

The Ethics of War and Friendship
The Moral Significance of Fellowship of Arms

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THESIS

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This thesis is dedicated to my parents, Jane Williams and Thomas Betz, whose love and support have been immeasurably valuable.

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SUMMARY

This thesis provides an overview of one of the central debates in contemporary just war theory concerning the Moral Equality of Combatants (MEC) and defends a moderate version of that thesis. According to the MEC, combatants whose war is unjust (unjust combatants) possess equal rights and responsibilities with combatants whose war is just (just combatants), including equal defensive *and* offensive permissions. This is the position of *traditionalist* just war theorists.

Revisionist just war theorists have offered powerful arguments against MEC and seemingly undermined the commonsense position that unjust combatants possess any defensive rights. According to the revisionist, basic moral principles preclude the defensive rights of unjust combatants and, thus, where the law of armed conflict affirms those permissions, that law is rooted in purely *pragmatic* rather than *principled* reasons.

My thesis is that unjust combatants are at least permitted to defend each other (even if they may not launch offensive attacks), and that this permission is not solely pragmatic. Rather, their other-defensive rights are rooted in the basic morality of friendship and its constitutive protective duties. Given the features that make war so different from other sorts of conflicts—in particular, the inherent uncertainty and chaos of war—soldiers’ decision-making turns on subjective assessments of moral risk. They have duties to avoid risks of substantial wrongdoing to innocent people. But the moral importance of soldiers’ friendships, even when their side’s war is unjust, entitles them to defend one another from imminent and direct threats of harm, even though doing so risks wronging non-liable enemy soldiers.

1. FRAMING THE CONTEMPORARY DEBATE IN JUST WAR THEORY

The United States, my country and home, has waged three major wars in my lifetime: two in Iraq and one in Afghanistan. Like many Americans I can remember vividly the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon, which were the catalyst and all-purpose justification for the ensuing conflicts. Shortly thereafter the U.S. Military launched an attack on Afghanistan to displace the Taliban leadership responsible, in part, for the terrorist attacks. Less than two years later the U.S., for the second time in twelve years, declared war on Iraq. The Bush Administration's stated justifications were Saddam Hussein's stubborn non-compliance with international treaties, his government's record of massive human rights abuses against its own people, his alleged complicity in the 9/11 attacks, and his possession of weapons of mass destruction—the latter two later known to have not been the case. I remember a sea of strident anti-war protestors on my college campus, and an equally strident group of hawks, both sides mostly shouting down the other's opinions with propagandistic slogans and invective. Just about the only thing the two groups could agree on was that, whether 'Operation Iraqi Freedom' was justified or not, it is crucial that we 'support the troops.' Over a decade later, neither the Afghanistan nor Iraq conflict has been resolved in a manner which secures what just war theorists call 'a just peace'. I think now, as I thought then, that the United States government is far too eager to launch large-scale conflicts. But the imperative to support the troops, by some means, has always rung true.

For most of us living in Western nations in which the threat of an armed incursion by a foreign military is remote, the idea of war is a bit of an abstraction. Through my own research on just war theory, war literature and film, soldiers' memoirs, and personal correspondence with

Afghanistan and Iraq veterans I have come to the conclusion that war is *very* different from life in peacetime, that the rules of war must be very different from the norms governing other conflicts, and that those war-time norms should speak, as much as possible, to the reality of soldiers' experience. That experience fundamentally consists of pervasive moral and epistemic uncertainty, fear, subordination, and a deep sense of camaraderie with their fellow soldiers.

War, even when justified, is deeply morally problematic. By its nature, war involves death and grave injury, severe human rights violations, the erosion or outright destruction of normal social relations, environmental damage, and, for soldiers and civilians alike, brutal psychological wounds and moral injury. War and its attendant horrors reached unprecedented scales in the 20th Century. In the period from 1900-1989 war accounted for an estimated 89 million deaths, 58 million of which were the result of the two world wars.¹

In light of these features of war, some people deny that it can be just at all: moral violations are too predictable a part of war for its resort to be permissible. This is a version of pacifism. Others deny—not that war is too heinous to ever be just—but that the state of war is not subject to moral restraints at all. Thomas Hobbes maintained that in the state of war justice and injustice have no place: morality exists only in a stable civil condition and war is by definition the absence of such conditions. General Carl von Clausewitz rejected the notion of morality in war as silly and naïve: war is restrained by strategic considerations and the demands of political prudence, which are not genuine moral restraints. These views are commonly called, somewhat misleadingly given the connotations of the term 'realism', *political realism*.²

¹ Glover (2012), p. 47.

² I am simplifying. There are several variations of both pacifism and realism, some more plausible than others. For a nice overview and critique of the different versions, see Orend (2014).

Situated between the extremes of pacifism and political realism is the *just war tradition*, or *just war theory* (henceforth, JWT).³ It is perhaps the only systematic doctrine from the medieval period that still enjoys general philosophical acceptance. Like any moral and political theory, it has been subject to serious revision and recasting through the centuries, but its most central theses have undergone such revision only since the early 21st Century. JWT affirms that the resort to war can sometimes be just, or at least justified, and that its prosecution is subject to moral restraints: governments must meet certain moral requirements before they can justly commit a nation to war; soldiers must abide by the rules of war to fight justly; and wars must be waged so that a stable and just peace may be restored in its aftermath. Regrettably, these ideals are seldom realized in practice.

JWT is the subject of this dissertation. Specifically, I focus on a fascinating and ongoing internal debate between two different contemporary approaches to JWT: collectivist traditionalism, or simply ‘traditionalism’ for short, and reductivist individualism, or ‘revisionism’, as I will call it. The former is commonly understood as maintaining that the morality of war is different from the morality of peacetime, and other sorts of conflict; the latter maintains that morality is continuous between war and all other contexts outside of war. My goal is to carve out a plausible and practicable middle position between these extremes concerning the rules of war, the permissibility of participation in an unjust war, and the responsibilities of soldiers.

The general thesis of this dissertation is the following: soldiers are morally permitted to defend their comrades-in-arms from direct, imminent threats of harm regardless of who is on the just or the unjust side of war. More specifically, I argue for the controversial thesis that all soldiers

³ Since the ethics of war does not consist of a single theory but a variety of different interpretations and normative frameworks, it is more accurate to say that the *just war tradition* is intermediate between pacifism and political realism. For ease of exposition, I refer generically to ‘just war theory’ with the caveat that there are several different theories, and variations of particular theories, within the overall just war tradition.

whose war is unjust, but who are not to blame for participating in that war, are permitted to defend each other from direct, imminent threats of harm. I call this thesis *the duty of mutual defense*. I will also refer to it as ‘the moderate moral equality of combatants’, or MMEC, thesis. MMEC is intended as a weaker version of a far stronger thesis endorsed by Michael Walzer, ‘the moral equality of combatants’ (MEC).⁴ MEC, says Walzer, holds that all combatants possess “the equal right to kill” all and only enemy soldiers, unless they have been rendered *hors de combat*, and regardless of the justice of their side’s war.⁵ In addition, MEC asserts an equality of battlefield *responsibilities*: combatants on both sides are equally responsible for following the rules and restrictions on battlefield conduct. It is the MEC’s claim that there are equal battlefield rights that is most controversial. From the standpoint of basic, non-conventional morality, my thesis is far weaker and more defensible than MEC.

To some, perhaps those already sympathetic with traditionalism, my thesis must seem somewhat trivial. Isn’t it obvious that combatants in the heat and fear of battle, whose information is limited, and for whom the trust of their fellows is so crucial, may defend each other’s lives? That combatants may defend themselves and each other is a veritable datum of traditional JWT, and of common sense. I also realize that this thesis must seem somewhat opaque at the moment. It is not yet clear what qualifications are built into MMEC, or what makes it different from the stronger thesis, MEC, and *why* it needs these qualifications. However, once we have elaborated the relevant terminology and concepts, and set out the debate between traditionalists and

⁴ Walzer calls this thesis ‘the moral equality of **soldiers**’. I have changed ‘soldiers’ to ‘combatants’ because within the military ranks there are many enlistees who are not soldiers, but rather naval personnel, air force pilots, and so on.

⁵ Walzer (2000), p. 41. Because I reference *Just and Unjust Wars* and Jeff McMahan’s book *Killing in War* quite heavily throughout this chapter, for ease of exposition I will henceforth use in-text brackets and page numbers, referring to Walzer’s book as ‘JW’ and McMahan’s book as ‘KIW’.

revisionists in more detail, the thesis itself will be much clearer, and will emerge as interesting and *non-trivial*. This first chapter is devoted to these clarificatory tasks.

In section 1, I discuss the fundamental moral issues involving killing and maiming both in and out of war. In section 2, I clarify some relevant terminology and concepts of JWT. Section 3 lays out the debate between traditionalists and revisionists, with particular attention devoted to the views of the most prominent traditionalist, Michael Walzer, and the most prominent revisionist, Jeff McMahan. I compare and contrast their respective accounts of the principle of discrimination, individual liability to defensive force, and show that there are symmetrical problems with both. In this section I also explain the MEC thesis in more detail, elaborating on how it is different from my weaker, ‘defensive rights-centered’, thesis. In section 4, I critically reconstruct McMahan’s responsibility-based theory of killing as it applies to war. I pay most attention to Seth Lazar’s ‘responsibility dilemma’ for McMahan’s theory. In section 5 I discuss some concerns about practicability in ethical theory. Section 6 lays out the structure of the rest of the project. In my view we must take very seriously the perspective of soldiers in the formulation and implementation of the rules of war. These rules should embody reasonable standards of epistemic and moral responsibility, and account for the depth and moral significance of soldiers’ friendships with each other, which are under near-constant threat in war.

1.1 Fundamental Moral Issues with Killing and Assault: It is seriously presumptively immoral to intentionally kill or injure another person. People have strong interests in not being treated in these ways and they possess stringent moral and legal rights protecting those interests, and these rights impose duties on others to respect those interests. Killing another person is one of the most seriously wrongful acts. However, both morality and the law recognize that there are exceptions to this general proscription. When someone poses a threat to your life or bodily

integrity, commonsense morality affirms that you may protect yourself by force, even *deadly* force if necessary. Individual self-defense against a wrongful threat to an innocent person's life, or bodily integrity, is the first generally recognized exception. Many people also believe that some violent criminals can morally deserve to die. These are retributive theories of punishment. Both of these justifications appeal, in different ways, to the *moral liability* of the individual who is killed (though as we will see below, there are some very important differences between liability to defensive force and desert-based liability—see section 1.3.3).

Moreover, not just *any* threat of harm can ground liability to defensive killing. A person can be liable to be killed only if he threatens quite significant rights. If I threaten to steal your stick of gum, for example, killing me to defend your right to the gum is massively disproportionate to the value of your defensive goal. It is only threats to a person's right to life or substantial rights of bodily integrity that can pass the test of proportionality. It is also possible that some property rights are sufficiently important to justify killing. Home invasions plausibly violate very important property and security rights. Plus home invaders may create a quite reasonable perception by the home-owners that there is a further threat to their lives or bodily integrity (there is more to say about the varieties of proportionality in sections 1.2 and 1.3).

Sometimes a person can validly agree to be harmed in certain ways, by certain agents, in certain contexts, and at certain times, as when a parent volunteers to donate one of her kidneys to her needy child. Similarly, an individual might *waive* his right to life, as in cases of voluntary active euthanasia, physician-assisted suicide, or through altruistic sacrifice. As an example outside of war, the members of a relatively small sect of Christianity (the Jesus Christians) see it as their religious duty to donate their own organs to needy strangers, even at great risk to their own lives or health. These justifications appeal to the *consent* of the individual who is killed.

Other times killing an individual as a means of preventing or mitigating a significantly greater harm, as in cases of sacrificing one person to save significantly more people, can be justified as the *lesser evil*. Lesser evil justifications are not the same as consequentialist justifications. The latter stipulates that even a somewhat greater good can, in principle, justify killing; the former maintains that the greater good must be far more substantial to justify killing.

What liability- and consent-based justifications of intentional killing have in common is that they do not *wrong* the person who is killed: killing does not violate the person's right to life, because that right is absent in the circumstances (albeit for very different reasons.) There is no duty constraining certain agents, at certain times, not to kill. In contrast, lesser evil justifications *do* involve wronging the person or violating the person's right to life, and violating a prior duty not to kill. Though this violation wrongs the person, it is not wrong all things considered. These are the three commonly recognized exceptions to the moral presumption against intentional killing and maiming.⁶

1.2 Is War a Further Exception?: War is large-scale chaotic violence waged over an indefinitely protracted period of time.⁷ While liability-based, consent-based, and lesser evil justifications all play significant roles in the moral assessment of war and acts of war, some just war theorists have regarded war as itself a further exception to the prohibition on intentional killing. They see it as its own distinctive activity, governed by its own rules, and where ordinary moral prohibitions—all moral prohibitions outside war—are more relaxed. These traditionalists offer a collectivist account of moral responsibility and emphasize the rights of states and political

⁶ A further exception could be that a duty not to kill is absent because the agents of killing have valid authorization. I sidestep this possibility, but it may be worth noting that the ultimate foundation validating this authorization is more basic individual defensive and security rights.

⁷ I elaborate on this definition of war at length in chapter 3: each component of the definition, I believe, highlights ways in which war is characteristically very different from other sorts of conflict.

communities in specifying the principles of just war and the rules of engagement. What is distinctive about traditionalism is *not* its claim that collectives exist, but rather that there is something morally special or distinctive about them. States and their agents are morally special. And so, on this view, is war.⁸

Traditionalists correctly observe that war is far-removed from ordinary life. Their more controversial view is that there are distinct norms governing life in peacetime and (at least somewhat) different norms governing war. While war is in many respects *analogous* to violence that arises in domestic contexts, it is not equivalent or reducible to violence between individuals. This method of reasoning about states and collectives as if they were sovereign individuals is known as ‘the domestic analogy’. The morality of war is instead *sui generis*. Traditionalists affirm a sharp division of responsibility between political leaders, soldiers, and civilians: large-scale enterprises require divisions of moral, tactical, and political labor. This, it is believed, changes the moral rules which apply to those contexts. Political leaders are thus responsible for ensuring the justice of their country’s resort to war. We do not hold soldiers responsible for their *participation* in an unjust war, but we do hold them responsible for their *conduct* on the battlefield. While soldiers are legitimate targets of violence in war, civilians are, barring extreme circumstances, morally immune from intentional attack.

These theses follow from the strict logical and normative separation of the requirements governing the resort to war, *jus ad bellum* (JAB), and the requirements governing its prosecution, *jus in bello* (JIB). Michael Walzer summarizes this two-level distinction, or ‘dualism’, about the morality of war as follows: “war is always judged twice, first with reference to the reasons states

⁸ The writings which are most often cited as representing the view that war is morally *sui generis* are Walzer (2000, 2014B); Shue (2008, 2013). In the next chapter I argue that the traditionalist notion of a *sui generis* morality of war is *not* making any problematic claim about basic moral principles, but about what constitutes the morally best *policies* for war.

have for fighting, secondly with reference to the means they adopt... the two sorts of judgment are logically independent. It is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules” (*JUW* 21). The dualism of JAB and JIB “is at the heart of all that is most problematic in the moral reality of war” (21). The central problem, as I see it, is explaining how it is possible—given a unitary, non-Hobbesian morality across all contexts—for an unjust war to be fought permissibly.

Following the most recent critical literature, I will refer to this dualism as ‘the independence thesis’, which states “that the *in bello* rights and obligations of a combatant in war are independent of the *ad bellum* justice of the war in which he fights.”⁹ A second traditionalist thesis, which has come under serious philosophical criticism in the past decade, is ‘the symmetry thesis.’ The symmetry thesis says that the rights and responsibilities specified by the JIB are equal between combatants regardless of who, if anyone, is in the right. As stated in the introduction, this thesis is better known as ‘the moral equality of combatants’, or MEC. (I will use the labels ‘symmetry thesis,’ ‘symmetrical rules,’ and ‘MEC’ interchangeably). A third thesis, embodied in both traditionalism and international law, is the near-absolute moral immunity of non-combatants from intentional attack (also known as the JIB principle of *discrimination*, *distinction*, or *non-combatant immunity*). (The MEC thesis, and the terms ‘combatant’ and ‘civilian’, will be explained at greater length in section 1.3.3.)

A second camp in the just war tradition has emerged in the past twenty years of scholarship, just war revisionists.¹⁰ In contrast to traditionalists, revisionists regard war as continuous with ordinary life and morality. There is nothing morally special about collectives or the large-scale violence waged between states; rather, the resort to war and the manner in which it is waged must

⁹ Rodin and Shue (2008), p. 3

¹⁰ Rodin (2003), Coady (2008), McMahan (2009B), Frowe (2014)

be judged by the same standards as violence in other contexts. Helen Frowe summarizes the basic position, that “the rules governing killing in war are simply the rules governing killing between individuals, most obviously (but not exclusively) the rules of self-defense and other-defense.”¹¹ War is just an extreme aspect of ordinary life and morality, on this view. The things that mark it as different from ordinary life, such as its large-scale, pervasive uncertainty, and fear, do not engender a different war-specific morality—even if there are sound pragmatic or policy-based reasons for endorsing war-specific legal rules. As Jeff McMahan says, war’s characteristically different descriptive features “change nothing at all; they simply make it more difficult to ascertain the relevant facts.”¹² The basic morality governing interpersonal killing is the same across all contexts. States, collectives, and war itself are not morally special. So holds the revisionist.

For all their differences, both traditionalists and revisionists hold that there is a close connection between personal defense and justified wars. Traditionalists see the rights of states to wage defensive wars as analogous to the rights of individuals to wield personal defense. In his discussion of the legalist paradigm, which frames his account of JAB and defense against aggression, Walzer in fact refers to the rights of *political communities*. It is for the sake of brevity that I refer to the rights of ‘states’, but it should be understood that the rights of sovereignty and territorial integrity can in principle be held by non-state collectives. Though Walzer himself frequently mixes the terms ‘political community’ and ‘state’, I interpret his use of ‘political community’ as intended to leave open that non-state collectives can possess these same rights (*JUW* 53-63). Just as individuals possess rights of freedom and bodily integrity which may be forcibly defended against acts of aggression, so states have rights of political sovereignty and territorial integrity which may be defended against aggression. States and political communities are to be

¹¹ Frowe (2014), p. 123

¹² McMahan (2014B), p. 148

regarded as sovereign individuals—not literally, of course, but as Walzer says “for the sake of analytical clarity” (*JUW* 72). In contrast, revisionists like McMahan see defensive war as the aggregation of individual defensive rights. As it happens, most of us have transferred those defensive rights to official authorities, such as the police and military. But agents of these institutions are not acting on behalf of normatively independent *state* rights, but the *individual* rights of the state’s citizens.

The main subject of this dissertation is the traditionalist MEC thesis. It will be helpful in understanding the debate over MEC to clarify some terms and concepts from JWT. With these clarifications in hand, a puzzle emerges as to why anyone has thought MEC is true, or why anyone should accept even a more moderate MEC thesis, such as the duty of mutual defense.

1.3.1 *Jus ad Bellum*: As stated in the previous section, there are two sets of principles in JWT. The first, the *jus ad bellum* (JAB), concerns justice in a nation’s resort to war. The JAB standardly consists of six principles: 1) Just Cause, 2) Proportionality, 3) Reasonable hope of success, 4) Last Resort, 5) Right Authority, and 6) Right intention. In order for the JAB to be satisfied, according to the traditional theory, all six of these conditions must be met. Let us briefly characterize each of these conditions, with special attention paid to the most important JAB requirement, just cause.

A *just cause* is the end or aim which justifies the resort to war. *Proportionality* is an assessment of whether the anticipated benefits of war outweigh the anticipated harms. For war to have a *reasonable prospect of success* is for there to be a sufficiently high probability that the just cause, and related just aims, will be achieved by means of war. War is a *last resort* when all reasonable non-violent alternatives to achieving the just cause have been exhausted—for example, economic sanctions, diplomacy, and the like. *Right authority* is the requirement that the agents

who declare war must be public authorities, most typically the leader or representative of a state. Hugo Grotius, easily the most eminent thinker to write about JWT in the past five hundred years, distinguished *public* wars from *private* wars.¹³ Public wars are publically declared *and* done so by a recognized authority; private wars are not declared or waged by any official authority, but are just conflicts waged between private persons. Grotius' use of the term 'war' is somewhat idiosyncratic to the modern eye, as he subsumes cases of one-on-one self-defense and duels under the broad label 'war', in addition to the more familiar large-scale conflicts waged between sovereign nations.¹⁴ Certainly Grotius, and the tradition which followed him, maintained that the latter is only legitimate if it is declared by a public authority. Finally, for war to be declared with the *right intention* is for the agents of war-making to be motivated by the just cause (and related just aims) rather than by ulterior motives such as enmity, predation, or selfishness. Mixed motives, of course, are very common in all the wars that have actually been fought.

Four of these six conditions include just cause in their definition. Without a just cause, there can be no assessment of whether there is a reasonable prospect of achieving the just cause; nor are there any just aims which can weigh against war's destructive effects in *ad bellum* proportionality calculations; waging war to achieve a just cause obviously cannot be a last resort without a just cause; and war cannot be waged with the *right intention* without a just cause to motivate its resort. This does not mean that the agents of war could not have good intentions, or be motivated by the sincere if mistaken belief that they wage war with a just cause, but these are not the same as having the *right intention*.¹⁵

¹³ Grotius (1901), bk. 1, ch. 3

¹⁴ Ibid

¹⁵ McMahan (2014A), p. 193

It is worth pausing to call attention to an ambiguity wrought by this last observation. Each of these principles (along with the *jus in bello* principles, discussed below) can be cast in either objective or subjective terms. Let us say that the JAB requirements are objectively satisfied when they are *as a matter of fact* satisfied: the things that would need to be true in order to make the resort to war just are in fact true. There must, as a matter of fact, be a just cause; its pursuit by means of war must in fact be a last resort; and so on. When the JAB requirements have been objectively satisfied let us say, following McMahan's terminology, that the war is *objectively just*. In contrast, the satisfaction of the JAB principles could be cast in *subjective* terms. That is, the agents of war might genuinely believe, on the basis of very solid evidence, that the resort to war is just. Country A might, for instance, have quite reasonable evidence that it faces an imminent external threat of invasion from Country B—because Country B has made credible threats to wage war, has engaged in brinksmanship, or has a history of unprovoked aggression against its neighbors. Should Country A go to war against Country B on the basis of this strong evidence, it might *subjectively* satisfy the JAB requirements. The beliefs of Country A's leaders, however reasonable, could turn out to be objectively false. Thus, it can turn out that a country wages a war that is *subjectively just* but *objectively unjust* (though it could be both subjectively and objectively just as well; or subjectively unjust but objectively just). This distinction between the objective and subjective satisfaction of the JAB (and JIB) requirements is a very important distinction, one which will play a crucial role in the arguments of later chapters. My own view, indeed, is that subjective standards of moral and epistemic justification are most appropriate for individual soldiers in the fog of war (chapter 5). But for purposes of simplicity, in the rest of this section, I discuss the requirement of just cause in terms of its objective satisfaction.

Though each of the six JAB conditions is necessary, I will restrict my (far from complete) discussion to the two most important requirements, just cause and proportionality.

a. Just Cause: Generically, there is a just cause only if there has been a *wrong received* or there is a wrong in imminent prospect. Moreover, the ‘wrong’ in question must exceed a certain level of severity: it must be a wrong that is sufficiently severe to make the wrongdoer *liable* to armed attack (*KIW* p. 5). Thus, a *just* cause is something more than merely a worthy or good cause. Boosting a country’s economic productivity is certainly a good and worthy aim, but it is not the type of goal that can justify the resort to war. Rather, a genuinely just cause must be a goal of a type that justifies killing and the infliction of grave injury, since these are essential features of war as it has always been and is presently waged.¹⁶ In general, a just cause for war in both morality and law must be *defensive*; that is, a just war must necessarily aim at the protection of important human rights against actual or imminent threats of violation.

In Michael Walzer’s legalist paradigm, which largely follows international law, it is external threats to a political community’s rights of political independence and territorial integrity which generate a just cause of national defense and make the resort to war potentially legitimate (*JUW* p. 53, 58-63). This legalist paradigm, it should be noted, appears to focus on the rights of *collectives* rather than *individuals*, though Walzer also suggests that the rights of collectives might be reducible to the rights of their individual members. He says that rights of territorial integrity and political sovereignty “belong to states, but they derive ultimately from the rights of individuals, and from them they take their force.” And he quotes with approval the view of a British lawyer, who says that “the duties and rights of states are nothing more than the duties and rights of the men who compose them.” For, “when states are attacked, it is their members who are challenged,

¹⁶ McMahan (2014A)

not only in their lives, but also in the sum of things they value most, including the political association they have made” (*JUW* 53). Threats to fundamental human rights to self-determination, life, and bodily integrity generate a just cause for both individual self-defense in the domestic sphere (subject to other conditions, such as necessity and minimal force) and for the resort to wars of national defense.

These rights may be sufficiently important that their threatened violation provides reasons for others who are not themselves under attack to enter a conflict. We can modify our earlier example, in which Country A defends itself from Country B, such that Country C enters the conflict between A and B. Seeing that A is under attack by B, C joins A’s efforts at national defense. This is more or less the same type of just cause as national self-defense against aggression, except that one of the defending countries is not itself under attack.¹⁷ This is a case of justified third-party defense or ‘other-defense’. In the early 1990’s, the Bush Administration’s war against Iraq had the stated justification of other-defense in stopping Saddam Hussein’s aggression against Kuwait.

A further, highly controversial, just cause for war is *humanitarian intervention*. Wars of intervention are justified where there are sufficiently severe violations of human rights, perpetrated by agents of a state against members of the civilian population, or in conditions of a failed state. Historical and contemporary examples of these human rights abuses are scandalously common: the massacre of the Tutsis by the Hutus in Rwanda; the slaughter of Albanian Kosovars by Serbian nationalists; the Ugandan genocide under Idi Amin; and the ongoing abuses—such as widespread rape, murder, and slavery—in the Congo and Southern Sudan today. Walzer has also held that

¹⁷ There are various complexities with third-party defense, at both the individual and international level, such as considerations of autonomy that make this picture much less clear-cut than I have indicated here. For illustrative purposes, I am here ignoring these important complexities.

interventions can be permissible where the intervener's aim is assisting a just secessionist movement, or balancing the scales of force from a prior intervention. These interventions are some further exceptions to the legalist paradigm (Juw 90). Humanitarian intervention is widely regarded as a distinct just cause for war, but it can be easily understood as a defensive cause. For, when just, these interventions aim to protect important human rights from systematic violation. Humanitarian interventions are really a form of other-defense; though not by one state in defense of another state, but rather by one state in defense of a population.

Jeff McMahan has called attention to an older tradition of JWT that endorses a more expansive account of just cause that goes beyond the defensive causes of resisting aggression and humanitarian intervention. One is reversing or rectifying the effects of past aggression; another is the prevention of future aggression.¹⁸ The former, though not technically defensive, protects the same sorts of values which justify defensive wars: rights of political and cultural sovereignty, for example, and perhaps others. The latter is prohibited by international law and is morally controversial: there might be occasions in which it is permissible, in principle, to justly go to war to prevent probable future aggression. Preventive war might be justified by analogy with the occasional permissibility of preventive detention in domestic contexts, such as restraining a known psychopath before he can go on a rampage, or quarantining the carrier of a deadly disease before it spreads. David Luban has argued that where preventive war is justifiable, in principle, it must first satisfy a requirement of *probabilistic imminence*: the probability of a future aggression must meet a certain threshold before preventive force becomes a potentially legitimate option. David Luban defines preventive war as “a preemptive war in which the imminence requirement is recast from temporal to probabilistic terms.”¹⁹ Preemptive war, in contrast, is war waged in response to

¹⁸ McMahan (2014A), pp. 199-202

¹⁹ Luban (2014), p. 259

a threat that is temporally imminent—i.e., the bomber planes are on their way to Manhattan and we attack them before this threat is actualized.

The medieval theory, finally, also endorsed certain just causes that have largely fallen out of favor with contemporary theorists, and which are also not recognized in international law: these are causes of religious conversion, the punishment of non-Christians,²⁰ and wars of vengeance. Certain complications concerning preventive war to one side—such as that the wrong has neither been received nor is it imminent—this survey of the concept and types of just cause should give us enough content to understand why the MEC is such a problematic and seemingly indefensible thesis. But first, let us say a bit about the requirement of proportionality, which gets most of its content from a war's just cause.

b. Proportionality: Three of the six JAB principles are concerned with the consequences of resorting to war: proportionality, last resort, and reasonable hope of success. Proportionality is arguably the most important of these, and on some views even holds moral priority over just cause in the overall assessment of the JAB.²¹ Generically, it is simply the requirement that the relevant expected evils of going to war should not exceed the relevant expected goods. The qualifying term 'relevant' is essential here: for not all costs of war count against the resort to war and not all benefits count in its favor.

The relevant costs of war include all the destruction, injury, loss of life, and other harms that come with the waging of war. Indeed, there are many more costs which can count against a war's proportionality than there are benefits that can count in its favor. The fact that soldiers might

²⁰ I believe Vitoria was the first just war theorist to argue that wars of religious conversion or punishment for non-belief cannot be just because they are not responses to actual or imminent wrongs. Though seemingly obvious to the contemporary eye, his insight, first developed in *On the American Indians*, is one of the great contributions to just war theory and to the progress of thought about ethics of war.

²¹ This is the view Larry May develops in his "The Principle of Just Cause", in which he contends that "there is a rudimentary proportionality requirement built into the concept of just cause." May (2008), pp. 60-62.

be eager to showcase their martial skills in real life combat is irrelevant to war's proportionality; or the fact that war might boost a country's economy is not a relevant benefit. But the fact that war will harm the economy or create men who are instinctively violent, seem to count heavily against it. The relevant benefits of war are those specified in a war's just cause(s) and its related just aims.²² Jeff McMahan and Robert McKim first introduced the distinction between *sufficient* and *contributing* just causes.²³ Sufficient just causes are enough by themselves to make the resort to war potentially just: they are simply the just causes discussed in the previous sub-section (any cause that aims to rectify or mitigate substantial and widespread wrongdoing). Contributing just aims are war aims which do not by themselves justify the resort to war, but which are legitimate to pursue once war is underway and can contribute to war's proportionality.²⁴ They may also constitute reasons for continuing a war or occupation even after the sufficient just cause has been achieved. These aims include disarming an aggressor country, punishing or removing the leadership responsible for the unjust aggression, deterring an aggressor or other would-be aggressors, and certain lesser humanitarian aims, such as helping an oppressed ethnic minority secure certain rights of political participation.

Proportionality may be the most complicated principle in the JAB. Its complexity is in part derivative of certain philosophical controversies about just cause—for example, about whether certain sorts of interventions or preventive wars can be just. More importantly, there is reasonable disagreement both about which values are in fact relevant to proportionality as well as how much weight those values should be assigned in the calculation. For example, there are major complications concerning how much weight to assign different lives that will be lost in war.²⁵

²² Hurka (2014), p. 301

²³ McKim and McMahan (1993), p. 502. Henceforth I refer to contributing just causes as 'just aims'.

²⁴ Hurka (2014), pp. 300-304

²⁵ Ibid, pp. 312-18

How do our soldiers' lives weigh against the lives of enemy civilians? How do our civilians' lives weigh against the lives of enemy soldiers? How do the lives of reluctant conscripts weigh against the lives of civilians? How much partiality toward our own soldiers or civilians is reasonable in these calculations? There are similar complexities for balancing other harms and benefits.

Another way to put this point is that proportionality is deeply *theory-laden*. If one is especially morally committed to the value of moral desert, one might hold that a war should be prolonged to ensure that the leadership of an aggressor nation gets its comeuppance: pursuing a just aim of retribution may justify force that would *not* be considered proportionate on a view that places more emphasis on, say, stability than on moral desert. In addition, a more paternalistic moral view might permit many more interventions than would be permitted by a view that places more emphasis on autonomy and national sovereignty. Or where national self-determination is of central value in Walzer's legalist paradigm, David Rodin denies that the defense of political self-determination does much, if anything, to help justify the killing and maiming of war.²⁶

These are potentially serious obstacles to the proper specification of JAB laws of war, as well as the correspondent JIB proportionality requirement. Michael Walzer does not discuss it at any length, but quite rightly points out in passing that violating the principle of proportionality "is by no means easy to do... since the values against which destruction and suffering are to be measured are so readily inflated" (*JUW* 192). In my view, the complexity of proportionality—its 'value-laden-ness' as I have called it—is a major contributing factor in the epistemic and moral uncertainty of soldiers at war; I develop this point further in chapter 4. In addition, the existence of both reasonable disagreement about relevant values and about how to weigh those values against each other, in my view, seems to favor a morality of war that focuses on the *morally optimum* set

²⁶ Rodin (2003, 2014)

of *public laws* for war, rather than leaving these judgments up to private individuals;²⁷ this is the subject of chapter 2.

Now that we have at least a sketch of the JAB requirements, especially just cause, we can turn to the JIB principles and, moreover, the traditionalist theses that have come under attack by revisionists.

1.3.2 *Jus in Bello*: There are three *jus in bello* (JIB) requirements: discrimination, JIB proportionality, and JIB necessity. These requirements are the responsibility of political leaders insofar as they make tactical decisions about war's prosecution, as well as the responsibility of combatants on the battlefield.²⁸ I will first briefly touch upon JIB proportionality and military necessity, but devote the bulk of this section to the requirement of discrimination.

JIB proportionality calculations focus on the relevant prospective costs and benefits of particular *acts* of war, rather than on the resort to war itself. The central idea of JIB proportionality is that the resulting harms of acts of war should not be excessive compared to the expected relevant benefits of those acts of war. To even get the JIB proportionality calculation started, there must be some legitimate end in view to weigh against the costs. Like its JAB counterpart, JIB proportionality gets much of its content from war's just causes and contributing just aims.²⁹ It also shares with JAB proportionality many of same complexities outlined in the previous section, which I will not rehearse here.

Necessity is the JIB counterpart to the JAB requirement of last resort. It holds that acts of force in war must be necessary to the achievement of legitimate military aims. Killing enemy combatants (or civilians collaterally), or causing destruction, is impermissible if there is no

²⁷ Similar views can be found in Shue, (2008, 2013) and Walzer (2014A, 2014B).

²⁸ Hurka (2014), p. 298

²⁹ Ibid, p. 304

prospective good in view, or if there is another option that would be comparably effective but cause less harm. Another way of characterizing the necessity requirement is to say that the minimal amount of force necessary to achieving a legitimate war aim must be used; excessive force is impermissible.

1.3.3 Discrimination and Liability (I), Material Liability: The principle of discrimination requires that soldiers distinguish legitimate from illegitimate targets of attack, intentionally targeting only the former. The controversy between traditionalists and revisionists does not concern the imperative to make this distinction. Rather, it concerns who falls into which category. As discussed in section 1.1, one of the three ways in which it can become legitimate to intentionally harm another person is if he has done something to make himself liable to attack. Liability is inherently goal-oriented. Unlike deserved harm, liability to attack requires that there be some further legitimate goal achieved by an act of killing, beyond the harm itself. In justified self-defense or in a just war, the goal is the defense of important rights. Thus, McMahan writes, “the goal is internal to liability, in the sense that there is no liability except in relation to some goal that can be achieved by harming a person” (*KIW* p. 8). Desert-based liability, in contrast, sees harms as themselves the end.

Liability is typically contrasted with ‘moral immunity’, which means simply that an individual retains the usual moral protections, or that the usual moral reasons against attacking him are in force. Liability and immunity are not strictly opposite. It is possible for an individual to be both liable and immune to attack at the same time. This might be the case when there are overriding moral reasons not to inflict harms to which a person is liable. For example, inflicting harm on a liable party may pose disproportionate risks on innocent bystanders. So from the fact that his right is absent it does not automatically follow that harming that person is permissible *all*

things considered. The liability question is this: what makes it the case that an individual loses his or her rights against being intentionally killed or injured; or, equivalently, what makes it the case that the person who kills or inflicts injury on the liable party no longer has a duty to the person not to kill or inflict injury on him? And what makes it the case that an individual is morally immune to attack?

For an individual to be liable is the same as saying that he is ‘non-innocent’. Thus, the heart of the controversy is determining who counts as innocent and non-innocent, and how individuals can become non-innocent in the sense relevant to liability. There are three substantive definitions of ‘non-innocence’ which have been proposed as criteria of liability. The first criterion is simply ‘posing a threat’. This criterion is etymologically well-grounded, for the term innocent has roots in the Latin expression ‘nocentes’, which means ‘injurious or harmful’. So to be ‘innocent’ is to be ‘non-nocentes’, non-threatening. As Thomas Nagel puts it, innocence “is opposed not to ‘guilty’ but to ‘doing harm’.”³⁰ In war, anyone who poses a threat of harm is non-innocent and so potentially liable; anyone who does not pose a threat retains her innocence and is morally immune to intentional attack. Let us call the criterion of liability based upon posing a threat *material liability* (or *material non-innocence*); and let us call the criterion of immunity based upon an individual’s being ‘non-threatening’ *material innocence*.

Before turning to the other criteria of liability and exploring the problems with material liability, let us first introduce some terms that will be prominent throughout this dissertation. A ‘combatant’ is any individual who, in the context of war, poses a threat. This is a moralized notion of ‘combatant’. It differs from the legal definition, which maintains that there are certain conventional criteria for the possession of combatant status: such as wearing a uniform, carrying

³⁰ Nagel (2014), p. 14.

one's arms openly, and following certain rules and conventions of the law of armed conflict. While the legal definition of combatant is important, I will be concerned with the moralized notion as it is the moralized notion that is most relevant to MEC. A non-combatant is any individual who, in the context of war, does not pose a threat. Combatants are most commonly, though not exclusively, understood as all active duty soldiers and military personnel who have not been rendered *hors de combat*; non-combatants are most commonly understood as members of the civilian population. I will use the terms 'combatant' and 'soldier' interchangeably. Despite common categorization, however, it is an as yet open question whether some members of the civilian population could have combatant status.

Let us refer to a combatant who participates in an unjust war—i.e., a war that fails to satisfy one or more conditions of the JAB—as an 'unjust combatant'; and a combatant who participates in a just war—i.e., a war that satisfies the conditions of the JAB—as a 'just combatant'. Let us refer to a civilian whose country is waging an unjust war as an 'unjust civilian'; and a civilian whose country is waging a just war as a 'just civilian.' Immediately, we see that on the material liability view, all combatants lose their immunity to attack, and all non-combatants retain theirs, *by definition*. If simply posing a threat of harm is the correct criterion of liability, it follows that both justified and unjustified combatants are liable to attack. If material non-innocence is the correct criterion of liability, then at least one component of the MEC thesis, that all and only combatants are legitimate targets of attack in war, immediately follows.

McMahan's primary objection to material liability, and so to the MEC thesis, is that it bears almost no resemblance to the liability rules in other conflicts. He says, "in contexts other than war, the morality of conflict is almost invariably asymmetric: those who are in the right may be permitted to use force and violence but those who are in the wrong are not" (*KIW* 35). Justified

combatants participating in a war to expel aggression are no more liable to attack by unjustified combatants than is the victim of an armed robbery who forcibly defends herself against a mugger. This is so despite the fact that, in defending herself, the victim thereby poses a material threat of harm to the armed robber. Of course, this analogy is imperfect: most unjustified combatants are not typically like criminal assailants. They tend to be much better people, often possessing honorable motives of duty and solidarity, and abiding by warrior codes which distinguish them from common bandits and murderers.³¹ To reject MEC, however, is not necessarily to regard unjustified combatants as criminals who are deserving of punishment or social condemnation. Rather it is to reject the claim that they do no wrong merely by participating in an unjust war. Moreover, it is to affirm that they are indeed responsible, not just for their own conduct on the battlefield, but also for determining the JAB status of the conflicts in which they fight. The analogy to individual self-defense illustrates the idea that unjustified attackers are not morally permitted a counter-defense against their victims' justified self-defense. The same, according to McMahan and other revisionists, is true of unjustified combatants. McMahan's position on the MEC can be stated in a slogan: justification defeats liability. And this, he argues, is true whether the conflict is war, individual self-defense, or any other conflict.

