

More Important Than Your Life:  
War, Individualism, and Justice

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## Abstract

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Modern systematic just war theory since the 16<sup>th</sup> century has been committed to both individualism and anti-individualism at the same time. This is revealed after it is recognized that modern just war theory has two inconsistent components. First, there is a theory of public war wherein the political sovereign has unique moral responsibility for the justice of war while political subjects can be obligated to serve in war upon command. Second, there is a theory of discrimination wherein it is permissible to deliberately target combatants waging an unjust war but it is always impermissible to target the innocent. These two components of just war theory posit two conflicting views of the distribution of responsibility for just war within political communities. This conflict is the result of the confused place individualism has in modern just war theory. The theory of public war has its roots in the anti-individualist theories of justice in Augustine and Aquinas. Three attempts at reconciling the theory of public war and the theory of discrimination with individualism are examined. These are the theories of Vitoria, Grotius, and Walzer. Each of these attempts fails as the theory of public war is inconsistent with

individualism. The only theory of just war that can be consistent with individualism is a theory of private war wherein all participants in war are responsible for the justice of war and no one is obligated to serve in war upon command. McMahan's theory of just war is an example of such a theory. The individualist theory of private war has troubling implications for political society, however, in that it renders the realization of political authority impossible. It is concluded that anti-individualist theories of just war ought to be considered and one such theory is articulated though not systematically defended.

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## Introduction

It is an old photo, very black and  
very white. One woman  
lifts up her heavy skirt as she runs.  
A man in a white jacket, his hands  
tied behind his back, runs,  
his chin stuck out. An old woman  
in massive black turns and looks behind her.  
A man throws himself onto the pavement.  
A child in heavy boots is running  
but looks back over his shoulder  
at the black and white heap of bodies.  
The wide grey stone square  
is dotted with fallen inky shapes  
and dropped white hats. Everything else is  
heaving away like a sea from the noise we  
feel in the silence of the photograph  
the way the deaf see sound: the terrible  
voice of the submachine guns saying  
*This is more important than your life.*

“Nevsky Prospekt”  
by Sharon Olds<sup>1</sup>

This dissertation began with a rather simpleminded suspicion. Although just about every discussion of justice and war these days takes the rights of equal individuals as paramount, when conventional warfare is observed it is difficult not to see exhibitions of extraordinary commitments to political and cultural ways of life, of group solidarity, of subservience to authority, and of self-sacrifice by its participants. This is to say that it is hard to see actual war as being guided by a concern for individuals and their equal rights. The dying and killing of war seems typically to be driven by a concern for supra-individual things, for peoples, nations, common lives, ways of life, or other collective entities that are deeply felt to be worth sacrificing

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<sup>1</sup> in *The Dead and the Living* (New York: Alfred A. Knopf, Inc., 1984), p. 9.

individuals for. Rather than being about individual persons, war seems typically to be about things thought to be more important than persons.

Even if this observation about war is true, it might be that it merely reveals how insane war typically is. Nonetheless, the observation motivates an important question. Should war be evaluated by appeal to the equal rights of individuals at all? Or, should we think about justice and war in entirely different terms?

It is this question that motivates this dissertation. Although I do not definitively answer this basic question, I aim to make trouble for individualist accounts of justice and war. To do this, I undertake the project of examining the history of systematic just war theory with an eye to the place of individualism within the theory. I aim to understand how the individual has been understood in the history of just war thought and explore its implications.

My conclusions are interesting and troubling. Systematic just war thought since the 16<sup>th</sup> century has been of two minds regarding the individual in war. On one hand, the theory has defended the view that the individual can be used and sacrificed for supra-individual ends. On the other, the theory has defended the view that the individual can never be used and sacrificed for supra-individual ends. At one and the same time, modern just war theory has held that the individual can be a mere instrument of their political community and that the individual can never be a mere instrument of their political community.

Furthermore, I find that any just war theory that is consistently individualistic must commit itself to views that have very far-reaching implications for political society. In particular, a truly individualist just war theory entails the rejection of realized political authority. Certain features that are, or are thought to be, essential to political authority are necessarily undermined by individualist just war theory.

Before elaborating, I must define some terms. The view I will refer to as Individualism is the view that certain basic interests or rights of individuals are the supreme values of the theory of justice. These interests/rights include life and liberty. Crucially, all individuals equally share these interests/rights such that none are given greater regard than others. Whatever value or rights supra-individual things (e.g., commonwealths, common lives, or political communities) have it is derivative from or secondary to the value of these equal basic interests of individuals. In other words, a supra-individual thing, if it has ethical significance, either gets it by appeal to the rights/interests of individuals and in that sense has an instrumental value or, if it has an intrinsic value, that value is not as significant as the rights/interests of individuals. An entailment of this view is that the interests or rights of supra-individual things cannot override the basic interests of individuals. The basic interests of individuals serve as constraints on the form and conduct of supra-individual things, especially political societies. In this regard, it might be useful to think of Individualism as the perhaps more familiar concept of “normative individualism.”

Often, Individualism is derived from an ontology that considers the fully developed individual person to be conceptually prior to their community or culture. This is most clear in early modern social contract theory which understands the political community as a voluntary scheme entered into by individuals in their natural condition, or the state of nature. This natural condition is a pre-political condition wherein all people, or at least men, take care of themselves in self-sufficient households. The political community is here understood as a creation of individuals that is not, strictly speaking, an essential part of their nature.

A number of contemporary political theorists have denied this individualist ontology and nevertheless defended Individualism.<sup>2</sup> I want it to be clear at the outset that my concern in this dissertation is with Individualism, not the ontology from which it arose in early modern thought. The problems I will uncover for Individualist theories of just war are indifferent to these ontological questions. The ultimate issue here is with Individualist theories of justice, not individualist social ontologies. Thus, even a theorist who denies that people are naturally independent and self-sufficient individuals yet accepts Individualism will be implicated in my argument.<sup>3</sup>

By contrast, the view I will refer to as Anti-Individualism holds that the basic interests of supra-individual entities, usually political communities, can have intrinsic value and this value can trump the value of privately conceived individuals such that the basic interests of individuals can be sacrificed for the sake of these supra-individual entities. Here, individuals may (or may not) have equal intrinsic value but this value is not necessarily supreme in the theory of justice. Rather, for Anti-Individualism, certain supra-individual things have supremacy in the theory of justice.

Anti-Individualism also originated in a certain social ontology. This ontology conceives of the political community as prior to the fully developed individual person. This is clearest in the ancient views of Plato and Aristotle. On these views, people are naturally members of a political society and cannot flourish, either materially or morally, without their community. The political society is not a mere voluntary scheme but a part of the natural function, the *telos*, of humanity. For this reason, the individual is seen as literally a part of a political body similar to

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<sup>2</sup> The most famous example is Rawls, John, *Political Liberalism* (New York: Columbia University Press, 1993).

<sup>3</sup> This point will be made clearer when Rawls' theory of just war is considered in the conclusion.

the way a limb is a part of an individual body. This political body has its own interests and these interests have priority over the interests of the individual privately conceived.

Here again, however, Anti-Individualism as such is distinct from these ontological views. However it is derived, Anti-Individualism denotes a distinct view of justice and this view is the ultimate concern here, not the ontological issues.

I should note that a number of theorists have attempted to chart a course between these two views. I have in mind the recent radical democratic theories of political authority of Carole Pateman and Carol Gould. Pateman, for instance, articulates a theory wherein the equal rights of individuals are the basis of justice, yet understands the individual as a social or “non-abstract” thing.<sup>4</sup> Similarly, Gould, takes the equal rights of individuals to be paramount but she understands individuals as essentially social, or as she calls them “individuals-in-relations.”<sup>5</sup> I will not directly consider how these views enter into the problems with just war theory I uncover.

To put the Individualist/Anti-Individualist distinction to use, the view to be developed in the chapters below is that modern just war theory is simultaneously both Individualist and Anti-Individualist. This is ultimately revealed by the fact that modern just war theory attempts to defend two inconsistent things. On the one hand, the theory defends what Grotius calls public war. This is the view that responsibility for the justice of war belongs uniquely to the political sovereign and, with some exceptions, soldiers are morally obligated to serve in war upon the command of the sovereign. On the other hand, the theory defends a particular theory of Discrimination in just war wherein deliberate attacks against innocent people are prohibited yet deliberate attacks against combatants are permitted because combatants are not innocent.

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<sup>4</sup> See her *The Problem of Political Obligation* (Berkeley, CA: University of California Press, 1979), esp. chs. 7 and 8.

<sup>5</sup> See her *Rethinking Democracy* (New York, NY: Cambridge University Press, 1988), esp. chs. 2 and 3.

These views posit two conflicting accounts of the responsibilities of soldiers. For the theory of public war, soldiers are not responsible for ensuring they only participate in just wars. Rather, soldiers are obligated to serve in war upon the command of their legitimate political authority independently of the justice of the war. Thus, a soldier can participate in an unjust war yet be personally acting justly.

For the theory of Discrimination, however, a soldier participating in an unjust war can be deliberately attacked because he is personally acting unjustly. On this view, soldiers are responsible for ensuring that they never participate in unjust wars and ought only to participate in just wars regardless of the commands of their legitimate political authority. As a participant in an unjust war, a soldier is thus wrongly participating in an unjust injury that gives others just cause for war against him.

In as much as modern just war theory is committed to both these views it is committed to the views that soldiers are not responsible for the justice of the wars they participate in and that soldiers are responsible for the justice of the wars they participate in. This is not merely a case of conflicting obligations as when a person cannot meet one obligation without thereby violating another. Rather, this is a case of incompatible moral responsibilities with respect to the same thing being given to soldiers because soldiers are understood as occupants of two incompatible moral roles in their political communities. On this view, good soldiers are at once instruments of their political authority and fully autonomous individuals. As instruments of their political authority they are not responsible for the justice of war. As autonomous individuals they are responsible for the justice of war. There is thus an incoherent understanding of the soldier and his moral situation in modern just war theory. For this reason, I refer to modern just war theories

as Dualist theories by which I mean they are theories that distribute responsibility for the justice of war within a political community in two distinct ways.

This Dualism reveals modern just war theory's inconsistency regarding Individualism and Anti-Individualism because the theory of public war entails Anti-Individualist commitments whereas the theory of Discrimination entails Individualist commitments. Although a number of philosophers have tried to reconcile them, the theory of public war is inconsistent with Individualism. A truly Individualist theory of just war must give up on public war and offer instead an exclusively private theory of just war. A private theory of just war is, following Grotius again, a theory that conceives of war as fundamentally a relation between autonomous, equal individuals who are not obligated to obey the orders of any other and who are individually responsible for the justice of the wars they participate in.

To show this, I reveal the historical origins of the theory of public war. In the first chapter, the just war theories of Augustine and Aquinas are examined. These theorists derive just war theory from decidedly Anti-Individualist theories of justice. In particular, both Augustine and Aquinas defend the obligation of soldiers to serve in war upon command independently of the justice of the war by appeal to their Anti-Individualism. Thus, the theory of public war originates in an explicitly Anti-Individualist theory. These theories do not provide a theory of Discrimination in war however.

In chapter 2, we examine the first systematic Dualist just war theory. This is the early 16<sup>th</sup> century theory of Francisco Vitoria. Vitoria defends public war by appeal to an explicitly Anti-Individualist theory of justice akin to Aquinas'. However, unlike Aquinas, Vitoria attempts to articulate a theory of Discrimination in just war that permits the deliberate targeting of combatants yet prohibits the deliberate targeting of the innocent. For Vitoria, combatants in an

unjust war may be deliberately attacked because they are wrongly participating in an unjust war. This view is based on an Individualist conception of justice and war. However, this view contradicts his view that combatants, or, more specifically, soldiers, are obligated to participate in war upon command regardless of the justice of the war. Thus, Vitoria holds that soldiers are both not responsible for the justice of war and are responsible for the justice of war. These two views are derived from his Anti-Individualist and Individualist commitments respectively.

Chapter 3 examines the first attempt to ground a systematic just war theory in an Individualist theory of justice. This is the early 17<sup>th</sup> century theory of Hugo Grotius. Like the previous theorists, Grotius defends a theory of public war. Unlike previous theorists, Grotius attempts to defend public war by appeal to the natural rights of individuals to life, liberty, and property. Grotius argues that the obligation of political subjects to serve in war upon command for the public good is based in an explicit or tacit contract that individuals freely enter into in the state of nature. I argue that his contractarian defense of public war fails because an individual cannot alienate his responsibility for abiding by natural justice to another nor can an individual's natural right to protect himself from unjust injury be trumped by the authority of another. In order to justify public war, Grotius must contradict his commitment to Individualism. Indeed, Grotius' theory of Discrimination in just war recognizes this in that it asserts that soldiers ought not to serve in any unjust war regardless of the commands of their sovereign. According to the theory of Discrimination, soldiers are not obligated to serve in war upon command and are responsible for the justice of the wars they participate in. This is why it is permissible to deliberately attack soldiers fighting an unjust war. Grotius' theory is thus another inconsistent Dualist theory.

Chapter 4 examines yet another incoherent Dualist theory. This is the more recent theory of Michael Walzer. Like Grotius, Walzer attempts to justify his theory in an Individualism and still produce a theory of public war. However, in defense of public war Walzer actually appeals to an Anti-Individualist theory of justice. He thus fails to reconcile Individualism and public war. Still, Walzer defends a principle of Discrimination in war that is consistent with Individualism. His theory of Discrimination, however, entails the denial of the obligation to serve in war upon command and thus contradicts his commitment to public war. Walzer's theory is thus based in both an Anti-Individualism and an Individualism.

