

THE DOCTRINE OF DOUBLE EFFECT
AS AN INEFFECTIVE TOOL IN WAR THEORY

By:

Alison S. Hoyt

2014 Candidate for LLM in International Law

University of San Diego School of Law

Spring 2014

Report Documentation Page

Form Approved
OMB No. 0704-0188

Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

1. REPORT DATE

01 JUN 2014

2. REPORT TYPE

3. DATES COVERED

4. TITLE AND SUBTITLE

**THE DOCTRINE OF DOUBLE EFFECT AS AN INEFFECTIVE TOOL
IN WAR THEORY**

5a. CONTRACT NUMBER

5b. GRANT NUMBER

5c. PROGRAM ELEMENT NUMBER

6. AUTHOR(S)

Alison Hoyt

5d. PROJECT NUMBER

5e. TASK NUMBER

5f. WORK UNIT NUMBER

7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)

**University of San Diego School of Law, 5998 Alcala Park, San Diego, CA,
92110-249**

8. PERFORMING ORGANIZATION
REPORT NUMBER

9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)

10. SPONSOR/MONITOR'S ACRONYM(S)

11. SPONSOR/MONITOR'S REPORT
NUMBER(S)

12. DISTRIBUTION/AVAILABILITY STATEMENT

Approved for public release; distribution unlimited.

13. SUPPLEMENTARY NOTES

14. ABSTRACT

Many proponents of the Doctrine of Double Effect (DDE) assert that its principles are applicable in the area of military operations. One way in which this is evidenced is the ever-present discussion of the tactical bomber versus the strategic bomber as an example of DDE's application, used by most DDE scholars to illustrate the difference between permissible and impermissible action under DDE's tenets. The goal of this paper is not to agree or disagree with DDE as a moral theory, but to propose that DDE is an unnecessary and ineffective tool in determining the propriety of military actions. The foundation of this argument is the notion that DDE should be thought of as a 'second-level' theory that serves only to guide the formulation of 'first-level' norms of behavior. After that, DDE is largely a useless resource in determining the permissibility of an agent's action due to its potential applicability in only a handful of very specific, unrealistic circumstances. Though the concept of 'collateral damage' as used in the military sense closely resembles the principles of DDE, collateral damage is not the only regularly used, or even the only commonly accepted, means of determining whether a particular military action is permissible. Other concepts, such as proportionality, necessity and discrimination, play a more important and concrete role in military theory, with collateral damage analyses only one factor in the equation of permissibility. It is this paper's position that these other elements, already firmly embedded in the Law of War, are jointly self-sufficient and indeed much less complicated in practice than DDE. As such, in reaching the conclusion that an operation is permissible, one need not rely on such a theoretical moral equation as DDE and, in fact, war would be made more complicated, and the propriety of war operations much more subjective and fluid, by such a solely morality-based approach. Though elements of the Law of War were no doubt influenced by DDE, the latter has outlived its utility and is, therefore, wholly superfluous and ill-advised in a modern military setting.

15. SUBJECT TERMS

16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES 26	19a. NAME OF RESPONSIBLE PERSON
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified			

Standard Form 298 (Rev. 8-98)
Prescribed by ANSI Std Z39-18

Table of Contents

INTRODUCTION.....	1
CONCEPTUAL BACKGROUND OF DOUBLE EFFECT	2
PRINCIPLES OF THE LAW OF ARMED CONFLICT.....	8
APPLICATION AND DISCUSSION	12
CONCLUSION	23

INTRODUCTION

Many proponents of the Doctrine of Double Effect (DDE) assert that its principles are applicable in the area of military operations. One way in which this is evidenced is the ever-present discussion of the tactical bomber versus the strategic bomber as an example of DDE's application, used by most DDE scholars to illustrate the difference between permissible and impermissible action under DDE's tenets. The goal of this paper is not to agree or disagree with DDE as a moral theory, but to propose that DDE is an unnecessary and ineffective tool in determining the propriety of military actions. The foundation of this argument is the notion that DDE should be thought of as a "second-level" theory that serves only to guide the formulation of "first-level" norms of behavior.¹ After that, DDE is largely a useless resource in determining the permissibility of an agent's action due to its potential applicability in only a handful of very specific, unrealistic circumstances.

Though the concept of "collateral damage" as used in the military sense closely resembles the principles of DDE, collateral damage is not the only regularly used, or even the only commonly accepted, means of determining whether a particular military action is permissible. Other concepts, such as proportionality, necessity and discrimination, play a more important and concrete role in military theory, with collateral damage analyses only one factor in the equation of permissibility. It is this paper's position that these other elements, already firmly embedded in the Law of War, are jointly self-sufficient and indeed much less complicated in practice than DDE. As such, in reaching the conclusion that an operation is permissible, one need not rely on such a theoretical moral equation as DDE and, in fact, war would be made more complicated, and the propriety of war operations much more subjective and fluid, by such a

¹ The concept of "second-level theory" versus "first-level norms" was an idea brought to the author's attention by Professor Horacio Spector, University of San Diego Law School, in Spring 2014 in a classroom setting wherein the topic of the course was "Ethics, Law and International Affairs."

solely morality-based approach. Though elements of the Law of War were no doubt influenced by DDE, the latter has outlived its utility and is, therefore, wholly superfluous and ill-advised in a modern military setting.

