

Killing Naked Soldiers: Distinguishing between Combatants and Noncombatants

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In 1625 Hugo Grotius argued, “War must be carried on with not less scrupulousness than judicial processes are wont to be.”¹ Grotius’s views form the basis for both modern just war theory and contemporary international legal theory. In this essay I will discuss one principle that has been a cornerstone of both of these theories, the principle of discrimination or distinction—namely, that war tactics must not be employed that fail to distinguish the group of combatants from that of noncombatants, refraining from attacking noncombatants but justifiably attacking combatants. I will offer various reasons to reject the traditional principle of discrimination, on both conceptual and moral grounds. At the end of the essay I will offer an amended principle. It is my contention that if we follow Grotius’s injunction that this principle be followed with minute scrupulousness, fewer military tactics will be justified than is normally thought.

Just war theorists contend that tactics are illegitimate unless they can be used in such a way so as to distinguish combatants from noncombatants. Contemporary international legal theory also draws heavily on the principle of discrimination. The Geneva Convention (IV), as interpreted in the Second Protocol of 1977, says: “The civilian population as such, as well as individual civilians, shall not be the object of attack...Indiscriminate attacks are prohib-

ited.”² The principle of discrimination also relies on the idea that it is possible to distinguish, in a morally significant way, those classes or groups of people who participate in wars from those who do not.³ The categories of “soldier” or “civilian,” “combatant” or “noncombatant,” are thought to be stable. Yet there are serious conceptual and normative problems with identifying such social groups. In this essay, I argue that, because of these problems, the traditional principle of discrimination offers no clear guidance because it offers no clear, morally relevant line between those who fight and those who do not. Nonetheless, I argue that a

* This essay is cut from my book-length manuscript, *War Crimes and Just Wars*. That book is the second part of a trilogy on the normative foundations of international criminal law. The first volume, *Crimes against Humanity: A Normative Account*, was published by Cambridge University Press in 2005. The final volume is tentatively titled *Crimes against Peace and Waging Aggressive War*.

¹ Hugo Grotius, “Prolegomena,” sec. 25, in *On the Law of War and Peace*, trans. Frances W. Kelsey (Oxford: Clarendon Press, 1925), p. 18.

² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (June 8, 1977), art. 13. The same wording occurs in Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) (June 8, 1977), art. 51.

³ On this point, see the excellent discussion in Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 2000 [1977]), ch. 9.

distinction of this sort should be maintained, although one that will restrict tactics in war far more than is normally recognized.

When soldiers go into war, they are told quite explicitly not to attack civilians, but that they can kill combatants. In the Gulf War of 1990–91, for instance, all U.S. soldiers leaving for Kuwait were given the “Pocket Card on the Rules of Engagement.” At the bottom of the card was the following summary of the rules governing the conduct of U.S. soldiers in this war:

Remember:

- 1) Fight only combatants
- 2) Attack only military targets
- 3) Spare civilian persons and objects
- 4) Restrict destruction to what your mission requires⁴

These relatively simple rules reflect a long-standing principle of the moral and legal conduct of war, the principle of discrimination. And this principle is still interpreted traditionally. As one influential contemporary international law textbook puts it: “The principle of discrimination, about the selection and methods, weaponry, and targets . . . includes the idea that non-combatants and those *hors de combat* should not be deliberately targeted” for attack.⁵

This essay proceeds as follows. I begin by spelling out the conceptual and normative problems with the principle of discrimination, as it is traditionally understood. I then consider the example of the naked soldier as a test case for thinking about how to draw the distinction between combatants and noncombatants. I then return to metaphysical issues, setting the stage for thinking that war should not be understood in a collectivist way. I explain why I think the principle of discrimination is nonetheless worth

saving, and offer a beginning attempt to provide a new restricted principle. I address various objections to my revised principle, and end with a discussion of the very status of using collective procedures in identifying who can be killed. Despite my misgivings about the traditional principle, throughout I argue that there is a major benefit to be derived from the principle of discrimination, in that it makes soldiers stop and think, and hence makes them less likely to use violence.

IDENTIFYING COMBATANTS

The 1907 Hague Convention’s Regulations⁶ provided the basis for the Geneva Conventions of 1949, both of which require four conditions for someone to be regarded as a combatant: “1) that of being commanded by a person responsible for his subordinates; 2) that of having a fixed distinctive sign recognizable at a distance; 3) that of carrying arms openly; and 4) that of conducting their operations in accordance with the laws and customs of war.”⁷ More recently, Ingrid Detter offers this definition of combatants: “‘combatant’ is defined as someone who distinguishes himself from the civilian population, carries arms openly

⁴ 1991 Operation Desert Storm, “US Rules of Engagement: Pocket Card,” reprinted in Adam Roberts and Richard Guelff, eds., *Documents on the Laws of War*, 3rd ed. (Oxford: Oxford University Press, 2000), p. 563.

⁵ Roberts and Guelff, eds., *Documents on the Laws of War*, p. 10. *Hors de combat* literally means “out of the fight.”

⁶ Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land (1907), sec. I, ch. I, art. 1. See Roberts and Guelff, eds., *Documents on the Laws of War*, p. 73.

