

IMMINENT HUMANITY

*Re-evaluating individual responsibility, liability, and
immunity in times of war from a liberal perspective*

15,000 words + 200 Abstract

ABSTRACT

How are we to reconcile due respect for individual autonomy, individual responsibility, and human rights with the morally necessary conduct of warfare? *Prima facie*, it seems antithetical to the exercise of war to enshrine these liberal considerations of justice when warfare is “the actual, intentional and widespread armed conflict of political communities”, and not individuals¹. Taking persons to be “self-originating sources of valid claims”, this paper outlines a consistent liberal approach to the ethics of warfare which justifies the forfeiture of combatants' human rights on the sole basis of immediate self-defense². Specifically, this paper focuses on the moral equality of combatants thesis, a view which grants combatants an equal war right to engage one another, independent of individual and collective responsibility, as well as the practice of granting immunity to civilians as a class. Recently, Igor Primoratz argued that liberal principles of justice commit one to accepting the intentional military targeting of civilian populations in democracies. In refuting this position, this paper will also engage in a discussion of the justifiability of killing in general and provide a number of pertinent revisions to the just war tradition from this liberal perspective.

INTRODUCTION

“[The enemy] alienates himself from me when he tries to kill me, and from our common humanity. But the alienation is temporary, the humanity imminent. It is restored as it were, by the prosaic acts that break down the stereotypes...”³

Traditionally, there is a sharp divide between *jus ad bellum*, principles governing the acceptable initiation of armed conflict, and *jus in bello*, the principles governing the conduct of a war effort. There have also been theorists who argue for the collapse of these categories into a unified and “consistent normative thread”⁴. Most accept, however, that wars must minimally meet the criteria of both *jus ad bellum* and *jus in bello* to qualify as a just exercise of force -- a war fought for just ends through just means⁵. Arguably, the only legitimate end of warfare is the vindication of rights, individual or collective, against aggression⁶. In cases of defensive wars against external aggression, it is the political rights of territorial integrity and political sovereignty that states seek to vindicate from unjust seizure or destruction⁷. In cases of humanitarian intervention against internal aggression, it is rights to life and liberty themselves that are under direct threat from an aggressor⁸. In this paper I will examine only the case of external aggression, and within this field, only the means that make this vindication of state and individual rights just or unjust.

Can due respect for individual autonomy and human rights be reconciled with the conduct of warfare? *Prima facie*, it appears antithetical to the exercise of war to enshrine considerations of human rights and individual responsibility when warfare is by contemporary definitions “the actual, intentional and widespread armed conflict of political communities”, and not individuals⁹. I will maintain throughout this paper, however, that individuals are morally and conceptually prior to the state. Recognizing the conceptual priority of individuals within the framework of just war theory entails that the rights of states are founded on the rights of the individual, and the legitimacy of all states is embedded in the rights of the individuals who comprise the political community that constitute the state. Recognizing the moral priority of individuals entails accepting considerations of individual autonomy, freedom and responsibility on a scale of particular individuals and their actions within the

otherwise state-centric concept of armed conflict. This priority is best expressed by the dictum “persons are self-originating sources of valid claims”, and within the greater liberal tradition, the claims of persons have often been taken as sacrosanct and logically independent of and prior to political rights.

War, by necessity, entails widespread or systematic killing, and thus the wholesale violation and forced forfeiture of human rights in the name of political rights. If human rights are to be viewed as sacrosanct and logically prior to political rights¹⁰, it seems paradoxical to argue that the prosecution of warfare can satisfy an approach to justice founded on fairness and individual autonomy when it is primarily through the violation of individual rights that political rights are to be vindicated¹¹. Further, it remains an open question whether any political right or interest of the state is worth the loss of an individual's life¹². The practice of overriding individual human rights can thus be justified by this broadly liberal approach only if there is some compelling reason to think that those who are killed in times of war have somehow actively forfeited their right to life by some action they undertaken personally. If this reason cannot adequately account for their forfeiture while simultaneously recognizing the moral priority of the individual over the state, then one of the following disjuncts must be the case: either the practice of war, even defensive war, is fundamentally unjust (alternatively, “beyond” considerations of justice)¹³, or war necessarily trumps individual rights in the name of greater, morally crucial goods¹⁴. This problem makes the reconciliation of an approach to justice based on individual autonomy with the conventional laws of warfare a difficult and often failed endeavour¹⁵.

In Just and Unjust Wars, Michael Walzer sets out a principle to discriminate combatant from noncombatant that details the forfeiture of human rights on the basis of an individual's active engagement in harm¹⁶. He claims that by posing a threat to the rights of others, soldiers and munitions workers “alienate [themselves] from our common humanity”¹⁷. By bearing arms effectively, being trained as dangerous persons, or by materially or causally supporting dangerous persons with the means to pose a threat, these individuals lay down their right to life and grant those whom they threaten the right to kill¹⁸. Walzer also recognizes the temporary nature of this alienation, and argues for the

imminent humanity of all combatants – when injured, disarmed, or surrendering, they regain their inviolable rights to life by ceasing to cause harm or pose a threat¹⁹. When individuals regain their humanity and noncombatant status, they are guaranteed immunity from harm, a guarantee that Walzer argues is only violable in cases of military necessity where due care is exercised to minimize this violation at the cost of sustaining greater risk to the military venture.

Thus, Michael Walzer establishes principles for the just conduct of warfare that restrict the brutalities of warfare with considerations of justice grounded on the notion of vindicating individual rights, recognized as best as they can in times of war²⁰. In this paper, I will examine Walzer's position on the moral equality of soldiers thesis, his principle of discrimination on the basis of harm, and his revisions to the Doctrine of Double Effect. As important as Walzer's work remains for establishing these paradigmatic tenets of *jus in bello*, there are fundamental inconsistencies in his appreciation of individual autonomy that I intend to expound and revise.

I will argue for a two sets of revisions to Walzer's position. First, I argue that the definition of harm Walzer provides as a distinction between combatant and noncombatant is not restrictive enough and admits of dangerous ambiguity. As it stands, Walzer confers combatant status to those who are directly “engaged in the business of war”, and the implications of this are problematically unjust²¹. Instead of accepting material support, causal support, or command responsibility as a constituent of “the business of war” I argue for the legitimate forfeiture of noncombatant immunity solely on the grounds of immediate and direct harm, thus invoking a principle of self-defense as a justification for the war right combatants gain. I will argue that principles of punishment are manifestly unjust when deployed in the ethics of war, and that only a refined principle of self-defense can grant the right to kill.

My second argument will examine Walzer's proposed revisions to the Doctrine of Double Effect and their tendency to value collective rights and political goods over the lives of individuals upon which these rights are founded - an unjust concession, I argue, to communitarianism, Walzer's preferred political philosophy²². I intend to revise this doctrine to reflect a more consistent respect for

individual rights by enforcing a clause that would limit the deployment of military operations, foreseeably resulting in collateral damage to immune noncombatants, solely to unavoidable, morally necessary circumstances where due care is exercised prior to minimize the collateral damage sustained.

Below is a structural outline of this paper in service of these aims:

Introduction

In this section, I will lay out the arguments of this paper and engage in a brief discussion of what it means to possess human rights, when it may be reasonable to guarantee or forfeit them, and the dangers inherent in adducing a principle to govern such occasions.

1 Walzer's Position

Here, I will carefully reconstruct the moral argument Walzer mounts for the following contentions: (1) the Moral Equality of Soldiers Thesis (2) the Harm Principle of Discrimination and (3) Walzer's refined Doctrine of Double Effect.

2 The Autonomy Approach

Here, I will entertain Igor Primoratz' liberal counterargument to the previous three contentions. I will demonstrate how this argument is fundamentally misguided about when it is permissible to grant a right to kill, but concede its successful exploitation of Walzer's harm principle, thus establishing a need for careful revision to Walzer's account.

3 Harm and Punishment

Here, I construct a revision to Walzer's principle of discrimination on the grounds of what constitutes harm. I argue that Walzer's principle proves unjust if it extends the definition of harm to include indirect material and causal support. I will redefine harm as the prosecution of immediate threat or violation of rights, and discuss the superiority of the principle of self-defense over Primoratz principle of punishment in determining who it is agents have the war right to kill.

4 The Pacifist Objection

Here I will assess an anticipated objection to my revisions and the just war tradition on the grounds of the moral priority of the individual over the state. I argue that the traditional reply to the pacifist objection, via the Doctrine of Double Effect, is unjust and that it should be revised to limit the violation of noncombatant immunity to cases of moral, not military, necessity.

Conclusion

Here I will summarize the arguments advanced and conclude with a note about the moral and conceptual priority of the individual over the state and what possible implications an autonomy approach to the justice of war may entail for considerations *jus post bellum*.

Before carrying out this project, it is important to unpack what it means to have rights, and when it is reasonable to guarantee or forfeit these rights. For the purposes of this paper, it will be helpful to think of rights as reasons; neither as mere conventions, to be overridden by more efficacious practices, nor as absolute values²³. I will use the term right to refer to an expectation, obligation, or

commitment to justice conceived of as fairness²⁴. Individuals possess rights in the sense that their interactions with others (and with themselves) are governed fairly by these reasons²⁵. I will not discuss whether these rights spring from human nature as a rational thinking being or whether they are constructed, or indeed, whether there is a difference between these positions; I will however, argue that these rights are reasons to respect the claims of persons and that these claims often conflict with one another. It is important to carefully establish the grounds on which one claim may override another, and what makes for the reasonable forfeiture of otherwise sacrosanct rights. If improperly formulated, principles invoked to circumvent individual rights in the name of greater justice are often open to grave abuse. It is therefore crucial to demarcate clear boundaries for principles that override human rights. This paper will engage in that task, starting with an examination of Walzer's principles of *jus in bello*.

1. WALZER'S POSITION

In this section I will carefully reconstruct the arguments Michael Walzer makes for the Moral Equality of Soldiers Thesis (MEST), the Harm Principle of Discrimination (HPD), and a refined conception of the Doctrine of Double Effect (DDE). All of these reflect a justice-centered approach to the responsibility, liability and immunity of individuals during warfare from a communitarian and liberal perspective that has come to be enshrined in international law²⁶. It is worth unpacking Walzer's claims here before drawing problematic or helpful implications from them in subsequent sections.

