The point of this paper is to introduce a distinction into our thinking about warfare, and to explore the moral implications of this distinction. I shall make two major assumptions. First, I shall assume without discussion that under some circumstances and for some ends warfare is morally justified. These conditions I shall lump together under such terms as "justice" and "just cause," and say no more about them. I shall also assume that in warfare some means, including some killing, are morally justified. I sometimes call such means "proportionate," and in general I say rather little about them. These assumptions, incidentally, are common to all of the philosophers whom I criticize here.

The distinction which I introduce can be thought of either as dividing wars into two classes, or else as distinguishing wars from certain other international combats. I have no great preference for one of these ways of speaking over the other, but I shall generally adopt the latter alternative. I am particularly interested in the moral significance of this distinction, and I shall explore in some detail its bearing on one moral question associated with warfare, that of the intentional killing of noncombatants.

My paper has two main parts. In the first I examine three closely related treatments of this moral question: the arguments of Elizabeth Anscombe, John C. Ford, and Paul Ramsey. These treatments seem to ignore the distinction which I will propose. I argue that on their own terms, and without reference to that distinction, they must be counted as unsatisfactory.

In the second part of the paper I propose and explain my distinction.
I then explore what I take to be some of its moral implications, especially with reference to the alleged immunity of noncombatants, and I argue that it supplies what was missing or defective in the treatments previously criticized.

I. THE IMMUNITY THEORISTS

A number of philosophers have held that a large portion of the population of warring nations have a special moral status. This is the noncombatant segment of the population, and they have a moral immunity from being intentionally killed. This view seems to have been especially congenial to philosophers who have tried to apply Christian ethics to the problems of warfare. Among the philosophers who have held this view are Elizabeth Anscombe, John C. Ford, and Paul Ramsey. I shall refer to this trio of thinkers as the immunity theorists.

Perhaps we should indicate a little more in detail just what the immunity theorists appear to hold, specifying just what segment of the population is being discussed and just what their immunity consists in. The immunity theorists commonly admit that there is some difficulty in specifying exactly who are the noncombatants. Roughly, they are those people who are not engaged in military operations and whose activity is not immediately and directly related to the war effort. Perhaps we could say that if a person is engaged only in the sort of activities which would be carried on even if the nation were not at war (or preparing for war) then that person is a noncombatant. So generally farmers, teachers, nurses, firemen, sales people, housewives, poets, children, etc. are noncombatants. There are, of course, difficult cases, ranging from the high civilian official of the government to the truck driver (either military or civilian) who hauls vegetables toward the front lines. But despite the hard cases it is held that warring nations contain large numbers of readily identifiable people who are clearly noncombatants.

2. Ford gives a list of over 100 occupations whose practitioners he considers to be “almost without exception” noncombatants.
What of their immunity? The writers whom I consider here make use of the "principle of double-effect." This involves dividing the consequences of an act (at least the foreseeable consequences) into two classes. Into the first class go those consequences which constitute the goal or purpose of the act, what the act is done for, and also those consequences which are means to those ends. Into the other class go those consequences which are neither the sought-after ends nor the means to those ends. So, for example, the bombing of a railroad yard may have among its many consequences the following: the flow of supplies toward the front is disrupted, several locomotives are damaged, and a lot of smoke, dust, etc. is discharged into the air. The disruption of transport may well be the end sought by this action, and perhaps the damage to locomotives is sought as a means of disrupting transport. If so, these consequences belong in the first class, a class which I shall generally mark by using the words "intentional" or "intended." The smoke, on the other hand, though as surely foreseeable as the other effects, may be neither means nor end in this situation. It is a side-effect, and belongs in the second class (which I shall sometimes call "unintentional" or "unintended").

Now, the moral immunity of noncombatants consists, according to these writers, in the fact that their death can never, morally, be made the intended consequence of a military operation. Or to put it another way, any military operation which seeks the death of noncombatants either as an end or a means is immoral, regardless of the total good which it might accomplish.