In Chapter 5 I argue that Individualism and public war are inherently contradictory and that the only kind of just war theory consistent with Individualism is a theory of private war. Public war conflicts with Individualism in as much as public war views soldiers as instruments of political authorities. For Individualism, no person can be the instrument of another. Therefore, the only view of just war that is consistent with Individualism is the view that all participants in war, including soldiers, are under no obligation to serve upon command and are fully responsible for the justice of the wars they participate in. This is a theory of private war and an important example of this view is found in the recent work of Jeff McMahan.

It is argued however that the Individualist rejection of public war has troubling consequences for political authority. Three things that are commonly thought to be essential to political authority are made unjustifiable by Individualism. First, political authority cannot have the authority to use the collective force of the community for the sake of its members. Second, political authority cannot have the authority to violently enforce the public will. Third, political authority cannot have a monopoly on legitimate violence. This limits political society to a quasi-

anarchist association. McMahan's work is used to reveal these implications of Individualist just war theory.

Though this does not entail a rejection of Individualist just war theory, it should open the discussion to alternatives. I close with a brief discussion of the prospects for an Anti-Individualist theory of just war and show how such a theory can coherently produce a plausible theory of Discrimination in just war. To do this, Rawls' views regarding just war are discussed.

In sum then, my conclusion is that modern systematic just war theory is in important respects inconsistent with Individualism. A coherently Individualist theory of just war requires crucial reforms to the content of just war theory. However, these reforms come at a cost. Individualist just war theory entails rejections of conventional views about political authority. For this reason, we ought to consider alternatives to Individualist just war theory. I propose, though don't systematically defend, one such alternative in the belief that I have shown that it deserves a place in the ongoing discussion of justice and war.

## Chapter 1

### The Classical Theory: Augustine and Aquinas' Just War

#### Introduction

This chapter analyzes the just war theories of Saints Augustine and Thomas Aquinas. These two men are justifiably seen as founders of just war theory. For this reason, understanding their approach to the subject will help us understand the origins of just war theory. Our analysis will pay particular attention to the theories of justice these thinkers employ to defend their views of the just war. As should be expected, their theories of just war are products of their theories of justice. The most basic goal of this discussion is to show the systematic relationship between their theories of justice and their theories of just war. Though, as we will see, there are substantive differences between the two of them, for our purposes their similarities are what matter. Thus, I will refer to their systematic views of justice and war collectively as the Classical Theory.

It is crucial to the argument of this dissertation that it be demonstrated that the origin of systematic just war thought is found here in theories of justice that are decidedly Anti-Individualist. Neither Augustine nor Aquinas is an Individualist. That is, they do not believe that justice is founded on the private interests of individuals viewed as equal private persons. On the contrary, for Augustine and Aquinas people are most appropriately viewed as unequal parts of hierarchically ordered political communities. These political communities, or commonwealths, have interests of their own as political bodies. Augustine and Aquinas refer to this interest as the common good. This interest is paramount in their theories of justice and trumps the private interests of individuals. Individuals are obligated to serve the common good even at the expense of their interests as abstract individuals. For Augustine and Aquinas, the responsibilities of

individuals are based on a teleological conception of justice wherein the right is conduct that aims at constituting and preserving the good life of hierarchically ordered political communities and the peace between them. The different social roles and ethical responsibilities that individuals have are determined by what is required to constitute and protect the common good and inter-communal peace. Thus, for the Classical Theory, political communities are ethically prior to their individual members. Revealing this Anti-Individualist origin of just war theory will help us understand the subsequent history of systematic just war thought and the foundational problems the introduction of Individualism produces that will be uncovered in subsequent chapters.

It is also vital to the argument of this dissertation that it be revealed how particular features of Augustine and Aquinas' just war theory are products of their Anti-Individualism. The features that are of particular interest here are either features that subsequent theories will adopt and attempt to defend on Individualist grounds or they are problems that subsequent theories will try to correct by appealing to Individualism.

There are three such features that deserve mention here. The first is Augustine and Aquinas' view of political authority over war and their attendant unequal distribution of responsibility for the justice of war between political authorities and their subjects, especially soldiers. For Augustine and Aquinas, legitimate political authorities are uniquely fully responsible for ensuring that their wars are just while their subjects, especially soldiers, are obligated primarily to obey commands from their authority pertaining to war. Soldiers are seen as servants of their political community and its authority who are obligated to fight and risk their lives upon command largely independently of the justice of the wars they are ordered to fight in. Augustine and Aquinas justify this conception of political authority and the distribution of

responsibility for war by appeal to the natural ordering of political communities, or the common good. For them, political authorities are uniquely responsible for just war and soldiers are instruments of their authority because such a relationship is either a constitutive part of the naturally just political community or because such a relationship is necessary in order to realize and maintain the naturally just political community. As stated above, this naturally just political community is a particular harmonious relationship between parts of a political whole. Thus, Augustine and Aquinas' view of authority over and responsibility for war is based in their Anti-Individualism. Subsequent just war theorists (e.g. Grotius) will refer to this view of political authority and war as "public war" and attempt (though fail) to give it an Individualist justification.

Another relevant feature of Augustine and Aquinas' theories of just war is the ultimate value they ground the justification of war in. For the Classical Theory, war and all the killing and destruction of people and property that it entails cannot be justified by appealing to the interests of mere private individuals. Augustine and Aquinas prohibit war waged by private individuals for private ends. What justifies war, for them, are not the interests of abstract individuals, but the common good of political communities. For Augustine and Aquinas, just war is exclusively a public act done for the public good. We may deliberately kill people and attack communities only when it is done for the sake of the common good of all relevant communities and in response to unjust harms to the common good. A political community may use its own members to protect itself in war and may kill the members of other communities only for the sake of the proper social and political order. In a just war, individuals, even innocent individuals, are deliberately sacrificed for the common good. This reveals how antithetical the values of the Classical Theory of just war are to Individualism. Subsequent Individualist just war theories will

have to appeal to fundamentally different values to justify war, i.e., the basic interests of private and equal persons. Ultimately, this move will to prove to undermine the possibility of public war and reduce just wars to exclusively private affairs between individuals for private purposes.

The last relevant feature of Augustine and Aquinas' theories of just war is the absence in their work of an elaboration of substantive constraints on the conduct of just war, or a theory of *jus in bello*. Both Augustine and Aquinas are focused primarily on developing principles that constrain the resort to war, or the *jus ad bellum*. They fail to provide detailed guidance as to how a just war ought to be waged. Most troublingly, they do not offer any principled discussion of just Discrimination in war: they do not tell us who may and may not be deliberately attacked in war. This is indeed a major shortcoming to their thought. It is relevant for our purposes because it will be shown in the following chapter that it was the development of a theory of Discrimination in war that led to the introduction of Individualism into just war theory. This will bring up the question of whether an Anti-Individualist theory can produce a plausible principle of Discrimination at all. If we want a plausible theory of just war, must we turn to Individualist theories of justice? Ultimately, I will argue that we can develop a plausible principle of Discrimination on Anti-Individualist grounds, although these grounds will be decidedly different from the Classical Theory's. The relevant concern in this chapter, however, is that Augustine and Aquinas leave the theory in need of a principle of Discrimination and this fact will help us understand the subsequent history of just war thought and the turn to Individualism.

Part I: Saint Augustine

Saint Augustine is often called the father of just war theory.<sup>1</sup> Like any such title, it is partly true and partly false. In one sense, the title is clearly well deserved. Though many philosophers discussed war prior to Augustine, these discussions were either not remotely systematic, as in the terse references to specific types of right conduct in war by Plato and Aristotle, or, these discussions condemned all war in no uncertain terms, as in the early Christian pacifists. Augustine, at least within the Western Christian tradition, is the first to attempt to offer a roughly comprehensive set of ethical guidelines for the appropriate engagement in war and to attempt to ground these guidelines in a systematic theory of justice. Augustine was no pacifist and he attempted to show that there are universal rules of just war. In this sense, he can justly be thought of as the father of the field of just war thought, at least, again, in the Western Christian tradition.

But, taken in another sense, the title is more controversial. If the thought is that Augustine is the father of orthodox just war theory, that is, that the form and content of contemporary just war theory is, at bottom, the theory that Augustine himself offered, then there is surely room for dispute. Certainly, some of the specific things Augustine holds to be permissible or righteous in war are no longer a part of just war theory. The notion that just war is a legitimate punishment of the enemy for his wrongdoing, or the idea that conquering an enemy in a just war gives one a right of permanent sovereignty over the enemy, for example, though both are central to Augustine's view, are beyond the pale today. Thus, simply looking at the content of just war theory, it can be hard to see Augustine's fingerprints.

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<sup>1</sup> For discussions of this description of Augustine see Christopher, Paul, *The Ethics of War and Peace*, second edition (Upper Saddle River, NJ: Prentice Hall, Inc., 1999) p. 29; Holmes, Robert, "St. Augustine and the Just War Theory," in *The Augustinian Tradition*, edited by Gareth Matthews (Berkeley, CA: University of California Press, 1999), pp. 323-345; and Mattox, John Mark, *St. Augustine and the Theory of Just War* (New York, NY: Continuum, 2006) pp. 1-4.

Yet, if we look at the form of contemporary just war theory, we will find some clear connections with Augustine's theory. In the course of this dissertation, I will argue that, from this perspective, the pedigree of just war theory is in some very important ways Augustinian. In particular, Augustine's view of the distribution of moral responsibility for the justice of war within a political community and his view of the obligations of soldiers will help us understand subsequent systematic just war theories and the emergence of Dualism. Dualist just war theories, again, are theories that distribute moral responsibility for the justice of war among the members of a political community in two distinct ways. Augustine is not a Dualist. For him, political leaders and soldiers are in the same relation of authority and responsibility with regard to all aspects of war, both its initiation and its conduct. Later Dualist theorists (including some of our contemporaries) will accept Augustine's view of the sovereign-soldier relation with one hand yet deny it with the other.

Among other things, what I wish to make clear in this explication of his theory is that Augustine's view of authority and responsibility for just war is a product of the peculiar, systematic theory of justice he relies on in its development. This theory of justice is decidedly Anti-Individualist. Augustine's theory is a teleological one shaped around a vision of the good that places membership in harmoniously composed, independent monarchical political communities at its apogee. In this respect, Augustine's theory is similar to Plato's. Augustine's theory holds that the private interests of individuals can, indeed, ought to be subordinated to the common good of their communities and that supra-individual entities (i.e. commonwealths) have intrinsic and supreme value. For Augustine, in certain circumstances, political communities may kill people in war and may sacrifice their soldiers in war for the sake of the community's interests. Simply put, war is justifiable because the value of commonwealths trumps the value of

privately conceived individuals. Understanding Augustine's theory of justice and how it produces these views of the just war will illuminate the relation between the theory of justice and Dualist theories more generally and serve as the first step in understanding the theoretical inconsistencies between Dualist theories and Individualism.

As we will see, however, there is some difficulty in arguing that Augustine adheres to a teleological theory of justice based on a singular Divinely inspired vision of the good. In some respects, my reading runs counter to most interpretations of Augustine's theory of justice. These mainstream readings tend to place Augustine closer to the political realist tradition in the vein of Hobbes than to the Platonic tradition.<sup>2</sup> From my perspective, this is a mistake. Seen within the whole scope of his thought, Augustine is at once a kind of political realist and a Platonist. That said, when it comes to the defense of his vision of the just war, he consistently appeals simply to his Platonic views. Thus, it is this strand in his thought that is most relevant to understanding his theory of the just war.

#### Augustine's Just War

To begin, Augustine's rules governing the righteous use of force in war are, viewed superficially, quite simple and straightforward. Summarizing Augustine's view, these rules can be reduced to four. The first two rules apply to the rulers and the latter two apply to soldiers.

- 1) Just Cause—A ruler is to engage his people in war only in order to rectify an injustice committed by another ruler or people in their relations with other rulers or peoples.
- 2) A ruler must not wage war out of bloodlust, anger, the desire for revenge, or any other earthly desire, but act solely from the desire to serve the common good of his people and the common good of his enemy.

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<sup>2</sup> See Deane, Herbert, *The Political and Social Ideas of Augustine* (New York, NY: Columbia University Press, 1963), esp. Introduction and Conclusion; and Dyson, R. W., *The Pilgrim City* (Rochester, NY: The Boydell Press, 2001), esp. Chapters 1 and 2.

- 3) Provided their orders are not patently contrary to God's will, soldiers are to obey the commands of their superiors without question and to fight using any means they are ordered to employ.
- 4) Soldiers in war must act not out of bloodlust, anger, the desire for revenge, or any other earthly desire, but solely from the desire to serve the common good of their particular community.

Though Augustine never lays them out so formally, these rules are outlined most clearly in his *City of God* and Book XXII of his *Contra Faustum*. In *City of God*, Augustine says, "it is the iniquity of the opposing side that imposes upon the wise man the duty of waging war."<sup>3</sup> It is clear that this duty is that of the ruler's only, for, as we will see, Augustine makes it clear that the appropriately ordered society is an absolute monarchy wherein all subjects are to be obedient to the political ruler they fall under. The duties of subjects in political life generally as well as in war are, with few exceptions, simply to obey the orders of their ruler.

Again, in *Contra Faustum*, Augustine argues that just wars are waged only against the wicked and for the sake of punishing their wickedness. These wars are to be commanded by rulers only and carried out solely with the aim and from the motive of correcting the wrongs of the enemy. As he says,

The desire for harming, the cruelty of revenge, the restless and implacable mind, the savageness of revolting, the lust for dominating, and similar things—these are what are justly blamed in wars. Often, so that such things might also be justly punished, certain wars that must be waged against the violence of those resisting are commanded by God or some other legitimate ruler and are undertaken by the good.<sup>4</sup>

Moreover, when a ruler commands his subjects to serve in a war, the subjects are bound to obey because it is their duty to obey the orders of their commander. Subjects are not responsible for

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<sup>3</sup> *The City of God Against the Pagans*, translated and edited by R. W. Dyson (New York: Cambridge University Press, 1998), Bk. XIX, Ch. 7, p. 929.

