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THE ETHICS OF LETTING CIVILIANS DIE IN AFGHANISTAN: THE FALSE DICHOTOMY BETWEEN HOBBSIAN AND KANTIAN RESCUE PARADIGMS

*Samuel Vincent Jones**

THE AFGHAN FARMER DILEMMA

In Kabul, Afghanistan, Taliban elements are using a virtually impenetrable transmission cryptogram to activate improvised explosive devices (IEDs) that are targeted at U.S. combatants.¹ Mahmud, an Afghan civilian, discovers the Taliban's encryption codes and informs the U.S. military. The information permits U.S. officials to reduce U.S. casualties by fifty percent in less than a month. U.S. intelligence operatives discover that the Taliban suspect that Mahmud sympathizes with U.S. forces, so they plan to assassinate Khan, a lone Afghan farmer, whom the Taliban mistakenly believe to be Mahmud. The United States has no relationship with Khan. U.S. intelligence reports indicate that Khan is innocent of any wrongdoing and lives a secluded life. The report also indicates that if the United States rescues Khan from his farm, the Taliban will assume that Khan is under U.S. protection and change their encryption codes before the U.S. military has deciphered the Taliban's encryption technology. As a result, the U.S. military would lose its intelligence advantage and IED-related casualties would likely double. Intelligence reports also indicate that if the Taliban assassinates Khan, the probability of the Taliban discovering its identification error is extremely low.

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1. This hypothetical is based on one offered by C.E. Harris, Jr. in his discussion regarding the ethics of self-interest, which I have substantially revised and expanded for purposes of illustrating the circumstances as they relate to counterinsurgency operations in present-day Afghanistan. See C.E. HARRIS, JR., *APPLYING MORAL THEORIES* 93-94 (2d ed. 1992).

The aforementioned hypothetical, which I term the “Afghan farmer dilemma,” requires a U.S. military commander to weigh the fundamental military imperative of reducing the risk to U.S. combatants stemming from IEDs and the serious harm attendant upon the undertaking of a rescue mission, against the humanitarian imperative to rescue an Afghan civilian from imminent danger.² What should the commander do? The hypothetical epitomizes the type of moral dilemma that arises pursuant to rescue operations that U.S. military commanders encounter because of the nature of combat operations in Afghanistan.

This Article explains existing antinomies between Hobbesian and Kantian orientations for deciding the rectitude of rescue operations and questions whether they are truly antithetical. It demonstrates that although Thomas Hobbes and Immanuel Kant held diametrically conflicting values regarding human dignity and self-interest, their frameworks for deciding rescue obligations during armed conflict can produce equivalent outcomes in rescue cases involving competing moral rules. It asserts that U.S. combatants have a duty to rescue endangered Afghan civilians by virtue of the special relationship between Afghan civilians and U.S. combatants. This Article attempts to take a first step in fashioning a decision-making paradigm for resolving rescue dilemmas that incorporates the moral imperative to respect human dignity without compromising the undeniable empiricism of necessity and self-preservation.

I. INTRODUCTION

Between March 2003 and July 2006, violence stemming from combat operations in Iraq caused the death of approximately 650,000 Iraqi civilians.³ An estimated 4,000,000 Iraqis sought refuge in Jordan and Syria or were internally displaced.⁴ As U.S. combat operations in Afghanistan intensify and expand, a legitimate concern is whether the calamity of war will reach levels similar to those experienced in Iraq.

2. See MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 155 (4th ed. 2006) (1977) (“And that is a legitimate concern. No one would want to be commanded in wartime by an officer who did not value the lives of his soldiers. But he must also value civilian lives, and so must his soldiers.”).

3. Gilbert Burnham et al., *Mortality After the 2003 Invasion of Iraq: A Cross-Sectional Cluster Sample Survey*, 368 *LANCET* 1421, 1427 (2006); see JASON H. CAMPBELL & JEREMY SHAPIRO, *AFGHANISTAN INDEX: TRACKING PROGRESS AND SECURITY IN POST-9/11 AFGHANISTAN* 4–6 (July 29, 2009), available at <http://www.brookings.edu/foreign-policy/~media/Files/Programs/FP/afghanistan%20index/index20090729.pdf>; David Brown, *Study Claims Iraq's "Excess" Death Toll Has Reached 655,000*, *WASH. POST*, Oct. 11, 2006, at A12.

4. M. Cherif Bassiouni, *Introduction*, 11 *DEPAUL J. HEALTH CARE L.* 267, 268 (2008).

Between 2007 and 2009, combat-related violence killed more than 4,534 Afghan civilians.⁵ In June 2009, Afghan civilian casualties increased by at least twenty-four percent as compared to the same period in 2008.⁶ It is estimated that 20,000 Afghan civilians have died as an indirect consequence of the armed conflict, including thousands who died because international aid agencies could not reach them.⁷

A large number of these fatalities are the product of asymmetrical attacks, such as suicide bombings, IEDs, and targeted assassinations.⁸ Nonviolent threats are also affecting the physical substratum of a significant number of Afghan civilians. Many civilians have died and will continue to die from disease, combat-related injuries, lack of food and water, loss of electricity, and lack of adequate medical care.⁹ The ravages of war have destroyed or forced the closure of public services, hospitals, humanitarian organizations, and facilities that would otherwise play a vital role in curtailing civilian deaths,¹⁰ while combatants have, in some instances, neglected to supply endangered civilians with lifesaving supplies.¹¹

The high number of civilian casualties has severely undermined support for U.S. counterinsurgency programs and the Afghan govern-

5. CAMPBELL & SHAPIRO, *supra* note 3, at 4.

6. See U.N. ASSISTANCE MISSION TO AFG., HUMAN RIGHTS UNIT, AFGHANISTAN MIDYEAR BULLETIN ON PROTECTION OF CIVILIANS IN ARMED CONFLICT, 2009, at 5 (July 2009) [hereinafter UN REPORT], available at <http://unama.unmissions.org/Portals/UNAMA/human%20rights/09july31-UNAMA-HUMAN-RIGHTS-CIVILIAN-CASUALTIES-Mid-Year-2009-Bulletin.pdf>.

7. Faiz Ahmed, *Afghanistan's Reconstruction, Five Years Later: Narratives of Progress, Marginalized Realities, and the Politics of Law in a Transnational Islamic Republic*, 10 GONZ. J. INT'L L. 269, 280 (2007).

8. UN REPORT, *supra* note 6, at 5–6; see, e.g., Stephen Farrell & Sangar Rahimi, *Suicide Bomber Kills a Top Intelligence Official in Afghanistan*, N.Y. TIMES, Sept. 3, 2009, at A10 (reporting a 2009 incident in which a suicide bomber killed an intelligence official and at least fifteen other people).

9. FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, COUNTRY PROFILE: AFGHANISTAN 7–8 (Aug. 2008), <http://memory.loc.gov/frd/cs/profiles/Afghanistan.pdf> (discussing the effects of war on Afghanistan's population); UNAMA, ARMED CONFLICT AND CIVILIAN CASUALTIES, AFGHANISTAN: TRENDS AND DEVELOPMENTS 01 JANUARY – 31 AUGUST 2008, at 1 (Sept. 10, 2008) [hereinafter CIVILIAN CASUALTIES], [http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/EGUA-7JJMA8-full_report.pdf/\\$File/full_report.pdf](http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/EGUA-7JJMA8-full_report.pdf/$File/full_report.pdf) (discussing the toll armed conflict has taken on the Afghan civilian population).

10. CIVILIAN CASUALTIES, *supra* note 9, at 1 (stating that “[a]ttacks by insurgents, counterinsurgency operations conducted by Afghan Government and international military forces (IMF), and operations linked to the Global War on Terror, are the major source of civilian death and injury, displacement, destruction of assets/property, and disruption of access to education, healthcare, housing and other essential services.”).

11. See M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711, 768 (2008).

ment itself.¹² Protection of the Afghan civilian populace is critically necessary to regaining their active and continued support for the Afghan government, and it is essential to depriving the Taliban of its authority and appeal.¹³ Responding to the emergent threat to the legitimacy of U.S. operations in Afghanistan, President Barack Obama has pledged to use every effort to reduce the number of Afghan civilian casualties.¹⁴ Following President Obama's declaration, General Stanley A. McChrystal, the top U.S. military commander in Afghanistan, affirmed before the U.S. Congress that the United States' policy would now place the safeguarding of Afghan civilians ahead of the tactical objective to kill Taliban forces.¹⁵ The normative consequence of these developments now obligates U.S. military commanders to confront a moral dilemma that strikes at their deepest impulses and notions of justice, and it forces a collision between the U.S. combatant's self-interest and the interests of the Afghan civilian. They will be required to decide whether and to what degree the United States has a duty to risk the lives of U.S. soldiers in order to rescue Afghan civilians from fatal harm caused by third-party actors.

The dilemma arouses considerable discussion and garners a variety of responses, the nature of which generally depends on the relevant moral domain to which one belongs.¹⁶ For those responsible for protecting the United States and its interests, self-preservation or necessity might provide the criteria by which to make judgments regarding the prioritization of Afghan civilian life over military objective. Indeed, under circumstances in which an Afghan civilian's death would

12. See Scott Wilson, *Obama Stresses Joint Action Against Taliban Push in South Asia*, WASH. POST, May 7, 2009, at A14.

13. U.S. DEP'T OF THE ARMY, COUNTERINSURGENCY § 5-4 (2006) (Field Manual No. 3-24) [hereinafter FM 3-24].

14. See Tim Reid & Michael Evans, *Deadly Airstrike on Civilians Sours Obama's Afghan Unity Summit*, TIMES (London), May 7, 2009, at 31. "Legitimacy is the most crucial factor in developing and maintaining international and internal support" in Afghanistan. U.S. DEP'T OF THE ARMY, ARMY SPECIAL OPERATIONS FORCES: UNCONVENTIONAL WARFARE § 4-16 (2008) (Field Manual No. 3-05.130) [hereinafter SPECIAL OPERATIONS FORCES]. Legitimacy of U.S. operations in Afghanistan is governed by the satisfaction of three criteria. First, the operation must adhere to U.S. law. See U.S. DEP'T OF THE ARMY, OPERATIONS § 4-16 (2008) (Field Manual No. 3-0) [hereinafter OPERATIONS]. Second, the operation must comply with international laws that are recognized by the United States, particularly the laws of war. See *id.* Third, the operation must bolster the authority and acceptance of the Afghan government by the Afghan populace and international community, which is essentially the most decisive element. See *id.*

15. See FM 3-24, *supra* note 13, § 2-4; Ann Scott Tyson, *New Approach in Afghanistan Likely*, WASH. POST, June 3, 2009, at A3; Press Release, Dep't of Def., McChrystal Assumes Command in Afghanistan (June 15, 2009), <http://www.defenselink.mil/news/newarticle.aspx?id=54778>.

16. 4 RICHARD RORTY, PHILOSOPHY AS CULTURAL POLITICS: PHILOSOPHICAL PAPERS 44-45 (2007) (suggesting that "moral identity is determined by the group or groups with which one identifies" and to which one remains loyal).

save or preserve its soldiers, one may reasonably question whether concern for the human dignity or welfare of an endangered Afghan civilian should fundamentally or even significantly matter to a nation. Yet for others, the moral rules requiring respect for human dignity might be upheld, even at the price of grave consequences to nationalistic objectives. One could seriously argue that moral worth is the most important dimension of human life, and thus, a U.S. combatant should be willing to sacrifice military objectives for the sake of humanity and the common good.

Because the material necessities of life are so abundantly available to most Americans and because respect for individual autonomy is so enshrined within American traditions, our self-interested impulses seldom need to be constrained. Indeed, the principles underlying rescue commitments have only a tenuous presence within the ethos of American society. Under American common law, there is generally no duty to rescue a person from grave danger.¹⁷ Even if one observes the commission of a crime against another or can rescue an endangered person without incurring any risk, no duty to rescue typically arises.¹⁸ Outside of a few exceptions, undertakings to rescue are dictated by moral notions rather than the strictures of American common law.¹⁹ The refusal of American common law to recognize a general duty to rescue an endangered person emanates from its well-established recognition of an individual's natural right to self-preservation.²⁰

17. See, e.g., *Folsom v. Burger King*, 958 P.2d 301, 310 (Wash. 1998); RESTATEMENT (SECOND) OF TORTS § 314 (1965); 74 AM. JUR. 2D *Torts* §§ 9, 14 (2001).

18. *Jackson v. City of Joliet*, 715 F.2d 1200, 1202 (7th Cir. 1983) (acknowledging the lack of a common law duty to rescue even if the defendant is a public officer whose duties include aiding those in distress). Wisconsin and Vermont are the exceptions in that they have codified a duty to rescue in their criminal codes. See WIS. STAT. § 940.34 (2008) (duty to report offense or assist victim); VT. STAT. ANN. tit. 12, § 519 (2002) (duty to give reasonable assistance); *State v. Joyce*, 433 A.2d 271, 273 (Vt. 1981) (noting that the Vermont statute does create an exception to the common law by mandating a duty to rescue under some circumstances, but does not create a duty to intervene in a fight because "danger or peril" to the rescuer prevents a duty from arising).

19. See 74 AM. JUR. 2D *Torts* § 9 (2001). Despite the American common law's blanket authorization to withhold assistance from an endangered person, there are several circumstances that potentially give rise to a legal obligation to rescue. See RESTATEMENT (SECOND) OF TORTS § 314 & cmt. a (1965). These obligations exist (1) when the rescuer and the endangered person have a special relationship; (2) when the rescuer has command and control over the third party that caused the harm, or over the endangered person; (3) when the rescuer created the situation of peril; and (4) when the actor attempts to rescue an endangered person, the rescuer is under an absolute duty of care to use every reasonable effort to accomplish the rescue. See RESTATEMENT (SECOND) OF TORTS §§ 314A, 316–20, 321, 322 (2003).

20. Cf. RESTATEMENT (SECOND) OF TORTS § 314 cmt. c (2003) (recognizing that, as a general rule, "one human being, seeing a fellow man in dire peril, is under no legal obligation to aid him, but may sit on the dock, smoke his cigar, and watch the other drown").

The laws of war generally mirror the jurisprudential personality of the American common law regarding rescue obligations. Absent specific exceptions, combatants do not have a duty to rescue endangered civilians from harm that is caused by third-party actors.²¹ As in the American common law system, recognition of a duty to rescue under the laws of war is constrained by notions of necessity and the inherent right of self-preservation.²² Not a single international court has held that in unprotected areas, the United States (or other “High Contracting Parties”) has an affirmative duty to rescue endangered civilians in situations in which U.S. actions are not the direct cause of the fatal harm.²³ Legal conventions, instead, have essentially left the fate of many Afghan civilians a consequence of a combatant’s discretion rather than duty, thus widening the gap between self-interest and altruism, and exacerbating the perilous circumstances facing the Afghan populace.