1.1 The Moral Equality of Soldiers Thesis

Walzer and the international community distribute responsibility in the following fashion: military and political leaders of a state are responsible for the initiation and declaration of war, while individual participants and citizens are culpable only for their conduct within it²⁷. Individuals in the executive branch of the government make the decision to go to war, and they are thereby responsible for respecting considerations of justice as they occur before the war breaks out: seeking war as a last resort, preparing a suitable formal declaration of the war, and engaging only aggressor states to vindicate state or human rights, to name a few of the limiting conditions. This is the “business of the

king” or the sovereign of the state²⁸. The soldier, however, is too far removed from this executive power to be held accountable for the overall justice of the wars they prosecute. Soldiers are instead only responsible for their own conduct within a war – their superiors, likewise, are responsible only for their own actions, but this includes the justice of the military exercises they plan and implement, and the conduct of the men of whom they are in command²⁹. This thesis is characterized in the literature as the moral equality of combatants, and it is formulated, in brief, below.

MEST Individuals are responsible only for those events over which they exercise effective control. Given that a soldier's sphere of control is considerably limited, soldiers are not morally culpable for the overall justice of a war or their decision to participate in it. Soldiers are thus morally culpable only for their conduct within war, and possess equal right to engage one another.

The universal statement underlying this thesis is that individuals are only responsible for the actions that fall within their sphere of effective control. Given that the decision to initiate hostilities lies outside of this sphere, we cannot reasonably hold soldiers responsible for the state's decision to engage another state. Thus, in and after combat, we recognize soldiers as persons, not criminals, even if they fight for an unlawful aggressor. Walzer captures this best when he claims: “when soldiers fight freely, their war is not a crime; and when soldiers are not free, their war is not their crime”³⁰. Most modern warfare meets the criteria of this second option – with conscription and coercion, it is hard to think of participation in armed conflict as voluntary; rather it is the sort of activity forced upon an agent directly by the mandate of the state, and indirectly by the agent’s socio-economic circumstances³¹.

Granting soldiers an equal right to engage one another requires that we accept their shared servitude to their state³². Yet, it could be argued that while the decision to initiate hostilities is beyond them, the decision to participate in a just or unjust war is entirely within the soldiers' sphere of control. By choosing to participate in a war that is likely unjust, or the justice of which has yet to be proven, soldiers lend legitimacy to the effort. Throughout the history of the just war tradition, scholars have argued that soldiers ought to take personal responsibility for their decision to participate in a war, and should therefore ascertain the justice of the war prior to their participation in it³³. More recently, Jeff

McMahan has engaged in a sustained attack on the moral equality of combatants, arguing as follows:

“We must cease to regard [combatants] as mere instruments or automata and recognize that they are morally autonomous and therefore morally responsible agents. And we must insist that they too recognize their own moral autonomy and abandon the comforting fiction that all responsibility for acts they do in obedience to commands lies with those who command them”³⁴.

Against this contention, Walzer offers six arguments concerning consent, patriotism, youth and the limited epistemic access of combatants, each of which attempts to justify the transfer of responsibility from individual soldiers to their commanders or political leaders³⁵. With these six points, Walzer attempts to “recognize the existence of authority structures and socialization processes” that would justify the reasons by which ordinary citizens become soldiers³⁶. Walzer argues (against Robert Nozick) that it is not elitist to exempt soldiers from the justice of their participation on these grounds, but that it is instead morally insensitive not to³⁷. Walzer then illustrates the consequences of his case with by way of an example with Field Marshal Erwin Rommel. It would be inconsistent to both praise and blame Rommel for his actions in the war, he claims. On one hand, we recognize that Rommel fought well and in accordance with the principles of *jus in bello*, almost to a supererogatory level, going so far as to burn Hitler’s Commando Order³⁸. But attributing this praise to Rommel is nonsensical if we believe that his actions were morally blameworthy from the start.

Walzer raises the key issue that, should we take the rights of just combatants to be as sacrosanct as the rights of noncombatants, then, counter-intuitively, all of the fighting Rommel undertakes in the service of an unjust war is murder, regardless of whether he targets soldiers, prisoners of war, or even civilians³⁹. Walzer argues that the distinction between *jus ad bellum* and *jus in bello* laws must remain strict if it is to sufficiently distinguish those acts which violate one set or the other. Maintaining this distinction will require understanding the nature of “political obedience” and accepting the six points Walzer presents for the soldier's absolution⁴⁰. “Rommel was a servant, not a ruler” Walzer writes, in the commander's defense, “the atrocities that he commits in war are his own; the war is not.”⁴¹

Walzer concludes that if we do not grant soldiers an equal right to kill one another, “war as a

rule-governed activity would disappear and be replaced by crime and punishment, by evil conspiracies and military law enforcement”⁴². Presumably, extending the domestic analogy in such a fashion would be detrimental to the conventions governing armed conflicts: should soldiers of an unjust belligerent state either a) properly engage enemy combatants, or b) intentionally slaughter innocent noncombatants, there is no distinction between the innocence of either target that could separate the crime in the first instance from the second. If both the killing of a combatant and the slaughter of a noncombatant present equal cases of murder, there is no rights-centered reason to prefer one option over the other, only utilitarian considerations – e.g. the fear of reprisals⁴³. Although, by choosing Rommel, an historical figure of disputable character, Walzer does his argument a disservice, we can abstract his argument from the particular case: if we grant that the epistemic conditions surrounding the outset of every war are such that each party believes that they are justified while their opponent is unjust, denying the moral equality of combatants effectively destroys the distinction between *jus ad bellum* and *jus in bello*. Later in this paper, I examine a particularly strong but erroneous argument for destroying this distinction as levied by Igor Primoratz.

1.2 The Harm Principle of Discrimination

In the introduction, I briefly discussed the importance of Walzer's Harm Principle of Discrimination (hereafter HPD), and how it serves to govern the acquisition of combatant status (and thus, the soldier's equal war right to kill and be killed) on the grounds of individual action -- a condition acceptable both to the communitarian and the liberal political philosopher. Walzer argues that one can only forfeit rights through one's own action, and maintains that any forfeiture legislated as a matter of class and not on the basis of individual action would be unjust and pernicious⁴⁴. For Walzer, the action that separates those who maintain their rights from those who rescind them is the act of engaging in harm. Those who engage in “the business of war” pursue the harm of others to some degree, regardless of whether this harm is undertaken for the vindication of state rights or conquest⁴⁵. For pursuing harm, combatants forfeit their rights and become legitimate targets of intentional attack so that the threatened

persons may secure themselves from harm. Walzer's HPD can thus be seen as a sophisticated instantiation of a self defense principle: A has the right to deprive B of her rights, *iff* B poses a direct or immediate threat to the rights of A or others, and the violation of B's rights is required to guarantee the threatened rights against harm. This principle is captured in brief below.

HPD Agent A acquires combatant status and forfeits her right to personal security and life if they i) directly engage in hostilities, ii) materially support, *qua* combatant, those directly engaged in hostilities, or iii) causally support the war effort by exercising counterfactual control over hostilities.

In his subsequent discussion of who this rubric qualifies as a combatant, Walzer constructs three categories of harm. First there are those who immediately engage in hostilities – soldiers, being armed and trained as dangerous men, present perhaps the most uncontroversial case of combatants⁴⁶. Their task in warfare is to kill, maim, injure, or take prisoner other soldiers; to capture political communities; or to overtake territory. Hence it is clear how soldiers harm the rights of individuals and states. Walzer adds, however, that there are circumstances in which even soldiers are to be granted immunity from legitimate military targeting. Being “imminently human”, once soldiers are deprived of the means by which they engage in harm or present a threat to the rights of others, their status as noncombatants 'springs up' again, and it is morally impermissible to terminate them⁴⁷. For example, when injured on the battlefield and crying for their mother, it is hard to see how a soldier is anything but human.

This notion of ‘imminent humanity’ is also crucial in limiting the extension of the second and third categories of harm. In both the case of material and causal support, combatant status is conferred conditionally – individuals gain combatant status only when actively engaged in the material and causal support of a war effort, and when they step out of this role, they regain their status as noncombatants⁴⁸. For instance, Walzer accepts that munitions workers are legitimate targets of intentional military attack but maintains that they acquire combatant status only when directly contributing to the war effort in a sufficiently warlike fashion. When these workers return home, or cease contributing material to the war, they regain their noncombatant status and hence immunity from intentional attack. According to

Walzer, it is just to kill these individuals while they are at work, where they are combatants, but unjust to target them in their homes, where they are simply human⁴⁹.

Walzer further stipulates a criterion of directness and necessity – it is justified to intentionally target combatants only if their elimination is required for the defense of rights. Walzer maintains that “no one can be killed for trivial purposes” - that individual right forfeiture must be a matter of necessity, even when justified⁵⁰. Those who support the war effort are only legitimate targets insofar as their elimination can reasonably be said to guarantee rights against harm. If the material citizens provide their war effort can be seized or destroyed before it can be utilized, this action is to be preferred over intentionally targeting those who produce it. Similarly, those who exercise direct control over hostilities are only legitimate targets insofar as they are directly in control of the hostilities being executed. With this condition, Walzer does not necessarily advocate the punishment of those who have exercised control over military ventures conducted in the past, but concedes to realpolitik the legitimate targeting of commanders, in the field as it were, and commanders in high political office, if these commanders in fact maintain a counterfactual control relationship over the hostilities being exercised.

Though this counterfactual relationship limits the legitimate targeting of those who causally support the war effort, it is not the only condition to limit those who materially support a war. Walzer recognizes that a number of intuitively innocent individuals materially contribute to the success of a war in ways that do not necessarily engage in harm or promote harm, for example, by paying taxes or producing food⁵¹. Walzer takes pains to distinguish the case of “munitions workers” as individuals who materially support the war effort by providing weapons, from medics and farmers who provide food or medicine, as all provide 'material support' for the war effort, yet not all of which are equally ‘engaged in harm’. In the first case, the work of the munitions manufacturer provides the war effort with the means necessary for executing harm, while the medic and the farmer provide solely for the humanity of the soldiers, and not his war making⁵². Walzer writes:

“An army has an enormous belly, and it must be fed if it is to fight. But it is not its belly but its arms that make it an army. Those men and women who supply its belly are doing nothing peculiarly warlike.”⁵³

Munitions workers however, are engaged in a peculiarly warlike activity – they produce the means by which soldiers fight – and in this sense, provide the army with its 'arms'⁵⁴. Should their efforts prove too difficult to frustrate through means short of their intentional targeting, munitions workers acquire legitimate combatant status on the grounds that their material support serves combatants *qua* combatant. Interestingly, it is a plausible consequence of Walzer's position that unwilling munitions workers may acquire their combatant status as a matter of economic necessity, while other civilians supporters may maintain noncombatant immunity despite espousing sincere enthusiasm for the war, or contributing in significantly less “warlike”, and yet equally important ways. For Walzer however, no civilian support, short of warlike material or causal support, can confer combatant status⁵⁵. Thus the HPD cuts in two directions – in one sense, it makes those who acquire combatant status legitimate targets who can be killed without recourse if certain conditions are met. It also affords noncombatants complete immunity from intentional attack in light of their innocence, understood as a distance from harmful activity. Walzer refers to this innocence as a “term of art” that means the individuals in question “have done nothing and are doing nothing that entails the loss of their rights”⁵⁶. Because they do not do harm, there is little reason to justify the violation of these rights: intentionally killing and maiming civilians, or even purposefully destroying civilian property, is unjust.