CONCEPTUAL BACKGROUND OF DOUBLE EFFECT

The Doctrine of Double Effect, in its most simplified form, is a moral theory used to determine whether a particular course of action adheres to an acceptable set of moral principles – if it does, the action is considered morally permissible, and if it doesn't, it is considered morally impermissible. The doctrine is based on certain foundational principles that, if met, lead to the conclusion that an action is morally justified. The *New Catholic Encyclopedia* lays out the four requirements for the application of DDE thusly:

- 1) The act itself must be morally good or at least indifferent;
- 2) The agent may not positively will the bad effect, but may allow it, unless he can avoid it (in which case he should);
- 3) The good effect must flow directly from the act and not from the bad effect;
- 4) The good effect must sufficiently compensate for the bad effect.²

Generally speaking, DDE states that it is morally permissible to cause harm, even if it is foreseen, if such harm is a *side effect* of an intended positive result. This is the case even if causing the harm would not be permissible if directly intended. In other words, it is permissible to bring about a harmful side effect that is *merely foreseen* though it may be impermissible to bring about the same harmful effect intentionally. The doctrine, then, focuses on the intent of the agent rather than the consequences of the agent's actions.

² As referenced in Alison McIntyre, "Doctrine of Double Effect," *The Stanford Encyclopedia of Philosophy*, Fall 2011, available at <http://plato.stanford.edu/entries/double-effect/>.

DDE's roots are thought to derive from Saint Thomas Aquinas' 13th century *Summa Theologica*, wherein he discussed the possibility that killing in self-defense may be permissible as a side effect of protecting one's own life.³ "Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention," Aquinas wrote. "Accordingly, the act of self-defense may have two effects; one, the saving of one's life; the other, the slaying of the aggressor."⁴ Aquinas based the justification for both effects on a characterization of the action as a means to achieving a justifiable goal. He does urge a limit, however, on the extent to which such effects may be pursued, relying on a proportionality assessment. "And yet, though proceeding from a good intention, an act may be rendered unlawful if it be out of proportion to the end. Wherefore, if a man in self-defense uses more than necessary violence, it will be unlawful, whereas, if he repel force with moderation his defense will be lawful."⁵ It should be noted that Aquinas did not offer an opinion on whether *intending* to kill one's enemy as a means of self-defense would be permissible.

Modern interpretations of Aquinas' theory, however, emphasize the distinction between intending to cause the harm as a means to a good end and causing the harm "unintentionally" as a foreseen side effect of pursuing a good end. As Alison McIntyre writes, "The principle of double effect is directed at well-intentioned agents who ask whether they may cause a serious harm in order to bring about a good end of overriding moral importance when it is impossible to bring about the good end without the harm."⁶ Some scholars categorize this distinction as *instrumental* versus *incidental* harm, or *intended* versus *merely foreseen* harm.⁷ While all moral

³ Id.

⁴ Thomas Aquinas, *Summa Theologica*, Benzinger Bros, 1947, as quoted in McIntyre, *supra* note 2.

⁵ Id.

⁶ McIntyre, *supra* note 2.

⁷ For example, see Alison McIntyre, "Doing Away With Double Effect," *Ethics*, Vol. 111 (January 2001), and Alison Hills, "Defending Double Effect," *Philosophical Studies* Vol. 116 (2003), pp. 133-152.

theorists would agree that intending harm as an end is impermissible (for example, pre-meditated murder), the fundamental element of DDE is the allegedly significant difference between harm that is intended as a means to a good end and harm that is not intended, but may be foreseen as a result of pursuing the means to a good end. The modern theory, then, combines a general prohibition on instrumentally causing harm as a means for the sake of achieving a good end and a special permission for causing that harm incidentally when it occurs as a side effect of the pursuit of a good end. Perhaps an example would best illustrate the difference. Imagine a doctor who wants to alleviate the pain of a terminally ill patient by administering morphine, which in turn causes the death of the patient. If the doctor sought to relieve the patient's pain *by intentionally hastening her death* with a lethal dose of morphine, it would be morally impermissible, but if he merely foresaw that hastening her death may result as a side effect of the same dose of morphine, yet his intent was only to alleviate her pain, his action would be morally permissible.

Modern DDE proponents also include Aquinas' proportionality factor and acknowledge that such a proportionality condition must be met when DDE is applied. As Alison Hills explains, "According to DDE, it is morally worse for an agent to bring about some intended bad consequence than to bring about that consequence when it is merely foreseen, provided that the agent's intention is good, that she does not want or intend that the bad consequence occur and that the foreseen harm she brings about is proportionate to the intended good."⁸ Therefore, in the above example, the doctor's use of morphine would not be justified simply because he didn't intend the patient's death, but rather only if such a powerful drug is indicated as an appropriate method of relieving her particular pain (as opposed to, say, using morphine to alleviate a headache, which would be disproportionate and thus impermissible).

⁸ Hills, *supra* note 7, p. 133.

Hills pushes the analysis even further by distinguishing between ways in which an actor intends harm as a means to an end; she discusses “mere means” versus “plan-relative ends”⁹ and claims that there is a moral distinction between the two in that the latter is akin to intending a harm as an end (which, as mentioned, is generally considered to be morally impermissible). According to Hills, it is morally worse to intend harm as an end because in doing so, the agent treats the harm as if it were valuable for its own sake. On the other hand, an agent who intends harm as a mere means does not treat the harm as valuable in and of itself, but rather as only valuable in the pursuit of some good end. It is here where Hills stretches the traditional concept of DDE into the two branches mentioned. Her contention is that an agent may pursue an end directly, and treat the means to that end as “mere means,” or the agent can pursue the end indirectly, and treat the means to that end as “plan-relative ends” that will help the agent reach the ultimate goal.¹⁰ The difference is this: with mere means, the actor is only committed to bringing about the ultimate end; the means to the end are not valuable in themselves but only as they relate to achievement of the end. In trying to attain the end, the agent monitors only the level to which she has achieved that end. With plan-relative ends, both the means and the ultimate end are independently valuable, with the agent’s focus on the extent to which the individual means are achieved with the expectation that such means will ultimately result in achieving the desired end.