My response—and I am not alone in thinking this³²—is that war is a very distinctive form of conflict, significantly different from nearly any sort of conflict that arises in ordinary life. This point is the subject of chapter 3. For now, let us turn to the second important objection to material liability, and then consider the alternative accounts.

³¹ French (2005), pp. 2-3; Walzer (2000), p. 36.

³² The observation that war is very different is Walzer's main response in his 2006 debate with McMahan in *Philosophia* [see Walzer (2014A)]. Shue (2008) also makes this case.

That second objection is this: there is no principled way of demarcating who counts as a threat that is not either too broad or too narrow. It will be helpful in setting out this discussion to introduce a further distinction, that between *direct* and *indirect* threats of harm. A person poses a direct threat of harm when he is himself posing the threat. The mugger who attacks the innocent victim is a paradigm direct threat. A person poses an indirect threat of harm when she is causally involved in a threat of harm, but is not herself the immediate agent of the threat. For example, suppose our indirect threat is a mob boss who has hired the mugger to attack the victim. The mob boss is not the direct agent of the threat, but she is implicated as a direct threat (and in both morality and law may share just as much responsibility for the resulting harms to the victim). In war, individuals who make certain sorts of contributions to the war effort count as indirect threats and may be potentially liable to attack. But what are the relevant contributions which would implicate them? How can we avoid extending the scope of liability so far that it illicitly implicates too many civilians?

Walzer points out a difference between soldiers and civilians which seems to implicitly make use of the distinction between direct and indirect threats of harm. He suggests that soldiers have made certain choices that relevantly differentiate their moral status from that of civilians. Part of what explains their liability isn't *just* that they are material threats, but that they have made themselves into material threats. According to Walzer, the active-duty soldier "can be personally attacked only because he is already a fighter. He has been made into a dangerous man, and though his options may have been few, it is nevertheless accurate to say that he has allowed himself to be made into a dangerous man" (*JUW* 145). I interpret Walzer's reference to the limited options ('his options may have been few') of the soldier to cover the case of conscripted soldiers, perhaps

especially the reluctant conscripts who would rather not fight. This enables him, in accordance with MEC, to generalize the moral status of all combatants while ignoring individual differences.

However, Walzer wants to count as liable not only those individuals who have allowed themselves to become dangerous men, but also those individuals who—though they do no actual fighting—make certain *types of contributions* to the war effort. Some civilians count as indirect threats. He therefore allows that a restricted class of civilians in war-time can count as legitimate targets of attack. So there is not, on Walzer's view, an absolute or clear-cut line between soldiers and civilians. Is there a clear-cut line between legitimate and illegitimate *civilian* targets? Walzer attempts to draw a principled line. "The relevant distinction," he writes, "is not between those who work for the war effort and those who do not, but between those who make what soldiers need to fight and those who make what they need to live, like all the rest of us" (*JUW* 146). Thomas Nagel makes much the same point:

"the threat presented by an army and its members does not consist merely in the fact that they are men, but in the fact that they are armed and are using their arms in the pursuit of certain objectives. Contributions to their arms and logistics are contributions to this threat; contributions to their mere existence as men are not. It is therefore wrong to direct an attack against those who merely serve the combatants' needs as human beings, such as farmers and food suppliers, even though survival as a human being is a necessary condition of efficient functioning as a soldier."³³

The provision of guns and ammunition to troops counts as a relevant contribution which renders those suppliers potentially liable; the provision of food or clothing to troops does not.³⁴

McMahan responds to this attempt at solving the problem of scope. He points out that the traditional theory does not include in the net of liability scientists whose research is essential to the development of new weapons technologies, despite the fact that their research is potentially far

³³ Nagel (2014), p. 14. The same basic distinction is also made by Hugo Grotius (1901), book 3, chapters 1 and 11; and also Coady (2008), pp. 111-14.

³⁴ Fabre (2009) argues that civilians who supply food, clothes, and shelter to (unjust) combatants are relevantly similar to civilians who provide them with arms, though she denies that the former provisions ground liability to attack.

more threatening than the activities of any individual combatant. He points out that “there are many people who pose a threat in war who would not be considered combatants by anyone. Elderly professors of physics working for the Manhattan Project in laboratories at Los Alamos and the University of Chicago posed a far greater threat to the Japanese than any ordinary American soldier, but no one would say that they were combatants” (*KIW* 12-13). I am not so sure about the last part of McMahan’s point: their contributions to the war effort could be seen as analogous to the contributions of munitions workers, whom Walzer regards as legitimate targets.

This particular example aside, McMahan’s point is well-taken: it is difficult to demarcate different types of threat such that we can draw a principled line between those who are threatening and those who are non-threatening. After all, politicians whose policies commit the military to war pose a threat: their contributions to the threat, though indirect, are causally quite significant. It might not be implausible to regard them as liable, but what if those leaders were democratically elected? Should the majority of the civilian population who voted them into office be regarded as contributors? What about members of the civilian population who, even if they did not vote for those leaders, pay the taxes and participate in the culture which renders war-making possible? There is, in short, a problem that the scope of liability will extend too far and counterintuitively capture too many members of the civilian population in the net of liability. Extended far enough, there would then be some persons who pose a threat to others but whom hardly anyone wishes to classify as ‘combatants’. On the other hand, there are some persons whom most of us would regard as combatants but who pose no threat at all. As an example of the latter: those combatants who in the course of a war never discharge their weapons, or who seek to sabotage their side’s war effort, do not pose a threat in any straightforward sense. And even the most inept and ineffective soldiers are regarded in JWT as legitimate targets of attack. I set this problem of scope aside for now:

McMahan's theory of liability, as we will see below, has a symmetrical problem of scope. Let us first turn to the 'unjust threat' account of liability.

1.3.4 Discrimination and Liability (II), Objectively Unjust Threats: There are alternative accounts of innocence and liability that focus more on the moral character of the threat rather than the fact that someone poses a threat. As the self-defense case involving the victim and mugger shows, it makes a considerable difference whether a threat is justified or unjustified. In her later work G. E. M. Anscombe suggests a conception of innocence which says that an individual becomes non-innocent, and so potentially liable, by virtue of posing an *unjust* threat of harm. "What is required," she explains, "for the people attacked to be non-innocent in the relevant sense, is that they should 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."³⁵ An objectively unjust threat is a threat to which the potential victim is not liable, or has a right not to suffer. A person can pose an objectively unjust threat of harm without being in any way morally responsible for doing so. A common example in the literature is the 'involuntary human projectile', a person who through no fault of his or her own is going to fall on and kill another person. Judith Thomson has developed a similar view, which holds that individuals who pose objectively unjust lethal threats, even without being at all morally responsible for them, are liable to defensive force.³⁶ On this view, innocence is simply 'not participating in an unjust threat of harm'.

(It is worth reiterating, parenthetically, that when a threat posed is *unjust* this is compatible with its being *justified*, all things considered. As stated in section 1.1., sometimes the balance of

³⁵ Anscombe (2014), p. 97.

³⁶ Thomson (1991)

reasons permits or even requires violating a person's rights as the lesser evil. A person's right to life may have to be violated to avert a catastrophe, or to prevent a significantly larger number of similar rights violations. The threat is *unjust* because it wrongs the victim, or violates his rights, but this violation is *justified* by weightier moral considerations.³⁷ Indeed, some account of how the killing and maiming of innocent people—especially members of the civilian population—can be justified is certainly necessary to a theory of justified killing in war. This is so because the death and injury of innocent people is inevitable in war as it is currently waged. In addition to there being a substantially greater good to outweigh these rights violations—a proportionality condition—just war theorists commonly add the conditions that the violation of their rights must not be intended as a means³⁸ to the achievement of the justified aims, and that the activity leading to these violations must itself not be intrinsically evil. This view, and variants of it, is known as *The Doctrine of Double Effect*.)

The Unjust Threat account of liability, like Walzer's material liability view, may face a problem of scope as well. Who should count as contributing to an unjust threat of harm? I will develop this problem of scope at greater length as it concerns McMahan's criterion of liability. But it should be noted, moreover, that the unjust threat view, when applied to certain domestic conflicts, gets the intuitively wrong answers. This is so because the unjust threat criterion makes no reference to the *moral agency* of the person who poses the unjust threat. To appreciate why this is a problem, consider these examples³⁹:

³⁷ When the encroachment of a person's right is justified, this is sometimes referred to as a mere 'infringement'. When the encroachment of his right is unjustified, this is sometimes referred to as a 'violation'. I am sticking with the term 'violation' for both sorts of encroachment, because I believe this language makes it clear that, whether the encroachment is justified or unjustified, the rights-holder has still been *wronged*.

³⁸ For a dissenting view which says that the intentional killing of the innocent is, in principle, justifiable see Kamm (2014).

³⁹ These examples are inspired by McMahan (1994B), pp. 280-1

The Trapped Miners: two workers are trapped inside a collapsed mine. They can communicate with emergency workers aboveground so the miners know that help is on the way. Unfortunately there is only enough oxygen in the mine for one of the two miners to survive until help arrives.

The trapped miners stand in the same threatening relation to each other. The breathing of one miner poses a threat to the other miner to which he is not liable, and vice versa. Have both of the miners become unjust threats vis-à-vis each other? Breathing is not normally regarded as “an objectively unjust proceeding” as Anscombe puts it. But if either is to survive, he must kill in self-defense. So perhaps we should say that neither of the miners is liable, and that the fairest way to deal with this case is by flipping a coin to see who should live.

More of a problem for the unjust threat view is this modified version of the case:

Malicious Miner: This time let us suppose that the collapsed mine was the result of one of the miner’s blameworthy actions: he deliberately hit a patch of rock that he knew would cause the collapse. There is only enough oxygen for one of the miners to survive until help arrives.

The relation between the two miners is the same as in the first case: one’s breathing the available oxygen threatens the oxygen supply of the other, and vice versa. But again breathing is not in itself “an objectively unjust proceeding.” The difference in this case is that the blameworthy and malicious act of one of the miners has caused this predicament. The Unjust Threat criterion of liability lacks the resources to explain why the culpable miner has a lesser claim, if he has any claim at all, to the available oxygen. But the fact that the first miner’s blamable act has caused this predicament seems, *prima facie*, to favor the second miner’s life: if anybody may kill in self-preservation, it is the blameless miner. In other words, it looks like the faulty agency of the malicious miner engenders a moral asymmetry between them. It appears that the posing of an unjust threat is not by itself *sufficient* for liability, though it does appear to be necessary. Some further asymmetry in the responsible agency of the parties to a conflict—or situation where

someone is inevitably going to suffer harm—also appears to be necessary. We need to know, in other words, under what circumstances the loss of the right to life—i.e., liability to killing—occurs.

1.3.5 Discrimination and Liability (III), The Responsibility Criterion: Like the unjust threat account of liability, McMahan's theory of individual liability requires that an individual be involved in an objectively unjust threat of harm. Also, there is a necessity condition implicit in the concept of liability to defensive harm: an individual is liable to be killed only if doing so is necessary for averting the threat he or she poses. McMahan writes, "if harming a person is unnecessary for the achievement of a relevant type of goal, that person cannot be liable to be harmed" (*KIW* 9). Let us call the 'kill-or-be-killed' scenario that is typical of lethal individual defense cases a *forced choice between lives*.⁴⁰ When there is a forced choice between lives, it is inevitable that at least one party to a conflict will suffer death. This is the structure of McMahan's account of defensive killing: this structure identifies the types of circumstances which make it possible for a person to lose the right to life.⁴¹ But how do we settle which of the two parties in the forced choice situation should suffer the loss of his life? How do we know which party has forfeited the right not to be killed? Here is where we need a criterion—some minimal sufficient basis—of liability to be killed.

As stated in section 1.3.2, McMahan and other revisionists reject merely 'posing a threat' as a sufficient basis of liability: some persons *justifiably* threaten and so do not thereby become liable: as stated above, the idea is that *justification defeats liability*. McMahan also rejects directly 'posing a threat' as a necessary condition of liability: there can be cases in which a person himself poses no direct threat of harm, but is causally implicated in a threat. That an individual should at least be causally implicated in a threat seems to be common ground between Walzer and

⁴⁰ McMahan (2002), p. 403.

⁴¹ I am following Lazar's interpretation in (2009), p. 703

McMahan. But rather than merely ‘posing a threat’, there must be some further moral asymmetry between the parties involved in the circumstances of forced choice. McMahan locates this asymmetry in the different tiers of *moral responsibility*. Let us now add that an agent is at least *potentially liable* to be killed when he meets the relevant conditions of moral responsibility and killing him might be a necessary and effective means of defense. The mob boss in our example above, though she does not pose any direct threat, is surely at least potentially liable. In sum, the criterion of liability to attack in both self-defense and in war is an agent’s moral responsibility for an objectively unjustified threat of harm (*KIW*, 35).

Individual liability tracks individual moral responsibility: both come in degrees. A person’s liability can range from a minimal standard to a maximal standard of moral responsibility.⁴² A person is minimally responsible for X when she brings about X in her capacity as a responsible agent. Call this standard ‘agent responsibility’. The preconditions of responsible agency are undoubtedly quite complex, but probably include certain (minimal) capacities for autonomy, self-reflection, and opportunities for self-control.⁴³ A person is maximally responsible for X when she brings about X *both* in her capacity as a responsible agent *and* she is the appropriate object of praise or blame for bringing about X. With respect to liability, of course, culpable responsibility involves a person’s blamable or faulty moral agency.⁴⁴ Call this maximal standard ‘culpable responsibility’. A person is culpably responsible for an unjustified threat of harm when he acts in a manner that is neither justified nor excused.⁴⁵

⁴² The terms ‘minimal’ and ‘maximal’ responsibility are from Lazar (2010), pp. 183-4.

⁴³ McMahan (2002), p. 401. For a detailed discussion of the preconditions for autonomous choice, see Beauchamp and Childress (2009), pp. 111-117

⁴⁴ Culpable agency can also come in degrees.

⁴⁵ The lack of excuse or justification for a threat is the key component of McMahan’s definition of a culpable attacker in (2002), p. 403

In his earlier work, McMahan maintained that culpable responsibility was necessary for liability to a fate as serious as death.⁴⁶ In his more recent work he has weakened the standard so that mere agent responsibility is a sufficient agential condition for liability to that fate—provided, that is, that killing would be necessary and proportionate.⁴⁷ There is, however, some tension between McMahan citing agent responsibility as sufficient for liability to defensive killing, on the one hand, and his view that the harm it is legitimate to inflict on a liable person tracks her degree of responsibility for an unjustified threat, on the other. To be liable isn't simply to be liable to any harm whatsoever, but *to some degree of harm*: or in other words, the harm must be proportionate to the threat. That degree of harm is determined, in part, by how responsible the person is for an unjustified threat.⁴⁸ This idea of a proportionality constraint that tracks a threatening agent's degree of liability (and hence his moral responsibility) McMahan calls 'narrow proportionality'. The narrow proportionality constraint is internal to liability (*KIW* pp. 20-1).⁴⁹ By this constraint, the weaker the degree of an agent's responsibility for an unjustified threat, the lesser the degree of harm it is proportionate to inflict on that agent; the stronger the degree of an agent's responsibility for an unjustified threat, the greater the degree of harm it is proportionate to inflict on that agent. Where an agent is culpably responsible for a lethal threat to an innocent person, killing that threat in self- or other-defense is proportionate; it is proportionate both in the sense that it is commensurate with the severity of the threat, and it is proportionate to the degree of the culpable agent's responsibility: narrow proportionality is a function of both of these factors. Killing the culpable attacker would be proportionate even if it were possible for the victim to divide the harm

⁴⁶ McMahan (1994A, 1994B).

⁴⁷ McMahan (2002), p. 403; (2005); (2009B), p. 34

⁴⁸ It is also determined by the magnitude of the threatened harm and, on some views, by whether there is a reasonable prospect of success in averting the harm.

⁴⁹ 'Wide' proportionality, in contrast, is the proportionality constraint governing permissible harms to the non-labile.

in some way—for example, by breaking the attacker’s leg at the cost of breaking her wrist. Assuming that the victim is not required to suffer a broken wrist, this is explained by the culpable responsibility of her attacker. Supposing that the attacker is not culpable, but is merely agent responsible, the potential victim may be required to suffer the broken wrist rather than imposing such a grave cost as death on the other person. The fact that the attacker is non-culpable explains why the victim might be required to suffer the broken wrist.⁵⁰

However, McMahan maintains that in both individual defense cases and in war, it can be permissible to kill persons who are only agent responsible for an unjustified threat. Prima facie, such killing appears to be narrowly disproportionate. How can this quite weak moral asymmetry make such a strong difference to a person’s fate?

The forced choice structure of self-defense attempts to provide the answer. Where it is inevitable that someone must be killed, we should opt for distributing that unavoidable cost in the fairest way possible, given the circumstances. This combination of 1) a forced choice structure of self-defense and 2) the asymmetry in responsibility that triggers an agent’s liability McMahan calls ‘The Justice-Based Account’ of permissible killing.⁵¹ Thus, justice demands that the individual who is even *slightly* responsible for the situation of forced choice should, as a matter of fairness, bear the total cost of his or her responsible action (or choice) rather than imposing that cost on the non-responsible (innocent) victim. Even a slight asymmetry in responsibility for a forced choice situation can be decisive to determining a person’s fate, assuming equal losses and no difference in side effects. This asymmetry can take the form not just of a responsible agent *posing* or *contributing to* unjustified threats of harm; on McMahan’s view, it can also take the form of

⁵⁰ Those who do not think she is required to suffer a broken wrist rather than kill may substitute some lesser harm.

⁵¹ See McMahan (2002), pp. 401-5. The view that defensive principles are principles for distributing unavoidable harms originates, I believe, in Montague (1981).

engaging in otherwise permissible activities that pose even a slight *risk* of serious harm to others. For example, driving a car is normally permissible, but poses potentially serious objective risks of unjustified harm. Thus, even a highly cautious driver who scrupulously maintains the safety of his vehicle could become liable to defensive killing—if, for instance, his car’s brakes fail and his car careers in the direction of an innocent pedestrian.⁵² Because the driver engaged, in his capacity as a responsible agent, in an activity that comes with foreseeable (even if remote) risks of serious unjustified harm to the innocent, then if those risks eventuate, it is only fair that he bear the costs of his risky activity, rather than imposing those costs on the innocent. Were our unfortunate pedestrian equipped with an explosive device as her only effective means of stopping the threat, she would be permitted to blow up the car, driver and all, in self-defense.⁵³

Notice that, on this view, a person can lose his or her right to life through bad luck!⁵⁴ It seems implausible on the face of it that a moral protection as significant as the right to life should be lost on such tenuous grounds as bad luck. For this reason, some philosophers opt for the stronger criterion of culpable responsibility for unjustified threats.⁵⁵ So do I. As a sufficient condition for liability, mere agent responsibility implies that there are cases in which bad luck triggers the loss of significant moral protections. Since the right to life is based, I believe, on a Kantian view of a person’s intrinsic worth and capacities for rationality, and that worth and those capacities are not automatically lost when one threatens the lives of others, there must be something more distinctive about that person’s agency than the faultless ‘wrong place, wrong time’ criterion of agent responsibility. That is, there must be something significantly *wrong* which he

⁵² This example is from McMahan (2005), p. 394.

⁵³ Ibid, p. 394

⁵⁴ As McMahan himself concedes in (2002), p. 405.

⁵⁵ Lazar (2009).

has done which weighs sufficiently against the loss inflicted by killing him—the loss, in this case, of a rational being of incalculable intrinsic worth.

(Making culpable responsibility the criterion for liability to defensive force would also give it greater symmetry with liability to punishment, in which an offender's culpable responsibility is indeed necessary. Though the two sorts of liability are distinct, both involve similarly grave harms: intentionally imposed 'harsh treatment.' Where liability to 'harsh treatment' is involved—as in punishment or forcible defense—there should be something distinctive about the offender's agency. Liability to the harms of death or serious injury are quite unlike the harms involved with liability to pay compensation. Liability to pay compensation can be based upon a weaker criterion of responsibility, I think, because the costs to the agent of compensation are presumably, though not necessarily, far less grave than the loss of life or than suffering permanent disfigurement.)

It is also a correlative implication of agent responsibility as the criterion of liability that individuals who face a lethal threat from a merely agent-responsible person can cease to be bound by quite stringent moral duties by virtue of their moral luck. The only asymmetry in responsibility between the driver and the pedestrian appears to be that the former faultlessly *imposes* a remote risk of harm while the latter faultlessly *assumes* remote risks of harm to herself (when walking around in public there is a remote risk of getting hit by a car). Both parties are agent-responsible for these risks arising.⁵⁶ The point is not to 'blame the victim' but to call attention to the fact that the circumstances in which they find themselves are a product of luck. To see this, consider that it could just as easily have been the pedestrian who chose to engage in a remotely risky activity: indeed, even *walking* is potentially risky, since she could have involuntarily been transformed into a human projectile, whose body weight threatens the life of some other pedestrian. *Anybody* could

⁵⁶ Ibid

be the victim of circumstances such as the cautious driver and pedestrian are in; not just anybody will behave in a malicious or negligent manner, but more likely individuals with deeply defective moral characters. The fair way to distribute harms in circumstances of forced choice is not to declare that a guiltless person loses his right to life, but some other fair procedure which splits the odds between the two parties: flipping a coin, or drawing straws for example.

I will not pursue this line of inquiry further. Instead, let us explore the implications of McMahan's account for the ethics of killing in war and, especially, for the MEC.

1.4 Implications for War: The most obvious implication for war of the responsibility-based account of liability is that MEC is false as a moral principle: just combatants do not make themselves liable to attack by justifiably defending themselves and their countrymen against an unjust attack. Moreover, unjust combatants may not permissibly fight, even in self-defense, in an unjust war: to do so would involve attacking and killing non-labile people, even if those non-labile people pose a threat.

That unjust combatants may not permissibly participate in an unjust war is but one revisionist implication of McMahan's rejection of MEC. For, recall, MEC specifies not only equal battlefield *rights* (what Walzer characterizes as the 'equal right to kill') but also equal battlefield *responsibilities*. In principle, according to revisionism, just combatants may be released from many of their customary obligations, and may have far more license on the battlefield than either traditional just war theory or international humanitarian law permits, or indeed should permit. In particular, noncombatants are no longer morally immune to intentional attack. Since an individual is liable to attack by virtue of his responsibility for an unjustified threat of harm, irrespective of whether he is the direct agent of the harm, and since mere agent responsibility is sufficient to trigger liability, a great many unjust civilians will count as legitimate targets of attack.

Civilians contribute to their country's (unjust) war in many ways. Some work in munitions factories which supply arms to the military. Others produce the food and shelter necessary for sustaining the troops. Soldiers' spouses and other family members provide them with morale which helps sustain soldiers in the worst trials of war. Even young children of professional soldiers provide emotional support. Politicians and their constituents are responsible for various policies which make unjust wars possible. Some civilians serve as what C.A.J. Coady calls *cheerleaders*, who support the war by expressing their support in publications or in public rallies, by encouraging patriotism ('my country right or wrong!'), or giving financial donations directly to the war effort.⁵⁷ Civilians pay the taxes which fund a government's war-making capacity, and almost all civilians participate in the wider culture and traditions which have made war possible. A low-threshold view of responsibility such as McMahan's appears to counterintuitively implicate nearly all these people as potentially liable. That is a quite radical revision of the principle of discrimination.

There is a symmetry between Walzer's account of posing a threat and McMahan's account of moral responsibility. Both criteria of liability face a problem of scope. We saw the difficulty in drawing a principled line between those who make the right sorts of causal contributions to the threat of war and those who do not (is there really such a difference between munitions workers and the suppliers of food to the troops?). But there is a similar difficulty in drawing a principled line between those who are *morally responsible* for their causal contributions to the (unjust) war and those who are not. How do we block the implication of widespread civilian liability—or *total war*?

McMahan must say that targeting civilians would be disproportionate, unnecessary, or ineffective to the achievement of just aims. But appeal to these principles is inadequate in

⁵⁷ Coady (2008), p. 113.

salvaging noncombatant immunity. If these unjust civilians are liable to even a slight degree, and there is a forced choice between their lives and similar number of just combatants' lives, the justice-based account holds that it is the civilians who should bear the costs of their responsible contributions rather than imposing those costs on non-liable just combatants (or, for that matter, risking any amount of death or injury to just civilians). Similar points apply to the requirement of necessity: the burden of last resort is lowered considerably when there is a choice between risking the lives of just combatants or civilians, on one hand, and directly attacking unjust civilians, on the other.⁵⁸ As to McMahan's point that harms to which one is liable must be instrumental to some goal beyond the harm itself: terrorist tactics—here understood as the deliberate killing of noncombatants—are actually alarmingly effective at securing the political goals of the individuals and groups who use them.⁵⁹ Examples abound, but the most vivid and gruesome has to be the Truman Administration's decision to drop two atomic bombs on populous civilian enclaves in order to force the unconditional surrender of Japan in World War II. We can argue that this tactic was not necessary for achieving its goal, or that unconditional surrender is not a legitimate demand; but it is not implausible to see the tactic as effective in achieving the goal.

This implication of widespread civilian liability is the *total war* objection to McMahan's theory. The total war objection is the direct outgrowth of consistently applying the forced choice structure of self- and other-defense with a low-threshold criterion of liability (i.e., minimal moral responsibility) to the context of war. Part of McMahan's motive for adopting the low-threshold criterion, I take it, is his recognition that a higher threshold such as culpable responsibility would release a great many, or even most, unjust combatants from liability. As I suggested in section 1.3.3, soldiers as a class, even those participating in an unjust war, tend to be quite dis-analogous

⁵⁸ Lazar (2010), p. 209

⁵⁹ Ibid, p. 207

to common criminals: most are not like Nazis in the Wehrmacht, trophy killers in Vietnam, or the members of ISIS who decapitate journalists. In general, unjustified combatants are not deserving of condemnation, but have sincere—and sometimes even epistemically justified—beliefs in the justice of their side's cause. In addition, the evidence bearing on a prospective war's justice or injustice is almost invariably mixed: even a soldier's most diligent attempts to determine the ad bellum justice of his side, whether those efforts are before or during the war, may yield indeterminate results. Even in the resistance against the Nazis there was doubt by many French citizens that forcible resistance would have any prospect of success, even though there was *obviously* a just cause. In democratic societies with relatively free presses and open information, the line between credible sources of information and cleverly-veiled propaganda is almost wholly opaque; it is especially opaque for the 18-24 year old demographic of men and women who are most likely to fight. (As I will argue in chapter 4, uncertainty is a condition of war, not an exceptional circumstance which grounds an individual excuse.) Almost all unjust combatants, perhaps especially reluctant conscripts, are in the grips of pervasive and persistent duress when they fight: war is a condition of fear, as Hobbes famously put it.⁶⁰ This duress is especially horrific for the soldiers fighting on behalf of illiberal regimes, who face draconian threats of punishment issued by their superiors. Nor are these draconian threats exclusive to illiberal regimes, or to regimes forcing people's participation in an unjust war. Even the American and British armies during the resistance against the Nazis had to resort to executing deserters and disobedient soldiers to secure their war aims. This observation runs counter to McMahan's suggestion that such draconian penalties are *prima facie* evidence of the illegitimacy of a regime and the war it wages (*KIW* p. 134).

⁶⁰ Hobbes (1994), ch. 13

In short, most soldiers have excuses of varying strengths, which include epistemic and moral uncertainty, duress, and (on some views) superior orders.⁶¹ Though these excuses probably do not absolve them of all *responsibility* for their participation in an unjust war, they probably do absolve them of *blameworthiness* for participation.

McMahan objects that if the supposed excuses of duress and uncertainty⁶² release unjust combatants from culpability for their participation, then simple consistency dictates that soldiers in general should be excused, for the same reasons, for their violations of *jus in bello* (KIW 123-31). I think we can block this appeal to consistency for three reasons. First, even in the fog of war it is typically easier to determine who is an unarmed civilian and who is a soldier than it is to decipher the complex empirical, historical, and philosophical data bearing on objective *ad bellum* justice: the appeal to uncertainty is credible less frequently for *in bello* violations than it is for *ad bellum* violations. Similar points apply to the treatment of prisoners of war: once a soldier is disarmed and incapacitated, there is seldom any credible appeal to duress or uncertainty for killing him.⁶³ Second, individual soldiers always have more direct control over their own tactics than they do over their government's intentions and tactics. Third, international humanitarian law (*jus in bello*), while perhaps not yet morally optimal, is a comparatively far more sophisticated, unambiguous, and well-developed set of publicly accessible rules than is any component of the *jus ad bellum*. By McMahan's own admission, the *jus ad bellum* is actually a scandalously underdeveloped component of both the just war tradition and of international law.⁶⁴ I think these

⁶¹ For a nice discussion of the pressures exerted on soldiers by superior orders, see Friedman (2008).

⁶² Of the three excuses I have mentioned, duress and uncertainty are McMahan's primary focus in chapter 3 of *Killing in War*.

⁶³ Unless perhaps the consequences of not doing so are that a soldiers' superiors will kill oneself or his loved ones. Though in the United States, duress is not considered a defense (either a justification or an excuse) for homicide.

⁶⁴ McMahan writes, "the comparative neglect of *jus ad bellum*, both in just war theory and in the law of war, can be explained largely by the fact that it has been easier to constrain the conduct of war than it has been to prevent wars from occurring." (2014D), p. 241.

observations make at least a *prima facie* case that there is nothing in principle inconsistent in granting soldiers excuses for their participation in an unjust war but then holding them to more demanding standards of responsibility for their battlefield comportment. And mine is not an idiosyncratic position: it is shared by a bulk of just war theorists throughout the history of the tradition.

We should conclude that *if* culpability is a necessary condition for liability, and *if* most unjust combatants are at least partially excused for their participation, then killing (at least) the ones who are ineffective as combatants and pose no threat is narrowly disproportionate. But most unjust combatants enjoy one or more of these excuses, and most, individually, will serve no essential or effective role in the achievement of an unjust cause.⁶⁵ By the terms of McMahan's theory, not only do those unjust combatants who kill and maim even in self-defense, violate the rights of just combatants, but so do the just combatants who kill and maim (excused, ineffective) unjust combatants. Killing these unjust combatants might be justifiable as a lesser evil, which is not the same as their losing their rights against lethal attack. In short, the idea of a war that respects individual rights becomes, in practice, a farce. The morality of war, barring supreme emergency, is a pacifist ethic. This is the *contingent pacifism* objection to McMahan's theory.

This implication of 'contingent pacifism' says that war can be justified in principle, but almost never in reality. This is the second horn of what Seth Lazar calls 'the responsibility dilemma', which goes as follows: if we lower the bar for liability so that agent responsibility is sufficient to trigger liability, the implication is *total war*; if we raise the bar for liability so that instead culpable responsibility is necessary for liability, the implication is contingent pacifism.

⁶⁵ Lazar (2010), p. 191. Lt. Colonel David Grossman describes and corroborates the findings of S.L.A. Marshall that fewer than 30% of combatants in World War II even fired their weapons; see Grossman (2009), pp. xvi-xix for an overview of Marshall's findings.

Both horns of the dilemma are unacceptable.⁶⁶ The responsibility-based account of liability, absent substantial amendment, cannot yield a practicable theory of war.

As I said in the previous section, I believe that some degree of culpable responsibility is probably necessary for liability to a fate as serious as death. If war really is morally continuous with ordinary life; if the principles and norms of war are really identical with the norms of all other conflicts, we should strongly consider abolishing the practice except for those rare cases when its resort is obviously the lesser evil.

1.4.1 The Practical Significance of the Distinction between Permission and Excuse:

McMahan correctly points out that an excuse is not the same as a justification or a permission. When an agent is excused for doing X, this is so because the agent has done something wrong but is not to blame for it. Excuses reflect an awareness that sometimes we cannot reasonably expect people to meet the demands of morality, and that it is exceedingly moralistic and hypocritical to condemn people for doing what all of us but heroes and saints would do in similar circumstances. But when an agent acts *permissibly*, she acts within her moral rights. When she acts *justifiably*, she acts within her rights plus there is a worthy moral reason for so acting. Where an agent is excused, she is not blameworthy; but the action is still objectively wrong (unjustified, impermissible). The fact that her character is less tainted by that wrong does not transform that wrong into a right.

In the distinctive circumstances of war, it is difficult to see what moral work is achieved by McMahan's distinction between permission and excuse. Consider this scenario: a just combatant is trying to distinguish culpable from non-culpable enemy combatants, and culpable enemy civilians from innocent civilians. She wants to ensure that, to the best of her ability, she

⁶⁶ Lazar (2010), p. 189

directs her attacks only at unjust combatants who are culpable. How shall she proceed? She certainly cannot consult her copy of *Killing in War* for subtle philosophical analysis of the varying degrees of moral agency. Nor would it help much if she could: for there are no sure signs of distinguishing culpable from non-culpable combatants, or of distinguishing degrees of responsibility among civilians. The distinction between permission and excuse, from the standpoint of a just combatant trying to decide what to do, has no discernible practical significance. The distinction between permission and excuse seems to only make a difference after the fact: an *unjust* combatant who is excused from blame for objectively wrongful action may owe restitution to the wronged parties; if he was permitted to act as he did, he may not owe restitution. But this difference cannot provide any guidance for the *just* combatant's conduct during war. As I see it, a crucial point of just war theory is to provide soldiers with a practicable guide for conducting themselves in battle, a context involving immediate and instinctual action and rarely any opportunities for careful deliberation. If the theory of liability motivating McMahan's conception of just war cannot provide such guidance, it is missing this crucial component of practicability.

McMahan recognizes the difficulty of just combatants distinguishing between culpable and merely agent-responsible unjust combatants. His solution is to argue that "since the overwhelming majority of unjust combatants" have at least a partial excuse "then just combatants are entitled to act on the *presumption* that the unjust combatants they face in combat" are partially excused. However, partial excuses do not eliminate responsibility; they may even leave some residual culpability, so there are grounds for holding them liable. Just combatants cannot possibly determine the moral status of every individual adversary in battle. To demand this epistemic work by just combatants "would demand the impossible; hence they must be guided by broad presumptions" (*KIW* 188).

One might wonder why just combatants should not be subject to overly-demanding epistemic tasks, but unjust combatants are. Some possible answers and rejoinders are among the topics of chapters 3 and 4. More importantly for the present discussion, however, is that McMahan's solution (making 'broad presumptions' about unjust combatants' moral status) is in tension with his critique of traditionalism. Recall that Walzer's basis of liability as 'posing a threat' is not at all sensitive to morally relevant differences between individuals: it treats all combatants and civilians as sharing the same liabilities or immunities without giving due consideration to other factors relevant to the moral status of individual combatants and civilians. The criticism of Walzer, in other words, is that he casts too wide a net of liability and immunity. However, if this is a sound objection to Walzer, it seems that the same sort of objection applies to McMahan's response to the problem of contingent pacifism. Instead of maintaining, as Walzer seems to, that all combatants are entitled to presume that anyone who poses a threat is liable (irrespective of just cause); McMahan claims that *only just* combatants are entitled to presume that *all unjust* combatants are liable. But this is the same problem that was thought so problematic for Walzer: McMahan has not given due consideration to individual differences in responsibility. Where Walzer generalizes the moral status of all combatants, McMahan generalizes the moral status of all unjust combatants.⁶⁷ That is an odd and potentially inconsistent maneuver for a theory that is based upon individual rights.

There appears to be a further dilemma for McMahan's theory: in order to make the account practicable in the epistemic fog of war, McMahan must generalize the moral status of all unjust combatants. But by generalizing in this way, he is compromising the spirit of individualistic morality (i.e., by being insensitive to differences in individual rights). If he remains consistent

⁶⁷ Lazar (2010), pp. 189-190

with the spirit of his individualism, just combatants have no practical guide. And the theory lacks application to war. Practicability comes at the expense of theoretical consistency and theoretical consistency comes at the expense of practicability.

1.5. Practicability and the Ethics of War: What McMahan has shown, I think without intending to do so, is that the war-making enterprise is incompatible with our most important moral duties.⁶⁸ What he has also shown, also perhaps without intending to do, is that a non-pacifist morality of war that seeks to respect individual rights, in the manner we rightly insist they be respected in ordinary life, is almost wholly *impracticable*! Practicability is no insignificant virtue of a moral or political theory: we want our basic moral principles and obligations to be specified in such a way that they stand a reasonable chance of being implemented in the real world. It seems to me that McMahan has engaged in very thoughtful and sophisticated form of ideal theory that, unfortunately, has almost no application to the very non-ideal context of war. A practicable theory of killing in war requires at least one of the following things: 1) that we abandon the idea that the morality of war is the same as the morality of other sorts of conflict; 2) that we focus on identifying a morally justified (preferably morally optimum) set of rules for distinctive circumstances of war; or 3) that some other basic moral considerations must be brought to bear in directly justifying at least *some* battlefield permissions of unjustified combatants. I think options 2 and 3 are the most promising routes.

If the resort to war is ever at least *justified* (perhaps because it is a lesser evil), its rules must as a matter of practical necessity look very different from the principles and rules governing most conflicts outside of war. This is not to say that war is morally *sui generis* but, rather, that war is a very distinctive form of conflict, quite unlike peacetime or other sorts of conflict. It must

⁶⁸ Ryan (2011)

therefore be governed by war-specific rules. However, we do not want those war-specific rules to depart too drastically from basic morality. It is a delicate balance: we don't want the ethics of war to be so idealized that it cannot be implemented in practice, but we don't want practicability to involve too radical a compromise with basic morality.

Walzer's characterization of MEC as the 'equal right to kill', if understood as including equal permissions by unjust combatants to launch *offensive* attacks, probably has no foundation in basic morality; its rationale is purely pragmatic. It is doubtful, in other words, that there are any (even radically adapted) non-pragmatic moral considerations that can serve as 'touchstones' for these offensive permissions. The MEC's implicit claim that unjust combatants are permitted to launch offensive attacks may be too radical a compromise with ordinary morality. On the other side, McMahan's rejection, in principle if not in practice, of unjust combatants' defensive permissions appears to embody too radical a lack of compromise with practicability. My goal in the rest of this dissertation is to carve out a middle position between Walzer and McMahan, what I call the 'moderate MEC' or 'duty of mutual defense': in conditions of uncertainty, unjustified combatants are morally permitted to defend each other from direct, imminent threats of harm.

1.6. Looking Ahead: For all that I have dwelled in this first chapter upon the differences between traditionalists and revisionists, and for how much the contemporary literature emphasizes the differences between Walzer and McMahan, there is actually much common ground. Once the foundational matters are set aside, they really seem to agree that war is a conflict requiring war-specific norms. Moreover, revisionists like Henry Shue are not really advocating a *sui generis* morality of war in any normatively interesting or problematic sense. As I show in chapter 2, traditionalists and revisionists are attaching different labels to what is in essence a very similar practical view.

Part of the reason there is this roundabout convergence of the two camps is that both traditionalists and revisionists recognize, in their own ways, that war is a very different sort of conflict. Though I agree with revisionists that war is not morally *sui generis* in the sense that an entirely new morality comes into play in the state of war, I think there is no doubt that war is a very distinctive form of conflict; but to my knowledge, traditionalists have barely elaborated on the respects in which this is so. This I set out to do in chapter 3 by identifying some characteristically distinctive features of war, features whose combination yields a pragmatic definition of war. Here I also show that what McMahan regards as merely ‘pragmatic’ considerations underpinning the traditional war convention (MEC, the independence thesis, and civilian immunity) are in fact the product of the very features that make war different: these pragmatic considerations together constitute what Walzer calls ‘the reality of war’.