This notion of noncombatant immunity is one of the most frequently and deeply enshrined conventions of war in international law, and it is perhaps one of the most fundamental considerations of justice for the prosecution of war. Those innocent in war should be protected at all costs. There is a tendency, however, for the class of noncombatants granted immunity to shrink over the course of a war, for the borders of what constitutes “harm” to broaden and incorporate more mundane civilian activities, and for military necessity to dictate frequent violations of this guarantee in any case. This presents a problem. If the violation of noncombatant immunity is justified in all cases by military

necessity, wars would prove more bloody and could hardly be called just. If the violation is never justified, however, no war could ever be prosecuted justly, for it would be impossible to engage in war without at least some degree of noncombatant collateral damage. Walzer recognizes these conditions and argues that the violation of noncombatant immunity can sometimes be legitimate, provided the circumstance meets the conditions of his refined Doctrine of Double Effect⁵⁷.

1.3 Civilian Immunity and the Doctrine of Double Effect:

<p>DDE morally serve as the agent seeks to minimize herself iv) the goodness of A is at</p>	<p>A good action A, with evil consequence B is justified <i>iff</i> i) A is otherwise permissible ii) the agent only intends A and not B iii) B does not means to A, and being aware of the evil effect of B, the the extent of B by accepting greater risk to least proportional to the evil of B.</p>
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Walzer concedes that there are circumstances where the immunity of noncombatants can, and should be broken. Until the weapons of war can be perfectly discriminating in the sense outlined by the HPD, the collateral damage of civilians or their property will remain a necessary condition of warfare. To reconcile this brutal reality of war with a rights-based approach to the ethics of war, Walzer identifies and refines the catholic doctrine of double effect in order to establish the conditions the prosecution of war must meet if it is to incur civilian collateral damage justly. Historically, early church scholars utilized the DDE as a tool of casuistry: a way of legitimating sins for a price⁵⁸. Walzer is initially skeptical of the DDE, but accepts it after revising its third condition to reflect the need to display “due care” to minimize the evil consequences of an action⁵⁹.

In war, then, individuals ought to express a positive effort to limit or minimize the harm sustained incidentally, even if unintentionally, to those innocent in war in order for their action to be just. Part of this positive effort will entail accepting a greater degree of personal risk or risk to the operation as a whole in order to preserve the justice of the action. Walzer details the limit of this risk at a point where “any further risk-taking would almost certainly doom the military venture or make it so costly that it could not be repeated”, and argues that up until this point, risk must always be accepted in order to minimize the amount of innocent lives lost⁶⁰. Walzer summarizes the intuition behind his

revision with a historical example from Vichy France that demonstrates the honourable acceptance of great personal risk. Free French bombers who would fly at low altitudes in order to gain targeting precision, accepting higher losses so that they may avoid wreaking collateral damage to their countrymen⁶¹. This acceptance of risk is the ideal, to be universalized in all military planning on all sides of a conflict, regardless of the justice or injustice of their cause.

The justice of the cause of a war, however, may not be entirely separable from the deployment of the doctrine, as I intend to prove in the fourth section of this paper. Walzer argues that, while it may be bearable to live in a world in which innocents are sometimes killed, it is “literally unbearable” to live in one in which genocide takes place unchecked⁶². In this respect, he argues that utilitarian and rights-based considerations of justice cannot be held “wholly distinct”⁶³. In cases of extreme moral emergency, the threat that especially aggressive armed force may pose to vitally important collective rights, or even our common humanity, may justify otherwise morally reprehensible activities that result in the foreseeable death of the innocent. Resolving problematic tendencies of the fourth condition of proportionality with individual autonomy will involve a deeper investigation of the relationship between the individual and the state than can be afforded here, but it is important to note that Walzer views the collective rights of states “the most vital and fundamental of rights”, and that negative utility that would result from the destruction of the common life forged by a community can, in principle, be proportional to a sum of innocent lives to be lost in its defense⁶⁴.

1.4 Concluding Remarks:

In the previous subsections I have carefully reconstructed Walzer's position on noncombatant immunity, the moral equality of soldiers, and the appropriate use of the DDE to justify the collateral damage warfare necessitates. Arguing for these principles, Walzer maintains a coherent middle-ground between the pull of realpolitik and pacifism grounded primarily on an individual rights-based conception of justice. There are, however, problematic tendencies in Walzer's argument to concede too much to the realist position, or to base too much of his policy on the value of collective rights over the

rights of the individual that ground them. In the following sections of this paper, I will seek to carefully revise Walzer's position to better reflect a consistent appreciation for individual autonomy divorced from utilitarian or communitarian considerations.

2. THE AUTONOMY APPROACH

In “Michael Walzer's Just War Theory – Some Issues of Responsibility” and the first chapter of his book, Civilian Immunity, Igor Primoratz charges Walzer's paradigm with adhering to an outdated model of the state and the inconsistent application of liberal political philosophy⁶⁵. In the service of reconciling the notion of individual responsibility with just war conduct, Primoratz makes two poignant revisions to Walzer's position. In both revisions, Primoratz works from the presumption that individuals are autonomous agents responsible for their actions and participation in state policy when such are chosen freely. From this, he argues first for the rejection of the moral equality of soldiers thesis, and second for an ascription of combatant status to active, war-supportive civilians of democratic states.

The aim of these arguments is singular – to propose further safeguards against the prosecution of unjust wars⁶⁶. If one is guilty of murder and liable to punishment when acting as a soldier on behalf of an unjust war effort, this will likely reduce the readiness of civilians to take up arms unless the justice of the war is made certain by the proper authorities. This same deterrent effect is the aim of Primoratz second argument. He argues that those who support injustice in a civilian role are made appropriate targets for intentional military attack unless they demonstrate symbolic civil disobedience to the state, thereby rendering its policy illegitimate. The dangerous implications of this argument serve to deter individuals from active or passive support of unjust war efforts even in strictly civilian capacities. Unjust wars would prove all the more difficult for states to prosecute when both its soldiers and its citizens required proof of the justice of its policy⁶⁷. In this section, I will criticize these two arguments. I will also argue, however, that Primoratz arguments strike close to necessary revisions in Walzer's account, despite their problematic elucidation.

2.1 *The Moral Inequality of Soldiers Counter-thesis*

Primoratz' First Argument, in brief:

- (1) As autonomous agents, soldiers are responsible for actions within their sphere of control.
- (2) Soldiers either are or are not free to choose their participation in war.
- (3) If soldiers freely participate in war, then it cannot be the case that soldiers are morally equal, for those who participate in unjust war freely are morally culpable for the violation of rights committed in the service of unjust policy.
- (4) If Walzer's six points hold and soldiers do not freely participate in war on account of their "servitude to the state", then it must also be the case that they are also absolved of their responsibility to adhere to principles of *jus in bello* by the same servitude to their commanders.
- (5) Given that (4) leads to a contradiction, we are forced to conclude (3) through disjunction elimination, and thus that soldiers are morally unequal.

Primoratz begins his paper by calling Walzer's account of the moral equality of soldiers "too lenient"⁶⁸. Primoratz argues that soldiers fighting for an unjust cause are not morally equal to soldiers fighting a just cause, for one commits a crime by fighting in the first place⁶⁹. Soldiers should discern for themselves the justice of their war before engaging in it, and harbour a bias against participation until this justice can be adequately proven⁷⁰. Primoratz claims Walzer conflates the question of responsibility for the war being fought with the question of an individual's responsibility for participating in it⁷¹. Primoratz grants, however, that individual soldiers bear no responsibility for their country's decision to go to war (except, as discussed in the next subsection, insofar as they bear that responsibility as citizens of democratic states) but this is not the same as claiming that soldiers are not responsible for their own decision to participate in the war. Insofar as this participation is 'free', soldiers cannot be morally equal, for one is guilty of being at least a minor accomplice to the crime of aggression, while the other is completely innocent. Walzer and Primoratz hence agree on premise (1) - that individuals are autonomous agents responsible for their actions and participations in state activities when such activity is free, but against Walzer, Primoratz argues that in some cases soldiers are free to choose, and in these circumstances should be morally culpable for the justice of the activities in which they participate.

Recall that Walzer entertains this notion in his brief account of Rommel, and argues that it would be absurd to hold that all soldiers, even those who fight well for an unjust cause, are guilty of

murder if the killing they undertake is for the sake of aggression⁷². Walzer's solution is to unbind soldiers from their decision to participate on account of their servitude to the state⁷³. Primoratz holds, however, that there is nothing inconsistent in blaming Rommel for his willing participation in the Second World War, while simultaneously commending his actions as they were conducted within the rules of *jus in bello*⁷⁴. At some point or another, Rommel's initial decision to fight warrants some ethical condemnation or praise. Further, we may very well come to blame Rommel for willfully contributing so profoundly to the success of an unjust war (until El Alamein, that is).

These notions have some intuitive appeal, for there is some crucial consideration of the justice of Rommel's very involvement in the war ignored by Walzer's account. Even supposing that Walzer's arguments from consent and epistemic access hold as genuine conditions by which to absolve soldiers of their participation generally, there may arise individual cases in which none of these points apply. If we are to properly account for individual autonomy, some free soldier would choose his participation willingly, and would thus be morally unequal to his peers. Walzer argues that his arguments grant all soldiers equal right to kill one another however, which is unjust even on Walzer's own terms, as it is a case of "unfair class legislation"⁷⁵. This is perhaps the first alternative conclusion an autonomy-based approach to just war theory may provide contrary to Walzer's case: despite socialization and "political obedience", the people are the sovereign of the state, and each person remains fundamentally free to choose their course of action – obedience to the state is itself a choice⁷⁶.

Primoratz then systematically lists and criticizes the six points Walzer unpacks as reasons for the moral equality of soldiers thesis to obtain. Primoratz' underlying argument here is a proof by contradiction. Primoratz shows that Walzer's arguments are either invalid or, assuming they are valid, that they would lead one to excuse soldiers from concerns of *jus in bello* as well - he thus derives a contradiction and concludes that there is inequality between soldiers on this account. Primoratz argues that soldiers are responsible for their participation in an unjust war, and should harbour a bias against participation in war. The fundamental inconsistency in Walzer's position, Primoratz argues, is that it

does not make sense to absolve soldiers of their responsibility for participating in a war on the grounds that the state has commanded them to, while maintaining the guilt of soldiers when they carry out precisely what the state has commanded them to do on the battlefield⁷⁷. This leads Primoratz to derive his practical contradiction – if any one of these propositions held to universally excuse soldiers of their participation in warfare, it would likewise destroy the necessity of establishing any rules of *jus in bello* by providing soldiers with sufficient excuse to violate these principles freely. Therefore, Primoratz concludes there must be an inequality between soldiers, for there are circumstances where participation in war is freely chosen, and where this participation freely contributes to injustice, it is considered a crime⁷⁸. It should hold as an imperative then, for soldiers to ascertain the justice of their wars before willfully participating in them, if indeed, we are to have principles of *jus in bello* in the first place.