<sup>4</sup> In *Augustine: Political Writings*, Michael Tkacz and Douglas Kries (trans.) (Indianapolis: Hackett Publishing Company, 1994), p 221-2.

determining whether or not it is the appropriate time to wage war or how the war should be waged. However, if the war is clearly contrary to God's will, soldiers ought to disobey.

The eternal law, which commands maintaining the natural order and forbids disturbing it, places some human actions in a middle position, so that when human beings take it upon themselves to do these actions, their audacity is rightly blamed, but when they do them in carrying out a command, their obedience is justly praised. In considering the natural order, one must consider what is done, by whom it is done, and under whose command it is done.<sup>5</sup>

The natural order, which is suited to the peace of mortal things, requires that the authority and deliberation for undertaking war be under the control of a leader, and also that, in the executing of military commands, soldiers serve peace and the common well-being.<sup>6</sup>

Therefore, a just man, if he should happen to serve as a soldier under a human king who is sacrilegious, could rightly wage war at the king's command, maintaining the order of civic peace, for what he is commanded to do is not contrary to the sure precepts of God, or else it is not sure whether it is or not. In this latter case, perhaps the iniquity of giving the orders will make the king guilty while the rank of a servant in the civil order will show the soldier to be innocent.<sup>7</sup>

There are at least two things that are immediately noteworthy about these views of the just war. First, there is the strict division of moral labor between a king and his soldiers with respect to responsibility for the war and the manner in which it is conducted. According to Augustine, not only are soldiers not responsible for the decision of whether and when to wage war, they are not responsible for the conduct of the war either. If a war is fought for the wrong reasons and is carried out using improper means, soldiers who willingly carry out the war are not necessarily doing anything wrong. As long as they act in accordance with the commands of their sovereign and they do so with the right intentions and from the right motives, soldiers can commit injustice justly. For Augustine, the duties of a soldier are not relative only to the conduct of the war he is engaged in. Rather, the duties of a soldier are relative primarily to the commands

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<sup>5</sup> *Ibid.*, p. 220.

<sup>6</sup> *Ibid.*, p. 222.

<sup>7</sup> *Ibid.*, p. 223..

of his sovereign. This view is different from the view that soldiers fighting an unjust war are not necessarily to *blame* for their actions because they are excused. Rather, the view is that the duty to obey one's sovereign can *justify* participation in unjust wars.

The second noteworthy feature of Augustine's conditions for a just war is his requirement regarding the motives of the rulers and the combatants engaged in war. This is sometimes referred to as Augustine's *interiority* and it is a famous component of Augustine's ethical thought in general. For Augustine, war must not only be waged for the right reasons and in the right way but also with the right intentions and from the right motives. A king behaves inappropriately when he wages war from the motive of bloodlust, for example, even when the war is waged in response to the injustice of the enemy. A good king is moved to fight only out of a desire to serve the common good of his people and his enemy. Similarly, a soldier behaves inappropriately when he engages in battle from the motive of hatred, even when he is at the same time following the orders of his ruler. A good soldier fights only out of a desire to serve the common good of his community, which for Augustine means serving the sovereign for the sake of serving the sovereign.

This concern with the motives of the actors engaged in war is unusual and it distinguishes Augustine's theory of just war from most contemporary statements of the just war. Though orthodox just war theory is sometimes said to contain the *jus ad bellum* requirement, usually called the principle of Right Intention, that those who wage war have the sincere intention of doing so in accordance with the rules of just war theory, Augustine's requirement is much more demanding. Augustine's requirement appeals to the *motives* of war's participants, not only to their *intentions*. Intentions are the ends and means we deliberately choose to pursue through our actions. Motives are our reasons for pursuing the ends and means we choose. For Augustine, not

only must those engaged in war seek the appropriate ends, they also must be moved to seek those ends from only specific types of motives. The contemporary principle of Right Intention is indifferent to motive. Augustine's criterion is not.

### Perfect Peace and the Earthly City

Augustine's theory of the just war is, of course, shaped by his theory of justice. To understand why Augustine produces the just war theory that he does and how it relates to an Individualist theory of just war, we must understand his theory of justice. Although there is good reason to think Augustine's corpus does not contain a single, systematic theory of justice,<sup>8</sup> his defense of his vision of the just war does appeal consistently a roughly unitary, though sketchy, theory. This is especially true in his tome *The City of God Against the Pagans*. In the end, I think we will see that Augustine's comprehensive theory of the just war is extraordinarily simple and elegant.

The first thing to recognize about Augustine's vision of justice is that it is directly informed by his elaborate Christian metaphysics. Specifically, Augustine divides the world into two distinct moral realms. There is, on the one hand, the heavenly community of souls (both disembodied and (some) embodied), angels, and God. This is the City of God. Though this city is composed of much more than the earthly community, it is nevertheless not wholly distinct from it. Those souls temporarily embodied in earthly form that are devoted members of the Christian faith and who will be rewarded with entrance into paradise after their earthly death are

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<sup>8</sup> It is widely acknowledged that Augustine is not an effective systematic theorist. See Deane, *ibid.*, p. viii; Dyson, *ibid.*, p. xi; and Mattox, *ibid.*, p. 4-8. Some have even denied that Augustine offers a theory of just war at all as opposed to a mere collection of statements and attitudes. See, for instance, Swift, Louis J., *The Early Fathers on War and Military Service* (Wilmington: Michael Glazier, Inc., 1983), quoted in Mattox, *ibid.*, p. 4.

considered members of the City of God. The citizens of the City of God are therefore divided between some who are physically embodied on earth and those who are not.

The city of man, or the earthly city, on the other hand, is the political community that each embodied soul, Christian or not, finds himself a member of. The earth is composed of multiple such cities and each individual is a member of one or another of these. The earthly city is therefore not a particular entity but a type of earthly community, namely, the political community, of which there are many tokens around the world.

Now, unlike earlier Christian writers, Augustine does not insist that the devout Christian pilgrim withdraw himself from earthly concerns altogether. Indeed, this is one of Augustine's major contributions to the development of Christian social and political thought. Instead, he takes very seriously the political and social obligations of earthly existence. For him, engaging in earthly political and social life in the appropriate way is morally required of all humanity, including the Christian faithful.

In order to account for the nature and content of our earthly duties, then, Augustine must develop some account of the nature of earthly justice. This task is made difficult for him, however, because of the above division between the City of God and the earthly city. In view of the Christian story of creation and the subsequent Fall of man, the earthly city is inherently corrupt and cannot be truly just. The difficulty then is what to say about the nature and origin of earthly justice. Augustine cannot say that perfect justice exists or is even attainable on earth. But, since war is clearly an earthly affair, it is earthly justice that our discussion is concerned with and, hence, what we must try to understand. We must then explore his conception of earthly justice and how it compares to perfect justice.

It is best to start by exploring perfect justice. It is clear that Augustine holds to an essentially Platonic vision of perfect justice. That is, true justice is a harmonious coming together of the parts of a social whole in accordance with the nature of the given social whole and its parts. Justice is achieved when things are appropriately ordered in relation to one another. To the extent that this harmony is achieved, there is peace and happiness within and between things. The goodness of a thing then, whether a man, a city or an inanimate object, is determined by the extent to which its parts are harmoniously composed and the extent to which it harmoniously fits with the larger orders of which it is a mere part.

This point is clearly articulated in Book XIX of *City of God*. There, Augustine tells us that the supreme and final good is eternal life in the City of God and that only in this condition will we be happy.<sup>9</sup> What makes eternal life good and happy is that it entails what Augustine calls perfect peace.<sup>10</sup> Peace, then is the supreme and final good; it is what everything aims at. As he says, “it is not possible to find anything better” than peace.<sup>11</sup>

This is an unusual understanding of the significance of peace. It is quite different from most modern conceptions of the value of peace. Peace is usually understood to be simply the absence of violent conflict. Hobbes, for instance, defines peace as the condition of not being at war.<sup>12</sup> Similarly, Kant says, “Peace means an end to all hostilities.”<sup>13</sup> If this is what we mean by ‘peace,’ then, because life is generally more commodious without hostilities, peace is at most or largely instrumentally valuable. Peace is so desirable, on this view, because it is a condition

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<sup>9</sup> *Ibid.*, Ch. 4, p. 918.

<sup>10</sup> *Ibid.*, Ch. 10, p. 932.

<sup>11</sup> *Ibid.*, Ch. 11, p. 933.

<sup>12</sup> *Leviathan*, Ch. XIII, edited by Richard Tuck, (New York, NY: Cambridge University Press, 1991), p. 88-9.

<sup>13</sup> “Perpetual Peace: A Philosophical Sketch,” in *Political Writings*, edited by H. S. Reiss (New York: Cambridge University Press, 1970), p. 95.

wherein we can attain things that are intrinsically valuable. When there is peace, for example, we can more readily lead lives wherein we enjoy intrinsic goods such as freedom, intimate friendships, private professional successes, philosophical contemplation, etc. Without peace, life is generally very difficult and we typically lack access to many goods. In this respect, the value of peace is understood in a way similar to many contemporary discussions of security.<sup>14</sup>

Augustine seems to have reversed the order however. For him, peace is in itself the most valuable thing, more valuable than any other good. Augustine, therefore, must have an understanding of peace different from most moderns. So, what does Augustine think peace is and what makes it supreme?

The answer is that for Augustine peace *just is* the harmonious ordering of things according to Divinely created nature. Peace is what happens when things take their natural place in relation to one another. Peace is achieved when, as he says, “suitable things [come] suitably together.”<sup>15</sup> Such a harmony is intrinsically good. Indeed, when it is perfectly complete, it is the highest good any thing can attain. In as much as anything fails to achieve this perfect harmony with its parts and with the things of which it is a part, it fails to be at peace and to be perfectly good and happy. This essential connection between the nature of things and peace means that nothing can exist that is not in some measure at peace. Everything, in order to be what it is, must share in peace to some degree. A thing that is absolutely lacking peace is nonexistent.

Even that which is perverse, however, must of necessity be in, or derived from, or associated with, *and to that extent at peace with*, some part of the order of things among which it has its being or of which it consists. Otherwise, it would not exist at all. [emphasis added]<sup>16</sup>

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<sup>14</sup> See, for example, Shue, Henry, *Basic Rights*, second edition (New York: Princeton University Press, 1996), Ch. 1; and Waldron, Jeremy, “Safety and Security,” *Nebraska Law Review* 85 (2006), pp. 301-353.

<sup>15</sup> *The City of God*, Bk. XIX, Ch. 12, *ibid.*, p. 937.

<sup>16</sup> *Ibid.*, Bk. XIX, Ch. 12, p. 936.

Peace, then, is more than the absence of hostilities. Peace is the right ordering of things. Simply put, peace is justice.

What then is the perfect ordering of humanity that is constitutive of what Augustine calls perfect peace? For Augustine, the direct answer to this question is that the perfect ordering occurs when two things are realized. First, we will be perfectly at peace when our souls are unencumbered by the body and are freed from the body's irrational, earthly needs and desires. When this occurs the soul can govern itself perfectly rationally without interference by recalcitrant desires and noncompliant parts of the body. Of course, this perfect internal peace is precisely what the self achieves eternally in the afterlife in the City of God.

According to Augustine, humans have been damned by God to live in a state of constant conflict between the rational part of their souls and the appetitive part over control of the body. This was God's punishment to humanity for the sins of Adam and Eve. Prior to their sin, Adam and Eve lived free from internal conflict between their rational and good wills, on the one hand, and their desires and corresponding bodily movements on the other. Before the Fall, sexual intercourse, for example, could have been carried out at will and did not require lustfulness. After their sin, however, humans were cursed to have their wills forever battle sinful, bodily passions. They cannot exist in their earthly form without irrational, unnatural desires interfering with their actions and contesting the dominance of their rational wills. Sexual intercourse for Fallen man, to use the same example, is not something that can be done without lustfulness.<sup>17</sup>

As will be relevant below, what this view of human action entails is that only when we act according to our duties and from motives that are natural, i.e., the love of ourselves and of others, are we truly acting justly. If we merely act in accordance with duty but from the motive

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<sup>17</sup> On these matters see *ibid.*, Bk. XIV, Chapters. 15-28.

of an unnatural passion, e.g., anger, lustfulness, jealousy, or the desire for dominance over others, we are unjust. Perfect justice is what perfectly accords with the natural order, and according to the natural order, humans are to serve God and one another out of an unadulterated and sincere love for all.

What we seek in seeking happiness is, among other things, the end of the internal war we have been condemned to endure in this life. We seek a return to the peace within ourselves that Adam and Eve enjoyed prior to the Fall. We wish for the direct and unquestioned governance of all the parts of our bodies and souls by our intellects. This is the natural and perfect ordering of our selves. When this happens we will find internal peace. There will no longer be a need to subdue bad and non-compliant desires for they will not exist.

But what is it that we wish to achieve when we desire to be made perfect at last by the Supreme Good? Nothing but that the flesh should cease to lust against the spirit, and that there should be no vice in us for the spirit to lust against.<sup>18</sup>

The second condition of perfect peace is the coming together of internally peaceful souls in a community under God. Here, all souls will be united by their love of one another and God and remain steadfastly obedient to his will and under his direct control. This, for Augustine, constitutes a perfect unity between the parts of each relevant thing, both between the parts of individual souls and between the members of the City of God. It is the perfect ordering of things according to nature. That is, it is perfect justice, or perfect peace. It is what is achieved in the City of God.