One of the most important respects in which war is different from other conflicts, and from peacetime, is its endemic uncertainty. The problems of uncertainty, imperfect knowledge, and intractable ignorance are central to the debate between traditionalists and revisionists. This is the subject of chapter 4. I here go into more detail about the many sources of soldiers’ uncertainty both before and during war, concluding that uncertainty is a *structural feature* of war, and that much of soldiers’ ignorance is an *essential ignorance*, precisely because of the features, expounded in chapter 3, that make war a different beast.

If I am correct that uncertainty is an in-eliminable fixture of war, the practical question for combatants is what they should do under conditions of uncertainty. Should they participate in war or refuse? They must determine which path constitutes the lesser moral risk—or, as Vitoria and Grotius suggest, they must follow the “safer course”. Both the meaning of “safer course” according to these thinkers, as well as the potential moral risks of non-participation in war, are the

subject of chapter 5. There I also argue that the proper epistemic standard to which we should hold soldiers is a *subjective* criterion: their epistemic responsibilities must be achievable. Moreover, deep and pervasive uncertainty should be assumed as the framework for formulating the rules of war.

In chapter 6, I turn to my positive defense of the moderate MEC—i.e., the defense-centered thesis. I argue that the friendships between even unjust combatants are morally valuable, both instrumentally and intrinsically, and may be worth protecting even if they were formed in the course of an unjust war. An associative ‘duty of mutual defense’ is constitutive of fellowship of arms. I offer two arguments. The first is that soldiers’ friendships are indispensable to independent goods of professional effectiveness, the successful prosecution of justified missions, and to unit cohesion. These considerations further support upholding the symmetry thesis as a public policy. The second, more controversial argument, is that sometimes these friendship duties can, in circumstances of pervasive uncertainty, override general negative duties to not risk wronging non-liable people—with some important qualifications to avoid further unpalatable implications.

2. RECONCILING TRADITIONALISM AND REVISIONISM

In the previous chapter, we surveyed the debate between traditionalists and revisionists. There seems to be a sort of dialectical standoff between Michael Walzer and Jeff McMahan. On the one hand, Walzer's account of the moral equality of combatants (MEC) and the rest of the war convention—i.e., privileged POW status and the near-absolute moral immunity of civilians—has at best tenuous grounds in basic morality: 'posing a threat of harm' is, outside the context of war, neither necessary nor sufficient for individual liability to forcible action. For all that Walzer's theory captures many of our intuitions about the moral status of soldiers, such as that soldiers are not criminals simply for participating in an unjust war or that disarmed prisoners on the unjust side must be treated humanely, revisionists have offered powerful arguments that these theses cannot be underpinned by appeal to basic moral principles. Just combatants neither forfeit nor waive their rights to life or against physical assault; and in general, the use of force against them is rarely a lesser evil, since they are (by definition) contributing to the advancement of just aims. It seems that Walzer's view of the equal status, privileges, and liabilities of combatants is rooted in pragmatic, rather than basic, moral considerations.

On the other hand, where Walzer's theory apparently succumbs to theoretical difficulties, McMahan's responsibility-based theory of individual liability apparently succumbs to serious practical difficulties. McMahan has done us a service by calling attention to how differently we evaluate killing in war compared to all other spheres of life; he has also shifted the burden of proof toward those who maintain that 'the doctrine of the permissibility of participation in an unjust war' derives from non-conventional morality. However, as we have seen, 'the responsibility dilemma' for McMahan's theory renders the just waging of wars impossible in practice. By his own

admission, there are decisive pragmatic reasons for not following through on all the implications of the responsibility-based account of liability.

In this chapter I argue that the differences between traditionalists and revisionists have been exaggerated. Both are affirming, in their own ways, that war is a distinctive sort of conflict requiring war-specific rules, rules which will look quite different from the liability rules of other sorts of conflict. The difference is that traditionalists like Walzer and Shue compromise moral principle for the sake of practicability *from the start*: there is no pretense that the rules of war can be assimilated to the rules of ordinary life. McMahan, on the other hand, first develops a theory of individual liability, draws out its assorted unpalatable implications for war, and then proceeds to vitiate that theory to avoid those implications. Both camps, in turn, are making compromises to accommodate the special circumstances of war. These compromises come from different directions, but ultimately reach similar conclusions about the rules of war: that they must, for the sake of practicability, look very different from the rules governing ordinary life. The differences almost vanish at the level of practice.

In this chapter, I sketch the preliminaries of my case for an intermediate position—i.e., that there are basic, non-pragmatic moral considerations underpinning the defensive rights of unjust combatants, a thesis I have called ‘the moderate MEC’. We must first, of course, get a handle on the conventional justifications for MEC, which is the central task of this chapter. In section 2.1, I discuss McMahan’s view that the three pillars of traditional just war theory—the independence thesis, MEC, and the moral immunity of noncombatants—are justified only *pragmatically* rather than as a matter of basic morality. In section 2.2, I draw out some further implications of the responsibility account which McMahan does not discuss explicitly. In particular, I am focused on the implications his theory has for unjust combatants who must decide what to do in the urgent

and chaotic circumstances of battle. As we will see, there are grave moral costs to implementing the responsibility account at *this* level as well, not least of which is the requirement of unjust combatants to betray their comrades. McMahan would probably block these further implications for pragmatic reasons as well. However, as I discuss in section 2.3, most of these ‘pragmatic’ considerations amount simply to what Walzer calls ‘the reality of war’, a reality to which ordinary moral norms must be adapted: war is such a different climate that it must involve different rules than other sorts of conflict. I argue that this ‘adaptation’ of moral principles need not be equivalent to claiming that war is morally *sui generis*; rather it is an extreme case of an otherwise familiar task in ethics—namely, *specifying* basic morality in a manner that renders its norms and principles *practicable*. Thus, despite all the differences highlighted in chapter 1, the traditionalists and revisionists end up with similar positions concerning the laws of war. And they end up with similar practical positions precisely because war is so different. In chapter 3 I elaborate precisely which distinctive features of war make it such a different conflict, and how McMahan’s pragmatic arguments in fact follow from those features.

2.1 McMahan’s Pragmatic Arguments for MEC: McMahan’s pragmatic arguments for the war convention appeal to the bad consequences of adopting rules or policies of war based on his theory’s principled implications. These principled implications, recall, are as follows: 1) Unjust combatants are not permitted⁶⁹ to participate in war or to attempt to kill and maim just combatants, even in self- and other-defense; conversely, just combatants may permissibly target unjust combatants; 2) just combatants may be permitted, in many more circumstances than is recognized by the law of armed conflict, to intentionally target certain unarmed civilians on the unjust side;

⁶⁹ Many may be morally excused, however, as McMahan (2009B) acknowledges, especially ch. 3. Seth Lazar (2010) argues that McMahan’s theory of excuse, coupled with a high threshold of responsibility, in fact implies that *most* unjust combatants are at least partially excused.

3) it is legitimate, again in many more instances than is recognized by the law of armed conflict, for just combatants to opportunistically kill prisoners of war on the unjust side (henceforth ‘unjust POWs’).

McMahan is understandably uncomfortable with these implications of his theory of liability. He thus thinks it “entirely clear that the laws of war must diverge significantly from the deep morality of war.”⁷⁰ He later suggests that while these conventional just war principles “are incompatible with the liability rules of basic morality,” this “does not imply that these principles have no role in the normative regulation of war.”⁷¹ Even if these principles lack a non-conventional moral foundation, the conventional rules of war (or variants of them) may be the best we can hope for given certain tendencies of human psychology, the shifting moral character, or moral ambiguity, of most wars, and the inherently uncertain and duress-filled circumstances in which the vast majority of soldiers find themselves. Let us briefly canvass some of these pragmatic arguments.⁷²

Consider first the denial of MEC. In practice, it is inadvisable to grant just combatants asymmetric battlefield privileges. It would not, for example, be prudent to allow just combatants greater leeway in the use of certain weapons or tactics, give them license to execute prisoners of war, or permit them to target civilians on the unjust side. Near-absolute civilian immunity, in particular, “is at present a legal necessity,”⁷³ which means, I take it, that the *law* should not grant a permission to just combatants to intentionally target civilians, regardless of their potential liability *in principle*. These legal prohibitions, and neutral rules of engagement more generally, ought to be maintained because in practice if just combatants exercise special privileges, unjust

⁷⁰ McMahan (2014C), p. 138

⁷¹ McMahan (2008), p. 39.

⁷² Unless otherwise noted, the following pragmatic arguments are from McMahan (2008), pp. 27-30.

⁷³ McMahan (2009B), p. 235.

combatants will help themselves to those same privileges: the result would be *total war*, a condition in which all persons are potential targets, and soldiers on both sides lose a sense of restraint in their treatment of civilians, prisoners, and, for that matter, their choice of weapons and battlefield tactics. As Walzer correctly and ominously puts it, without battlefield equality “war as a rule-governed activity would disappear and be replaced by crime and punishment, by evil conspiracies and military law enforcement.”⁷⁴ McMahan’s pragmatic rationale, it seems, is already implicit in Walzer’s justification of the war convention as well.

Upholding MEC as a matter of law (if not as a matter of principle) is justified by the prospective perverse incentives engendered by a policy of battlefield *inequality*: what one side’s soldiers do in battle, the other side will do as well, or perhaps worse. And we do not want to further corrupt the incentive structure of war. Incompatible though it might be with basic moral and liability rules, MEC should stay on as policy until institutions of war-making can be reformed, or the epistemic situation of soldiers regarding *ad bellum* justice can be improved. The latter leads to a second pragmatic concern: the epistemic limitations of soldiers.

As just war theorists from Vitoria onward have highlighted, soldiers on both sides tend to believe—perhaps even with a high degree of reasonable or justified belief—that they are fighting on the side of justice, or at least that they are permitted to participate whether or not their side is just. So it is not as though unjust combatants, since their side has objectively failed to satisfy *ad bellum* morality, will simply surrender, defect, or refrain from defending themselves and each other. From their perspective, they believe they are objectively in the right. Even if it is correct that war cannot be *objectively* just on both sides, it is possible for war to be *subjectively* just on both sides—that is, soldiers on both sides might reasonably believe that justice is on their side even

⁷⁴ Walzer (2000), p. 41

if these beliefs are objectively mistaken. The pragmatic worry is, then, that any battlefield entitlements assumed by (objectively) just combatants will also be assumed by (objectively) unjust combatants. Indeed, even unjust combatants who are *not* so confident in the justice of their side will likely help themselves to these entitlements. So even if, in principle, just combatants may have asymmetric battlefield rights—that is, *more permissive* standards apply to them than to unjust combatants—in practice, the exercise of those rights or their embodiment in public policy would be potentially disastrous. The implementation of asymmetric rules of war could result in an even greater spiral of violence, prompting unjust combatants to fight without restraint, provoke reprisals, or provide them incentives to escalate the violence rather than surrender. There may be particularly strong incentives to not surrender and instead fight with yet greater ferocity, for example, if unjust combatants know that they will be punished by the victor should their side lose the war. Until we have institutional mechanisms in place that can mitigate the epistemic limitations of soldiers, McMahan thinks we must account for these limitations in the rules of war. It is difficult to imagine what those effective institutional mechanisms would be or, indeed, why the very mechanisms which mitigate uncertainty would not bring us to the near-utopian ideal of abolishing war. (McMahan proposes a *jus ad bellum* committee of legal, philosophical, and historical experts deliberating in a non-authoritative court to assess these matters—I discuss this proposal in chapter 4).

In addition, epistemic limitations, especially in combination with high levels of duress, may diminish the culpability of individual unjust combatants. Thus, they should not generally be punished for participating in an unjust war. A publically known policy of punishment for

participation would also, McMahan thinks, create perverse incentives to escalate violence rather than surrender.⁷⁵

It is worth dwelling on this last point for a moment. We certainly *do* want to avoid creating perverse incentives for unjust combatants to not surrender: any incentives that can diminish war-making in general should be welcome. But it is not clear, in the first place, that a public policy of punishment must create these incentives. There could be perfectly non-perverse incentives to surrender sooner rather than later. An international tribunal might offer individual unjust combatants incentives to surrender as quickly as possible—for example, by offering them amnesty for defection, in a manner roughly analogous to domestic law enforcement’s treatment of erstwhile criminals who have a change of heart and serve as police informants. The tribunal could, as Rodin points out, “offer to reduce or suspend punishment of unjust combatants providing they surrender or defect.”⁷⁶ The specific policy of punishment matters a great deal to determining just how perverse the incentive structure could become. Presumably, long-term imprisonment or death would very well create perverse incentives; but the penalties need not be so severe.

However, even in a system of gradual and proportionate punishment for unjust combatants, individual soldiers might well risk more than just a comparatively mild legal penalty should he defect. The scorn and shame of their nation for failing to fulfill their professional and social duties may be far worse for many than any legal repercussions, no matter how mild or severe. The feeling of personal and social disgrace, as highlighted in Tim O’Brien’s *The Things They Carried*, is for many soldiers a fate worse than death. O’Brien describes this feeling among his fellow conscripts as being “too frightened to be cowards.”⁷⁷ It might be less the fear of legal retribution that creates

⁷⁵ McMahan (2008), p. 30

⁷⁶ Rodin (2008), p. 62

⁷⁷ O’Brien (2009), p. 21. I discuss this passage further in chapter 3.

perverse incentives to fight than it is the fear of social disapprobation from one's fellow citizens. The shaming tactics of the 'white feather girls' during World War I, who would pass out white feathers to any able-bodied men not fighting as a symbol of their cowardice, is another example. It may be preferable to die fighting, or suffer 'victor's justice', than to suffer the meta-death of social ostracism from one's fellow citizens. The fear of becoming a social pariah may be the most perverse incentive to fight that soldiers have.⁷⁸

These complexities concerning the practice of punishment, the structure of incentives, and the extent to which social condemnation is a more powerful incentive than threats of punishment (regardless of their severity), is less significant a concern than the widespread *excuses* enjoyed by most combatants. Uncertainty, duress, and superior orders are some of the potential excuses. As highlighted in chapter 1, liability to *punishment*, if not liability to defensive force, tracks an offender's culpable responsibility. And the variety of excusing conditions also highlighted by Rodin and McMahan serve to mitigate unjust combatants' culpability to the point that severe punitive measures would be disproportionate to their responsibility.⁷⁹

The near-absolute moral immunity of civilians has similar pragmatic justifications. Whatever entitlements just combatants assume, unjust combatants will tend to assume in kind. Thus, intentional attacks on civilians may provoke reprisals and lead to escalation of the violence, rather than hastening the end of war, or the advancement of other just aims. It is the same with the execution or maltreatment of prisoners of war.⁸⁰ Just combatants, by acting upon the principled

⁷⁸ McMahan (2009B) interprets Tim O'Brien's passage about the fear of being branded a coward as fear of social ostracism, pp. 117-18. Ryan (2011) offers a different take on the same passage, suggesting that the fear of social ostracism was not just any 'loss of face' but being upbraided for failing in a professional or social obligation, that conscientious objectors commit a wrong of ingratitude, p. 33.

⁷⁹ I briefly argued in chapter 1 that these excusing conditions, by the lights of the responsibility account of liability, probably also make defensively killing most unjust combatants disproportionate to the degree and type of responsibility they have for their participation: see sections 1.3.4 and 1.4.

⁸⁰ Civilian and POW liability are the principled implications of the view that mere 'agent-responsibility', as opposed to culpable responsibility, is the sort of responsibility sufficient for individual liability.

implications of McMahan's account, may be more likely to provoke reprisals, resentment, and foster still greater enmities between belligerents.

With few historical exceptions, moreover, the *jus ad bellum* status of wars tends to be mixed rather than 'fixed' by the categories of objective justice or objective injustice. Anscombe has pessimistically but astutely observed that "human pride, malice and cruelty are so usual that it is true to say that wars have mostly been mere wickedness on both sides."⁸¹ By the standards of just war theory, wars are often unjust on both sides, in that they fail one or more conditions of the *jus ad bellum*: there may be a just cause, but war is not a last resort, etc. It is also arguably more common for the aims of both sides to be *morally mixed* rather than for one side to possess objective justice, especially for the whole duration of a war.⁸² Consequently, evaluating sides in war as objectively just or unjust is, in the real world, a misleading dichotomy.

Asymmetric battlefield privileges in these cases are not only imprudent, they are not even grounded in the responsibility-based account of liability. Since neither side has objective justice on its side, we cannot set the moral status of one side's combatants as 'objectively just' or 'objectively unjust'. Even if McMahan's theory is correct when considering cases—such as the allied resistance in World War II—where objective justice rests with one side for the duration of the conflict, the more common trend in war is mixed motives and mixed justice, or injustice on all sides. A related point is that even wars that begin as objectively just (or unjust) can shift their aims in ways that drastically alter the *ad bellum* character of war—without most soldiers even realizing it. In addition, a war that began as an unjust occupation can become just in the course of its prosecution.⁸³ Once a military has unjustly aggressed or occupied a victim country, reasons of

⁸¹ Anscombe (2014), p. 96

⁸² As McMahan himself discusses in McMahan (2014A), p. 207; Bazargan has developed the theme of morally mixed or heterogenous wars at length in Bazargan (2013B).

⁸³ McMahan (2014A); Bazargan (2013B).

justice may require that erstwhile unjust aggressor to remain in the victim country and continue to wage war—for example, to ensure stability. At the least, these observations should prompt sympathy for soldiers. For these are such common features of war that, in practice, the equal status of combatants, and a common set of neutral rules, are the only reasonable policies to adopt.

In sum, the incentive structure in combat, the risk of provoking reprisals and escalations, the epistemic limitations and duress of soldiers, and the moral ambiguity of most wars, are according to McMahan, persuasive pragmatic considerations that make it both imprudent and morally costly to implement his liability rules in the context of war. The rules of engagement must therefore be neutral between soldiers in practice, even though the morality of the conflict and the moral status of soldiers, civilians, and POWs is—at least in cases where one side is objectively just, and remains so for the duration of the conflict—non-neutral by the lights of non-conventional morality. Until we can reform the institutions of war-making and improve soldiers' epistemic situations, neutral rules of war are probably the best way to limit the carnage—aside, of course, from abolishing the practice altogether.

2.2 Practical Implications: Conscientious Refusal, Surrender, and Defection: Ultimately, I will contend that most of what McMahan regards as 'pragmatic' considerations in support of the war convention are in fact considerations that reflect in-eliminable *features* of the combat experience, features which flow from the very definition of war, from what war is fundamentally *like* in contrast to peacetime. I develop these points in chapter 3. First, it is worth asking a further question: what exactly *are* the practical implications of McMahan's morality of war? If the analysis of individual responsibility, the model of liability based on individual moral responsibility, and the non-conventional morality of interpersonal violence not only does not, but for morally sound reasons *should* not, substantially alter many of the conventional rules and

policies governing war, then what exactly is McMahan's morality of war supposed to do? How, specifically, should soldiers conduct themselves if they accept the responsibility-based account of liability?

The chief practical implication is supposed to be that soldiers should refuse to participate in wars that are (or that they believe are) unjust. There may be something to be said for permitting soldiers greater discretion in picking and choosing the wars in which they participate *before they have been deployed*.⁸⁴ We need rules of war for *combatants*, not for inactive soldiers and civilians! So what guidance does McMahan's theory provide for soldiers who already find themselves in, to borrow Jonathan Glover's revealing expression, 'the trap of the trenches'?⁸⁵ The answer, given the epistemic situation of most soldiers, is none. Henry Shue has put the point with admirable clarity:

"The principle that one ought to fight only in wars that are just tells one little else about how to conduct wars that one has decided to fight in... Appreciating that one's beliefs may be mistaken may well encourage restraint in acting upon them. What it will not do is lead one to act as if they are mistaken, while one still believes them. What one would not decide is not to attack anyone on the other side, even though one had decided that one ought to participate in the fighting."⁸⁶

Let us suppose some soldiers who already find themselves in war come to believe (correctly or incorrectly) that the war in which they are participating is unjust. What should they do? The answer depends on the severity of the injustice in which they are implicated: some wars are so beyond the moral pale that an honorable warrior should (and would) sooner die than continue to fight in it. That caveat aside, I see four options. 1) These soldiers can shoot over enemy soldiers' heads, minimizing the risk of harm to the morally innocent; 2) they can surrender; 3) they can defect to the other side (either by switching sides or by acting as saboteurs of their own side); or

⁸⁴ There are reasons to doubt this claim, which I develop in more detail in chapter 5.

⁸⁵ Glover (2012), pp. 156-8

⁸⁶ Shue (2008), p. 108

4) if the injustice is sufficiently severe, these soldiers might be permitted, or even obligated, to turn their weapons on their fellow soldiers.

Are these options generally morally acceptable? The first option perhaps is, and it is one which soldiers in the history of warfare have taken up regardless of their beliefs about the *ad bellum* status of their side. It has been notoriously difficult, historically, to even get most active-duty soldiers to fire their weapons in the first place.⁸⁷ Killing and injuring other people is psychologically distressing for all but the most ruthless of sociopaths, and it is a tendency that even the indoctrination of boot camp seldom fully eradicates. Even as the soul hardens from the worst ravages of combat, soldiers' sense of empathy and moral identity still occasionally break through. This is one practical implication of McMahan's view with which I am partially sympathetic, though it is an implication that is congruent with the traditionalist view as well: it reflects the requirement to minimize harm where possible. My agreement is only *partial*, however, because such target-less shooting may place one's fellow soldiers at greater risk of harm, thereby failing to honor important role-based and relationship-based duties of protection.

I am less persuaded by the three remaining options. Surrender may be perceived by one's fellow soldiers as abandonment. However sincere the conscientious refusals of soldiers who lay down their arms, if the option of surrendering at one's own discretion is a generally available option, this will engender reasonable fears of abandonment among one's comrades. As if war were not horrifying enough, this level of individual discretion will add to the fear. A similar point applies to defecting to the other side. Soldiers' fear and insecurity is made worse if they must entertain the thought that, should their comrades exercise their private judgment that war is unjust, their comrades may become their enemy. We do not have to be romantic militarists to see that

⁸⁷ See Grossman (2009) for discussion of this point, and chapter 5 below.

trustworthiness and loyalty are among the few individual virtues that are possible, or perhaps even strengthened, in a state of war.

Undermining these virtues is precisely what we risk doing by granting soldiers the private discretion to surrender or defect on the basis of their private moral scruples. This is not the claim that one or a few men surrendering or defecting will undermine trust and loyalty; it is the claim that *public knowledge*, i.e., a publically promulgated *policy* or *rule*, that individual soldiers have this level of discretion would undermine trust and loyalty, and thus unit cohesion, whether or not soldiers in fact act on these private judgments.

We should qualify the previous statement: soldiers should not, generally, be permitted great leeway to judge a war unjust and then surrender or defect on the basis of that judgment. But on all views within the just war tradition, and according to international humanitarian law, combatants must disobey orders to kill and maim unarmed civilians and prisoners of war.⁸⁸ They therefore must have at least *some* level of individual discretion to obey manifestly unjust or illegal orders. So American troops who fired on villagers at My Lai had no justification, or even excuse, based upon obedience to superior orders. There are also occasions where one side is so patently unjust that these soldiers ought to surrender or defect regardless of the climate of fear this engenders in their comrades. (Our stock example is the Nazis, though it is important to remember how exceptional the case of World War II was: most wars simply aren't like that, nor are they so patently unjust.) Primarily at issue here is soldiers' discretion about obedience to orders that fall within the limits of the *jus in bello* rules. Allowing individual discretion at that level is more hazardous, morally, than I think McMahan allows.

⁸⁸ These laws were implemented initially in the 1907 Hague Conventions and later elaborated and refined in the Geneva Conventions of 1949. Similar rules were a matter of international law as early as the 1865 Lieber Code. For elaborate discussion of these and other war conventions, see Kalshoven and Zegveld (2011) and Roberts (2008).

The point here is not that it can never be permissible for troops to surrender, defect, or rebel against their side when they come to believe their side fails *ad bellum* morality. The point is that this level of individual discretion could not be implemented as a publically recognized policy.⁸⁹ What I had conjectured to be ‘practical’ implications of McMahan’s theory are in fact impracticable in a great many circumstances. Are these implications, like those discussed in the previous sub-section, defeated on pragmatic grounds as well? Perhaps so, but it seems evident that the trust and loyalty between soldiers at war are not just pragmatic concerns; they are considerations that have moral weight in their own right, in addition to considerations of consequences and the structure of incentives.

The fear that one’s fellow soldiers might abandon or go rogue in the midst of combat is not just a pragmatic concern. There is a deeper moral risk of soldiers failing to honor important associative duties to their comrades-in-arms. In *Just and Unjust Wars*, Walzer offers two grounds for MEC: for soldiers who fight voluntarily, MEC is based on ‘consent and mutuality’; for soldiers who fight non-voluntarily, MEC is based on their ‘shared servitude’.⁹⁰ There are grounds for skepticism about the first basis; with this much I am in agreement with the revisionists. Walzer describes soldiers in the grips of a ‘shared servitude’ as “poor sods” trapped in a “war of someone else’s making.”⁹¹ He is regrettably unclear on how this point is supposed to support MEC. If he is pointing to the exemption from culpability engendered by the trap of war, McMahan would say that these ground *excusing conditions* rather than *permissions*. However, I actually think that the latter basis—shared servitude—can be more broadly interpreted to apply to soldiers who fight

⁸⁹ Compare Ryan (2011): “The issue is not just the impact on the war effort of a certain number of individual soldiers defecting, but also the impact on all soldiers of knowing that their fellow soldiers might defect at any moment.” p. 35. Where Ryan is concerned with the impact that public policies permitting defection could have on a *just* war effort, I am concerned with the impact of such policies on soldiers’ friendships, which are morally important whether or not their war is just.

⁹⁰ Walzer (2000), p. 37

⁹¹ Ibid, p. 36

voluntarily, in addition to conscripts. Walzer may not endorse this extension of the concept ‘shared servitude’, but I think the most plausible way we can ground unjust combatants’ defensive rights in basic moral considerations rather than pragmatic concerns, is by understanding that the common struggle of battle, the shared experiences, and relationships created in the martial professions give rise to distinctive loyalties; provided these loyalties and relationships possess a certain moral character—which need not be determined by the moral character of the war—they may give rise to special duties. The bonds, camaraderie, trust, and interdependence of soldiers that arise in units, platoons, squads, and teams change the moral circumstances in a manner which can sometimes conflict with considerations of objective *ad bellum* justice. Where considerations of objective justice may imply that unjust combatants are not permitted to defend themselves or their comrades, their friendships and filial loyalties may obligate them to do so. Insofar as these associations give rise to new and particular duties between soldiers, soldiers’ surrender or defection are no light moral matters. From the friendships, communal values, and solidarity possessed by soldiers in war arise genuine loyalties, which may come in competition with considerations of moral liability (and non-liability). This is the subject of the sixth and final chapter.

The point of this and the previous section is that McMahan’s liability theory, without considerable alteration, has at best very few practical implications for the conduct and decision-making of soldiers in combat. This is so, on his view, because there are legitimate pragmatic concerns about implementing the actual implications of the theory in practice. However, the whole point of a *just war theory* is not simply to evaluate wars in moral terms, but to provide foundations for a *practicable* set of rules. A practicable system of rules must address the experience of those who actually participate in war; the rules must speak to soldiers *as soldiers*. Rules of war must account for the reality of war: it involves a form of non-ideal theory for the most non-ideal of all

conditions. I suspect that the main reason McMahan's theory cannot be implemented, and he must fall back on 'pragmatic arguments' is because the theory itself is too idealized to have any application to war; it does not taken adequate account of how different war is in trying to make the norms of war congruent with the norms of other conflicts. Indeed, McMahan suggests that formulating the public laws of war is a separate task from formulating 'the deep morality of war.'⁹² War is a reality that is so different from peacetime that the attempt to assimilate the liability rules of ordinary morality into a state of war treats, as Walzer amusingly puts it, "war as a peacetime condition."⁹³

2.3 The Roundabout Convergence of Traditionalism and Revisionism: Walzer's account of the rules of war endorses the equal battlefield rights and responsibilities of combatants; it holds soldiers responsible for their conduct on the battlefield but not for the justice of war as a whole; and, correlatively, his account denies that combatants should be punished for participation in a war that is objectively unjust. McMahan affirms close variants of each of these positions. At the level of policy, the disagreement between traditionalists and revisionists seems to vanish.

The gulf between revisionists and traditionalists does not really seem to concern policy, but the question whether there is a war-specific morality that departs in significant respects from ordinary moral standards. Shue suggests that he and McMahan in fact "agree that one ought to aim at the morally best laws of war, recognizing fully well that these laws will (justifiably) certainly differ from the specific moral standards that apply to life outside war and possibly depart from the existing laws of war, the Law of Armed Conflict (LOAC) as it is currently formulated."⁹⁴ McMahan holds that war is *morally continuous* with other forms of interpersonal conflict.

⁹² McMahan (2008), pp. 33-36. It is my understanding that McMahan's future work will focus on formulating practicable laws of war that are as closely congruent with basic morality as they can be, in practice.

⁹³ Walzer (2014B), p. 145.

⁹⁴ Shue (2008), p. 89.

Moreover, he is quite clear that his *de facto* endorsement of the war convention is rooted in pragmatic considerations rather than the “deep” (deontological) morality of war. It is a virtue of McMahan’s theory that it does not have to invoke apparently schizophrenic moral standards across the different contexts. The same liability rules governing self-defense also govern the morality of war. In the same way that, in the peacetime context, an individual attacker’s moral status is partly determined by his moral responsibility for posing (or contributing to) an objectively unjustified threat of harm, so the individual combatant’s moral status is partly determined by his moral responsibility for helping to advance an objectively unjust cause; in the case of just combatants, their status as ‘innocent’ or ‘non-liable’ is determined primarily by their side’s satisfaction of the *jus ad bellum*—in particular, the just cause requirement.⁹⁵ Along the spectrum of conflicts ranging from 1-1 self-defense, to mob violence, on down to international conflict, the liability rules remain the same. They remain the same, that is, until it is time to convert principle to practice. McMahan blocks this conversion with pragmatic arguments.

The purported disagreement between traditionalists and revisionists is apparently *foundational* rather than *practical*—at least that is how revisionists have framed the debate. Walzer and Shue are frequently cited as advancing the view that war is morally *sui generis*, that there is a morality of war but it is largely divorced from the morality of peacetime, and is discontinuous with the morality of other sorts of interpersonal violence. However, it is difficult to find evidence of such an extraordinary view, outside of revisionist caricatures of traditionalism. In characterizing the traditional view, McMahan suggests that Shue, in particular, thinks that “war is governed by altogether different moral principles from those that govern other areas of life.”⁹⁶

⁹⁵ The moral status of just combatants can also shift depending on whether they abide the rules of engagement. If they deliberately attack unarmed civilians, erstwhile unjust combatants certainly have a right to attack those just combatants in other-defense.

⁹⁶ McMahan (2009B), p. 15

Consider as well Helen Frowe's recent description of traditional just war theory as holding "that war is *sui generis*, subject to its own special morality."⁹⁷ The claim that war is governed by "altogether different moral principles" and is "subject to its own special morality", when understood as a claim about basic morality, is a misunderstanding. But, first, consider this passage from *Just and Unjust Wars*:

"The war convention as we know it today has been expounded, debated, criticized, and revised over a period of many centuries. Yet it remains one of the more imperfect of human artifacts: recognizably something that men have made, but not something that they have made freely or well. **It is necessarily imperfect, I think, quite aside from the frailties of humankind, because it is adapted to the practice of modern war. It sets the terms of a moral condition that comes into existence only when armies of victims meet...** The convention accepts that victimization or at least assumes it, and starts from there. That is why it is often described as a program for the toleration of war, when what is needed is a program for its abolition."⁹⁸

It is curious that neither McMahan nor Frowe cites this passage, for the bold portion lends some potential support to their characterization of traditionalism. Not to be overlooked, however, is Walzer's statement in this same passage that the war convention is "adapted to the practice of modern war," a point which he has emphasized in more recent writings. In his 2006 debate with McMahan, for example, Walzer writes that war "is universally oppressive. Just war theory is adapted to the moral reality of war, which means that 'justice' in the theory lives, so to speak, under a cloud."⁹⁹ He concludes that paper by observing that "McMahan's 'deep morality' is simply our ordinary morality, and that the conventions represent the adaptation of this morality to the circumstances of war. **Now we might argue about whether ordinary morality provides a critical standard for the war convention. Of course, it does. But we can't apply the standard without attending far more closely than McMahan seems prepared to do to the moral reality**

⁹⁷ Frowe (2014), p. 123

⁹⁸ Walzer (2000), p. 45, my emphasis

⁹⁹ Walzer (2014B), p. 145

of war.”¹⁰⁰ He says much the same thing in a more recent reply to McMahan: “Conventional just war theory is nothing more than the adaptation of everyday moral rules to that reality”¹⁰¹ (i.e., the reality of war). References to the “moral reality” of war should not mislead us to think Walzer is saying that at the moment a conflict counts as ‘war’ then, via some mysterious moral alchemy, new moral principles pop into existence. The more charitable reading sees him as engaged in the quite familiar task of specifying (“adapting”) ordinary moral principles in the formulation of practicable rules of war. The specification regards *war* as different, but not *morality* as such.

Henry Shue has also been cited by McMahan and Frowe as committed to a *sui generis* morality of war. But in the very paper cited by them to support this attribution, Shue is clear that “morality is all of a piece; the fundamental moral considerations are the fundamental moral considerations.”¹⁰² Contra Frowe, Shue is explicitly rejecting any “special morality” of war. Shue’s position, rather, is that “the circumstances of war are so different from the context of ordinary life that even when **the same fundamental moral touchstones are the reference, the differences in the circumstances yield different specific guidelines.**”¹⁰³ Given those circumstances, according to Shue, just war theory and, hopefully, international law seek a *morally optimum set of rules for war*—that is, the rules of war that do the best job of reflecting our basic moral commitments, with the understanding that those rules cannot *fully* reflect them. There is nothing mysterious about that, and there is no reason to view Walzer or Shue as committed to the claim that war is morally *sui generis* in a theoretically problematic sense.

In short, both traditionalists and revisionists agree that the publically promulgated laws of war will look rather different from the morality of ordinary life. But it is far from clear that a

¹⁰⁰ Ibid, p. 147, my emphasis

¹⁰¹ Walzer (2014A), p. 330

¹⁰² Shue (2008), p. 88

¹⁰³ Ibid, p. 87, my emphasis.

special set of basic moral principles, emergent only in war, is what traditionalists like Walzer and Shue are proposing. Their claim is not that there is a basic morality that is unique to war, but rather that war is itself a quite unique sort of conflict; one so utterly different from ordinary life that the same moral principles must be altered to suit its distinctive circumstances. McMahan seems more or less to agree, as evidenced by his rejection of the principled implications of his liability theory. Contemporary just war theorists have spilled a lot of ink emphasizing their differences when, at the level of practice, there is considerable convergence.

2.4 Conclusion: Both traditionalists and revisionists are, in their own ways, acknowledging that war is a very distinctive form of conflict. This is an insight which guides Walzer's notion of 'the reality of war', Shue's 'morally optimum rules for war', and McMahan's 'pragmatic arguments.' To my knowledge, however, no just war theorist has offered a detailed account of precisely *what* makes war so different. They all seem to share the basic insight that it is, but hardly go further than slogans like 'war is hell' or 'war is tyranny'. It is not just an amorphous, albeit shared, intuition that war is different; there are identifiable features of war that *make* it different from peacetime and from other sorts of conflict. I believe that we can better understand the roundabout convergence, at the practical level, of traditionalism and revisionism, as well as come to grips with the idea of war-specific rules, by analyzing these features.

3. WHAT MAKES WAR DIFFERENT

It is a mistake to think that the drastically altered circumstances of war must make war morally *sui generis*, in the sense that a wholly new set of moral principles come into existence in the state of war. To the contrary, it is the *distinctive characteristics* of war compared to other conflicts that necessitates war-specific *guidelines*, whether they are merely pragmatic or based upon *radically adapted* moral principles. The puzzle for traditionalists thus does not concern justifying a unique, war-specific morality. For traditionalists like Walzer and Shue have not claimed there is such a thing. Rather, the puzzle involves reconciling two seemingly conflicting claims: 1) Morality is *morality*, whether we are talking about violence in peacetime or in war; 2) We should have more relaxed standards in evaluating the violence of war than we do in evaluating violence in other contexts. The previous chapter argued that both traditionalists and revisionists, whatever their other differences, are on board with the first claim. But the traditionalists owe an explanation of the second. And that explanation seems to appeal to this intuitively correct but undeveloped claim that war is, in important respects, a very different sort of conflict.

McMahan has thus issued a challenge to traditionalists that “it is essential... to be able to distinguish with precision between wars and other kinds of conflict. For on all such views, if people are attacking and killing one another, whether they are acting permissibly or are guilty of murder may depend on whether their conflict counts as war.”¹⁰⁴ Echoing McMahan’s point, Saba Bazargan has more recently suggested that “the burden of proof lies on the side of those who claim that there is something about war which relaxes the standards of excuse for unjustified killing.”¹⁰⁵

¹⁰⁴ McMahan (2009B), p. 36

¹⁰⁵ Bazargan (2014), pp. 8-9. Bazargan uses the language of ‘excuse’ rather than ‘justification’ but the basic challenge, for our purposes, is that we owe an explanation of the more relaxed standards applied to the state of war—i.e., how does the fact that war is so different lead us to more relaxed moral evaluations?

Without good reasons for thinking that the reality of war engenders significant moral differences between war and other sorts of conflict, the default position seems to be that the same liability rules apply to war as all other interpersonal violence. In other words, without a principled distinction between killing in war and killing outside of war, it looks like traditionalists—to the extent that their account is supposed to be based on more than merely pragmatic considerations—are invoking schizophrenic moral standards.

In order to answer the revisionist challenge set forth by McMahan (and Bazargan), we must first understand what McMahan seeks when he calls “for distinguishing with precision between war and other kinds of conflict.” Presumably the demand is not for an agreed set of necessary and sufficient conditions for when a conflict counts as war; philosophical precision of that kind is not possible. The standard of precision is too demanding if it is a call for precise demarcation. We also need not, and should not, understand the challenge in terms of a *sui generis* morality of war, for reasons given previously. Instead, the idea seems to be that, though morality is the same across all conflicts, war is so distinctive that we must *adapt* morality’s strictures to that distinctive reality. But, then, if war has looser guidelines such that what would normally count as murder or unjust assault in other contexts is not so condemnable in war, we had better know whether the conflict in which those acts occur counts as war or something else!

Of course, that there are looser, or different, guidelines governing war compared to other conflicts is common ground between traditionalist views and McMahan’s pragmatic arguments for laws of war that diverge from the deep morality of war. Having argued against reading traditionalists as holding that war is morally *sui generis* in a normatively problematic sense, we find that traditionalists and revisionists share common ground in thinking that war is different. What neither camp has done, however, is offer a precise characterization of the features of war

that *make* it different, descriptively, from other sorts of conflicts. The goal of this chapter is to do just that.

With help from social contract theorists who have written about the state of war (Hobbes, Locke, Grotius, and Rousseau), I identify in section 3.1 certain features of war that are mostly unique to war and whose combination is sufficient for a state of war. Bringing these features of war together yields a *pragmatic definition* of war: **large-scale chaotic violence waged over an uncertainly protracted duration**. As I discuss in section 3.2, these features make war phenomenologically very different for the participants, to whom the rules of war must speak. While the features discussed here lend no support to the idea that war is governed by a wholly unique morality, it *does* put us in a position to see that Walzer's and Shue's basic view is correct—namely, that we must adjust morality to the circumstances of war in order to have practicable rules, in addition to the overarching aim of limiting war's carnage. We will also see, in section 3.3, that the pragmatic considerations to which McMahan appeals in fact flow from the definition of war, from the very characteristics that make war so different.