The unintended death of noncombatants, on the other hand, is not absolutely forbidden. A military operation which will foreseeably result in such deaths, neither as means nor ends but as side effects, may be morally acceptable according to these writers. It will be morally acceptable if the good end which it may be expected to attain is of sufficient weight to overbalance the evil of these noncombatant deaths (as well as any other evils involved in it). This principle, sometimes called the principle of proportionality, apparently applies to foreseen but unintended noncombatant deaths in just the same way as it applies to the intended death of combatants, the destruction of resources, and so on. In all of these cases it is held to be immoral to cause many deaths,

much pain, etc., in order to achieve minor goals. Here combatant and noncombatant stand on the same moral ground, and their deaths are weighed in the same balances. But when the slaying of noncombatants is envisioned as an end or, more commonly, as a means—perhaps in order to reduce the production of foodstuffs or to damage the morale of troops—then there is an unqualified judgment that the projected operation is flatly immoral. The intentional slaying of combatants, on the other hand, faces no such prohibition. This, then, is the place where the moral status of combatant and noncombatant differ sharply.

Now, if a scheme such as this is not to appear simply arbitrary it looks as though we must find some morally relevant basis for the distinction. It is perhaps worthwhile to notice that in this context the immunity of noncombatants cannot be supported by reference to the sanctity or value of human life, nor by reference to a duty not to kill our brothers, etc. For these authors recognize the moral permissibility, even perhaps the duty, of killing under certain circumstances. What must be sought is the ground of a distinction, and not merely a consideration against killing.

Such a ground, however, seems very hard to find, perhaps unexpectedly so. The crucial argument proposed by the immunity theorists turns on the notions of guilt and innocence. Anscombe, for example, says:

Now, it is one of the most vehement and repeated teachings of the Judaeo-Christian tradition that the shedding of innocent blood is forbidden by the divine law. No man may be punished except for his own crime, and those "whose feet are swift to shed innocent blood" are always represented as God's enemies.

Earlier on she says, "The principal wickedness which is a temptation to those engaged in warfare is the killing of the innocent," and she has titled one of the sections of her paper, "Innocence and the Right to Kill Intentionally." Clearly enough the notion of innocence plays a large role in her thinking on this topic. Just what that role is, or should be, will be considered shortly. Ford, in the article cited earlier, repeatedly

4. Anscombe, p. 49.
5. Ibid., p. 44.
couples the word "innocent" with "civilian" and "noncombatant." His clearest statement, however, is in another essay. There he says:

Catholic teaching has been unanimous for long centuries in declaring that it is never permitted to kill directly noncombatants in wartime. Why? Because they are innocent. That is, they are innocent of the violent and destructive action of war, or of any close participation in the violent and destructive action of war. It is such participation *alone* that would make them legitimate targets of violent repression themselves.6

Here we have explicitly a promising candidate for the basis of the moral distinction between combatants and noncombatants. It is promising because innocence itself seems to be a moral property. Hence, if we could see that noncombatants were innocent while combatants were not it would be plausible to suppose that this fact made it morally proper to treat them in different ways.

If we are to succeed along this line of thought, then we must meet at least two conditions. First, we must find some one sense of "innocence" such that all noncombatants are innocent and all combatants are guilty. Second, this sense must be morally relevant, a point of the greatest importance. We are seeking to ground a moral distinction, and the facts to which we refer must therefore be morally relevant. The use of a morally tinged word, such as "innocent," does not of itself guarantee such relevance.

Well, is there a suitable sense for "innocent"? Ford said that noncombatants "are innocent of the violent and destructive action of war." Anscombe, writing of the people who can properly be attacked with deadly force, says, "What is required, for the people attacked to be noninnocent in the relevant sense, is that they themselves be engaged in an objectively unjust proceeding which the attacker has the right to make his concern; or—the commonest case—should be unjustly attacking him." On the other hand, she speaks of "people whose mere existence and activity supporting existence by growing crops, making clothes, etc.,” might contribute to the war effort, and she says, "such

people are innocent and it is murderous to attack them, or make them a target for an attack which he judges will help him towards victory." These passages contain, I think, the best clues we have as to the sense of "innocent" in these authors.