⁷ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (August 12, 1949), art. 13. See Roberts and Guelff, eds., *Documents on the Laws of War*, p. 202.

and is subject to an internal disciplinary system . . . he must also act on behalf of a belligerent.”⁸ These definitions are useful, but it is unclear whether they provide the bright line we need for a morally relevant distinction.

There are many problems with this basis of the principle of discrimination, conceptual as well as moral. Not the least of the conceptual problems is that this basis fails to take into account “irregular” armed forces, such as guerrilla groups or terrorist groups, which are surely just as morally worthy of attack, if anyone is, as are regular soldiers. There have been significant attempts to try to capture the nature of modern war, which is often waged by even such irregular forces as suicide bombers. What the definitions by stipulation lack is a morally relevant basis for drawing distinctions among classes or groups of people during war. For we can form groups by stipulation in an infinite number of ways, but this will not tell us who should be morally distinguished from whom.

“Soldiers” is a group that is often hard to define conceptually and even harder to identify according to any morally relevant characteristics. Morally, the distinction between those who can be attacked and those who cannot is often thought to be better drawn in terms of the distinction between the innocent and the guilty, or at least between the innocent and the noninnocent, rather than between soldiers and civilians.⁹ This distinction is suggested as a way to capture the obvious point that enthusiastic munitions workers participate more in war efforts than reluctant conscripts who sit in desk jobs far from the front. What is needed, rather, is a morally significant demarcation. The one that many have seized on is the distinction between those who have done something wrong, insofar as it jeopardizes the security of others, and those who have not. It is the for-

mer but not the latter group that is a legitimate target of attack. Some have thought that a morally relevant distinction is between those who participate and those who do not participate in a type of harm. We could try to distinguish combatants from noncombatants on this basis—namely, on the basis of whether the individuals in question do or do not participate in an unjust war. If they do participate, then they are legitimate targets of assault by enemy combatants. If they do not participate, then they retain their immunity from such attack, and if they are nonetheless attacked, then this would signal a basis for a charge of war crimes. But this basis for distinguishing is also fraught with problems, especially if the distinction is to have any moral relevance, as we will next see.

Francisco Suárez, reacting against a long tradition to the contrary, tried to demarcate the truly innocent and separate them from those who are “guilty” in war. Earlier theorists, such as Averroes, had said that it is justifiable to kill any males who might take up arms.¹⁰ Suárez instead held to the general principle that “no one may be deprived of his life save for reason of his own guilt.” The innocent include “those who are able to bear arms, if it is evident that in other respects they have not shared in the crime nor in the unjust war.”¹¹ Suárez says that the innocent in war

⁸ Ingrid Detter, *The Law of War* (Cambridge: Cambridge University Press, 2000), p. 26.

⁹ See the important discussion of this issue in Robert Holmes, *On War and Morality* (Princeton: Princeton University Press, 1989), ch. 6.

¹⁰ Averroes, “Jihad” [from “Al-Bidaya”] (c. 1167), para. 3, in *Jihad in Classical and Modern Islam*, ed. and trans. Rudolph Peters (Princeton: Markus Weiner Publishers, 1996), p. 33.

¹¹ Francisco Suárez, “On War” (Disputation XIII, *De Triplici Virtute Theologica: Charitate*) (c. 1610), in *Selections from Three Works*, trans. Gladys L. Williams, Ammi Brown, and John Waldron (Oxford: Clarendon Press, 1944), pp. 845–46.

“neither consented to the war nor gave any assistance in it, but who on the contrary, urged the acceptance of peace.”¹² This is an important point since if we allow, as Averroes did, that anyone who could take up arms is counted as guilty or even noninnocent, then counterintuitively wars can be waged “indiscriminately,” says Suárez.

In addition to considering the views of Suárez, we should also consider Grotius’s views of who can count as innocent, views that could have led him to pacifism. In *On the Law of War and Peace*, Grotius begins by articulating a very strong version of the principle of discrimination: “No action should be attempted whereby innocent persons may be threatened with destruction.”¹³ He is led to support the view that the guilty can be released if it is “for the sake of the innocent.”¹⁴ Grotius defends this principle by reference to mercy and also to justice, for from the standpoint of justice the innocent surely do not deserve to be killed, and mercy dictates that in any event “from humanitarian instincts” the innocent must be protected. All of this does not sound extremist today, but what Grotius says about who is innocent leads him almost to what Jeff McMahan and Robert McKim have called, in a different context, “a contingent form of pacifism.”¹⁵

Grotius says that children, women, and old men are normally to be afforded the status of innocents, since they are generally “untrained and inexperienced in war.”¹⁶ For similar reasons, those whose occupations concern religious matters or letters are not to be considered guilty,¹⁷ as is also true of farmers and merchants.¹⁸ Furthermore, those who have surrendered or who are prisoners of war are innocent rather than guilty.¹⁹ For our purposes, it is especially interesting that Grotius says, “It is not sufficient that by a sort of fiction the enemy may

be conceived as forming a single body.” Indeed, even “a quite obstinate devotion to one’s own party, provided only that the cause is not altogether dishonorable, does not” mean that one should be grouped with the guilty.²⁰ This claim suggests that even when one is in a military unit, it cannot be assumed that one is guilty and may legitimately be killed. Rather, fine distinctions need to be made to understand why one is serving in the military, for if one is merely serving out of patriotism, one is not to be grouped with the guilty. On Grotius’s account, very few if any soldiers may legitimately be killed. And in any event, Grotius’s arguments make it illegitimate to discriminate on the basis of large class categories at all. Grotius thus solves the problem of how morally to save the principle of discrimination, but he does so by calling for such fine-grained discriminations that it will be very difficult to satisfy the principle in practice, lending credence to the view that Grotius ends very close to a kind of contingent pacifism. My own view is similar to that of Grotius, as we will see.