3.1 Distinctive Features of War: A pragmatic definition aims at *usefulness*, at capturing our intuitions about what makes war so different. Admittedly, a pragmatic definition will encounter grey areas, conflicts that evidently satisfy the criteria spelled out in the definition but which are situated somewhere between clear-cut cases of 'war' and 'peacetime conflicts'. These vague cases are commonly labeled 'conflicts short of war,' though there may be others as well. The goal of this definition is more modest than full-fledged explication or conceptual analysis; it is to pin-point those characteristics of war that make it a different beast, features which make war-specific rules pragmatically necessary. This further advances the claim of the previous chapter

that, at the practical level, revisionists and traditionalists seem to agree that the rules of war will look different from those governing other conflicts.

3.1.1 The Chaos of War: The first respect in which war is different from other conflicts is that in the state of war, the belligerents lack recourse to an effective common judge, or final authority, for peacefully resolving the dispute. In peacetime, people still have recourse to common judges (even if they opt not to seek a resolution by appealing to those judges.) War most commonly breaks out when there is no impartial arbitrator, where social relations have broken down to the point that common judges are either unavailable or else wholly ineffective in their capacity as arbitrators. There are at least two senses in which common judges might be absent: they are either absent because there is a full-fledged anarchy and it's 'every man for himself', or there *are* common judges but they are ineffective (or corrupt). Either way, the absence of (effective) common judges leads to a chaotic condition, which I will refer to as 'combat as chaos.' Anarchic chaos is the first characteristic feature of the state of war.

The lack of effective common judges is clearly not enough by itself to distinguish war as we commonly think of it from *other* conflicts which lack common judges. This is so because such absence is also a feature of individual self-defense cases. In domestic contexts, it is a necessary condition of an individual's justified resort to force that she be unable to appeal to the proper authorities, such as the police, for protection. Both *immediacy* and *necessity* are constraints on an individual's justified resort to force. In other words, the circumstances of conflict render appeal to third party resolution practically impossible. It rings intuitively incorrect to categorize cases of one-one self-defense as war.¹⁰⁶ The difference between war and one-one conflicts lies not in the bare absence of common judges, however. In the self-defense case, there is still a stable

¹⁰⁶ Though see Uwe Steinhoff (2009) for an argument that it is not possible for two individuals to wage war, but only for *contingent* rather than conceptual or principled reasons.

background of effective authority and the rule of law is still in place; only due to an exceptional concatenation of circumstances, the individual defender lacks recourse to these social and legal remedies. Those institutions are still available at the end of the conflict. War characteristically involves the breakdown of normal background conditions—i.e., the social and legal institutions—which regulate interpersonal relations in the domestic sphere. It is a form of *chaotic* violence.

This chaos, according to John Locke, could apply to conflicts between only two persons. Locke maintained that a state of war is *any* conflict that involves intentions of “enmity and destruction,”¹⁰⁷ and “force without right”, or the threat of such force, “upon a Man’s Person”.¹⁰⁸ The initiators of aggression, who are said by Locke to deliberate and act with a “sedate settled design,” make a state of war and *act unjustly by definition*. It is curious that Locke defines the state of war as unjust by definition. We can presume he would have been well-acquainted with Grotius’ arguments that the justice or injustice of war must be a separate question from the definition of war; the substantive normative question of war’s justice or injustice should not be built into the definition of war.¹⁰⁹ Nor can we necessarily settle who is in the right by who initiates the use of force. (As Anscombe put it, three centuries after Locke, “Why must it be wrong to strike the first blow in a struggle? The only question is, who is in the right, if anyone is.”¹¹⁰) Morally loaded definitions tend to obscure the substantive issues and make answering the question ‘is war just?’ too easy.

Locke goes on to say that “force, or a declared design of force upon the Person of another, where there is no common Superior on Earth to appeal to for relief, *is the state of war*: And ‘tis the want of such an appeal gives a Man the Right of War even against an *aggressor*, though he be

¹⁰⁷ Locke (1988), p. 278

¹⁰⁸ Ibid, p. 281

¹⁰⁹ Grotius (1901), Bk. 1, ch. 1

¹¹⁰ Ancombe (2014), p. 96

in Society and a fellow Subject.”¹¹¹ Where Locke plausibly identifies the lack of a common judge (even if one exists in the background) as a central feature of war, he seems to counterintuitively maintain that the state of war can take place even where there are *background conditions* of authority and a stable rule of law (“though he be in society and a fellow subject”). A more charitable reading might be that Locke is thinking in terms of domestic conflicts which lack appeals to *effective* or properly *impartial* common judges and so these domestic disputes are *analogous* to the chaos of war. (Indeed, when the judges themselves are the perpetrators of unjust violence—as in an oppressive or tyrannical government—it is perfectly reasonable to call that a state of war.) Locke continues,

“when the actual force is over, the State of War ceases between those that are in society, and are equally on both sides subjected to the fair determination of the Law; because then there lies open the remedy of appeal for the past injury, and to prevent future harm: but where no such appeal is, as in the state of nature, for want of positive laws, and judges with authority to appeal to, *the state of war once begun, continues*, with a right to the innocent Party, to destroy the other whenever he can, until the aggressor offers Peace, and desires reconciliation on such terms, as may repair any wrongs he has already done, and secure the innocent for the future: nay where an appeal to the Law, and constituted Judges lies open, but the remedy is denied by a manifest perverting of Justice, and a barefaced wresting of the Laws to protect or indemnify the violence or injuries of some Men or Party of Men, *there it is hard to imagine anything but a State of War.*”¹¹²

For Locke, quite literally any physical altercation, or credible threat of violence, where there is no appeal, in the circumstances, to a common judge counts as a state of war. Locke alludes to an important difference between war and violence that arises within a stable society, wherein a peaceable remedy is possible when the violence ends: in the absence of fair or impartial legal remedies, the violence “once begun, continues.”

Locke’s discussion points out the *chaotic violence* of the state of war, whether or not that violence is strictly *anarchic* (in the sense that there are no laws or overarching authorities to govern

¹¹¹ Locke (1988), p. 280

¹¹² Ibid, p. 281. I have altered Locke’s spellings slightly.

it). That Locke sees war as chaotic comes out more clearly in his claim that victims of attack may treat their attackers as “wolves or lions”: this is so “because such men [i.e., those who attack the innocent] are not under the ties of the common law of reason, have no other rule, but that of force and violence, and so may be treated as beasts of prey” rather than the victims allowing themselves to “[fall] into their power.”¹¹³ There are two potential inconsistencies between this passage and others from chapter 3 of Locke’s *Second Treatise*. How can aggressors be so deliberate in their actions (acting upon a “sedate, settled design”) and yet be reduced to the status of unreasoning beasts when they act on those designs? The uniquely human capacities for reasoning and calculation can be used for good or ill, for beneficence or cunning. To be consistent Locke must mean that “the common law of reason” necessarily implies peaceable human relations, rather than merely capacities for calculation and purely instrumental rationality. This would make sense, given Locke’s conception of moral rights as mandates of reason (and of divine law).

However, the unreasoning ‘beasts of prey’ claim also seems potentially inconsistent with Locke’s view that ‘force without right’ is sufficient for the state of war. We can imagine an aggrieved—‘innocent’—party agreeing to a duel with the wrongful party in a state of nature. In the first place, even if duels are themselves morally objectionable forms of dispute resolution, they are not altogether unrestrained or lacking in agreed-upon rules of conduct. Not all barbarism is equally barbaric. Secondly, duels *are* a wrongful form of dispute resolution: they involve ‘force without right’ on the part of *both* participants; yet by hypothesis, one of the participants is objectively in the right.

It seems that the chaos which Locke identifies is partially the result of his bald denial of a proportionality constraint on self-defense. Hence his almost hyperbolic claim that it is permissible

¹¹³ Ibid, p. 279

to kill a thief who has merely stolen some money “because I have no reason to suppose, that he, who would take away my Liberty, *would not when he had me in his Power, take away everything else.*”¹¹⁴ According to Locke, any resort to unjust force, no matter how meager (such as petty theft), constitutes an attempt to bring the victim under the dominion of the aggressor, and any such attempt may be interpreted as a wholesale attempt to take away the victim’s liberty. Proportionality—of either punishment or self-defense—returns only where there is an effective impartial authority for adjudicating the case.¹¹⁵ I can only suppose that Locke means that where there are no effective impartial judges to resolve disputes, the victims of crime must remain in a state of fear and uncertainty about the intentions of their aggressors. For even thieves have moral standards!¹¹⁶ They may steal your property, but draw the line at killing and maiming. But the victim cannot know that and, Locke seems to think, is entitled to presume the worst about anyone who would violate any of his or her moral rights. Can such a presumption lead to anything but chaos?¹¹⁷ Reflecting on his combat experience in Iraq, Tyler Boudreau describes the urgency of the circumstances: “No one knows how a man will behave under fire until the fire arrives. Boot camp cannot fully prepare a man for the stress or predict his behavior in war.”¹¹⁸ Locke seemed to think that, in the urgent and chaotic circumstances of assault, even the slightest degree of uncertainty about an aggressor’s intentions eliminates any individual sense or requirement of self-

¹¹⁴ Ibid, p. 280

¹¹⁵ This point about proportionality follows Moseley (2005), p. 125.

¹¹⁶ So, apparently, do convicted murderers to whom rapists and pedophiles are regarded as the lowest forms of life in prisons!

¹¹⁷ Thus, Mosely (2005) interprets Locke’s denial of a proportionality constraint as follows: “Despite the strong evidence in the Second Treatise emphasizing the removal of aggressors from humanity’s moral spheres, the strictness of Locke’s *jus ad bellum* criteria (war may only be fought in self-defence) implies that such an attitude towards aggressors reflects the *emergency* conditions of war, in which violence is imminent, inherent, and barely avoidable. For once warring factions have access to legal remedies, the need to destroy recedes, and proportionality returns. The injured have a right to punish, to reparations, and to deter others from similar actions in the future” p. 125.

¹¹⁸ Boudreau (2008), p. 133.

restraint. Though the Lockean state of nature is supposed to be peaceful, the introduction of even the smallest moral offenses can transform it into a quasi-Hobbesian spiral of violence.

If war is partially characterized as a condition of chaos, it makes sense that on Locke's view isolated individuals could be in a state of war with each other. Even if it initially reads as somewhat idiosyncratic to the modern eye, Locke's characterization need not be thought wholly counterintuitive, nor is it unprecedented in the just war tradition. Locke may well have had Grotius in mind when crafting the early chapters of his *Second Treatise*. For Grotius attached the label 'war' to both one-one self-defense cases, duels, as well as collective violence between states. Following Cicero, Grotius offers an expansive definition of war as simply a state of affairs involving contending parties employing force, a view which he thinks "comprises those wars of every description... Nor are single combats excluded from this definition."¹¹⁹ Though as stated in chapter 1, Grotius was careful to distinguish *public* wars from *private* wars, where international conflict falls into the former category.¹²⁰ Both Locke's and Grotius' usage of the term 'war' does depart in certain respects from common usage. We almost always think of 'war' as large-scale and chaotic at the level of combat, even as, paradoxically, the participants themselves may be well-organized into hierarchical chains of command. Inasmuch as Locke's passages highlight the chaotic violence of war, where the usual peace-keeping authorities are either unavailable, wholly ineffective, or are themselves complicit in the violence, (and according to Locke, consequently, all restraints of proportionality evaporate) he is capturing some important ways in which war is characteristically different. We need not too harshly take him to task for his assertion that 'war'

¹¹⁹ This despite the fact that Grotius is much more careful than is Locke to provide a morally neutral definition of war. Grotius (1901) says, "justice is not included in the definition of war, because the very point to be decided is, whether any war be just, and what war may be so called. Therefore we must make a distinction between war itself, and the justice of it" bk. 1, ch. 1.

¹²⁰ See Grotius (1901), bk. 1, ch. 3; and chapter 1 section 1.3.1 above.

can be waged between only two people. Of course, I would reject Locke's claim that even unjustified aggressors are not owed proportionate defense or punishment, as well as his claim that aggressors of all kinds are removed from the realm of moral reasoning and moral consideration. But insofar as he is calling attention to the *chaos* of conflicts where there is no effective common judge, Locke is spot-on in that characterization.

Recall that the starting point of our inquiry is the intuition that war is characteristically very different from most other conflicts: that appears to be common ground between traditionalists and revisionists. That this is so is a plausible explanation of why McMahan must vitiate nearly all the implications of his liability theory with pragmatic arguments. The commonsense notion of war is hardly captured by including one-one self-defense under the concept 'war' (even if individual conflicts can be quite chaotic). We sometimes speak loosely of 'war' between individuals involved in a duel, personal defense against a mugger, or urban gang 'wars,' but such conflicts are a world apart from the chaotic condition of violence that takes place in conflicts between relatively large and organized groups. What else is missing from Locke's (and Grotius's) potentially over-inclusive definition?

We can fill in the picture by looking to two other figures in the social contract tradition, Thomas Hobbes and Jean-Jacques Rousseau. For all that their philosophies of human nature are diametrically opposed, these two thinkers share in common a number of important points about the reality of war.

3.1.2 War and Duration: Nowhere is the idea that war is chaotic captured more vividly and pessimistically than in Hobbes' grim discussion in chapter 13 of his *Leviathan*. Unlike Locke,

who saw the state of nature as a relatively benign condition of “perfect freedom,”¹²¹ Hobbes equated it with anarchy in the pejorative sense, as itself a “state of war,” a “condition of fear” in which “every man is enemy to every man”¹²² and “every man has a right to everything, even to one another’s body.”¹²³ And in perhaps the most frequently quoted passage in moral and political philosophy, Hobbes writes that in the state of war,

“there is no place for industry, because the fruit thereof is uncertain, and consequently, no culture of the earth, no navigation, nor use of the commodities that may be imported by sea, no commodious building, no instruments of moving and removing such things as require much force, no knowledge of the face of the earth, no account of time, no arts, no letters, no society, and which is worst of all, continual fear and danger of violent death, and the life of man, solitary, poor, nasty, brutish, and short.”¹²⁴

We might well criticize Hobbes for his exceedingly pessimistic take on the state of nature, or his objectionably individualistic take on human nature; Rousseau would later do just that. Indeed, we will later see that my own view is more Aristotelian in that in all spheres of life—even a state of nature or a state of war—the love and trust between friends (where friendship is construed broadly to include filial and romantic relations) still has a morally central place.¹²⁵ Hobbes is quite correct, however, in his general description of war as chaotic condition of fear and violence.

I am here less concerned to reiterate the characterization of war as chaotic violence than to call attention to a relatively lesser known passage in Hobbes’ famous discussion of the state of war, one which is relevant to my overall characterization of what makes war different. (This feature is also directly linked to several of McMahan’s pragmatic arguments for the war convention, as we will see below.) Hobbes distinguished war from isolated conflicts in that the

¹²¹ More precisely, Locke describes occupants of the state of nature as in “a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the Law of Nature, without asking leave or depending upon the Will of any other man.” p. 269.

¹²² Hobbes (1994), p. 76

¹²³ Ibid, p. 80

¹²⁴ Ibid, p. 76

¹²⁵ This is the subject of chapter 6.

former is an ongoing *condition* of violence (and preparedness for violence) and that it is of *indefinite duration*. The state of war, according to Hobbes, need not involve fighting or bloodshed at all times. Rather a consistent readiness and *will to kill and maim* marked off the state of war from, for example, duels and personal defense. “For War,” he says, “consists not in battle only, or the act of fighting, but in a tract of time wherein the will to contend by battle is sufficiently known.” War is analogous to “the nature of foul weather,” which “lies not in a shower or two of rain, but in an inclination thereto of many days together, so the nature of war consists not in the actual fighting, but in the known disposition thereto during all the time there is no assurance to the contrary. All other time is Peace.”¹²⁶

Hobbes identified an important feature of war that makes it different from other sorts of conflict: the fear, chaos, and insecurity of war have, in the circumstances, no obvious or certain end in sight. Importantly, this contributes to what Clausewitz called ‘the fog of war’, or deep and pervasive *uncertainty*. There is little or no predictability concerning the timing or magnitude of the enemy’s next onslaught. In addition, the more prolonged is a conflict, the more obscure the initial reasons for the conflict can become. Indeed, the longer the conflict lasts the more likely it is that the aims of warfare shift in ways that are scarcely perceptible to combatants, or civilians. (Can anyone, for example, offer a clear and unambiguous historical and philosophical analysis that settles who is objectively in the right in the ongoing Israeli-Palestinian conflict?) *Ad bellum* justice is already quite difficult for soldiers to ascertain at the onset of conflict; it may become wholly opaque as war drags on over time. (I take up these points at greater length in the next chapter.)

While Rousseau devotes much space to criticizing the “odious” system of Hobbes, he shares with Hobbes the idea that war, unlike peacetime conflicts, is protracted over an indefinite

¹²⁶ Hobbes (1994), p. 76.

duration. War is, in Rousseau's words, "a permanent state which presupposes lasting relations, and such relations rarely obtain between man and man, where everything between one individual and another is in continual flux which constantly changes relations and interests." In contrast, with individual conflicts outside war "the subject of a dispute arises and disappears almost instantaneously, a quarrel begins and ends in a single day, and there may be fights and murders, but never or very rarely extended enmities and wars."¹²⁷ The notion of a conflict spanning an indefinite, and subjectively uncertain, duration of time is a key feature of war that marks it off from other conflicts, with at best rare exceptions.

These rare exceptions, however, warrant a qualification of my claim that indefinite duration is a constituent feature of war, as well as Hobbes' emphasis on war's prolonged "tract of time" and Rousseau's emphasis on "lasting relations." The Falklands War lasted less than three months (April 2, 1982-June 14, 1982) and Grenada less than two years (initiated October 25, 1983 and U.S. troops left in June 1985). The issue of duration, therefore, has less to do with the *objective length* of a war than it does the participants' "lack of assurance" (in Hobbes' words) as to the precise duration of conflict. Once war has been declared, soldiers have little or no assurance that war will end in a matter of weeks or be prolonged over several years, or even decades. This *uncertainty* about duration, rather than the *objective* duration itself, is I think Hobbes' and Rousseau's key insight. I therefore amend my claim to this: war is a conflict waged *at least* over a *subjectively uncertain* duration and is *typically* (though not always) waged over an *indefinite duration*. Let us say that 'uncertainly prolonged duration' is a constituent feature of war that distinguishes it from a vast majority of other conflicts. This qualification has the further virtue of capturing the phenomenology of combat, as we will see in section 3.2.

¹²⁷ Rousseau (2010), p. 166

We can find recent historical evidence that ‘uncertainly prolonged duration’ is a distinctive feature of war. Hawkish political leaders have a habit of promising ‘swift victories’ or ‘bringing the troops home for the holidays’ but seldom are these promises borne out.¹²⁸ When President George W. Bush committed the United States to war with Iraq, the U.S. military toppled Saddam Hussein’s defensive forces in under two weeks; as the banner proclaimed shortly thereafter, ‘mission accomplished.’ And yet the fighting persisted throughout the decade. As of this writing, renewed sectarian violence in Iraq and the burgeoning Islamist group ISIS are rekindling the need for Western military presence. Whether they are shrewdly aware that wars do not start and stop in determinate blocks of time and so aim to deceive the public, or they are themselves blind to the nature of war, political leaders are notoriously bad at predicting the duration or far-reaching effects of their pro-war policies.¹²⁹ Consider also that North Korea and South Korea, though they live side-by-side more or less peaceably, have never officially signed a peace treaty and are still, legally, at war with each other. However, we are here more concerned to characterize war in *phenomenological* terms rather than in *legal* terms. This is not meant to undersell the importance of legal definitions, but to say that part of our purpose is to come closer to understanding the perspective of soldiers, which we cannot do by consulting the law books.

3.1.3 Groups and Largeness of Scale: Rousseau identified a further characteristic feature of war, which separated his view from Locke, Grotius, and Hobbes, that it is waged between *groups*. Seeing war as group-based is well-grounded in common sense as well. Contra Locke, who is evidently Rousseau’s target in the above-quoted passages, we commonly think of war as

¹²⁸ With Grenada and the Falklands War perhaps among these rare exceptions.

¹²⁹ A related problem, which also afflicts McMahan’s categorization of wars as ‘objectively just or unjust’ is *the individuation of wars*. Is the Iraq War of 2003 a distinctive war that failed the just cause requirement, or could it be interpreted as a resumption of the first Gulf War, which had a just cause? If the United States and its allies commit ground troops to war against ISIS, is that a resumption of previous wars or a distinct war?

waged between *groups* and, in particular, *organized political groups*. The great political realist Clausewitz also recognized that “the contest in War is not a contest of individual against individual, but an organized whole, consisting of manifold parts.”¹³⁰ These “manifold parts” are more commonly known—in descending order of size—as military units, platoons, squads, and teams. Rousseau identified this collective feature of war as what essentially distinguishes it from other sorts of conflict. It is not enough for two or more individuals or groups of individuals, in the face of aggression, to fall into chaotic violence in lieu of appeals to a common judge, as Locke believed. Rather, there is a level of *political* or *hierarchical organization* among the participants in war, as well as identifiable political agendas. More importantly for Rousseau, there is something *morally special* about political entities and conflicts between them.

The closest analogues to the protracted, collective violence of war seem to be ongoing inner city gang turf wars, or family blood feuds that persist across generations. Why should we not count these as ‘wars’? Rousseau attempts to provide an answer. He writes, “duels, challenges, cartels, calls to single combat, quite aside from the fact that they were illegitimate and barbarous excesses of an entirely military constitution, they led not to a genuine state of war, but to a *private affair that was so clearly settled in finite time and place that a second bout required a renewed call to combat*.”¹³¹ The force of the last portion of this passage depends upon Rousseau’s view that states have *wills*; they are described in terms of a collective intention, rather than what they happen to be doing at a given time. Thus, much as Hobbes suggests that there need not be fighting or bloodshed at all times but a “known inclination thereto”, so political entities do not need to keep re-declaring the call to combat. And for Rousseau there appear to be at least two ways in which

¹³⁰ Clausewitz (2010), p. 30

¹³¹ Rousseau (2010), p. 167, my emphasis

one can be in conflict but fail to be at war: 1) there is no collective intent, as in mob violence; 2) even if there is an intention, it is set out in a finite, fixed duration, as in a duel.

It is not my purpose to evaluate Rousseau's view of collective wills or the position that a special morality applies to collectives: for *whether or not* states are morally special, war is still characteristically very different from other conflicts. In that light, Rousseau's passage points to a cluster of features whose combination is (almost) unique to war: it is a protracted and large-scale conflict waged between groups, and these groups have publically declared political agendas. We can find conflicts in the domestic sphere that capture one or two of these features—gang violence is group-based and, to a lesser extent, it can be of indefinite duration; but is neither large-scale nor waged for publically recognizable objectives. And unless we are talking about gang violence or family feuds in a state of nature, background conditions of stable authority and the rule of law are still in place in those other conflicts. Recourse to a common authority is available, even if 'representatives' of these gangs or feuding families refuse to appeal to it. These conflicts may be chaotic, but may be less so where effective common judges are available.

Rousseau dwells on the group element of warfare, I take it, because he sees states and political communities as morally special. Perhaps the main reason that he sees *war* as different is precisely because he sees *states* as special. The collective political element might change the principles that apply to war between states (and state-like entities). This is precisely what McMahan and other individualist-reductionists reject. The moral standing of states is not my primary concern, however. Rather, I see the group element as significantly impacting the *size* and *distribution* of armed forces. Where large groups and sub-groups are in conflict, the uncertainty of individual soldiers becomes more commonplace and intractable. And since the members of one large group cannot all be fixated on any single goal, the group must divide into sub-groups which

will in turn further divide and distribute the moral and tactical labor. The group element of warfare, as I will show in chapter 4, is a substantial source of individual ignorance and pervasive battlefield uncertainty. This is true irrespective of whether Rousseau is correct about the morality of statehood. That is, even if there is nothing morally or ontologically special about groups—we are reductive individualists—it is still true that large-scale group conflicts create conditions of deep and pervasive uncertainty. In addition, individual soldiers form special relationships within these groups and sub-groups, and these relationships *do* change the normative circumstances. This is so because special duties arise which may be independent of the moral character of the war, or of the state. That is the subject of chapter 6.

3.1.4 The Pragmatic Definition of War: Bringing the foregoing features together, let us offer the following pragmatic definition of war: **war is large-scale chaotic violence waged over an uncertainly protracted duration.** Now recall McMahan's challenge to those who hold that, because war is so different from other conflicts, it should be governed by different norms: in order to determine whether acts of force constitute rights violations or legitimate acts of war depends on whether the conflict in question counts as 'war'. Our definition does not serve to carve the world of forcible conflicts into 'war' and 'not war'; there may be conflicts whose status is uncertain, such as inner city turf wars or family blood feuds. But as our survey of Locke, Grotius, Hobbes, and Rousseau indicates, the definition illustrates several respects in which war is characteristically different from other conflicts. These differences make war-specific laws a practical necessity. Thus, when I side with Shue and Walzer, who hold that the rules of war must be different, this is simply a recognition that war is very far removed from ordinary life. The combination of features embodied in the pragmatic definition are precisely what makes it so, and this is borne out by considering what combat is like from soldiers' perspectives.

3.2 The Culture of Violence: Begin first with the fact that war is *violence protracted over an indefinite duration*. Several things follow from this piece of our definition. First, soldiers must have much more tolerance for violence than would be acceptable in ordinary life. What this means in practice is that the laws of war will be more permissive than any peacetime laws. This is deeply regrettable, but it is a reality that both Walzer, Shue, and McMahan accept, in their own ways. In addition, Hobbesist fear also flows from war's indefinite duration, and the climate of chaos. It is not just that soldiers face lethal threats; it is also that these threats have no foreseeable end. As Rousseau might say, the duress imposed by the state of war does not begin and end in a single day, but is a condition of uncertain length. This feature of war makes the soldier's profession unlike any peacetime role.

The pervasive and indefinitely protracted chaotic violence of war also does things to the participants that have no analogue in ordinary life. Much as Hobbes characterized war as a prevailing condition of violence, Iraq War veteran Tyler Boudreau has written about war as a *killing culture*.¹³² Soldiers endure humiliating and dehumanizing campaigns of indoctrination and desensitization to violence in boot camp. Their natural aversion to killing is systematically blunted in basic training, and their sense of individuality largely sabotaged. These campaigns are designed to inure troops to the killing and maiming that is endemic in war, and to instill an almost robot-like psychology of obedience.¹³³ There is simply nothing which corresponds to this feature of the military profession in peacetime. As Boudreau says: "Nowhere back home does the soldier kill. But within the gates of any base or any fort, the notion of killing is mentioned so frequently, and with such nonchalance or even zeal, that it becomes a completely acceptable element of every

¹³² Boudreau (2008), pp. 75-83. His expression 'the killing culture' appears explicitly at p. 79.

¹³³ See Grossman (2009) for discussion of these indoctrination techniques, as well as their frightful effectiveness at transforming young people into killing machines.

soldier's consciousness."¹³⁴ Though this training has the effect of eroding normal human responses of sympathy and moral identity, it is a necessary evil of the soldier's role. (It is also one of the many seeming contradictions of war that soldiers are also expected to disobey manifestly unjust orders, such as targeting unarmed civilians.) War is a condition of extreme and protracted violence to which the soldier must accommodate himself as a matter of physical and psychological survival. This personal transformation is also a major part of what makes the profession of war-making, and war itself, fundamentally different from peacetime.

Regrettably, blunting the aversion to violence can become a part of the individual soldier's identity. The culture of violence includes not just shameless violence, but shame for one's *aversion* to violence. Tim O'Brien describes "the soldier's greatest fear" as "the fear of blushing. Men killed, and died, because they were embarrassed not to. It was what had brought them to the war in the first place, nothing positive, no dreams of glory or honor, just to avoid the blush of dishonor. They died so as not to die of embarrassment... They were too frightened to be cowards."¹³⁵ This shame prevents conscientious individuals from refusing to fight. Few people will willingly enter the large-scale prolonged chaos of war, so war-supporters resort to repugnant tactics of social ostracism. The willingness of young men to participate is thus, as O'Brien describes it, a matter of shame, "hot, stupid shame", of "not want[ing] people to think badly of me... I was ashamed of my conscience, ashamed to be doing the right thing."¹³⁶ He notes with dejection, "I would go to the war—I would kill and maybe die—because I was embarrassed not to."¹³⁷ O'Brien has identified excellent reasons for countries to not go to war lightly, and for militarist types to curb their (shameless!) shaming tactics. He has also, apropos the present

¹³⁴ Boudreau (2008), pp. 79-80

¹³⁵ O'Brien (2009), pp. 20-1.

¹³⁶ Ibid, p. 49

¹³⁷ Ibid, p. 57

discussion, called attention to how far the military's culture of violence extends and how ordinary people are complicit in the dismantling of young men's psyches.

Tolerance for violence is necessary for the soldier's effectiveness, however. Again, quoting Boudreau, "we did what we had to do to stay alive, and we did it in accordance with our nature. As Marines, our nature, synthetic though it may have been, was violence. That's what we knew; it's what we understood; it's how we'd been conditioned to deal with our problems and to resolve our conflicts. It's surely how we dealt with our problems in Iraq."¹³⁸ For American Marines, boot camp conditions soldiers to the chaotic and prolonged condition of violence which they may someday face in combat. Soldiers must, as a matter of professional necessity, be desensitized to and indeed *brutalized* by violence. As Boudreau describes it, in a chilling Hobbesian tone, soldiers cannot survive without *much* more tolerance for violence than would be tolerable in peacetime. The culture of violence is the reality of the soldier's experience, and it is necessarily the reality of war. This reality obtains no matter the moral character of the war. Whether just, unjust, or (more commonly) a morally mixed war, the fact is that "atrocities will be committed, not by happenstance, but by definition. They are a natural feature of the battlefield. And the longer the war, the more breakouts will emerge. That's the way wars go."¹³⁹ And as J. Glenn Gray points out, the "emotional environment of warfare" is an "atmosphere of violence. The threat to life and safety that the presence of the opponent, 'the enemy,' represented created this climate of feeling."¹⁴⁰ War is what it is, and if its resort is ever justified we had better be prepared to justify—or more likely, *tolerate*—the killing culture.

¹³⁸ Boudreau (2008), p. 154

¹³⁹ Ibid, p. 92

¹⁴⁰ Gray (1988), p. 26

Tragically, many soldiers are so psychologically unhinged by combat that they are unable to return to civilian life: they are mentally disconnected from the peacetime condition. After the Vietnam War, Kien (the lead character in Nin Bao's 'The Sorrow of War') watches a U.S. war movie and finds himself "ready to jump in and mix it in the fiery scene of blood, mad killing, and brutality that warps soul and personality. The thirst for killing, the cruelty, the animal psychology, the evil desperation. [Kien sits] dizzied, shocked by the barbarous excitement of reliving close combat with bayonets and rifle butts."¹⁴¹ War has the effect of permanently altering soldiers' lives after war. The memory and post-traumatic stress of war consumes them, just as "for Kien, the most attractive, persistent echo of the past is the whisper of ordinary life, not the thunder of war, even though the sounds of ordinary life were washed away totally during the long storms of war. The prewar peace and the postwar peace were in such contrast."¹⁴² Life is never again 'normal' for soldiers suffering combat stress and moral injury. Having been so thoroughly desensitized to the culture of violence, returning to the norms of peacetime is, for many, a staggering ordeal. Memories of the battlefield, the horrors endured and inflicted, and also the *nostalgia* for battle many soldiers take home with them. Post-traumatic stress disorder, survivor's syndrome, and moral injury are the psychological wounds many soldiers carry back from war. Their experience in combat is too different to re-assimilate to peacetime.

These considerations should leave us strongly considering the validity of pacifism. They should at least lead nations to be far less cavalier in sending soldiers to war in the first place. But if we must do so, it must be understood that the rules of war will be quite unlike the rules that bind us in peacetime. As Shue suggests, "much more killing and violence have to be tolerated, **if war**

¹⁴¹ Ninh (1993), p. 47.

¹⁴² Ibid, p. 63

can be tolerated.¹⁴³ The bold portion is revealing. For it might well be that this inevitable moral compromise is unacceptable, that the divergence of standards between ordinary life and war leads “one to conclude that war cannot be justified—that pacifism is the only morally sustainable position.”¹⁴⁴ While McMahan would probably hold that the degree and scale of violence, and the creation of killing machines which is thereby made inevitable, constitute pragmatic reasons for war-specific rules, I think such rules are necessitated by the fact that war is a large-scale, indefinitely long, chaotic culture of violence: *war is hell*. We of course should be pragmatic in hell-like circumstances, but it is hard to believe that the norms governing life in hell will be the same as the norms governing life outside the foyer to hell.

3.3 Moral Ambiguity: A second reality of war which follows from war’s indefinite duration is that the moral and political character of the conflict often changes dramatically. A war that begins as objectively just can become unjust; some of a side’s missions can advance just aims, others unjust or morally mixed aims; a war that begins as unjust can become just, or at least acquire morally good aims, in the course of its prosecution; wars that begin as ambiguous can become just or unjust in the course of their prosecution; and so on. As noted in chapter 1, reasons of justice may even require continuation of a war whose initiation was *ad bellum* unjust. Even if, for example, we never should have sent American troops to Iraq in the first place (both for the sake of the Iraqi civilians and for the soldiers themselves), once they were there and the hostilities were under way, there arose powerful moral reasons to stay: such as protecting Iraqi civilians and securing regional stability. The fact that new war aims arise in the course of a war’s prosecution means that the *ad bellum* status of most wars can change. These fluctuations in the moral character

¹⁴³ Shue (2008), p. 95, my emphasis

¹⁴⁴ Ibid, p. 97

of war are precisely what we should expect when violence rages over an indefinite duration, and when there are complex political and historical issues in play—as there always are.

It is also what we should expect when violence is waged on a *large scale between groups*. A military, as a whole, does not have only a single mission within the same war. Any collective effort on a large scale requires a division of labor. In order of group size, the United States military divides into units (~several hundred to a few thousand soldiers), platoons (~dozens to a few hundred soldiers), squads (~8-12 soldiers), and teams (~4-7 soldiers). Different groups and sub-groups in a military perform different missions and make different contributions to particular war aims. One platoon may be contributing to objectively unjust aims; another platoon on the same side may be providing humanitarian aid; still others may be mostly inactive. The activities of these different military groups contribute to the shifting moral character of a war—this despite the fact that traditional just war theory assigns total responsibility for the *jus ad bellum* to the state which defines the ends of war. The Iraq War is an interesting case study here. Some squads were charged with ‘winning hearts and minds’ and helping the Iraqi people rebuild its infrastructure; others were charged with the quite gruesome task of unearthing corpses from Saddam Hussein’s well-concealed mass graves; and others would stand guard at bridges, oil refineries, and town borders, with unflinching orders to fire upon any vehicle that drove too slowly (out of concern for insurgent suicide bombings), with tragic costs in innocent lives. In short, the division of moral and tactical labor that is essential to the proper functioning of a military means that particular missions within war will have differing moral characters. With so many different groups, sub-groups, and missions in the course of war, it is rare for the moral character of a war to remain ‘fixed’ as objectively just or unjust.¹⁴⁵

¹⁴⁵ Bazargan (2013B), pp. 970-71; McMahan (2014A), p. 207

Because of their indefinite duration, large scale, and consequent divisions of labor, *wars are dynamic moral and political affairs*. Recall McMahan's pragmatic argument that since wars tend to be morally mixed or to shift aims in the course of their prosecution, it is not practically feasible to have non-neutral rules of war, or to generally have individual soldiers' moral status determined by their side's objective just cause (or lack thereof). About this much we are in agreement: non-neutral rules of war are not practically feasible. But in light of what war is like by definition, the language of 'pragmatics' is misleading. The shifting moral character and mixed justice of war are precisely what we should expect given what war fundamentally *is*—indefinitely long, waged on a large scale, and chaotic. What McMahan refers to as pragmatic considerations for neutral rules of war are really the product of these distinctive and essential features of war. And it is precisely Shue's and Walzer's point that, because war is so different, the rules governing it will look different as well. There is, once again, a roundabout convergence of traditionalism and revisionism at the level of practice, and for much the same reason: if moral rules are to apply at all, they will necessarily look very different because of the very features that make war so different. The alternative, I believe, is contingent pacifism.

3.4 Conclusion: In her description of McMahan's reductive-individualist view, Helen Frowe has written that "war is part of ordinary life, to be judged by ordinary moral rules."¹⁴⁶ I think my discussion here has been sufficient to undermine at least the first part of this claim; and in any case it is difficult to see how anyone could really believe it. If that is really the general thesis of revisionist just war theory—that 'war is part of ordinary life'—this gives purchase to Walzer's *reductio* that revisionist theories treat war as a peacetime activity.¹⁴⁷ Perhaps the first part of Frowe's quote is simply a poor choice of words and all that she means to say is that war is

¹⁴⁶ Frowe (2014), p. 123, my emphasis

¹⁴⁷ Walzer (2014B), p. 145.

morally the same as ordinary life. This much traditionalists do not deny, as “the same fundamental moral considerations are still the final touchstones of all human action.”¹⁴⁸ But then we can simply rehearse the earlier objections from chapters 1 and 2 that McMahan’s theory is impracticable and can provide no meaningful practical guidance to combatants. Whichever way we interpret Frowe’s claim, the revisionist theory has almost no practical significance for the actual conduct of war. Either it literally, and absurdly, regards war as part of ordinary life; or its resulting rules are so drastically modified, or outright discarded, that the resulting laws of war emerge as a simple recasting of traditionalism, just under the banner of “pragmatic considerations.”

The features that make war a different beast go a long way in explaining why McMahan’s ‘pragmatic arguments’ in fact follow from what war is fundamentally like, rather than depending upon contingent features of war which can potentially be remedied. There are two reasons for thinking that McMahan regards these features as contingent and potentially remediable rather than fundamental to the reality of war. First, as discussed in chapter 2, he vitiates nearly all the principled moral implications of his theory with pragmatic arguments. Second, he has more recently offered proposals about how to mitigate the uncertainty of soldiers concerning matters of *ad bellum* justice; a proposal which I critique in chapter 4.

All of the features we have canvassed above which make war an essentially different conflict also serve to make the uncertainty of war essentially different. I have not yet addressed in a detailed way McMahan’s pragmatic argument concerning the epistemic limitations of soldiers, and the uncertainty of the battlefield. These are such crucial issues to just war theory, and to the contemporary debate in particular, that they deserve fuller discussion.

¹⁴⁸ Shue (2008), p. 95

4. UNCERTAINTY AS A STRUCTURAL CONDITION OF WAR

The previous chapter highlighted an assortment of distinctive features of war and of the soldier's experience which make war a descriptively *very* different sort of conflict than almost any other. While these descriptive differences do not warrant the claim that 'war is morally sui generis', in the sense that new *basic* moral principles emerge in the state of war, these features do strongly suggest that different *legal* requirements are both practically necessary and, indeed, inevitable until we can abolish war altogether.

The main difference between McMahan and myself—with respect to whether war is different—is not in regards to the view that war must be governed by rules that look very different from the rules governing self- and other-defense in peacetime. Our disagreement seems to concern the question whether the features of war that make neutral rules of engagement essential also make neutral rules *inevitable*. McMahan apparently thinks that there could someday be a public system of rules for war that are asymmetric between just and unjust combatants. (That he believes such reform is possible will become more evident in section 4.4 below.) I believe, to the contrary, that because of what war *is*, because of what it is fundamentally *like*, that it is probably impossible to reform war in a way that would render a general system of asymmetric rules for just and unjust combatants practicable. To do so would amount to the abolition of war itself—not, I hasten to add, a bad thing! But until we can abolish war, the law of war must consist of rules that reflect what war is like: uncertainty follows, necessarily, from the very features which make war *war*. Or in other words, **uncertainty is a structural feature of war**.