Few would deny that there is something intuitively incongruent about a corpus of law or moral tradition that purports to prohibit the

21. As under the American common law, specific circumstances may arise that create a legal duty to rescue. For instance, under the laws of war, combatants have a duty (1) to use every effort to effect the rescue once they have attempted to rescue a sick or wounded civilian; (2) to rescue civilians in “protected” areas; (3) to rescue civilians from harm caused by a third party whom the combatant controls; and (4) to rescue a civilian when the combatants created the endangered civilian’s perilous situation. See generally Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 16, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] (providing that parties to the conflict “shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment”); *id.* art. 29 (mandating that individuals “in whose hands protected persons may be” will be held responsible for their treatment, “irrespective of any individual responsibility which may be incurred”); *id.* art. 27 (protected persons “shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity . . . women shall be especially protected . . . against rape, enforced prostitution, or any form of indecent assault”).

22. See Samuel Vincent Jones, *Has Conduct in Iraq Confirmed the Moral Inadequacy of International Humanitarian Law? Examining the Confluence Between Contract Theory and the Scope of Civilian Immunity During Armed Conflict*, 16 DUKE J. COMP. & INT’L L. 249, 296 (2006) (asserting that conduct during military occupations is predominantly controlled by “considerations of self-preservation and military necessity, rather than humanitarian imperatives”); Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1276 (2004) (asserting that the “constitutional law of necessity and self-preservation dictates that the first responsibility of the President in time of war, when the survival or safety of the nation is at stake, is to *win that war*”); cf. Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L. 291, 292, 295 (2006) (describing the view that necessity is the basis for articulating universal norms, and the belief that positive law “derives from and is inferior to international morality or natural law precepts”).

23. See Gerhard Werle, *Individual Criminal Responsibility in Article 25 ICC Statute*, 5 J. INT’L CRIM. JUST. 953, 966 (2007) (noting that international law has not yet developed general criteria for when an affirmative duty to rescue is established, but claiming that there are instances where such an obligation exists).

willful killing of the innocent with the intent to protect them from harm, while authorizing combatants to refuse to rescue them from violence or other calamities that have a tendency to produce equal, if not more, egregious harm. Indeed, a myriad of circumstances arise in Afghanistan, as in previous armed conflicts, in which U.S. combatants are not responsible for creating the peril facing the civilian populace, but they nonetheless have the capacity and reasonable opportunity to rescue them from the deadly circumstance. The question remains: should they?

At the poles of this debate are Thomas Hobbes,²⁴ one of the foremost adherents of self-preservation, and Immanuel Kant,²⁵ one of the foremost defenders of human dignity. Their views, both hugely influential, are widely viewed among scholars to be antithetical with respect to moral notions.²⁶ Kant's theory that a combatant should always act in such a way that he would be willing to have his behavior become universal and that a combatant should refrain from using himself or others merely as a means to an end,²⁷ vies with Hobbes's claim that combatants, as self-interested, prudentially rational agents, should pursue whatever they believe necessary for self-preservation.²⁸ Kantian idealism rests, in part, on the claim that self-preservation is

24. See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 545 n.102 (2005) (referring to Hobbes as "the father of social contract theory").

25. See Fernando R. Tesón, *The Jurisprudence of International Law: Classic and Modern Views, Realism and Kantianism in International Law*, 86 AM. SOC'Y INT'L L. PROC. 108, 113, 117 (1992).

26. See Gunnar Beck, *The Idea of Human Rights Between Value Pluralism and Conceptual Vagueness*, 25 PENN ST. INT'L L. REV. 615, 619 (2007) (recognizing that Kant rejected Hobbes's consequentialist approach to determining right and wrong); Bruce Chapman, *Rational Choice and Categorical Reason*, 151 U. PA. L. REV. 1169, 1172 (2003) (noting Hobbes's rejection and Kant's acceptance of the rationalist tradition); Jamal Greene, *Beyond Lawrence: Metaprivacy and Punishment*, 115 YALE L.J. 1862, 1924–25 (2006) (recognizing that Kant and Hobbes "differed dramatically" as to their views regarding duties to others); Philip Soper, *The Moral Value of Law*, 84 MICH. L. REV. 63, 65 (1985) (noting that Kant's "moral theory is usually thought to be the polar opposite of the egoistic approach of Hobbes"); Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 59 n.29 (1992) (noting that while Kant and Hobbes shared similar views regarding their conception of the state of nature, they differed in their positions relative to morality and the preeminence of the social contract); Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535, 1545–47 (1996) (demonstrating how Hobbes and Kant held materially different positions regarding right and wrong, and good and evil).

27. See IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 54–55 (Lewis White Beck trans., Liberal Arts Press 1959) (1785).

28. See THOMAS HOBBS, LEVIATHAN: OR THE MATTER, FORME AND POWER OF A COMMONWEALTH, ECCLESIASTICALL AND CIVILL 86–87 (A.R. Waller ed., Cambridge Univ. Press 1904) (1651).

T[h]e RIGHT OF NATURE, which Writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which

subordinate to one's moral vocation and on the fundamental need to respect the intrinsic moral worth of every person.²⁹ Hobbesian "realism," conversely, argues that one's worth is derived exclusively from the individual's usefulness to another,³⁰ and that combatants have a natural right to do whatever is necessary for self-preservation.³¹

In isolation, neither position appears wholly satisfactory for explicating or systematizing a decision-making paradigm for resolving the rescue questions that are presented by the Afghan farmer dilemma. On the one hand, Kant's moral directive to respect dignity underlies the moral arguments against human rights abuses or malicious omissions that some may regard as a necessary corrective to Hobbes's apparent willingness to sacrifice human dignity to self-preservation.³² Kant's fundamental concern with the value of human dignity and respect for life aligns with our pre-reflective notions of moral conduct. It seems fair to presume that if combatants made their own welfare the sole criterion for determining whether to rescue civilians, the ravages of armed conflict would relegate civilians to a state of near extinction, an unacceptable result. For these reasons, Kant's emphasis on human dignity has strong appeal to the personal ethos of American culture and is widely regarded as the jurisprudential basis upon which the Convention Against Torture, the Universal Declaration of Human Rights, and the Geneva Conventions of 1949 were conceptualized and founded.³³

in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto.

Id. at 86.

29. See ROGER J. SULLIVAN, AN INTRODUCTION TO KANT'S ETHICS 116–17 (1994).

30. See HOBBS, *supra* note 28, at 55.

The Value, or WORTH of a man, is as of all other things, his Price; that is to say, so much as would be given for the use of his Power: and therefore is not absolute; but a thing dependant on the need and judgment of another. An able conductor of Souldiers, is of great Price in the time of War present, or imminent; but in Peace not so. A learned and uncorrupt Judge, is much Worth in time of Peace; but not so much in War. And as in other things, so in men, not the seller, but the buyer determines the Price. For let a man (as most men do,) rate themselves at the highest Value they can; yet their true Value is no more than it is esteemed by others.

31. See *id.* at 87. For purposes of the arguments presented, the author shall treat armed conflict in Afghanistan as a Hobbesian *state of nature* wherein the "life of man" is "solitary, poore, nasty, brutish, and short" and characterized by "continual feare, and danger of violent death." *Id.* at 84.

32. *Id.* at 217 (stating that "[i]f a man by the terrour of present death, be compelled to doe a fact against the Law, he is totally Excused; because no Law can oblige a man to abandon his own preservation"); *id.* at 86–87 (asserting that every man has a natural right to do whatever is necessary for his own preservation).

33. The UN General Assembly passed a declaration condemning torture as an "offense to human dignity." Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), art.

On the other hand, the intricacies and unforgiving consequences of U.S. counterinsurgency operations in Afghanistan render these missions impervious to certain moral imperatives that might otherwise have appeal during more conventional armed conflicts, such as those between states. The unalterable features of selfish impulses impel alignment with Hobbes's claim that the natural right to self-preservation should be the absolute measure of whether a U.S. combatant should undertake to rescue endangered Afghan civilians. Hobbes's prescription offers an alternative to Kant's stringent prohibition against using others as merely a means to an end, which critics might identify as Kant's failure to sufficiently account for the destructive costs to combatants of adhering to certain moral imperatives during the dire circumstances that are generated by the exigencies of combat operations in Afghanistan.³⁴

For these reasons, it is widely accepted that a U.S. commander's decision to rescue an endangered civilian depends predominantly upon his adherence to either a Kantian or a Hobbesian schema for resolving moral dilemmas.³⁵ This view implicitly rejects the possibility that the normative consequence of the Kantian paradigm, which em-

2, U.N. Doc. A/RES/3452 (Dec. 9, 1975); accord AN ENCYCLOPEDIA OF WAR AND ETHICS 260 (Donald A. Wells ed., 1996) [hereinafter ENCYCLOPEDIA]. The Preamble to the Universal Declaration of Human Rights recognizes the signatories' obligation to "reaffirm[] their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women." Universal Declaration of Human Rights, G.A. Res. 217(III)A, at 71-72, U.N. Doc. A/810 (Dec. 10, 1948); see also James Bohman, *War and Democracy*, in WAR, ESSAYS IN POLITICAL PHILOSOPHY 105, 106 (Larry May ed., 2008) [hereinafter WAR] (asserting that Kant's theory of international justice led to the formation of international law and peaceful relations between democratic states); ALEX J. BELLAMY, JUST WARS: FROM CICERO TO IRAQ 85 (2006) (noting Kant's contribution to international law).

34. Francis Lieber's theory that the best way to serve humanity during war is through the use of harsh and violent tactics implicitly rejects Kant's respect-for-human-dignity approach. See Gen. Orders No. 100: Instructions for the Government of Armies of the United States in the Field arts. 5, 17, 18, and 29 (Apr. 24, 1863), available at <http://fletcher.tufts.edu/multi/texts/historical/LIEBER-CODE.txt> (last visited Sept. 1, 2009) [hereinafter Lieber Code]; see also THEODOR MERON, WAR CRIMES LAW COMES OF AGE 132-33 (1998) (claiming that Francis Lieber's balancing of humanitarian concerns with military necessity did not favor humanity).

35. See William J. Fenrick, *Attacking the Enemy Civilian As a Punishable Offense*, 7 DUKE J. COMP. & INT'L L. 539, 546 (1997) (arguing that a "human rights lawyer and an experienced combat commander" will most likely harbor different opinions regarding harm to civilians and military objectives during war). In his work on the moral justification of torture during war, Michael Davis asserts without discussion that different moral theories seem to produce different results. See Michael Davis, *Justifying Torture As an Act of War*, in WAR, *supra* note 33, at 187, 199; see also Jeff McMahan, *Aggression and Punishment*, in WAR, *supra* note 33, at 67, 71 (asserting that Hobbes's views about war deviated radically from classical conceptions of just war theory); GRADY SCOTT DAVIS, WARCRAFT AND THE FRAGILITY OF VIRTUE: AN ESSAY IN ARISTOTELIAN ETHICS 3 (1992) (describing how those unwilling to pursue an "Hobbesian" approach to just war are drawn to a theory of justice that is rooted in the idea of a "common good" and codified in international law).

phasizes human dignity, can ever be coterminous with the Hobbesian paradigm, which encompasses an overriding value of self-preservation.

Part II of this Article examines the Hobbesian decision-making paradigm as it applies to rescue scenarios represented by the Afghan farmer dilemma.³⁶ In so doing, it discusses the interplay between the Hobbesian broad necessity claim and the laws of war, and it examines the law's capacity to shape the realist state's decision-making process. Part III discusses the significance of the moral distinction between killing a civilian and allowing a civilian to die.³⁷ It argues that there is no significant distinction between killing and allowing a civilian to die in certain rescue situations because there exists a moral symmetry between the two actors after the initiation of the risk that produced the fatal outcome. Part IV examines the Kantian decision-making process, relying principally on Kant's categorical imperatives of universalizability and respect for human dignity.³⁸ It demonstrates the propriety and viability of using Kant's "stronger ground of obligation" test as a framework for resolving the competing tension between the moral rule to rescue endangered civilians and the military necessity of protecting U.S. combatants from harm.

II. REALISM AND RESCUE DILEMMAS

While many legal scholars consider self-preservation a viable moral consideration, Hobbesian adherents, whom I shall refer to as *realists*, consider it the supreme criterion for discerning right from wrong.³⁹ The inferential connection between the realists' susceptibility to harm and their rational aspiration for security during armed conflict prompts them to exercise a broad right of necessity as a means of self-preservation. This brand of ethics not only justifies violence in the context of self-defense, but also validates aggressive or acquisitive actions when necessary for self-preservation.⁴⁰ The realist's rationale is that because a combatant cannot guarantee standing, military advantage, and survival during armed conflict, combatants are always privileged to do what is necessary to achieve or ensure self-preservation.⁴¹

36. See *infra* notes 39–83 and accompanying text.

37. See *infra* notes 84–120 and accompanying text.

38. See *infra* notes 121–190 and accompanying text.

39. See HOBBS, *supra* note 28, at 87, 224; HARRIS, *supra* note 1, at 76–77.

40. See HOBBS, *supra* note 28, at 87; NOEL MALCOLM, ASPECTS OF HOBBS 449 (2002); ROBERT SHAVER, RATIONAL EGOISM: A SELECTIVE AND CRITICAL HISTORY 18 (1998).

41. Hobbes writes potently about the unlimited desire persons have for power in his book *Leviathan*. See HOBBS, *supra* note 28, at 63.

A. *The United States and Realism*

Given the realists' propensity to derogate humanitarian obligations when necessary for self-preservation, one might challenge the empirical basis of any claim that the United States is a realist nation. Indeed, the United States has long considered itself a "nation of laws" with a long history of respect for human dignity.⁴² Such assertions are undeniably soothing to our national sensibilities and in line with the U.S. tradition of respecting the fundamental tenets of decency and prosperity for all people.⁴³ Nevertheless, the United States' emphasis on self-preservation as the criterion for deciding action can be traced to the writings and actions of some of the nation's most prominent and respected figures.⁴⁴ Indeed, President Thomas Jefferson famously

So that in the first place, I put for a generall inclination of all mankind, a perpetuall and restless desire of Power after power, that ceaseth onely in Death. And the cause of this, is not always that a man hopes for a more intensive delight, than he has already attained to; or that he cannot be content with a moderate power: but because he cannot assure the power and means to live well, which he hath present, without the acquisition of more. And from hence it is, that Kings, whose power is greatest, turn their endeavours to the assuring it at home by Lawes, or abroad by Wars: and when that is done, there succeedeth a new desire; in some, of Fame from new Conquest; in others, of ease and sensuall pleasure; in others, of admiration, or being flattered for excellence in some art, or other ability of the mind.