Prior to Grotius, the guilty were those who were either members of a society that committed harms, or members of a subgroup that did so. This is why Averroes said that all able-bodied men could be slain, since he was speaking of members of an

¹² Ibid., p. 847.

¹³ Grotius, “Moderation with Respect to the Right of Killing in a Lawful War,” sec. 8, in *On the Law of War and Peace*, p. 734.

¹⁴ Ibid.

¹⁵ Jeff McMahan and Robert McKim, “The Just War and the Gulf War,” *Canadian Journal of Philosophy* 23, no. 4 (1993), pp. 501–41.

¹⁶ Grotius, *On the Law of War and Peace*, p. 735.

¹⁷ Ibid., p. 736.

¹⁸ Ibid., p. 737.

¹⁹ Ibid., p. 739.

²⁰ Ibid., p. 741.

infidel society. As infidels, they were already guilty, and then since the men were all able to fight, they could also be slain. It is interesting that Averroes does not think that all infidels, even children, women, and old men, could also legitimately be slain in a jihad. It was assumed that even in a society of infidels, only those who could take up arms to defend their society could be legitimately attacked. Generally, in the Middle Ages there was not such a fine line between soldiers and civilians, with people passing out of one group and into another quite rapidly, and without putting on uniforms. The point here then is that Averroes is trying to establish a firm line between those who can legitimately be killed and those who have immunity from attack, and doing so on the basis of guiltiness. Today many would readily dispute his criteria for guiltiness. What I want, however, is for us also to rethink the very strategy of using group identifications here.

There is a serious question of whether those who are currently taking up arms can morally be distinguished from those who would do so if given the chance, and also from those who perform other militarily necessary functions but do not take up arms. It is hard to see that merely carrying arms, especially if one has no intention of using them except in self-defense, is enough to make one morally guilty.²¹ And it is harder still to see that those who do choose to take up arms can be seen as guilty, and yet those who choose to work in munitions factories cannot. There has been quite a lot of good argumentation by other theorists on this count, so I won't belabor this point here.²² My point is only to indicate that guiltiness will be a poor basis for providing a bright line between those who are subject to attack and those who are immune from attack. I do not think that *jus*

ad bellum considerations are relevant for *jus in bello* assessments—that is, I do not presume soldiers who participate in a war, unjust or otherwise, to be guilty. While it may be true that soldiers who participate in an unjust war share in the collective guilt of their states, the share of guilt that soldiers must bear in such cases is normally quite small. Soldiers do not normally intend to do anything other than what they have been ordered to do. Lacking the requisite *mens rea*, soldiers are not personally guilty in a way that would make them liable to be attacked.

The guiltiness of individual persons normally is judged in degrees, as is the innocence of individual persons. When we make moral judgments on the basis of rough-grained markers, such as large social group membership, we necessarily must eliminate or diminish morally relevant differences among members of a group. Individual combatants or soldiers are not all guilty to the same extent, even if the basis of their guilt is that they represent an aggressing state. Indeed, I would also challenge, although I cannot do so here, the idea that representing an aggressing state makes an individual person subject to punishment or penalty in any event. In the next sections I will take up the question of whether, given the conceptual and moral problems identified above, we should merely dispense with the principle of discrimination altogether.

²¹ Some might argue that it would matter whether one were fighting an unjust war or not. I attempt to defeat such arguments in another paper, "Collective Responsibility, Honor, and the Rules of War," *Journal of Social Philosophy* 36, no. 3 (2005), pp. 289–304.

²² The very best recent essay on this topic is by Christopher Kutz, "The Difference Uniforms Make: Collective Violence in Criminal Law and War," *Philosophy & Public Affairs* 33, no. 2 (2005), pp. 148–80.

THE PROBLEM OF THE NAKED SOLDIER

The principle of discrimination is indeed worth preserving, on conceptual and moral grounds. In my view, one of its main benefits is to force soldiers to think before they shoot. And this will nearly always mean that soldiers will shoot less, which is nearly always a good thing in itself. In this section, I turn to the example of the naked soldier and offer a criticism of what Michael Walzer says about such cases, while nonetheless arguing that the distinction that is at the heart of the principle of discrimination is indeed worth preserving. I will then say a bit about the distinction between justice and humanity, returning to Grotius's important work on this topic. Finally, I will end the essay with a discussion of what a revised principle of discrimination might look like.