I am by no means the first to suggest that uncertainty is endemic in war. Clausewitz called the inherent uncertainty of the battlefield 'the fog of war', observing that "great part of the

information obtained in War is contradictory, a still greater part is false, and by far the greatest part is of a doubtful character.”¹⁴⁹ Tim O’Brien characterized the opacity of war’s political ends as “certain blood” being “shed for uncertain reasons.”¹⁵⁰ And Michael Walzer, as we have seen, has said that uncertainty is most aptly understood as part of *the reality of war*, rather than the sorts of exceptional or mitigating circumstances which ground epistemic excuses—or what is sometimes called an *excuse of ignorance*.¹⁵¹ This is so, I will argue in this chapter, because uncertainty is *multi-faceted*, *pervasive*, and therefore *ineradicable* from war. It structures the decision-making of combatants at nearly every turn.

This thesis should not be confused with the trivial claim that all human activities have an element of uncertainty built into them as a result of human fallibility. The uncertainty of war is different in *kind* from the vast majority of other human endeavors; soldiers confront an essential ignorance that we do not commonly have elsewhere.

In section 4.1, I clarify what I mean in claiming that soldiers’ uncertainty in war is ‘multi-faceted’ and ‘pervasive’. There are multiple factors working against soldiers’ ability to obtain reliable morally relevant information concerning matters of objective *ad bellum* justice and these factors are *very widespread*: a vast majority of the soldiers will be the victims of a cluster of epistemic obstacles, whether or not their war is just, and encounter serious obstacles to attaining morally relevant information about a prospective war. I categorize these factors into four broad types. The first obstacle I call ‘political uncertainty’ (4.1.1), or the problem, prior to war’s outbreak, of soldiers’ encountering a multitude of conflicting views—in media, public debate, and their government—over the political aims, prospects of success, the question of last resort, the

¹⁴⁹ Clausewitz (2010), p. 54

¹⁵⁰ O’Brien (2009), p. 38

¹⁵¹ Walzer (2014A), p. 330

necessity of their individual participation, and the intentions of political leaders during the soldiers' attempts at deliberating about the justice of a prospective war. Related to the first obstacle is what I call 'scholarly uncertainty,' (4.1.2): this is the multitude of plausible but conflicting views about a prospective war, or war in progress, that soldiers will encounter should they attempt to overcome the *first* obstacle (political uncertainty) by, in Vitoria's words, "consulting the verdicts of wise men." The third obstacle I call 'role-based uncertainty' (4.1.3). This is the uncertainty that arises because soldiers are limited *qua soldiers* in their access to certain morally relevant information: some things are simply not part of their role to know or try to find out, and often this is the case for morally legitimate reasons: this obstacle in particular highlights how uncertainty in war is different in kind from other spheres of life. The fourth general "obstacle" I call, borrowing Clausewitz's expression, 'the fog of war' (4.1.4). Here I re-introduce the discussion of chapter 3 concerning the distinctive characteristics of war. The fog of war is the uncertainty that is inherent to the waging of war: it is the uncertainty which flows from the features of war—such as its general *chaos, indefinitely protracted duration, and large-scale* which guarantee high levels of uncertainty concerning the *ad bellum* justice of war, or the nature of soldiers' contributions to the war effort. (I hesitate to call 'the fog of war' an *obstacle*, because I do not believe it is something that can be overcome without abolishing the practice of war itself: it is inherent to the battlefield.)

In section 4.2, I reply to some objections. In section 4.3 I argue that, based partly on considerations from section 4.1, that a *subjective* standard of moral justification is most appropriate for the circumstances of war. Section 4.4 addresses McMahan's more recent effort to identify practical measures for reducing soldiers' uncertainty and reducing the strength of uncertainty as an excusing condition. I argue that his hypothetical *jus ad bellum* 'court of experts' would do nothing to resolve the epistemic obstacles identified in section 4.1, and that the panel could even

contribute to governments' unwillingness to wage *just* wars. Symmetrical rules of war are the best option—not necessarily because they will reduce uncertainty, but because they reflect achievable epistemic standards while restraining the damage wrought by war.

The upshot of this discussion is that multi-faceted and pervasive uncertainty frames the decision-making of individual soldiers, insofar as they have discretion. This makes individual decision-making a matter of risk assessment in uncertainty, which will be the subject of chapter 5.

4.1 Uncertainty is Multi-Faceted and Pervasive In what follows, I assume the perspective of an American soldier who is exposed primarily to American sources of information. Though I will frequently use the Iraq War as an example, I do not mean to generalize about all wars on the basis of this example. However, as the United States' most recent war, it makes for a vivid case study. Moreover, since the United States is one of the freest democratic societies in the world, with a relatively free-flow of information and individual access to a diversity of opinions, it is fair to say that if uncertainty is nonetheless rampant among American soldiers, it will be at least as rampant in closed, illiberal societies. (Though as we will see there are special uncertainties that arise from having a free press and open access to information as well.) Most of the sources of uncertainty identified in this section we can safely assume apply to the bulk of soldiers on all sides of war—in particular, uncertainty due to information sources, propaganda, and the ignorance inherent to the soldier's role.

4.1.1 Political Uncertainty: the Problem of Evidence Sources: Where should an epistemically diligent and morally conscientious soldier begin when contemplating participation in the Iraq War?

The television media outlets to which he is probably most exposed will be highly politicized. Major media outlets, such as Fox News and MSNBC, are something of an unfunny

joke when it comes to journalistic integrity and objective reporting. Fox News is notorious for its deeply conservative bias and supplication toward the Republican Party, but MSNBC is rightly becoming more and more recognized for its shameless bias in favor of the Democratic Party as well. These networks are the *de facto* propaganda arms of the two dominant political parties in the United States.

These perceptions are not merely subjective or anecdotal, either. Of the claims evaluated as ‘mostly false,’ ‘false,’ or blatant lies (‘pants on fire’) by the fact-checking website politicfact.com in September 2015, CNN fared the best at 21%; MSNBC and NBC came in at 44%; and, not surprisingly, Fox News misinformed the audience 60% of the time.¹⁵² Lest the MSNBC apologist seek some consolation in how their network compares to Fox News, the Pew Media Research Center’s 2013 State of the News Media Report showed that **85%** of MSNBC’s content is “commentary and opinion” rather than reporting, compared to a relatively more “balanced” **55%** commentary and opinion on Fox News.¹⁵³ There are strong reasons to be generally skeptical of at least the *major* television news outlets. Unfortunately, these networks will have some of the loudest voices when the country is at war, or is contemplating going to war.

A conscientious soldier should therefore look to other sources and, fortunately, in a free society is able to do so. However, he may confront a further obstacle. Even printed news that seems to veer more toward real reporting than opinion and political propaganda will yield conflicting or ambiguous results. Consider some of the information available during the Iraq War. In 2005, NBC news reported that there was no evidence that Iraq, post-Saddam Hussein, had

¹⁵² See [<http://www.politifact.com/punditfact/article/2015/jan/27/msnbc-fox-cnn-move-needle-our-truth-o-meter-scorec/>] Accessed November 4, 2015

¹⁵³ For a summary of the Pew Research findings, see [<http://www.pewresearch.org/fact-tank/2013/06/05/is-msnbc-the-place-for-opinion/>] Accessed November 4, 2015

weapons of mass destruction.¹⁵⁴ If that is right, it effectively vitiated the Bush Administration's main case for going to war to remove Hussein—that Hussein was in possession of weapons of mass destruction prohibited both by special treaties to which he was party and a violation of international law. But in July 2014, the New York Daily News reported that the terrorist group ISIS had seized a bunker of rockets containing sarin gas which dates back to Hussein's regime. The report reads in part, "UN weapons inspectors **reported in 2004** that Bunker 13 housed 2,500 sarin-filled chemical rockets and about 180 tons of sodium cyanide, 'a very toxic chemical and precursor for the warfare agent tabun'."¹⁵⁵ If that is right, Hussein's regime *was* in fact in violation of its treaty obligations and there was a strong *legal* case for war.¹⁵⁶ Of course, though at least one of these reports is false that does not automatically mean the reporters lied. Lies and dissimulation are not the point of bringing in these particular examples. The point is, rather, that for the average soldier (or citizen), consulting prevailing news sources can and does yield opposing verdicts even if we charitably assume that the news outlets are epistemically diligent and are reporting in good faith. It is not surprising that the evidence relevant to war would be misleading or ambiguous: war is a messy business, rife with political interests, mixed motives, and complex historical facts. Epistemically diligent reporters, like epistemically diligent citizens and soldiers, will have difficulty parsing the evidence as well.

¹⁵⁴ http://www.nbcnews.com/id/7634313/ns/world_news-mideast_n_africa/t/cias-final-report-no-wmd-found-iraq/#.VjpCorerQdU

¹⁵⁵ <http://www.nydailynews.com/news/world/isis-seizes-chemical-weapons-depot-baghdad-sarin-gas-rockets-article-1.1859934> My emphasis

¹⁵⁶ And Hussein would unambiguously have been in violation of the 1993 'Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction', whose sixth paragraph of the preamble reads: "Determined for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons, through the implementation of the provisions of this Convention, thereby complementing the obligations assumed under the Geneva Protocol of 1925." See Kalshoven and Zegveld (2011), p. 192.

Instead, the conscientious soldier might reasonably defer to the epistemic authority of his government and the judgment of his superiors, as traditional just war theory recommends he is entitled to do. Indeed, it is plausible to think that individual soldiers have a *right* to trust these sources, that deferring to them is part of his *role* (more on the uncertainty built into roles in section 4.1.3). Regardless, a conscientious soldier would be aware that politicians lie; his government has been known to initiate predatory wars on false pretenses. On the other hand, he is also aware that governments must classify certain information on legitimate grounds of national security; dissembling messengers might have good reasons for propagating misinformation. This is not to say that ‘national security’ could not be an elaborate ruse to ensure his participation (and possible complicity) in an unjust war; but how can he be sure either way? Healthy skepticism about the government’s motives is surely warranted, but one should not automatically assume that the government’s non-disclosure or even its deceitfulness is wholly unjustified. Some political and strategic dimensions of a just war are not for soldiers to know. Indeed, satisfying at least one *ad bellum* requirement—reasonable hope of success—may even *require* the government’s non-disclosure or deceit.

Justified non-disclosure aside, even in a liberal democracy with mostly open access to information, determining the *ad bellum* moral character of war is no easy task. David Rodin, however, maintains that soldiers’ epistemic obstacles are exaggerated. He has dismissed the appeal to uncertainty as an excuse on the grounds that, regardless of their duplicity or non-disclosure, the soldier’s epistemic task is still much easier under free or democratic regimes. “It is true,” writes Rodin, “that military commanders and government officials restrict access to relevant information and routinely engage in outright deception of soldiers and citizens, but there often exist other channels of relevant information—at least within democratic societies with an

active free press.” He goes on to suggest that it is “a source of embarrassment to the proponent of the excuse response... that both the duress and the ignorance excuses seem more plausible for soldiers of authoritarian states than they do for those of democratic states.”¹⁵⁷

Some of these alternative channels of information such as the mainstream media are, as argued above, unreliable if not outright dishonest. Even the honest and reliable media sources may offer conflicting reports or evidence. This means that the soldier must find some uniformity of opinion across the various “channels of relevant information.” This, I think, will involve consulting more scholarly sources than media or journalistic sources; this comes with problems of its own, as I discuss in section 4.1.2.

However, Rodin is largely correct that the *duress* excuse is stronger for soldiers fighting for illiberal regimes. In liberal democracies, soldiers who conscientiously refuse to participate may face a light prison sentence and social stigma¹⁵⁸; soldiers who refuse to fight for authoritarian regimes may face more draconian punishments, sometimes even the death penalty. But Rodin, I think, underestimates the strength of the *ignorance* excuse for soldiers under democracies. (Though in my view ignorance is less an excuse than it is an essential feature of soldiers’ experience.) In many ways, the free flow of information can make the soldier’s epistemic task more difficult: where wars are not obviously unjust, a soldier will find a variety of plausible but conflicting opinions concerning the morality of its resort. If he must discern the good-faith arguments both for and against war, as well as distinguish persuasive propaganda for both hawkish and pacifistic policies from the facts, his epistemic task remains daunting. Even if soldiers with more open access to information are better off, epistemically, than their hard-luck counterparts

¹⁵⁷ Rodin (2008), p. 58.

¹⁵⁸ Though as I suggest in chapter 3, we should not underestimate the seriousness of social stigma and shaming tactics. For many conscripts in the Vietnam War, risking life and limb in battle was preferable to the meta-death of social ostracism and pariah status in America.

fighting under a totalitarian regime, this point is certainly not “an embarrassment” to anyone invoking uncertainty as an excusing condition—or, more my view, as a *condition* of the war-time experience of soldiers. It is not uncommon in intellectual and political discourse to find equally compelling arguments or evidence for opposite judgments. I think Rodin underestimates, or even outright ignores, this side of soldiers’ relatively free access to information. In light of the above considerations, perhaps the alternative sources of information should be scholarly rather than more and less honest journalism and news media.

4.1.2 Scholarly Uncertainty: Over 500 years before the internet and televised news media, Francisco de Vitoria wrote that where the justice of war is uncertain “every man must decide not according to his own inclination, but by logical arguments or the authority of the learned. To do otherwise is impudent, and exposes one to the danger of sin, which is itself sinful.” He goes on to say that “in cases of doubt,” one “must rely on the opinion of those authorized to resolve such doubts.” These authorities are, according to Vitoria, “the prelates, preachers, confessors, and jurists versed in divine and human law... some apostles, and some prophets, and some evangelists, and some pastors and teachers” as well as “the scribes and the Pharisees [who] sit in Moses’ seat: all therefore whatsoever they bid you observe, that observe and do.”¹⁵⁹ He suggests not only that those who are in doubt are prudent to appeal to authoritative scholars and religious leaders, but that doing so is a moral obligation (to do otherwise “exposes one to the danger of sin, which is itself sinful.”)

Less than a century later, Hugo Grotius also called attention to the difficulties inherent to deliberating about the justice of a dispute.¹⁶⁰ “In doubtful cases,” he says, “after examination, the

¹⁵⁹ Vitoria (1991B), pp. 235-36.

¹⁶⁰ The following discussion of Grotius, and the quoted passages, are from Grotius (1901) bk 2, ch. 23. Going forward I shall utilize in-text citations of Grotius.

mind seldom remains neuter, but inclines to one side, or the other, persuaded either by the merits of the case, or by respect for the judgment of those who have delivered an opinion upon the question” (2.23.3). Much as Vitoria recommends that each individual seek the advice of scholarly authorities, Grotius also suggests that a conscientious individual will consult scholarly sources. He writes (emphasis mine) that,

“To apprehend such distinctions properly, practice and penetration are necessary, and where men have not in themselves a capacity for the active exercise of judgment, it behoves them to follow the maxims of others, who are distinguished by their wisdom and experience. For, in the opinion of Aristotle, **those things are probably just, or true, which seem so to all, or to the greater part of men of worth. And this is the method pursued by Sovereign Princes, whose engagements in the affairs of life allow them but little leisure for study and deliberation.**” (2.23.4)

In the bold portions of this passage, Grotius is, like Vitoria before him, calling for deference to the experts (“men of worth”). Also similar to Vitoria, Grotius endorses the Roman approach which involves consulting “the sacred college, established for that purpose,” and “advising with the Bishops, in order to be apprized of any thing therein that might affect religion”—where to ‘affect religion’, in the context of Grotius’s discussion, is evidently synonymous with determining how to avoid ‘risking sin’ or wrongdoing. Where at least the plurality of scholars concur on the justice or injustice of a dispute—or the justice of war—a leader should defer to those scholars. Revisionists like McMahan would offer similar advice to soldiers (as I discuss below, section 4.4): the conscientious soldier, like the conscientious leader in Grotius’ passage, will also consult the scholarly sources. But before considering McMahan’s particular version of this ‘scholarly authority’ proposal, I will identify some *prima facie* difficulties confronting any appeal to scholarly sources to resolve a modern soldier’s doubts. I will assume that the best scholarly sources are philosophers writing in the just war tradition; but the same basic points would probably apply to other scholarly authorities as well.

The previous section's point about the plurality of plausible opinions, arguments, and evidence applies also to philosophical and scholarly debates about war. In the contemporary scholarly landscape—in which the religious authorities to whom Vitoria and Grotius require epistemic deference are either absent or lack overriding authority—the question is: to which scholars or philosophers should we defer?

Suppose you take this scholarly route and work your way through classical and contemporary philosophical writings on the morality of war: you carefully read Augustine, Aquinas, Grotius, Vitoria, Walzer, McMahan, and others. As an epistemically responsible soldier-scholar, you will find plausible, well-argued, but divergent opinions in the course of your research. You will find different interpretations of the classical thinkers, as well as ongoing scholarly debate about the morality of war and self-defense, the nature and sources of political legitimacy, and the ethical and political significance of state sovereignty. There will be plausible arguments and considerations supporting a variety of conflicting views. Does the threat of atomized terrorist groups alter the requirements of *jus ad bellum*? Is preventive war ever justifiable in practice, as the Bush Doctrine says? Which values are relevant to the proper specification of the two proportionality requirements? How stringent are the requirements of necessity and proportionality in assessing the permissibility of humanitarian intervention? As we saw in chapter 1, the just cause requirement alone is a matter of considerable scholarly debate. Do the considerations which might make humanitarian intervention permissible also make it a duty? If so, how do we determine *who* specifically has the duty? Does the removal of violent, oppressive dictators whose worst humanitarian violations lie in the past (such as Saddam Hussein) constitute a just cause of punishment, even though pursuing it involves invading an otherwise stable state? Is sovereignty

entailed by statehood or is sovereignty contingent on the satisfaction of minimal moral requirements?¹⁶¹

The only consensus that a soldier-scholar will find concerning what counts as a just cause for war is that *genocidal aggression* justifies defensive war—that is, that serious large-scale violations of a population’s most important human rights justify collective defense; though even *here* there is disagreement about what counts as ‘genocide’ or whether some rights are important enough to warrant protection by means of war. There is, moreover, no consensus on whether humanitarian intervention, preventive war, and defense of territorial or political rights, count as just causes. This makes assessing at least three of the other *ad bellum* requirements (reasonable hope of success, proportionality, and last resort) almost impossible. If a soldier were to dig far enough into the scholarly debate about *jus ad bellum*, he would find esteemed just war theorists who deny, with highly compelling arguments, that national defense against territorial encroachments or political self-determination—regarded by many as the paradigmatic just causes for war in theory and in law—are the sorts of rights that warrant the resort to war *at all*. The issues are very complex. Do collectives such as cultures, communities, and states have value or possess rights which exist over and above the value or rights possessed by individual persons (the hard collectivist view)? Or, if individuals are the locus of moral concern, are their rights to determine their own political institutions, shape their own culture, and to participate in the public sphere sufficiently weighty to justify war (the individualist-reductionist view)?¹⁶² I will not restate the

¹⁶¹ For an excellent overview of these issues, see Holder (2008). For a Hobbesian argument that provision of security is indeed the minimally sufficient condition of legitimacy, see May (2005).

¹⁶² Richard Norman (1993), I believe, was the first to call attention to the *prima facie* disproportionality of war in defense of territory or political sovereignty. Rodin (2003) argues that defense of purely political rights cannot justify the killing and maiming that are inevitable parts of war. Rodin (2014) offers a forceful restatement of his skepticism about defense of territory and political rights, “The Myth of National Defense,” pp. 69-89. Lazar (2014A) calls attention to the difficulties confronting the attempt to justify defense against political aggression in terms of individual rights, as well as a preliminary attempt to identify a purely *collective* value whose defense is important enough to justify all the killing and maiming of war.

complexities of the *ad bellum* proportionality requirement here, except to reiterate that the difficulties are acknowledged by all contemporary just war theorists, Walzerian traditionalists and individualist-reductionists alike. (For more detailed discussion, see section 1.3.1 of chapter 1.) The short version is that philosophers have only begun to offer detailed analyses of this principle in the last fifteen years.

There is, ironically, one view in the just war tradition about which there is close to a consensus. That is the view that determining the *ad bellum* status of war and, indeed, researching the just war literature is not your job as a soldier in the first place.¹⁶³ Nor is such research what Grotius, in particular, had in mind. What Grotius says of sovereign princes—that “they have but little leisure for study and deliberation”—applies even more so to soldiers: detours into the just war literature are wholly impractical. At the very least there are definite limits to how far a soldier must investigate these matters. Insofar as a soldier is required to make good faith efforts to ascertain the moral character of war, it is generally agreed that his epistemic duties are discharged by consulting the proper authorities. With the exception of some revisionists, contemporary just war theory and the publically promulgated law of war places the epistemic burden of determining *ad bellum* justice squarely with political leaders and policy-makers. If these leaders and policy-makers are, in turn, obliged to consult authoritative scholars, they will run into the same disagreements, controversies, and intrinsically difficult moral and political issues just discussed.

The point of this discussion is not that these philosophical and scholarly debates are all ‘a wash’ or that the search for answers is a waste of time. Rather, the point is that it is unreasonable, in the words of Dan Zupan, to “hold combatants responsible for ‘knowing’ the justice of their

¹⁶³ McMahan (2008) even acknowledges this point, noting that it is a “pervasive assumption, promulgated by the dominant theory of the just war, that it is not a combatant’s responsibility to enquire whether the war in which he or she has been commanded to fight is just” p. 28.

cause when those with time and formal training... cannot agree[.]”¹⁶⁴ I *do* nonetheless think that leaders and policy-makers should consult the best available scholarship on just war theory and international law, regardless of the difficulty and regardless of the philosophical controversies they will encounter. Indeed, many higher-ups in military academies, if not U.S. presidents or congress people, do just that. However, it is plausible to think that a low-ranking soldier, has discharged his epistemic duties by consulting his leaders and superiors in the chain of command; he is not obliged to become a part-time scholar or investigative journalist. Plainly these things are not part of a soldier’s role, which, as we will see in the next section, inherently comes with various information restrictions.

4.1.3 Role-Imposed Uncertainty: Even in free democratic societies, soldiers will lack access to certain relevant information; this is an essential ignorance that is at the core of the their vocation. Soldiers quite reasonably appeal, and are probably entitled to trust, their own governments as sources of information. Like the sources of information discussed above, this will surely lead to the problem of mixed verdicts, misinformation, and interminable political debate. For soldiers to discharge their epistemic obligations, governments must fulfill theirs.

Divisions of labor are essential to any large-scale cooperative enterprise, as is the organization of large groups into efficient and well-defined hierarchies. A military is no different: the efficient functioning of a military chain of command is necessary for a properly-functioning standing army. And efficient chains of command require individual deference and epistemic trust on the part of soldiers. Limited information and discretion are therefore at the vocational core of lower-ranking soldiers.¹⁶⁵ Vitoria recognized the necessity to military effectiveness of limiting the epistemic burdens placed on soldiers—and this in an era of comparatively much smaller armies

¹⁶⁴ Zupan (2008), p. 218.

¹⁶⁵ Benbaji (2009).

and smaller-scale wars. He suggests that “it would be impossible, and inexpedient, to put the arguments about difficult public business before every member of the common people.”¹⁶⁶ His point is true not only of the general public, but of low-ranking soldiers as well. This is not because of condescension or elitism, but as a matter of necessity, efficiency, and prudence.

A soldier’s role requires obedience rather than careful investigation of *ad bellum* justice or the government’s motives. This is so, in part, because high-ranking officials have greater resources at their disposal and much greater access to relevant information. If a war is just, a government’s basic control over the flow of information may be very important. Yitzhak Benbaji thus writes, “full control over obedient armies enables states to initiate a just pre-emptive attack or to form a credible deterrent threat, even if these actions look unjust to private (and therefore less informed) individuals. We can assume... that requiring soldiers to attend to *ad bellum* considerations would undermine military effectiveness.”¹⁶⁷ Even the epistemically diligent soldier cannot know whether his or her government has a hidden agenda, or is withholding relevant information, for legitimate reasons. A related point concerns the fact that the average soldier cannot be sure that his government has satisfied other *ad bellum* requirements. It is virtually impossible for soldiers to know whether the resort to war is proportionate, is a last resort, what the probability of success is, or whether their government is in fact motivated by the just cause (if there is one). A soldier is a soldier, not a full-time scholar or policy-maker. Their role requires physical fitness, preparedness to fight, obeying orders, fighting within the bounds of the rules of engagement, technological skills, and deference to authority; ideally, they will also strive to develop martial virtues of honor, courage, strength, and equity.

¹⁶⁶ Vitoria (1991C), p. 308.

¹⁶⁷ Benbaji (2009), p. 600

There have, however, been warrior cultures in which scholarship is very much part of a warrior's role, especially during peacetime. Shannon French writes, for instance, that the Japanese Samurai "were encouraged not only to acquire skills of obvious pragmatic worth, such as horsemanship, archery, and the sword arts, but also to study literature, philosophy, religion, and the fine arts."¹⁶⁸ We must be wary of some possible Western bias in my claims that soldiers' professional role limits their capacity as scholars. But I am not denying that *modern* soldiers should find a place for scholarship in their roles: this is rightly part of the focus of military academies in the United States. But as French observes, even a scholarly-inclined martial culture such as the Japanese Samurai still imposed role-based limitations on a warrior's pursuit of academics and the arts. Thus, she writes, that the Samurai "must not so devote their lives to memorizing texts or perfecting tea ceremonies that they are no longer up to snuff as swordsmen and archers. The martial arts must always be their primary focus." The Samurai, like the modern soldier, also had to prioritize superior orders. The Samurai were "expected to place loyalty and obedience above all other considerations, including concerns for the protection of both their master's interests and their own."¹⁶⁹ This is an admittedly brief and narrow cross-cultural comparison, but it seems likely that any effective military will limit its soldiers' role as epistemic agents by prioritizing martial skill and norms of obedience, even if a particular culture places comparatively greater emphasis on scholarship. More in-depth scholarship is a full-time profession.

Wars are complicated. If only they were as simple as 'country A attacks country B' then we might reasonably expect the average soldier to fully attend to the moral and political status of war. But most wars are not like this. Wars do not randomly pop into existence in the way a mugger

¹⁶⁸ French (2005), p. 210

¹⁶⁹ Ibid, p. 218

might randomly target the first vulnerable person he sees. War, like an ongoing family blood feud, usually involves a complex interplay of historical grievances, reasonable claims of justice on all sides of the dispute, political posturing, propaganda, brinksmanship, overzealous patriotism, provocation, backdoor deals, and so on. It would be impossible for individual soldiers to attend to all of these considerations and remain effective as soldiers. Determining the objective morality of war is difficult enough for full-time scholars. It is not something we can reasonably expect of the average soldier. They will not be effective soldiers if we also demand that they be effective scholars; they will not be effective scholars if we demand that they be effective soldiers. These are different tasks for different roles.

4.1.4 The Fog of War: Let us now take up the perspective of a soldier already participating in war, which is of course most relevant to the formulation of rules of war. Several points which came out in chapter 3 shall resurface here. There I argued that war is a very distinctive sort of conflict by virtue of its indefinitely protracted duration, general chaos, and large scale. Each of these features contributes to the individual soldier's uncertainty and, more generally, to widespread battlefield uncertainty: 'the fog of war.'

Wars are dynamic moral, political, and tactical affairs. A war that begins as just can shift its aims or strategy in a way that makes it unjust, totally unbeknownst to all but a few higher-ups in the chain of command. Or new information can arise that makes an otherwise morally ambiguous war a just war, or an unjust war. In short, it is not the case that the moral status of a given war is determinately 'fixed' by the moral category of 'objectively just cause'. This is common enough, then, that it is misleading to view soldiers' individual moral status as determinately fixed as objectively just or unjust. The shifting aims, dynamic moral character, and thus altered individual moral status of combatants is precisely what we should expect with chaotic

violence waged over an indefinite duration. Different phases of a just war may be just or unjust; different phases of an unjust war may be unjust or just. Or a just war can become unjust overall, and vice versa.¹⁷⁰ Unless these phases involve obvious violations of the rules of war—such as the blatant killing of vulnerable civilians at My Lai—soldiers will remain uncertain about the objective moral character of war as a whole. For a given ‘war’ is not a single entity, but a series of missions and phases prosecuted by different divisions. And these different divisions may do good and bad things, often without the awareness of other soldiers on the same side.

The large scale of war similarly contributes to individual soldiers’ uncertainty. The division of a military into units, platoons, squads, and teams as well as the dispersion of these different groups across the landscape, and the groups’ varying missions across varying phases of war engender an epistemic fog that also requires considerable trust and individual deference to the chain of command.¹⁷¹ Low-ranking combatants often cannot know whether the specific role they perform contributes to a just cause, or whether they contribute to a prospectively proportional or successful war strategy.¹⁷² This is so for the reasons discussed in the previous paragraph, but there is a further point. What a combatant does, morally, frequently depends on what *others* do.¹⁷³ Whether what *I* do contributes to a just aim or not may depend on whether *you* have successfully performed *your* part in some other task. But if you are participating in some other remote mission, and the success of my mission depends on the success of your mission, about which I am ignorant, I might not be able to form reliable beliefs about what the moral status of my mission is: I must accept on trust that you and your squad have done your part. Strategically, war is a cluster of

¹⁷⁰ McMahan (2014A); Bazargan (2013B).

¹⁷¹ Benbaji (2009).

¹⁷² Lazar (2012B), pp. 27-8.

¹⁷³ For elaborate discussion of the collective nature of war and its impact on individuals’ moral liability, see Zohar (1993); Bazargan (2013A).

larger or smaller group tasks, with still further micro-tasks assigned to individual soldiers; the successful completion of many of these tasks depends upon the successful completion of other individual and group tasks. The individual soldier is often not in a position to directly ‘know’, or even have a high degree of warranted belief about, whether what he does on a mission is one component of a broader just mission, a pointless task, or actually counterproductive to his side’s war aims. Their roles and missions are interconnected in ways beyond each individual soldier’s epistemic grasp. For all you know, some unjust act I have done on a distant battlefield has served to undermine your efforts to achieve a just mission.

Consider again the Iraq War. Suppose that a squad leader, on the basis of superior orders, adopts a strategy of excessive force which renders at least some phase of the war disproportionate or indiscriminate, and hence unjust. Some American soldiers, for example, were tasked with safeguarding bridges in and out of major Iraqi cities, and at some points were given orders to fire on any approaching vehicles: for there was a serious risk that those vehicles contained suicide bombers or insurgents prosecuting a sneak attack. Though this policy probably saved many soldiers’ lives—a legitimate war aim, in my view—it also cost many innocent civilian lives. For in such urgent circumstances where snap judgments are necessary, these distinctions were exceedingly difficult to make. Meanwhile, other American soldiers were tasked with ‘winning hearts and minds’; building relationships with Iraqis to aid in rebuilding the country’s infrastructure, and also in resisting the common threat of terrorist and insurgent threats (threats which, since the United States’ departure, have now become the burgeoning terrorist group ISIS). Building trust with members of an occupied nation is exceedingly difficult not only because occupying troops are quite reasonably perceived as an invader, but also because other members of their military may have killed these peoples’ neighbors or family members, and may be continuing

to do so in another front of the war. What others do elsewhere, unbeknownst to many, can undermine the success of otherwise justified missions.

4.2 Replies to Objections: It might be objected that this battlefield information could be more readily available because of the internet and social media platforms like Twitter: soldiers could figure out what is going on in a different front of the war and more readily determine how what others are doing impacts the morality of what they are doing. This seems very doubtful. The Military simply is not going to permit soldiers to transmit sensitive military information via social media, where it can be easily intercepted by the enemy. And for similar reasons of non-disclosure discussed above, superior officers rather than low-ranking soldiers will have the most access to even this information; ordinary combatants still must obey and defer rather than being fully informed.

It could be further objected that combatants' ignorance and epistemic uncertainty should apply, for reasons of consistency, to observance of the rules of engagement as well.¹⁷⁴ If uncertainty is so pervasive and multi-faceted that it undermines soldiers' ability to reliably assess objective *ad bellum* justice in most cases, the same should be true of their individual assessment of battlefield tactics, and they should be more often exempted from responsibility for their violations of the *jus in bello*. Before responding, we must admit that there is some truth in this. For in the above example, American soldiers guarding Iraqi bridges could not distinguish civilian drivers from insurgents and terrorists. Uncertainty and ignorance assuredly does afflict the soldier's epistemic access in areas besides his assessment of the *jus ad bellum*. My claim is not, however, that satisfying the *in bello* rules is typically easy or that uncertainty and ignorance are never serious obstacles to fulfilling a proportional or discriminate strategy. I do not mean to

¹⁷⁴ McMahan (2009B), pp. 123-31

underestimate the severity of battlefield uncertainty. Sometimes uncertainty, along with duress or the superior orders defense, will serve as excuses (or even exemptions from responsibility) for violations of the *jus in bello*.

With those caveats in mind, I will restate the case I made in chapter 1, section 1.4. First, even as insurgent and terrorist tactics in war become more commonplace in modern conflicts, it has historically been much easier for combatants to distinguish unarmed civilians from armed enemies than it is for them to decipher the complexities of the *jus ad bellum*. Second, individual soldiers have far greater control over their own actions on the battlefield than they do the decisions of their governments or superior officers. In any case, there are indeed public laws of war that block the superior orders defense or appeals to excuses of ignorance in the face of manifestly illegal or patently unjust orders.¹⁷⁵ While I lack the space, even if I had the knowledge, to go into the definitions of ‘manifest injustice’ or ‘manifest illegality,’ it should be clear that shooting unarmed civilians and prisoners of war will, excepting extreme circumstances, fall unambiguously into both of these categories. Third, ongoing controversy surrounding the *jus ad bellum* has made it much easier for soldiers to follow public rules of engagement than to attend to matters of the objective justice of war as a whole. As McMahan admits, “the comparative neglect of *jus ad bellum*, both in just war theory and in the law of war, can be explained largely by the fact that it has been easier to constrain the conduct of war than it has been to prevent wars from occurring.”¹⁷⁶ McMahan’s hypothesis is quite plausible, but it also speaks further to the view that there is no inconsistency in holding soldiers to higher epistemic standards concerning their own battlefield conduct than we hold them for matters of *jus ad bellum*; though given the first two reasons, I don’t

¹⁷⁵ For helpful discussion of the manifest illegality rule and how it blocks excuses of duress, ignorance, and especially superior orders, see Friedman (2008), p. 219.

¹⁷⁶ McMahan (2014D), p. 241

think these differential epistemic standards are *solely* or even primarily a matter of scholarly neglect.

(It is worth noting, parenthetically, that the considerations discussed in the last two paragraphs may help explain and may even justify—at least pragmatically—war-specific liability rules based upon the traditionalist criterion of ‘posing a threat’. Because of the inherent coerciveness and uncertainty of war, combatants must be entitled to presume that any armed enemy counts as liable and, moreover, that each individual armed enemy is *equally* liable irrespective of their contributions or level of moral responsibility. Conversely, they must presume that unarmed civilians count as equally innocent, irrespective of *their* individual moral responsibility. The principle of combatant/noncombatant distinction would, simply be impossible to ever satisfy if the criterion of liability were based on individual moral responsibility. The deep, pervasive, and multi-faceted uncertainty of war necessitates certain broad presumptions about combatants and non-combatants, presumptions which must, as a matter of practicability, be part of the morally optimum set of rules for war. That these sorts of broad presumptions are necessary in war, and necessary to the rules of war, is deeply regrettable. The “collectivization” (in Walzer’s terminology¹⁷⁷) of moral status is one of the many things that makes war a great evil; it is one of the in-eliminable features of war that should leave us to take seriously a pacifist ethic.)

I should emphasize that, even if the above discussion of soldiers’ uncertainty is persuasive, I am *not* claiming that individual uncertainty is itself a source of individual justification or even permission for participation in an unjust war—certainly not in the sense of *objective* justification or permission. I am not conflating permission and excuse. But nor do I think excusing conditions

¹⁷⁷ “One of the reasons we hate war,” Walzer (2014B) points out, is that “it is a coercively collectivizing enterprise; a tyrannical enterprise; it overrides individuality, and it makes the kind of attention that we would like to pay to each person’s moral standing impossible; it is universally oppressive” p. 145.

are the appropriate moral concept for the uncertainty and ignorance I have described. Walzer beautifully describes the view for which I have argued:

“We normally think of excuses as exceptions to some general rule: I ought to do this; everybody ought to do this; but because of these specific circumstances, I ask to be excused for not doing it. But if the circumstances are not specific, if they are general, if they are the circumstances, literally, of hundreds of thousands, even millions, of soldiers, then it seems odd to call them ‘excusing conditions.’ Instead, we should think of them simply as the reality of war. Conventional just war theory is nothing more than the adaptation of everyday moral rules to that reality. It is the product of the experience of war or, better, of intellectual reflection on that experience, over many centuries.” (Walzer (2014) p. 330)

If we *were* to adopt the “odd” language of excusing conditions to evaluate soldiers’ choices given the deep, pervasive, and multi-faceted uncertainty of war-time deliberation and of the conflict itself, we would still be admitting that most unjust combatants are non-culpable and non-criminal (provided they abide the rules of engagement) despite their participation in an objectively unjust war. It is unreasonable to hold them responsible for acquiring all the information relevant to the moral assessment of war. It is also unreasonable to regard them as negligent for not attempting to acquire much of this information: not only is there no standing obligation for individual soldiers to consult just war scholarship, their role may impose obligations on them *not* to consult these sources—at least not very deeply, or in a way that makes it a priority over their martial role. For the process of attaining reliable beliefs about the justice of war will diminish their very effectiveness as soldiers. That is precisely why just war theorists like Vitoria regard soldiers’ epistemic duties as discharged once they have consulted the appropriate authorities—namely, their government and military superiors.

Gideon Rosen has argued that those who perform objectively wrongful actions from blameless ignorance are everywhere excused. Here is what Rosen imagines such a hypothetical ignorant actor who unknowingly wronged someone saying in his or her own defense:

“Consider what it would have taken for me to see a reason for acting differently. I would have had to invent a new sensibility for myself. I wish I had. I regret that I didn’t. But it is frankly unreasonable for you to blame me or for me to blame myself for doing what seemed reasonable given everything I can plausibly be expected to have known at the time.”¹⁷⁸

Rosen’s hypothetical interlocutor could easily be an unjust combatant defending his choice to participate in war before a *post bellum* tribunal.

4.3 Subjective Moral Justification: In this section, I suggest that a less demanding standard of moral justification is appropriate to war. This standard tracks an achievable epistemic standard.

Soldiers might reasonably but mistakenly determine that a war is just, or be epistemically justified in believing that their participation in war is permissible whether or not their side is just. They might, in other words, be *epistemically* justified in believing they may do that which is *objectively morally* unjustified. McMahan holds that epistemic justification that turns out to be objectively false can ground an excuse but does not generate a permission. Even acting on the basis of well-justified beliefs that turn out to be false, with the result that the action violates people’s rights, renders the act objectively unjustified irrespective of its epistemic credentials in the circumstances of choice. It is interesting, however, that McMahan’s theory of liability and its attendant account of objective *moral* justification seems to exceed any reasonable or achievable standard of *epistemic* justification. It is a fixture of epistemology that an agent can be justified in believing that which is in fact false—as when she is under a vivid and realistic perceptual illusion. A demanding epistemic standard that does not set us down the path to epistemological skepticism will differ from its less demanding counterparts primarily in the degrees of reasonableness or warrant that an agent’s belief must have. Even a highly demanding standard of justification (though not so demanding that we must be skeptics) maintains in-eliminable subjective

¹⁷⁸ Rosen (2003), p. 68.

components of reasonableness and epistemic warrant. The question is what is the appropriate standard of epistemic justification for soldiers?