The decision-making model Hills has in mind is as follows. In pursuing a goal, the agent develops a plan, and the means are the intermediate steps in that plan that lead to the ultimate goal, with the agent committed to each waypoint along the way as necessary pieces of the bigger

⁹ Id.

¹⁰ Id., p. 145. “If you pursue some good directly by an evil means, you are not treating the evil means as if it were valuable for its own sake, you are treating it as a *mere means* to something valuable for its own sake....But if you pursue some good indirectly by an evil means, you do not treat your evil means as if they are mere means; you treat them as plan-relative ends, as if they are valuable for their own sake.”

puzzle. The example Hills uses is a person trying to be happier. If he attempts to directly pursue his goal and is only concerned with the end result of being happier, his only metric is the extent to which he has succeeded in that goal, with little focus on the means used to reach the goal. If he attempts to indirectly pursue his goal, he will develop a plan he thinks will best contribute to reaching that goal, perhaps by being nicer to his friends, taking better care of himself, getting outside more, etc. As he progresses on his path, he monitors his success in achieving each of the plan-relative ends, rather than focus on the ultimate goal itself, and presumes that success in each plan-relative end will lead to overall success in reaching his desired goal. Hills argues that, while this indirect pursuit is often more successful, those plan-relative ends are just that – ends – and therefore intending harm at any of those intermediate steps would be morally worse than merely foreseeing harm. “[I]f an agent who intends some harm as an end has a ‘bad attitude,’ an agent who intends some harm as a plan-relative end also has a ‘bad attitude’; if it is morally worse to intend some harm as an end than to foresee bringing it about, it is morally worse to intend some harm as a plan-relative end than to foresee bringing it about.”¹¹

We can understand Hills’s view by examining the way in which she applies her plan-relative ends analysis to a war scenario. She proposes a case in which a commander develops a plan to achieve his ultimate goal to win the war depending upon the information available to him at the time. The commander can pursue that end in two ways: directly, by focusing only on whether he wins or loses the war, or indirectly, by adopting a plan he believes will best contribute to winning the war and then focusing on achieving each intermediate step. Under normal circumstances, it would be wisest for the commander to pursue his plan indirectly, concentrating on bombing each military objective rather than on his overall success at winning the war. In destroying the targets, the commander knows he will cause some deaths, but he does

¹¹ Id., p. 137.

not aim at killing and therefore does not have a “bad attitude” toward the harm. The same is true if the commander pursues winning the war directly. It is interesting to note that Hills applies this result to a terrorist as well, but only if the terrorist pursues his plan directly. According to Hills, in a direct pursuit, the terrorist, who chooses to kill and terrify civilians as a means to win the war, need not believe that the killing is good for its own sake, but only that it is valuable in relation to its effectiveness at bringing about a justifiable end. She does, however, use DDE to create a hierarchy of morality, with the strategic commander, in both direct and indirect pursuit, morally better than the terrorist in direct pursuit (which, in turn, is better than the terrorist in indirect pursuit whereby he values killing as a plan-relative end and is therefore morally wrong).

In my view, though, this distinction lacks practical foundation. It seems to me that Hills’s hierarchical distinction, and DDE generally, are simply tools of setting apart the “good guys” (conventional, strategic warriors) from the “bad guys” (terrorist warriors) and justifying harm that would otherwise lack justification (specifically, directly causing civilian deaths). Indeed, DDE says that the key factor in determining morality of an action is whether the harm was intended, but neither Hills nor other DDE theorists define “intended” with any precision. DDE defenders claim that a strategic commander who intends to bomb military objectives but incidentally causes civilian deaths is morally justified despite the fact that the civilian deaths were foreseen and the commander still made the conscious decision to drop the bomb, meaning that his *action* was intentional, even if he did not intend the resulting harm. One could argue that the terrorist behaves in quite a similar way – he does not intend the harm because his desired end is winning the war.¹² In both cases civilian deaths are both foreseen and directly caused.

¹² This position is also espoused by Horacio Spector in *Autonomy and Rights: the Moral Foundations of Liberalism*, Clarendon Press, Oxford (1992), p. 111. “I have tried to show that it is not possible to find any real difference in the attitudes which an agent respectively has towards the means and the double effect: both are regarded as ‘prices’ to be paid for achieving the end wished for.” Spector’s explanation echoes that of Jonathan Bennett in “Morality and

Though moral theorists may argue that the agent's intent is a matter of utmost importance, the consequences of both actions are the same, and it is my contention, then, that in practical reality, the agent's intent is neither important nor determinable, leaving DDE as a lofty but useless theoretical resource.