In summary, Primoratz argues that soldiers of unjust cause have no license to kill at all, and least of all “a sweeping excuse for the killing they do”⁷⁹. While Primoratz entertains the implication that Walzer condemns regarding the trial of all unjust soldiers for the crime of murder, it is only the problematic concerns of practicality and jurisdiction that cause Primoratz to concede the implausibility of such an endeavour⁸⁰. Given mitigating circumstances that may arise in the unfolding of a war, the consequences of the moral inequality of soldiers is not particularly “outlandish” argues Primoratz, and he eagerly defends veterans of the Vietnam War against their treatment *post bellum*⁸¹. If just war theory is to be mindful of individual autonomy consistently, however, it need not prosecute unjust soldiers, but it must recognize their inequality on the battlefield.

2.3 Problems with the Inequality of Soldiers

Though initially exhaustive and persuasive, Primoratz fails to counter the argument implicit in Walzer's historical example regarding the consequences of holding soldiers unequal on the battlefield. We can grant, however, that Primoratz counter-arguments to Walzer's six justificatory points stand -- that if we are to justify the practice of granting equal moral standing to combatants, it cannot be on the grounds of epistemic access, patriotism, or consent. First, even if Walzer's justifications held in the

majority of cases they would not hold necessarily in every specific case. Supposing that an individual decided to participate in an unjust conflict as a matter of free will, none of Walzer's reasons could justify that particular individual's involvement unless these reasons were taken to justify the moral equality of soldiers as a class, that is, on the basis of the social position they occupy within the state rather than their individual actions or decisions. Thus, Primoratz has struck an important point. If just war theory is to respect individual autonomy, it must not legislate life and death on the grounds of these social positions but on the basis of individual action. I would conjecture then, that the six points Walzer provides fail on this ground – even if they should hold, they cannot in all circumstances, at which point there would exist cases where soldiers would prove unequal. While I have argued that this particular formulation of the MEST falls, it stands in spirit, I believe, even against Primoratz' onslaught, on account of the argument Walzer provides with regard to distinguishing the *jus in bello* crime of murder.

Recall from earlier discussion on the MEST that Walzer argues - should the unjust soldier be denied the war-right to engage in hostilities against just soldiers engaged in hostilities, and any circumstance of such be deemed murder, there would be no way to distinguish the unjust soldier's crime of murder in the case of soldier from the case of civilian⁸². Perhaps this is in fact what Primoratz wants to advocate. This consideration, however, has a polarizing effect that Primoratz does not acknowledge. Individuals who engage in an unjust war are guilty of the same crime of murder regardless of who they target, and are thus presented no rights-based reason to prefer one over the other⁸³. The added tactical asset of terror may therefore convince unjust war efforts to abandon the pretense of justice in the conduct of warfare, as they are in a sense, 'damned' either way on account of the *jus ad bellum* guilt of the decision to initiate the war – guilty of the same crime whether or not they adhere to rules of *jus in bello*. Further, since each side believes they have justice and that their soldiers are as innocent as their civilians, they are more likely to use more drastic and indiscriminate measures against an opponent thought to be unjust, and hence, criminal. One need only look at the purported justifications of the Hiroshima and Nagasaki bombings to understand how undermining the distinction between *jus ad*

bellum and *jus in bello* degenerates just war into crusade war. Since the polarizing implications of this contention are too grave to accept, we must still grant the moral equality of combatants, but only insofar as it keeps the separation between *jus ad bellum* and *jus in bello* intact.

2.4 Civilian Immunity and Jus Ad Bellum Guilt

Primoratz' Second Argument, in brief:

- (1) Citizens, as individuals, are conceived of as conceptually and morally prior to the state.
- (2) Executive power over state policy confers responsibility for the justice of that policy.
- (3) Citizens of a perfect democracy would wield direct executive power over the declaration of warfare and therefore acquire combatant status on account of their active or passive support of unjust war, or gain noncombatant immunity on account of their active protest of unjust war.
- (4) Citizens of imperfect democracies wield sufficiently direct power to license command responsibility over state policy of warfare, and therefore acquire combatant status on account of their active or passive support of unjust war, or gain noncombatant immunity on account of their active protest.

Here, Primoratz wants to extend the consequences of Walzer's position given an updated model of the state that accepts the individual qua citizen as morally and conceptually prior to the state⁸⁴. This means that the government is executor of the peoples will⁸⁵. If this is granted, then it is nonsense to confer citizens immunity from direct military targeting when the war is conducted “in their name” and they wield enough control over their governments to stop or alter the course of the war through political action⁸⁶. This power is evident particularly in democratic societies, where the civilian population elects and retains the power to remove the executive branches of the government should these branches betray the mandate the people set out for them. Democratic citizens are thus causally responsible for the war and their refusal to oppose unjust state policy is tacit reinforcement and compliance with injustice. The relationship between citizen and state is sufficiently analogous to the commanders relationship to his troops to hold the citizen responsible for what is done “in their name”. For this guilt, Primoratz argues that democratic civilians deserve to become legitimate targets of attack.

Walzer holds Grey's principle, that “the greater the possibility of free action in the communal sphere, the greater the degree of guilt for evils done in the name of everyone”⁸⁷. Others have argued that even in brutal despotic regimes, the people remain the sovereign and render legitimacy to the

despot by refusing to take up arms and actively revolt against the rule⁸⁸. Primoratz concedes early in his papers that a duty to resist a brutal regime is moralistic and far-fetched⁸⁹. He does however, narrow his focus to sufficiently democratic states and argue that citizens of these exert command responsibility over their elected governments. Primoratz argues that in a perfect democracy, citizens wield complete executive power over the 'evils done in their name', and they should thus be held wholly responsible for the wars the state prosecutes. Ideally the distinction between combatant and noncombatant would devolve down to a question of ones voting record on the matter: those who voted for a policy would be wholly responsible, and those who did not vote would be guilty of negligent indifference⁹⁰. Only those who voted against the policy and undertook measures to protest the policy could be 'innocent'⁹¹.

The crucial step in Primoratz argument is then to argue that present democracies are sufficiently like the perfect democracy to warrant extending an equivalent degree of command responsibility, at least in principle, to these citizens. In moderately democratic societies, it is conceivable that ordinary citizenry can forfeit or overthrow the government should its policy violate the mandate they have given to it. Primoratz accepts that present democracies are imperfect in that they are never transparent, information is often party controlled, and that democratic participation is intermittent⁹². These concerns however, do not alter the fundamental fact that the state, since the French Revolution, is a tool for carrying out the policies of the people, and that the people can exercise, and have in the past exercised the power to enforce regime change⁹³. The imperfections of democracy, Primoratz argues, are “constraints on what [one] can accomplish, not excuses for doing nothing”⁹⁴.

The next crucial step in Primoratz argument is to argue that *jus ad bellum* guilt can legitimate targeting individual civilians. Given that the government and military serve as the executors of the people's will, if the people will injustice, this is a consideration that reduces their moral standing and innocence⁹⁵. Active supporters of a war effort are effectively propagating the war, and render themselves legitimate military targets, falling under Walzer's categorization of harm as causal support. Thus, citizens have a moral imperative to actively protest the prosecution of unjust war, and failure to

do so constitutes passive or tacit support of the war effort. “Sitting on the fence is not a privilege in wartime”, and while the legitimate military targeting of passive supporters is a stance Primoratz is not willing to commit himself to, he does claim that the destruction of infrastructure or the property of passive supporters is “richly deserved”⁹⁶. As for indiscriminately bombing cities thought to be populated by active supporters, Primoratz rules out this option, but only on account of the fact that modern weapons are not yet precise enough to carry this out⁹⁷. In theory, Primoratz accepts that if active supporters could be separated from the passive or the symbolic protesters, they can be justly targeted. Civilians as a class do not hold special immunity or moral standing, he writes, they only benefit from the “practical and technical impossibility of separating the sheep from the goats”⁹⁸.

Protest is the only option Primoratz entertains for distinguishing oneself as a sheep rather than a goat, however. The obligation to protest holds even when the likelihood of successfully altering public policy is negligible – even when the protest is purely symbolic, citizens have an obligation to do so, to demonstrate the illegitimacy of the policy⁹⁹. Active support and passive support, to the contrary, confer combatant status onto citizens, and those who engage in that behaviour can reasonably expect to become legitimate targets of military action. In order to justify this stark claim, Primoratz illustrates his case with a thought example involving the hiring of an agent and the hypnotism of an agent to kill another that is meant to parallel the circumstances of modern warfare¹⁰⁰.

Suppose that there is an agent, Alpha, who wants to kill agent Charlie. In one circumstance, Alpha hypnotizes an agent Beta to kill Charlie. In the second circumstance, Alpha contracts the services of Beta' to kill Charlie for a sum of money. In the contract case, Charlie has the option of killing either Alpha or Beta' in order to void the contract and defend herself from the threat on her life, and Primoratz argues that the self-defense justification would hold that the justice of either course of action is equal, and the decision between the two options arbitrary¹⁰¹. In the hypnotism case however, Primoratz argues that it is morally permissible to kill Alpha, the hypnotist, for Beta is otherwise innocent, and if the hypnotism can be broken by killing Alpha, this is to be preferred¹⁰². Primoratz

further argues that there exist reasons to prefer the killing of Alpha in the contract case as well, but that these reasons are slightly less compelling than those in the hypnotism case – if Charlie does not kill Alpha, there is always the chance Alpha will hire some other agent, Delta, to get the job done¹⁰³. The conclusion that Primoratz draws from this 'innocent aggressor' thought experiment is that a self-defense view cannot wholly account for who is to be a legitimate target in warfare, and that the guilt of the parties involved is a relevant factor in the decision. Guilt can, in some situations, entail punishment.