Let us now introduce some additional terms. A standard of *objective permissibility* holds that an action is permissible only if “it is permissible in light of all the non-moral facts.” A standard of *subjective permissibility*, on the other hand, holds that an action is permissible only if “it is permissible in light of some subjectively constrained set of non-moral facts.”¹⁷⁹ The former standard is simply unachievable for individual soldiers. The most we can demand of soldiers, insofar as they have a role as epistemic agents in war, is that they make the best decision available to them *given what it is reasonable to believe* about the non-moral facts. This will require that soldiers take some steps to check sources of information, perhaps especially their friends and family members, for accuracy. I do not have in hand the precise limits concerning what lengths they must go to ensure reasonableness, but here is a proposal I find plausible: soldiers must check their beliefs and information sources *as they approach, but do not surpass, the point where their professional effectiveness becomes compromised*. Subjective standards of permissibility, which track a subjective standard of epistemic justification, are most appropriate given soldiers’ essential ignorance in war, for formulating rules of war, and for defining a concept of manifest illegality or patent injustice. The laws of war, in short, should be sensitive to the deeply constrained epistemic position of individual soldiers; the morality of war (insofar as it differs from the laws of war) should hold soldiers to achievable epistemic standards, given the distinctive characteristics of war. As Kant taught us, ‘ought’ implies ‘can’.¹⁸⁰ Objective moral justification in war is wholly out of place: pace McMahan, moral justification should track epistemic justification, whether or not the reverse is also true. The very demanding epistemic standard of the revisionists—even if achievable

¹⁷⁹ Lazar (2015A), p. 53.

¹⁸⁰ And as Henry Shue also emphasizes in Shue (2008), pp. 99-100, and Shue (2013), p. 277.

in principle—is practically impossible for soldiers to achieve: there are simply too many epistemic obstacles.

Rather than simply despair at the ineradicable uncertainty of war, we might instead look to ways of mitigating the moral costs and risks of wrongdoing posed by the condition of uncertainty. One way to do this is to provide combatants with the least ambiguous and practicable set of rules to guide their conduct. “Don’t kill or torture prisoners of war”; “don’t purposefully attack unarmed civilians”; “obey orders that are not manifestly illegal”—these are the sorts of guidelines that could spare soldiers unachievable epistemic labor with a higher probability of reducing the carnage. (This is a sort of institutional or rule utilitarian approach to the rules of war.) In contrast, rules like “attack only those enemy soldiers whose culpability and causal contributions exceed some threshold”; “target only enemy civilians who voted for hawkish politicians or who agitated for the war”; “use lesser defensive force against reluctant as opposed to enthusiastic conscripts”—these are not helpful guidelines at all, in large part because following them would impose impossible epistemic demands on soldiers.

The adoption of a subjective standard of moral justification does not so much mitigate uncertainty, as it takes pervasive uncertainty for granted: it presupposes an epistemic standard that is achievable. What it does not do, however, is improve the condition of uncertainty. To do so would seem to require new and improved institutions for deliberating about war. I consider one such proposal in the following section.

4.4 Mitigating Uncertainty: McMahan’s Jus ad Bellum Court of Juror-Scholars: While McMahan devotes fully ¼ of *Killing in War* to rebutting attempts to excuse combatants’ participation in unjust wars, he more recently seems to have conceded that unjust combatants actually have a compelling appeal to uncertainty about *ad bellum* morality in most wars, thereby

furnishing at least a partial excuse for participation.¹⁸¹ In this concession McMahan is not alone. Another prominent revisionist, C.A.J. Coady, had earlier suggested that

“given the twin facts of conscription and limited access to information, it may be that very many of the troops are acting under both duress and ignorance... here we can at least concede that the facts mentioned make some difference to the way we regard at least many soldiers in war, and some of the soldiers themselves acknowledge this difference by regarding enemy soldiers with a degree of sympathy as people whose plight is similar to their own.”¹⁸²

Sympathy with soldiers’ epistemic situation and the oppression of war is part of the reason we ought not to punish them for participating in an unjust war. But unjust wars are an awful thing, and it is awful to find oneself participating in one: there can be no overstating these points. Short of eradicating the institution of war-making, the next best option may be to find ways of improving the epistemic circumstances of individual soldiers with respect to *ad bellum* justice. After all, unjust wars cannot be fought without individual soldiers to do the fighting. So perhaps if more soldiers could have more reliable assurance of the justice or injustice of a prospective or ongoing conflict, then they could refuse to fight on moral grounds. Even a small percentage of conscientious individuals could put a potential dent in a government’s unjust war-making schemes. How might these epistemic reforms come about?

In his contribution to a (2014) volume in honor of Michael Walzer, Jeff McMahan has explored a new proposal to reduce the epistemic uncertainty confronting soldiers, thereby at least reducing, if not eliminating, one of the excusing conditions for their participation in an objectively unjust war. In addition, the proposal aims to provide soldiers (especially those who, if they could be more assured that a war was unjust would not participate in it) an epistemic source superior to their governments at assessing the justice of prospective wars. McMahan proposes that the panel

¹⁸¹ McMahan (2014D)

¹⁸² *Morality and Political Violence* p. 194

of experts should comprise “a congress of eminent and respected authorities on international law and just war theory that would have as its purpose the formulation of an *ad bellum* code... and the establishment of a court-like institution that would judge whether wars... were just or unjust by reference to the code.”¹⁸³ Because of their access to these expert judges, individual soldiers will more easily resolve their doubts and (looking ahead to the next chapters) need not worry about the moral risks of not discharging important associative duties: for they can have a higher degree of justified confidence about matters of objective *ad bellum* morality. This could significantly diminish the epistemic excuses currently enjoyed by a vast majority of unjustified combatants.¹⁸⁴ In addition, the *ad bellum* court could together potentially construct unambiguous and widely shared definitions and specifications of the *ad bellum* principles. This would aid in reforming the public system of laws, even bringing them into closer congruence with basic moral principles.

McMahan’s proposal also emphasizes the crucial point that the *jus ad bellum* is underdeveloped in morality and law compared to the *jus in bello*. For this *jus ad bellum* court aims not only to aid soldiers’ decision-making and help resolve their doubts, but also to make scholarly, philosophical, and legal progress in the development of the *jus ad bellum*.¹⁸⁵ As we have seen, there is certainly much more work to be done in defining and specifying the content of the requirement of just cause, determining the relevant benefits for *ad bellum* proportionality calculations, and determining the pre-conditions of legitimate authority. Just war theory is due for much more expansive philosophical and legal scholarship on these principles, and the *ad bellum* court could assist in those advances. I am certainly on board with this scholarly aim of the hypothetical *ad bellum* court: it is perhaps the greatest virtue of McMahan’s proposal. But I am

¹⁸³ McMahan (2014D), p. 246

¹⁸⁴ Ibid p. 243: “If the court had correctly declared that a war in progress was unjust or illegal, and if this judgment was widely disseminated, that would weaken the excuses available to those fighting in it.”

¹⁸⁵ Ibid, pp. 241-2

skeptical that the *ad bellum* court would do much to help individual soldiers' immediate decision-making about a prospective war, and there may even be reasons for thinking it could hurt.

In light of the discussion in section 4.1.2, the first thing to point out about McMahan's proposal is that it is nothing new. Over 500 years ago, Vitoria and Grotius urged political leaders to consult panels of scholars and church authorities to determine the justice of war, and to help resolve doubts where the justice of war was uncertain. Apart from the types of scholars comprising McMahan's panel of experts (he does not explicitly include church authorities), the main difference between McMahan's approach and Grotius' is that McMahan wants his *ad bellum* court constructed primarily for the epistemic benefit of *soldiers*, whereas Grotius sought to aid the epistemic situation of *leaders*. If only more leaders had taken Vitoria's and Grotius's advice in the ensuing centuries, a great deal of bloodshed may have been spared. In any case, if individual *leaders* who are actually in a position to impact policy have mostly refused to consult "men of wisdom," it isn't clear what influence a group of scholars can have on low-ranking soldiers.

Nevertheless, it could be worth the effort. Suppose we manage to construct this court of experts. The scope of its epistemic authority would be very limited in practice. For one thing, McMahan admits that even if the panel had the standing of a formal court of law, it would not be tasked with doling out punishment to individual combatants. This is so due to many of the familiar pragmatic reasons against punishing unjust combatants for participation, as well as excusing conditions that would continue to apply.¹⁸⁶ More importantly, closed, illiberal societies would lend no credence to the panel, nor permit their soldiers access to its judgments. Many governments may also resort to the usual propaganda to undermine verdicts of the court that are unfavorable to their national interests. There is thus a question about how many states would even listen to

¹⁸⁶ Ibid, p. 243

McMahan's panel of experts, much less permit members of their military to defer to its judgments. In turn, their lack of willingness would negatively impact the willingness of *open* societies to heed the panel as well. For if closed societies, which are likely to be the most aggressive and unjust societies, have insulated themselves and their soldiers against unfavorable judgments by the court, then open societies would be in a very unfair position to make their case. Would the uncertainty of soldiers in free and democratic societies substantially improve?

Normally, an impartial jury should be demographically diverse as a safeguard against biased decisions. Shouldn't a jury such as the one McMahan proposes have a diversity of *scholarly* perspectives? Would Clausewitzian or Machiavellian hawks be included in the panel? What about absolutist pacifists? Even if the only scholars allowed on the panel are those sympathetic with the just war tradition, I fail to see how the divergence of scholarly opinion highlighted in section 4.1.2 would be mitigated. Suppose further that it is a panel of nine scholars and experts (an odd number in case tiebreaks are needed). What is the confused soldier to do when there is a 5-4 vote, or a non-unanimous vote? Given the complex realities of war as well as the intrinsic scholarly difficulty of the relevant moral issues (discussed in section 4.1.2), a near-split verdict like this would hardly be surprising. It would also, as Walzer points out, "hardly resolve the problem of uncertainty, which is one of [McMahan's] excusing conditions."¹⁸⁷

Suppose instead that there are one or two dissenting opinions among the hypothetical juror-scholars. Presumably these dissenters would draft articles explaining and arguing for their dissent, as is done in the U.S. Supreme Court. And the majority would together draft an article explaining and justifying its decision. But should the soldier consulting the court be required to read those different opinions? If so, the soldier would be doing little different than consulting the scholarly

¹⁸⁷ Walzer (2014A), at p. 330.

literature with all its attendant controversies and uncertainties (section 4.1.2) and engaging in tasks well outside his or her professional role (section 4.1.3). In any case, what if the majority and minority opinions are equally convincing (a not uncommon occurrence in philosophy and politics)? Should the soldier just assume that the majority knows best? It is after all possible that the minority opinion is correct. Supposing the (correct) minority opinion is that war is just. It seems like many of the points I have already made about the uncertainty of scholarly sources can simply be reiterated about McMahan's panel of experts.

The point I have made in various places here and in earlier chapters that wars are complex, dynamic affairs is also relevant in this context. Determining individual persons' guilt or innocence in an ordinary court of law is difficult enough. The chief reason the Anglo-American legal system utilizes juries is because of their epistemic reliability (at least that's the theory). However, the presumption of innocence means that some genuinely guilty persons will go free.¹⁸⁸ This is so because the stakes for the accused are very high should there be a wrongful conviction, and it is better to let the guilty go free than to risk convicting the innocent. Suppose that the analogous case with McMahan's *ad bellum* court is that, in circumstances of split opinion, they should presume that war is unjust. This would be so, I would guess, because the stakes are very high if the individual soldier participates and the war turns out to be unjust. This is to say that the panel of just war experts should, in its own condition of uncertainty, let the *subjective assessment of moral risk* guide their verdict and perhaps err on the side of caution.

While it seems to me that a court of experts such as McMahan proposes might spare individual soldiers much of the leg-work of hardcore scholarly research, my earlier points about philosophical and scholarly disagreement also apply to this court. Anyone who has attended a

¹⁸⁸ Of course, some genuinely innocent persons are also convicted.

philosophy class, workshop, or conference should appreciate the naiveté of expecting a consensus about deeply complex scholarly issues. While the members of the court could make real advances in our scholarly and philosophical understanding of the *jus ad bellum* and the formulation of international law, as a supposed epistemic authority it's difficult to see that it would go very far in mitigating the soldier's uncertainty, much less the fog of war. And where the court itself is uncertain, its members will just end up following what they reasonably believe is the safest course, which we should perhaps urge soldiers to do as well. What counts as the 'safest course' and, indeed, the very meaning of this expression, I shall take up in the following chapter on moral risk.

5. UNCERTAINTY AND THE SUBJECTIVE ASSESSMENT OF MORAL RISK

Under conditions of deep and pervasive uncertainty, the individual soldier needs guidance about what he should do. There is the question, first, whether he should join a war effort (either in prospect or already being waged in the first place; and, second, whether he should *continue* to participate in a war in which he already finds himself. Pending the construction of reliable epistemic authorities for assessing *ad bellum* morality, such as McMahan's panel of experts, the problems of evidence sources, role-imposed uncertainty, and the fog of war generally inhibits the soldier's ability to acquire morally relevant information which bears on his decision to join a war effort, or to continue participating in a war in progress. The pervasive and multi-faceted uncertainty of war means, in my view, that the appropriate question for the individual soldier to ask is not "is this war objectively just?" but rather, "am I permitted to participate given that I cannot be confident in the *ad bellum* status of the war?" The soldier needs a suitable guide to action under conditions of uncertainty.

One guide that classical theorists such as Vitoria and Suarez have suggested is that soldiers defer to their superiors: this requires little epistemic labor on the soldier's part that could detract from their martial role. Assuming that deference to leaders is morally suspect, but that individual soldiers cannot reasonably be expected to attend to all of the relevant moral matters, they must confront the question of *ad bellum* justice from a different angle. Following a strand of thought in the just war tradition which he attributes to Grotius and Pufendorf, Jeff McMahan frames the question of action under uncertainty in terms of the assessment of the probable *moral risk* of participation.¹⁸⁹ Rather than attempting to discern objective justice, soldiers should follow the

¹⁸⁹ McMahan (2009B), p. 146

course of action that most likely has the lesser risk of wrongdoing. As McMahan suggests, “the more that is at stake morally in the choice an agent makes on the basis of some belief, the higher the level of *justified* confidence the agent must have in the truth of that belief in order for the belief to ground an excuse of a fixed degree of strength, if the belief is in fact false.”¹⁹⁰ Tim O’Brien forcefully states a similar position based on his experience during the Vietnam War:

“It was my view then, and still is, that you don’t make war without knowing why. Knowledge is, of course, always imperfect, but it seemed to me that when a nation goes to war it must have reasonable confidence in the justice and imperative of its cause. You can’t fix your mistakes. Once people are dead, you can’t make them undead.”¹⁹¹

The basic point expressed by McMahan and O’Brien is that the greater the risks that accompany an agent acting on some belief, the greater the epistemic burden on that agent to ensure the correctness of that belief. It is evident from the context of the quoted passage, however, that O’Brien is directing his suggestion at policy-makers rather than individual soldiers. And as discussed in chapter 4, Vitoria and Grotius also place this epistemic burden primarily upon leaders; McMahan’s position is unique in placing the burden of risk assessment upon individual soldiers.

In McMahan’s terms, for a soldier to have an *epistemic excuse* (full or partial) for his participation in an objectively unjust war, his belief in the permissibility of participation must have a high degree of *warrant*. This last claim is crucial. In most wars, the individual soldier qua-epistemic agent can typically have at best a very low degree of justified confidence in his belief that war is objectively justified, or not. Acquiring the relevant information is exceedingly difficult, for reasons discussed in chapter 4. This is true, even of wars that are objectively *just*: questions of ad bellum proportionality and reasonable hope of success can be very difficult to assess even in an otherwise transparently just war of defense against aggression (this point will come out more

¹⁹⁰ Ibid, p. 139.

¹⁹¹ O’Brien (2009), pp. 38-9.

clearly in connection with particular examples, below). The demand for a belief with a “fixed degree of strength” about *objective ad bellum* justice is too demanding. More often than not, it will lead to a verdict of non-participation. McMahan’s theory is confronted, once again, with the implication of contingent pacifism.¹⁹² Let us therefore weaken the epistemic demand to this: the individual soldier’s *belief in the permissibility of his participation* (rather than his belief in the objective justice of his side’s cause) must have a high degree of epistemic warrant, if the soldier is to be excused for participation. Even on this weaker epistemic standard, it seems, McMahan would caution the soldier against participation: the moral risks of participation will more often than not outweigh the risks of non-participation, irrespective of whether the soldier’s belief in the permissibility of participation is epistemically justified.

5.1 Risks of Participation and Non-Participation: Consider **four** possibilities: (i) A soldier chooses to participate in a war that turns out to be objectively unjust; (ii) A soldier chooses not to participate in a war that turns out to be objectively unjust; (iii) A soldier chooses to participate in a war that turns out to be objectively just; (iv) A soldier chooses not to participate in a war that turns out to be objectively just.¹⁹³ This schema is, of course, oversimplified. Most wars tend to be morally heterogeneous¹⁹⁴ rather than reducible to the black-or-white terms of objective justice or injustice. But for the sake of dialectical clarity, let us work within this four-fold schema. For the further sake of simplicity, I will assume, additionally, that the soldier who must decide under conditions of uncertainty is a member of a military in a legitimate state.

¹⁹² Lazar (2010), p. 196; Lazar (2012A)

¹⁹³ McMahan (2009B). McMahan is here primarily concerned with evaluating “the moral difference between the two ways in which [a soldier] might get it wrong: by fighting in a war that is unjust and by refusing to fight in a war that is just,” p. 140.

¹⁹⁴ ‘Morally heterogeneous wars’ is an expression coined in Saba Bazargan’s (2013B) article by that title.

A soldier chooses to participate in a war that turns out to be objectively unjust. The moral risks are substantial, indeed. An active-duty soldier may injure or kill objectively non-labile ‘innocent’ on the responsibility-based account—persons.¹⁹⁵ This includes injuring or killing justified combatants as well as collateral harms to civilians. In both cases, this means violating people's most stringent moral rights, which constitutes very significant wrongdoing. He will also make some contribution to the pursuit of objectively unjust ends (though for reasons suggested in chapter 2, he might also find himself contributing to justified missions within the overall unjust campaign.) A further point that McMahan does not mention, but which seems relevant, is that the soldier's participation in an objectively unjust war could constitute complicity in the corruption of his country's domestic institutions. We need not further belabor the risks of participating in an unjust war: the more unjust the war is, of course the greater the risk of wrongdoing.

A soldier chooses not to participate in a war that turns out to be objectively unjust. This soldier will avoid all the risks of wrongdoing listed previously. His conscientious refusal will certainly have varying *prudential* costs, depending on the penalties attached to non-participation. If the penalties are especially draconian, then the prudential risks are significant. If the penalties are slight, the prudential risks are insignificant. However, there might be further *moral* costs—as distinct from direct risks of wronging people in battle—that result from these prudential ones. Imprisonment for non-participation could make it impossible for a soldier to adequately support his family, or to maintain his civic commitments—such as protesting the war, or other unjust wars. Perhaps, though, these costs are outweighed by the risk of wronging innocent enemy combatants and civilians.

¹⁹⁵ Keep in mind that we are here assuming that the soldier does not risk injuring or killing persons he *knows* to be innocent. That would be even more objectionable because it would embody *culpable agency*. See McMahan (2009B), p. 142.

Even in an unjust war, however, a soldier's conscientious refusal risks failing in his professional, contractual, and associative duties.¹⁹⁶ These assuredly are moral hazards of non-negligible moral weight. McMahan does not explicitly deny this, but points out that if the war is objectively unjust, "those to whom the obligation was owed would have, on balance, no reason to regret that it was not fulfilled."¹⁹⁷ I am not so sure that such failures of professional, contractual, and associative obligations are so easily dismissed, or unworthy of regret or resentment by either the duty-holders or duty-bearers: the extent to which they are, or not, depends in part on the magnitude of the war's injustice. Setting the question of the magnitude of a war's injustice aside, though, professional and contractual obligations of soldiers enlisted in the military of legitimate states are themselves morally significant. This is not to say that they can never be overridden, or defeated by more important obligations; even when overridden or defeated, the moral importance of contractual and role-based obligations need not be diminished to nothing.¹⁹⁸ There *is* cause for regret that they could not be fulfilled; Cheyney Ryan describes these conflicting obligations as an 'awful dilemma' in which we force soldiers to choose between institutional obligations to which they have voluntarily committed themselves and prior basic obligations of non-maleficence and justice.¹⁹⁹ Unless a military contract specifies terms which are themselves intrinsically immoral, opting out of it is no light moral matter. It is, in many cases, to renege on a voluntary commitment that is widely viewed as giving rise to moral reasons that are new and particular—such as obligations of obedience to lawful orders and deference to the chain of command. As discussed in chapter 4, section 4.1.3, obedience and deference are at the core of a soldier's profession. This is so for reasons of military and civic cohesion, as well as effectiveness in one's role. The

¹⁹⁶ Lazar (2010), p. 200; Lazar (2012A), p. 368

¹⁹⁷ McMahan (2009B), p. 143

¹⁹⁸ Lazar (2010, 2012A).

¹⁹⁹ Ryan (2011)

effectiveness of military hierarchies, whatever their overall aims or missions, requires an allegiance to these role obligations as well. As Asa Kasher suggests, “a military unit cannot adequately function as such if each of its members acts on one's own moral philosophy, be it Aristotelian, Kantian, or Millian. The ideas of military hierarchy, discipline, and obedience are meant to create a sphere of activity in which expectations are well-coordinated.”²⁰⁰ In short, the connection between soldiers' specific obligations and military and civic cohesion means that failing to fulfill those obligations, even justifiably, constitutes a moral loss. There is a genuine moral risk to non-participation in circumstances of uncertainty.

A single conscientious objector, of course, need not undermine military or civic cohesion. But that is compatible with the failure of professional and contractual obligations being a cause for regret. If this were not so, it would be difficult to make sense of the view, endorsed by McMahan himself, that soldiers who refuse to serve on the basis of sincerely held moral grounds should be prepared to accept penalties for their professional and contractual breaches. Even as he endorses more widespread selective conscientious objection, McMahan tempers his view by suggesting that the legal system would be justified in imposing “significant penalties on active-duty conscientious objectors. Soldiers granted selective conscientious objector status after receiving wages, training, and so on from the military would have to submit to these penalties as a means of demonstrating their sincerity.”²⁰¹ Moreover, “genuine objectors might be compelled, like those who engage in civil disobedience, to make themselves martyrs to morality.”²⁰² It is puzzling how this proposal could be seen as just and reasonable if the punishment itself were not a response to some moral wrongdoing. For if a breach of contractual or professional obligations,

²⁰⁰ Kasher (2014), p. 53

²⁰¹ McMahan (2009B), p. 101

²⁰² Ibid

even on sincere grounds of individual conscience, is not a cause for *any* amount of moral regret, then McMahan is calling for the punishment of individuals who do not morally deserve to be punished. We are, in effect, solving the problem of conscientious refusal—which is supposedly not a cause for moral regret and thus not a moral problem in the first place—by punishing the innocent. If breaching these contractual and professional obligations is morally insignificant (is “on balance” nothing to regret), as McMahan says, it is difficult to see why, morally, conscientious objectors should make martyrs of themselves.

Here is one further possible justification of punishing conscientious objectors, which might also explain why they are obligated to submit themselves to undeserved punishment. It could be that they have made a voluntary commitment to submit to legal punishment should they renege on their other voluntary commitments. Why should they not renege on *that* commitment? The answer presumably concerns upholding, at least indirectly, military and civic cohesion. But, then, that is precisely the moral grounds for upholding the initial commitment to fight and follow orders on which they initially reneged. The most plausible explanation of why conscientious objectors, even when they are right to object, should submit to punishment that is *prima facie* unjust is that their specific duties are in fact morally important. It seems to me the best way to make sense of McMahan's endorsement of penalties for conscientious objectors is not that such punishments are justified solely on deterrent grounds, but that he implicitly recognizes that the system of obedience and subordination of judgment, upheld by demanding contractual and role-based obligations, serves a morally very important function, and that insubordination to that system should not be taken lightly.²⁰³ This is, in other words, to acknowledge that there is a moral hazard involved with

²⁰³ On the importance of these contractual and role-based duties see Lazar (2010, 2012A).

non-participation after all. If there were not, we could make no sense of the requirement that conscientious objectors make themselves “martyrs to morality.”

There are also an assortment of associative duties that a conscientious objector risks breaching.²⁰⁴ Some are indirect breaches, such as duties to financially support family members, which one cannot do while in prison. If one thinks that associative duties ultimately underpin and explain the variety of specific martial obligations discussed above, then breaches of professional and contractual duties will be violations of associative duties.²⁰⁵ There may also be associative duties of democratic respect owed to the soldier's fellow citizens—duties, for example, to subordinate one's judgment to the general will of the populace or to the just democratic institutions in which he participates. In addition, civilians on the unjust side may be put at risk of serious harm in the course of war, through terrorist attacks or 'collateral damage'. These harms are unjust.²⁰⁶ Soldiers have associative protective duties toward their fellow citizens and members of their own communities as well. Under circumstances where a soldier's nation is going to war regardless of what he does, protecting the lives of his compatriots provide reasons of participation that are independent of the *ad bellum* status of the war. Specific duties to protect one's fellow citizens and, especially, innocent civilians do not depend upon the moral status of the war: breaching these duties is morally significant as well.²⁰⁷

Though these are undeniably very important associative duties, I am in this project concerned primarily with the breach of associative duties owed to one's fellow soldiers; with new and particular protective duties that arise in the course of combat. Some of these associative duties are based on morally very important friendships; others on the moral significance of fellowship-

²⁰⁴ Lazar (2010), pp. 199-200; though here Lazar is concerned with breaches of associative duties if a war is *just*.

²⁰⁵ Lazar (2010)

²⁰⁶ Steinhoff (2012); Lazar (2012), p. 376

²⁰⁷ Lazar (2010), p. 200

of-arms (whether or not such fellowship involves genuine friendship). To betray a valuable interpersonal relationship is morally very costly: even when doing so is justified or morally required, there is a genuine moral loss involved and there is certainly cause for regret at not fulfilling the duty. If a soldier is in a position to help protect his fellows' lives, to encourage them in the course of combat to avoid wrongdoing, or to prevent them from doing foolish or risky things, there are compelling moral reasons to do so. Here too non-participation in an unjust war involves moral risk—especially if non-participation involves abandoning one's fellows in a war-in-progress. (In the final chapter, I will develop an account of one sort of associative duty—the duty of mutual defense—that applies, with some qualifications, to most unjust combatants and is not contingent upon the moral status of war as a whole.) Lt. Colonel Dave Grossman summarizes the soldier's dilemma of participation versus non-participation: "The soldier in combat is trapped within this tragic Catch-22. If he overcomes his resistance to killing and kills an enemy soldier in close combat, he will be forever burdened with blood guilt, and if he elects not to kill, then the blood guilt of his fallen comrades and the shame of his profession, nation, and cause lie upon him. He is damned if he does, and damned if he doesn't."²⁰⁸ Even in an objectively unjust war, there are very few decisions that do not come with substantial moral risk.

A soldier chooses to participate in a war that turns out to be objectively just. The chief risk of participation in this case is one which is common to active participation in any war: the risk of injuring or killing, or contributing to the injuring or killing of, enemy non-combatants or unjust combatants who are morally innocent, because excused. Another risk of participation is the risk of *moral injury*. Moral injury is similar to post-traumatic stress disorder, but occurs less from what the soldier has done *to him* or the traumatic events he has witnessed, than it does from what the

²⁰⁸ Grossman (2009), p. 86

soldier is asked to do to others. Tyler Boudreau has described his internal struggle upon returning from the Iraq War: “The greatest pain I felt was not linked to those moments when violence was being directed at me but when I was involved in inflicting it on others.”²⁰⁹ These risks are certainly prudential but can also plausibly be viewed as moral as well. PTSD and crippling moral injuries could seriously weaken an individual's capacities as a moral agent. The risk of moral injury raises serious questions, not so much about the permissibility of the individual soldier's participation, but about the permissibility of *our* sending young persons to distant countries to bear these burdens of conscience. The analysis of war in terms of ordinary moral principles—i.e., the revisionist method—as well as the reality of the soldier's experience might leave us taking very seriously the implication of contingent pacifism. Regardless, there are wars that are objectively just, and so from the impartial point of view the soldier's participation is permissible and may even be an overriding obligation.

A soldier chooses not to participate in a war that turns out to be objectively just. Many of the same moral risks involved with conscientious refusal in an unjust war apply here: there is a risk of breaching morally important contractual, professional, and associative duties.²¹⁰ The breach of associative duties is especially significant if the soldier's country or immediate community is at risk of being overrun by an unjust aggressor.²¹¹ Depending on the nature of the injustice to which the resort to war is a response, non-participation could contribute to a potential disaster; or, if there are more than enough soldiers to participate in his place, the risk could be comparatively slight. Non-participation could weaken the security of the soldier's country. If he is an especially vocal and charismatic conscientious objector, he might influence other soldiers to

²⁰⁹ Boudreau, “The Morally Injured.” *The Massachusetts Review*, p. 748 (photocopy)

²¹⁰ Lazar (2010), p. 199; Lazar (2012A), p. 368

²¹¹ Lazar (2010)

refuse to fight. His non-participation also risks failing to assist his fellow soldiers, which is a serious breach of duties of friendship and fellowship-of-arms. He would be failing to do his part in achieving just aims, failing to fulfill his professional role, and failing to discharge other special duties. (Again, the moral significance of friendship and fellowship-of-arms are the subject of the final chapter.)

When a soldier ponders the risks of non-participation in a just war, McMahan suggests that the soldier might reason like this: “If... he refuses to fight and the war is in fact just, he will fail in his duty, as a soldier, to protect innocent people. He may even allow innocent people to be killed whom he could have saved. Yet, he might reflect further, if he refuses to fight, he will certainly be replaced by someone else who is likely to be as effective as he would have been. Perhaps the real victim of his refusal to fight would be the person who would replace him and be exposed to the risks of war in his stead.”²¹² Of course, the risk of wrongdoing in non-participation is clearly not a wrong as severe as killing or maiming innocent people; but it still could be a wrong of ‘letting-be-killed’ or ‘letting-be-maimed, which if the soldier could clearly prevent those wrongs, is very serious. Even if no such wrong is at issue because someone else will pick up the slack in one’s absence, there is still a wrong of ingratitude and disloyalty. The deliberating soldier has talked himself into free-riding on other people’s willingness to make sacrifices and fulfill *their* obligations. McMahan has, perhaps without realizing it, identified a moral wrong of free-riding in his very attempt to argue for the claim that non-participation in a just war is a mostly risk-free affair. Contained in his passage as well is a focus on the comparatively trivial consequences of a soldier’s non-participation. The moral risk of failing to discharge specific obligations is not solely a matter of not contributing to a good outcome, but of disrespecting the persons and institutions

²¹² McMahan (2009B), pp. 140-141

who, in a legitimate state, rightfully claim the soldier's loyalty. The consequences of free-riding need not be significant, but this wrong of disrespect is nonetheless a consideration to take seriously in assessing the various moral risks under conditions of uncertainty.

McMahan's view is that in conditions of uncertainty, the assessment of moral risk will generally tip the scales against the soldier's participation. The risks of non-participation, he thinks, are trivial compared to the risks of participating in an unjust war. If the case I made in chapter 4 concerning the epistemic obstacles confronting even the most diligent soldiers is correct, and decision-making really boils down to following the path with the least risk, McMahan's position seems to be that individual soldiers should not participate in a vast majority of wars, even some *just* wars. For their belief in the permissibility of participating in a war that is, in fact, just will usually have a weak degree of justification. And, as we have seen, where so much is at stake, morally, in the decision to fight the belief in the permissibility of fighting, according to McMahan and O'Brien, must be based on very solid evidence. Before further evaluating McMahan's views on the assessment of risk, it is worth taking a scholarly detour to see what another prominent just war theorist has to say about this issue. For this discussion reveals a fundamental disagreement about the moral hazards of non-participation in war.

5.2 Vitoria on Risk: Prudential or Moral? One of the main points emphasized within the first possibility listed in our four-fold schema of moral risk—that non-participation may weaken the security of a soldier's country—has been emphasized by Francisco de Vitoria. Vitoria also viewed the problem for individual soldiers as that of deciding what to do under conditions of uncertainty, and he too sees the assessment of risk as crucial to the soldier's choice. His basic insight is that, unless wars are “patently unjust” or the soldier has conscientious (even if mistaken) doubts about the justice of war, the soldier's uncertainty should be allayed by deferring to the

epistemic and moral authority of his leaders.²¹³ He suggests that the soldier's deference is a *duty*, declaring that “for an action to be good in cases where a person has no other means of certainty, it is a necessary condition that he act in accordance with the ruling and verdict of wise men.”²¹⁴ In particular, individual subjects of a commonwealth—and especially the leaders of the society—who are uncertain about disputed contracts must appeal to epistemic authorities. In chapter 4, I noted that soldiers generally have a right—perhaps even a duty—to trust their governments, to defer to their moral and epistemic authority. We also saw earlier that Vitoria sees leaders themselves as morally bound to resolve their own doubts about the justice of war by consulting scholarly and moral authorities; in turn, soldiers are morally bound to resolve *their* doubts by deferring to their leaders. For, Vitoria argues, “a prince neither can nor ought always to explain the reasons for war to his subjects; if subjects were unable to fight until they understood the justice of the war, the safety of the commonwealth would be gravely endangered.”²¹⁵ Vitoria is expressing what I earlier called *role-imposed uncertainty*. The structure for resolving a soldier’s doubts about matters of justice, in Vitoria's view, is something like this: 1) scholars and religious authorities attend to matters of justice; 2) leaders consult the scholars; and 3) subjects (soldiers) defer to the leaders. It is a classical version of the moral and epistemic division of labor endorsed by contemporary traditionalists, such as Walzer and Benbaji.

Vitoria sees the problem of uncertainty in terms similar to McMahan—that is, as a matter of deciding what to do by assessing the course of action that is probably less morally perilous. Vitoria comes to a different verdict than McMahan, however. Here is what he says: “In cases of doubt *the safer course should be followed*; but if subjects fail to obey their prince in war from

²¹³ Vitoria (1991C), p. 307

²¹⁴ Vitoria (199B), p. 235

²¹⁵ Vitoria (1991C), p. 311

scruples of doubt, *they run the risk of betraying the commonwealth into the hands of the enemy*, which is much worse than fighting the enemy, doubts notwithstanding; therefore they had better fight.”²¹⁶ This passage suggests that the subjective assessment of risk in resolving doubts about the justice of war tips the scales in favor of the soldier’s participation. If war is just and the soldier opts out he is risking a great deal—“betraying the commonwealth into the hands of the enemy”—than if the war is unjust and the soldier fights.

McMahan disagrees on two levels, one interpretive and the other empirical. First, he interprets Vitoria to mean by “safer course” the *prudentially* safer course, “*not the morally safer course, the course that involves the least moral risk.*” Second, McMahan challenges Vitoria’s empirical claim on the grounds that “it is extremely unlikely that [a country’s] soldiers will have significant doubts about whether it is permissible to fight in self-defense, either individual or national.”²¹⁷ This is so, McMahan says, because it is uncommon in history for “a significant proportion of soldiers [to refuse] to fight on conscientious but not pacifist grounds in a war that was both wholly defensive and objectively just.”²¹⁸ Both of McMahan’s claims are questionable and I discuss each in turn.

5.3 The Interpretive Question: Turning first to the interpretive question. A closer look at “On the Law of War” as well as some of Vitoria’s earlier writings suggests that McMahan may be misinterpreting him. In the passage to which McMahan refers, Vitoria seeks—in the characteristically scholastic dialectical style—to refute his interlocutor’s, i.e., Hadrian’s, assertion that “the subject who does go to war in these circumstances [i.e., circumstances of doubt] is not acting in good faith, and therefore **runs the danger of incurring mortal sin.**”²¹⁹ The bold portion

²¹⁶ Ibid, pp. 311-12

²¹⁷ McMahan (2009B), pp. 145-6.

²¹⁸ Ibid, 146

²¹⁹ Vitoria (1991C), p. 311, emphasis mine.

of this quotation makes clear that Vitoria's target is a view very much like McMahan's—namely, that the greater moral risk in conditions of uncertainty is to participate in war. Framed as an argument in opposition to Hadrian's view of risking mortal sin, Vitoria should be read as arguing that the greater moral, as opposed to prudential, risk is in not fighting. This is so, as we will see, because disobedience of a proper authority is, on Vitoria's view, itself wrong, sinful *unless one's disobedience is genuinely conscientious or the war is patently unjust*. Moreover, shortly after the passage in which Vitoria avers that the danger of betraying the commonwealth could require a soldier to fight, he goes on to support this claim by appealing to the authority of Augustine that

“If ordered to do so, a just man may righteously go to war, even under a sacrilegious king, so long as he is either certain the order is not against God's precept, or uncertain whether it is... Augustine said plainly that when it is uncertain (that is, unresolved) whether the war is against God's precept, the subject may lawfully fight... It is no reply to say that such a man is required to rid himself of his doubts and persuade himself in conscience of the justice of the war, since it is clear, morally speaking, that he cannot do so, as in other cases of doubt... [I]f I am in doubt about the justice of war, it follows that it is lawful for me to go to war at the command of my prince.”²²⁰

The language of “God's precept”, of “righteously” going to war, and being assured of war's justice in one's conscience, all indicate that Vitoria holds that there are positive moral reasons—sometimes even suggestive of *obligations*—to obey one's leader in circumstances of doubt. Further support for reading Vitoria as putting forward a moral, as opposed to prudential, imperative of obedience derives from his earlier work “On Civil Power.” Here, Vitoria makes explicit that “the laws and constitutions of rulers are such that whoever transgresses them is guilty of a crime in the court of conscience.”²²¹ On his view, the authority of the government has the same moral authority as divine law. Vitoria appears, indeed, to endorse a strong conception of political authority in that a law or command of itself confers rightness or wrongness upon human action.

²²⁰ Ibid, p. 312

²²¹ Vitoria (1991A), p. 32

He writes that “human law has the power to decide that one thing is essentially virtuous, while its contrary is essentially vicious” and goes on, after citing various examples, to assert that “there is no difference between human and divine law in this respect. Nor do they differ on the point that merit attaches to virtuous actions, guilt to vicious ones. Therefore, *just as divine law has the power to assign guilt, so too does human law.*”²²² “In short,” he adds, “those who concede that papal decrees are binding in conscience (and all authorities who are not heretics conclude this) cannot possibly deny that civil laws also have the same force... Scripture commends obedience to secular powers no less diligently than to ecclesiastical ones.”²²³ The idea that laws of the political authority are binding in conscience makes clear that Vitoria sees obedience as a moral, rather than purely prudential, imperative.

In “On the American Indians”, Vitoria also makes it clear that obedience is often obligatory in circumstances of doubt: “for an action to be good in cases where a person has no other means of certainty, it is a necessary condition that he act in accordance with the verdict of wise men.” He then approves of Aristotle’s view that such deference “is one of the necessary conditions of a good action.” Moreover, “if a man does consult wise men on a doubtful case, and then disregards their verdict, he acts wrongly, even if the action is in itself lawful.”²²⁴ Whatever one might think about the merits of the divine command meta-ethic undergirding Vitoria’s moral and political philosophy, his view of the status of law makes clear that obedience is morally obligatory rather than merely prudentially rational. (It is worth keeping in mind, of course, that these passages concern a subject’s obligations when he is uncertain about war’s justice; as we have seen, Vitoria

²²² Ibid, pp. 34-5

²²³ Ibid, pp. 35-6

²²⁴ Vitoria (1991B), p. 235

maintains that when war is patently unjust—i.e., the individual has no doubt as to its *ad bellum* character—the individual is obligated in conscience not to fight.)