It is probably evident enough that this sense of "innocent" is vague in a way parallel to the vagueness of "noncombatant." It will leave us with troublesome borderline cases. In itself, that does not seem to me a crucial defect. But perhaps it is a clue to an important failing. For I suspect that there is this parallel vagueness because "innocent" here is just a synonym for "noncombatant."

What can Ford mean by saying that some people are "innocent of the violent and destructive action of war" except that those people are not engaged in the violence of war? Must not Anscombe mean essentially the same thing when she says that the noninnocent are those who are themselves "engaged in an objectively unjust proceeding"? But we need not rely wholly on these rhetorical questions. Ramsey makes this point explicitly. He first distinguishes between close and remote cooperation in military operations, and then he alludes to the distinction between the "guilty" and the "innocent." Of this distinction he says, "These are very misleading terms, since their meaning is exhaustively stated under the first contrast, and is reducible to degrees of actual participation in hostile force."8 In this judgment Ramsey certainly seems to me to be right.

Now, we should notice carefully that a person may be an enthusiastic supporter of the unjust war and its unjust aims, he may give to it his voice and his vote, he may have done everything in his power to procure it when it was yet but a prospect, now that it is in progress he may contribute to it both his savings and the work which he knows best how to do, and he may avidly hope to share in the unjust gains which will follow if the war is successful. But such a person may clearly be a noncombatant, and (in the sense of the immunity theorists) unquestionably "innocent" of the war. On the other hand, a young man of limited mental ability and almost no education may be drafted, put into uniform, trained for a few weeks, and sent to the front as a replacement in a low-grade unit. He may have no under-

standing of what the war is about, and no heart for it. He might want nothing more than to go back to his town and the life he led before. But he is "engaged," carrying ammunition, perhaps, or stringing telephone wire or even banging away ineffectually with his rifle. He is without doubt a combatant, and "guilty," a fit subject for intentional slaughter. Is it not clear that "innocence," as used here, leaves out entirely all of the relevant moral considerations—that it has no moral content at all? Anscombe suggests that intentional killing during warfare should be construed on the model of punishing people for their crimes, and we must see to it, if we are to be moral, that we punish someone only for his own crime and not for someone else's. But if we construe the criminality involved in an unjust war in any reasonable moral sense then it must either be the case that many noncombatants are guilty of that criminality or else many combatants are innocent. In fact, it will probably be the case that both of these things are true. Only if we were to divest "crime" of its moral bearings could we make it fit the combatant/noncombatant distinction in modern wars.

The fact that both Anscombe and Ramsey use the analogy of the criminal in discussing this topic suggests that there is an important fact about warfare which is easily overlooked. And that is that warfare, unlike ordinary criminal activity, is not an activity in which individuals engage qua individuals or as members of voluntary associations. They enter into war as members of nations. It is more proper to say that the nation is at war than that its soldiers are at war. This does not, of course, entail that individuals have no moral responsibility for their acts in war. But it does suggest that moral responsibility may not be distributed between combatant and noncombatant in the same way as between a criminal and his children. Many of the men who are soldiers, perhaps most of them, would not be engaged in military operations at all if they did not happen to be citizens of a warring nation. But noncombatants are citizens of warring nations in exactly the same sense as are soldiers. However these facts are to be analyzed they should warn us not to rely too heavily on the analogy with ordinary criminality.

We seem, then, to be caught in a dilemma. We can perhaps find

9. Ibid., p. 144.
some sense for notions such as *innocence* and *criminality* which will make them fit the distinction in which we are interested. But the price of doing so seems to be that of divesting these notions of the moral significance which they require if they are to justify the moral import of the distinction itself. In the ordinary senses, on the other hand, these notions do have the required moral bearings. But in their ordinary senses they do not fit the desired distinction. In neither way, therefore, can the argument from innocence be made to work, and the alleged moral immunity of noncombatants seems to be left as an arbitrary claim.

II. Convention-Dependent Morality

Despite the failure of these arguments I have recently come to think that there may be something of importance in this distinction after all, and even that it may have an important moral bearing. How might this be?