In Walzer's example of the naked soldier, he defends the justifiability of shooting the naked soldier; indeed, he says that it is, strictly speaking, impermissible not to shoot him.²³ The example he uses, which he takes from Robert Graves, is the following:

While sniping from a knoll in the support line, where we had a concealed loop-hole, I saw a German, about seven hundred yards away, through my telescopic sights. He was taking a bath in the German third line. I disliked the idea of shooting a naked man, so I handed the rifle to the sergeant with me. "Here, take this. You're a better shot than I am." He got him; but I had not stayed to watch.²⁴

Walzer points out that Graves expresses dislike—a feeling, not a moral judgment. And in a related case Walzer also points out that "[George] Orwell says, 'you don't feel like' shooting him rather than 'you should not' [shoot him], and the difference between these two is important." For Walzer there is

a "fundamental recognition" that it is permissible to kill the naked soldier.²⁵

Walzer expresses much ambivalence about this position, but in the end he argues that war cannot be fought without discriminating between fighters and nonfighters, where the former "are subject to attack at any time."²⁶ The reason for this is that a soldier has allowed himself "to be made into a dangerous man."²⁷ A significant part of Walzer's argument justifying the permissibility of killing the naked soldier is directly relevant to our discussion of collective identity and discrimination in the previous section of this essay. For Walzer admits that soldiers "do not always fight; nor is war their personal enterprise. But it is the enterprise of their *class*, and this fact radically distinguishes the individual soldier from the civilians he leaves behind."²⁸

It is tempting to say that Walzer is relying on a notion of collective responsibility of the worst sort. And indeed this is partly right. Walzer is arguing that the naked soldier is still a soldier, and as such he is subject to attack at any time, unlike civilians, who are supposed to be only rarely subject to attack. Even though the soldier, as he sits naked in the bath, seems to be less dangerous than a normal, dressed, adult male civilian, the naked soldier will soon resume his role as a "dangerous man," and as part of a group of dangerous men he can be attacked at any time. It is because of his "class" that he can be shot; and because of her class a civilian

²³ Walzer, *Just and Unjust Wars*, p. 143.

²⁴ Robert Graves, *Good-bye to All That*, rev. ed. (New York: Anchor Books, 1958), p. 132, quoted in Walzer, *Just and Unjust Wars*, p. 140.

²⁵ Walzer, *Just and Unjust Wars*, p. 140.

²⁶ *Ibid.*, p. 138.

²⁷ *Ibid.*, p. 145.

²⁸ *Ibid.*, p. 144, emphasis added. By "class" Walzer does not mean socioeconomic status but merely "group."

cannot be shot. But the classes are not clearly the only relevant moral basis for distinguishing one individual from another, especially if we are in effect talking about a kind of punishment or penalty for the one but not for the other.

Walzer admits that there are other morally relevant factors in the case of the naked soldier. Indeed, he says that a soldier "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 stereotypes." In the case of the naked soldier, "My enemy is changed into a man."²⁹ As a person I feel that he should not be killed; but I also recognize that because of his being still a member of a dangerous class, it is "less than is permitted" to spare his life.³⁰ Hence, Walzer comes to the conclusion that the group-based moral considerations override what he calls merely "passionate" feelings.

The group-based approach to determining who can legitimately be killed runs into problems when one asks *why* a particular member of the group deserves to be killed. Walzer says that all of the members of the group have lost their immunity because they have allowed themselves to be made into dangerous men. If by this he means that each person in the class is dangerous by virtue of having taken up arms and joined a military unit, it is hard to see why a member of the group cannot take himself out of the group, even temporarily, and thereby regain his immunity not to be shot. We can see this most graphically when a soldier drops his gun and raises his hands. Surely Walzer wouldn't maintain that that soldier still has no immunity from being shot. So why is the naked soldier, who also has clearly dropped his gun

and indicates by his behavior that he has no desire to shoot at us, not similar to the surrendering soldier?

Of course, it is true that the naked soldier, unlike the surrendering soldier, has indicated that he will still fight, and in the near future too, whereas the surrendering soldier indicates that he will, for the foreseeable future, stop fighting. In this sense the naked soldier is more dangerous than is the surrendering soldier. But at the moment, the naked soldier is not a threat, either to other enemy soldiers or to the state against which he has been, and will later continue to be, fighting. It is thus difficult, although not impossible, to see the naked soldier as a threat who is liable to be punished.

Perhaps Walzer thinks that by not surrendering, the naked soldier indicates that he is still a member of the group and hence without immunity from being killed. But why are all of the members of the group to be treated the same? Why is the only way to regain one's immunity completely to remove oneself from the group? And what do we do with the fact that even those who surrender are legitimately seen as required to try to escape so they can rejoin their military units? If those who surrender are not permanently excluded from the class of dangerous men, it makes more sense to say that they have not regained their immunity, at least not fully. But then it appears that the immunity from being killed is something that might vary over time and circumstance, disrupting the bright-line character of the principle of discrimination. If the principle has a variable status, then this would explain why it

²⁹ Ibid., p. 142.

³⁰ Ibid., p. 143.

might be that the naked soldier is immune from attack but loses his immunity when he gets dressed and steps back into combat.

