.

⁷⁵ *Id.* at 558.

emplace the DDE's traditional conditions onto an assessment of agency-action in wartime fails to account for both the "fog of war" and the "new" conditions which contemporary armed conflicts produce. Second, whereas the DDE's original task was to morally shield an agent from an unintended bad effect, the doctrine has evolved to become a seminal presupposition of the positivist legal structure which is far too permissive. Third, while the manifestation of a natural law principle into a positive rule may in some way alter its operative force, here, the LOAC has explicitly removed from the DDE a condition upon which it logically rests: That an agent's act must not merely be good, but also that the good act be in furtherance of a good, or just cause. For these reasons, the DDE in wartime is an inadequate means of assessing moral action, and jeopardizes the DDE's underlying presumption that noncombatant immunity and military necessity can ever be resolved.