Imagine a statesman reflecting on the costliness of war, its cost in human life and human suffering. He observes that these costs are normally very high, sometimes staggering. Furthermore, he accepts the principle of proportionality. A consequence of this is that he sometimes envisions a just war for a just cause, but nevertheless decides not to prosecute that war even though he believes it could be won. For the cost of winning would be so high as to outweigh the good which would be attained. So he must sometimes let oppression flourish and injustice hold sway. And even in those wars which can be prosecuted the costs eat very seriously into the benefits.

Then he has an idea. Suppose—just suppose—that one could replace warfare with a less costly substitute. Suppose, for example, that one could introduce a convention—and actually get it accepted and followed by the nations—a convention which replaced warfare with single combat. Under this convention, when two nations arrived at an impasse which would otherwise have resulted in war they would instead choose, each of them, a single champion (doubtless a volunteer). These two men would then meet in mortal combat, and whoever won, killing his opponent or driving him from the field, would win for his nation. To that nation would then be ceded whatever territory, influ-
ence, or other prize would have been sought in the war, and the nation whose champion was defeated would lose correspondingly.

Suppose, too, that the statesman believes that if such a convention were to come into force his own nation could expect to win and lose such combats in about the same proportion as it could now expect to win and lose ordinary wars. The same types of questions would be settled by such combats as would otherwise be settled by war (though perhaps more questions would be submitted to combat than would be submitted to war), and approximately the same resolutions would be arrived at. The costs, however—human death and suffering—would be reduced by several orders of magnitude. Would that not be an attractive prospect? I think it would.

While the prospect may seem attractive it may also strike us as hopelessly utopian, hardly to be given a serious thought. There seems to be some evidence, however, that exactly this substitution was actually attempted in ancient times. Ancient literature contains at least two references to such attempts. One is in the Bible, I Samuel 17, the combat between David and Goliath. The other is in the Iliad, book 3, where it is proposed to settle the siege of Troy in the very beginning by single combat between Menelaus and Paris. It may be significant that neither of these attempts appears to have been successful. The single combats were followed by bloodier and more general fighting. Perhaps this substitute for warfare is too cheap; it cannot be made practical, and nations just will not consent in the end to abide by this convention. But consider, on the one hand, warfare which is limited only by the moral requirements that the ends sought should be just and that the means used should be proportionate, and, on the other hand, the convention of single combat as a substitute for warfare. Between these extremes there lie a vast number of other possible conventions which might be canvassed in the search for a less costly substitute for war. I suggest that the long struggle, in the western world at least, to limit military operations to "counter-forces" strategies, thus sparing civilian populations, is just such an attempt.

If I am right about this, then the moral aspects of the matter must be approached in a way rather different from that of the immunity theorists. Some, but not all, of their conclusions can be accepted, and somewhat different grounds must be given for them. These thinkers
have construed the immunity of noncombatants as though it were a moral fact which was independent of any actual or envisioned convention or practice. And they have consequently sought to support this immunity by argument which makes no reference to convention. I have already argued that their attempts were failures. What I suggest now is that all such attempts must be failures, for they mistake the sort of moral requirement which is under consideration. Let me try to make this clearer.

I find it plausible to suppose that I have a moral obligation to refrain from wantonly murdering my neighbors. And it also seems plausible to discuss this, perhaps in utilitarian terms, or in terms of the will of God, or of natural law, or in terms of a rock-bottom deontological requirement, but in any case without essential reference to the laws and customs of our nation. We might, indeed, easily imagine our laws and customs to be other than they are with respect to murder. But we would then judge the moral adequacy and value of such alternative laws and customs by reference to the moral obligation I have mentioned and not vice versa. On the other hand, I may also have a moral obligation to pay a property tax or to drive on the right side of the street. It does not seem plausible to suppose, however, that one can discuss these duties without immediately referring to our laws and customs. And it seems likely that different laws would have generated different moral duties, e.g. driving on the left. These latter are examples of “convention-dependent” moral obligations. More formally, I will say that a given moral obligation is convention-dependent if and only if (1) given that a certain convention, law, custom, etc., is actually in force one really does have an obligation to act in conformity with that convention, and (2) there is an alternative law, custom, etc. (or lack thereof) such that if that had been in force one would not have had the former obligation.