We might contrast the naked soldier with the soldier who does not otherwise appear to be threatening to us, but who may be scouting out our position so that he can later help target us for air bombardment. The latter may indeed be dangerous, and too dangerous to our own safety to grant him the mercy that is otherwise due to those who appear to be merely human rather than members of a class of dangerous men. Walzer treats this case in the same way he treats the case of the naked soldier taking a bath who is seen in a telescopic lens at some distance, and who presumably does not see his enemy. In both cases, Walzer says that the soldiers can, indeed should, be killed. But unless Walzer is willing to take a thoroughgoing collectivist approach, and he seems unwilling to do so, he cannot argue that all soldiers can be targeted for attack. Thus, we must search for a way to reconceptualize the principle of discrimination.

The rough-grained approach that Walzer adopts is both conceptually flawed and morally unsettling. He suggests that his view is morally disturbing when he indicates that there are people who are very hesitant to shoot the naked soldier. The conceptual flaw is not as readily apparent, but as I have been arguing, it emerges when we recognize that the members of the class of soldiers are not all dangerous all of the time. Indeed, in the case of the surrendered soldier, who is expected to escape and return to battle, we recognize that soldiers can regain their immunity from being killed, even if only temporarily. This suggests, as we will see in the next section, that a fine-grained approach to the principle of discrimination might do a better job of capturing both the conceptual and morally intuitive idea of

who has immunity than does the rough-grained approach taken by Walzer.

As one can see from the pocket card issued to U.S. soldiers during the first Gulf War, the principle of discrimination is indeed understood as assigning to some an immunity and to others a lack of immunity. This is seen in the rules “spare civilian persons” and “fight only combatants.” It is clear that individual soldiers are being told not to kill civilians, and that they are allowed to kill combatants. Individual soldiers are accused of and tried for war crimes when they violate these directives. And while the principle of discrimination may speak differently to leaders than to soldiers, the principle of discrimination does speak loudly to individual soldiers, at least if one is on the ground, as it were. The question, then, is whether the principle of discrimination can be justified in such a way as to warrant the loudness with which it seems to speak.

SAVING THE PRINCIPLE OF DISCRIMINATION?

Despite all of the conceptual and moral difficulties, if there are going to be wars, then I believe the principle of discrimination is worth saving, although not in the form traditionally given. In this section I provide a preliminary framework for a new way to understand the principle of discrimination. In recasting the principle of discrimination as a fine-grained rather than a rough-grained basis for drawing distinctions, I will urge that we greatly limit who can be legitimately attacked. I will first return to remarks by Walzer and Grotius, employing their arguments for somewhat different purposes than they might wish. I then turn to what it is about the principle of discrimination that is worthy of being saved.

First, consider the strategy adopted by Walzer. If soldiers make themselves, or allow themselves to be made, into dangerous men (and women), then perhaps they lose the right not to be killed. But not all, or even very many, soldiers actually are dangerous to other soldiers.³¹ If I am sitting in a foxhole and you come charging at me with your bayonet leveled at my heart and your finger on the trigger of your rifle, you are certainly a dangerous person for me. The principle of self-defense will surely allow that you have lost your immunity to be attacked by me. And if I am distracted at the moment, and don't see you coming, then the principle of justice may allow a third party to kill you in my behalf. Notice, though, how few soldiers will be dangerous to each other in this way, especially in a high-tech war.

Second, following Grotius, we should recognize that it is a mistake to see the enemy as forming a single body. Soldiers as a class do not make themselves dangerous, at least not on the normal understanding of dangerousness. Many if not most soldiers never fire a shot and do not have any intention of doing so.³² Indeed, as Grotius pointed out, many soldiers, especially those who are involuntarily conscripted, do not even support the war effort and have nothing to gain from shooting other soldiers. Of course other soldiers, perhaps many others, support the war effort, and more important are patriotically willing to do whatever it is that the commander in chief asks of them. In this sense they seem to be dangerous, but now as representatives of those who are truly dangerous, not really in and of themselves.

Grotius offers us an important distinction in this respect. He proposes that the permissibility to kill is not the only or even the most important consideration in such cases. Rather, we should think about these matters from the perspective of the principle

of humanity rather than that of justice and rights. In this respect a Grotian position is one that stresses that the rules of war are supposed to display mercy, at least whenever doing so does not directly jeopardize our own safety. While it may be that those who are members of a dangerous class do not deserve restraint on our part, the just war tradition has also embraced a principle of humaneness, from which the term "humanitarian law" is derived, where we are supposed to treat people with respect and mercy, even when they are our enemies, as long as undue hardship is not created by this treatment. Treating people humanely will mean that their merely being in some general sense dangerous is not enough justifiably to kill them.

What is at stake here is whether social group categories should be used as absolute rules that are in themselves sufficient for action decisions, or whether the group categories are merely guides that inform but do not determine our actions. I do not think that we should abandon the category of combatants. What I object to is the rough-grained use of this category to determine who can be justifiably attacked in wars. I have argued instead that soldiers need to look further than the combatant category itself to see if certain combatants are indeed posing a danger to them. Given my argu-

³¹ Another possible line of argument is that a person who fights in justified self-defense can never lose the right not to be killed. If the point here is to link *jus ad bellum* to *jus in bello* considerations, then I would reject this move.