Primoratz then mentions two brief historical examples in which his revision to noncombatant immunity could have been or could still be implemented: first, against pro-war rallies in Serbia during the onslaught on Croatia, Bosnia and Kosovo, and second in the Palestinians armed resistance to Israeli “occupation”¹⁰⁴. Given that the supporters gathered at the warmongering rallies in Serbia effectively declared their active support of the war with their presence, Primoratz suggests the targeting of this rally would have been not only a legitimate but a commendable military action. Further, on the condition that Palestinian armed resistance proved careful enough to discriminate between minors and adult occupiers, Primoratz argues that those individuals are legitimate to target the settlers, given that their occupation is itself an active support of perceived aggression against the Palestinians¹⁰⁵. Though the political ramifications of these revisions to immunity are hard to ascertain the true limit of, I will examine the problematic tacit approval of terroristic activity that Primoratz exemplifies with the Palestinian historical account and a number of other problems with this position in the next section.

2.5 Problems Separating the Sheep from the Goats:

The problems plaguing Primoratz' arguments are manifold, but in this section I will focus on three key flaws and argue that his attempted revisions are misguided. I will draw several of these flaws from Robert Sparrow's “Hands Up! Who Wants to Die?” and generate several novel counter-arguments. The first flaw in Primoratz account is that it reduces combatant status to a purely psychological phenomenon that cannot be accurately ascertained or measured¹⁰⁶. Second, he fails to recognize the dangerous implications of his position with regard to the prosecution in just warfare and

terrorism¹⁰⁷. Thirdly, he is fundamentally confused about the concepts of the individual, the citizen and the state, and the moral and conceptual hierarchy of these concepts in contemporary liberal philosophy¹⁰⁸.

To begin, Primoratz revision to the combatant status on the basis of individual innocence and guilt problematically devolves responsibility to a matter of psychology which is impossible to reliably ascertain. The problem lies in the notions of active and passive “support” which can be expressed in a number of ambiguous ways that do not necessarily express ideological, material, or causal support for the war effort. Primoratz accepts voting, declarations of allegiance, and a number of other symbolic activities as “active support”¹⁰⁹. It is easy to imagine a situation however, in which a strident governing party supporter may choose to vote for their preferred party out of respect for the fact that they have always done so, while maintaining a personal disposition against the war, perhaps even manifest in protest against the policy. It must be the case then that the action of voting is either harmful in itself or that it is only a reliable guide to tracking the genuinely harmful ideological support of the war. It cannot be that the action is harmful in itself, however, for most wars never get referendums and most governments are elected prior to initiating war, and typically do not run a campaign with their dispositions to war in open scrutiny of the public. Additionally, votes and allegiance often have little to do with a specific policy, even one as significant as war, unless that war is already in prosecution, and discriminating between those votes cast in support of that policy from those in support of another is an exercise in futility. Considering these acts harmful in themselves is impractical and potentially unjust. If it is the ideological approval or will to propagate the war that is the crucial consideration, however, then this reduces the guilt of individuals to a purely unmeasurable psychological state¹¹⁰. Deciding who lives and dies on this basis is likely a very unstable principle for overriding human rights.

The harmful intention or action problem also plagues Primoratz symbolic protest requirement. There may be cases in which one has extenuating circumstances that would justify their inability to engage in protest, however symbolic. Do these individuals deserve to have their property targeted or

destroyed because of this inability¹¹¹? Sparrow raises the interesting contention: if the protest is symbolic, what does it matter what form it takes¹¹²? Sparrow then suggests that perhaps bumper stickers and mumbled utterances while reading the newspaper may in fact qualify as symbolic acts of protest, and thereby legitimate their immunity¹¹³. Should these activities qualify in spirit, it seems that the crucial distinction between those who are immune from attack and those who “richly deserve it” is simply a matter of one’s attitude to the war¹¹⁴. Basing combatant status on attitudes however, is a shaky process. For instance, suppose that there were fervent supporters of the war effort in a third-party country not actively engaged in the war – would the attitude of the population legitimate their combatant status¹¹⁵? Further, Sparrow notes that Primoratz committed himself to the proposition that sitting on the fence is not a privilege of warfare, and yet accepts that distance can be a factor that grants one this privilege¹¹⁶. Suppose there were a hegemonic nation with the power to stop or intervene with unjust warfare – if we are to reduce responsibility to individual attitudes, then we cannot grant these citizens the privilege to remain neutral, or, should they favour the effort, immune¹¹⁷. Further, suppose two individuals from warring nations were to meet in a third party neutral country¹¹⁸. Could their attitudes toward the war effort legitimate their killing of each other in that context? Clearly, justifying the forfeiture of rights to life on the grounds of opinion, regardless of how repugnant or vocal this opinion may be, is absurd.

Primoratz claims not to be undermining the distinction between *jus ad bellum* and *jus in bello*, but this is betrayed by applying his position to civilians of a just war¹¹⁹. On the just side of conflict, there is likely to be a majority of citizens who actively support the war effort who retain their immunity not as a product of their war support but on the sole condition that the war initiated justly. *Ad bellum* guilt or innocence thus becomes the determining factor for who lives and who deserves to be targeted. The next contradiction that I wish to focus on is in applying Primoratz’ revision back to the case of combatants. If noncombatants gain or lose their immunity on the basis of their active or passive support of the war effort, then combatants should likewise gain or lose the same immunity from attack.

Similarly, if it is only the practical and technical impossibility of distinguishing the psychological state of noncombatants and their support of the war effort that bars them from indiscriminate attack, the same impossibility in distinguishing free soldiers from indentured soldiers should likewise grant them immunity from attack. Primoratz is thus committed to either altogether rejecting considerations of immunity or simultaneously granting it to soldiers.

Against this, Primoratz would argue that even conscript soldiers “allow themselves to be conscripted” and support this claim by suggesting that the moral imperative not to kill in injustice is an imperative that one must meet, even if the cost of upholding this standard is to be paid with one's own life¹²⁰. The notion of the 'innocent aggressor' plays an important role in the thought-experiment that Primoratz conducts as a justification for the military targeting of warmongering civilians, but if he is to grant that there is such a circumstance as an innocent soldier or that the circumstances surrounding conscription are sufficiently analogous to hypnotism rather than contract, then he will have to grant immunity to soldiers, else denying the practice altogether and forfeiting his analogy as a prudent thought experiment. Against this, Primoratz may argue that while the impossibility of distinguishing precisely the psychological state of the soldier, the DDE justifies targeting military institutions or units on the grounds that the elimination of aggressors is what is intended, and that the death of innocent aggressors is only foreseeable. Since Primoratz does not distinguish between civilians and soldiers as a matter of kind, however, the DDE could then also be used to justify the incursion of innocent civilian death in the explicit targeting of active supporters – for example, by bombing residential areas known to have voted largely for the government responsible for initiating the war, the death of minors present being only a foreseeable and not intended consequence of the action¹²¹.

This line of argument raises issue with Primoratz' conspicuous silence on some of the more radical implications of his work. The practical problem of distinguishing “sheep from goats” bars indiscriminate bombing, but it opens a potentially revolutionary way of executing terroristic ends¹²². Terrorists have the advantage over regular forces in that they can infiltrate and execute military action

with extreme precision. They present themselves as a discriminate weapon capable of targeting those individuals who actively or passively support a war through assassination and improvised explosive devices. Accepting campaigns designed to strike terror into the heart of supporters of a war effort not only as a legitimate but preferred tactic in warfare is a difficult consequence to accept¹²³.

All of these superficial flaws aside, Sparrow contests that Primoratz primary failure is to assume that the individual is conceptually or morally prior to the state in their role as citizen¹²⁴. By definition, citizenry is a concept that is derived from the state – it implies membership in the state¹²⁵. To be sure, there are many individuals within the state that are not citizens, and citizenry is itself a rather arbitrarily bestowed title¹²⁶. If it is so crucial, however, for Primoratz, it is difficult to see why the symbolic protest requirement he adduces is not a requirement to renounce ones citizenship and thereby break apart from the state entirely, completely illegitimizing it¹²⁷. Certainly, what Primoratz means to suggest is that individuals are morally and conceptually prior to the state which is founded on their will and rights regardless of the social position they occupy in the state¹²⁸. Developing his arguments along these lines, however, significantly changes his recommendations and revisions. Sparrow concludes his paper by claiming that respect for individual rights, exemplified by Primoratz misguided revisionary attempts, is antithetical to war¹²⁹. War must remain conceptually state-centric, and therefore at odds with individual rights. I argue against this conclusion in the next section of this paper, and maintain that the main premises of the arguments launched by Primoratz hold on a civil level, not on a military level, and that due respect for individual rights can only be respected if the principle that adjudicates the violation of these rights is an instantiation of a principle of self-defense and not punishment, as Primoratz advocates, and such a principle of self-defense is restricted enough to avoid the manipulation it was prone to under Walzer's definition of harm¹³⁰.

3. HARM AND PUNISHMENT

What do we owe each other in our conduct of war? This paper has examined the answer supplied by Walzer: due care for individual rights, as best as they can be understood in the context of

conflict. So far, the principle contentions of this position have more or less withstood refutation. In the previous section, I argued that though Primoratz' argument to extend combatant status to the citizens of democratic states was prone to egregious flaws, it nevertheless indicated a disturbing ambiguity in Walzer's principle of discrimination on the basis of harm. If we are to accept indirect or mediate forms of harm to justify the deployment of the principle of self-defense, we thereby commit ourselves to the intentional military targeting of noncombatants. In this section, I undertake to refine Walzer definition of harm to avoid this exploitation and better account for considerations of individual autonomy.

Adapting this redefinition of harm to the principle of self-defense, I will argue that this re-conceptualized principle is the sole means for justifying the right to kill in war, and that the injustices of Primoratz account stem primarily from his insistence on the validity of a principle of punishment.

3.1 The Case of Munitions Workers

Earlier, Walzer argued rather playfully that the stomach of an army does not do the fighting, rather it is “its arms that make it an army”¹³¹. Walzer defined harm open enough to accept material and causal support of a war effort as legitimate constituents, the pursuit of which turned ordinary human beings into military targets, temporarily¹³². There is some inconsistency in Walzer's argument for this seemingly uncontroversial concession to *realpolitik*, however, stemming from the distinction Walzer derives between warlike and otherwise inert goods¹³³. The work of the munitions worker, Walzer argues, is sufficiently warlike for servicing the soldier *qua* soldier, while the medic and the farmer, and implicitly, the law-abiding tax paying citizen, are exempt from legitimate target because the service they provide the soldier supplies them *qua* human being¹³⁴. Walzer further supports this line of reasoning by suggesting that the nature of the work the medic and the farmer do during war does not differ in kind from their efforts in peace time¹³⁵. The case of the munitions worker is an individual who does not necessarily provide “warlike” material, and that the product of the munitions worker does not vary in kind between pre-war periods and during the war: the munitions worker also provides for the soldier *qua* human being, only the munitions worker supplies people with the means to defend

themselves. For these similarities, munitions worker should be exempt from legitimate targeting.