PRINCIPLES OF THE LAW OF ARMED CONFLICT

The Law of Armed Conflict (LOAC, also called the Law of War) is a body of law comprising all the international law, both written (treaties and other international agreements) and customary (state practice), that regulates the conduct of armed hostilities. LOAC has two main purposes, a humanitarian one and a functional one, which are further broken down as follows:

Humanitarian:

- 1) Protecting both combatants and noncombatants from unnecessary suffering;
- 2) Safeguarding persons who fall into the hands of the enemy; and
- 3) Facilitating the restoration of peace

Functional:

- 1) Ensuring good order and discipline;
- 2) Fighting in a disciplined manner consistent with national values; and

Consequences,” in S. McMurrin (ed.), *The Tanner Lectures on Human Values*, Vol. 2, University of Utah Press, Salt Lake City, Utah (1981), pp. 100-2. A similar argument can be found in Thomas Scanlon's *Moral Dimensions: Permissibility, Meaning, Blame*, Belknap Press of Harvard University Press, Cambridge, Massachusetts (2008), p. 32. “Those who believe that there is an important moral difference between tactical bombing and terror bombing need to defend some version of the combatant/noncombatant distinction. But they need not be saddled with the additional burden of defending the relevance of intent, or the doctrine of double effect.” Scanlon continues on p. 37: “In explaining why certain actions are impermissible, people often refer to intent – to an agent's reasons for acting – when in fact what makes these actions wrong is the considerations that count against it, not the agent's view of those considerations.”

3) Maintaining domestic and international public support¹³

LOAC applies to all cases of armed conflict between one or more states or organized armed groups, and has as its sources the Law of The Hague, the Geneva Conventions of 1949, the 1977 Additional Protocols of the Geneva Conventions and other domestic and international sources. While the Law of The Hague dictates rules for the “means and methods” or warfare (such as types of weapons and humanitarian concerns), the Geneva Conventions dictate rules for treatment of “victims” of conflict (combatants, noncombatants, and special classes of each). LOAC encompasses four basic principles of behavior during armed conflict: those of military necessity, distinction, proportionality, and unnecessary suffering. Though LOAC is a vast body of behavior regulation, it is on these four principles that this paper will focus in arguing that DDE is a superfluous and unnecessary addition to war theory.

The Principle of Military Necessity “justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.”¹⁴ The Hague Regulations, Article 23(g) state that a belligerent may not “destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.”¹⁵ It is important to note that the principle of military necessity does not imply authority for acts otherwise prohibited by LOAC, such as the intentional targeting of protected persons or destruction of civilian objects, unless such persons directly engage in hostilities or such objects become legitimate military objectives.

¹³ “Operational Law Handbook.” The Judge Advocate General’s Legal Center and School, U.S. Army, Charlottesville, Virginia (2013), p. 11.

¹⁴ U.S. Department of the Army, Field Manual 27-10, The Law of Land Warfare, 18 July 1956 (Change 1, 15 July 1976) [hereinafter FM 27-10], paragraph 3a.

¹⁵ Convention IV Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Annex to the Convention: Regulations respecting the laws and customs of war on land - Section II: Hostilities - Chapter I: Means of injuring the enemy, sieges, and bombardments - Regulations: Art. 23.

The Principle of Distinction is sometimes referred to as the Principle of Discrimination. It requires that belligerents distinguish between combatants and noncombatants, and between military objectives and civilian objects. Parties to a conflict may only direct action against combatants and military objectives, unless, as mentioned, noncombatants participate in direct hostilities or civilian objects become legitimate military objectives. Additional Protocol I of the Geneva Conventions defines military objectives as “objects which by their nature, location, purpose or use, make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”¹⁶ Significantly, the Principle of Distinction applies both offensively and defensively. Offensively, civilian objects and individuals must not be made the object of deliberate attack, and defensively, military forces must distinguish themselves from the civilian population so as not to put the latter at undue risk.

The Principle of Proportionality requires that the anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained.¹⁷ While not a separate legal standard per se, this principle provides a method by which an agent can balance military necessity and civilian loss in circumstances when an attack may cause incidental damage to civilians or civilian property. This incidental loss is referred to as “collateral damage” and consists of both unavoidable and unintentional damage to civilian personnel or property as a result of an attack on a military objective. In determining whether the Principle of Proportionality has been met, one must weight the military advantage expected. Military advantage relates to one’s overall strategic goals and can be assessed either on a target-by-target basis or on an overall objectives basis.

¹⁶ Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977 [hereinafter AP I], Article 52(2).

¹⁷ FM 27-10, *supra* note 14, paragraph 41, change 1.

Finally, the Principle of Unnecessary Suffering requires military forces to avoid inflicting gratuitous violence on the enemy. It applies to a wide variety of considerations in the conduct of armed conflict, including types of weapons (e.g. chemical weapons) and manner of attack (e.g. using otherwise lawful weapons in a manner designed to inflict superfluous injury), and does not discriminate between combatants and noncombatants. Of course, the very existence of this principle recognizes that some suffering is necessary and justified by military necessity. The threshold is generally considered to be where the action would inevitably cause injury or suffering manifestly disproportionate to the military advantage expected.¹⁸

In addressing the application of the LOAC principles, let us use the example of civilian shields in armed conflict. There are two ways in which the enemy may use civilian shields: voluntarily or involuntarily. Given the customary nature of much of the Law of War, both civilians wanting to assist the war effort and enemies trying to take advantage of a situation are aware of the generally accepted limitations on targeting civilians. As such, in a voluntary shield scenario, a civilian may attempt to impede the opposition's mission by placing herself near a legitimate military objective or between ally and enemy¹⁹ so that the opposition cannot fire upon the target. An example might be a group of civilians surrounding a munitions plant to aid the war effort by preventing the bombing of an otherwise legitimate military objective. In an involuntary human shield scenario, the enemy forcibly uses civilians as a sort of "insurance policy" against attack. If they can place the civilian between themselves and the opposition, the belief is that the opposition will be prohibited by LOAC to fire. An example might be tying a civilian to a tank to avoid the enemy destroying that tank.