³² Walzer notes this himself in *Just and Unjust Wars*, p. 139: "In the course of a study of combat behavior in World War II, S.L.A. Marshall discovered that the great majority of men on the front line never fired their guns." Walzer provides the following citation: S.L.A. Marshall, *Men Against Fire* (New York, 1966), chs. 5 and 6. Some scholars have called this claim into question.

ments against Walzer's naked soldier example, one could wonder why we should not dispense with the category of combatants altogether. My response is to say that—as in all of human affairs—we cannot easily get by without some categories to frame our thinking. This, in my view, is what the principle of discrimination should do for us.³³ It should not be seen itself as a firm basis for making decisions, but rather as a framework within which decisions can be made about which action to take.

Within the framework of what is permissible in terms of justice and rights, we then need to ascertain what actions would also be consistent with the principle of humaneness. The latter determination is a very particularized one, and perhaps in some cases, where danger is all around us, there will not be enough time to make this further determination, and we will have to rely only on the general framework. But in other cases, such as when viewing a naked soldier taking a bath, where one is far removed from the soldier and he is unaware of our presence and not at all trying to harm us, it seems clear that the principle of humaneness would dictate that such a soldier should not be killed, even though he is truly a member of the group “combatants.”³⁴ The framework, which is based on rough-grained considerations, can only be the sole thing appealed to when the fine-grained determination of particular circumstances is somehow blocked—for instance, in emergencies. Collective identity strategies, such as the principle of discrimination, have their use, but it is a more limited use than has normally been recognized.

When there is an emergency and when there is no other information available, it is appropriate for soldiers to use the simple rule: attack “enemy” soldiers, not civilians. But in all other cases, surely the vast major-

ity of cases, there will be no simple test. Therefore, one needs to proceed to determine, among other things, whether the civilian poses a threat at the moment, or whether the soldier is not a threat. Such judgments will not be easy to make and will not necessarily follow any easy-to-learn rules. Indeed, even the apparently naked soldier may have a gun ready to hand, and the child pointing a gun at me may turn out to be holding a realistic-looking water gun.

The reason why the test is so hard to formulate, at least for the majority of cases, is that the status of civilian or soldier does not yet tell us whether the person in question is indeed a danger to us, or a vulnerable person who needs our compassion. Humanitarian instincts require more from us than does a sense of justice, but there are certainly limits to what is required even as a matter of humaneness.³⁵ And it is generally not required that a person jeopardize his or her own security. So, it will matter whether a given civilian is armed, or even whether the civilian can defend herself or himself, obviating the need for the soldier to risk his or her own well-being to protect this civilian. And it will also matter if it turns out that the “enemy” soldier I am confronting has himself or herself been rendered vulnerable, due to being naked in the bath, or being wounded in ways that make him or her no

³³ Some might dispute the idea that the just war tradition does concern such consequentialist factors. I would respond that one need only consult the work of Suárez or Grotius, two paradigmatic just war theorists, to see that some just war theorists mixed consequentialist and deontological factors.

³⁴ For an opposing view, see Jeff McMahan, “War as Self-Defense,” *Symposium: War and Self-Defense, Ethics & International Affairs* 18, no. 1, pp. 75–86.

³⁵ See ch. 4 of my book-length manuscript, *War Crimes and Just Wars*, where I explain why humaneness rather than justice is the cornerstone of the rules of war.

longer a threat to my security, and instead in need of my compassion and protection.

The thing that matters is whether there is a significant risk to the soldier if he or she would act to protect someone rather than to attack him or her. And part of making that determination is whether a given soldier, or civilian for that matter, is indeed a threat to the soldier. The test amounts to discovering whether the person one is confronting does indeed pose a threat. Part, but only part, of the test is to look at the status of the person one confronts. Then one must assess additional information to see if the person one confronts fits into an exception class, such as that of a child who seems to be concealing a weapon. This test is often very hard to use, since it turns on an appreciation of a nearly complete set of facts. We need a demonstration that our compassion will be met with a significant loss of security before it is not the case that we are required to act compassionately, even toward our enemies.

Of course, there are two types of enemy that could be threatened by the naked soldier. We have been discussing the enemy soldier who spies the naked soldier off in a distance. To that enemy, the naked soldier hardly poses much of a threat at all. But it could be argued that the naked soldier nonetheless poses a threat to the enemy state, for the naked soldier will soon end his bath and resume his role as a danger to the enemy state. Perhaps this is why he may be killed. I will take up this larger issue in the next section, where I discuss a collectivist view of soldiers and the threats they pose. Suffice it here to say that “at the moment” it is not clear that the naked soldier is indeed a threat to the enemy state. More information is needed here as well, and the information is of the same sort—namely, whether that soldier will later play a major role in attacking the enemy state, and how likely this is.