If food is insufficiently warlike on the grounds that the stomach of a soldier does not do the fighting, the argument can be said to excuse the weapon itself – it is not the gun that does the fighting either; whether a weapon is utilized in an act of aggression or an act of defense is a function of the soldier pulling the trigger, not the weapon itself. It must be recognized that through the course of most wars it is only people, in and of themselves, who are capable of being harmful, not inert materials. Still, it may be argued that material support is to be distinguished from domestic goods on the grounds that war-materials “allow the soldier the means necessary for fighting”¹³⁶. I argue, however, that the production of guns, tanks, and even explosives do not necessarily fall under this category. While it is true the efficacy of prosecuting war without these means is hindered, it does not necessarily follow that munitions workers are serving individuals with the means to prosecute aggression or war. The peacetime and wartime comparison in Walzer's argument is a useful tool here to distinguish what features inhere in weapons themselves. It is possible, and perhaps likely, that the material munitions workers provide serve the soldier in his need for self-defense: that is, in the tools the soldier requires for protecting his rights from violation. The choice to use those weapons in a warlike fashion will always be a choice made by the individual, and it is only these individuals that actively and immediately pose a threat, despite their relative 'innocence' regarding the initiation of war, that one has the right to kill. Thus, the production of war materials cannot be considered itself an act of harm – it does not endanger the rights of others, and in fact, a strong case could be made to say that the weapons manufacturing allows for the successful vindication or defense of rights when used to that effect.

In conclusion to this revision, I would stipulate that the targeting of munitions factories is an unjust exercise in warfare for two reasons: first, that the material munitions workers produce are not in themselves harmful, and the act of producing and supplying these materials is decidedly inert until these materials are put to actual use in combat. To be certain, the seizure or destruction of the materials themselves is permissible and the preferred tactic if such an action is necessary to undertake in order to

secure victory in the war effort¹³⁷. It does not follow however that the rights of otherwise innocent individuals can be violated on the grounds that the production of these weapons cannot be frustrated by any other means short of targeting to the factories. This much is an undue concession to realpolitik. It is too often a phenomenon in war that even the innocent civilians of the opposing side of a war become second-class human beings, whose lives are sacrificed without their consent in the name of the greater good, namely victory. The end of war, however, remains the vindication of rights¹³⁸. There is no compelling reason to think that political rights takes precedence over the very concrete rights innocent individuals possess, regardless of their allegiance, explicit, tacit or otherwise¹³⁹.

3.2 Self-Defense and Punishment

In the previous subsection, I have argued that Walzer's HPD can be revised to better accommodate considerations of individual autonomy. I have chosen this line of reasoning over completely abandoning respect for individual autonomy in war for a state-centric conception of war, as advanced by Rousseau and shared by Sparrow¹⁴⁰. In this subsection, I will argue that the civilian failures that Primoratz attempts to justify combatant status with still hold against democratic civilians if these failures are understood as civil crimes and not military crimes. The key considerations of autonomy Primoratz brings to the discussion stand – his principle failure is in equivocating who deserves to die with who we have a right to kill¹⁴¹. My main contention against Primoratz is that he fails to recognize that only a principle of self-defense, further restricted by the conditions I espoused in the previous subsection, can justify military targeting and the violation of human rights, and that a principle of punishment necessarily generates injustices if deployed to justify war's conduct.

To argue this point, I will reexamine the 'innocent aggressor' hypnotism thought experiment. While I grant that Primoratz is right to insist that there are some moral considerations brought to light by the relative innocence or guilt of the parties involved, his conclusion that it is preferable to kill agent Alpha over agent Beta is a leap. Alpha's attempt on Charlie's life through a hypnotized individual is a crime, but there is not just cause enough for Charlie to deliberately kill Alpha for this crime – Alpha

deserves punishment to be certain, but it is precisely because a principle of self-defense cannot justify the killing of agent Alpha that Alpha remains 'innocent' in a sense stronger than a "term of art"¹⁴².

Alpha is innocent from legitimate targeting in the sense that Charlie is not entitled to a right to kill Alpha. Perhaps, it can be argued, Alpha deserves to die for their crime, but this is distinct from granting specifically to Charlie the right to carry out this punishment and kill Alpha. For Charlie to obtain this right, Primoratz would have to invoke a principle of punishment, and it is my argument that such a principle may appeal intuitively on the domestic level, but that it has no place in the ethics of war.

If Primoratz is to argue that the hypnotized agent Beta is analogous to the common soldier, then he has tacitly accepted Walzer's MEST by denying the soldiers responsibility over the circumstances that led to the agent being hypnotized. If he is to remain consistent however, and argue that there is some crucial moral guilt in allowing oneself to be hypnotized, then already his thought-experiment has lost its intuitive appeal. To be sure, it is a moral tragedy of sorts that Charlie finds herself in such a position as to have to end the life of another individual in order to preserve her own livelihood, but Alpha poses no legitimate, immediate or direct threat to Charlie, and the proxy agent Beta is engaged in such direct harm, and therefore can be killed if necessary. Ideally, neither party would be killed, but given the necessity of defending ones right to life, we are forced to confer Charlie the right to kill Beta for the harm Beta presents, despite their lack of explicit moral guilt or will to pose hostilities against Charlie.

This much is a principle of self-defense, it holds that individual A has the right to deprive B of their rights, *iff* B poses a threat or engages in harm directed towards A or the rights of others, and the violation of B's rights is required to guarantee the threatened rights against harm. It is incidental to the experiment that killing Alpha voids the contract or breaks the spell of the hypnotized agent. The primary crime of Alpha is their initiation of the contract or the act of hypnotism, and this does not meet the conditions of directness or immediacy – by definition, the contract and the hypnotism utilize a medium through which a threat is posed to Charlie, and it is this medium agent that does the harm or

poses the threat. Primoratz thought-experiment thus attempts to justify what is essentially a principle of punishment: those who are morally guilty may be killed in the name of justice if we have the capacity to discriminate their guilt. As I have demonstrated in the previous sections, however, allowing that one lays down their rights on account of their posing indirect threat or their morally repugnant but otherwise inert actions is a concession that proves practically and morally repugnant.

Universalizing the killing of those who are guilty is prone to several key problems: first, there is the practical concern of ascertaining what constitutes guilt and the proportional punishment each form of guilt requests. Establishing the guilt of individuals in times of war is inherently more complicated than Primoratz thought-experiment allows for. It often devolves to a question of one's opinion regarding the war effort, and legislating the death of individuals on this basis is prone to great injustice¹⁴³. If guilt is to be expressed as an action however, it is perhaps equally impossible to establish what guilty action could warrant capital punishment short of those actions already subsumed under the principle of self-defense: namely, posing direct and immediate harm to the rights of others, where the vindication of these rights necessitates imposing capital punishment. There is the logical possibility that these questions could be resolved – for an adequate taxonomy of guilt to be established that could justify capital punishment. I contend, however, that in order for such a taxonomy to avoid the codification of grave injustice, it will have to share the spirit and conditions of the principle of self-defense. It too will have to restrict the crimes that warrant the exercise of capital punishment to morally necessary circumstances of direct or immediate harm.

3.3 Civil Crimes and The Right to Kill

An unresolved question remains after this discussion: if the right to kill can only be granted by a principle of self-defense, and the crimes of Alpha or the warmongering Serbian population do not warrant exercising capital punishment, what is the proper response to or categorization of these crimes? The key points that Primoratz strikes when attempting to establish an individual based approach to the ethics of war still stand, and indeed, make a great deal of sense, if they are understood to demarcate

civil crimes, and not military crimes. Indeed, an individual-based approach to justice would seem to require these considerations of individual guilt on the basis of their willful endorsement of injustice. As Primoratz argued, the willing unjust soldier is not morally equal to his indentured peer and the warmongering citizen is significantly more culpable than the hunger strike anti-war-activist, but in both cases, this guilt is not sufficiently threatening or harmful enough to grant individuals the war right to kill these people. The notion of individual autonomy and responsibility requires that we recognize and punish the crimes these individuals are guilty of, but if such action is to be carried out, it must be done in a proportional and fair manner – that is, through due process, a jury of peers, or perhaps through negotiated terms established in treaties of peace and reconciliation between the warring nations. Sentencing these individuals to death unilaterally in the course of a war is an unjust concession to realpolitik with little theoretical foundation outside of a principle of punishment. The only truly universalizable principle that can effectively override this immunity is the principle of self-defense. This is initially counter-intuitive in that it can allow for the termination of otherwise innocent aggressors, but when limited to conditions of directness and immediacy, it is the only “morally satisfactory” justification for the killing of our imminently human peers.

I anticipate that it could be argued against my position thus far, however, that even having established a more refined conception of harm and restricted the right to kill to cases of self-defense, there are still aspects of the moral priority of individuals over the state that my arguments have ignored, particularly related to the sustaining of collateral damage in the course of defending ones rights or the rights of the state. In the next section of this paper, I will anticipate an objection posed by the deontological Pacifist, and examine the viability of the DDE as a potential response.

4. THE PACIFIST OBJECTION

Pacifist Objection in brief:

- (1) If the foreseeable death of innocent individuals are a necessary condition of war, it must be the case that war is fundamentally unjust.
- (2) It is the case that the foreseeable death of innocents is a necessary condition of war.

(3) It follows that all war must therefore be unjust.

This modus tollens objection is important to raise because of the stress with which I have emphasized the principle of self-defense as the sole justificatory tool in an individual autonomy based, liberal approach to the ethics of war. It is conceivable to take the reverence for individual rights that I have attempted to enshrine in this paper to another level and argue that it can never be the case that the vindication of political rights can ever justify the violation of an innocent individual's rights¹⁴⁴.

Typically, the DDE is trotted out to cast aside this deontological pacifist objection, but it is worth some investigation in the final stages of this paper to address complaints against the DDE and its tendency to justify granting precedents to collective rights over individual rights¹⁴⁵.

4.1 Asymmetry and Proportionality

The first unjust tendency of the DDE is that it advocates the pursuit of definite harm to innocent civilians in the name of only probable good, namely some intangible contribution to victory. The uncertainty that surrounds a military action's contribution to the overall war effort makes this distinction disparaging. Though unintended by the soldiers who execute the military action, the death of innocent individuals is still known and guaranteed to occur, while the success of the war effort is loosely connected to the activity at best. Walzer himself claims that "no one can be killed for trivial purposes": it follows that unless there is some clear evidence that the action being undertaken contributes in some significant way to the war effort, there should exist some pre-established bias against conducting military action in areas populated by noncombatants¹⁴⁶.