Id.

42. When speaking in observance of "United Nations International Day in Support of Victims of Torture" in June 2003, President George W. Bush declared that the United States is "committed to building a world where human rights are respected and protected by the rule of law." INSPECTOR GENERAL, CENTRAL INTELLIGENCE AGENCY, SPECIAL REVIEW 93 (May 7, 2004), available at http://luxmedia.vo.llnwd.net/o10/clients/aclu/IG_Report.pdf; see also Paul Koring, *Rumsfeld Cleared in Prison Abuse Scandal; Activists Decry Finding*, GLOBE & MAIL (Can.), Mar. 11, 2005, at A12 (reporting Senator Carl Levin's statement that the "failure of accountability of senior leaders sends the wrong signal to our troops and to the American people. It harms the United States'[] standing as a nation of laws.").

43. Interview with Lt. Col. Yvonne Bradley, USAF, Defense Counsel for Guantanamo Bay Detainee Binyam Mohamed (Nov. 21, 2008), available at <http://www.protectthehuman.com/videos/yvonne-bradley-on-torture> ("[W]e like to believe, as Americans, we're above [torture], we're fair, we're honest, we're giving people due process but, I have real grave concerns about how we're going about doing all this because . . . rules have been broken and laws have been violated.").

44. See Jones, *supra* note 22, at 289–90 (describing General Robert E. Lee's orders to kill captured U.S. Army soldiers for the purpose of self-preservation); see also *Korematsu v. United States*, 323 U.S. 214, 218–23 (1944) (upholding President Roosevelt's executive order that deprived people of Japanese ancestry of fundamental rights on grounds of "military necessity"). When faced with what he perceived to be a threat to national security after the Japanese Navy attacked Pearl Harbor, President Franklin D. Roosevelt substantially restricted the freedom of Japanese-American citizens. See *Korematsu*, 323 U.S. at 222. When the U.S. Supreme Court considered the lawfulness of President Roosevelt's necessity claim, it reasoned that although the Constitution did not grant him such powers, his actions were justified by the "direst" nature of the circumstances. *Id.* at 219–20. Although the *Korematsu* decision arguably stands as one of the U.S. Supreme Court's most disappointing opinions, the ruling underscores the Hobbesian influence on U.S. policy during times of war or perceived national threat.

declared that the boundaries of governmental authority are defined by the “laws of necessity, of self-preservation, [and] of saving our country when in danger . . . [To] lose our country by a scrupulous adherence to written law, would be to lose the law itself.”⁴⁵

Similarly, President Abraham Lincoln rhetorically asked, “[W]ould not the official oath be broken if the government should be overthrown, when it was believed that disregarding the single law would tend to preserve it?”⁴⁶ In justifying his extralegal conduct during the Civil War, President Lincoln wrote, “I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the Constitution, through the preservation of the nation.”⁴⁷ President Lincoln was not an apologist for his moral orientation. He insisted throughout his adult life that he did not believe in free choice, but rather in the preeminence of necessity.⁴⁸ He resisted the notion that law applied without consideration of the dire consequences at large and reasoned that law could be “suspended” in response to existential threats.⁴⁹ President Lincoln’s actions unequivocally illustrated a tendency toward truncation or abrogation of legal directives when necessity compelled derogation of the law.⁵⁰

Likewise, President George W. Bush fashioned his directives regarding the use of force on the grounds of necessity rather than on the strictures of the laws of war.⁵¹ Despite applicable legal prohibitions

45. DANIEL FARBER, *LINCOLN’S CONSTITUTION* 193 (2003) (quoting Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in *THOMAS JEFFERSON: WRITINGS* 1231, 1231 (Merrill D. Peterson ed., 1984)).

46. Abraham Lincoln, President of the United States of America, Message to Congress in Special Session (July 4, 1861), in *ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS* 601 (Roy P. Basler ed., 1946) [hereinafter *LINCOLN*].

47. Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), in *ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865*, at 585 (Don E. Fehrenbacher ed., 1989).

48. See ALLEN C. GUELZO, *REDEEMER PRESIDENT* 19 (1999); see also *LINCOLN*, *supra* note 46, at 9 (noting that Lincoln’s writings underscored his belief in the “doctrine of necessity”). As discussed *supra* note 44, the U.S. Supreme Court’s decision in *Korematsu v. United States* also illustrates Hobbesian moral limits in its consideration of the extent to which the state necessity claim could outweigh constitutional limitations.

49. See *LINCOLN*, *supra* note 46, at 701.

50. See GIORGIO AGAMBEN, *STATE OF EXCEPTION* 20–21 (Kevin Attell trans., 2005) (claiming that President Lincoln’s actions fall within Carl Schmitt’s theory of exceptionalism).

51. The Bush Administration justified its actions in public statements, memos, and court filings. See Jim Garamone, *Geneva Convention Applies to Taliban, Not Al Qaeda*, *DEFENSELINK NEWS*, Feb. 7, 2002, <http://www.defenselink.mil/news/newsarticle.aspx?id=43960>; Amanda Ripley, *Redefining Torture*, *TIME*, June 21, 2004, at 49–50; see also U.S. DEP’T OF THE ARMY, *ARMY REG. 15-6: FINAL REPORT: INVESTIGATION INTO FBI ALLEGATIONS OF DETAINEE ABUSE AT GUANTANAMO BAY, CUBA DETENTION FACILITY 4* (2005), available at <http://www.defenselink.mil/news/Jul2005/d20050714report.pdf> (stating that military necessity required the use of harsher or “special” interrogation techniques against detainees because those authorized under U.S. Army Field Manual 34-52 had proven unsuccessful). Secretary of Defense Donald Rumsfeld

against the use of certain measures, President George W. Bush implemented what may reasonably be described as legally tenuous and morally questionable strategies, such as subjecting detainees to harsh interrogation techniques,⁵² incarcerating suspected criminals without allowing them access to judicial review,⁵³ denying habeas corpus,⁵⁴ killing suspected unprivileged combatants,⁵⁵ holding detainees incommunicado,⁵⁶ and refusing to hold military officers criminally accountable for torture or murder of persons *hors de combat*.⁵⁷ Regardless of one's reaction to the merits of President George W. Bush's necessity claim, his actions, quite arguably, are not only consistent with a

approved a list of harsh interrogation techniques, which included hooding, stress positions, isolation, stripping, deprivation of light, removal of religious items, forced grooming, and the use of dogs. See David Stout & Scott Shane, *Cheney Defends Use of Harsh Interrogations*, N.Y. TIMES, Feb. 7, 2008; Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President 39–41 (Aug. 1, 2002); Memorandum from William J. Haynes II to the Secretary of Defense, Counter-Resistance Techniques (Nov. 27, 2002), <http://humanrights.law.monash.edu.au/usdocs/guantanamo/d20040622doc5.pdf> (recommending the approval of certain “counter-resistance techniques” to aid in the interrogation of detainees at Guantanamo Bay).

52. See Scott Shane, *C.I.A. Chief Doubts Tactic to Interrogate Is Still Legal*, N.Y. TIMES, Feb. 8, 2008, at A9; Scott Shane et al., *Secret U.S. Endorsement of Severe Interrogations: Justice Dept. Said to Back Harsh Tactics After Declaring Torture “Abhorrent”*, N.Y. TIMES, Oct. 4, 2007, at A1; Neil A. Lewis, *British Judges Criticize U.S. on the Prisoners Held at Guantanamo*, N.Y. TIMES, Nov. 9, 2002, at A13.

53. See *Concerns over Detainees*, N.Y. TIMES, Jan. 31, 2003, at A10 (noting that “[t]he European Parliament called on the United States to immediately clarify the status of detainees at the American naval base at Guantanamo Bay, Cuba”).

54. See Neil A. Lewis, *Detention Upheld in Combatant Case*, N.Y. TIMES, Jan. 9, 2003, at A1.

55. See, e.g., Jones, *supra* note 22, at 279–80 (examining CIA and U.S. Army Central Command use of armed Unmanned Aerial Vehicles (UAVs), known as Predators, to target and kill suspected terrorists); see also David Teather, *CIA Authorised to Target and Kill Al-Qaida Members*, GUARDIAN (London), Dec. 16, 2002, at 11 (reporting that President Bush authorized the CIA to “hunt down and kill” people the CIA determined were “enemy combatants”). Such conduct is extrajudicial. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949 6 U.S.T. 3114, 75 U.N.T.S. 32 [hereinafter Geneva Convention I].

Persons taking no active part in the hostilities, . . . shall in all circumstances be treated humanely To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture

Id. The Torture Victim Protection Act of 1991 provides that “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation” who subjects an individual to torture or extrajudicial killing shall be liable in civil action to that individual or the individual’s legal representative. 28 U.S.C. § 1350 (2003).

56. See Robert Knowles & Marc D. Falkoff, *Toward a Limited-Government Theory of Extraterritorial Detention*, 62 N.Y.U. ANN. SURV. AM. L. 637, 642–43 (2006) (describing the legal battle regarding detainees that have been kept incommunicado at U.S. detention centers in Afghanistan and Iraq, and in CIA “black sites” at undisclosed locations).

57. See *US Detainee Death Toll “Hits 108,”* BBC NEWS, Mar. 16, 2005, <http://news.bbc.co.uk/2/hi/americas/4355779.stm>.

Hobbesian theory of self-preservation, but also representative of specific Jeffersonian and Lincolnian manifestations of allegiance to claims of necessity.

B. *The Laws of War and Realism*

In recognition of the inherent right of a state to do what is necessary for self-preservation, states legitimized it as a principal feature of the laws of war. The right of necessity as memorialized in Article 8 of Geneva Conventions I, II, and III, and Article 9 of Geneva Convention IV requires states to “take account of the imperative necessities of security.”⁵⁸ In addition, the right of necessity inherent in the concept of self-preservation can be identified as the most dominant right enunciated under the Geneva Conventions. The following examples of phraseology indicate the degree to which the broad concept of necessity is incorporated in various Articles under the Geneva Convention: “in case of urgent necessity,”⁵⁹ “rendered absolutely necessary by military operations,”⁶⁰ “should military operations prevent,”⁶¹ “as military considerations allow,”⁶² “so far as operational requirements permit,”⁶³ “within the bounds set by military or security considerations,”⁶⁴ “where absolute military security so requires,”⁶⁵ “rendered necessary by imperative military necessities,”⁶⁶ “made necessary by imperative military requirements,”⁶⁷ “[s]ubject to the latter consideration and to the necessity,”⁶⁸ and “not justified by military necessity.”⁶⁹

58. Geneva Convention IV, *supra* note 21, art. 9. Article 8 of Geneva Conventions I and II further state that a protecting powers’ activities shall be restricted only by “exceptional and temporary measure when this is rendered necessary by imperative military necessities.” Geneva Convention I, *supra* note 55, art. 8; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 8, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]. The fact that Geneva Conventions III and IV do not contain such language appears to be an indication of intent to maintain the obligations under those treaties irrespective of certain military imperatives. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention IV, *supra* note 21.

59. Geneva Convention I, *supra* note 55, art. 34; Geneva Convention IV, *supra* note 21, art. 57.

60. Geneva Convention IV, *supra* note 21, art. 53.

61. *Id.* art. 111.

62. *Id.* art. 16.

63. Geneva Convention II, *supra* note 58, art. 27.

64. Geneva Convention IV, *supra* note 21, art. 30.

65. *Id.* art. 5.

66. Geneva Convention I, *supra* note 55, art. 8.

67. Geneva Convention IV, *supra* note 21, art. 55.

68. *Id.* art. 64.

69. *Id.* art. 147. The aforementioned discussion and phraseology appears in Samuel Vincent Jones, *Military Necessity and the Convenience of Waging War 5–6* (May 2005) (unpublished

Indeed, very few rights are as broad or dominant, within the sphere of international relations, as the right of *necessity*.

The degree to which states may rely on the broad right of necessity has prompted questions regarding the degree to which international relations are governed by genuine legal obligations⁷⁰ and subject to legitimate authority.⁷¹ Like every system of rules, the laws of war suffer from certain limitations: they can be imprecise, they can be a source of iniquity, and it can be difficult to discern what they require in certain circumstances.⁷² Because the international community lacks a reliable centralized judicial and enforcement regime that applies to all states, state violations often occur and often go unpunished.⁷³ Although states may plead compliance to avoid acquiring a reputation

paper on file with Scott Horton in satisfaction of academic course requirement at Columbia Law School and also on file with author). Portions of the phraseology later appeared in Scott Horton, *Kriegsraison or Military Necessity? The Bush Administration's Wilhelmine Attitude Towards the Conduct of War*, 30 *FORDHAM INT'L L.J.* 576, 590 n.77 (2007).

70. See Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 *U. CHI. L. REV.* 1113, 1116 (1999).

71. See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 234 (1979) ("The obligation to obey the law implies that the reason to do that which is required by law is the very fact that it is so required."); Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 *MINN. L. REV.* 1003, 1036–37 (2006); see also Samuel Vincent Jones, *Darfur, The Authority of Law, and Unilateral Humanitarian Intervention*, 39 *U. TOL. L. REV.* 97, 108–10 (applying a Razian concept of authority when discussing the degree to which the UN Charter lacks practical authority); Jones, *supra* note 22, at 294 (asserting that socio-contractarian aspects of armed conflict may supersede the mandates of international humanitarian law).

72. See KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 11–12 (1987) (discussing the imprecision of the law); Joseph Raz, *About Morality and the Nature of Law*, 48 *AM. J. JURIS.* 1, 1 n.1 (2003) (reasoning that the law can be a source of evil); Ralph Ruebner, *The Evolving Nature of the Crime of Genocide*, 38 *J. MARSHALL L. REV.* 1227, 1232 (2005) (arguing that the imprecise and vague nature of the Genocide Convention "runs counter to the universally recognized norms of legality and due process").