[T]his peace is a perfectly ordered and perfectly harmonious fellowship in the enjoyment of God, and of one another in God. When we have reached that peace, our life will no longer be a mortal one; rather, we shall then be fully and certainly alive. There will be no animal body to press down the soul by its corruption, but a spiritual body standing in need of nothing; a body subject in every part to the will.<sup>19</sup>

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<sup>18</sup> *Ibid.*, Bk. XIX, Ch. 4, p. 921.

<sup>19</sup> *Ibid.*, Bk. XIX, Ch. 17, p. 947.

In earthly affairs, this perfect social ordering is rendered problematic. As we've seen, thanks to Adam and Eve, the internal ordering of our souls and bodies has been corrupted by unreasonable passions. But, worse, the perfect ordering of our interpersonal relations and of our relations with God are also corrupted. The relations of Fallen men with one another are difficult and troublesome. There are many conflicts between men and within households. There are also many conflicts between human societies.

Chapters 5, 6, and 7 of Book XIX of *City of God* aim to show that pilgrim social life is characteristically contentious and fractious, i.e. that it is not peaceful and harmonious. Augustine asks rhetorically, "Who...could manage to number and weigh the great ills which abound in human society and the woes of this mortal condition?"<sup>20</sup> Specifically, the breakdown of social harmony occurs in the household, in the earthly city, and between earthly cities. Of the household, he says,

In general, who are, or who ought to be, more friendly with one another than those who are contained within the same household? Yet who is secure even in such friendship as this, when such grievous ills have so often arisen even from the secret treachery of or people within the same family?<sup>21</sup>

The earthly city is also far from perfect peace. Augustine says,

If, therefore, there is no security even in the home from the common evils which befall the human race, what of the city? The larger the city, the more is its forum filled with civil law-suits and criminal trials. Even when the city is at peace and free from actual sedition and civil war, it is never free from the danger of such disturbance or, more often, bloodshed.<sup>22</sup>

As for the character of relations between earthly peoples,

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<sup>20</sup> *Ibid.*, Bk. XIX, Ch. 5, p. 925.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*, p. 926.

I could not possibly give a suitably eloquent description of these many evils, these manifold disasters, these harsh and dire necessities. How lengthy this discourse would be, if I were to try to do so.<sup>23</sup>

All of this discord in the human community is contrary to perfect peace. In a state of perfect peace there would not exist such insecurity and conflict at any level of social life. All would be bound together with reciprocal love and live according to the direct commandments of God and reason. Again, such a condition is only attainable in the City of God.

Augustine states clearly and repeatedly that the reason earthly relations are so contentious is that Fallen man and his society are inherently corrupt. For him, the earthly city is inherently unnatural and contrary to perfect peace. It is therefore incapable of justice.

For Augustine, the natural order according to God's design does not include many of the institutions that are basic to earthly social and political life. In the true state of nature, there is no private property, no slavery and other forms of domestic servitude, and no human government of any kind. Strictly according to their nature then, mankind is perfectly equal with respect to authority and the distribution of property. Among men, there are no natural kings and subjects, masters and slaves, rich and poor. In as much as these inequalities exist they are a corruption of nature.

In Chapter 15 of Book XIX, Augustine clearly tells us that there is no natural inequality between men.

This is prescribed by the order of nature: it is thus that God created man; for He said, 'Let them have dominion over the fish of the sea, and over the fowl of the air, and over every creeping thing which creepeth on the earth.' He did not intend that His rational creature, made in His own image, should have lordship over any but irrational creatures: not man over man, but man over the beasts. Hence, the first just men were established as shepherds of flocks, rather than as kings of men. This was done so that in this way also God might indicate what the order of nature requires...<sup>24</sup>

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<sup>23</sup> *Ibid.*, Bk. XIX, Ch. 7, p. 929.

<sup>24</sup> *Ibid.*, p. 942.

He adds that in particular slavery is not natural to man's condition: "By nature, then, in the condition in which God first created man, no man is the slave either of another man or of sin."<sup>25</sup>

Hierarchically ordered domestic households, however, are natural. For Augustine, a hierarchical relationship between women, children and domestic servants, on one hand, and a male head of household, on the other, is included in God's original design. It is therefore, natural for women, children and servants to be obedient to their particular patriarch. Slavery, however, is not an institution that is natural to the household.<sup>26</sup>

Given that basic earthly social and political institutions are not found in the City of God and that they were not originally intended for earthly life, these statements should be interpreted as asserting that these earthly social and political institutions are unnatural. There is, thus, a fundamental division between the City of God and the earthly city. No earthly city, not even a Christian one, can possibly be truly just; they are essentially corrupt in as much as they entail divisions of authority and property between men.

The reason for the impossibility of true peace and harmony in earthly communities is the corrupt psychology of Fallen man. Just as there can be no truly harmonious human society, neither can there be a truly harmonious individual human. All humans, even the faithful Christian pilgrim, are corrupt. This corruption consists in the controlling influence that earthly desires play in the behavior of men. Contrary to the natural design of men wherein they were to be ruled by their rational wills entirely without the interference of irrational desires for earthly goods, humans are forever in a state of tension between their rational wills and their recalcitrant

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<sup>25</sup> *Ibid.*, p. 943.

<sup>26</sup> *Ibid.*, Bk. XIX, Ch. 16, p. 944.

earthly desires. No human escapes this conflict; not even the Christian faithful. Therefore, no human lives according to nature and no human is justly constituted.

According to Augustine, beings that are not harmoniously constituted according to nature cannot come together in collectivities that are constituted according to nature. The tension within mankind will necessarily be manifested in tensions within the community. Since men are forever possessed of the desire for earthly goods such as glory, power, wealth, and bodily gratifications, the relations between men will forever be contentious and violent. There will never be a harmonious unity of men in social and political life. If we organize our political bodies hierarchically we might achieve some semblance of peace, but it will never be complete (some will always be prepared to violate it) and, more to the point, it is inherently contrary to natural, perfect peace wherein men are equal and united in reciprocal love. True peace and harmony does not require coercive power, e.g. states. True peace is, as Augustine says, a “disposition” of parts to constitute a whole in the appropriate way.<sup>27</sup> Since this disposition is characteristically absent in Fallen men, their social groups are corrupt.<sup>28</sup>

This would seem to mean that we should not read Augustine as a kind of Platonic theorist of earthly justice. For him, unlike for Plato, all earthly cities are unnatural and corrupt. The only community that is ruled by true, natural justice is the City of God. Forever fallen from this community, all earthly social and political life is unnatural and cannot possess the sort of harmony of parts that is constitutive of perfect justice.

Earthly Justice as Divine Punishment?

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<sup>27</sup> As we will see below, this emphasis on dispositions is what grounds Augustine’s concern with motive in action, i.e. his interiority.

<sup>28</sup> On this reading of the division between the City of God and the earthly city in terms of justice, see also Deane, *ibid.*, Ch. II and III; and Dyson, *ibid.*, Ch. 1 and 2.

Given that perfect peace, or perfect justice, is only attainable in the City of God and not in the earthly city, what role does Augustine give to justice in the earthly city?

As stated above, it is clear that Augustine does not reject the applicability of justice to earthly affairs altogether. He unhesitatingly asserts that humans have specific obligations to one another and to their communities. As we have seen, Augustine thinks rulers and soldiers have clear responsibilities to their communities and others. He also clearly attributes obligations to other actors. For instance, in a famous discussion of the duties of a judge, Augustine argues that a judge is sometimes morally obligated to treat defendants in ways that can seem horrific. In particular, a judge might be obligated to order the torture of an accused person in order to ascertain whether he is innocent or guilty. If innocent, the torture of the suspect can seem to be unfair brutality. Indeed, the torture may even kill the accused, or, may make him falsely confess and thereby be wrongly punished. Still, it is the duty of the judge to find out the truth with respect to the charges leveled against the accused in his courtroom. The responsibilities of the judge then, put him in a position where the execution of his duties risks bringing about terrible outcomes. However, Augustine argues, the judge should not abdicate his responsibilities because of this. Rather, the judge is obligated to take the bench because such service is his duty to his community regardless of the tremendous moral hazards that come with that duty.

Given that social life is surrounded by such darkness, will the wise man take his seat on the judges' bench, or will he not venture to do so? Clearly, he will take his seat; for the claims of human society, which he thinks it wicked to abandon, constrain him and draw him to this duty.<sup>29</sup>

The question then that needs to be considered is what the ground of the judge's duties is. Why exactly does human society have a moral claim on him and, by extension, everyone else? If natural, perfect justice does not ground our earthly social duties then what does?

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<sup>29</sup> *Ibid.*, Bk. XIX, Ch. 6, p. 927.

One answer Augustine offers is that, after the Fall, God has reconstituted each particular social order hierarchically and commands that all remain steadfastly obedient to their superiors. Specifically for Fallen man, God wills that each particular ruler or office-holder occupy their particular position and that all others are to respect their divinely granted authority. In other words, in response to the Fall, God has ordered the formation of hierarchical social and political groups and commanded that all members of those groups be obedient to whatever authority they find themselves under.

These new divine orders are given, not because God seeks to make human social life consistent with nature or His original design, but precisely because human social life can never be consistent with nature. Given the unredeemable character of humanity, God has ordered that unequal social and political bodies be formed so that humans can be punished for their inherent sinfulness and perhaps be corrected to some degree. The point of human social and political institutions is thus to punish and rectify the corruption of humanity. The disquiet we may experience as subjects to absolute rulers in domestic or in political life is our divinely ordained punishment for our inherently corrupt nature.<sup>30</sup> Such human authorities also provide some measure of order to social life in that, through their punitive power, they give us incentives to follow rules that will limit the destructiveness of the earthly desires.

It is in this sense then that human social and political life is consistent with God's intentions and yet inconsistent with his original plan for earthly life, i.e. with perfect nature. Given the Fall of man, God has ordered a new political and social complexion for mankind. This

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<sup>30</sup> If we attribute this view to Augustine, there may be a problem for him here. For, according to him, God punished mankind by damning him to live with a corrupt desiderative part of the soul *and* punished mankind for having this corrupt soul by making him live under the rule of political elites. On this view then, men are divinely punished for a condition that was itself a divine punishment. It is difficult to see how it could be just to punish people for a condition that was itself a just punishment.

time, He has abandoned the vision of the perfect equality and unity of mankind and sought to render them subservient to kings and other elites. This is perhaps the most common reading of Augustine on the nature of earthly justice.<sup>31</sup>

This view offers an explanation of how, for Augustine, our social and political duties in a corrupt world are ultimately grounded. They derive not from nature as such but from God's will specifically for Fallen man. We ought to follow the claims of human society because this is what God has demanded that we do as punishment for our sinful nature and as an attempt to limit the destructiveness of that nature. Our duties therefore find their origin not in perfect justice but in the Divinely ordained imperfect justice, the justice specifically designed for corrupt beings like us. This point is most clearly made in *City of God*, Book XIX, Ch. 15.

The first cause of servitude, therefore, is sin, by which man was placed under man in a condition of bondage: a condition which can come about only by the judgment of God, in Whom there is no injustice, and Who knows how to distribute different punishments according to the merits of the offenders....

By nature, then, in the condition in which God first created man, no man is the slave either of another man or of sin. But it is also true that servitude itself is ordained as a punishment by that law which enjoins the preservation of the order of nature, and forbids its disruption. For if nothing had been done in violation of that law, there would have been no need for the discipline of servitude as a punishment. The apostle therefore admonishes servants to be obedient to their masters, and to serve them loyally and with a good will, so that, if they cannot be freed by their masters, they can at least make their own slavery to some extent free. They can do this by serving not with cunning fear, but in faithful love, until all unrighteousness shall cease, and all authority and power be put down, that God may be all in all.<sup>32</sup>

The duty to obey applies to every subject regardless of the character of their ruler and his particular commands. The authority of every ruler, even the most wicked, is divinely sanctioned. God has granted each office-holder his position. This divine mandate is not overt but simply implied by the fact that each particular ruler is in possession of the office. Though the fact of

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<sup>31</sup> See Deane, *ibid.*, Ch. III and IV; and Dyson, *ibid.*, Ch. 2 and 3.

<sup>32</sup> *The City of God, ibid.*, Bk. XIX, Ch. 15, p. 943-4.

their occupation of office might appear to us to be arbitrary—they might, for instance, have seized power in a *coup d'état* or inherited it by birth—rulers have in fact been granted their position by God. God is always the one who decides who is ruler and who is subject.<sup>33</sup> To disobey the commands of any ruler is therefore to disobey the commands of God. Such insubordination is always wrong. Indeed, Augustine makes it clear that a Christian subject is obligated to serve even a Pagan ruler and that, even when a particular ruler himself has seized power by violating his obligation to obedience to the prior ruler, he is nevertheless to be obeyed by his new subjects.<sup>34</sup>

At times, Augustine allows for exceptions to this rule. He says that we may, or indeed, ought to disobey commands by our superiors that are contrary to God's wishes. The clearest case of such a command, indeed the only one that Augustine mentions explicitly, is one where a ruler commands things that are contrary to Christian faithfulness and worship. For example, a ruler's command to renounce Christianity would undoubtedly be contrary to God's wishes and a subject would be justified in refusing such an order.