¹⁸ Operational Law Handbook, *supra* note 13.

¹⁹ The author is fully aware of the political impact of using these two terms, with everyone's enemy being someone's ally and vice versa. However, to facilitate the discussion and distinguish between sides in this hypothetical conflict, "enemy" in this case refers to "their" side, while "ally" refers to "our" side.

Clearly LOAC permits intentional attacks on combatants, but it limits attacks on civilians to cases in which the civilian becomes a legitimate target by participating in direct hostilities, in which case they are referred to “unprivileged enemy belligerents.”²⁰ Those directly participating in hostilities may be attacked in the same manner as identified members of an opposing force. However, in the last few decades, it has become increasingly common for the enemy in an armed conflict to fall outside the traditional definition of combatant (specifically, they often lack military uniforms, clear insignia, and other hallmarks of a defined “combatant”). This new generation of foe, often in transnational armed groups with shifting alliances, deliberately and illegally uses the civilian population or civilian objects to conduct or conceal their attacks as a strategy of war, nearly eliminating the traditionally bright line distinction between civilian and combatant. To determine the legitimacy of a target, then, a commander is left to the four principles of LOAC in conducting his analysis.

APPLICATION AND DISCUSSION

Let us turn now to why DDE plays little to no useful role in evaluating military operations and why LOAC is a more robust and effective tool. Colloquially, DDE might be considered an exception to the general moral rule against causing harm. To act morally, we are to eschew harm to the extent possible, and if not possible, at least we are to limit it to foreseeable and unintended harm. Likewise, collateral damage can be thought of as the military version of double effect – an exception to the general rule against causing harm to civilians and civilian property. To act permissibly, we are supposed to avoid civilian deaths, but when they are

²⁰ This is a term used by the United States, but not found specifically in the Law of The Hague or the Geneva Conventions/Additional Protocols. Article 44(3) of AP I allows belligerents to attain combatant status (and with it combatant protections, such as POW privileges) by openly carrying arms, but the U.S. has historically (and vehemently) opposed this blurring of lines. This concept mirrors the prohibition under DDE on directly causing harm.

collateral damage, they may be permissible. Few moral or military theorists would disagree with these two general premises. But DDE is at once too nebulous and too limited to be effective in a wartime scenario. The doctrine is too nebulous in that it seeks to draw in all moral theory, all fundamental truths, into one concept that is supposed to guide human behavior away from harm and toward good. It is too limited in that it focuses primarily on the intent of the actor, without regard for the tangible consequences of the action or the practical variability of morality due to the extenuating circumstances of any given situation. In her paper, “Defending Double Effect,” Hills asserts that DDE makes two important claims: 1) that the foreseen and intended consequences of an action can be differentiated, and 2) that such differentiation is morally significant.²¹ However, I would argue that the first claim is never as easy as it sounds during the madness of war and in fact is usually only distinguishable in hindsight. With respect to the second claim, an act utilitarian would argue that it makes no difference what result an agent is committed to bringing about, it only matters what the agent does in fact bring about. LOAC relies more heavily on this utilitarian view in weighing the factors of a military action, which I believe is a more stable, and ultimately more useful, method.

Though DDE scholars do not specifically reference it, propriety of action must inherently incorporate two elements: a deontological/normative one (what behaviors are morally right) and an explanatory one (what behaviors are legally right).²² The former is the foundation of DDE – determining whether a harm is intended or merely foreseen leads to a moral analysis that guides behavior, but it ignores the second claim altogether.²³ At first blush, it may seem a higher ideal

²¹ Hills, *supra* note 7.

²² This idea was raised by Professor Horacio Spector, University of San Diego Law School in Spring 2014 in a classroom setting wherein the topic of the course was “Ethics, Law and International Affairs.”

²³ Discussed in Spector, *supra* note 12, p. 102. “The fact of a result’s being intended or merely foreseen...if it counts at all as a moral reason, can only constitute a deontological consideration, since by hypothesis it is not grounded upon the occurrence of certain consequences but presumably on the attitude adopted by the agent in the face of certain consequences.”

to base right and wrong on morality rather than legality, but it is my opinion that morality is indeed the basis of legality. Laws, and especially customary laws, develop from common morality, and LOAC is no exception. As previously discussed, customary law plays a key role in the Law of War. What is customary law if not a collection of long-standing, generally accepted crumbs of morality put into practice and implemented globally? So if that is the case, LOAC incorporates both elements mentioned, the deontological *and* the normative, going beyond the limited scope of DDE. I would further argue that the morality base of LOAC is of an even higher quality than that of DDE because the Law of War removes agent intent as a factor and relies only on qualitative and quantitative parameters to determine propriety of an action.