Secondly, there is the notion implied in the fourth condition of proportionality that simply cannot hold if theorists are to accept the moral priority of the individual over the state. In the introduction, I remarked that it is still an open question whether the preservation of political rights can ever justify the loss of innocent life¹⁴⁷. Given the priority of the individual however, it seems clear that the preservation of state rights cannot justify the loss of even a single individual's life. Given the conceptual priority of the individual however, the issue is complicated by the notion that the rights of

the state are derived from the rights of the individuals that comprise the political group of its citizens¹⁴⁸. Thus the rights of the individuals who comprise the state cannot be violated in the name of the state without thereby rendering the state illegitimate. This relationship also makes distinguishing those threats which are made strictly against the political rights of a state from the rights of the individuals who make up the state a troublesome task, however.

The deontological Pacifist could thus launch the argument against the condition of proportionality that it can never be the case that political rights themselves can prove proportional to an amount of innocent individual lives. I would respond to this objection to the DDE by arguing that it is the case that the threat to the political rights of the state can also express itself as a threat to the rights of a number of individuals, and that this threat can prove proportional to the cost of innocent lives terminated in the service of protecting this proportional number of innocent individuals. The condition of proportionality can thus stand as a limiting condition of the doctrines deployment – that is, only if what is to be weighed are units of the same measure – the rights of individuals, and not the values of our “common lives”¹⁴⁹. These common lives are meaningless without our individual lives.

4.2 Refining the Doctrine of Double Effect

I concede to the deontological Pacifist that the DDE, even under the revisions that Walzer expounds, is a troubling heuristic for justifying rights violation. The key to rectifying the doctrine such that its deployment might demonstrate due consideration for the rights of individuals, however, lies in enforcing a strict condition of moral necessity. I define this 'moral necessity' as a circumstance in which the failure to act presents a highly probable threat *in itself* to the rights of individuals, and I argue that this conception of necessity should replace the military necessity implied by Walzer's account¹⁵⁰.

Despite its tendency to justify harsh acts of war, the DDE retains its usefulness if it is seen as a constraint – as a factor that limits the deployment of military activity – and not a justificatory tool¹⁵¹. The conditions of due care, and proportionality are helpful heuristics to apply to any and all military actions undertaken in warfare. The case for conceding some circumstances of collateral damage to

moral necessity does not need to be beleaguered. There are a number of circumstances that arise in war where the failure to engage enemy combatants will more than likely result in the death of other innocent people, and an accidental byproduct of this action will be the death of other innocents. These circumstances present soldiers with a task that we are seldom asked to attend to in civilian life – stark moral compromise. I have argued that the importance of victory and the vindication of state rights at any and all cost to individual rights is inflated and untenable, a position that is systematically unjust. If there is to be justice in the prosecution of war, and collateral damage is a necessary condition of this war, individuals who undertake the military actions that endanger otherwise innocent individuals must adhere to harsher constraints of impartiality. Due care should be exercised to the point where the exercise could prove unrepeatable. Given the imminent humanity of all soldiers and noncombatants, individuals must engage their enemy combatants as though all territory were their own – that the noncombatants thereby endangered were their own countrymen, for in a sense, they are. Individuals should thus harbour a reluctance to engage in activities that may foreseeably result in the collateral damage of individuals to the point at which this reluctance itself poses a threat to the lives of innocent individuals. It is only this condition of moral necessity that can allow the DDE to circumvent the problem of comparing and weighing the rights of states against the rights of the individual. The threat to the state must manifest itself as a direct threat against individuals before action that may contribute to victory at the cost of innocent lives can be considered. The aim of victory is not the imperative concern of warfare – it is the vindication of rights. Given that the political rights of states derive from the rights of the individual it can only be in circumstances in which the rights of individuals themselves are endangered that can justify the violation of these rights.

CONCLUSION

In Civilian Immunity, Primoratz argues that the individual, as a citizen, is morally and conceptually prior to the state¹⁵². From this, Primoratz attempted to adduce a principle of punishment that would justify the intentional targeting of morally guilty noncombatants. Robert Sparrow and I have

argued that this attempt fails, partly due to a confusion over the relation between citizenship, the individual, and the state¹⁵³. The concept of citizen is a social position within the state, an arbitrarily received relation that confers political power or rights within the state¹⁵⁴. It is therefore impossible for citizenship to precede the concept of the state upon which it is based.

It is likely that Primoratz intended to argue that the individual is conceptually and morally prior to the state, not the citizen¹⁵⁵. This view is shared in part both by Walzer and the deontological pacifist. Walzer expresses the conceptual priority of the individual in the early sections of his canonical work, Just and Unjust Wars¹⁵⁶. There, he holds that the state is primarily in the minds of the individuals who comprise it – that the core rights of political sovereignty and territorial integrity are derived from the individual correlates of liberty and personal security¹⁵⁷. The state thereby only achieves legitimacy through the will of the people who constitute it. In some sense, Walzer tacitly accepts the “updated model of the state” Primoratz argued his position remained ignorant of¹⁵⁸. According to this model, the people are the sovereign of their state, regardless of its form of government, on account of the legitimacy they confer the state by engaging with the state as a citizen. Problematic tendencies in Walzer's arguments emerged from his “unjust class legislation” regarding the moral equality of soldiers, his callous definition of harm that included material and causal support, and his tendency to value our “common way of life” as the greatest value humans are capable of¹⁵⁹. This account proved unjust when collective goods were given priority over the individual rights that granted them value.

The deontological Pacifist, on the contrary, stresses the moral priority of the individual before the state. They argue that the collective rights of groups of individuals can never supersede the rights of the individuals upon which the collective rights are founded¹⁶⁰. Sparrow, conversely, argued that because this conflict of collective rights against individual rights appeared irreconcilable, it must be the case that the rights of the state effectively took precedence over the rights of the individual. Sparrow remained open as to whether this spelled complication for the exercise of war or for the individual¹⁶¹.

Through the course of this paper I have attempted to respect the conceptual and moral priority

of the individual as best as it can be understood in times of war. This has resulted in the revision of Walzer's HPD to reflect stricter conditions of directness and immediacy, and the DDE to reflect moral necessity over military necessity. In this sense, I have demonstrated how it is possible to express strict respect for the moral and conceptual priority of the individual while pursuing the vindication of collective rights, and how the ethics of warfare can be founded on an individual autonomy approach to justice without debilitating the efficacy of war prosecution. Ultimately, this conception of the laws of *jus in bello* offers to marry the conduct of warfare with genuine respect for the imminent humanity of both combatants and noncombatants. Recognizing this humanity may not make the world of war a “fully comprehensible” place, but it does threaten to make the world of war “morally satisfactory”¹⁶².

1 Orend, Brian. The Morality of War Broadview Press. 2006. p.2

2 Rawls, John. “Kantian Constructivism in Moral Theory” *Journal of Philosophy*, vol. 77 no 9 (Sept. 1980) p. 546

3 Walzer, Michael. Just and Unjust Wars. New York: Basic Books, 2000 [1977] p. 142

4 Orend, Brian. “Just and Lawful Conduct in War: Reflections on Michael Walzer” *Law and Philosophy*, Vol. 20, No. 1 (Jan. 2001) p. 15

5 Walzer, Michael. Just and Unjust Wars. New York: Basic Books, 2000 [1977] p 3-20

6 Orend, Brian. “Justice After War”. *Ethics and International Affairs* (2000) 16: p. 46

7 Walzer, Michael. Just and Unjust Wars. New York: Basic Books, 2000 [1977] p. 52

8 Ibid. p. 101-8

9 Sparrow, Robert. “Hands up Who Wants to Die?: Primoratz on Responsibility and Civilian Immunity in Wartime” *Ethical Theory and Moral Practice*, Vol. 8. No. 3 (Jun. 2005) p.318, and Orend, Brian. The Morality of War Broadview Press. 2006. p.2

10 Walzer, Michael. Just and Unjust Wars. New York: Basic Books, 2000 [1977] p. 54

11 Sparrow, Robert. “Hands up Who Wants to Die?: Primoratz on Responsibility and Civilian Immunity in Wartime” *Ethical Theory and Moral Practice*, Vol. 8. No. 3 (Jun. 2005) p.300

12 Ibid. p. 317

13 Proponents of this view are generally referred to as pacifists.

14 Proponents of this view are generally referred to as realists, and the school of thought, *realpolitik*.

15 Ibid. p. 29

16 Walzer, Michael. Just and Unjust Wars. New York: Basic Books, 2000 [1977] p 43

17 Ibid. p 142

18 Ibid.p. 145

19 Ibid. p 142

20 Orend, Brian. “Just and Lawful Conduct in War: Reflections on Michael Walzer” *Law and Philosophy*, Vol. 20, No. 1 (Jan. 2001) p. 14

21 Walzer, Michael. Just and Unjust Wars. New York: Basic Books, 2000 [1977] p 43

22 Sparrow, Robert. “Hands up Who Wants to Die?: Primoratz on Responsibility and Civilian Immunity in Wartime” *Ethical Theory and Moral Practice*, Vol. 8. No. 3 (Jun. 2005) p. 302

23 Orend, Brian. Human Rights: Concept and Context Broadview Press. 2002. p. 19

24 Cf. John Rawls, A Theory Of Justice. Harvard University Press. 2005 [1971]

25 Orend, Brian. Human Rights: Concept and Context Broadview Press. 2002. p. 19

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- 26 Cf. Kretzmer, David. "Civilian Immunity In War: Legal Aspects" Civilian Immunity In War, Ed. Igor Primoratz Oxford University Press. Oxford. 2007.
- 27 See Ibid.
- 28 Walzer, Michael. Just and Unjust Wars. New York: Basic Books, 2000 [1977] p. 39
- 29 Ibid. p. 316-17
- 30 Ibid. p. 39
- 31 Ibid. p. 39
- 32 Ibid. p. 39
- 33 Ibid. p. 40 For a very interesting and lucid description of the history and development of the just war tradition, refer to McKeogh, Colm. Innocent Civilians: The Morality of Killing In War. Palgrave MacMillan: 2002
- 34 McMahan, Jeff "Arguments for the Moral Equality of Combatants" Killing in War. Oxford: Clarendon Press. 2009. p. 95
- 35 Walzer, Michael. Just and Unjust Wars. New York: Basic Books, 2000 [1977] p. 34-47
- 36 Ibid. p. 40
- 37 Ibid. p. 40
- 38 Ibid. p. 38
- 39 Ibid. p. 40
- 40 Ibid. p. 39
- 41 Ibid. p. 39
- 42 Ibid. p. 41
- 43 Orend, Brian. "Just and Lawful Conduct in War: Reflections on Michael Walzer" *Law and Philosophy*, Vol. 20, No. 1 (Jan. 2001) p.19
- 44 Orend, Brian. "Just and Lawful Conduct in War: Reflections on Michael Walzer" *Law and Philosophy*, Vol. 20, No. 1 (Jan. 2001) p.7, Walzer, Michael. Just and Unjust Wars. New York: Basic Books, 2000 [1977] p. 40, 138
- 45 Walzer, Michael. Just and Unjust Wars. New York: Basic Books, 2000 [1977] p. 43
- 46 Ibid. p. 43
- 47 Ibid. p. 142
- 48 Walzer, Michael. Just and Unjust Wars. New York: Basic Books, 2000 [1977] p. 142
- 49 Ibid. p. 146
- 50 Ibid. p. 156
- 51 Ibid. p. 146
- 52 Ibid. p. 146
- 53 Ibid. p.146
- 54 Ibid. p. 145
- 55 Ibid. p. 147
- 56 Ibid. p. 146
- 57 Ibid. p. 153
- 58 Ibid. p. 152
- 59 Ibid. p. 156
- 60 Ibid. p. 157
- 61 Ibid. p. 157-9
- 62 Ibid. p. 257
- 63 Ibid. p.156
- 64 Ibid. p. 254
- 65 Sparrow, Robert. "Hands up Who Wants to Die?: Primoratz on Responsibility and Civilian Immunity in Wartime" *Ethical Theory and Moral Practice*, Vol. 8. No. 3 (Jun. 2005) p. 300 Alternatively, most of the same core ideas are expounded in Primoratz, Igor. "Civilian Immunity in War: Its Grounds, Scope and Weight" Civilian Immunity In War, Ed. Igor Primoratz. Oxford University Press. Oxford. 2007. though that piece distinguishes itself in that Primoratz explicitly defends his account for being apologist for terrorism.
- 66 Primoratz, Igor. "Michael Walzer's Just War Theory: Some Issues of Responsibility" *Ethical Theory and Moral Practice*, Vol. 5, no 2, (Jun. 2002) p.228