Julian was an infidel Emperor, an apostate, a wicked man, an idolator; Christian soldiers served an infidel Emperor; when they came to the cause of Christ, they acknowledged Him only who was in heaven. If he called upon them at any time to worship idols, to offer incense; they preferred God to him: but whenever he commanded them to deploy into line, to march against this or that nation, they at once obeyed. They distinguished their everlasting from their temporal master; and yet they were, for the sake of their everlasting Master, submissive to their temporal master.<sup>35</sup>

Despite the moral permissibility of such instances of refusal however, Augustine thinks that this disobedience must always be of a passive nature. That is, the insubordinate subject must not directly challenge the authority of his ruler and, instead, readily accept punishment for his

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<sup>33</sup> *Ibid.*, Bk. V, Ch. 19, p. 225.

<sup>34</sup> See Deane, *The Political and Social Ideas of St. Augustine*, *ibid.*, pp. 144-7.

<sup>35</sup> Quoted in Deane, *ibid.*, p. 149.

disobedience.<sup>36</sup> Moreover, Augustine clearly thinks that despite the permissibility of the subject's disobedience in these cases, the ruler is still justified in punishing such disobedience or in forcing the subject to carry out the command against his will. Augustine's exception to absolute obedience is then very limited and does not threaten the authority of rulers.<sup>37</sup>

#### Earthly Justice as the Common Good

This reading of Augustine on the nature and origin of our duty to obey the "claims of human society" cannot be the whole story however. If this were all there were to Augustine's theory of justice, then Augustine would be a kind of simple-minded ethical legalist with respect to our earthly duties. For Augustine, duty and justice would be reduced to the commands of the ruler, whatever they may be. The duty to obey the "claims of human society" would be nothing more than the duty to obey the claims of the ruler.

If this were what earthly justice consisted in, the ruler himself would have no moral obligations to rule in one way over another. Anything the ruler did would be just. If punishment of Fallen man were the only goal of governance, rather, if governance itself were punishment, then there would not be any substantive ethical constraints on the sort of things rulers can and cannot do as rulers. Merely in causing us suffering by constraining our earthly desires, however they wish, rulers would be fulfilling their purpose.

However, it is clear that, for Augustine, those in positions of power, including kings, are also bound by the claims of human society. That is, the elites have duties of their own. They can do wrong too. Therefore, the origin of earthly social and political duties cannot be simply God's will that we be punished for the Fall by being submissive to arbitrary authority. Because

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<sup>36</sup> See *City of God*, Bk. VIII, Ch. 19, *ibid.*, p. 340 where Augustine praises the Christian martyrs who willingly endured punishment for their Christianity.

<sup>37</sup> See Deane, *ibid.*, p. 149.

Augustine clearly thinks there are substantive duties attendant to ruling, there must be more to “the claims of human society” than simply the arbitrary demands of the ruler.

In particular, Augustine holds that it is the duty of those in power to do what is in the best interest of the communities they rule. The interest rulers are expected to serve is that of the community itself, not the private interests of any subjects or, especially, the private interest of the ruler. In other words, a ruler is expected to serve the common good of his commonwealth. A similar claim is made regarding heads of households and masters of servants and slaves. They are also to serve the interests of the particular groups they have authority over.

In *City of God*, Book XIX, Ch. 16, Augustine tells us that it is the duty of heads of households to protect and serve all the members of their household, including slaves who, as we’ve seen, are not natural parts of a household. One ought to treat one’s slaves as paternalistically as one would one’s children. As the “father,” one is to ensure the well being of all in one’s household.

This is what the order of nature prescribes: so much so that this is the origin of the name *paterfamilias*, a name now so generally used that even those who rule unjustly rejoice in being called by it. But those who are truly ‘fathers of their families’ are as much concerned for the welfare of all in their households, in respect of the worship and service of God, as if they were all their children. They desire and pray that they may all come to that heavenly home, where the duty of commanding mortal men will no longer be necessary because there will no longer be a necessary duty of caring for the welfare of those who now enjoy the happiness of immortality. Until that home is reached, however, fathers have a duty to exercise their mastery which is greater than that of slaves to endure their servitude.<sup>38</sup>

The duties of heads of households with respect to the members of their households are analogous to the duties of political rulers with respect to their subjects. Just like a father is to ensure the well being of his household, a king is to ensure the well being of his people. Crucially,

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<sup>38</sup> *Ibid.*, p. 944.

the well being of the family and the city is constituted by the proper ordering of its parts, not by the sum of the private goods of each individual member.

A man's household, then, ought to be the beginning, or a little part, of the city; *and every beginning has reference to some end proper to itself, and every part has reference to the integrity of the whole of which it is a part.* From this, it appears clearly enough that domestic peace has reference to civic peace: that is, that the ordered concord of domestic rule and obedience has reference to the ordered concord of civic rule and obedience. Thus, it is fitting that the father of a family should draw his own precepts from the law of the city, and rule his household in such a way that it is brought into harmony with the city's peace. [emphasis added]<sup>39</sup>

We can thus evaluate the behavior of elites in terms of their effectiveness at serving and maintaining the common good of their respective communities. A good head of household or king will be one who, through his commands, organizes his group in such a way that each part effectively serves the good of the whole by occupying its natural place in the natural way. He is responsible for ordering the group according the interests of the group as a whole, or the common good. His goal in ruling, then, is the common good of his community. The most important part of the harmonious composition of the community then is the ruler himself. He is the most important factor contributing to the common good. He, like all the other parts of the community, must work for the well being of the group. But, unlike all the other parts of the group, he is responsible for ensuring that all others serve the well being of the group.

A bad ruler, on the other hand, fails to organize his group in such a way that each part works in the service of the whole. For Augustine, this failure is most likely to be the result of a failure on the part of the ruler to make the well being of his community his end. A bad ruler will fail to achieve the harmonious composition of his community because he aims at the wrong goal. Specifically, Augustine is most concerned with rulers who seek their own private good in ruling.

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<sup>39</sup> *Ibid.*, p. 945.

Such rulers are the clearest case of irresponsible leadership. They fundamentally fail to follow the duties of ruling a community.

By what means does a ruler effectively order his community? He does this by punishing those members of the group who fail to carry out their proper work. When a member of the group fails to do what is required of him for the constitution of a well-ordered community, he must be punished. This punishment must be tailored to rectify the transgressor's crime as well as to help him see what is his appropriate place in the community. The punishment is, thus, not simply punitive, it is also corrective. It is aimed at bringing the inappropriately behaving individual back into line with the interests of the group. In this way, a ruler uses the coercive power of the state to limit the behavior of his subjects in accordance with the boundaries of their appropriate activity within the group and to instill in them an understanding of what that appropriate place is.

If anyone in the household is an enemy to domestic peace because of his disobedience, he is corrected by a word, or by a blow, or by whatever other kind of punishment is just and lawful, to the extent permitted by human society; but this is for the benefit of the person corrected, so that he may be readmitted to the peace from which he has sundered himself. For just as it is not an act of kindness to help someone if he thereby loses a greater good, so it is not a blameless act to spare someone if he thereby falls into a graver sin. If we are to be blameless, therefore, our duty includes not only doing no harm to anyone, but also restraining him from sin or punishing his sin, so that either he who is chastised may be corrected by his experience, or others may be warned by his example.<sup>40</sup>

Given that it is immediately after this statement that Augustine tells us that the household is “a little part of the city,” it is clear that Augustine thinks that a king has this duty as well with respect to constraining and correcting the behavior of his subjects.

For Augustine, it is because Romans have been so well governed in this regard, and thereby been so well ordered as a polity, that God has rewarded them with such a vast empire.

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<sup>40</sup> *Ibid.*, p. 944-5.

The Roman leadership, even before Christianity became the empire's official religion, was constituted in such a way that every part, including its rulers, worked for the sake of the whole. Rome is thus for Augustine a good example of what a good earthly city ought to be like. He makes it clear that what sets Rome apart from other poorly constituted cities is that it is governed for the common good, not the private. This has been the virtue that Roman rulers and subjects have possessed and that other communities have not: the desire to serve the community, not the self, in social and political life. It is what has made Rome worthy of world historical success.

...if He had not even granted them [the Romans] the merely earthly glory of supreme empire, a reward would not have been rendered to their good arts—that is, to the virtues by which they strove to attain so great a glory. For it is to such men, who seem to do some good in order that they may be glorified by men that the Lord Himself said: 'Verily I say unto you, they have received their reward.' So also, *the Romans held their own private interests in low esteem for the sake of the common good, that is, for the commonwealth*. For the sake of its treasury they resisted avarice, and they took counsel for the good of their fatherland with unfettered minds; nor were they guilty of any offense against its laws, or of any unwholesome desire. By all these arts did they seek honour and power and glory, as by a true way. They were honoured among almost all the nations; they imposed the laws of their empire upon many races; and they are glorious among almost all peoples to this day, in literature and history. They have no reason to complain of the justice of the highest and true God: 'they have received their reward.' [emphasis added]<sup>41</sup>

Ultimately, for Augustine, the only way one can righteously do the things one does in social and political life is by acting from the motive of regard for the interests of others, in particular, for the common good. If we are to govern others, we must do so not from self-interest but from love and a desire to benefit others and the community. Only when our motives are such are we righteously engaged members of a group such as fathers, judges, statesmen and rulers. These motives are constitutive of the harmonious social order that is the highest good. To do the things done in governance from a motive of private interest is to do terrible injustice. Augustine, for example, tells us clearly that violence in self-defense is wrongful because it is done from the

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<sup>41</sup> *Ibid.*, Bk. V, Ch. 15, p. 215-6.

motive of private interest. However, violence done in the service of one's community such as is done in a just war or in the rightful execution of legal punishment is not only permissible, it is obligatory.

In *On Free Choice* Augustine claims that it is wrong for a person to kill another person in defense of his own life, liberty or chastity. This is so because killing in self-defense or in defense of any private good entails excessive love for temporal goods. Such concern is a corruption of the soul. A good person will refrain from killing another for the sake of such trivial things. Augustine is clearly opposed to all killing for private purposes. As he puts it, men are not to "kill anyone for the sake of things that can be lost against their will and thus should not be loved."<sup>42</sup>

Yet Augustine clearly believes that killing by public servants as legal punishment for criminal activity and in just warfare can be justified. What makes these acts of killing morally different from acts of private self-defense is that they are done for the sake of the common interest. When a man is in a position of public authority, whether as a head of household, or a judge, or a soldier, or a king, he may use violence against others only when he does so from a sincere concern for the well being of the group he serves. This is because the very purpose of his position is to serve the common good. Heads of households, judges, kings, etc. are intended by God to effectively serve the interests of the corrupt humans they have authority over. When a person in such a position acts without love for those he rules it constitutes a corruption of the purpose of his position and is therefore unjust. Therefore, soldiers, executioners, and other agents of public violence are allowed to kill so long as doing so serves the common good and they act from a concern for the interests of their community.

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<sup>42</sup> in *Augustine: Political Writings* (Indianapolis, IN: Hackett, 1994), p. 214.

It should be clear from these statements regarding the duties of rulers and the nature of the common good for earthly communities that Augustine holds that earthly communities have a good that is natural to them. The assertion that communities ought to be governed for the sake of the common good and that subjects ought to obey their rulers for the sake of the common good is based on the assumption that political bodies are naturally good and just when ordered hierarchically and harmoniously in this way. It seems to me that this idea contradicts Augustine's insistence that earthly society is inherently corrupt and unnatural. But whether or not it is consistent is not relevant to my argument. The fact that Augustine grounds earthly duties in the harmonious constitution of an earthly city in accordance with nature is all that matters here. It shows that earthly justice is not simply divine punishment but that the earthly city has a distinctive common good and this is the highest value of earthly justice. For Augustine, the reason the judge ought to take his place on the bench is that it is his appropriate station in his community and is a constitutive part of the common good.

To drive the point home, in one place Augustine attempts to define what the peace is for all relevant things. Along side the Heavenly City, he includes in his list of things Fallen men and earthly cities. Thus, it is explicitly stated that he believes there is a naturally appropriate order peculiar to Fallen men and earthly cities. In Book XIX, Chapter 13 of *City of God* he says

The peace of the body, therefore, lies in the balanced ordering of its parts; the peace of the irrational soul lies in the rightly ordered disposition of the appetites; the peace of the rational soul lies in the rightly ordered relationship of cognition and action; *the peace of the body and soul lies in the rightly ordered life and health of a living creature*; peace between mortal man and God is an ordered obedience, in faith, under an eternal law; and peace between men is an ordered agreement of mind with mind. The peace of a household is an ordered concord, with respect to command and obedience, of those who dwell together; *the peace of a city is an ordered concord, with respect to command and obedience, of the citizens*; and the peace of the Heavenly City is a perfectly ordered and perfectly harmonious fellowship in the enjoyment of God, and of one another in God. *The*

*peace of all things lies in the tranquility of order; and order is the disposition of equal and unequal things in such a way as to give to each its proper place. [emphasis added]*<sup>43</sup>

## The Just War and the Global Good

At this point, we can articulate Augustine's ground for the duties of soldiers in war. A soldier's duties with respect to war are derived in the same way that the duties of the judge with respect to discovering the truth regarding criminal accusations are derived. A soldier is a servant of the public authority and his overriding obligation is to execute the will of that authority. This is his proper place in the social order and his wholehearted assumption of that position is a constitutive part of the common good. A good soldier will see himself as appropriately an obedient servant of the ruler and this will be reflected in the soldier's desires. He will want to serve the common good for its own sake by following his sovereign's orders with respect to war. If he fails to want this or if he has desires that conflict with this, he fails to be a good soldier. Whatever interests a soldier has in his own life and liberty these are outweighed by his community's interests. The soldier *qua* soldier is obligated to participate in war upon command regardless of the justice of the war and the risk his service poses to him personally.