Further support for reading Vitoria’s ‘safer course’ passage in moral, as opposed to solely prudential, terms comes by contrasting his position with that of his successor, Hugo Grotius. Grotius, too, contended that in circumstances of doubt a soldier’s or subject’s decision to participate came down to an assessment of moral risk. Unlike Vitoria, however, Grotius regards the greater risk as that of participation, for if the war is unjust and a soldier participates, he risks wronging innocent people. Grotius himself even uses the same ‘safer course’ expression as Vitoria, suggesting that “whoever hesitates, when reflecting, in his decision to act ought to choose the safer course. The safer course, however, is to refrain from war.”²²⁵ In his reading of Grotius, McMahan claims that “although he uses the same form of words as Vitoria, [Grotius] clearly means something quite different.”²²⁶ McMahan goes on to cite this passage by Grotius to support that reading:

“It is no objection that on the other side there is danger of disobedience. For when either course is uncertain that which is the lesser of two evils is free from sin; for if a war is unjust there is no disobedience in avoiding it. Moreover, disobedience in things of this kind, by its very nature, is a lesser evil than manslaughter, especially than the slaughter of innocent men.”²²⁷

McMahan is quite correct to cite Grotius as an ally in his view that assessments of moral risk will speak against participation: when in doubt, don’t participate.

A crucial component of Grotius’s discussion in book II, chapter 24, section 4, however, is missing from McMahan’s discussion—namely, that he is *agreeing* with the view expressed by Hadrian. As we have already seen, Vitoria very explicitly *opposes* Hadrian’s view, which it is

²²⁵ Grotius (1925), bk. II, ch. XXVI, sec. IV.4 (p. 592).

²²⁶ McMahan (2009B), p. 146

²²⁷ Ibid, 146; Grotius (1925) p. 592.

now worth restating: “the subject who does go to war in these circumstances [i.e., circumstances of doubt] is not acting in good faith, and therefore runs the danger of incurring mortal sin.”²²⁸ Grotius maintains that Hadrian’s²²⁹ position runs counter to that of St. Augustine and that Hadrian’s position “may be established, not exactly by the reason which he adduces, but by the more pressing one that whoever hesitates, when reflecting, in his decision to act ought to choose the safer course.”²³⁰ In their more complete contexts, we see that Vitoria’s ‘safer course’ passage and Grotius’s ‘safer course’ passage share two common interlocutors: Augustine, whose position Vitoria supports but Grotius opposes²³¹; and Hadrian, whose position Vitoria opposes but Grotius supports.

It is worth quoting what Grotius goes on to say shortly *after* the long passage cited above and also quoted by McMahan; for Grotius is addressing Vitoria directly:

“That is not of great weight which some adduce, that if this principle should be admitted the state would in many cases perish, the reason being that oftentimes it is not expedient that the reasons for policies should be made public. Although this may be true of persuasive causes, it is not true of justifiable causes, which ought to be clear and open and, further, should be such as may and ought to be openly set forth.”²³²

The passage by Vitoria which Grotius is here addressing is not, however, the ‘safer course’ passage that has been the subject of our interpretive concern. Rather, Grotius references section 25 of “On the Law of War,” which does indeed seem to make a purely prudential claim. Vitoria there says that “lesser subjects who are not invited to be heard in the councils of the prince nor in public council are not required to examine the causes of war, but may lawfully go to war trusting the judgment of their superiors.” He goes on to argue,

²²⁸ Vitoria (1991C), p. 311

²²⁹ Grotius changes the spelling of ‘Hadrian’ to ‘Adrian’. For ease of exposition, I will stick with ‘Hadrian’.

²³⁰ Grotius (1925), p. 592

²³¹ Ibid, p. 591

²³² Ibid, p. 592

“This is proved, in the first place, because it would be impossible, and inexpedient, to put the arguments about difficult public business before every member of the common people. Second, men of lower condition and class cannot prevent war even if they consider it to be unjust, since their opinion would not be heard; it would therefore be a waste of time for them to examine the causes of war.”²³³

Vitoria engages Hadrian at section 30, and the ‘safer course’ passage appears at section 31, of “On the Law of War”. Grotius does not reference these passages nor does he discuss what Vitoria explicitly says about what constitutes the ‘safer course’. Vitoria certainly does suggest that it would be imprudent (‘inexpedient’) for leaders to disclose all information concerning the reasons for going to war but secondly, as we have seen, he cites “the risk of betraying the commonwealth into the hands of the enemy”: *this* risk is what makes participation the ‘safer course’, according to Vitoria, *not* the inexpedience of the leadership disclosing information. It seems to me a scholarly oversight by Grotius to not address Vitoria’s safer course passage; and Grotius’s oversight is one which McMahan’s discussion in *Killing in War* apparently misses.

Grotius and McMahan have both, in subtly different ways, misread Vitoria. Where Grotius simply neglects to discuss—or at least properly cite—Vitoria’s ‘safer course’ passage, McMahan simply asserts without argument that Vitoria is making a prudential claim. On my interpretation, we have a fundamental *moral* disagreement between Vitoria and Grotius concerning the weight of particular risks in conditions of uncertainty: the former believes that the greater risk of wrongdoing (‘danger of sin’) is in disobedience and failing to protect the commonwealth; the latter believes that the risk of killing the innocent constitutes the greater wrong.

5.4 Wrongdoing of Action vs. Wrongs of Omission: While McMahan provides no reason for us to read Vitoria as concerned solely with prudential matters, we can set the interpretive issue aside and consider the positive arguments he does make for the view that the greater moral risk is

²³³ Vitoria (1991C), p. 308

to participate in war. He argues that cases of non-participation where a war turns out to be just, and then a community is overrun by the enemy or one's fellow soldiers are put in harm's way, the non-participating soldier merely *allows* harm to occur but is not himself actively *doing* harm. In contrast, killing a non-liable—innocent—person (an instance of active wrongdoing) is generally more objectionable than letting an innocent person die; and causing wrongful harm intentionally is morally more serious than causing harms foreseeably but unintentionally (depending, however, on the number of innocents being killed as well as the extent of the harms being inflicted; some intentional killing is excusable or even justifiable as a lesser evil).²³⁴ Within our four-fold schema, a soldier's failure to contribute to a just cause merely *unintentionally allows* some people to be killed or injured whom he might otherwise have saved. But if the soldier assumes an active combat role in an *unjust* war, he might intentionally kill or injure non-liable persons.²³⁵ In other words, allowing harms to occur does not constitute *wrongdoing*, and so does not constitute a genuine *moral* risk. The acts/omissions and killing/letting die distinctions may support the claim that the chief risk of non-participation is therefore prudential rather than moral.

Though I have some doubts about the relevance of the distinction between acts and omissions, we can rebut McMahan's view even if we accept the distinction. In the first place, it is false that a soldier's non-participation constitutes *merely* an *omission*, or that his participation constitutes only positive *acts*. Both choices involve both acts and omissions.²³⁶ Nor need it be the case that the participating soldier's *intentions* are worse than those of the non-participating soldier. For in both cases the soldier may believe he acts justifiably and need not intend the wrongs which result from his decision. Moreover, where important positive duties are stake—such as the

²³⁴ McMahan (2009B) appeals to the doing vs. allowing and acts vs. omissions distinction at pp. 113-14, 141.

²³⁵ Ibid, pp. 141-2.

²³⁶ Lazar (2010), p. 199

professional, contractual, or associative duties mentioned previously—the moral wrong is constituted by the intentional breach of the duty, and not the soldier’s agency in ‘acting’ or ‘omitting.’ Even if deliberate acts of wrongdoing are, in general, morally more serious than omissions, omissions can still be gravely wrong. The parent who actively drowns her child in a bath tub is scarcely better than a parent who purposefully allows her child to drown when she could have easily prevented it. The failure of parental responsibility in the ‘letting drown’ case is a very grave wrong, whether or not the breach of the negative duty in the ‘active drowning’ case is the more serious wrong.

Let us summarize the first response to McMahan’s first criticism of Vitoria—that is, the criticism that Vitoria is concerned with prudential rather than moral risks. The claim that ‘betraying the commonwealth into the hands of the enemy’ is solely a prudential concern is highly dubious, both interpretively and morally. The risk of failing to discharge important positive duties when war is just has significant moral costs, regardless of whether the soldier’s failure is described as an act or an omission. The question whether certain positive duties—specifically duties of friendship—are sufficiently important to permit participation in an unjust war is the subject of the final chapter.

5.5 The Empirical Question: The previous discussion does not entail that Vitoria is correct about what constitutes the morally more hazardous path. Vitoria’s is a blanket claim concerning the risk of security breaches to the community and a breach of duties of obedience. From the standpoint of those of us in large empires with large standing armies, the claim about the hazards of a single individual’s non-participation need not be so severe; from that standpoint, his claims seems an exaggeration. The assessment of risk might still tip the scales in favor of non-participation. All we have shown is that the risks of non-participation are more significant than

McMahan thinks. As previously stated, moreover, even if McMahan's observations about the assessment of risk under uncertainty, and their implications for the soldier's decision, are correct, it seems to follow that a soldier will not be permitted to participate in wars that turn out to be *just*. If a large number of soldiers refuse to fight when war is just, then this may indeed pose the significant prudential and—as I believe we are justified in reading him—*moral* risks highlighted by Vitoria.²³⁷

McMahan points out that a single soldier's refusal to fight is unlikely—even if the war is just—to have the disastrous effects Vitoria suggests. It is not the case that a single soldier's refusal to fight will, by itself, result in the dissolution or conquest of a political community. Nor, argues McMahan, is a single conscientious objector or deserter likely to influence other soldiers to refuse to fight.²³⁸ McMahan's point is well-taken as regards modern states and their sizeable standing armies. But in the Sixteenth Century when Vitoria wrote, the population of Spain was approximately 7-8 million people.²³⁹ Spain's population as of 2014 is approximately 47,000,000.²⁴⁰ In a time of much smaller city-states with relatively small standing armies a single military deserter would be far more impactful than it is in an era of populous empires with relatively huge standing armies. This is so not just because of the isolated individual's failure to do his or her part, but also because of the influence he or she would have on other soldiers. In a very large army, such as the United States Army, a single deserter or conscientious objector—even an exceptionally charismatic and influential one—may not have a significant influence on other soldiers. Of course, to the extent that McMahan is urging policy proposals and is seeking to formulate moral foundations for laws of war, the effect of a single person's action is beside the

²³⁷ This paragraph follows Lazar (2010), pp. 199-203.

²³⁸ McMahan (2009B), p. 146

²³⁹ http://www.worldmapper.org/posters/worldmapper_map8_ver5.pdf

²⁴⁰ <http://www.worldpopulationstatistics.com/population-of-spain-2014/>

point. If soldiers *on the whole* adopted McMahan's view, that could be devastating even to the United States Army.²⁴¹ Policy-based considerations aside, it is possible that in a small army, a single soldier's influence on others could be more impactful than we, in our much more sizeable country, can fully appreciate.

It is important to note that McMahan restricts his discussion of the soldier's risk assessment to wars fought in distant countries; the soldier's own country is not under threat of actual or imminent attack. This assumption nicely fits the perspective of soldiers in Western nations: as stated at the beginning of this dissertation, most of us in Western nations have never experienced the ravages of war first-hand. On the other hand, says McMahan, "when a country is being unjustly attacked or invaded, it is extremely unlikely that its soldiers will have significant doubts about whether it is permissible to fight in self-defense, either individual or national" and, furthermore, "even if a soldier does believe that the war is unjust and refuses to fight, the chance that he will be setting an example that others will be tempted to follow is remote, principally because just wars of national defense are almost always *obviously* just."²⁴² Earlier he points out that in just defensive wars "there is usually no shortage of volunteers."²⁴³ I will consider each of these claims in turn.

First, consider McMahan's—accurate—observation that soldiers in Western governments today will typically be asked to participate in non-defensive wars. This fact is supposed to create a strong presumption against the soldier's choosing to participate. There is some apparent tension between this claim and McMahan's view that humanitarian interventions are justified, and that countries suitably positioned to prosecute these interventions should do so more frequently than

²⁴¹ For a similar observation, see Lazar (2010), p. 201.

²⁴² McMahan (2009B), p. 146. A possible criticism of this claim is that the influence of some individual soldiers—the exceptionally charismatic, popular, or persuasive—really can have a significant influence on others. Think of people's admiration for Pat Tillman, the NFL player who volunteered to fight in the Iraq War and who was unfortunately killed by 'friendly fire'. Some voices are louder than others!

²⁴³ Ibid, p. 134

they have been willing.²⁴⁴ This is not to downplay the problem of predatory interventions. But the United Nations' policy of non-intervention in Rwanda was a moral outrage.²⁴⁵ Moreover, even if NATO's intervention in Kosovo employed a disproportionate strategy, NATO *did* have a just cause to intervene. If wars that are not a self-defensive response to an actual or imminent threat can ever be justified, properly-motivated humanitarian interventions are the paradigm case. If generally followed, McMahan's prescription of non-participation under uncertainty would leave just wars of humanitarian intervention unfought. Insofar as McMahan holds that humanitarian interventions are not only sometimes permissible but even *obligatory*, this prescription is theoretically and morally costly. Again, even if it is the case that our leaving a just intervention unfought constitutes an omission rather than a positive act (which is dubious), an omission can still be very seriously wrong where it involves a failure of important positive obligations.

Second, consider McMahan's point that defensive wars are usually 'obviously just' and seldom lacking in sufficient volunteers. The first claim is far from obvious and the second is historically ill-founded.²⁴⁶ It is debatable how obvious the justice of defensive wars typically are²⁴⁷: to whom are they obvious? From the standpoint of many in the invaded countries, French, Polish, and Croatian self-defense in World War II was not obviously just. And many people today have doubts about whether Israeli self-defense, in 1947-9, even if just, was *obviously* just. Moreover, we do not have to look too far in history to find examples of just wars in which there were an insufficient number of volunteers. The French had to resort to conscription in their efforts to expel the Nazi occupation; the British and American governments had to resort to conscription

²⁴⁴ McMahan (2009A)

²⁴⁵ As Lazar (2010) also notes, p. 201. For discussion of the United Nations' deliberate policy of non-intervention in Rwanda, and the Clinton Administration's scandalously active role in that policy, see Glover (2012), p. 122

²⁴⁶ Ryan (2011), p. 35.

²⁴⁷ Ibid.

as well. Even if it was obvious to the French that there was a just cause of national defense, there were significant doubts about the *prospects of success* in resisting the Nazis, or whether the costs in lives would be proportional to the possible gains of expelling the occupiers. And, it is worth adding that, to right-wing non-Jews at least, a Nazi occupation might not have seemed so bad—at least at the beginning of the occupation. We must keep in mind that just cause is one of six *ad bellum* requirements. Even if a nation's citizens (or leaders) have no doubt that there is a just cause of national defense, they may reasonably doubt that other *ad bellum* requirements have been satisfied. People can reasonably, even if mistakenly, believe that even the most eminently just causes are not worth pursuing by means of war (even if war is the last resort).

A more recent example is the North Vietnamese resistance of American forces in the Vietnam War. Whatever one might think about the tactics employed by the Viet Cong or the political agenda of the communists, theirs was a justified resistance of national defense. From the perspective of the Vietnamese this resistance may have seemed 'obviously just'. But their government *still* had to resort to conscription to get a sufficient number of fighters.

Still a third example is 'The Turkish War of Independence', a justified resistance by the Turks against the Ottoman Sultanate which took place shortly after the end of World War I. The Turkish resistance also required conscription. Even if it is the case—something I am not competent to judge—that the Turks regarded their resistance as 'obviously just', their military was not large enough nor were there sufficient volunteers. The Turkish resistance was successful, but not because Turks were lining up to enlist.

While there certainly are just wars in which there are sufficient volunteer soldiers, I have highlighted three cases from the Twentieth Century alone that seriously call into question McMahan's claim that 'obviously just' defensive wars seldom have a 'shortage of volunteers.'

World War II is the most glaring example. But in each case, soldiers, citizens, and potential conscripts need not have doubted that there was a just cause. Their scruples about participation, regardless of their belief in just cause, might just as well have derived from doubts about the prospects of success, the necessity of their individual participation, or whether the gains of forcible resistance were worth the costs. Even if it is correct that just cause is the most important condition of a just war, it is not the case that people's perceptions of whether war is just, or whether they ought to participate, are shaped by the satisfaction of the just cause requirement—even if it has obviously been satisfied.²⁴⁸

5.6 Why Conscription is Sometimes Necessary: That conscription is necessary even for the prosecution of many eminently just wars—not least of which being the resistance against the Nazis—suggests that McMahan overestimates the motivating power of a just cause in securing sufficient volunteer fighters. In addition to people's possible doubts about the prospects of a war's success or the proportionality of resistance, a further reason that conscription is sometimes necessary to fight just wars is that a majority of people are psychologically repelled by killing and maiming another human being. It is a rare psychopath who experiences no sense of disgust and moral revulsion at himself or others for committing acts of killing, especially those that are 'up close and personal.' As highlighted in chapter 3, soldiers suffer hidden wounds of war such as combat stress and moral injury both from what they see in battle and what they themselves do.

That most people, including soldiers, are naturally averse to killing is, empirically, beyond question. S.L.A. Marshall's research about the firing rates during World War II, which have been corroborated by every relevant study published since, show that only about 15-25% of all active-duty soldiers who had the opportunity to fire their weapons actually did so; and a majority of those

²⁴⁸ I am here granting for the sake of dialectic that the satisfaction of just cause was obvious to people. For reasons given in previous sections, I think this claim is often mistaken.

who did fire their weapons did not shoot to kill but instead aimed over the enemies' heads.²⁴⁹ The American Civil War, in which close-range combat was the norm, had casualty rates rather different than one might expect. As Dave Grossman describes it, "an average engagement would take place at thirty yards. But instead of mowing down hundreds of enemy soldiers in the first minute, regiments killed only one or two men per minute. And instead of enemy formations disintegrating in a hail of lead, they stood and exchanged fire for hours on end."²⁵⁰ World War I also saw similarly low firing rates, and low 'shoot-to-kill' rates among those who did fire. Grossman observes that the powerful "lack of enthusiasm for killing the enemy causes many soldiers to posture, submit, or flee, rather than fight; it represents a powerful psychological force on the battlefield; and it is a force that is discernible throughout the history of man."²⁵¹ Based on his extensive study of, and experience in, World War II Marshall concluded that "the average and healthy individual... has such an inner and usually unrealized resistance towards killing a fellow man that he will not of his own volition take life if it is possible to turn away from that responsibility... At the vital point [he] becomes a conscientious objector."²⁵² Soldiers don't want to be killed, but almost as much they do not wish to do any killing.

As a result of Marshall's findings, militaries have universally resorted to psychologically re-programming ordinary persons so that they are de-sensitized to the act of killing. These efforts included replacing bulls-eye targets in military (and police) academies with human silhouette targets. Further efforts to increase firing rates since World War II have included subjecting soldiers to coercive and often humiliating systems of indoctrination to curb their sense of individuality and their aversion to killing—while, paradoxically, supposedly leaving them enough autonomy to

²⁴⁹ See Grossman (2009), esp. *Introduction* and Section I.

²⁵⁰ *Ibid.*, p. 21

²⁵¹ *Ibid.*, p. 29

²⁵² *Ibid.*, p. 30

honor the rules of engagement. As Jonathan Glover has discussed at length, “armies need to produce something close to a ‘robot psychology’, in which what would otherwise seem horrifying acts can be carried out coldly, without being inhibited by normal responses.”²⁵³ Physical distancing is at least as important as soldiers’ psychological reprogramming in overcoming the unwillingness of soldier’s to kill. Bombing from a distance or attacking coordinates on a screen, where the result is hundreds or thousands of human casualties, is less psychologically burdensome than killing a single person by your own hands. Indeed, what Glover calls ‘the shift to killing at a distance’ can make us forget that war is something to be avoided.

I cannot hope to do justice to the vast empirical literature on the human psychological aversion to killing or the training and operant conditioning required to overcome it. Rather, the point of this discussion is that the most eminently just causes do not, by themselves, blunt the very natural—and generally desirable—human aversion to killing and maiming. In his work, Glover is concerned with how the ‘robot psychology’ instilled in basic training can objectionably erode people’s sympathy and senses of moral identity. As discussed in chapter 3, moreover, there are serious ethical questions about putting persons through this reprogramming, as well as subjecting them to the horrific risks of PTSD and moral injury in war’s aftermath. But it is clear that such indoctrination may be a necessary evil in wartime. For example, it would have been an unmitigated disaster if the Nazis had achieved victory over the allies.²⁵⁴ Ironically, McMahan leans on the Nazi example to illustrate that Germany would have been better off if more of its soldiers and citizens had defaulted on *their* professional and associative duties.²⁵⁵ The flip-side of McMahan’s

²⁵³ Glover (2012), p. 48

²⁵⁴ The prospects of a Nazi victory may even have been so disastrous that the rules of engagement were more relaxed or even suspended for the Allies. It may have been a rare case of what Walzer calls ‘supreme emergency’. See Walzer (1974) and (2000), pp. 255-263, for discussion.

²⁵⁵ McMahan (2009B), p. 143.

point, however, is that France and Britain were *worse off* for their citizen-soldiers defaulting on *their* professional and associative duties. While counterfactual judgments about these cases are more difficult for me to make, the Vietnamese and the Turks were probably worse off for their citizens' refusal to fight as well.

The problem is that large-scale collective projects create free-riders: individuals who will soak up the benefits of a cooperative scheme while contributing little or nothing to that scheme. Free-riding, though a wrong of disrespect, need not involve very bad consequences—indeed, the bad consequences are avoided precisely because most other people are *not* free-riders. In Kantian terms, an individual's choice to free-ride gets him what he wants because, in reality, that maxim of choice has not been universalized. However, due largely to the human aversion to killing and maiming, the free-rider problem is augmented in war. Because ordinary people, soldiers certainly included, are instinctually repelled by risking their own death or serious injury, as well as inflicting those harms on others, they will avoid participation if they can. A just war, or any legitimate cooperative scheme, can succeed given a few free-riders; it cannot succeed when free-riding reaches a critical mass. That critical mass will vary from war to war, but when reached it will ensure a society's need for conscription. The free-rider problem is much more the outgrowth of the human unwillingness to kill and maim, as well as doubts about the prospects of success, than a product of laziness or individuals lacking a sense of fairness. This also means that there is nothing close to a guarantee that just wars will have sufficient volunteer fighters.

We can now return to Vitoria's point about the moral risk posed by a soldier's non-participation—that is, risks to the safety of the commonwealth. A large enough number of individual conscientious refusals or deserters really does pose a significant danger to a political community. Vitoria's point stands when a sufficient number of citizen-soldiers renege on their

role-based and associative duties. The history of warfare and conscription in the 20th Century, as well as empirical-psychological data explaining the temptation toward military free-riding, supports this claim.

5.7 Conclusion: War is inherently deeply uncertain. A soldier's individual decision about whether to participate, or what to do in war, therefore turns on subjective assessments of moral risk. In a slogan shared by both Vitoria and Grotius, the soldier must follow the safer course. On McMahan's view, the risk assessment seems to almost always speak against participation in wars that are not obviously just: the best way to avoid wronging the innocent is to altogether avoid participation in war. We might criticize this approach for its lack of practical guidance for individual soldiers. As Seth Lazar and Laura Valentini have suggested in a recent paper,

“we can indeed always abide by the duty not to kill nonliable people, by simply refusing to fight, but this is like saying that a blind person can obey the prescription ‘you ought to cross roads only when the green man is lit’ by never crossing roads. If [revisionist principles] give us no more guidance than this as to what to do given the uncertainty and stress characterizing war, then our only option is to endorse pacifism.”²⁵⁶

Though in previous chapters I have been concerned with considerations of providing soldiers meaningful practical guidance, my focus in this chapter has been to show that non-participation is morally more hazardous than McMahan thinks. There are risks of non-participation that go beyond the prudential and, indeed, it is not the case that Vitoria's view about the ‘safer course’ of action under uncertainty is concerned solely, or even primarily, with prudential risks. McMahan (and Grotius) could very well be right that the morally more hazardous course is for the soldier to join, or continue participating in, a war effort. I hope to at least have shown that, even if non-participation is the morally safer course, it is not a course that is free of substantial risks of

²⁵⁶ Lazar and Valentini (2014C), p. 23.

significant wrongs, such as free-riding and the dereliction of role-based, professional, and associative duties; as well as correlative threats to military and civic cohesion.

We have seen that even an eminently just cause may be inadequate motivation to get individual people to overcome their psychological resistance to the killing and maiming of warfare. This natural human aversion, though in general highly desirable, can create a serious motivational problem even when a *just* war must be fought. Militaries are well-aware that abstract moral ideals and nebulous political goals are not primarily what motivates individual soldiers to fight. Soldiers are most motivated to fight by their sense of camaraderie with each other. Friendship and fellowship of arms are not only deeply motivationally powerful, but also create new moral duties that cannot, even in an unjust war, be infringed without significant moral costs—costs not only to unit cohesion, but also to intrinsically valuable friendships between soldiers. The moral significance of fellowship-of-arms in an unjust war is the subject of the final chapter.

6. THE MORAL SIGNIFICANCE OF FELLOWSHIP OF ARMS

Imagine yourself in this situation: you see a loved one, either a close friend or family member, under attack by a stranger. You don't know whether the assailant is justified in attacking your loved one, what the assailant's ultimate aims are, or whether your loved one has done something wrong to invite this attack. You *do* know that if you do not intervene with force, then your loved one will be killed or gravely injured. If you can vividly imagine yourself in that situation, and if your first instinct would be to come to the defense of your loved one, you are, in an imperfect way, seeing things from the perspective of a soldier whose comrades-in-arms face imminent and direct threats of harm in war.

Soldiers' instincts to defend a comrade in peril are at least as strong as their drive for self-preservation but, as we have seen, there are serious questions whether they are morally permitted to do so when the war in which they participate is objectively unjust. The doctrine of the moral equality of combatants, as Michael Walzer formulates it, gives an easy answer to this question: since all combatants have equal battlefield rights and responsibilities, including "the equal right to kill" all and *only* enemy combatants²⁵⁷, it readily follows that even unjust combatants are entitled to defend one another from imminent and direct threats of harm. Of course, we have seen throughout this project that MEC appears to have only a pragmatic basis; it appears to lack any foundation in basic interpersonal morality. If individual liability to defensive force is the predominant moral justification for killing in war, and the criterion of liability is moral responsibility for an objectively unjustified threat of harm, MEC has no non-conventional grounds on which to stand. Nor, despite most people's intuitions about the above hypothetical, does the

²⁵⁷ Walzer (2000), p. 41.

thesis that unjust combatants are permitted to defend one another from imminent and direct threats of harm. Revisionist approaches like Jeff McMahan's preclude most of the battlefield rights afforded unjust combatants, and does so by consistently applying moral standards across all forms of interpersonal violence.

My thesis, contra the revisionists, is that unjust combatants' are permitted to defend each other from imminent and direct threats of harm. However, the argument of this final chapter does not depend upon the claim that just combatants are permissible targets of defensive force because they are uniformly liable: that just combatants pose a threat is not, by itself, the basis of unjust combatants' other-defensive rights (though it is undoubtedly necessary to my view).

Instead, I will argue that soldiers' friendships ground a particular *associative duty* which I call *the duty of mutual defense*.²⁵⁸ The basic argument is this: 1) soldiers are led for good reasons to form close, personal relationships with each other; 2) once they are in these relationships, they come to have duties that are new and particular, and which need not depend on the objective moral character of the military's collective actions (i.e., the objective justice of their war effort); 3) these duties include mutual protection; 4) in the face of imminent and direct threats of harm, the duty of mutual protection takes the form of forcible defense.²⁵⁹ The claim that forcible defense by unjust combatants is more often permissible than McMahan's theory allows but less often permissible than Walzer's MEC allows is the core thesis of this chapter and of this dissertation as a whole: that

²⁵⁸ To my knowledge, Lazar (2013) is the first to develop an associativist account of combatants' protective duties. That essay has been an inspiration, and the present chapter is in many ways an extension and defense of his novel approach.

²⁵⁹ My discussion of unjust combatants' defensive rights focuses solely on the permissibility of *other-defense* of close friends. Since I am arguing for soldiers' right of mutual defense by appealing to associative duties of friendship, the issue of *self-defense* here remains un-addressed. Self-defense is a difficult issue because, even if there can be some moral duties to oneself (as Kant thought), there cannot be *associative* duties to oneself. While I think there are some resources within an associativist account for addressing the issue of self-defense—such as the need to preserve one's own life for the sake of protecting innocent people and one's own comrades—a more complete explanation of unjust combatants' defensive rights would have to look for moral grounding outside the framework of associative duties.

there is a plausible intermediate position between these extremes that can capture common sense about *practicability* without departing too far from common sense about *basic morality*.

Before proceeding, I must introduce a caveat to the analysis presented in this chapter. The duty of mutual defense, as an associative duty, is based upon the value and moral significance of the relationships between soldiers, and I will be analyzing those relationships in terms of the value and moral significance of *close friendship*. Yet not all soldiers for whom this duty is binding are actually friends with one another in the familiar sense of the term. For one of the definitive characteristics of friendship is that friends *like* each other or share *mutual affection*. But some soldiers do not particularly like each other and may even personally detest some among their fellows. But other features that are characteristic of friendship, such as mutual concern, loyalty, shared experience, and solidarity, are still very much a part of their relationships even if mutual affection is not. Soldiers can form morally important relationships with one another even if those relationships are not technically friendships. On the other hand, many soldiers' bonds are so mutually loving and intimate that analyzing them in terms of friendship may potentially fall short of capturing the significance of the relationship (though that may well depend on one's conception of friendship). Combat soldiers are known to form bonds whose personal significance is rivaled only by the parent-child relationship. Despite these caveats, I will, for ease of exposition, analyze the moral significance of fellowship of arms in terms of the value and duties of friendship, though it should be understood that the duty of mutual defense still obtains even among soldiers who do not like each other, as well as among soldiers whose relationships arguably transcend friendship. Such an analysis should be unobjectionable, I hope, precisely because their relationships are imbued with other central goods of close friendship.

Soldiers' friendships are morally important in two respects: first they are instrumental to independently desirable goals of unit cohesion, individual martial effectiveness, and—correlatively—the successful prosecution of just missions; second, the friendship is valuable in itself which in turn gives rise to associative duties. In section 1, I develop a *prima facie* case that fellowship-of-arms and the duty of mutual defense are indispensable to the proper functioning of military units, platoons, squads, teams, and the effectiveness of individual soldiers. In addition, I argue that the effectiveness of soldiers is desirable even when the wars in which they participate are unjust. In section 2, I provide a general account of the value of friendships underpinning associative friendship duties, an account of true friendship and loyalty, and the relevance of friendship and loyalty to soldiers' mutual protective duties: certain goods are constitutive of close, personal friendships—including mutual concern, shared experiences, trust, and loyalty—and generate stringent associative duties, among which is the duty of mutual defense. Special relationships, in my view, are special precisely because they are constituted by associative duties. The duty of mutual defense is constitutive of fellowship-of-arms. Picking up on the theme of chapters 4 and 5, I argue in section 3 that the moral significance of unjust combatants' friendships helps to lower the epistemic bar for imposing *risks* of unjust harm on just combatants. The protection of morally significant relationships justifies taking a moral risk of killing or injuring *non-labile threatening agents*, whose non-labile status is uncertain. To not take this uncertain risk would involve a very grave, and near-certain, wrong of disloyalty. The duty of mutual defense can, in more war-time circumstances than McMahan's theory allows, but in fewer circumstances than Walzer's allows, permit defensive force against non-labile threatening agents: uncertainty plus the moral importance of friendship lowers the epistemic burden imposed on soldiers' in determining the liability or non-liability of individuals who pose imminent and direct threats of

harm. In the final analysis, the duty of mutual defense has roots in basic morality rather than merely convention and it responds to the reality of combatants' experience. The instrumental and intrinsic value of fellowship of arms supports retaining equal defensive rights as a central component of the law of armed conflict.

6.1 Friendship, Just Wars, and Just Missions: Militaries do good and bad things, as do individual soldiers. They provide humanitarian relief in the aftermath of natural disasters, provide security for the domestic population, prosecute justified wars and missions, and soldiers take on significant personal risks to protect the innocent. On the other hand, militaries and individual soldiers also participate in atrocities, wage unjust wars or unjustified missions within war, and soldiers may render innocent people unnecessarily vulnerable. We would like the soldiers participating in the good and just things that militaries do to be as effective as possible. Ideally, we also want them to be ineffective in contributing to the bad and unjust things that militaries do.

As discussed in chapter 5, killing and maiming does not come naturally to a majority of people. Professional soldiers and conscripts are no different. It takes intensive conditioning to overcome the natural aversion to inflicting violence, especially when that violence is 'up close and personal'. Abstract notions of justice and country do not have nearly the motivating power for individual soldiers that the idealistic slogans propagated, for example, in Navy, Army, and Marine recruitment advertisements in the United States would have us believe. Soldiers' primary motivation to fight, risk their lives, and find the courage and strength to endure the tyranny of war comes from their love for, and solidarity with, one another. Friendship is possibly the most powerful facilitator of effective soldiering and, thus, of a unified and effective military, that there is. The motivational power of friendship is a recurring theme in countless veterans' memoirs, of which I will provide a small sampling.

Reflecting on his experience in the European theater of World War II, J. Glenn Gray writes,

“Through military reverses or the fatiguing and often horrible experiences of combat, **the original purpose [of war] becomes obscured, the fighter is often sustained solely by the determination not to let down his comrades... Numberless soldiers have died, more or less willingly, not for country or honor or religious faith or for any other abstract good, but because they realized that by fleeing their post and rescuing themselves, they would expose their companions to greater danger.** Such loyalty to the group is the essence of fighting morale. The commander who can preserve and strengthen it knows that all other psychological or physical factors are little in comparison.”²⁶⁰

Iraq War veteran Tyler Boudreau also writes, “I’ve heard people say since I was a private myself that men don’t fight for causes or flags, they fight for each other.”²⁶¹ The empirical data supports Gray’s and Boudreau’s testimony. Lt. Colonel David Grossman reports on the numerous studies establishing that “men in combat are usually motivated to fight *not* by ideology or hate or fear, but by group pressures and processes involving **(1) regard for their comrades, (2) respect for their leaders, (3) concern for their own reputation with both, and (4) an urge to contribute to the success of the group.**”²⁶² What really motivates soldiers to fight and risk their lives in the chaotic, uncertain, and oppressive circumstances of war are the more tangible relationships they have with family, friends, members of their community, and their comrades-in-arms.²⁶³ For some soldiers, there is no distinction among these groups. Another Iraq War veteran, Sgt. Ian Darbyshire, reports that his unit in Iraq, which consisted of over 1,500 soldiers, was literally a family.²⁶⁴ Richard Gabriel takes the point further, noting that “in military writings on unit cohesion, one consistently finds the assertion that the bonds combat soldiers form with one another are stronger than the bonds most men have with their wives.”²⁶⁵

²⁶⁰ Gray (1988), p. 40, my emphasis

²⁶¹ Boudreau (2008), p. 195.

²⁶² Grossman (2009), p. 89, my emphasis

²⁶³ Lazar (2013), p. 6

²⁶⁴ Sgt. Ian Darbyshire, my friend and former student, reported this to me in a personal interview.

²⁶⁵ Quoted in Grossman (2009), p. 149

In writing about the unity of a political community, Aristotle (endorsing a sentiment expressed by Socrates) wrote that friendship is “the greatest good of states and what best preserves them against revolutions.”²⁶⁶ A similar point applies to unit cohesion and the prospects of success in war. Militaries know this. Soldiers are most motivated to endure the sacrifices and hardships involved with basic training, as well as war itself, by their sense of solidarity and kinship with each other. By design, therefore, military training emphasizes team-building exercises as much as individual physical trials and technical expertise. Boudreau recalls one such team-building exercise in Iraq:

“An eight mile run with all our gear came on a day when my knees were being particularly cantankerous... **If one man failed, the whole squad failed. This was just the kind of training that built a relentless sense of camaraderie in Marines.** I wasn’t going to be the guy who failed, no matter what.”²⁶⁷

The military deliberately encourages the formation of close bonds among soldiers because it knows very well that camaraderie and loyalty are essential to unit cohesion, fighting morale, and consequently, to the military’s objectives as such. The examples in support of the instrumental significance of friendship could be multiplied, but Shannon French summarizes the point nicely: “the motif that echoes in nearly every war memoir or veteran’s interview is that comrades-in-arms come to feel an intense love for one another... The love a warrior has for his comrades-in-arms is what gives him the strength to stand against the dreadful tide of a heavily armed, charging host of enemies.”²⁶⁸ It is no wonder, then, that militaries work to instill the “relentless sense of camaraderie” described by Boudreau.

Friendship is clearly a powerful motivator to effective soldiering. If war or armed missions are to have any hope of success, the participants in them must be effective. Thus, it is not

²⁶⁶ Aristotle (1996), p. 34 [*The Politics*, 1262bI]

²⁶⁷ Boudreau (2008), p. 196, my emphasis

²⁶⁸ French (2005), p. 12

implausible to think that one of the *jus ad bellum* requirements—reasonable hope of success—cannot be satisfied without soldiers’ friendships. We want soldiers participating in the *just* missions to have the highest prospect of success possible, which means they must be as effective as possible. Ideally, we would also want them to be ineffective when the missions are unjust. But camaraderie will tend to motivate soldiers to keep fighting and performing their roles effectively whether the missions are just or not: for protecting one’s comrade is a soldier’s primary objective in moments of peril. Friendship and its substantial motivating power are insensitive to the opaque and frequently shifting *ad bellum* considerations. When a war is or becomes unjust, comrades-in-arms cannot simply turn off their sense of friendship and loyalty, and then turn it back on when the war or mission is just, as though close personal relationships were like a light switch. If friendship is going to achieve its motivating power in the just wars and missions, it will also as a matter of practical necessity have to have that motivating power in the unjust wars and missions—and every moral gradation in between. If we want soldiers to be effective in fighting the just wars, there is no denying the instrumental importance of friendship, trust, and solidarity; but if we want soldiers to form these friendships in the first place, we must accept that they will then be more effective in fighting the unjust wars as well.

6.2 Friendship and Effectiveness in Unjust Wars: We have in hand at least a *prima facie* case that friendship is indispensable to the success of militaries in doing good and just things. Revisionist just war theorists, however, have powerfully argued that unjust combatants have very few battlefield rights when militaries are doing bad and unjust things. Their focus, in particular, is on wars that are *ad bellum* unjust. But if we want soldiers to create close personal friendships for the sake of martial effectiveness in the *just* wars, it seems we must tolerate the fact that friendship and its motivating power will tend to remain stable across the moral spectrum of

conflicts, including the unjustified and morally heterogeneous ones. The basic point about friendship's motivational power may run deeper than this instrumental argument: arguably the family-like relations between soldiers are *constitutive* of military cohesion and not just instrumental to it. The claim that we must put up with martial effectiveness in unjust wars might, however, be seen as merely pragmatic: if only it were practically feasible to render soldiers less effective in the unjust wars without compromising their effectiveness in the just wars, perhaps we should do so.

However, combatants' effectiveness is not always or even typically undesirable even in unjust wars. There are undoubtedly some armies whose goals and tactics are so grotesque that their ineffectiveness is highly desirable. Nazi soldiers in the Wehrmacht are an ominous example of this. The Nazi case will, in my more direct discussion of the duty to protect, help to illustrate some important qualifications on the sort of shared history that can give rise to duties of friendship. But for now it is important to, again, remember how exceptional World War II was in the history of armed conflict. There were few, if any, remotely justified missions undertaken by the Wehrmacht during the Nazi invasions and occupations of Europe and North Africa for which martial effectiveness would have been desirable. But in other cases martial effectiveness in an unjust war is desirable and so it is a good thing that the motivational power of soldiers' friendships remains stable.