73. See Michael P. Scharf, *Getting Serious About an International Criminal Court*, 6 *PACE INT'L L. REV.* 103, 109 (1994) (quoting the acknowledgment by U.S. Special Advisor to the United Nations General Assembly Conrad Harper that "egregious violations of international law may go unpunished because of a lack of an effective national forum for prosecution"); see also BELLAMY, *supra* note 33, at 82 (asserting that Kant "insisted that international law could not constrain states because it had no binding power"); Jones, *supra* note 71, at 107–08 (describing the human rights atrocities in Rwanda, Sudan, Bosnia, and Iraq as the UN's "failure[s]"); Jeremy I. Levitt, *The Responsibility to Protect: A Beaver Without a Dam?*, 25 *MICH. J. INT'L L.* 153, 176 (2003) (reviewing *INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT* (2001)) (describing the UN Security Council as ineffective, given its inaction and dismal responses to global humanitarian crises and threats to world peace).

for willful disobedience,⁷⁴ genuine compliance is often neglected, particularly when a state is under perceived duress.⁷⁵

In the face of security threats, a state will typically weigh the consequences of complying with the laws of war against the pursuit of its national interest.⁷⁶ As threats to a state's security increase, the strength and authority of legal rules that attempt to constrain or restrict its freedom to respond decrease.⁷⁷ The law of necessity supplants legal rules, and self-preservation, rather than law, directs or justifies the reasoning by which the state acts.⁷⁸ As a result, self-pres-

74. See MALCOLM, *supra* note 40, at 449–50; Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 934–36 (2005). Despite widespread claims that high rates of civilian casualties result from armed conflicts in which the United States is engaged, most U.S. officials insist that American culture is peaceful and law-abiding. President George W. Bush remarked,

This nation fights reluctantly, because we know the cost and we dread the days of mourning that always come. We seek peace. We strive for peace. . . . [But] if war is forced upon us, we will fight with the full force and might of the United States military—and we will prevail.

Mark E. Brandon, *War and American Constitutional Order*, 56 VAND. L. REV. 1815, 1824 n.44 (2003).

75. See Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293, 310–11 n.74 (1991); William V. O'Brien, *The Meaning of "Military Necessity" in International Law*, in 1 WORLD POLITY: A YEARBOOK OF STUDIES IN INTERNATIONAL LAW AND ORGANIZATION 109, 112–13 (1957). As Michael Byers notes,

Whenever the US government wishes to act in a manner that is inconsistent with existing international law, its lawyers regularly and actively seek to change the law. They do so by provoking and steering changing patterns of state practice and *opinio juris*, with a view to incrementally modifying customary rules and accepted interpretations of treaties such as the UN Charter.

MICHAEL BYERS, *WAR LAW: UNDERSTANDING INTERNATIONAL LAW AND ARMED CONFLICT* 64 (2005).

76. See Susan L. Turley, *Keeping the Peace: Do the Laws of War Apply?*, 73 TEX. L. REV. 139, 167–68 (1994). A state may also act in violation of international law even when there is no legitimate threat to its sovereignty, so long as it convinces its citizens that there is one. Once the state's citizenry is convinced that national security is at stake, the citizenry will be more tolerant of the risks of unconstrained executive power and abuse. Such blind support for government action leads to misuse of the necessity plea for political gain and avoidance of the constitutional obligation to adhere to international law. See Geoffrey R. Stone, *War Fever*, 69 MO. L. REV. 1131, 1146 (2004); see also Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103, 107 (1951) (stating that fear and anxiety may facilitate public demands for assurances of security, "which may not be justified by necessity but which any popular government finds irresistible").

77. See ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 26–27 (2007).

78. The self-preservation claim

is in some cases asserted parallel to, or as a form of, a doctrine of necessity. There would seem analytically to be no distinction between the two and the discussions in works of international law certainly treat them as identical except in so far as necessity is a wider legal category and may, for example, appear in the context of the laws of war. In many cases, necessity thus appears merely as an aspect of the right of self-preservation. When "necessity" is defined, it appears to be applicable when action is necessary

ervation preempts or supersedes legal rules that would otherwise play an important role in the reasoning process that resolves conflict.⁷⁹

The widespread reliance on self-preservation claims and the extensive degree to which necessity qualifies many rights and duties enunciated under the laws of war have resulted in competing degrees of acceptance of the necessity doctrine. Some contend that necessity is an exceptional justifying cause that combatants use to “dismiss their duties” under the guise of exercising a broad and imprecise extraordinary right under law⁸⁰ or to perform acts that depart from well-estab-

for the security or safety of the state. As the state taking such action was regarded as the judge of the situation, necessity, like self-preservation, usually appears as the window dressing of *raison d'état*.

IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 42 (1963) (footnotes omitted).

79. For instance, Article 51 of the UN Charter does not specifically state that an armed attack against a state's citizens outside its territory constitutes an attack against a state of sufficient consequence to trigger a legal right of armed attack on grounds of self-defense. But in 1976, when pro-Palestinian hijackers seized control of an aircraft carrying 251 Israeli passengers and forced it to land in Entebbe, Uganda, Israel seized control of the aircraft through armed force without securing authorization from the Ugandan government or the UN Security Council. See BYERS, *supra* note 74, at 56–58. Similarly, even though the text of Article 51 authorizes the use of unilateral force only in cases of self-defense, the United States launched a missile attack against Iraq months after it discovered evidence suggesting that the Iraqi government had attempted to assassinate one of its former presidents, George H.W. Bush. Although the United States had time to present its evidence before the UN Security Council and to pursue sanctions or express authorization, it attacked Iraq well after government efforts eliminated the threat to its former president. See Robert F. Teplitz, *Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?*, 28 CORNELL INT'L L.J. 569, 601–07 (1995). The retaliatory and punitive action of the United States, while not explicitly authorized under Article 51 or international law, was, according to President Clinton, demanded by the law of necessity. See *id.* Amos Hershey notes that states have historically acted out of the “right to preserve the integrity and inviolability of [their] territory” and committed exceptional acts based on claims of necessity, though their actions involved infractions or unique interpretations of international law, for example, by Germany in defense of its invasion of Belgium in August 1914,

by England through the seizure of the Danish fleet in 1807, by Canada in the case of the *Caroline*, by Spain in the case of the *Virginius*, and by Japan in the invasion of Korea and Manchuria, the very objects of the conflict, at the outbreak of the Russo-Japanese War.

AMOS S. HERSHEY, *THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW AND ORGANIZATION* 232–33 & n.6 (rev. ed. 1927) (citations omitted). Some observers assert that the U.S. invasion of Iraq in March 2003 qualifies as a necessity claim because the removal of Iraqi President Saddam Hussein from office and the annihilation of Iraqi weapons of mass destruction were necessary to preserve the national interest of the United States. See Brett D. Schaefer, *U.N. Authorization for War with Iraq Is Unnecessary*, HERITAGE FOUNDATION, Sept. 5, 2002, <http://www.heritage.org/Research/MiddleEast/em831.cfm>; WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 218 (1998) (stating that a “government’s authority to engage in conduct that infringes civil libert[ies]” is greatest during armed conflict).

80. Sarah Eagen, *Preserving Cultural Property: Our Public Duty: A Look at How and Why We Must Create International Laws That Support International Action*, 13 PACE INT'L L. REV. 407, 426–27 (2001).

lished humanitarian norms.⁸¹ Others assert that necessity is not an extraordinary right,⁸² but rather a right to perform the normal, legitimate, unquestionably legal acts that are designated permissible by law.⁸³ Regardless of which perspective one aligns with, few would deny that during armed conflict there are a miscellany of solutions to moral dilemmas—particularly those involving Afghan civilians—the resolution of which are dependent upon subjective notions of necessity. As a result, reasonable minds will differ regarding the rectitude of rescue missions.

III. THE REALIST DECISION-MAKING PARADIGM

Pushed to its logical limit, realism places no limitation on what a combatant may do in the name of self-preservation or necessity. Utilitarian equations and humanitarian ideals matter only to the extent that their precepts do not compromise self-preservation.⁸⁴ The only standard by which an action can be judged is by its “conduciveness to self-preservation.”⁸⁵ Seen this way, the rectitude of a rescue depends on whether it enhances or exacerbates self-preservation.⁸⁶ If *A* does not give water to *B*, a civilian in dire need of it, *A* can never be judged to be wrong on the ground that *A* breached a duty because *A* owes no duty to *B*. *A*’s conduct is judged exclusively by whether *A* reasonably believed that allowing *B* to die enhanced *A*’s self-preservation. *A* has an unqualified right not to help *B*. *A* does not have that right if *A*’s refusal to help *B* detracts from *A*’s self-preservation.⁸⁷ *B*’s life has no independent or intrinsic value to *A*. Rather, the value of *B*’s life is externally determined by *B*’s use to *A*. Hence, *A* will act to save *B*’s life only when, and to the extent that, the rescue improves or does not detract from *A*’s self-preservation.

The framework by which the realist applies this standard is methodical and straightforward. First, the actor determines the consequences of a particular course of action or inaction and its alternatives as each bears on his self-preservation.⁸⁸ Second, the actor selects the course of action that produces consequences that are at least as good

81. Cf. O’Brien, *supra* note 74, at 138.

82. *Id.*

83. *Id.*

84. MALCOLM, *supra* note 40, at 32.

85. *Id.* at 34.

86. See HOBBS, *supra* note 28, at 224; see also Martin van Creveld, *Power in War*, 7 THEORETICAL INQ. L. 1, 4 (2006) (describing Hobbes’s theory that man has a right to kill, burn, or maim any and all that oppose or refuse to surrender to him).

87. See MALCOLM, *supra* note 40, at 34.

88. See HARRIS, *supra* note 1, at 79.

for his self preservation as the consequences of any available alternative.⁸⁹ If the course of action promotes maximum self-preservation, or detracts from self-preservation the least amount possible, it is obligatory.⁹⁰ If the course of action fails to promote self-preservation as much as some available alternative, or detracts from self-preservation more than another course of action, it is impermissible.⁹¹ “If each of several actions contributes to [self-preservation] at least as much as any other action[], or detracts from [self-preservation] as little as any other action[], all the actions are equally morally permissible.”⁹² The simplest formulation of the realist paradigm is that the course of action is morally acceptable if it produces consequences that are at least as good for self-preservation as the consequences of any alternative action.⁹³ After performing this analysis, if the actor identifies a course of action as enhancing self-preservation, he must pursue it.

When the realist decision-making paradigm is applied to the Afghan farmer dilemma, the hypothetical U.S. commander first determines how rescuing the Afghan farmer bears on U.S. self-preservation or national objectives. By virtue of the commander’s profession and allegiance, U.S. national security interests define his conception of self-preservation and shape his objectives. He satisfies his professional duty by accomplishing these objectives. He resolves the Afghan farmer dilemma by choosing the course of action that produces consequences that are most favorable to achieving those objectives or that least detract from the achievement of those objectives.⁹⁴ The commander might endanger U.S. troops by attempting to rescue the Afghan farmer or lose them to IED attacks if the United States loses the military advantage it has acquired. Refraining from rescuing the Afghan farmer, however, would result only in the death of one Afghan farmer. This would have a negligible impact on military operations because Khan is an unimportant, solitary individual whose death will go largely unnoticed and unreported. The consequences of allowing the farmer to die are thus more favorable to the United States and the commander’s self-preservation. The realist paradigm obligates the commander to allow the Afghan farmer to die.⁹⁵

89. *See id.*

90. *See id.*

91. *See id.*

92. *Id.*

93. *See id.* at 77.

94. *See id.* at 79.

95. *See id.* at 94.

A. *The Moral Distinction Between Killing and Allowing Civilians to Die*

Some would argue that because the hypothetical U.S. commander and his command merely allowed the Afghan farmer to die rather than killed him, the U.S. military commander avoids any moral culpability associated with the farmer's death at the hands of the Taliban.⁹⁶ The rationale is that the commander is shielded from liability because neither the commander nor his subordinates were agents of the fatal violence that befell the Afghan farmer.⁹⁷ That is, U.S. combatants did not aid, abet, or initiate the fatal sequence leading to his death.⁹⁸ Regardless of whether a coroner would find the cause of death to be by bullet wound or explosion, U.S. combatants did not participate in pulling the trigger or detonating the explosive that was used in the fatal sequence. Therefore, according to the claim, U.S. combatants have not committed a wrong.

This assertion, which Joel Feinberg describes as the "moral significance claim,"⁹⁹ posits that the difference between causing a death and merely allowing it to happen is significant enough to limit the recognition of a duty to rescue only to cases in which the combatant directly causes the fatal harm.¹⁰⁰ Indeed, if this moral distinction between killing and allowing civilians to die is credible, then it certainly justifies current applications of the laws of war, which assign moral culpability for killing to only those cases in which the combatant triggered the fatal harm facing the civilian, exempting those who merely allowed the risk of fatal harm to continue. If the moral significance claim cannot be sustained, however, it seems appropriate to conclude that a combatant should have a duty to rescue an endangered civilian from fatal harm.

Philippa Foot offers a potent illustration of the apparent moral distinction between killing and allowing a person to die. Assume that a group of soldiers is hurrying to save five civilians, all of whom are in imminent danger of drowning without a moment to spare.¹⁰¹ While en route to save the civilians, the soldiers encounter a person who is trapped under a log—whose circumstance was due to no act or omis-

96. *See id.*

97. *See* PHILIPPA FOOT, *MORAL DILEMMAS: AND OTHER TOPICS IN MORAL PHILOSOPHY* 80 (2002).

98. *See id.*

99. 1 JOEL FEINBERG, *HARM TO OTHERS: THE MORAL LIMITS OF CRIMINAL LAW* 166 (1984).

100. *See id.*

101. The following paragraph is largely drawn from an example provided by FOOT, *supra* note 97, at 81.

sion of the soldiers—and who is in need of eventual rescue from rising water.¹⁰² Regrettably, the soldiers cannot save this person and save the five civilians. Most observers would claim that allowing the trapped person to die is morally permissible. What if, however, to get to the five civilians, the soldiers must drive over and kill the trapped person who is otherwise in no immediate danger of dying? Then our intuitions become more difficult. Although the five people will drown if the soldiers do not drive over the trapped person, Foot argues, I believe correctly, that most people would find it morally impermissible, or at least highly problematic, to drive over the trapped person.¹⁰³ This is true even though these same people were reasonably comfortable with the first scenario in which five lives are saved by leaving one to die.¹⁰⁴

The divergences in reactions to the two variations of this scenario do not turn on utilitarian calculations that might determine the outcome in many other instances. Instead, one's reactions turn on the moral distinction between the actor's initiating the fatal sequence (killing the person) and the actor's allowing the fatal sequence to continue (allowing the person to die).¹⁰⁵ The scenario demonstrates, as Feinberg notes, that in some cases, "the effort or risk required to prevent the harm is great enough to justify [the would-be rescuer's] failure to prevent that harm yet not great enough to justify causing similar harm in similar circumstances."¹⁰⁶ Put another way, risk to a combatant's own survival may be enough to justify his not giving a civilian his last ounce of water, but it would not be enough to justify his killing the civilian to obtain more water.¹⁰⁷ Undoubtedly, the moral permissibility and impermissibility of these two actions illuminates a profound distinction between causing harm and allowing harm to occur.