The duties of rulers in war have a different and slightly more complicated origin. As we've seen, Augustine justifies the coercive violence of state power in domestic society by arguing that a ruler may use violence against his own subjects to punish and rectify their behavior that infringes on the peace of the community. At the same time, a ruler must be sure that his punitive violence is exercised with a sincere and due regard for the good of his subjects and community.

When it comes to war, however, a ruler's duties are determined by more than just the good of his own community. A ruler may use violence against another community only for the

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<sup>43</sup> *Ibid.*, p. 938.

sake of the good of both communities, his own and his enemy's, as well as any other affected group. In so doing, a ruler must be sure that the violence is employed with a sincere and due regard for the good of all communities in question. Just as one must rule from the desire to serve the good of one's community, one must also employ one's war-making power from the desire to serve the good of one's community as well as that of other communities, especially the targeted community. In particular, Augustine prohibits waging war from the motive of lust for power, domination, or wealth. Waging war with such desires constitutes a failure to act in harmony with the duties attendant to a ruler's social position. To act with such desires is to fail to be a good ruler.

The important and difficult question is, "How exactly does one wage war for the good of one's community and that of the enemy community? Which wars do this and which do not?" The answer to this question is suggested by the first rule of his just war theory stated above.

Augustine thinks that war is justified and is in the service of the relevant communities when it is done to punish the behavior of a commonwealth or to rectify an injustice committed by a commonwealth in its relations with another community. Only when a community has acted flagrantly unjustly in its relations with other communities can war aimed at punishing and rectifying their behavior be justified. A just war is an act of punishment aimed at enforcing a standard of justice regarding the proper relations of peoples.

This is clearest in Book XIX, Chapter 12 of *City of God*. Here, Augustine tells us that all wars, even unjust ones, aim at some form of peace. But since, as we've seen, peace is a harmony of parts according to nature, of "suitable things [coming] suitably together," an unjust war aims at an unjust peace, a peace wherein the global order is perversely constituted. A just war, on the other hand, aims at a just peace, a peace wherein all peoples assume their appropriate place in the

global community. He says, “[H]e who has learnt to prefer right to wrong and the rightly ordered to the perverse, sees that, in comparison with the peace of the just, the peace of the unjust is not worthy to be called peace at all.”<sup>44</sup> For the unjust, the peace they seek is the subjugation of others out of self-interest. The just, on the other hand, seek a peace wherein the good of all peoples is served. The just, in other words, seek global justice through war. A justly constituted global order is the aim of a just war. The just war is simply a necessary condition for eliminating injustice from the relations between peoples.

As an example of unjust behavior against communities, Augustine uses the case of the imperial expansion of the Assyrian empire by King Ninus. When a kingdom subjugates others who have done no harm and merely for the purposes of enriching one’s own, as Ninus did, that kingdom is morally equivalent to a robber band.

But to wage war against neighbours, and to go on from there against others, crushing and subjugating peoples who have done no harm, out of a mere desire to rule: what else is this to be called than great robbery?<sup>45</sup>

Augustine, however, is not opposed to imperialism as such. He states clearly that imperial expansion can be justified. It can be justified only when the expansion is not carried out through the use of violence against the innocent and is done with the sincere desire to serve the global peace. Thus, if a city gains control of foreign territories by justly subjugating peoples who have behaved unjustly toward others and not out of a desire for power, then that city’s expanded power is just. Without quite asserting that the Roman Empire was in fact established this way, Augustine tells us that if it had been, then it would be a justly acquired empire.<sup>46</sup>

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<sup>44</sup> *Ibid.*, p. 936.

<sup>45</sup> *Ibid.*, Bk. IV, Ch. 6, p. 150.

<sup>46</sup> *Ibid.*, Bk. IV, Ch. 15, p. 162.

Augustine gives us at least three specific types of actions a community can carry out that would make war against them justified.<sup>47</sup> First, when a people has acted aggressively toward another community. Second, when a people has refused to make reparations for wrongdoing on the part of its citizens against another community. Third, when a people has refused to return property it has unjustly seized from another community. Clearly, what unites all these cases is that the community against whom war can be waged has acted in ways that violate the harmony of the global community. In so doing, they give others a just cause for war against them.

A clear connection can be drawn here between the duties of rulers with respect to war and the duties of rulers with respect to coercive domestic law enforcement. To repeat, a ruler can, indeed, is obligated to use violence against his subjects when they behave in ways that violate the harmony of domestic society, so long as that violence is intended to punish and rectify the disharmony and is employed from a sincere desire to preserve the social harmony. Similarly, a ruler can, indeed, is obligated to use violence against foreign communities when they behave in ways that violate the harmony of the global community, so long as that violence is intended to rectify the disharmony and is employed from a sincere desire to preserve the global harmony. Any war that is waged in circumstances or with aims or motives other than these is an unjust war.

What this view of the just war entails is that commonwealths have interests that are worth killing for. In order to defend its interests, a political community may wage war against another community. The relevant interests are not the private interests of the individuals who compose the community. Rather, they are the interests of communities as such. Thus, it is fair to attribute Augustine with the view that just war is a relation between communities (i.e., commonwealths),

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<sup>47</sup> These are listed by Deane, *Ibid.*, p. 160.

not mere individuals. This entails the war cannot legitimately be waged by set of private persons for private ends. Moreover, because soldiers can be obligated to serve in an unjust war, at least the typical just war will include the deliberate killing of innocent people, i.e., the soldiers on the opposing side. Though soldiers in an unjust war are carrying out injustice, they are not necessarily doing any thing contrary to their duties as soldiers. Thus, for Augustine, it is permissible to deliberately kill innocent people for the sake of the interests of commonwealths.

We have seen what Augustine thinks the nature of the just civil order is. To repeat, it is a severely hierarchical order wherein all subjects are wholeheartedly subservient to their single king. The punitive violence in which the state engages in civil life is directed at those who violate the harmony of this order and is aimed at restoring it.

We now see that warfare also aims at constituting a certain just order, although in the case of war, the order in question is not domestic society alone, but the global community, the community of commonwealths. Crucial to understanding Augustine's just war theory then is an understanding of the vision of the harmonious global order that underpins it. What is that vision?

Unfortunately, Augustine does not explicitly state this vision in his direct discussions of the just war. However, it can be found implicit in his discussions of the development of empires as well as in his discussions of specific uses of war in history. The vision is rough and incomplete. Nevertheless, its general outline is intelligible and informative.

Augustine thinks that a just global order is one in which there are numerous, relatively small states, each one internally just and each one respectful of the autonomy of the domestic affairs of other states. In other words, global justice is achieved when all states are individually harmoniously composed into authoritarian, monarchical structures, and collectively all states are harmoniously composed into a global community with each state content to refrain from

encroaching on the internal affairs of the other states. This is what constitutes a just earthly human order. It is the giving to each their due on a global scale.

It is also what determines which wars are just and which unjust. An unjust war is one that violates this harmonious global order. It is an act of violence by a state or its members that encroaches on things that are appropriately those of another state or people. A just war, on the other hand, is one that aims at rectifying such illegitimate encroachments and enforcing the standards of global justice on corrupt rulers or peoples. This is the sense in which a just war aims at peace.

This view is evident in Book IV of *City of God*. In the course of several chapters, Augustine develops a comparison between two types of kingdoms. One is lustful and desirous of power over other peoples. The other is modest and content to self-sufficiently serve its own people. The comparison begins with the drawing of an analogy between these two types of kingdoms and two types of individuals with corresponding characters: one rich and ambitious for power, the other poor and modest. Augustine argues that it is the poor man who is morally superior to the rich man. Likewise, the kingdom that is modest and self-sufficient is morally superior to the kingdom that is rich and imperially ambitious. In both cases, it is the one who allows others to have what is legitimately theirs and seeks self-sufficiency with its own property that is happier and at greater peace with itself and with its neighbors.

Let us not allow the edge of our attentions to be dulled by the splendid names of things when we hear of ‘peoples’, ‘kingdoms’ and ‘provinces’. Instead, let us imagine two men (for each individual man, like one letter in a text, is, as it were, an element of the city or kingdom, no matter how extensive it is in its occupation of the earth). Let us suppose one of these men to be poor, or at any rate of moderate means, and the other to be very wealthy. The wealthy man, however, is troubled by fears; he pines with grief; he burns with greed. He is never secure; he is always unquiet and panting from endless confrontations with his enemies. To be sure, he adds to his patrimony in immense measure by these miseries; but alongside these additions he also heaps up the most bitter cares. By contrast, the man of moderate means is self-sufficient on his small and

circumscribed estate. He is beloved of his own family, and rejoices in the most sweet peace with kindred, neighbours and friends. He is devoutly religious, well disposed in mind, healthy in body, frugal in life, chaste in morals, untroubled in conscience. I do not know if anyone could be such a fool as to dare to doubt which to prefer. As, therefore, in the case of these two men, so in two families, two peoples, two kingdoms, the same principle of tranquility applies; and if we use this principle vigilantly, to guide our search, we shall very easily see where vanity dwells, and where tranquility lies.<sup>48</sup>

According to Augustine, a kingdom that is desirous of greater power than is appropriate to them is morally equivalent to a robber band. A kingdom only becomes a just kingdom when it comes together to meet its own needs and does not aim to greedily usurp the authority of other kingdoms.<sup>49</sup> King Ninus' empire is, as we've seen, an example of this kind of corrupt, robber band-kingdom.

Of course, wars occur between the members of global society and empires develop through them. Most of these empires are the direct product of the greed and avariciousness of ambitious kingdoms or rulers. Some, however, might come about justly through the just use of force against these ambitious rulers. Perhaps Rome is an example. In any case, what brought about these just empires is the injustice of other kingdoms in the global community. If not for injustice, there would be no empires whatsoever, neither just empires nor unjust empires.

Augustine says clearly that if there were never any injustice, the global order would be one composed of numerous small, self-sufficient states which do not desire to interfere with what is not appropriately theirs.

[I]f men were always peaceful and just, human affairs would be happier and all kingdoms would be small, rejoicing in concord with their neighbours. There would be as many kingdoms among the nations of the world as there are now houses of the citizens of a city. Hence, waging war and extending their sway over conquered nations may seem to wicked men to be felicity, but to good men it is seen as a necessary evil.<sup>50</sup>

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<sup>48</sup> *Ibid.*, Ch. 3, p. 146-7.

<sup>49</sup> *Ibid.*, Ch. 4.

<sup>50</sup> *Ibid.*, Ch. 15, p. 161.

## *Jus in Bello*

Because later theorists will claim the opposite (i.e., Walzer), it should be clear that for Augustine there is no division of responsibility between the *jus ad bellum* and the *jus in bello*. The exclusive responsibility for ensuring that a war is both just and fought justly resides uniquely with the ruler. Soldiers are not responsible for ensuring that the wars they carry out are fought justly. Soldiers are simply responsible for obeying the commands of their ruler.

What is less clear, however, is what constraints, if any, Augustine puts on the methods of warfare. Given that a war is fought for just reasons and with the proper motives, what sort of moral limits are there on the means employed? What are Augustine's rules of *jus in bello*?

It has appeared to some commentators that Augustine has no substantive *jus in bello* constraints.<sup>51</sup> This reading is understandable, though false, in as much as it is true that Augustine never explicitly gives examples of types of external behavior that are wrongful in war. He does not say if it is legitimate to summarily kill prisoners of war, or to kill civilians, or to use spies, for example. This is the sort of discussion that is absent in Augustine's philosophy of the just war. Unfortunately, as I will argue in the following chapters, this has enabled many to think that a theory like Augustine's cannot ground adequate ethical constraints in a just war.

However, Augustine does state that the just methods of war are limited. Specifically, he tells us that what is allowable in war is constrained by the same vision of the global good which constrains the resort to war. Just as one must not go to war when doing so violates the global harmony of peoples, one must also never use methods in war that violate that same global harmony. What makes the resort to war just or unjust is the same thing that makes methods of war just or unjust. Any method of war that is inconsistent with the production or preservation of

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<sup>51</sup> Christopher, Paul, *The Ethics of War and Peace*, second edition, (Upper Saddle River, NJ: Prentice Hall, 1994) p. 37-8.

a global order wherein all people are harmoniously organized into independent and sovereign absolute monarchies is unjust.

This reading of Augustine on the moral limits of the methods of war follows from the reading of his theory of global justice offered above. This reading holds that the duties of rulers and subjects in all things, not just in war, are grounded in a single vision of the common and global good. Anything that violates this vision is wrongful. This is the mark of the unjust war; it is a war that threatens the production or continuation of the global harmony of commonwealths. Entailed by this is the notion that if there are any methods of war that threaten the global harmony, these methods are unjust.

Indeed, Augustine says as much. When he tells us that peace is the end of the just war, he clearly states that this end applies to all conduct in war. In *City of God*, he says that, “Wars themselves...are *conducted* with the intention of peace” [my emphasis].<sup>52</sup> More clearly, in his letter 189 he implores rulers to, “[b]e a peacemaker...even in war, so that by conquering them [the enemy] you bring the benefit of peace even to those you defeat.”<sup>53</sup> As long as peace is the objective, violence in war ought to be limited to realize that end. As he says elsewhere,

For he whose aim is to kill is not careful how he wounds, but he whose aim it is to cure is cautious with his lancet; for the one seeks to destroy what is sound, the other that which is decaying...[W]hat is important to attend to but this: who were on the side of truth, and who were on the side of iniquity; who acted from a desire to injure, and who from a desire to correct what was amiss?<sup>54</sup>

Thus, there is a clear unity of rationale underpinning Augustine’s constraints on the just resort to war and the methods of war. For Augustine, the *jus ad bellum* and the *jus in bello* do not exist in separate justificatory spaces. The move from the *jus ad bellum* to the *jus in bello* occurs

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<sup>52</sup> *Ibid.*, Bk. XIX, Ch. 12, p. 934.