The four principles of LOAC – proportionality, necessity, distinction and humanity – incorporate the elements of DDE, even Aquinas’ proportionality concept, but go even further, eliminating the vagaries of an actor’s intent. In a wartime setting, action is fast-paced; decision-making is often on the spot and could mean the life or death of one or many. Determining an actor’s intent may or may not even be possible, and certainly can’t be trusted in the heat of the moment. What one “intends” in garrison where decisions can be second-guessed and analyzed under a morality microscope is an interesting exercise but not practical or even effective. Pressure changes thought processes. What a person believes his intent *will* be under fire may very well not be what his intent *ends up being* when the heat is on. And after the pressure subsides and he is asked to expound on his intent at the time of his action, his view will likely be colored by what he knows his intent *should have been*. Worse yet, how are we to determine the veracity of what an actor claims his intent to be? In the thick of war, passions flare, but any military member in the world knows that legitimate wars cannot be premised on passion. A DDE-style reliance on intent rather than quantitative and qualitative factors will, simply as a

factor of human nature, lead to distortions of the truth in order to justify action. It is simply impractical in military operations. No commander is going to tell evaluators of his action that he acted with malice (or decision makers that he plans to act with malice); the answer will always be that the harm caused is unintentional. And what of the “intended” versus “merely foreseen” question raised previously? Every action has smaller elements to it – the contemplation, the evaluation of options, the decision, the implementation of the necessary tools, and the carrying out. To which elements do we apply the question of intention? Using the standard military example previously cited, which actions of the strategic bomber are considered intentional and which are not? DDE theorists are comfortable with applying the “intentional” label to the bomber choices regarding objective, weapon, time of day to act, etc., but then are uncomfortable with applying it to the full extent of harm caused. If the action (bombing the target) was done intentionally, couldn’t it be said that any foreseeable harm was caused intentionally?

Even assuming for a minute that every actor’s intent would be pure of heart, reliance on DDE raises another interesting and potentially insurmountable issue. What exactly is a “moral truth?” As rational, freethinking animals, it seems incontrovertible that one person’s moral truth can never align perfectly with that of any of other person. DDE proponents rely on an assumption that there are indeed foundational principles fundamental to all morality, unquestionable by any reasonable being, but this is unrealistic. Even what may be considered the most basic elements of morality – what is good, what is evil, to what extent are we as humans obligated to seek one and avoid the other – are malleable and vary based on culture, upbringing, understanding of the universe, etc. What one person believes is a justifiable action may not be considered justifiable by another person, and who is to judge that action? Who is granted the supreme authority to evaluate whether an action is *morally* sound? As a purely intellectual

exercise, DDE has the luxury of attempting to whittle down behavior into “moral” and “immoral” because it has no tangible consequences. The same cannot be said for war. There is no luxury in war, no opportunity to engage in deep moral discourse about right and wrong without ramification, and certainly no ability (or authority) to establish some universal moral framework that would guide the action of thousands, or hundreds of thousands, of unique individuals with any kind of practical uniformity.

Finally, DDE’s failure to concern itself with the consequences of action is inadequate for a wartime scenario. Remember that one of the functions of LOAC is maintaining international and public support. Granted, the public is willing to grant or deny support to an operation based on the motives of the actors, but for the sake of argument, let us remove that piece of the pie for a moment. Much is made in double effect theory of the difference between a terrorist’s killing of a civilian and a strategist’s killing of a civilian, but regardless of the motivation behind the killing, the result is still the same. War is war, death is death. The number of casualties is not offset by some moral exchange rate where one ill-intentioned death is equivalent to two justifiable deaths. If you remove the intent of the actor from the knowable data, the public must rely on the tally of consequences, and since intent is not realistically knowable, consequences are in the end what matter. On this point, I am in agreement with Scanlon: “Holding fixed the actual consequences of the raid and what the parties have reason to believe these consequences to be, might an action be permissible if performed by an agent with one intention but impermissible if performed by an agent with a different strategy in mind? I...[find] this implausible.”²⁴

This is where LOAC thrives. It is conceded that the four LOAC principles are not hard and fast mathematical formulae for determining right and wrong in war, but they do provide widely accessible, understandable parameters that all operators, from the Private to the General,

²⁴ Scanlon, *supra* note 12, p. 20

can rely on to create a more concrete, less complicated, and more consistent framework of operation. Despite every potential operation being different from another, with different ramifications and effects, each one can be plugged into the same equation, regardless of the biases of the actor, to determine the allowable range of action. Every decision is based on the information reasonably available to the commander at the time, and that information is evaluated in the same way leading to consistency in an otherwise very inconsistent and ever-changing realm of behavior. Some might find relying solely on LOAC without a strictly moral basis controversial, and indeed some outcomes of the equation may be controversial, such as when civilian deaths are considered justified. However, LOAC provides a concrete, analytical framework that can be recreated, demonstrated and evaluated, unlike morality-based approaches.

This can be demonstrated using the civilian shield scenario discussed previously. An armed enemy soldier appears behind a civilian using the latter to protect himself, fully shielding himself from the aim of the allied soldier. The allied soldier must decide on a course of action, quickly coming to the decision that killing the civilian is the only way to stop the enemy threat. Is it morally permissible to kill the civilian? Can killing the civilian be considered a merely foreseeable side effect of killing the enemy soldier? Can it be considered a justifiable action based on the potential threat the civilian poses? The answer depends upon where on the spectrum of analysis one falls. Strict moralists, like Michael Walzer, would answer the first question in the negative. According to Walzer, killing civilians is never morally justifiable,²⁵ regardless of whether it is intended or foreseen, regardless of its “collaterality.” However, Walzer proposes an untenable concept of warfare, where operations are conducted outside city centers where civilians will not inadvertently (or intentionally) find their way into the line of fire. Should the civilian become a factor, Walzer believes it is morally required that the combatants

²⁵ Michael Walzer, “Terrorism and War,” *Philosophia*, Vol. 34 (2006), pp. 3-12.

avoid killing the civilian at all costs. While this may seem a principled and morally responsible approach, it is impractical and unrealistic in any warfare scenario. It is nearly impossible to conceive of a model of modern warfare that would include no threat to civilian safety. Not only have wars moved out of the open field and into urban environments, civilians have been brought legitimately to the battlefield in positions of contractors, logisticians, technicians and countless other support fields (not mentioning the illegitimate presence of civilians in scenarios such as human shields). In the case of the civilian shield, Walzer's proposal would lead to significant risk to the allied soldier and would fly in the face of established self-defense principles. This strict moral prohibition on harm to civilians is simply an unattainable goal, and I would argue in some circumstances, is actually counter-productive.