B. The Law of Double Effect

This moral distinction between deliberately bringing about the death of an innocent person and merely permitting it to occur bears the imprint of allegiance to a Catholic moral theory known as the "law

102. *See id.*

103. *Id.*

104. *See id.*

105. *See id.*

106. FEINBERG, *supra* note 99, at 167 (quoting Heidi Malm, Good Samaritan Laws and the Concept of Personal Sovereignty 11 (2003) (typescript University of Arizona)) (internal quotation marks omitted).

107. *See id.*

of double effect.”¹⁰⁸ Advanced by Saint Thomas Aquinas in his influential work, *Summa Theologica*, the theory posits that “moral acts take their species according to what is intended, and not according to what is beside the intention, since this is accidental.”¹⁰⁹ This moral principle argues that a certain grave action, albeit horrific, can be morally permissible or required if it is the side effect of a legitimate, morally permissible goal.¹¹⁰ Thomas Hill, Jr., a leading Kantian scholar, argues that Immanuel Kant endorsed the law of double effect when Kant reasoned that if a person’s refusal to lie to a murderer causally contributes to the death of another, the death is still “imputed entirely to the killer” and not to the person who refused to lie because the truthful person lacks the requisite intent to harm.¹¹¹

As Thomas Nagel and Michael Walzer have noted, the law of double effect holds a significant place in just war theory because it makes a certain degree of incidental harm to civilians morally permissible. Essentially, it distinguishes between what a combatant willfully does to civilians and what happens to civilians because of the actions or inactions of a combatant.¹¹² For instance, assume that an American pilot uses a bomb to destroy a bridge in order to stop two hundred enemy soldiers from killing eighty trapped American soldiers, and in

108. THOMAS NAGEL, *MORTAL QUESTIONS* 60 (1979).

109. 2 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. II-II, question 64, art. 7, at 1471 (Fathers of the English Dominican Province trans., Benzinger Bros. 1947). In his discussion of the law of double effect, Michael Walzer enunciates the four criteria encompassing the law of double effect within the just war context:

- (1) The act is good in itself or at least indifferent, which means, for our purposes, that it is a legitimate act of war.
- (2) The direct effect is morally acceptable—the destruction of military supplies, for example, or the killing of enemy soldiers.
- (3) The intention of the actor is good, that is, he aims only at the acceptable effect; the evil effect is not one of his ends, nor is it a means to his ends.
- (4) The good effect is sufficiently good to compensate for allowing the evil effect . . .

WALZER, *supra* note 2, at 153.

110. See Russell Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 901–02 (2002). Christopher explains,

[A]n act which has two effects or consequences, one bad and one good, is impermissible if the bad consequence is intended; but the act is permissible if the good consequence is intended and the bad consequence is neither intended as an end nor as a means to one’s end, even if the bad consequence is known or foreseen.

Id.

111. Thomas E. Hill, Jr., *Making Exceptions Without Abandoning the Principle: Or How a Kantian Might Think About Terrorism*, in *VIOLENCE, TERRORISM, AND JUSTICE* 221 (R.G. Frey & Christopher W. Morris eds., 1991); see also Brian Orend, *Kant on International Law and Armed Conflict*, 11 CAN. J.L. & JURIS. 329, 372–73 (1998) (explaining the similarity between Kantian views regarding the apportionment of blame and duty, and the doctrine of double effect).

112. See NAGEL, *supra* note 108, at 60–61; WALZER, *supra* note 2, at 152–53.

doing so, the pilot knowingly kills two civilian bridge repair workers who could not have been saved without compromising the military objective. Although the pilot initiated the fatal sequence (dropping the bomb) that caused the civilian deaths, he is considered blameless because he held a single intention—to kill enemy combatants—and lacked any malign intent to kill the civilians.¹¹³ In fact, the pilot would rather have not killed the civilians. One regards the civilian deaths as an unintentional side effect of the direct attack that was aimed at protecting the eighty trapped soldiers.¹¹⁴

The fact that combatants may harbor malign intentions when they kill civilians arguably justifies the strong emphasis on intent when apportioning guilt. If good intentions may be a sufficient condition for absolving a combatant of culpability when the combatant knowingly triggers a fatal sequence, then malign intentions may be a sufficient condition for ascribing culpability when the combatant did not trigger the fatal sequence yet knowingly had the capacity and reasonable opportunity to interrupt it. In cases in which combatants appear to share exactly the same malign intentions, which manifest themselves in the same morally relevant fashion, any distinction between killing and allowing death arguably becomes insignificant.¹¹⁵ For instance, suppose that a soldier removes the lid of a manhole with the malign intent to kill a blind civilian who routinely walks across the manhole. The soldier hides six feet away and watches the blind civilian fall to his death. The soldier is clearly liable for willfully killing the blind civilian, and he is assigned all moral culpability associated with killing the innocent person. Let us posit a second scenario in which a soldier observes a blind civilian walking down the path who is in danger of falling to his death because a manhole is uncovered. The soldier, standing six feet away, can easily prevent the blind civilian from falling to his death by simply warning him of the manhole or physically blocking his path. By doing so, the soldier would not endanger himself or compromise

113. See Anthony J. Colangelo, *The New Universal Jurisdiction: In Absentia Signaling over Clearly Defined Crimes*, 36 GEO. J. INT'L L. 537, 589–90 (2005) (explaining how NATO was effectively absolved of all responsibility for civilian deaths resulting from an attack on a bridge in which the NATO pilot blew up a civilian passenger train); see also W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 171 (1990) (citing Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977 [hereinafter Protocol I]) (noting that Article 57(2)(a)(iii) of Protocol I requires that decision makers “refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”).

114. The outcome may be different if the pilot killed eighty civilians to save two soldiers.

115. See FEINBERG, *supra* note 99, at 166–67.

his mission. Nonetheless, the callous soldier, amused by the developments, remains silent and motionless, and he watches the blind civilian fall to his death. Although the soldier in the second scenario did not remove the manhole lid, it is hard to deny that there is moral symmetry between the soldier in the first scenario and the soldier in the second scenario.¹¹⁶

As Ernest Weinrib notes, intuitive understandings that lead one to conclude that the soldier in the first instance caused the death, whereas the soldier in the second instance merely allowed the death to occur, are “problematic.”¹¹⁷ As applied to the two scenarios, the risk-producing event is morally—and perhaps legally—arbitrary when one considers the fatal sequence. What separates the two soldiers is that the soldier in the first scenario (1) initiated the risk-producing fatal sequence by removing the manhole cover (“Act 1”) and (2) allowed the fatal sequence to cause death by allowing the civilian to fall in the manhole (“Act 2”). The soldier in the second scenario did not satisfy Act 1, but he did satisfy Act 2. The course of events prior to the starting point of the risk-producing fatal sequence is of critical importance because of the emphasis placed on Act 1—but should it be?¹¹⁸ Arguably, Act 2 is of greatest importance because Act 1, without Act 2, does not result in death; whereas Act 2, without Act 1, results in death, as the scenario illustrates. In the second instance, there was no interaction between the soldier and the blind civilian. When the soldier encountered the blind civilian, the risk-producing fatal sequence, which exposed the blind civilian to grave danger, had already begun. In the first instance, by contrast, the soldier triggered the risk-producing fatal sequence.¹¹⁹ Despite this difference, each soldier committed an identical omission in that they both failed to interrupt the fatal sequence. Because each soldier could have, with minimal effort, stopped the fatal act from occurring, there is moral symmetry between the soldiers because each harbored the same malign intent *after* the risk was produced. In each instance, the blind civilian would not have died “but for” the malign intent of each soldier.¹²⁰

Hence, the blind civilian’s death is a direct result of the identical omissions of each soldier. With respect to Act 1, the moral distinction between the two soldiers is certainly significant enough to apportion culpability to one soldier but not the other. With respect to Act 2, the

116. *See id.* at 167.

117. Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 *YALE L.J.* 247, 253 (1980).

118. *See id.*

119. *See id.* at 253–54.

120. *See id.* at 253.

moral symmetry between the two soldiers creates identical moral culpability. Of course, a soldier who satisfies both Act 1 and Act 2 is more culpable than a soldier who satisfies Act 2 only. Likewise, a soldier who satisfies Act 1, but changes his mind and does not satisfy Act 2 is less morally culpable than a soldier who satisfies Act 1 and Act 2 or only Act 2 because no death results from the commission of Act 1 alone. The overall by-product of this bifurcated, logical reasoning is a distinct duty to act in both instances and a system that assigns a higher culpability for violations of both Act 1 and Act 2, as opposed to only those combatants who violate only Act 1 or only Act 2.

This reasoning underscores a conceptual flaw in any underlying moral justification behind the realist approach in that it relies heavily on the moral significance claim. As has been shown, the distinction between killing and allowing civilians to die is, in some instances, not significant enough to warrant attribution of culpability for killing civilians while withholding culpability for allowing civilians to die. Therefore, it cannot be established with any degree of certainty that the realist avoids the culpability associated with the willful killing of civilians when the combatant consciously chooses to allow a fatal sequence to continue rather than rescue the civilian from the risk. Therefore, the realist framework for resolving rescue questions is morally precarious because it subjects the combatant to culpability if he does not act to threaten self-preservation. Further, to the extent moral legitimacy is a fundamental necessity for the successful prosecution of U.S. counterinsurgency operations in Afghanistan, the importance of the moral distinction between killing and allowing a civilian to die becomes negligible under the realist paradigm in situations in which the civilian's death or harm would increase Taliban appeal and capacity to influence support.

IV. THE KANTIAN MORAL LAWS AND RESCUE DILEMMAS

I have described and offered some critique of the realist decision-making paradigm for resolving rescue dilemmas. There are, however, a number of alternative grounds upon which to resolve rescue dilemmas,¹²¹ of which the strongest and most influential is that offered by Immanuel Kant. Kant claims that people have a duty to respect one another's dignity that is categorical and independent of any circum-

121. See, e.g., Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 850–56 (describing various presidential authorizations and plans used to combat terrorism and achieve military objectives under the Bush Administration and criticizing many as violations of international and constitutional law).

stance, including armed conflict.¹²² The priority he assigns to respect for human dignity was shaped by a perception that combatants have a tendency to be brutal, are always self-interested,¹²³ and are naturally inclined to promote the happiness of themselves and their group.¹²⁴ Their benevolent impulses are so weak, and selfish urges so strong, that unless combatants recognize a duty to respect the dignity of others outside their group, they will rarely do so.¹²⁵ The events at Haditha,¹²⁶ Yusufiyah,¹²⁷ Ishaqui,¹²⁸ and Hamdaniya¹²⁹ demonstrate,

122. As I will discuss, Kant imposed upon all a duty to avoid treating ourselves and others as merely a means to an end. See *infra* notes 168–194.

123. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 123 (Mary Gregor trans., 1991).

124. See THOMAS E. HILL JR., *HUMAN WELFARE AND MORAL WORTH: KANTIAN PERSPECTIVES* 186 (2002).

125. Cf. KANT, *supra* note 27, at 18 (stating “without any view to duty all men have the strongest and deepest inclination to happiness”); HILL, *supra* note 124, at 186–87 (asserting that Kant’s view was that given the natural inclination to promote our own happiness, people must recognize a duty to promote the happiness of others). Kant is seen as postulating that while we have a right to tend to our own happiness and welfare there is only an indirect duty to do so. For Kant, one cannot have an obligation to do what one will inevitably and spontaneously do. Rather than tending to one’s happiness, Kant is viewed as claiming that the duty lies in striving for good moral character. See SULLIVAN, *supra* note 29, at 76.

126. On November 19, 2005, a squad of U.S. Marines reportedly went on a violent rampage after a roadside bomb killed one of its members and injured two others. See Tim McGirk, *Collateral Damage or Civilian Massacre in Haditha?*, TIME, Mar. 27, 2006. The squad’s five-hour-long “series of raids” left twenty-three Iraqis dead. *Id.* at 36; GLOBAL POLICY FORUM, *WAR AND OCCUPATION IN IRAQ* ch. 7, at 5 (2007), available at <http://www.globalpolicy.org/iraq/humanitarian-issues-in-iraq/atrocities-and-criminal-homicides.html> [hereinafter GPF REPORT]. Five unarmed youths were initially killed by the squad leader at the site of the roadside bombing. GPF REPORT, *supra*, ch. 7, at 5. The Marine squad proceeded to raid a series of homes, firing freely and indiscriminately, killing fifteen unarmed civilians, including women, children, “and an elderly man in a wheelchair.” *Id.* Local accounts told that one man was “left to bleed to death as marines ignored his pleas for help.” Raymond Whitaker, *US Marines on Trial for Iraq Atrocity*, INDEPENDENT (UK), Oct. 21, 2007, available at <http://www.independent.co.uk/news/world/middle-east/us-marines-on-trial-for-iraq-atrocity-397457.html>. The Marines claimed that they were justified by military necessity. See GPF REPORT, *supra*, ch. 7, at 5 (reporting that the Marines claimed they were being attacked by insurgents); McGirk, *supra*, at 36 (stating that naval detectives faced the question of whether the killing of fifteen noncombatants was “an act of legitimate self-defense or negligent homicide”). A total of twenty-four Iraqis died in the incident. See GPF REPORT, *supra*, ch. 7, at 5; McGirk, *supra*, at 36 (reporting that several men were later classified by the military as enemy fighters, and that two AK-47s were discovered). But see Sean Alfano, *General Orders Ethics Training in Iraq*, CBS NEWS, June 1, 2006, <http://www.cbsnews.com/stories/2006/06/01/iraq/main1673122.shtml> (repeating allegations that all “two dozen” of the civilians killed in Haditha were unarmed). The incident gained worldwide attention and became the focus of a motion picture. See *BATTLE FOR HADITHA* (Channel Four Films 2007).

127. On March 12, 2006, a group of U.S. soldiers left their posts at a checkpoint, dressed themselves in black long underwear and entered the home of an Iraqi family. See Jim Frederick, *Civilian Trial Begins for Ex-Iraq Soldier*, TIME, Apr. 29, 2009, <http://www.time.com/time/nation/article/0,8599,1894375,00.html>. As one soldier guarded the door, three others raped and murdered a fourteen-year-old Iraqi girl, killed her six-year-old sister and both parents, then burned their bodies in an attempt to disguise the killings. *Id.*; see also Julian Borger, *US Soldier Admits*

yet again, the truism that once combatants are able to deny the humanity of civilians, they are prone to commit or allow the most barbaric harm to befall them.¹³⁰

It logically follows that unless combatants respect the intrinsic worth of civilians, the moral value of civilians will deteriorate into mere legal value or less, and thus become subject to derogation due to the soldiers' urges of self-preservation.¹³¹ Without some degree of confidence in and respect for the moral character of all civilians, armed conflicts can degenerate into campaigns of extermination.¹³² In light of this potentiality, Kant reasoned that selfish urges must be controlled.¹³³ According to Kant, the solution to controlling selfish urges

Killing Family After Raping Girl, GUARDIAN (UK), Nov. 16, 2006, available at <http://www.guardian.co.uk/world/2006/nov/16/usa.iraq1>.