At this point, before developing the way in which it may apply to warfare, let me forestall some possible misunderstandings by a series of brief comments on this notion. I am not claiming, nor do I believe, that all laws, customs, etc., generate corresponding moral obligations. But some do. I am not denying that one may seek, and perhaps find, some more general moral law, perhaps independent of convention, which explains why this convention generates the more specific obli-
gation. I claim only that one cannot account for the specific obligation apart from the convention. Finally, I am not denying that one might have an obligation, perhaps independent of convention, to try to change a convention of this sort. For I think it possible that one might simultaneously have a moral obligation to conform to a certain convention and also a moral obligation to replace that convention, and thus to eliminate the first obligation.

Now, the core of my suggestion with respect to the immunity of noncombatants is this. The immunity of noncombatants is best thought of as a convention-dependent obligation related to a convention which substitutes for warfare a certain form of limited combat. How does this bear on some of the questions which we have been discussing?

To begin with, we might observe that the convention itself is presumably to be justified by its expectable results. (Perhaps we can refer to some moral rule to the effect that we should minimize social costs such as death and injury.) It seems plausible to suppose that the counter-forces convention, if followed, will reduce the pain and death involved in combat—will reduce it, that is, compared to unlimited warfare. There are surely other possible conventions which, if followed, would reduce those costs still more, e.g. the substitution of single combat. Single combat, however, is probably not a live contender because there is almost no chance that such a convention would actually be followed. It is possible, however, that there is some practical convention which is preferable to the present counter-forces convention. If so, the fact that it is preferable is a strong reason in favor of supposing that there is a moral obligation to promote its adoption.

It does not follow, however, that we now have a duty to act in conformity with this other possible convention. For the results of acting in conformity with a preferable convention which is not widely observed may be much worse than the results of acting in conformity with a less desirable convention which is widely observed. We might, for example, discover that a “left-hand” pattern of traffic flow would be preferable to the present system of “right-hand” rules, in that it would result in fewer accidents, etc. The difference might be so significant that we really would be morally derelict if we did not try to institute a change in our laws. We would be acquiescing in a very costly proce-
dure when a more economical one was at hand. But it would be a disas-
ter, and, I suspect, positively immoral, for a few of us to begin driving
on the left before the convention was changed. In cases of convention-
dependent obligations the question of what convention is actually in
force is one of considerable moral import. That one is reminded to take
this question seriously is one of the important differences between this
approach and that of the immunity theorists.

Perhaps the counter-forces convention is not really operative now
in a substantial way. I do not know. Doubtless, it suffered a severe
blow in World War II, not least from British and American bombing
strategies. Traffic rules are embedded in a broad, massive, compara-
tively stable social structure which makes their status comparatively
resistant to erosion by infraction. Not so, however, for a convention
of warfare. It has little status except in its actual observance, and de-
pends greatly on the mutual trust of the belligerents; hence it is espe-
cially vulnerable to abrogation by a few contrary acts. Here arises a
related difference with the immunity theorists. Taking the obligation
to be convention-independent they reject argument based on the fact
that "the enemy did it first," etc.\textsuperscript{10} If the obligation were independent
they would be correct in this. But for convention-dependent obliga-
tions, what one's opponent does, what "everyone is doing," etc., are
facts of great moral importance. Such facts help to determine within
what convention, if any, one is operating, and thus they help one to
discover what his moral duties are.

If we were to decide that the counter-forces convention was dead
at present, or, indeed, that no convention at all with respect to warfare
was operative now, it would not follow that warfare was immoral. Nor,
on the other hand, would it follow that warfare was beyond all moral
rules, an area in which "anything goes." Instead, we would simply go
back to warfare per se, limited only by independent moral require-
ments, such as those of justice and proportionality. That would, on the
whole, probably be a more costly way of handling such problems. But
if we live in a time when the preferable substitutes are not available,
then we must either forgo the goods or bear the higher costs. If we had
no traffic laws or customs, traffic would be even more dangerous and

\textsuperscript{10} For example, Ford, "The Morality of Obliteration Bombing," pp. 20, 33.
costly than it is now. Traveling, however, might still be justified, if the reason for traveling were sufficiently important.