Assume now that the allied soldier conducts a DDE analysis and determines that in stopping the enemy soldier he is likely to cause the death of the civilian. He shoots at the enemy and indeed ends up killing both the enemy and the civilian. Were his actions justified? DDE would say yes if the soldier's intent was only to kill the enemy and the civilian death was merely foreseen. His action was aimed at a greater good, was proportionate and did not incorporate any "bad attitude" toward the death of the civilian. DDE would say no, though, if the soldier intended to kill the civilian in order to ensure the death of the enemy, knowing that it was his only feasible option to save the enemy from causing worse harm and that there was no opportunity to wait until the enemy could be killed outside the presence of the civilian. In that case, the soldier could be said to have intended to kill the civilian, a fact morally unsupported by DDE. Either way, both the civilian and the enemy are killed but the outcome of the analysis pivots on the soldier's intent. If asked, the soldier will more often than not say his intent was to kill only the enemy (which may or may not be true, but would be impossible to determine

independently). Is it reasonable to argue that the civilian's death was "merely foreseen?" I would argue that the closer the effect is to the goal, both spatially and temporally, the harder it is to say the effect was collateral or a mere side effect.²⁶ Even if the soldier intended to kill the civilian in order to stop the threat of the enemy, does that necessarily make it immoral? According to DDE it does, but what if the enemy would have gone on to kill others and killing the civilian, and thus the enemy, would prevent that eventuality? According to DDE absolutists, "a virtuous agent should never intend harm for its own sake, no matter what the consequences are, i.e. intending harm is a 'wrong-making' feature of action."²⁷ But according to other non-absolutist DDE proponents, like Hills, the outcome may fall somewhere short of blanket prohibition, though where on the spectrum of permissibility it will fall is anyone's guess. In such a case as civilian shields (not by any means unheard of in modern warfare), DDE is ill-equipped to offer a consistent and predictable analysis, and consistency and predictability are necessary in the evaluation of such an inherently unpredictable field as war.

Ruling out DDE as a nebulous moral doctrine that has little practical applicability to war, the soldier is left with LOAC: proportionality, necessity, humanity and distinction. The soldier must weigh whether killing the civilian is proportional to his strategic goal of stopping the enemy, whether it is militarily necessary to achieve that goal, whether he can do so in a manner that will not cause superfluous suffering, and whether he can distinguish between the combatant and others. Humanity is often the simplest principle to dispense with so I will start there.

²⁶ Both Scanlon, *supra* note 12, and Spector, *supra* note 12, discuss "closeness" with respect to the permissibility of actions and the applicability of DDE. Spector writes, "For the point of the doctrine [of double effect]... is to claim that a certain difference in the *subjective structure* of an action is significant for its moral assessment, as something different from the moral assessment of the agent. But the difference discovered is linked only to relative time positions, that is to say, to certain objective features of the action, and not to its subjective structure. This point aside, the centrally important question is whether, in the absence of intentional or strictly causal differences, a pure time difference may serve as a basis for a moral distinction. With the question put in these terms, I believe that everybody would answer in the negative without the slightest hesitation." p. 113.

²⁷ Hills, *supra* note 7, pp. 138-9.

Assuming the soldier is not using hollow-point bullets or some other unnecessarily brutal method of killing the civilian (or the enemy), this principle is met. The other three require more analysis from the soldier.

With respect to military necessity, the soldier must evaluate whether another action that does not cause the death of the civilian could achieve the same military advantage. In the scenario presented, where the enemy is hiding behind the civilian, the allied soldier must consider the potential ramifications of not taking the action. In this case, if the soldier does not neutralize the enemy there is no rational reason to believe that the enemy will not go on to cause more damage, likely by killing other allied soldiers. Clearly, the soldier in the situation is the only one who can know if the action is militarily necessary, but the bottom line is that the soldier must weigh whether it would be possible to conduct the action (killing the enemy) without killing the civilian. Turning to the principle of distinction, the soldier must determine if he can distinguish between the combatant and the noncombatant. In a human-shield scenario, it might be nearly impossible to determine whether the civilian is partaking in hostilities. Even if the soldier can make such a distinction, he then must evaluate whether the civilian poses a direct threat to the allied forces, and if so, it would be permissible to cause the harm in question.