128. In March 2006, U.S. Marine air and ground forces attacked a farmhouse, located approximately eight miles north of Balad, after intelligence reports indicated that an insurgent was inside. See GPF REPORT, *supra* note 126, ch. 7, at 5. Iraqi police reported that U.S. forces entered the home, gathered the entire family in one room, and killed eleven people—"five children, four women, and two men," including a seventy-five-year old and a child of six months. *Id.*

129. On April 26, 2006, a squad consisting of seven U.S. Marines and a U.S. Navy sailor reportedly "dragged an innocent, unarmed and disabled Iraqi [man] . . . from his home, bound his hands and feet, and repeatedly shot him at point blank range." GPF REPORT, *supra* note 126, ch. 7, at 6 (citing Josh White & Sonya Geis, *8 Troops Charged in Death of Iraqi*, WASH. POST, June 22, 2006, at A1). The squad reportedly had been "lying in ambush for someone else" and when their intended target did not appear, they decided to attack the disabled man and then disguised him as an insurgent. *Id.* (citing Carolyn Marshall, *Corpsman Sentenced to Prison in Case of Iraqi Civilian Who Was Killed*, N.Y. TIMES, Oct. 7, 2006, at A11).

130. See NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 14 (1999). This phenomenon is illustrated by the following example: during the American Civil War, Nathan Bedford Forrest, a cavalry leader for the Confederate States of America, "could not, and did not accept [African-Americans] as human beings." James D. Lockett, *The Lynching Massacre of Black and White Soldiers at Fort Pillow, Tennessee, April 12, 1864*, 22 W.J. BLACK STUDIES 84, 87 (1998). Rather, he saw African-Americans as "subhumans consigned to slavery for life." *Id.* He considered African-American Union soldiers an unequivocal challenge and intolerable threat to slavery. *Id.* at 84-85. As a result of his hatred of African-Americans, he directed "one of the most horrible deeds in the history of warfare—the massacre at Fort Pillow, April 12, 1864." *Id.* at 85. Through the illegal use of the white "flag of truce" under the guise of good faith negotiations, Forrest took control of Fort Pillow. *Id.* at 90. During the siege, Confederate fighters employed a "no quarter" policy toward African-American Union soldiers, burning, lynching, and burying them alive. *Id.* at 89-90. The "no quarter" policy is recognized as "the basis of the long and sad history of the lynching" of African-Americans in the United States. *Id.* at 87.

131. See Dallas Willard, *Moral Rights, Moral Responsibility, and the Contemporary Failure of Moral Knowledge*, in *GUANTANAMO BAY AND THE JUDICIAL-MORAL TREATMENT OF THE OTHER* 161 (Clark Butler ed., 2007); Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President 13 (Aug. 1, 2002) (using a novel legal argument to authorize the torture of suspected terrorists in cases where the interrogation technique would not result in "death, organ failure or permanent damage").

132. See ENCYCLOPEDIA, *supra* note 33, at 260.

133. See KANT, *supra* note 123, at 124; ENCYCLOPEDIA, *supra* note 33, at 261.

lies in a combatant's ability to engage in practical reasoning and to perfect his capacity for good will.¹³⁴

A. *The Kantian Categorical Imperatives*

Kant postulated that people have the capacity to guide their actions in a moral direction.¹³⁵ He imposed a duty upon every person to guide his or her conduct by creating maxims.¹³⁶ Kant used what he termed "categorical imperatives" as guides to the reason by which one could test these maxims.¹³⁷ In advancing three formulations of his categorical imperatives, he reasoned that a person must (1) measure a maxim by its universalizability;¹³⁸ (2) respect all human beings and avoid treating oneself or others as merely a means to an end;¹³⁹ and (3) perform these imperatives out of a sense of duty rather than selfish inclination.¹⁴⁰ For the purposes of this Article, the first two are of particular relevance.

1. *The Universalizability Principle*

The first step in Kant's process requires one to act in such a way that one would be willing to have one's actions become universal.¹⁴¹ That is, the moral permissibility of a person's behavior depends upon whether the person can accept his maxim as a universal principle.¹⁴² If a person's contemplated conduct is consistent with this principle, then it may be morally acceptable.¹⁴³ If, however, a person cannot reasonably accept the maxim as a universal principle, then the conduct is morally unacceptable.¹⁴⁴ Kant believed that, through this reasoning, a person could discover or assume certain general principles and then deduce a system of morality from them.¹⁴⁵ To illustrate the ap-

134. See KANT, *supra* note 27, at 47-48, 54-55.

135. See *id.* at 54-55; SULLIVAN, *supra* note 29, at 34.

136. See KANT, *supra* note 27, at 39; SULLIVAN, *supra* note 29, at 36-37, 75-76.

137. KANT, *supra* note 27, at 39, 43.

138. See IMMANUEL KANT, KANT'S POLITICAL WRITINGS 18-19 (Hans Reiss ed., H.B. Nisbet trans., 1970).

139. See *id.*

140. See *id.*; see also George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533, 537 (1987) (claiming that the "centerpiece of Kant's thinking about morality is the notion of acting out of duty alone").

141. See KANT, *supra* note 138, at 39; HUNTER MEAD, TYPES AND PROBLEMS OF PHILOSOPHY: AN INTRODUCTION 306-07 (1946); EDWIN W. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 380 (1953).

142. See KANT, *supra* note 27, at 39-40.

143. MEAD, *supra* note 141, at 307 (claiming that, in Kant's view, "whatever act we would be willing to universalize we may presume to be good").

144. See KANT, *supra* note 123, at 49; see also MEAD, *supra* note 141, at 306-07.

145. See MEAD, *supra* note 141, at 306.

plication of this reasoning, Kant offered the following example. A person facing financial difficulties may consider whether it is moral for him to make a false promise to repay money in order to obtain a loan that he believes will enable him to pay bills.¹⁴⁶ Lying is the proposed conduct. Thus, the proposed universal maxim is that a person is privileged to lie whenever lying would be helpful. Because a rational being could not conceive of such a maxim as a universal principle for prudential reasons, the maxim imposed by the categorical imperative for this moral problem is this: Under no circumstances is it permissible to lie.¹⁴⁷

Kant considered all lying immoral, regardless of the circumstances, because the liar excuses himself from the expected norm of truth-telling.¹⁴⁸ The liar makes a self-exception because without a communal expectation that people tell the truth, the liar's chances of being believed and gaining advantage are substantially reduced.¹⁴⁹ As a rational agent, the liar knows that if his behavior became the universal rule, the credibility of all promises would be undermined, and it would compromise the social order or institutions relying on truth-telling.¹⁵⁰ Thus, the liar would not be willing to have his own conduct become the universal rule. Still, he excuses himself from the duties expected of everyone else, thereby prioritizing his own value over that of others and treating the recipient of the lie as merely a means to the end of satisfying the liar's self-interest.¹⁵¹ For Kant, the liar's conduct is unethical because it involves a violation of the means-end and universal rule principles.¹⁵²

Just war theorists have heralded Kant's universalizability principle as a "useful benchmark" for formulating legitimate behavior.¹⁵³ Michael Walzer, when considering the extent to which combatants can

146. See KANT, *supra* note 27, at 40.

147. See PATTERSON, *supra* note 141, at 380–81.

148. See MEAD, *supra* note 141, at 307.

149. See KANT, *supra* note 123, at 226.

150. See SULLIVAN, *supra* note 29, at 58.

151. Cf. KANT, *supra* note 123, at 226; MEAD, *supra* note 141, at 308 (describing the way in which a liar violates the universalizability principle in making an exception for himself from the general rule of truth-telling).

152. Cf. KANT, *supra* note 123, at 226; MEAD, *supra* note 141, at 306–08.

153. See BELLAMY, *supra* note 33, at 85–86. While some commentators have likened Kant's universalization principle to the "Golden Rule," others have recognized the Kantian efforts to distinguish the universalization principle from the Golden Rule. See Bailey Kuklin, *The Morality of Evolutionarily Self-Interested Rescues*, 40 ARIZ. ST. L.J. 453, 498 (2008) (stating that Kant's universalization principle has been likened to the Golden Rule); Lionel K. McPherson, *Excessive Force in War: A "Golden Rule" Test*, 7 THEORETICAL INQUIRIES L. 81, 91 (2006) (asserting that because the Golden Rule is ill respected in normative ethics, Kantians can be quick to distinguish the categorical imperative from the Golden Rule).

expose civilians of other countries to risk, asserts that combatants should not expose foreign civilians to any level of risk that they would find unacceptable for civilians of their own country.¹⁵⁴ Walzer's claim is merely a contextualized application of Kant's universalizability principle. It argues that combatants should not employ strategies that harm the civilian populace if they would not accept these strategies as universal maxims for all combatants to employ against themselves or others during armed conflicts. Although universalizability could be celebrated as a principle of reciprocity that requires all maxims of conduct to be capable of universal application, there are some difficulties inherent in applying Kant's universalizability principle in the context of armed conflict.¹⁵⁵

As Richard Rorty notes, one's loyalty to a specific group greatly influences one's moral predilections or ability to derive a universal principle.¹⁵⁶ This is particularly true during armed conflict when beliefs in racial primacy may dictate the tactics that one group employs to the grave detriment of another group. Some commentators have aptly cited Nazi Germany's "Final Solution" as an object lesson of how racial bigotry might engender heinous conduct and distort proper application of the universalizability principle;¹⁵⁷ however, one can draw an example, albeit of significantly lesser magnitude, from American military history as well.¹⁵⁸

154. See Michael Walzer & Avishai Margalit, *Israel: Civilians & Combatants*, N.Y. REV. BOOKS, May 14, 2009, at 22.

155. See HILL, *supra* note 111, at 201 ("I have little confidence that Kant's famous 'universal law' formulations of the Categorical Imperative can function adequately as guides to moral decision making."). *But see* McPherson, *supra* note 153, at 91.

The difficulty in using [Kant's] universalization test is that trying to determine what counts as excessive force in war resists credible moral generalization in hard cases.

There are too many factors regarding the comparative value of persons, things and goals, and we have no clear idea how to weigh them.

Id.

156. See RORTY, *supra* note 16, at 47 (asserting that Kant's approach is "always in danger of being contaminated by irrational feelings that introduce arbitrary discriminations among persons").

157. See Kuklin, *supra* note 153, at 511.

158. For example, although the Confederacy wanted to enslave rather than exterminate African-Americans, the underlying bigotry behind the Confederacy's refusal to acknowledge African-Americans as human beings who have intrinsic value rather than as things nearly mirrors the position of Nazi Germany's National Socialist Doctrine. See François de Menthon, *The Concept of War Crimes*, in *THE NUREMBERG WAR CRIMES TRIAL 1945-46: A DOCUMENTARY HISTORY* 150 (1997).

The man who does not belong to the superior [German] race counts for nothing. Human life and even less liberty, personality, the dignity of man, have no importance when an adversary of the German community is involved. It is truly "the return to barbarism" with all its consequences. . . . National Socialism goes to the length of assuming the right, either to exterminate totally races judged hostile or decadent, or to

During the American Civil War, for instance, the reality that African-American Union soldiers were fighting against the Confederacy represented an intolerable condition for Confederate fighters.¹⁵⁹ The Confederacy “could not and did not accept” African-Americans as “human beings” or as capable of exhibiting the type of courage or behavior required of a soldier.¹⁶⁰ They firmly believed that African-Americans should be either enslaved or killed, and certainly never accorded the honor and trust associated with being a soldier.¹⁶¹ For this reason, Confederate fighters tortured, enslaved, or killed African-American soldiers and any African-American civilians accompanying them. Confederates engaged in this practice whenever they encountered African-Americans, even if the African-Americans surrendered.¹⁶² Confederates also punished or condemned many caucasian Americans who sympathized with African-Americans.¹⁶³ According to Confederate fighters, slavery and obedience of African-Americans should have been the universal principle to which all adhered. If consistent, the Confederate fighter would claim that even if he had been born an African-American, he would not have any rights that a caucasian American would be obligated to respect.¹⁶⁴

subjugate or put to use individuals and groups capable of resistance, in the nations. . . . It will thus become possible to assure an absolute domination over a . . . people . . . for the benefit of the Reich, the resources and the human material of those people reduced to slavery. . . . The conquered peoples must concur, willingly or by force, in the German victory by their material resources, as well as by their labor potential. Means will be found to subject them.

Id. C.E. Harris, Jr. offers a potent illustration of the impact of racism on one’s application of the universal law principle, which I expand upon for purposes of this Section. See HARRIS, *supra* note 1, at 161. See generally Lockett, *supra* note 130, at 84 (discussing the ways in which racial hatred influenced warfare during the American Civil War.).

159. See DREW GILPIN FAUST, *THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR* 44 (2008).

160. Lockett, *supra* note 130, at 87, 89–90 (discussing Nathan Bedford Forrest’s use of perfidy to capture military objectives and to torture, lynch, and bury alive African-American Union soldiers); see also FAUST, *supra* note 159, at 44–45 (discussing how Robert E. Lee and other Confederates implicitly authorized or participated in the torture of African-American Union soldiers).

161. See Lockett, *supra* note 130, at 87, 89–90; FAUST, *supra* note 159, at 44–45.

A major tenet of the institution of slavery was the belief that biological differences existed between slaves and whites. Slaves were viewed as a distinct species that was immune to certain diseases, yet inferior biologically and mentally to whites. These real and fabricated biological differences offered to the slave owner partial justification for the institution of slavery.

JOHN HOBERMAN, *DARWIN’S ATHLETES: HOW SPORT HAS DAMAGED BLACK AMERICA AND PRESERVED THE MYTH OF RACE* 147 (1997).

162. See FAUST, *supra* note 159, at 44–45.

163. See *id.* at 45–46.

164. See HARRIS, *supra* note 1, at 161.

Although the Confederacy's treatment of the African-American Union soldiers seems morally horrific, the behavior and reasoning satisfy Kant's universalizability principle.¹⁶⁵ Because dehumanization is as great a risk in contemporary conflicts as it was during the American Civil War, this fatal limitation precludes Kant's universalizability principle from functioning as a complete formulation for resolving moral dilemmas during armed conflict because it affords minimal protection against a combatant's willingness to have his immoral behavior become universal.¹⁶⁶ Ostensibly, in recognition of this limitation, Kant's second formulation of his categorical imperative requires a person to respect the dignity of all people and to avoid treating any human being as merely a means to an end.¹⁶⁷

2. *Respect for Dignity*

Kant wrote movingly about the requirement to avoid valuing people as mere things.¹⁶⁸ Unlike people, things have only an externally determined purpose.¹⁶⁹ Because no action or conduct can be attributed to a thing, it lacks a moral conscience and cannot be morally responsible.¹⁷⁰ A rifle, for example, is manufactured to perform a specific function.¹⁷¹ Its utility and functionality are predetermined. The rifle's value is "extrinsic, conditional, and subjective; that is, [it] . . . ha[s] value only insofar as someone . . . happens to regard [it] as valuable . . . for [its] utility."¹⁷² It therefore has a quantifiable value.¹⁷³

People, conversely, are free to determine their own purposes and functionality.¹⁷⁴ The capacity to determine one's own purpose is the

165. *See id.*

166. *See id.*

167. *See KANT, supra* note 27, at 53–54.