In addition, we need to examine closely whether a soldier is himself or herself in a vulnerable position that calls for our compassion. For in such situations, there may be competing motivations, as the case of the naked soldier makes clear: the motivation to attack due to a worry about the threat posed, and a motivation to protect due to a worry about the vulnerability exposed. Return again to the case of the naked soldier taking a bath. Here is a good example of the conflict just mentioned. This soldier is still a soldier—that is, someone whose job it is to try to attack or kill soldiers from the enemy camp. There is thus a motivation, as Walzer argued, to attack or kill this soldier. But there is another motivation, the motivation to protect the naked soldier because of his clearly vulnerable position. The question that arises is which motivation is stronger, and should be stronger, in the naked soldier case. As noted above, this is not immediately evident. Additional facts would be useful here, such as whether the naked soldier has his gun resting next to him, or ready to hand, or whether he could conceivably mount an attack against us. If we have no additional facts, it is not at all clear that Walzer is right to say that the naked soldier may, and indeed must, be killed. At the very least, Walzer should admit that there are competing motivations that have strong moral support. As I indicated above, it is surely at least permissible for the naked soldier’s life to be spared. It will take quite a bit of information in order to justify killing the naked soldier. And there will not be many if any situations when there is the kind of emergency where we can straightforwardly justify killing the naked soldier without knowing whether he poses any threat at all to those who come across him. The competing motivations in the case of the naked soldier cannot be so

easily resolved, and this is a telling example of why the principle of discrimination or distinction needs to be seen as much more nuanced than is often thought. In the next section I will take up various objections to my proposal to weaken the strictures of the principle of discrimination or distinction so as to allow for many different contexts and circumstances.

OBJECTIONS

One of the most significant objections raised to my proposal is that I have rendered effective fighting in war all but impermissible by reconfiguring the principle of discrimination. For, it would be claimed, I have put such a strict limitation on who counts as a true combatant that even fully justified defending soldiers must wait until they see not only the whites of the eyes of the enemy but also that the enemy is about to fire upon them before they can justifiably attack the enemy. And in many cases that will be too late to be able to stop an aggressing army from overrunning innocent armies and even innocent states. This is even clearer in the case of aerial bombardment. Defending soldiers often cannot see the source of these potential attacks, since they originate in airplanes too high to be spotted or in ships far out to sea. If such soldiers and their weaponry cannot be targeted, then it will be very difficult to wage effective war, even in defense of one's homeland. And even among those advancing armies, it will be very difficult to figure out which soldiers can be justifiably attacked, since the collectivity of the social group has been pierced and can no longer be treated as an undifferentiated unit.

This is quite a serious objection. One of the main points of the principle of discrimination or distinction was to separate two

groups of individuals, the group that may be attacked without worrying about what each individual member is doing at the moment, and the group that ought never to be attacked, again regardless of what is happening at the moment. Such a strategy of collective identity has not only simplicity in its favor; it also is a strategy that takes out of the hands of the soldiers the need to engage in fine-grained calculation that is quite likely to be mistaken. Advancing armies must be treated indiscriminately if successful defense is likely to occur. And civilian populations also must be treated indiscriminately if the inhumanity of war is to be kept to a minimum. For, as soon as such collective identification is disrupted, and what is substituted for it is a highly individualized basis of treatment, we will find that soldiers are left in a very difficult position, where they are more likely than not to make tragic mistakes. If combatants are to be treated all alike, and noncombatants are to be treated all alike as well, then all the soldier needs to do is to figure out which camp a given individual falls into. And while there will be difficult cases, the vast majority of cases will be clear-cut and the soldier, who often has to make split-second life-and-death judgments, will be better served.

My response to this objection has two parts. The first part is more clearly to indicate when rough-grained distinctions can still be made. In emergency situations, such as in the contemplated imminent attack, where one can literally see the whites of the eyes of the attackers, I certainly do not advocate that soldiers wait before firing. Also, I do not mean to restrict the idea of dangerousness so that soldiers can only attack when their own personal safety is threatened. For, as mentioned, threats can also be made to the state for which the soldier serves. So there is no attempt on my

part to render the waging of war impossible. But I am suggesting that concern for the normative underpinnings of the rules of war, and specifically for the principle of discrimination, should indeed make wars harder to fight.

The second part of my response is that it is not clear to me that soldiers will indeed be better off with the simplicity of the rough-grained distinction between civilians and soldiers. In Vietnam, many civilians posed as much danger for the U.S. soldiers as did enemy soldiers. The slightly better group category was that of combatants, a category into which apparently even some children fit. But then the simplicity and ease of identification fade away as advantages of the group-identity model. In addition, there is the problem of whether there is indeed a category of combatants at all that allows for meaningful discrimination in war. Think of what Averroes argued—namely, that all able-bodied enemy men should be treated as legitimate targets of attack, since they could take up arms and threaten the lives of soldiers. This position is highly problematical. But my proposal does not countenance such rough-grained discriminations. Only those who are indeed a threat and not in a vulnerable position may legitimately be attacked, and identifying this group will require fine-grained discriminations, since it will not include all able-bodied men.