Perhaps the most complicated of the four principles is proportionality. Whether an action is proportionate will be determined by evaluating the relevant goods as compared to the relevant harms, a concept discussed by Thomas Hurka.²⁸ First, Hurka proposes that proportionality must be considered in two different ways: objective proportionality and subjective proportionality. “An objective version assesses a war or act in light of its actual effects, that is, the relevant good it actually produces and its actual destructiveness; a subjective version does so considering only

²⁸ Thomas Hurka, “Proportionality in the Morality of War,” *Philosophy & Public Affairs*, Vol. 33, No. 1 (2005), pp. 34-66.

an item's likely effects given the evidence available to agents at the time.”²⁹ Hurka then discusses three variations on the proportionality analysis. The simplest view is the “quasi-consequentialist” view, which counts all the contributing goods and evils that result from a war or act of war and weighs them equally. Under this view, a war is disproportionate if the total evil it causes is greater than its total good. Such contributing goods could be economic gain, benefits of spreading democracy, etc. The second view Hurka discusses can be referred to as the “traditional” view; this view weighs good effects somewhat more heavily than bad ones but asserts that relevant goods must be sufficiently related to the just cause of the action. This view requires evils to be *proportionate* to goods (rather than no greater than goods). The third view, which Hurka espouses as the correct one, is an “intermediate” view, which takes into account some contributing goods along with the sufficient goods. It does not count all the goods a war will produce nor only those sufficient to the just cause, but supplements the latter with the former.

Hurka then turns his attention to relevant evils, but proposes that there is no similar limitation on what evils should be considered. “In assessing a war for proportionality, it seems we count evils of all the kinds it will cause, with no limits on their content.”³⁰ In comparing the goods and evils, and thereby evaluating proportionality of an action such as killing the civilian shield, Hurka believes that consideration should be made on the broad scale: proportionality should not be limited to comparing numbers of victims, but rather should be a comparison between the advantages gained and those lost by not taking the action. In this sense, it is my opinion, that killing the civilian shield would be considered a proportional action regardless of which method of analysis is used.

²⁹ Id., p. 38.

³⁰ Id., p. 46.

The foregoing is but a very cursory example of how LOAC is applied in the field, but the main point in presenting it is to show that LOAC involves a situation-specific analysis that takes into account qualitative and quantitative parameters in making each individual operational decision. It does not rely, as DDE does, on something that can be as easily manipulated as actor's intent. As stated previously, the consequences of an action should be the primary driver rather than intent, with permissibility of an action determined by practical interpretation of a factual situation. As Scanlon writes, "It remains true, in my view, that a person who intends to kill noncombatants in order to shorten the war by undermining morale (and has no further justification for her action) acts wrongly – she has an intention that she should abandon. But this truth should not be taken to suggest that intention has a fundamental role in determining the impermissibility of this action, in the way claimed by the doctrine of double effect. The intention is wrongful because the act intended is wrongful, and the act is wrongful because of its likely consequences, not (fundamentally) because of the intention."

In the same sense that LOAC eliminates the usefulness of DDE in war, Alison McIntyre further illustrates the limits of the effectiveness of DDE. She discusses six constraints on the application of DDE that, in my opinion, both incorporate some of the concepts of LOAC and illuminate the very limited circumstances in which DDE can be applied. These constraints are as follows. First, the fact that a harm is "merely foreseen" is not sufficient to determine permissibility of an action because, as mentioned previously in this paper, a harm cannot always be said to be unintentional simply because the harm was not the desired effect.³¹ Permissibility must also incorporate proportionality (similar to LOAC's principle of proportionality). Second, permissibility of an action requires minimization of the collateral harms (similar to LOAC's principle of necessity). If there are other, less harmful, means of achieving the same end, we

³¹ Spector, *supra* note 12, discusses this concept in more detail.

should take them. Third, McIntyre clarifies the concept of intentionality and argues that DDE ignores the possibility of malicious intent because it focuses only on the agent's intent with respect to the harm caused, not with respect to the end sought. Fourth, a distinction must be made between allowing harm and causing harm (for example, the difference between allowing an enemy to kill a hostage and killing the hostage ourselves), a distinction not made by DDE. Fifth, DDE relies on intention to determine permissibility, but gives no criteria for how to determine what is intentional versus what is merely foreseen. And sixth, DDE does not address cases in which the agent has no direct responsibility for an action. In such cases, the harm may still occur but the permissibility of the action that caused it cannot be evaluated using DDE because the agent's intent is not at issue.

McIntyre's constraints go to show that, when you eliminate all the cases in which DDE *cannot* be applied, you end up with a very narrow set of circumstances in which it *can* be applied, and even those situations are rather hypothetical and unrealistic. As Spector states, "It should be borne in mind that the more one restricts the application of a distinction, the less important this distinction becomes."³² It is the goal of this paper to show that DDE is just such a distinction, lending itself to the development of useful norms such as LOAC, but otherwise insufficient and relatively useless to practical wartime scenarios.

CONCLUSION

The purpose of the Doctrine of Double Effect is to explain the rationale behind our basic intuitions, and in that sense, it has served its function. However, there is very little that is of actual practical use in that theory, especially when it comes to conducting war, and indeed has shown itself to be convoluted and extremely narrow. As Spector says, "The central proposition

³² Id., p. 107.

[of DDE] asserts that whether an act's bad result is intended as a means or an end by the agent or is merely foreseen by him makes a difference as regards the moral standing of the act,"³³ but it is this author's contention that DDE's ignorance of the consequences of an action, among other limitations, makes it ineffective in determining the propriety of military action. The fact is that, in real life, intended effects and incidental effects are equally important in the *vast* majority of situations; DDE is only useful as an intellectual tool in the relatively minute number of scenarios when they are not, and by all accounts, the conduct of war is not one of those scenarios.

³³ Id., p. 108-9.