An end is an object of the choice (of a rational being), through the representation of which choice is determined to an action to bring this object about. Now I can indeed be constrained by others to perform actions that are directed as means to an end, but I can never be constrained by others to have an end; only myself can make something my end.

KANT, *supra* note 123, at 186.

168. *See HILL, supra* note 124, at 157 (stating that Kant's idea is "that dignity, unlike 'price,' admits no equivalents, amounts to an important constraint upon deliberation from the legislative perspective, namely, that legislators must not think of the value of *persons*, like that of things, as subject to rational trade-offs (for example, they must not reason, as they would about things")); KANT, *supra* note 27, at 52–53 (explaining the distinction between "things" and "persons").

169. *See KANT, supra* note 27, at 52–53; SULLIVAN, *supra* note 29, at 67–68.

170. *See KANT, supra* note 123, at 50.

171. *See HARRIS, supra* note 1, at 161–62.

172. SULLIVAN, *supra* note 29, at 67; *accord* HARRIS, *supra* note 1, at 161–62.

173. *See KANT, supra* note 27, at 53.

174. *See KANT, supra* note 123, at 50.

basis of Kant's means-end principle.¹⁷⁵ Because of a person's moral personality, he or she possesses an intrinsic, unconditional, and absolute value that remains uninfluenced by the opinion or estimation of another.¹⁷⁶ As self-existent ends, this attribute gives people intrinsic worth by virtue of them being alive.¹⁷⁷ A person's right to dignity is absolute.¹⁷⁸ It is not influenced by feelings, impulses, heredity, social rank, or the advantages that one's individual talents might procure.¹⁷⁹ Rather, it is rooted in an unconditional and non-quantitative value that is inherent in all human beings because of their moral potentialities.¹⁸⁰

For these reasons, a combatant's moral responsibility should emanate from the premise that all people—civilians, combatants, friends, and foes—have equal moral worth.¹⁸¹ This premise holds true regardless of the indifference or hostility the combatant may harbor toward another.¹⁸² Even a reprobate's autonomy is entitled to respect because of his capacity to develop a morally good will.¹⁸³ A combatant, therefore, has no right to discard a civilian's life as if the civilian were a mere thing over which one could assert ownership.¹⁸⁴ Rather, a civilian is a person in whom the ownership of property can be vested, and for this reason, a civilian's life cannot be discarded nor the value of it reduced as if the person were property.¹⁸⁵ Indeed, a combatant—being a rational and moral agent—cannot claim his own autonomy as a moral right on the one hand, and deny civilians the same right on the other hand. To do so would be to create a self-exception in the same way the liar creates a self-exception. Rather, the combatant must extend to civilians the same rights he implicitly and inevitably claims for himself.¹⁸⁶ Combatants must therefore respect the conditions that allow civilians to exercise their moral autonomy, and they must refrain from interrupting civilians' freedom and their ability to set their own

175. *See id.*

176. *See SULLIVAN, supra* note 29, at 68.

177. Kant's assertion of inherent worth is not a repudiation of human skills or talents that may have some extrinsic value. Kant did not regard as impermissible the recognition of those talents as means. Rather, he regarded as immoral the use of the skilled person as a means *only* or *simply* to satisfy desires. *Id.* at 69.

178. *See KANT, supra* note 27, at 46–47.

179. *Id.*

180. *See id.*

181. *See HILL, supra* note 124, at 185.

182. *See KANT, supra* note 123, at 255; *SULLIVAN, supra* note 29, at 70.

183. *See KANT, supra* note 123, at 255; *SULLIVAN, supra* note 29, at 70.

184. *See* IMMANUEL KANT, *LECTURES ON ETHICS* 165 (Louis Infield trans., Harper & Row, Publishers, Inc. 1963) (1930).

185. *See id.*

186. *See Weinrib, supra* note 117, at 288.

goals and to preserve their own welfare.¹⁸⁷ For Kant, this duty to respect people as autonomous beings with inherent value includes a duty to actively protect or rescue them from harm or misery.¹⁸⁸ This obligation to respect the dignity of human beings occupies a key place in the corpus of the laws of war.¹⁸⁹

At this point, one might claim that the vagaries of armed conflict would preclude a combatant from complying with Kant's unconditional duty to respect human dignity. Indeed, one common interpretation of Kant's proscription against treating a person as merely a means to an end is that it constitutes a deontological constraint.¹⁹⁰ Kant's essay, *On Lying*, could be viewed as a paradigmatic expression of this position.¹⁹¹ To illustrate its application, assume that *A* asks *B* whether *C* is hiding in *B*'s house, and *B* knows that *A* intends to harm *C*.¹⁹² Should *B*, knowing that *C* is actually in *B*'s house, answer truthfully, or should *B* lie and answer, "No," in order to save *C* from harm?¹⁹³ For Ronald Dworkin and other legal scholars, the nature of Kant's deontological rule against lying requires *B* to answer the question truthfully, regardless of the harmful consequences to *C*.¹⁹⁴

Kant's firm prohibition against treating a person as merely a means to an end stands in stark contrast to the realist position that a combatant is privileged to lie or even kill if either act would enhance self-preservation. The next Part discusses the complexity of applying Kant's categorical imperatives to the Afghan farmer dilemma that was presented at the beginning of this Article.

187. See HARRIS, *supra* note 1, at 162.

188. See KANT, *supra* note 184, at 199 ("I see a man miserable and I feel for him; but it is useless to wish that he might be rid of his misery; I ought to try to rid him of it."); see also Fletcher, *supra* note 140, at 548 (acknowledging that Kant recognized a moral duty to "come to the aid of another person in distress").

189. See, e.g., Geneva Convention IV, *supra* note 21, art. 3(1)(c) (prohibiting "outrages upon personal dignity, in particular humiliating and degrading treatment").

190. See MEAD, *supra* note 141, at 307.

191. See KANT, *supra* note 123, at 225–26.

192. See PATTERSON, *supra* note 141, at 381.

193. See *id.*

194. See *id.*; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 172 (1977) ("Kant thought that it was wrong to tell a lie no matter how beneficial the consequences, not because having this practice promoted some goal, but just because it was wrong."); see also Steven H. Resnicoff, *Lying and Lawyering: Contrasting American and Jewish Law*, 77 NOTRE DAME L. REV. 937, 945 & n.40 (2002) ("Truthfulness in statements which cannot be avoided is the formal duty of an individual to everyone, however great may be the disadvantage accruing to himself or to another.") (citing Immanuel Kant, *On a Supposed Right to Lie from Altruistic Motives*, in CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS IN MORAL PHILOSOPHY 348 (Lewis White Black trans. & ed., 1949)); Anita L. Allen, *Lying to Protect Privacy*, 44 VILL. L. REV. 161, 168 (1999) ("The German philosopher Immanuel Kant advocated an absolute, categorical duty to speak the truth without regard to the consequences.").

V. THE AFGHAN FARMER DILEMMA AND THE
KANTIAN FRAMEWORK

A. *Universalizability Principle*

For a Kantian, the commander's response to the moral quandary presented by the Afghan farmer dilemma must satisfy Kant's universalizability principle. Under that principle, the commander's action is morally permissible only if the commander would find it acceptable for everyone to adopt his conduct as a universal rule.¹⁹⁵ The commander's maxim must account for the normative and empirical realities borne from the chaotic and unpredictable nature of land warfare, meaning that risk and uncertainty are inherent in all rescue operations.¹⁹⁶ Reasonably estimating and intentionally accepting risk are fundamental to conducting successful operations.¹⁹⁷ The commander has limited resources and must ensure that the benefits of a successful rescue mission are measurable and weighed against the risks that are inherent in the mission assessment.¹⁹⁸ This requires the commander to consider the potential loss of troops and equipment, and the adverse effects on U.S. diplomatic and political interests if the mission fails.¹⁹⁹ A rescue mission that affords only a marginal contribution to the short- and long-term objectives while presenting great risk to personnel and materiel would not be operationally acceptable. Hence, the maxim must be tailored to preserve the commander's military discretion while imposing a clear duty to act in a way that the commander could accept as the rule for all battlefield commanders who must respond to rescue obligations of citizens of his own country and any other country. One such formulation might be this: in all circumstances in which such intervention would be appropriate, a combatant shall attempt to rescue an endangered civilian when there is a reasonable opportunity to avert the fatal harm. The maxim preserves the commander's discretion to weigh risk by qualifying the duty by a "reasonable" and "appropriate" standard while sufficiently requiring a duty to perform the same action if the commander were the endangered party. Equally important is that if the maxim became universal,

195. See *supra* notes 141–167 and accompanying text.

196. See OPERATIONS, *supra* note 14, §§ 5-15, 6-19.

197. See *id.*

198. Cf. SPECIAL OPERATIONS FORCES, *supra* note 14, § 3-61, at 3-14 (when considering whether the outcome of the mission justifies the risk, a commander must ensure the "benefits of successful mission execution are measurable and in balance with the risks inherent in the mission assessment").

199. See *id.* (commanders should not only consider the potential loss of troops "and equipment but also the risk of adverse effects on U.S. diplomatic and political interests if the mission fails").

combatants would not have a duty to act in circumstances in which the probability of success is small or when the circumstances indicate that it would be inappropriate to attempt a rescue. To avoid problems associated with the universalizability principle discussed in Part II,²⁰⁰ however, the commander's action must also cohere with Kant's second formulation: the duty to respect the dignity of people, which includes the Afghan farmer as well as U.S. combatants. This requirement makes the formulation considerably more complex, as the next Section demonstrates.

B. *Duty to Respect Others*

Satisfying Kant's moral rule to respect the dignity of all human beings in the case of the Afghan farmer dilemma is complicated by the fact that in the hypothetical, either (1) the U.S. combatants may suffer harm both if they attempt to rescue the civilian, or if the Taliban changes its encryption codes, or (2) if no rescue is undertaken, the farmer may suffer harm when he returns to his farm. The commander must resolve the conflict between rescuing the farmer from fatal harm in order to comply with the moral rule to respect his dignity, and allowing the farmer to die in order to respect his troops' dignity. The moral dilemma raises a noteworthy question regarding how the commander should decide between conflicting moral rules when he cannot observe both. Regardless of the course of action the commander chooses, the equation suggests that the commander will have to violate a duty owed either to the U.S. combatants or to the Afghan farmer. As discussed in the next Section, however, this is not the case because the commander owes a duty only to the party holding the stronger ground of obligation.

C. *The Stronger Ground of Obligation Test*

Kant believed that moral obligation arises from practical necessity, and that two conflicting obligations cannot be simultaneously necessary when obligations conflict; only the obligation that is necessary becomes a duty.²⁰¹ For this reason, a person is not morally obligated to comply with every moral rule.²⁰² A conflict between moral duties never arises because two conflicting moral rules cannot be active simultaneously.²⁰³ When a person encounters an apparent conflict between moral rules, as the commander does in the Afghan farmer

200. See *supra* notes 39–83 and accompanying text.

201. See KANT, *supra* note 123, at 50.

202. See *id.*; SULLIVAN, *supra* note 29, at 101.

203. See KANT, *supra* note 123, at 50.

dilemma, only one moral duty actually arises.²⁰⁴ When the duty arises to act according to one moral rule, then to act according to a competing moral rule is not to act upon a duty, but rather to violate a moral duty, because the competing moral rule never develops into a duty.²⁰⁵ Hence, the commander can only have one morally binding obligation, and which one of the two competing rules becomes a duty is determined by identifying which moral rule has the stronger ground of or basis for obligation.²⁰⁶ Once the commander determines where the stronger grounds of obligation lie, the other rule becomes nonbinding.²⁰⁷

For instance, recall the lying scenario posited earlier involving *B*, who receives an inquiry from *A*, a stranger, regarding the whereabouts of *C*. *B* knows the whereabouts of *C* and also knows that *A* intends to harm *C*. This circumstance involves a conflict between the moral rule to refrain from lying (an act that Kant described as the “greatest violation of man’s duty to himself”)²⁰⁸ and the moral rule to respect the dignity of humanity and protect others from harm (a rule that Kant described as the “supreme limiting condition on freedom”).²⁰⁹ Let us now assume that *C* is *B*’s spouse. *B*’s duty hinges on the strength of the relational duties owed to *A* and *C*. The moral rule requiring a person to honor a commitment to a spouse imposes a stronger obligation than the moral rule requiring a person to tell the truth to a stranger.²¹⁰

The rationale is that *B* and *C*, by virtue of their marriage, have unique duties and obligations. As Kant saw marriage, spouses grant each other “rights” by which they each “surrender the whole of their person to the other with a complete right of disposal over it.”²¹¹ Each spouse is authorized to act in a special way relative to the other and has what Wesley Hohfeld considered a “claim” right—the right to insist on, or claim, action or forbearance from another by virtue of rela-

204. See *id.*; see SULLIVAN, *supra* note 29, at 100.

205. See KANT, *supra* note 123, at 50; SULLIVAN, *supra* note 29, at 100.

206. See KANT, *supra* note 123, at 50; SULLIVAN, *supra* note 29, at 100.

207. See KANT, *supra* note 123, at 50; SULLIVAN, *supra* note 29, at 100.

208. KANT, *supra* note 123, at 225.

209. KANT, *supra* note 27, at 49.

210. Both Kant and the U.S. Supreme Court have recognized that spousal rights and correlative duties are so strong that they “outweigh the disadvantages to the administration of justice.” *Wolfe v. United States*, 291 U.S. 7, 14 (1934) (discussing the high degree of importance and protection given to spousal immunity within the judicial system); see also KANT, *supra* note 184, at 167 (“Matrimony is an agreement between two persons by which they grant each other equal reciprocal rights, each of them undertaking to surrender the whole of their person to the other with a complete right of disposal over it.”).