Notwithstanding the Nazi counterexample, it is important to not view unjust combatants' roles too narrowly. In general, professional soldiers go wherever their government commits them. This is part of the oath they take when entering the military ranks. Tragically, this oath can lead them to participating in unjust wars. It can also lead them to fight just wars, or justified missions short of war. Their role may lead them to assist in wholly just humanitarian aid, such as helping

the victims of natural disasters, famines, and the like. It is vitally important that they perform their role well in these situations. A number of these justified missions can and do arise in the course of an unjust war. Not all unjust wars are equally severely unjust and not all unjust combatants participate in equally wrongful missions within war. Since even in unjust wars there may arise justified aims, including obligatory humanitarian aims, it is imperative that unjust combatants perform their role well. Indeed, sometimes in unjust wars reasons of justice may actually *require* continued participation in the war effort to stabilize a victim country and ensure that a prior aggression or occupation does not wreak further havoc in one's absence. This, I believe, is the most charitable interpretation of former President Bush's boastful insistence that the U.S. Military in Iraq not 'cut and run'.

The point here is that a soldier's role is fluid, not fixed; the same is true of his or her moral status.²⁶⁹ An unjust war can become a just war by changing in ways that a soldier does not and cannot know about, and that soldier can be involved in an unjust mission in an unjust war on one day but involved in a just mission within the same war on the next. This is precisely what happened with many American soldiers fighting 'the war on terror' in the first decade of this century. Let us suppose, for purposes of illustration, that the war in Afghanistan was just and the war in Iraq was unjust. A soldier could be participating in dubiously just aims in Iraq and then be re-stationed in Afghanistan where the aims were more evidently just, and then go back to Iraq again. Even in Iraq there arose particular just or at least permissible aims. These aims included protecting Iraqi civilians from insurgents, preventing terrorists from setting oil refineries ablaze and, indeed, from taking over the country, as well as (in my view) protecting fellow soldiers from imminent and direct threats of harm. In the wake of Hurricane Katrina in 2005, some soldiers who were

²⁶⁹ That is, their moral status with respect to *liability* and *innocence*.

previously stationed in Iraq or Afghanistan were re-stationed in New Orleans to provide humanitarian relief,²⁷⁰ missions whose aims were obviously just (and obviously morally required). Even when they risk participating in an unjust war, it is in general very important that soldiers perform their role well *wherever that role takes them*. The testimony of the previous section bears out the claim that friendship is at least as decisive as any other motive in facilitating this effective performance.

The main finding of this section is that even *unjust* combatants' friendships are in general highly instrumental to further worthwhile ends. Militaries promote tight-knit bonds between soldiers by design and it is good that they do: just wars, just missions, and justified missions that arise in unjust or morally mixed wars are much less likely to succeed without the motivating power of friendship. But close friendships simply cannot flourish without an abiding sense of trust and mutual concern—these are part of the very meaning and value of true friendship. Suppose we deny unjust combatants the right to defend one another from imminent and direct threats of harm except when a mission is obviously justified. This will seriously erode trust among soldiers. It will compromise each individual's sense of security. Instead of the 'all for one, one for all' spirit that is essential to military cohesion, platoons and squads on the battlefield will fracture. Each soldier will adopt an 'every man for himself' mentality. It is difficult to believe that this corrosive attitude would not bleed into the justified missions as well. The duty of mutual defense must be recognized for better or worse, though not without exceptions.

6.3 Approaches to Associative Duties: The previous section provides strong support for the first premise of my argument—that is, that soldiers are led for good reasons to form close friendships with each other. Moreover, I argued that these reasons remain intact even in the unjust

²⁷⁰ Thanks to (ret.) Sgt. Ian Darbyshire for providing this information in a personal interview.

wars, thereby offering a partial defense of premise 3—that the duty of mutual defense need not be contingent on the objective justice of war.

Apart from the instrumental value of soldiers' camaraderie, something else happens when soldiers form close bonds in basic training, in their stations, and in combat: new associations that are, themselves, intrinsically valuable and duty-laden come into being. Such relationships alter the landscape of moral obligations. As premise 2 states, duties that are new and particular emerge with the flowering of soldiers' friendships, duties which may be binding and have moral force independently of any larger purpose or institution the relationship itself serves. These are the associative duties of friendship.

As I will understand them, associative duties are a class of special duties which are based upon the value of our social relationships. My view of their normative structure is *teleological*. The teleological approach locates the source of associative duties as internal to the social relationship: they are inherently a part of the very meaning and value of friendship. Friendship simply cannot be understood to be a special relationship if participants in the relationship are not partial to each other—i.e., if they do not owe each other associative duties. Moreover, at the same time that the associative duties give the relationship its special character, they also help make the friendship intrinsically valuable. Samuel Scheffler has written that “to attach non-instrumental value to my relationship with a particular person just is, in part, to see that person as a source of special claims in virtue of the relationship between us.”²⁷¹ Developing a similar position, Joseph Raz has argued that “the relations between friends... cannot be specified except by reference to the duties of friendship.”²⁷² This is the *constitutive* interpretation of the teleological approach to

²⁷¹ Scheffler (2001), p. 100

²⁷² Raz (1989), p. 19

associative duties.²⁷³ Friends are *friends* precisely because they are disposed to provide special benefits to each other, press special claims on each other, and take on special sacrifices for each other. As Scheffler suggests, this special treatment is not only definitive of friendship, it is part of what makes it a valuable relationship in the first place, and indeed something to which nearly everyone attaches significant non-instrumental value.

We can also view associative duties as *instrumental* to promoting an intrinsically valuable relationship, which is an alternative (and perhaps complementary) teleological approach. Thus, Marilyn Friedman writes that “to the extent that personal relationships are necessary for integrity and fulfillment in life, then, to that extent partiality is instrumentally required as a means to achieving those morally valuable ends.”²⁷⁴ Where the relationship is valuable and in fact contributes to a flourishing life, “the general presumption... seems to be that the mere relationship with someone who is ‘one’s own,’ in some sense, is always morally worth promoting.”²⁷⁵ Seth Lazar has also recently laid the groundwork for a *non-teleological* view of associative duties.²⁷⁶ This approach sees associative duties as arising from the non-instrumentally valued features of social relationships but is non-teleological precisely because it does not see the duty—at least not primarily—as intrinsic to those relationships or as justified by the fact that they promote the flourishing of those relationships. Lazar instead analyzes associative duties as one type of *appropriate response* to the valuable properties of social relationships.

I am on board with the teleological approach and, indeed, find a hybrid between the constitutive and instrumentalist thesis quite plausible. The teleological approach also seems to be

²⁷³ Jonathan Seglow (2013) attributes to Raz a *hybrid* teleological approach. He writes, “the duties of friendship, according to Raz, are constitutive of the good of friendship itself, at the same time as they help promote that good” p. 16.

²⁷⁴ Friedman (1991), p. 820

²⁷⁵ Ibid

²⁷⁶ Lazar (2014B). Lazar (2013) also earlier develops a non-teleological, appropriate response account of associative duties.

the most popular in the literature. For purposes of the present argument, however, it does not much matter how we understand the ultimate foundation or structure of associative duties: the duty of mutual defense could be advanced on the basis of any of these approaches to associative duties. Moreover, one of the most important elements needed for my argument is common to all these approaches: that friendship, and other close social relationships, are intrinsically valuable and that the associative duties are importantly connected to that intrinsic value—whether the duties in part constitute that value, are instrumental to realizing that value, or are an appropriate response to its value. I will simply jump on board with the teleological approach and direct my attention to characterizing the value of friendship and fellowship of arms. Philosophers have done ample work in spelling out the value of friendship and in what follows, I shall survey some of that work. Included as well are some additional remarks concerning the inherent value of *investing* in a friend.

6.4 The Value of Friendship: The ways in which friendship is valuable and a source of duties is evident from phenomenological considerations.²⁷⁷ Most of us think that a life devoid of close personal friendships is scarcely worth living, and it is almost universal for people to structure their lives around friends and family members. Thus, Aristotle suggests that even if we could have all the other material goods of life, but on the condition that we could have no friends, almost no one would take the deal.²⁷⁸ Many of us also at least implicitly accept the Aristotelian view that friendship is central to the ethical life and also the end of individual human flourishing. (It is also, as we have seen, the cornerstone of a unified and properly functioning military.) We do in fact live our lives as though friendship (and other close, personal relationships) are a source of special responsibilities. Of course, we could be wrong. But if friendship is not a ground of special duties,

²⁷⁷ Jonathan Seglow's (2013) book-length defense of associative duties in various relationships, including those between parents and children, friends, and citizens, also begins with an appeal to the phenomenology of our moral lives.

²⁷⁸ Aristotle (2000), p. 143 [*Nicomachean Ethics*, 1155a]

then most of us are living our lives in the grips of a massive moral illusion. Associative duties at least have the virtue of fidelity to the normative appearances. The phenomenological case makes the idea of associative duties intuitively compelling. But it is not the main grounding of associative duties; rather, it is the distinctively valuable features of friendship which ground them, features which lead us to value friendship as an end itself. Part of our understanding of friendship is the particular associative duties that we have, just by virtue of participating in the friendship. Friendship is characterized by the partiality with which friends treat each other. It makes no sense to refer to someone as a friend whom you treat no differently than a loose acquaintance or a complete stranger. Friendship is a *special* relationship precisely because friends show one another special concern and special treatment (this is a central commitment of the teleological view). Among other things, *good* friends will make sacrifices for each other, devote time and attention to each other's needs, share fun and rewarding experiences, and invest in each other's interests and goals.

Perhaps the best evidence that friendship is valued non-instrumentally is simply the fact that almost everyone seeks it out for its own sake rather than solely or primarily for personal advantage—that is, we seek more than what Aristotle referred to somewhat derogatorily as ‘friendships of utility’.²⁷⁹ Friendships based solely on utility are evidently less fulfilling and sought after than those based on *intimacy*, *trust*, *loyalty*, and *shared experience*. Let us call these intrinsically valued goods ‘friendship goods’.²⁸⁰ The more intimate and mutually caring a friendship, I will say, the *closer* is the friendship.

²⁷⁹ Lorraine Pangle (2003) writes that “friendships of utility are especially subject to disappointments, complaints, and ruptures. Even at their best they are attenuated, since there is no particular reason that those who find each other useful will also enjoy each other's company, whereas Aristotle will say that nothing characterizes friendship so much as spending one's days together” p. 40.

²⁸⁰ The expression ‘friendship goods’ is from Seglow (2013), p. 95

The formation of close friendship takes interaction and investment between two people over time. Trust and intimacy do not come cheap. We commonly say of strangers or mere acquaintances who seem too eager to reveal their private lives as *too trusting* or as revealing, to employ a somewhat obnoxious phrase, *too much information*. Forced intimacy is not real intimacy. Indeed, when someone is too trusting or intimate too soon we may experience discomfort or irritation, similar to that which we experience when listening to a desperate sales pitch. The intimacy that is the hallmark of genuine friendship is no small achievement: it takes time, interaction, and the mutual discovery and shaping of common values and interests through those interactions. Friendship is an inherently intimate relationship, characterized by openness and responsiveness “to one another in ways that lead to mutual understanding.”²⁸¹ To some extent we may value our friendships as the product of this investment, but it is important to realize that the investment need not be some onerous task with which we would dispense, were friendship achievable, as Diane Jeske correctly says it is not, “on the spur of the moment.”²⁸² The shared experience and history that shape the character of, and give direction to, the friendship are also intrinsically valuable. These shared experiences also generate the much sought-after intimacy and trust that constitute close friendship. Through adventures, youthful mischief, teamwork, and common pursuits, friends shape each other’s lives, values, and personalities. Trust, intimacy, and mutual caring are the products of this mutual investment, but the investment is valuable for its own sake. Valuable shared experiences and history are a source of associative duties.

The process of achieving and deepening friendship is also a vehicle for self-discovery, a sense of individual purpose in life, and a sense of social identity. As Seth Lazar says of our intimate social relationships more generally, “it is only with those closest to us that we present ourselves

²⁸¹ Jeske (2001), p. 335

²⁸² Ibid, p. 335

whole, or at least nearly whole, without the veneers we habitually erect when among strangers.”²⁸³ Where most of us most of the time conceal important parts of ourselves behind masks of social decorum, we can more fully express and be ourselves in the company of good friends. Close friendships provide opportunities for our authentic selves to come out; they also furnish a context through which we discover and develop that authentic self. Through friendship, each of us is better able to find out who we are, what we value, and what makes life worth living *for us*. True friends, as Aristotle observed, are an extension of ourselves.²⁸⁴ When we achieve intimacy and mutual concern, we cherish these things among the highest goods of life. Friendships are therefore well worth pursuing and, once attained, preserving and strengthening. They are ends in themselves.

Duties of loyalty plausibly count as a constituent element of close friendships as well as being valued by the participants in the friendship: duties of loyalty constitute close friendships at the same time that fulfilling those duties makes the friendship still closer. Loyalty is thus at once constitutive of and instrumental to close friendship. To see this, imagine a friend who uniformly failed ever to prioritize her friend’s interests, made no special efforts to advise her friend against unwise decisions, or never took action or made sacrifices to assist a friend in distress. Even if we could regard such a person as a ‘friend’, we certainly would not regard her as a *close* friend. While even the best of friends can fall short or have moments of apathy, it is virtually impossible to imagine a close friend who had no sense of loyalty at all, who made no special efforts, as the slogan goes, ‘to have her friend’s back.’ Without loyalty, friendship itself is diluted and *close* friendship does not exist.

²⁸³ Lazar (2013), p. 12

²⁸⁴ Aristotle (2000), p. 179 [*Nicomachean Ethics*, 1170b]; Sherman (1987), pp. 597-600; Whiting (1986); Whiting (1991), pp. 18-24; Pangle (2003), pp. 142-154.

Loyalty, I will say, is the generally unhesitating devotion and responsiveness of one friend to the needs and interests of the other. It characteristically takes the form of expressions of concern for, trust in, or action on behalf of a friend, even, if necessary, at considerable cost to oneself. There are certainly associative friendship duties to be loyal, but close friends will also tend to value their friendships largely because of the loyalty they share. *True friendship*, I will stipulate is a *close friendship* in which the personal sacrifices incurred by acts of loyalty may be substantial, and both friends show a willingness to make such sacrifices for each other. Though it is possible for one individual to be a true friend to another via substantial personal sacrifice, if that degree of loyalty is not mutual or reciprocal, we should not call it a true *friendship*; perhaps instead it is an unequal friendship advancing in the direction of greater mutuality.

True friends are thus loyal *to each other* in the highest degree. They share mutual concern, just like all friends. But the concern between true friends takes the form of devotion and responsiveness to each other, even at significant personal cost, and even sometimes at the cost of assuming certain *moral risks* to help the other (or so I argue in the final section).²⁸⁵ We cherish friends who will unflinchingly come to our aid; and if we ourselves are true friends, we will unflinchingly come to theirs. Those who are not disposed to loyalty and sacrifice on behalf of a friend, especially when times get tough or they have to ‘get their hands dirty’, we might regard as lesser friends or even ‘fair-weather friends.’²⁸⁶ True friendships involve mutual concern of a higher order: a concern which I call *reciprocal loyalty*.

Reciprocal loyalty is not, however, straightforwardly or solely a matter of reciprocity for specific benefits or transactions. It is, more importantly, part of the very meaning of true friendship

²⁸⁵ The idea that the reasons generated by friendship can sometimes involve embroiling a friend in moral wrongdoing is defended in Cocking and Kennett (2000). Where Cocking and Kennett use the expression *close friend* I employ the expression *true friend*.

²⁸⁶ Ibid, p. 289

and a constituent of its intrinsic value. True friends make special efforts to assist and, where necessary, to protect each other. Disloyalty—betraying a friend’s trust or showing insufficient devotion or self-sacrifice—is more than merely imprudent. A grave disloyalty is itself a serious moral wrong. It is a failure to honor the distinctive history, values, and mutual affection you share with that particular person; a failure to treat your closest friends with the respect and esteem they are owed. In the absence of compelling reasons to act impartially, disloyalty displays a crass insensitivity to the value and importance of the people closest to you.

It is important to emphasize that these friendship goods are not just valued non-instrumentally by friends, but that they are themselves objectively valuable. Proponents of associative duties are thus not committed to the claim that merely having or sharing a strong feeling of affection for, or devotion to, a person automatically generates duties. If mere feelings could ground duties, then individuals in the grips of Stockholm syndrome, or who remain irretrievably attached to their physically or emotionally abusive partners, would have associative duties to their captors or abusers. And opportunistic seducers could create moral duties through sheer emotional manipulation. Objectively, there are usually few or no grounds for especially strong associative duties toward the captor, abuser, or manipulator. (There probably are few grounds for especially strong duties of beneficence or reciprocity-based duties either.) But these sorts of relationships objectively lack the characteristic friendship goods I have discussed here. My claim is that true friendship—which is authenticated via *objectively* valuable shared experiences, trust, intimacy, and loyalty—is itself a source of duties, duties which protect, promote, and constitute an intrinsically valuable relationship.

6.5 Fellowship of Arms: Fellowship of arms is the paradigm of true friendship.²⁸⁷ Indeed, it might be one of the most deeply personal and significant instances of true friendship. As Vietnam veteran John Early highlights, nothing quite matches the bond formed with men on whom you are depending for your survival:

“This is going to sound really strange, but there’s a love relationship that is nurtured in combat because the man next to you—you’re depending on him for the most important thing you have, your life, and if he lets you down you’re either maimed or killed. If you make a mistake the same thing happens to him, so the bond of trust has to be extremely close, and I’d say this bond is stronger than almost anything, with the exception of parent and child. It’s a hell of a lot stronger than man and wife—your life is in his hands, you trust that person with the most valuable thing you have.”²⁸⁸

The friendship goods of shared experience, intimacy, and loyalty are clearly part of fellowship of arms. Without the duty of mutual defense, trust and mutual concern in war are empty. The duty of mutual defense is instrumental to and constitutive of fellowship-of-arms.

That soldiers need friendship and solidarity for their survival has been demonstrated in section 1. The goods of intimacy, shared experience, mutual concern, and especially loyalty are immediately tangible for comrades-in-arms. A preponderance of soldiers will begin forming close friendships with each other once they have entered the profession: valuable and duty-laden friendships may arise before war even breaks out, and so before the hazy questions of *ad bellum* justice enter the picture. Those bonds may become even deeper in war, and new bonds will form as well. For active-duty soldiers, things could not be otherwise. From the time they join the military, soldiers bond with one another over the shared hardships of basic training and boot camp. They together endure the physical and emotional tolls of training, getting yelled at by their superiors, initiation rites into ‘grunt’ status, and the overall adaptation to a uniquely intimidating

²⁸⁷ I remind the reader of my earlier caveat that some soldiers for whom friendship duties are binding do not like each other and so are not technically friends, but they can still have battlefield intimacy, trust, solidarity, and a strong sense of loyalty.

²⁸⁸ Quoted in Grossman (2009), p. 89

culture of rigid discipline, obedience, and toleration for violence. Adaptation to military culture, which distances young people from family life and the comparative ease of peacetime culture, requires making friends with one another as a matter of physical and psychological survival.

In addition to seeing each other through the hard times, comrades-in-arms get to share the good times.²⁸⁹ Together they can enjoy valuable experiences of teamwork, conquering personal limitations, and celebrating each other's achievements.²⁹⁰ Acts of heroism and supererogation seldom seen in peacetime are the hallmark of true friendship in combat, again both defining the friendship and strengthening it. J. Glenn Gray describes the combat bond as expanding "the boundaries of the self," such that soldiers "sense a kinship never known before."²⁹¹ Few of us who have never experience combat can appreciate the extent of loyalty between comrades-in-arms. "Men are true comrades," according to Gray, "only when each is ready to give up his life for the other, without reflection and without thought of personal loss."²⁹² Loyalty clearly permeates fellowship of arms, and battlefield intimacy is unlike just about anything else. Fellowship of arms is the paradigm of true friendship. But there that relationship does not and cannot exist without risk, personal sacrifice, and mutual protection.

Fellowship of arms is intrinsically valuable independently of its instrumental value. The battlefield intimacy, trust, mutual concern, and *valuable* shared experiences make them so. Soldiers have very weighty and stringent duties to protect each other, duties that are constitutive of that relationship. In special relationships generally, on my view, particular associative duties are constitutive of, and promote, particular *kinds* of special relationships. For example, duties of nurturance, guidance, and protection (among other things) are constitutive of the parent-child

²⁸⁹ Lazar (2013), pp. 13-14

²⁹⁰ Ibid

²⁹¹ Gray (1988), p. 45

²⁹² Ibid p. 46

relationship. Duties to converse, spend time together, provide solace and assistance in times of personal turmoil, and even duties to protect each other from threatening interlopers (among other things) are constitutive of close friendship. Duties to contribute to team efforts, duties of loyalty, and of mutual protection are constitutive of fellowship of arms: these true friendships cannot exist in the absence of these duties because the duties define the very meaning and character of that relationship. Given a profession fraught with peril and moral risk, soldiers' friendships must involve coming to one another's defense in the face of imminent and direct threats of harm. The duty of mutual defense is intrinsic to the true friendships of soldiers.

6.6 The Necessity of *Valuable Experiences*: Shared experiences and history are part of what makes a friendship valuable and thus a source of associative duties. Yet the foregoing discussion invites a charge of over-romanticizing fellowship of arms. The charge goes beyond the fact that soldiers can and do mistreat each other via, for instance, particularly perverse hazing rituals.²⁹³ Much more important to my argument is what to make of the friendships between unjust combatants. McMahan thus objects to Seth Lazar's defense of the duty to protect on the grounds that unjust combatants' friendships have

“Developed because of their having been in combat together. **But because their war is unjust, the bond has arisen because of their shared participation in an activity that is objectively wrong.** Indeed, they did wrong to get themselves into the situation in which the bond developed and now motivates them to kill people who are not liable to be killed... **The contaminated nature of the relation between them diminishes or even vitiates altogether its moral significance.**”²⁹⁴

²⁹³ I believe there is a case to be made in response to the hazing objection that could leave the value of soldiers' friendships intact. It concerns the importance of these rituals to securing investment and loyalty in the group. I lack the space to go over this account in detail, but there is strong psychological data supporting the basic idea that putting one's allies through seemingly pointless, humiliating, and even painful hardship—as in certain religious rites of passage or college fraternity 'hell week' rituals—is highly effective at securing individual investment in the group and thereby securing loyalty. Thus, Cialdini suggests that these “are acts of group survival. They function, oddly enough, to spur future society members to find the group more attractive and worthwhile. As long as it is the case that people like and believe in what they have struggled to get, these groups will continue to arrange effortful and troublesome initiation rites.” *Influence: The Psychology of Persuasion*, p. 90. The rest of the chapter on ‘commitment and consistency’ (pp. 57-113) is *fascinating* reading.

²⁹⁴ McMahan (2013), photocopy, my emphasis.

The reader might have glimpsed a possible occurrence of the genetic fallacy in the bold portions of this passage. To say no more of that, I will offer two lines of response to the objection that unjust combatants' friendships are "contaminated" or that their moral significance is altogether vitiated by the objective injustice of the war.

First, many soldiers will form bonds before they enter war; others will bond in war, but before they have made any contribution to the war. It is not always the case that bonds between unjust combatants are contaminated by their shared experience of wrongdoing. Moreover, unjust combatants may bond with each other in the course of participating in justified missions within a war that is *ad bellum* unjust. Those relationships need not be contaminated either. Thus, my first line response simply reiterates my argument from section 6.1.2: that even in unjust wars it is very important that soldiers remain motivated, effective, that there be unit morale and cohesion, and that soldiers' friendships are essential to those ends. Unless a military and its members are uniformly wicked—akin to a criminal gang—there will be compelling reasons for wanting soldiers to remain professionally effective and well-motivated even in unjust wars.

McMahan's point about the 'weak application' of the duty to protect, or what I call the duty of mutual defense, is correct in some cases. In consideration of the deeply offensive SS reunions in Europe, for example, Thomas Hurka has suggested that "a shared history of doing good or suffering evil can justify duties of partiality, a shared history of doing evil cannot... Some activities and states of people, most notably their doing good or suffering evil, call for a positive, caring, or associative response. Others, such as their doing evil, call for a negative or dissociative response."²⁹⁵ Curiously, Seth Lazar had already, in the paper to which McMahan's passage responds, qualified his version of the associative view by suggesting that "if the relationship's

²⁹⁵ Hurka (1997), p. 152.

internal qualities were developed through the **knowing infliction of wrongful suffering** on outsiders, then any capacity that relationship would otherwise have had to generate strong moral reasons may well be defeated.”²⁹⁶ I am on board with this important constraint on associative duties expressed by Hurka and Lazar.

Of course, it is undeniable that some soldiers are overwhelmingly culpable for their participation in an unjust war, or the war itself is so severely unjust, as the Nazis’ war on all fronts assuredly was, that their duties of friendship are frequently overridden by negative duties. In addition, German soldiers in the Wehrmacht, trophy killers in Vietnam, soldiers in Saddam Hussein’s Iraqi Republican Guard, and members of ISIS may form deep personal connections around their shared participation in atrocities and injustices; these are obviously not the sorts of shared experiences that generate any associative duties that could compete with general justice-based duties or duties of non-maleficence owed to civilians and other non-labile people. This is so because, to ground an associative duty, the shared experience must itself be *objectively valuable*; it is not enough merely that the participants’ happen to have bonded over the experience. As stated earlier, associative duties are not based simply on people’s feeling of obligation, but on objectively valuable characteristics of their relationship. Knowingly violating other people’s rights is without question an objectively *dis-valuable* form of shared experience, one which provides, following Hurka, reasons to disassociate rather than positive reasons of partiality. And the participants in these barbarous activities *do* know, even if they don’t care, that what they are doing violates international humanitarian law (since variations of the principles of distinction and humane treatment of prisoners of war had been implemented as early as the 1865 Lieber Code), they cannot credibly cite those intrinsically evil shared experiences as a ground of associative duties. The

²⁹⁶ Lazar (2013), p. 41, emphasis mine.

epistemic uncertainty that most commonly characterizes the combat experience is plainly absent when one is shooting unarmed people or beheading journalists.

Where there is at best little room for uncertainty, the excusing conditions—or, more accurately, *subjective permissions*—may be wholly absent or at least substantially weaker. Moreover, friendship is no justification for participating in activities that are already independently proscribed by the *in bello* principles of distinction and minimal force. My second response, then, will be to show that for most unjust combatants it is not the case that, in the course of defending each other, they are knowingly wronging non-liable people. I take this claim up in the next section.

6.7 The Relevance of Uncertainty and Risk: Consider the following domestic analogy. There is a police department that is, by and large, corrupt. Many but not all of its high-ranking officials embezzle funds, brutalize a racial and ethnic minority (a vivid possibility in the United States), accept bribes, and selectively send more patrolmen to wealthy neighborhoods for reasons of financial opportunism or nepotism. Some of the department's officers are abusive toward civilians, plant evidence to frame the innocent, and are providing protection for a local drug cartel. Other officers are unaware of, or cannot prove, this general corruption and simply wish to 'protect and serve'. Suppose the non-corrupt cops form close friendships with each other. What should we make of the value of these friendships? If the non-corrupt cops are largely unaware of the broader corruption or that they are participating in some of this corruption, or they have had no opportunity to do anything about it, it is hard to believe that the formation of their friendship within the corrupt police department serves to contaminate their friendships or vitiates their duties to protect each other. This is so because the moral character of the friendships, and the individuals involved in them, is largely insulated from the broader corruption. It is perfectly possible for an individual person to be non-culpable for his or her involvement in corrupt or unjust collective

efforts; for similar reasons, it is perfectly possible for friendships to remain uncontaminated by corrupt or unjust collective efforts as well.

The same thing is often true of individual soldiers and of the friendships they form. This is so not only because soldiers form bonds before the outbreak of hostilities, but because they are not typically in a position to know or form reliable beliefs about the *ad bellum* character of those hostilities, or about the ways in which war's *ad bellum* character shifts in the course of its prosecution. Nor are they typically in a position to reliably assess the liability or non-liability of the soldiers who threaten them and their comrades: war is simply not the place for assessments of a threatening agent's intentions, personal history, and individual causal contributions (among other factors potentially relevant to liability). None of this is accidental to war either: uncertainty is a structural feature of large-scale conflicts, as argued in chapter 4, and it serves to radically diminish individual soldiers' fault for participating in an unjust war. Perhaps unjust combatants "did wrong" in getting themselves embroiled in the conflict, in an objective sense of wrongdoing; but in the usual case they did not *knowingly* do wrong in getting themselves involved. And it is knowing wrongdoing that really serves to contaminate an individual's character as well as potentially morally stain his or her friendships.

The factors that would serve to morally stain the friendships between soldiers go beyond determining the objective *ad bellum* character of the war in which they participate. Non-culpable ignorance of *ad bellum* injustice would morally insulate their friendships from that broader injustice: we judge the moral value of the friendship similar to how we judge the value of an individual soldier's character, and that is in large part a function of what they can reasonably be expected to know concerning *ad bellum* morality, or even the normative aims of particular missions. It is not, however, reasonable to expect soldiers to know about the *ad bellum* character

of war before its outbreak or in the course of its prosecution. Unjust combatants, and the friendships formed before and during war, are therefore quite similar to the good cops in the corrupt police department. In both cases, as Walzer says in his defense of MEC, “it is precisely the recognition of men who are not criminals.”²⁹⁷

But if the *typical* case is ignorance of *ad bellum* justice, it is admittedly not *always* the case. For some militaries are much more like criminal gangs than morally heterogeneous police departments, and indeed known to be so. The members of criminal gangs know, or have overwhelming reasons to suspect, that their associates are criminals and that they are contributing to immoral ends. Of course, members of criminal organizations can bond and, from the perspective of participants in those relationships, *feel* themselves to have stringent friendship duties; but criminal organizations have no right to exist in the first place, much less to foster friendships which revolve around and are formed by virtue of criminal activity. There certainly can be *apparent* duties constitutive of these sorts of defective relationships. Members of the mob, for example, may share an ethos of ‘not snitching’ or not talking to the police; they may endorse imperatives to intimidate, beat up, or kill outsiders for mere verbal sleights against the organization; or they may have initiation rites which involve the murder of an innocent outsider. Whatever genuine associative duties might arise in a criminal gang, they are much more limited than their members believe. It is thus important to recall my earlier point, following Hurka, that associative duties are not based merely on a friend’s *feeling* that he is obligated. It is the objective value of the relationship that generates genuine duties. Shared experience must *actually* be valuable, not merely *valued by the participants*.

²⁹⁷ Walzer (2000), p. 36

Participation in objectively unjust, or corrupt, aims is not by itself sufficient to contaminate the character of an individual, or the character of a friendship either; the participants' awareness that they participate in a criminal enterprise is also relevant to that assessment. We assess the good cops in the corrupt department much differently from the members of the mob. In the first place, police departments have a right to exist for legitimate law-enforcement functions; criminal organizations do not. Second, members of the mob *know* it is a criminal organization, which leaves a serious moral stain on the members and their friendships. As McMahan might say, the objective immorality of the criminal organization at least weakens supposed protective duties; I would add that their knowledge of the organization's criminality is probably decisive in vitiating those duties. And assuredly many of the associative duties the criminals believe themselves to have are already ruled out by the intrinsically immoral character of their content: initiation killings, thwarting the rule of law, bullying store owners, and failing to do one's part to bring criminals to justice are morally impermissible no matter who does them. (Similarly, knowingly killing unarmed civilians or prisoners of war is independently ruled out by the *jus in bello* rules; friendship is no justification.) The fact that the mob members bond over these things is irrelevant to the demands of morality, associative or otherwise. Nor does uncertainty about the collective aims of the organization lower the epistemic bar for triggering criminals' supposed duties of mutual defense—for example, when they are in a shoot-out with the police. Indeed, recognition of the (internal) obligation 'not to snitch' indicates precisely that these men know that what they are doing is illegal and immoral. True friendships may require taking on moral risks in the name of loyalty, but where one *knows* one's targets to be non-liable, we are no longer in the realm of risky killing but in the realm of certain wrongdoing. It is the former that is primarily relevant to the duty of mutual defense.

It is very unlikely that you (or a soldier) may kill a person whom you know to be non-liable even in order to protect a loved one. To do so would mean knowingly violating another person's most vital moral rights. To knowingly kill a non-liable person is worse than doing so on the basis of non-culpably formulated beliefs, however.²⁹⁸ Both killings are of course objectionable—even objectively impermissible—but the first case shows a particularly objectionable disregard for the non-liable person's moral status.²⁹⁹ Thus, Seth Lazar writes, “treating innocent victims as a means like this is always *pro tanto* wrongful. But there are degrees of moral seriousness. How you instrumentalize your victim and your reasons for doing so determine the severity of that wrong.”³⁰⁰ The duty to not knowingly kill the non-liable is among the most stringent negative duties. However, there are further negative duties we have toward others which are operative in circumstances in which we cannot attain the morally relevant knowledge, or cannot form reliable beliefs about a threatening person's innocence or liability. In such conditions of uncertainty where people's vital interests are at stake, there is a negative duty to not expose those persons to excessive risks of being wrongfully killed or injured. *This* negative duty, rather than the negative duty to not knowingly kill the non-liable, is primarily at issue in the deeply uncertain context of war. Defensive killing in war is almost always a matter of assessing moral risks under uncertainty.³⁰¹

Return to the hypothetical case with which I began this chapter. It is not simply that your friend or loved one is in grave peril and you are in a position to do something about it, but that you are deeply uncertain about who if anyone is in the right. I submit that you are permitted, in these urgent circumstances, to forcibly defend your loved one even if it turns out, unbeknownst to you, that the individual to whom you direct that defensive force is objectively non-liable. Provided you

²⁹⁸ Lazar (2015B); Lazar (2015C), pp. 57-8 & 75.

²⁹⁹ Lazar (2015C), pp. 56-100; see also Lazar (2015B), esp. p. 97.

³⁰⁰ Lazar (2015C), p. 59.

³⁰¹ *Ibid*, p. 75.

are not culpable for this conflict arising, you have a subjective permission—that is, a permission to act on what it is reasonable to believe in the circumstances—to use necessary force to protect and preserve a close relationships that is in itself deeply and objectively morally significant. In conditions of uncertainty, following the discussion of chapter 5, your decision-making turns on an assessment of the probable risks of different courses of action. What makes the difference in this case is the moral importance of your relationship: since you are uncertain about the liability and innocence of the conflicting parties and the moral character of the conflict, you are choosing between a *certain* risk of failing to protect a close associate and an *uncertain* risk of harming a potentially non-labile, but threatening, non-associate. This uncertainty, combined with the urgency of the circumstances, and the probable risk to your loved one, lowers the epistemic bar for assessing the conflicting parties' liability or lack of liability. Given the absence of reasonable alternatives and non-culpable ignorance on your part, you are permitted to protect your close friend or family member. The potential risk of failing to do so is simply too significant.

The circumstances of this hypothetical case roughly capture circumstances which are pervasive in combat. Note that what I am claiming is not that uncertainty or non-culpable ignorance ground *justifications* or *permissions*; but nor am I making a claim about *excusing conditions* either. My claim is rather that uncertainty and the moral importance of friendship lowers the epistemic burden imposed upon soldiers in ascertaining a threatening agent's liability or non-liability. In turn, the factors of uncertainty and friendship lower the epistemic burden of determining the prospective moral risks involved in forcible defense. Soldiers are entitled to take a greater risk of committing wrongs, an entitlement which they probably would not have in the absence of uncertainty and the special relationship. The fog of war, in my view, already diminishes

the epistemic responsibilities of soldiers; the importance of protecting morally important relationships diminishes them further.

Acknowledging the uncertainty and ignorance endemic in war, Vitoria, Grotius, and McMahan agree that the safer course should be followed. For Grotius and McMahan, this involves not participating in war. But what if the soldiers making the decision are already participating in war? Here there are potentially very grave moral risks involved with unilateral surrender, defection, or deliberately failing to protect one's comrades-in-arms: non-participation may then be very risky, as Vitoria held. There are moral hazards that Vitoria does not discuss, however. The considerations adduced in section 1 regarding the possibility of just aims in an unjust war, and the moral importance of friendship even among unjust combatants expand the risks of non-participation. For a friendship's intrinsic moral significance can also remain intact independently of *ad bellum* considerations. Unjust combatants' shared history need not be one of deliberate wrongdoing. In the hypothetical domestic case, you are uncertain whether your loved one is in the wrong; but you *are* certain that if you do nothing, he or she will be seriously injured or killed. In war, soldiers cannot typically be certain who is in the wrong; but they *are* certain that if they do nothing in the face of imminent and direct threats, their comrades-in-arms may be seriously injured or killed. By abstaining from force, a soldier avoids risking one serious moral wrong with the near-certain result of another.

That the value of shared experience and of soldiers' friendships need not be contingent on the injustice of a military's collective efforts is not without exceptions. The duty of mutual defense does not apply to all soldiers, or to all armies: my thesis lacks the full generality of Walzer's more ambitious MEC. This is so because some armies are not merely *analogous* to the criminal gang described earlier, but virtually *are* such gangs. Nazis in the Wehrmacht, the Iraqi Republican

Guard under Saddam Hussein, and ISIS are paradigm examples. Some squads or platoons within a military that is not, as a whole, a criminal organization can turn rogue and transform themselves into criminal gangs via their atrocities—as was the case with William Calley’s platoon of slaughterers at My Lai. The transformation into criminal-like gangs can also occur with squads and platoons who are members of armies participating in just wars. One does not have to condone the Nazis to find it seriously objectionable for renegade bands of allied soldiers to torture or kill disarmed or wounded German soldiers for revenge or sadistic thrills. As Nietzsche observes, “Whoever fights monsters should see to it that in the process he does not become a monster.”³⁰²

Where Walzer’s MEC makes a general claim about *all* soldiers, in *all* militaries, in *all* wars: that they possess ‘the equal right to kill’; my moderate thesis makes a *qualified* general claim about *most* soldiers, in *most* militaries, in *most* wars; that they possess the right of mutual defense. In domestic life there are limits to what our associative duties permit us to do; it is similar in war. But where uncertainty is pervasive, the failure to come to the defense of a friend in peril risks a very serious moral wrong: the wrong of betraying a loved one, which, as argued in 6.2.2, constitutes a serious wrong of disloyalty. The gravity of that potential risk lowers the epistemic bar for imposing alternative risks of wrongdoing on threatening non-associates who, for all the soldier is in a position to know, may or may not be liable.

6.8 Conclusion: Fellowship of arms is a morally very important relationship, instrumentally and intrinsically. Unit cohesion and fighting morale are impossible without it; and without these things, there is a much lower probability of success in just wars and justified missions. However, fellowship of arms is not possible without the duty of mutual defense.

³⁰² Nietzsche (1989), p. 89 [‘Epigrams and Interludes’, 146]

But, in addition to friendship's instrumental value, the relationship's very meaning and value is constituted by the duty of mutual defense (among other associative duties), which arise from friendship goods of intimacy, mutual concern, and shared experience. These friendship goods need not be contaminated, nor the corresponding associative duties vitiated, by the objective injustice of a military's collective efforts. To show that these relationships are contaminated, we would have to show that participants are culpable for their participation or have formed their friendships around knowingly wronging innocent people, as is the case in criminal organizations. While some armies and some soldiers are so deeply morally tainted as to vitiate their protective duties, this is frequently not the case. Rather, the liability of a threatening agent is almost always uncertain, and given the structural uncertainty of war, defensive action most often poses a potentially grave *risk* of unjust harm rather than the *certain commission* of unjust harm. But, on the other side, *not* defending one's comrades does involve a near-certain wrong of disloyalty: when in doubt, protect a friend in peril.

A legal policy granting unjust combatants a right of mutual defense can thus be justified on more than merely pragmatic grounds: the foundation of this policy is the moral importance and associative duties of friendship. Policy-based considerations aside, in any circumstances of deep uncertainty about objective justice in which our friends face imminent and direct threats of harm, true friends are permitted to defend each other.

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