<sup>53</sup> in *Augustine: Political Writings*, edited by Atkins and Dodaro (New York: Cambridge University Press, 2001) p. 217.

<sup>54</sup> Quoted in Mattox, *ibid.*, p. 61.

solely at the practical level, not at the theoretical. For Augustine, there is no logical independence of the *jus ad bellum* and the *jus in bello* such that an unjust war can be fought justly as there will be for Walzer. At all stages of warfare, from the initiation to the conclusion, rulers are responsible for making sure they do nothing inconsistent with the global good. All aspects of war must be conducive to the production of global peace.

What is sorely missing in Augustine is any discussion of exactly which methods of war would fail to be conducive to the production of global peace. However, a fundamental principle that limits the just methods of war is there: wars ought to be conducted so as to realize peace. This principle would seem to ground a principle of Necessity which states that the destruction of war ought not to exceed what is necessary to achieve peace. This is important to note because it will be argued in the conclusion of this dissertation that a principle of Necessity similar to this can ground a principle of Discrimination in war.

## Part II: Saint Thomas Aquinas

Like Augustine, Aquinas' thoughts on the nature of the just war have been the subject of much commentary. I wish to briefly review Aquinas' contributions to the field. I will argue that Aquinas' view is of the same relevant type as Augustine's. The content and structure of the two theories are fundamentally similar. The most significant contribution Aquinas makes is to refine Augustine's theory, adding some needed specificity and nuance to his rules of the just war. In particular, Aquinas allows political subjects, including soldiers, permission to disobey rulers in a wider range of circumstances than does Augustine.

These similarities between Aquinas and Augustine's theories of just war should not be understood as entailing fundamental similarities between the two with respect to their theories of

justice. There are substantive differences between them at this level. Augustine professes that mankind is irredeemably corrupt, social life necessarily contentious and miserable, and the point of politics is to force people into submission as punishment for their inherent sinfulness. However, in defending his views of the appropriate conduct of rulers and subjects in actual social life, he relies on a concept of the common good and global good wherein people are seen as inherent parts of hierarchically ordered communities. This commits him to the view that a harmoniously constituted monarchical society is inherently good, not a corruption of the natural state of Fallen man. Thus, the origin of the duties of rulers and subjects is, for Augustine, a theory of justice very similar to Plato's view of justice as a harmony of the parts of natural communities.

For Aquinas, by contrast, mankind is unambiguously inherently social and capable of living in harmoniously composed social groups. Further, the point of government is not the mere punishment of Fallen man. Rather, governance is described as a constitutive part of the common good. This means that Aquinas can defend duties for rulers and subjects similar to Augustine's much more straightforwardly. To cite the relevant example, for him (as ultimately for Augustine) a just war is that which aims to defend a harmonious global order wherein all commonwealths are harmoniously constituted into hierarchical political orders and each commonwealth wholeheartedly embraces the autonomy and independence of the world's other commonwealths. Wars are only just when they plausibly aim to establish or protect this global good. Thus, with basically the same goal as the end of just war, Aquinas and Augustine derive similar rules of war.

Moreover, Aquinas' theory of justice is more heavily indebted to Aristotle than to Plato. Aquinas, as is well known, was one of the major protagonists in the "recovery of Aristotle" in

Christian Europe in the 13<sup>th</sup> century. In defense of his views, Aquinas regularly refers to Aristotle, or “the Philosopher.” Though this reveals some important differences between Aquinas and Augustine’s theories of justice, for our purposes these differences are not relevant. Along with Plato and Aristotle, both Aquinas and Augustine appeal to the common good as a proper ordering of parts of a natural community and hold that the good of such communities can justify war and grounds the social and political obligations of political rulers and subjects.<sup>55</sup>

Although Aquinas explicitly puts forward a list of rules of the just war that is slightly different from Augustine’s, we will see that similar versions of all of them are ultimately found in Augustine’s theory, just not as explicitly. All told, Aquinas puts forward four explicit rules of war. The first three apply only to rulers and the last applies only to soldiers.

1. Legitimate Authority: A just war can only be waged by the command of a legitimate prince.
2. Just Cause: A just war can only be waged against a people or ruler who has committed some wrong against others.
3. Righteous Intent: A just war can only be waged by a ruler who intends to serve some good end.
4. Soldiers, or anyone called upon by the legitimate ruler to engage in war, are to obey their orders except in cases where they are ordered to do something patently unjust.

The first three rules are very briefly (and inadequately) outlined in Aquinas’ *Summa Theologiae* IIaIIae:40. Here, Aquinas states

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<sup>55</sup> Not all agree with this reading of Aquinas. John Finnis argues that, for Aquinas, the political community is largely instrumentally valuable as a means of protecting the interests of individuals and households. On this reading, the individual and the household are prior to the political community and their rights form the basis and object of just governance. For Finnis, Aquinas is a quasi-human rights theorist and social contractarian. See his *Aquinas* (New York, NY: Oxford University Press, 1998), esp. chapters V and VII. There is not room here to refute Finnis’ reading. I will simply say that I do not see how his reading can be reconciled with Aquinas’ views on the nature and justification of political authority discussed below.

If a war is to be just, three things are required. First, the authority of the prince by whose command war is to be waged...

Second, a just cause is required: that is, those against whom war is to be waged must deserve to have war waged against them because of some wrongdoing...

Third, it is required that those who wage war should have a righteous intent: that is, they should intend either to promote a good cause or avert an evil.<sup>56</sup>

As we will see, Aquinas' presentation of these rules obscures the elegantly systematic ground he has for them.

Aquinas does not state the fourth rule explicitly in his discussion of the just war. It is found, however, in his discussions of the duty of political obedience and the permissibility of sedition. At *IaIIae*:104, he tells us that, "a soldier must obey his commander in things pertaining to war."<sup>57</sup> In this case, the duty is given as an example of an inferior that is obligated to obey his superior. Aquinas adds that a soldier's obedience to his superior is intrinsically good. As he says, "a soldier who defends the king's castle completes both a work of courage by not shirking the peril of death for a good end, and a work of justice by rendering a service owed to his lord."<sup>58</sup>

Thus, we can see immediately that there are strong structural similarities between Aquinas' and Augustine's theories of the just war. For example, we can see that Aquinas' theory has the same or similar division of responsibility between rulers and subjects that governs Augustine's theory. The obligations of rulers are fundamentally different from those of subjects, especially soldiers. Only the ruler is fully responsible for ensuring that their war is just at both the *ad bellum* and *in bello* level. The soldiers, on the other hand, do not have this same burden. A soldier's most fundamental obligation is to follow the orders of his legitimate leader. For Aquinas, as for Augustine, the soldier's duties in war are relative primarily to the orders of his

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<sup>56</sup> Art. 1, corpus, in *Aquinas: Political Writings*, edited and translated by R.W. Dyson (New York: Cambridge University Press, 2002), p. 239.

<sup>57</sup> Art. 5, corpus, *ibid.*, p. 69.

<sup>58</sup> *IaIIae*:104, art. 3, ad 1, in *ibid.*, p. 61.

legitimate ruler. However, as we'll see, Aquinas includes important exceptions to the soldier's duty to obey.

### Legitimate Authority

It is unquestionable that Aquinas views the just society as one composed hierarchically, with a prince at the head and his subjects largely obedient to his will. For him, the legitimate ruler is ultimately politically sovereign, not his subjects.

For Aquinas, the basis of this hierarchy is Divinely ordained nature. The authority of the prince is ultimately grounded in God's will for the order of nature. According to the Divinely ordained laws of nature, humans are to be members of quasi-monarchical societies which have a monarch who is elected permanently by popular vote and who employs aristocrats as administrators.<sup>59</sup> For Aquinas the just government is a "mixed" one similar to Aristotle's. These communities, in turn, are each to be composed of hierarchically structured households. Each individual is to assume their proper place in their particular communal hierarchy and wholeheartedly carry out the duties attendant to their role, whether this is the role of ruler, subject, judge, soldier, husband, wife, child, or whatever. Only when all the members of a community successfully carry out their respective duties and they do so with motives and intentions that recognize the intrinsic goodness of their social role is the common good of the community fully realized. In other words, the common good simply is the harmonious ordering of a community into patriarchal households governed by a quasi-monarchical state.

That this is Aquinas' view of the nature of justice is clear from his discussions of the nature of dominion and obedience in the *Summa Theologiae*. On the nature of dominion, Aquinas contradicts Augustine by claiming that even in the state of innocence some men would

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<sup>59</sup> *Summa Theologiae* IaIIae:105, art. I, corpus, in *ibid.*, p. 53-4.

have had dominion of others. For Aquinas, dominion is natural to humanity. This is so for two reasons. First, man is by nature a political animal and dominion is necessary for the existence and preservation of community, including political community.

...dominion would have existed in the state of innocence between man and man, for two reasons. First, because man is by nature a social animal, and so in the state of innocence would have lived a social life. But there cannot be social life among a multitude of people save under the direction of someone who is to look to the common good; for many, as such, seek many things, whereas one attends only to one. And so the Philosopher says at the beginning of the *Politics* that wherever many things are directed to one end, there is always found one at the head, directing them.<sup>60</sup>

In his *De Regno*, Aquinas repeats this justification of dominion in a political community. Here, he makes it clearer that dominion is necessary for the existence of the community as a “unity,” as a “body.”

If, therefore, it is natural for man to live in fellowship with many others, it is necessary for there to be some means whereby such a community of men may be ruled. For if many men were to live together with each providing only what is convenient for himself, the community would break up into its various parts unless one of them had responsibility for the good of the community as a whole, just as the body of a man and of any other animal would fall apart if there were not some general ruling force to sustain the body and secure the common good of all its parts... This accords with reason; for individual interests and the common good are not the same. Individuals differ as to their private interests, but are united with respect to the common good, and such differences have various causes. It is fitting, therefore, that, beyond that which moves the individual to pursue a good peculiar to himself, there should be something which promotes the common good of the many. It is for this reason that wherever things are organized into a unity, something is found that rules all the rest. For by a certain order of Divine providence all bodies in the material universe are ruled by the primary, that is, the celestial, body, and all bodies by rational creatures. Also, in one man the soul rules the body, and, within the soul, the irascible and concupiscible appetites are ruled by the reason. Again, among the members of the body there is one ruling part, either the heart or the head, which moves all the others. It is fitting, therefore, that in every multitude there should be some ruling principle.<sup>61</sup>

It is clear that maintaining the political community as a unity of parts is not good because the unified community serves the private interests of the parts, but is good because the political

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<sup>60</sup> *Summa Theologiae* I:96, art. 4, *corpus*, in *ibid.*, p. 4.

<sup>61</sup> Bk. I, Ch. I, in *ibid.*, p. 7-8.

community is more than a set of private individuals. The community is itself a body, or, as Aquinas describes it elsewhere, a perfect community, whose members are its parts. This political body has interests of its own that are independent of the parts viewed in the abstract and has a significance that trumps the private interests of its parts. Similar to Aristotle, Aquinas believes that men are by nature political animals and that the political community is the most appropriate and complete organization of individuals and households. In order for this organization to exist and be preserved as a body, the community must have a hierarchy of authority wherein one, a king, has authority over the parts and is uniquely responsible for its unity and common good. Importantly, this entails that the good of the political community is more important than the private good of the parts. As Aquinas puts it elsewhere,

Just as one man is part of a household, so a household is part of a State; and a State is a perfect community, as is said at *Politics* I. And so just as the good of one man is not the final end, but is subordinated to the common good, so too the good of one household is subordinated to the good of the whole State, which is a perfect community.<sup>62</sup>

The second reason there would be dominion in the state of innocence is that some men are by nature superior to others. These superior men ought to be in positions of authority over others. This naturally just social hierarchy grounds the authority of rulers. In support of this, Aquinas cites Augustine.

Second, if one man were pre-eminent over all the others in knowledge and righteousness, it would be inconsistent [with the idea of moral pre-eminence] for such pre-eminence not to be directed to the benefit of others... Hence Augustine says at *De civitate Dei* [*The City of God*] 19... 'This is prescribed by the order of nature: it is thus that God created man.'<sup>63</sup>

On the nature of obedience, Aquinas claims that, "just as in the divinely instituted natural order lower natural things are necessarily subject to higher things and are moved by them, so too in human affairs inferiors are bound to obey their superiors by virtue of the order of natural and

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<sup>62</sup> *Summa Theologiae* IaIIae:91, art. 3, ad 3, in *ibid.*, p. 82.

<sup>63</sup> *Summa Theologiae* I:96, art. 4, corpus, in *ibid.*, p. 4.

Divine law.”<sup>64</sup> Indeed, given that this is naturally just, it is also intrinsically good. Aquinas says that obedience to a deserving authority constitutes a good and is thus the virtue of a subject. As Aquinas puts it, “Now obedience to a superior is due according to the divinely instituted order of things...and is consequently a good...”<sup>65</sup> There should be no question then that for Aquinas, contrary to Augustine’s proclamations, the authority of the monarch is natural and good.