A second objection maintains that I have missed the point of the principle of discrimination or distinction. This principle, at least as reasonably interpreted, only prohibits indiscriminate attacks—that is, attacks that pay no attention to who is being singled out for attack. According to this view, the idea is to make the soldiers stop and think before they shoot. Since, however, these are situations in which the soldier's own life is often on the line, we cannot expect that the soldiers

will stop for very long. For this to be a workable principle, discrimination or distinction can only be expected between large classes or groups. And the groups must be ones for which the borders between them are rough-grained rather than fine-grained. My proposal, on the other hand, calls for such fine-grained discrimination that soldiers will either have to stop and think for so long that they render themselves vulnerable to attack, or they will simply give up and ignore the distinctions altogether, surely a worse alternative if one is motivated by humanistic instincts.

My response here is that I have tried to show that the traditional large groups in question are actually not that easily identifiable, at least not in a way that is morally significant. If we use the traditional category of soldier, what are we to do about guerrilla fighters and other irregular fighters who are just as dangerous, if not more dangerous, to soldiers of a modern army operating in a large, hostile city? And if instead we shift to the slightly more helpful category of combatants, there are many problems in discerning who is part of the necessary support of the war effort and who is not. Not only do children and other people who would normally fit into the noncombatant camp sometimes fit into the combatant camp, but so do munitions workers, for instance. Thus, if one sees a crowd of civilians, it will not be easy to pick out from that crowd those who are, and those who are not, noncombatants, as we have increasingly seen in the streets of the Middle East. Soldiers will still have to make fine-grained decisions according to the traditional view of the principle of discrimination or distinction, at least if those discriminations are to be morally justifiable ones. Even the traditional view will also have to make room for some fine-grained determinations—otherwise, the pocket card carried by soldiers would often be misleading.

A third objection is to ask why we should not merely be pragmatists (or even realists) about social groups. If there is some rough utility in using a particular distinction, then use it; otherwise, throw it out. And it does seem that there is such utility in the traditional way of understanding the principle of discrimination or distinction—namely, that soldiers are made to stop and think before they shoot their guns. A pragmatic way to approach collective identity is to give up any hope of discerning a natural kind that corresponds to any social group. Rather, look only for those categorizations that allow us to do various things we think are worth doing. Distinguishing between those who participate in a war and those who do not seems an eminently reasonable thing to do, especially if one is in a position in which one might be attacked and is deciding how to defend oneself. As long as people can indeed identify members of a group, and the use of that group in making decisions has some utility, why not do so?

In general, I agree that talk of social groups is both omnipresent and also quite useful.³⁶ The problem I have tried to identify is that some talk of social groups is more misleading than useful. The distinction between civilians and soldiers is one such distinction. There are two problems. First, conceptually, can a clear set of criteria identify who is a soldier or a combatant and who is a civilian or a noncombatant? Second, normatively, even if we can draw a clear distinction between these groups, should we use this distinction in our moral assessments? From both a conceptual and a normative perspective we should abandon the easy distinction between soldiers and civilians and be content with the distinction between those soldiers or combatants who are, and those who are not, a threat and are not themselves vulnerable.

I do not dispute that people talk as if they can make the conceptual distinction between soldier and civilian, and that many also think that this is a morally relevant distinction. And I also do not dispute that something important might be lost if this version of the principle of discrimination or distinction were to be abandoned. My contention is that we can save some of what the principle of discrimination is best able to do—namely, make soldiers stop and think before they act, and, further, not to attack those who are not a threat to them. As it turns out, however, the people who are such a threat are not clearly so in very many cases. If this were acknowledged, then soldiers would not feel justified in shooting very often, just as is now true of police officers in the United States. Indeed, police in the United States and elsewhere are able to conduct most of their business by other than lethal means, so that when they do fire a gun they must fill out special paperwork to justify it. Soldiers likewise should be inspired to try less lethal means than shooting, and, in general, the world would be a safer place.³⁷ Of course, this does assume—which I might not assume otherwise—that there are going to be some cases in which shooting is justified. The principle of discrimination or distinction was correctly envisioned to place limits on what tactics are

³⁶ Indeed, see my books: Larry May, *The Morality of Groups* (Notre Dame, Ind.: University of Notre Dame Press, 1987); and Larry May, *Sharing Responsibility* (Chicago: University of Chicago Press, 1992).

³⁷ Some might argue that getting soldiers to think more is not necessarily a good thing, for they may then act on their emotions, such as their feelings of revenge. I would counter that there are offsetting emotions, such as compassion, as well as other considerations that would normally make the soldier shoot less if he thought more.

justified in war. If we embrace my way to characterize the principle of discrimination, this objective will indeed be met, with the added benefit that we will have less violence in the world.

In this essay, I have tried to set out a more nuanced understanding of the principle of discrimination or distinction than the one that is normally advocated in either the just war tradition or the contemporary international law literature. What I have advocated is that the distinction between soldier and civilian, or between combatant and noncombatant, be used as a beginning for determining whether someone can legitimately be

attacked or killed. According to this initial group categorization, civilians cannot be subject to such attacks during wartime, whereas soldiers can be. But such a determination provides only an initial framework for decision. If there is time, and if there is more information available, then there must be a more fine-grained determination of whether the civilian or the soldier is currently a threat or in a vulnerable position. Only in situations of emergency and inability to gather more information does the traditional principle of discrimination or distinction operate alone to justify or restrict violent action.