In such a case, of course, there would be no obligation to drive on the right, or in any regular manner, nor would there be any benefit in it. Probably the best thing would be to drive in a completely ad hoc way, seeking the best maneuver in each situation as it arose. More generally, and ignoring for the moment a final consideration which will be discussed below, there is no obligation and no benefit associated with the unilateral observance of a convention. If one’s cause is unjust then one ought not to kill noncombatants. But that is because of the independent moral prohibition against prosecuting such a war at all, and has nothing to do with any special immunity of noncombatants. If one’s cause is just, but the slaying of noncombatants will not advance it to any marked degree, then one ought not to slay them. But this is just the requirement of proportionality, and applies equally and in the same way to combatants. If one’s cause is just and the slaying of noncombatants would advance it—if, in other words, one is not prevented by considerations of justice and proportionality—this is the crucial case. If one refrains unilaterally in this situation then he seems to choose the greater of two evils (or the lesser of two goods). By hypothesis, the good achieved, i.e. the lives spared, is not as weighty as the evil which he allows in damage to the prospects for justice or in the even more costly alternative measures, e.g. the slaying of a larger number of combatants, which he must undertake. Now, if the relevant convention were operative, then his refraining from counter-population strategies here would be related to his enemy’s similar restraint, and indeed it would be related to the strategies which would be used in future wars. These larger considerations might well tip the balance in the other direction. But by hypothesis we are considering the case in which there is no such convention, and so these larger considerations do not arise. One acts unilaterally. In such a situation it certainly appears that one would have chosen the worse of the two alternatives. It is hard to suppose that one is morally obligated to do so.

I said above that we were ignoring for the moment one relevant consideration. It should not be ignored forever. I have already called attention to the fact that conventions of warfare are not, like traffic
rules, embedded in a more massive social structure. This makes them especially precarious, as we have noted. But it also bears on the way in which they may be adopted. One such way, perhaps a rather important way, is for one party to the hostilities to signal his willingness to abide by such a convention by undertaking some unilateral restraint on his own part. If the opponent does not reciprocate, then the offer has failed and it goes no further. If the opponent does reciprocate, however, then the area of restraint may be broadened, and a kind of mutual respect and confidence may grow up between the belligerents. Each comes to rely on the other to keep the (perhaps unspoken) agreement, and therefore each is willing to forgo the immediate advantage which might accrue to him from breaking it. If this happens, then a new convention has begun its precarious life. This may be an event well worth seeking.

Not only may it be worth seeking, it may be worth paying something for it. For a significant increase in the likelihood that a worthwhile convention will be adopted it may be worth accepting an increased risk or a higher immediate cost in lives and suffering. So there may be some justification in unilateral restraint after all, even in the absence of a convention. But this justification is prospective and finite. It envisions the possibility that such a convention may arise in the future as a result of this restraint. Consequently, the justification should be proportioned to some judgment as to the likelihood of that event, and it should be reevaluated as future events unfold.

III. Convention vs. Morality

I began by examining some attempts to defend a certain alleged moral rule of war, the immunity of noncombatants. These defenses have in common the fact that they construe this moral rule as independent of any human law, custom, etc. I then argued that these defenses fail because they leave a certain distinction without moral support, and yet the distinction is essential to the rule. Turning then to the task of construction rather than criticism, I suggested that the immunity of noncombatants is not an independent moral rule but rather a part of a convention which sets up a morally desirable alternative to war. I argued then that some conventions, including this one, generate spe-
cial moral obligations which cannot be satisfactorily explained and defended without reference to the convention. And in the final pages I explored some of the special features of the obligation at hand and of the arguments which are relevant to it.

The distinction I have drawn is that between warfare per se on the one hand, and, on the other hand, international combats which are limited by convention and custom. But the point of the distinction is to clarify our thinking about the morality of such wars and combats. That is where its value must be tested.