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- 67 Ibid. p. 228
- 68 Ibid. p. 222
- 69 Ibid. p. 230
- 70 Ibid. p. 228
- 71 Ibid. p. 223
- 72 Ibid. p. 230
- 73 Ibid. p. 224
- 74 Ibid. p. 223
- 75 Orend, Brian. "Just and Lawful Conduct in War: Reflections on Michael Walzer" *Law and Philosophy*, Vol. 20, No. 1 (Jan. 2001) p.7, Walzer, Michael. Just and Unjust Wars. New York: Basic Books, 2000 [1977] p. 40, 138
- 76 Walzer, Michael. Just and Unjust Wars. New York: Basic Books, 2000 [1977] p 39 and Primoratz, Igor. "Michael Walzer's Just War Theory: Some Issues of Responsibility" *Ethical Theory and Moral Practice*, Vol. 5, no 2, (Jun. 2002) p.224
- 77 Ibid. p. 224
- 78 Ibid. p. 229
- 79 Ibid. p. 230
- 80 Ibid. p. 230
- 81 Ibid. p. 230
- 82 Walzer, Michael. Just and Unjust Wars. New York: Basic Books, 2000 [1977] p. 40
- 83 Ibid. p. 40
- 84 Primoratz, Igor. "Michael Walzer's Just War Theory: Some Issues of Responsibility" *Ethical Theory and Moral Practice*, Vol. 5, no 2, (Jun. 2002) p.224
- 85 Ibid. p. 235
- 86 Ibid. p. 236
- 87 Walzer, Michael. Just and Unjust Wars. New York: Basic Books, 2000 [1977] p. 298
- 88 Cf. Green, M., "War, Innocence, and Theories of Sovereignty". *Social Theory and Practice* vol. 18 (1992) pp. 39–62
- 89 Primoratz, Igor. "Michael Walzer's Just War Theory: Some Issues of Responsibility" *Ethical Theory and Moral Practice*, Vol. 5, no 2, (Jun. 2002) p. 235
- 90 Ibid. p. 232
- 91 Ibid. p. 232
- 92 Ibid. p. 232
- 93 Ibid. p. 233
- 94 Ibid. p. 238
- 95 Ibid. p. 239
- 96 Ibid. p. 238
- 97 Ibid. p. 239
- 98 Ibid. p. 239 Interestingly, Jeff McMahan argues that it is itself a kind of unfair class legislation to confer immunity to civilians as a class rather than on the basis of individual actions. For this argument, see McMahan, Jeff. "Liability and Collective Identity: A Response to Walzer." *Philosophia*, vol. 34 (Aug. 2006) p. 13-17 and Walzer's response to this in Walzer, Michael. "Response to Jeff McMahan" *Philosophia*, vol. 34 (Aug. 2006) p.19-21.
- 99 Ibid. p. 238
- 100 Ibid. p. 236
- 101 Ibid. p. 237
- 102 Ibid. p. 237
- 103 Ibid. p. 237
- 104 Ibid. p. 240
- 105 Ibid. p. 240
- 106 Sparrow, Robert. "Hands up Who Wants to Die?: Primoratz on Responsibility and Civilian Immunity in Wartime" *Ethical Theory and Moral Practice*, Vol. 8. No. 3 (Jun. 2005) p. 300

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- 107 Ibid. p. 300
- 108 Ibid. p. 300
- 109 Sparrow, Robert. "Hands up Who Wants to Die?": Primoratz on Responsibility and Civilian Immunity in Wartime" *Ethical Theory and Moral Practice*, Vol. 8. No. 3 (Jun. 2005) p. 300, Primoratz, Igor. "Michael Walzer's Just War Theory: Some Issues of Responsibility" *Ethical Theory and Moral Practice*, Vol. 5, no 2, (Jun. 2002) p. 237
- 110 Sparrow, Robert. "Hands up Who Wants to Die?": Primoratz on Responsibility and Civilian Immunity in Wartime" *Ethical Theory and Moral Practice*, Vol. 8. No. 3 (Jun. 2005) p. 300
- 111 Ibid. p. 311
- 112 Ibid. p. 311
- 113 Ibid. p. 311
- 114 Ibid. p. 312
- 115 Ibid. p. 309
- 116 Ibid. p. 308
- 117 Ibid. p. 308
- 118 Ibid. p. 308
- 119 Sparrow, Robert. "Hands up Who Wants to Die?": Primoratz on Responsibility and Civilian Immunity in Wartime" *Ethical Theory and Moral Practice*, Vol. 8. No. 3 (Jun. 2005) p.306
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- 121 Sparrow, Robert. "Hands up Who Wants to Die?": Primoratz on Responsibility and Civilian Immunity in Wartime" *Ethical Theory and Moral Practice*, Vol. 8. No. 3 (Jun. 2005) p. 304
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- 123 Primoratz, Igor. "Michael Walzer's Just War Theory: Some Issues of Responsibility" *Ethical Theory and Moral Practice*, Vol. 5, no 2, (Jun. 2002) p. 237
- 124 Sparrow, Robert. "Hands up Who Wants to Die?": Primoratz on Responsibility and Civilian Immunity in Wartime" *Ethical Theory and Moral Practice*, Vol. 8. No. 3 (Jun. 2005) p. 307
- 125 Ibid. p. 316
- 126 Ibid. p. 307
- 127 Ibid. p. 316
- 128 Primoratz, Igor. "Michael Walzer's Just War Theory: Some Issues of Responsibility" *Ethical Theory and Moral Practice*, Vol. 5, no 2, (Jun. 2002) p.224
- 129 Sparrow, Robert. "Hands up Who Wants to Die?": Primoratz on Responsibility and Civilian Immunity in Wartime" *Ethical Theory and Moral Practice*, Vol. 8. No. 3 (Jun. 2005) p. 318
- 130 Cf. Alexander, Lawrence A. "Self-Defense and the Killing of Noncombatants: A Reply to Fullinwider." *Philosophy and Public Affairs*, Vol. 5, No. 4 (Summer, 1976) p 408-415 and Fullinwider, Robert K. "War and Innocence" *Philosophy and Public Affairs*, Vol. 5. No. 1 (Autumn, 1975) p. 90-97. for the lengthier but more fruitful debate of the virtues and flaws of principles of self-defense and punishment.
- 131 Walzer, Michael. Just and Unjust Wars. New York: Basic Books, 2000 [1977] p. 146-148
- 132 Ibid. p. 146
- 133 Ibid. p. 147
- 134 Ibid. p. 147
- 135 Ibid. p. 147
- 136 Ibid. p. 146, in reference to G.E.M. Anscombe's comments
- 137 Ibid. p. 147
- 138 Orend, Brian. The Morality of War Broadview Press. 2006. p.2
- 139 Sparrow, Robert. "Hands up Who Wants to Die?": Primoratz on Responsibility and Civilian Immunity in Wartime" *Ethical Theory and Moral Practice*, Vol. 8. No. 3 (Jun. 2005) p. 317. For an interesting parallel argument, refer to May, Larry. "Killing Naked Soldiers: Distinguishing between Combatants and Noncombatants" *Ethics and International Affairs*, Vol. 19. No. 3. (Aug. 2006). May reaches the conclusion that no principle of discrimination can justify killing as a principle, and that more fine-grained considerations are due rather than comprehensive principles.

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- 144 Orend, Brian. The Morality of War Broadview Press. 2006. p. 254 For a rather important work on Pacifism, refer to Holmes, Richard. On War and Morality. Princeton University Press, 1989
- 145 Orend, Brian. The Morality of War Broadview Press. 2006. p. 254-260 For a rather cogent response to pacifism, please refer to Narveson, Jan. "Pacifism: A Philosophical Analysis" *Ethics*, Vol. 75, No. 4 (July 1965) p. 259-271
- 146 Walzer, Michael. Just and Unjust Wars. New York: Basic Books, 2000 [1977] p. 156. On the distinction between foresee and intend, Tony Coady has some interesting suggests. Refer to Coady, C.A.J 'Tony'. "Collateral Immunity in War and Terrorism" Civilian Immunity In War. Ed. Igor Primoratz Oxford University Press, Oxford. 2007.
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- 149 Walzer, Michael. Just and Unjust Wars. New York: Basic Books, 2000 [1977] p.254
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- 151 Cf. Coady, C.A.J 'Tony'. "Collateral Immunity in War and Terrorism" Civilian Immunity In War. Ed. Igor Primoratz Oxford University Press, Oxford. 2007.
- 152 Primoratz, Igor. "Michael Walzer's Just War Theory: Some Issues of Responsibility" *Ethical Theory and Moral Practice*, Vol. 5, no 2, (Jun. 2002) p.224
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- 154 Ibid. p. 313
- 155 Primoratz, Igor. "Michael Walzer's Just War Theory: Some Issues of Responsibility" *Ethical Theory and Moral Practice*, Vol. 5, no 2, (Jun. 2002) p.224
- 156 Walzer, Michael. Just and Unjust Wars. New York: Basic Books, 2000 [1977] p. 52
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- 162 Walzer, Michael. Just and Unjust Wars. New York: Basic Books, 2000 [1977] p. 327