211. See KANT, *supra* note 184, at 167.

tional duties owed to the spouse that are superior to duties owed to others.²¹² These claim rights make each spouse the object of singular trust and dependency and create a stronger ground of obligation. Kant displays his allegiance to this assertion when he argues that if a thief asks *Z*—his intended victim—where *Z*'s money is located, *Z* has no duty to tell the thief the truth because the thief does not have what Kant termed a “right to demand” the truth from *Z*.²¹³ Only by some change in the nature of the relationship between the thief and *Z*, such as a promise to tell the thief the truth, would the thief acquire a claim right to the truth from *Z*.²¹⁴

One can draw at least two points from this reasoning. First, it is unlikely that a person can be said to have breached a duty to someone to whom no right to demand compliance with a moral rule exists. When *Z* tells the untruth to the thief, the statement is not morally characterized as a “lie” because nothing in the relationship between *Z* and the thief creates an expectation of truthfulness or a right to demand it.²¹⁵ For instance, a combatant's killing of an enemy combatant during armed conflict is not murder because the attacking combatant has no right to claim that he should not be killed. Second, although it is not explicitly stated, part of Kant's position must be that special relationships, duties, or roles—such as marriage—create stronger obligations than interactions that arise through normal relational arrangements because the claim or demand rights conferred between the relational agents are stronger in the former relation and weaker in the latter.

Hence, one way in which a person might determine the stronger ground of obligation is to ask, “Who has the stronger claim right to limit my freedom to do *X* or to demand that I do *X*?” In the scenario involving *A*, *B*, and *C*, spouse *C*'s claim right acts as a normative limitation against spouse *B*'s freedom to disclose *C*'s whereabouts, while conversely, *A*, a stranger, is not vested with a claim right to limit or demand *B*'s conduct.²¹⁶ The rule requiring *B* to protect the dignity of

212. WESLEY NEWCOMB HOHFELD, RIGHTS AND JURAL RELATIONS, PHILOSOPHY OF LAW 309 (3d ed., 1986) (describing the distinction between a “claim” right and a privilege). For purposes of this analysis, I shall refer to Hohfeld's “claim” as a “claim right.” See JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 27–28 (1988) (describing the nature of complex bundle of rights and liberties that emanate from legal relations); see also DAVID RODIN, WAR AND SELF DEFENSE 19–22 (2002) (discussing Hohfeld's theory regarding rights and duties); KANT, *supra* note 123, at 188.

213. KANT, *supra* note 184, at 227.

214. See *id.*

215. See *id.* at 228.

216. See RODIN, *supra* note 212, at 19–20 (explaining the correlation between claims rights and duties).

the spouse escalates into a duty and is therefore the only moral obligation that arises in this circumstance, despite the moral rule to tell the truth.²¹⁷ The moral rule requiring truth-telling never rises to the level of a duty, but rather stands contrary to *B*'s duty in this case.²¹⁸

The "runaway tram" hypothetical, introduced by Professor Foot, is helpful in illustrating the proper application of the stronger ground of obligation test to moral judgments.²¹⁹ In Foot's hypothetical, the brakes of a tram fail and the tram driver has to choose between continuing on the present track, where the runaway tram will kill five people, and turning onto another track where only one person will be killed.²²⁰ Most agree that it is morally permissible for the driver to turn onto the track where the tram will kill a single person because it is morally preferable to kill the single person in order to save the five.²²¹

What if, however, the tram driver, a U.S. citizen, knows that the single person on the alternate track is the President of the United States and the five people on the main track are U.S. soldiers who have been ordered to rescue and protect the President? The moral duty in this circumstance does not turn on the number of deaths that would be avoided by choosing one route over the alternative route. Rather, the duty turns on the essential features of the driver's obligation relative to the people on each track. Fewer observers would find it morally objectionable to save the President at the expense of the soldiers. Even the five U.S. soldiers, though facing grave peril, would tell the tram driver to save the President and simply hope to survive the collision. By virtue of their role responsibilities, the soldiers do not have an assertable right—or claim right—that limits the freedom of the tram driver in this circumstance. To the contrary, the special nature of their roles as soldiers imposes a duty upon them to insist that the driver save the President. Furthermore, the President, by virtue of his role, has a claim right to insist that the driver save him from the collision at the soldiers' expense. The morally acceptable course of action would be for the tram driver to continue toward the five soldiers in order to save the President of the United States, even though more deaths are likely to occur because of this decision. Hence, determination of the stronger grounds of obligation does not turn on mathematical equations that some might apply but rather on

217. KANT, *supra* note 123, at 50–51; SULLIVAN, *supra* note 29, at 100.

218. See KANT, *supra* note 123, at 50–51; SULLIVAN, *supra* note 29, at 100.

219. FOOT, *supra* note 97, at 85.

220. See *id.*

221. See *id.*

moral obligations that emanate from the duties assumed by the persons in the scenario. In this instance, the stronger ground of obligation weighs in favor of preserving the President.

1. Resolving the Antinomy Between Kantian and Hobbesian Paradigms

In applying Kant's stronger ground of obligation test to rescue operations, the aforementioned moral reasoning directs the rights and obligations relative to the U.S. commander and potential rescuees, and it resolves the normative contradiction between Hobbesian and Kantian formulations. Returning to the Afghan farmer, the rescue duty is derived from whichever moral rule has the stronger ground of obligation relative to the U.S. commander, the Afghan farmer, and the U.S. soldiers.

The commander's autonomy relative to the U.S. soldiers is limited in a way that it is not in relation to the Afghan farmer because of the oath the commander has taken; his obligations to the United States; the privileges, authority, and benefits the sovereign has granted him; and the special nature of the relationship between the commander and U.S. soldiers. The commander, like all U.S. commanders, has a moral and legal obligation to accomplish the assigned mission and preserve the welfare of the human resources under his command, that is, the U.S. soldiers.²²² The commander's duty to the U.S. soldiers provides the U.S. soldiers with a claim right that constrains the commander's freedom in a special way. This claim right creates an obligation that is stronger than these obligations that arise between the commander and normal relational agents. Put differently, the claim right provides the soldiers a right to demand that the commander refrain from rescuing the Afghan farmer if it would threaten the commander's military objectives or the welfare of the soldiers because doing so would violate his moral obligation.²²³

The potential rescuee, the Afghan farmer, on the other hand, does not have such a claim right. Keeping the Afghan farmer alive is not part of the commander's primary military objective and there is no relationship of trust and confidence between the commander and the Afghan farmer. Absent a special relationship between the commander and the Afghan farmer, all obligations owed to the Afghan farmer arise only out of the basic duty the commander owes to all

222. See Maj. Gen. (Ret.) Michael J. Nardotti, Jr., *Military Commissions*, ARMY LAW., Mar. 2002, at 1, 2; see also *United States v. Dowell*, 10 M.J. 36, 43 (1980) (Cook, J., dissenting).

223. The result would be different, of course, if the primary military objective was to keep the informants alive, as illustrated by the "runaway tram" hypothetical.

human beings by virtue of their membership in the human race. The commander owes a more grounded and specific obligation to the U.S. troops, which stands in addition to and superior to those obligations that arise simply by being a member of the human race. Hence, the stronger obligation lies in the moral rule requiring the commander to protect the welfare and human dignity of the U.S. soldiers because it represents the higher ground of obligation.

Accordingly, the moral rules requiring the commander to protect the dignity of the Afghan farmer become non-obligatory, and to act upon them would be contrary to the commander's duty. The commander, according to Kantian reasoning, would be morally bound to refrain from rescuing the Afghan farmer. The same result is demanded by the Hobbesian approach. This finding shows that in some circumstances, where certain relational obligations create a stronger ground of obligations, Kantian and Hobbesian paradigms for deciding rescue missions lead commanders to coterminous results even when doing so appears to compromise the human dignity of the potential rescuee.

2. *Special Relationships and Potential Rescuees*

One argument that one might advance when the analysis is contextualized to the Afghan farmer rather than to foreign rescuees in general is that it presupposes that there is no special relationship between the Afghan farmer and the U.S. commander. However, this is not true despite the presence of a public assurance and absence of personal interaction between the two. Indeed, one may reasonably claim that a special relationship exists between the Afghan farmer and the U.S. commander because of U.S. assurances relative to the safety of the Afghan populace.²²⁴ The argument is persuasive if a special relationship of trust and confidence between the United States and the Afghan populace is a reasonable by-product of the implied and expressed assurances of President Obama and General McChrystal regarding the United States' new priority to protect Afghan civilians.

Undeniably, a well-recognized principle of American common law is rooted in the moral principle that when one makes a promise that is reasonably expected to induce reliance, and it in fact does induce reliance, the promisor is obligated to perform the promise in order to avoid injustice.²²⁵ The preeminence of promissory obligations is also a

224. Press Release, Dep't of Def., McChrystal Assumes Command in Afghanistan (June 15, 2009), <http://www.defenselink.mil/news/newsarticle.aspx?id=54778>.

225. See, e.g., *Wright v. Newman*, 467 S.E.2d 533, 534 (Ga. 1996) (discussing the principle of promissory estoppel).

critical component of U.S. counterinsurgency doctrine, given the military imperative to achieve and maintain relationships of trust and moral authority.²²⁶ Although personal interaction may be a condition of a relationship of trust and confidence between the U.S. soldiers and Afghan civilians, it is not a prerequisite for the establishment of special duties. To illustrate a context in which this tenet applies, let us assume that a U.S. sentry is standing post adjacent to a manhole in order to prevent approaching civilians from stepping into the manhole, which is not readily apparent to anyone but the sentry.²²⁷ An Afghan civilian sees the sentry standing on the path and walks along feeling secure because he harbors a reasonable expectation that the sentry would warn him of any danger. The civilian walks along the path and falls to his death because the sentry chose not to warn him about the open manhole. Like the soldier discussed earlier who satisfied only Act 2,²²⁸ the sentry is morally culpable for the death of the civilian. The sentry occupies a higher degree of moral culpability because he violated both the Afghan civilian's trust and a "general duty of humanity held in common with all other members" of humanity.²²⁹ In addition, the sentry breached duties assigned uniquely to him as a sentry, "duties which made [him] the object[] of a singular trust and dependency."²³⁰ Such violations constitute a breach of the moral rule to respect the dignity of civilians.

The crux of the argument is that U.S. combatants serving in Afghanistan hold the same status as the sentry. Because of U.S. humanitarian actions, public statements regarding its commitment to safeguarding civilians, and a proclaimed desire to reduce violations of the laws of war and bring to justice those who commit violence against the Afghan populace, Afghan civilians have claim rights to demand protection or rescue from U.S. commanders. Unlike the U.S. soldiers, who have assumed the risk of harm or death by virtue of the sacrifices, chivalry, and discipline demanded of a soldier, Afghan civilians have not assumed the risk of harm or death. Taken together, the lack of assumed risk and the special relationship arising out of U.S. military

226. See FM 3-24, *supra* note 13, § 1-3 ("Counterinsurgents seeking to preserve legitimacy must stick to the truth and make sure that words are backed up by deeds."); *id.* § 5-8 ("Counterinsurgents should never knowingly commit themselves to an action that cannot be completed."); *id.* § 1-25 ("[F]ailure to deliver promised results is automatically interpreted as deliberate deception, rather than good intentions gone awry.").

227. This scenario is principally drawn from a hypothetical advanced by Joel Feinberg. See FEINBERG, *supra* note 99, at 154.

228. See *supra* notes 117-120 and accompanying text.

229. FEINBERG, *supra* note 99, at 154.

230. *Id.*

objectives create a moral rule that obligates the commanders to protect Afghan civilians from harm. The argument, however, while potentially decisive in some cases, fails to establish a stronger ground of obligation with respect to the Afghan farmer because it merely establishes the *possibility*, rather than the *presence*, of detrimental and justifiable reliance that is sufficient to outweigh obligations the commander owes to U.S. soldiers. Put differently, the relationship between the U.S. commander and U.S. soldiers is rooted in mutual exchanges of expressed and implied promises layered with shared reliance interests that will outweigh many, but not all, special relationships between the U.S. and Afghan civilians. It is, therefore, appropriate for U.S. commanders considering rescue obligations to contemplate the extent of any special relationship between the U.S. soldiers and Afghan civilians. While it is possible for the stronger ground of obligation to lie with an Afghan civilian because of U.S. assurances, even when no personal relationship is present, given the absence of justifiable and detrimental reliance upon the U.S. assurances in the present case, the argument fails. Accordingly, under both Kantian and Hobbesian reasoning, the U.S. commander would be morally bound not to rescue the Afghan farmer if the rescue mission would compromise military objectives or the welfare of his soldiers.

VI. CONCLUSION

Kant's claim that combatants shall conduct themselves in such a way that they would be willing to have their behavior become universal, and the assertion that one shall refrain from using oneself or others as merely a means to an end, vies with Hobbes's claim that combatants—being self-interested and prudentially rational—should pursue whatever is necessary for self-preservation. The degree to which the normative implications of Hobbesian realism are antithetical to Kantian idealism cannot be understated. Kant's idealism is perceived to align with our most fundamental notions of right and wrong, which Hobbesian realism offends. This Article has shown, however, that Kantian and Hobbesian procedures for determining rescue obligations may produce equivalent practical results in certain circumstances. Specifically, in circumstances in which the stronger ground of obligation is to U.S. combatants under a Kantian paradigm and the consequences of allowing a civilian to die are more favorable to U.S. self-preservation under a Hobbesian paradigm, or in circumstances in which rescuing a civilian promotes maximum consequences under a Hobbesian paradigm and the stronger grounds of obligation lies with the endangered civilian. Accordingly, this Article has not shown that

Kantian and Hobbesian paradigms for deciding rescue duties will always, or usually, produce identical outcomes. Rather, this Article demonstrates that in some instances, the empirical consequences produced by Hobbesian and Kantian procedures for deciding rescue commitments are indistinguishable in counterinsurgency operations.

This Article further demonstrates that the Kantian paradigm does not absolutely prohibit soldiers from allowing civilians to die in order to preserve the lives of others. It simply precludes soldiers from formulating such decisions based upon the consequences of weighing and balancing calculative values or self-preservation, rather than duty, despite the instinctively compelling urge to do so. Put differently, Kant opposed performing an act in order to produce morally desired results, but he supported performing an act even if it produces morally objectionable results, so long as the act derived from duty.

This Article has further shown that while many accept Kant's principles as the jurisprudential basis of many international juridical constructs, Hobbes's claim of self-preservation as the supreme criterion for determining conduct has great influence—albeit to some extent surreptitiously—within the sphere of international arrangements, which facilitates broader incompatibility between law and practice during war.

In sum, these findings, at the very least, raise significant questions about the frequency with which Hobbesian and Kantian procedures might serve to generate invariable or consistent outcomes. More importantly, they represent a first step in discovering a just war framework that effectively encompasses Kant's "duties" and Hobbes's "rights" during rescue operations.