To say that political authority ought to be vested in a ruler and not in the ruled is not to say that the ruler is free of all duties to his subjects and other peoples. On the contrary, as Aquinas says repeatedly, rulers can be good or bad, just or unjust, by living and acting in accordance with the common good or by deviating from it. For Aquinas, as for Aristotle and Augustine, rulers are bound to wholeheartedly accept the duty to always protect the common good of their people and that of others. This is precisely what separates a just ruler from a tyrant. Just rulers aim at the common good, while unjust rulers aim at their own private good. As Aquinas says,

If, therefore, a community of free men is ordered by a ruler in such a way as to secure the common good, such rule will be right and just inasmuch as it is suitable to free men. If, however, the government is directed not towards the common good but towards the private good of the ruler, rule of this kind will be unjust and perverted....  
If, therefore, government is exercised unjustly by one man alone, who in ruling, seeks gain for himself and not the good of the community subject to him, such a ruler is called a tyrant...<sup>66</sup>

What does service to the common good require of a ruler? For Aquinas, among other things, the king is responsible for creating and preserving the good life of the community. This requires, first, that the members of the community live in unity, or peace, second, that its members be prevented from violating that unity by appropriate laws and punishments, and, third,

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<sup>64</sup> *Ibid.*, IIaIIae 104, *art. 1*, p. 58.

<sup>65</sup> *Ibid.*, *art. 2*, p. 60.

<sup>66</sup> *De Regno*, Bk. 1, Ch. II, in *ibid.*, p. 8.

that the community have a sufficient supply of the necessities of life. In as much as these three things are perfectly created and maintained, the community is perfect.<sup>67</sup>

For our purposes we may mention two relevant things that are required of the ruler in order to create and preserve this good life of the community. First, the ruler must organize the community such that its good life is, or at least can be, created and maintained. This direction of the order of the community includes assigning the members roles and responsibilities that are necessary for the perfection of the community, especially the creation of the sufficient supply of the necessities of life but also including the security forces necessary to protect the community. Thus, for Aquinas, the king is responsible for organizing the entire political economy of the community so as to create and maintain its good life as a community.

... it is necessary for the founder of a city or a kingdom [the king] to divide it up in such a way as to supply all the needs which must be met if the kingdom is to be complete. For example, if a kingdom is to be founded, it will be necessary to provide locations suitable for the establishment of towns, farms and castles, and centres will need to be set up for the pursuit of learning, the training of soldiers and the conduct of commerce; and so on with the other things which the perfecting of a kingdom requires. Again, if a city is to be established, it will be necessary to provide places suitable for worship, for the administration of justice and for the pursuit of the various trades. Then, it will be necessary to group men together in suitable locations in the city according to their various occupations. Finally, it will be necessary for the needs of each man to be supplied in a fashion appropriate to his condition and standing: otherwise neither the city nor kingdom could endure for long.<sup>68</sup>

This social order and the roles it assigns to its members not only defines (in part) the common good, it also defines justice and the virtue of each member of the group. What is appropriate for each individual is relative to his station in his community and its relation to the production and maintenance of the common good.

Now it is clear that all who are included in a community are related to that community as parts to a whole. But a part is that which belongs to a whole. Hence whatever is a good of

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<sup>67</sup> *Ibid.*, Bk. I, Ch. XV, p. 43-4.

<sup>68</sup> *Ibid.*, Bk. I, Ch. XIV, p. 38-9.

a part can be directed to the good of the whole. It follows therefore that the good of any virtue whatsoever, whether the virtue in question directs a man in relation to himself or in relation to some other individual persons, is ultimately referable to the common good to which justice directs: so that all acts of virtue can pertain to justice insofar as justice directs man to the common good.<sup>69</sup>

Second, the unity of the community, once established, must be preserved by implementing an appropriate system of law and punishment and by maintaining sufficient military forces so as to protect the community from external attack and destruction. As will be relevant below, for Aquinas, the purpose of both criminal law and punishment and military forces is the creation and maintenance of the unity, or peace, of a political community. There is, as there was for Augustine, a philosophical connection between criminal punishment and war.

Moreover, both punishment and war are among the activities that the king has authority over. The king is to have a unique power and responsibility over such things. As Aquinas says, the king “should restrain the men subject to him from iniquity by means of laws and commands, penalties and rewards, and lead them to do virtuous works.” And, “it is the king’s task to furnish the community subject to him with protection against enemies; for taking measures against internal perils will bring no benefit if it is not possible for it to be defended against external ones.”<sup>70</sup> This entails a division of moral responsibility over the law and war between the political authority and his subjects. It is not a subject’s responsibility to make just laws and wars. Full moral responsibility for such activities belongs to the king, not the subject.

#### Just Cause

Because rulers have a unique authority over war and their primary responsibility is to create and protect the common good, a ruler ought to only wage war for the protection of the common good. If a ruler is to wage a just war, the war must be in the service of the common

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<sup>69</sup> *Summa Theologiae*, IIaIIae:58, art. 5, corpus, in *ibid.*, p. 177.

<sup>70</sup> *De Regno*, Bk. I, Ch. XV, in *ibid.*, p. 44.

good of his people, not his private good. Moreover, the war must also be in the service of the common good of those the war is waged against. This is what it is to have a just cause for war: the war is necessary in order to protect the common good of peoples, or, the global good.

That this is ultimately Aquinas' view becomes clear from understanding Aquinas's view of the relation between just war and just capital punishment. Aquinas tells us that the justification for war is ultimately fundamentally the same as the justification for domestic punishment. He says, "Just as it is lawful for them [princes] to use the material sword in defense of the commonwealth against those who trouble it from within, when they punish evildoers...so too, it pertains to them to use the sword of war to protect the commonwealth against enemies from without."<sup>71</sup>

This connection between punishment and war is elaborated in his discussion of homicide at *Summa Theologiae* IIaIIae 64. Here it is said that it is lawful to kill sinners because, through their sin, they are a kind of corruption of the proper ordering of a commonwealth. Sinners *qua* sinners are those who act in ways that are contrary to their proper role within their community. Thus, just as the health of a body sometimes requires the removal of some part when it is diseased, an individual can be destroyed when he has become a danger to the health of his community. It is crucial to note here that what makes the sinners so reprehensible is that their sin is contrary to the common good and that what makes their destruction justifiable is that it protects the common good.

Now every part is directed to the whole as imperfect to perfect; and so every part naturally exists for the sake of the whole. For this reason we see that if the health of the whole body requires the removal of some member, perhaps because it is diseased or causing the corruption of other members, it will be praiseworthy and wholesome for it to be cut away. Now every individual stands in relation to the whole community as part to whole. And so if some man is dangerous to the community, causing its corruption

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<sup>71</sup> *Summa Theologiae*, IIaIIae:40, art. 1, corpus, in *ibid.*, p. 240.

because of some sin, it is praiseworthy and wholesome that he be slain in order to preserve the common good; for ‘a little leaven corrupteth the whole lump.’<sup>72</sup>

Aquinas makes it clear in his discussion of the prohibition against killing innocent people that the only occasions when intentional killing is justifiable at all are when it is necessary to prevent harm to the common good. Innocent people do not threaten the common good and therefore cannot be killed.

A man may be considered in two ways. In one way, in himself; in another way, in relation to something else. If a man be considered in himself, it is unlawful to kill anyone, since in everyone, even the sinner, we ought to love the nature which God has made, and which is destroyed by slaying him. On the other hand, as stated above, the slaying of a sinner becomes lawful in relation to the common good, which is corrupted by sin, whereas the common good is conserved and promoted by the life of righteous men, for they are the foremost part of the community.<sup>73</sup>

Despite the fact that these sinners may be intentionally killed, private persons cannot legitimately kill them. This is because what makes the death of the sinner praiseworthy is that it is in the service of the common good. However, for a private person to kill another private person would be contrary to the common good. As was stated above, the common good requires the vesting of authority to govern the community in accordance with the common good in the hands of a monarch. Therefore, the only person who can legitimately kill a sinner is the prince or those who act under his authority as public servants, the prince being the only person with the authority to unilaterally act in the service of the common good. When a private person kills another without the prince’s authority he harms the common good.

As stated above, it is lawful to kill a malefactor insofar as doing so is directed to the health of the whole community; but so to do pertains only to him to whom the task of preserving the community’s health has been entrusted, just as it pertains to the physician

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<sup>72</sup> *IIaIIae:64, art. 2, corpus, in ibid., p. 253-4.*

<sup>73</sup> *Ibid., art. 6, corpus, p. 261.* In line with this, Aquinas prohibits suicide because, among other reasons, to kill oneself is to harm the common good of the community of which one is a constitutive part. Suicide is thus a harm to the common good and is therefore never justifiable. See *ibid., art. 5, corpus, p. 258-9.*

to cut off a decayed member when he has been entrusted with the care of the health of the whole body. Now the care of the common good is entrusted to princes having public authority; and so they alone, and not private individuals can lawfully kill malefactors.<sup>74</sup>

Following Aquinas' connection between just punishment and just wars, it is clear that the just cause for war in Aquinas' view is the protection of the common good. Sinners may be killed precisely because they threaten the common good, so too, rulers or nations may be warred against and their members killed because they threaten the common good. However, I stated above that along with Augustine, Aquinas holds that a just cause for war includes serving the common good of the enemy, not simply the good of one's own people. Aquinas states as much when he responds to the charge that it is always wrong to wage war because it is contrary to Matthew's precept, "resist not evil," by stating, "a man should always be prepared not to resist or not to defend himself if need be. But it is sometimes necessary to act otherwise than this for the common good: *even, indeed, for the good of those against whom one is fighting*" [emphasis added].<sup>75</sup>

This means that just wars are constrained not only by the good of a ruler's own community but by the good of all other communities as well. A ruler must not wage war at times or in a manner that is inconsistent with the common good of any people. In this way, there is a conception of the global good at play in Aquinas' theory, a conception of the proper relations between communities. It is clear that the vision of the global good he has is similar to Augustine's. For both Aquinas and Augustine, the naturally just global order is one wherein all peoples are harmoniously organized into hierarchically structured quasi-monarchical societies and each community wholeheartedly embraces the sovereignty and independence of the others. Although Aquinas never explicitly articulates this vision of the global good, he implicitly

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<sup>74</sup> IIaIIae:64, art. 3, corpus, in *ibid.*, p. 255.

<sup>75</sup> IIaIIae:40, art. 1, ad 2, in *ibid.*, p. 241.

acknowledges it when he claims that peace is the aim of the just war and quotes approvingly Augustine's assertion of the same. He says,

Those who wage just wars intend to secure peace, and so they are not opposed to any peace except that evil peace which the Lord 'came not to send' upon the earth. Hence Augustine says: 'We do not seek peace in order to wage war; rather, we wage war in order to achieve peace. Be peaceful, therefore, in making war, so that, in vanquishing those against whom you fight, you may lead them to the benefit of peace.'<sup>76</sup>

As shown above, peace for Augustine is not an external condition but an internal one; it is a harmony between individuals and peoples. For Augustine, a global harmony of peoples is the highest good. It appears to be the same for Aquinas. Indeed, as we've seen, Aquinas defines peace as "the unity of a community."<sup>77</sup> This implies that when he speaks of peace between communities he means the giving to each community their due which includes respecting their integrity as a community with their own political sovereign.

This vision of the global good is the most fundamental aim of just wars. It is the mark of just wars: it is what just wars protect and what unjust wars harm. When a people or ruler engage in acts that do not serve the global good they are acting unjustly and may be justly warred against by others for the sake of the global good. Violations of the global good are what give others just cause for war. Just as sinning individuals may be killed because they are a corruption of the common good, so too a sinning commonwealth may be warred against because they are a corruption of the global good.

Aquinas appeals to Augustine for examples of actions that constitute violations of the global good and provide just cause for war. These are when a state "has neglected either to put right the wrongs done by its people or to restore what it has unjustly seized."<sup>78</sup> Although, again,

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<sup>76</sup> *Ibid.*, ad. 3, p. 242.

<sup>77</sup> *De regimine principum*, Bk. I, Ch. XVI, in *ibid.*, p. 43.

<sup>78</sup> *Summa Theologiae* IIaIIae:40, art. 1, corpus, in *ibid.*, p. 240-1.

Aquinas does not explicitly say so in this passage, it is clear from his claims about the aims of a just war that what makes these acts violations of the global good is the same thing that makes them such violations for Augustine. That is, that they are inconsistent with respect for the sovereignty and independence of commonwealths. Thus, a constituent part of the global good for Aquinas is respect among rulers and peoples for the sovereignty and independence of other peoples. This is what it means to serve the common good of other peoples. This is part of the global harmony of perfect communities.

With peace between perfect communities as the ultimate aim of the just war and harms to this good providing the only just cause for war, Aquinas commits himself to the view that the fundamental value underpinning his just war is, similar to Augustine, the peace between natural political bodies. Political bodies and their appropriate internal and external ordering are the supreme value in his theory of justice. The reason a community may go to war, using its own members as instruments in war and killing individual members of the enemy community, is that the value of peace between political communities transcends the value of individuals. A community may sacrifice its own members and kill the members of other communities, including the innocent, when it is in the service of the common good of political communities.

Before proceeding, it is important to note that, for Aquinas, just as it is impossible for a private person to punish a sinner in the service of the common good because for a private person to do so is a violation of the common good, it is also impossible for a private person to wage war against a violator of the global good because for a private person to do so is a violation of the global good. Punishment and war can only be done in a manner consistent with the good when carried out by legitimate rulers.

But since it is unlawful for anyone to take a man's life except a public authority acting for the common good...it is not lawful for one man to intend to kill another in self-

defence, except in the case of those who have public authority, who, though intending to kill a man in self-defence, refer this to the public good: for instance, a soldier fighting against the enemy and a minister of the judge fighting with robbers; although even these sin if they are motivated by private animosity.<sup>79</sup>

Thus, for Aquinas, as for Augustine, war fought by private agents for private ends is always unjust. A just war is exclusively a public act undertaken by legitimate political authorities for the sake of the common good. A private person or set of persons cannot engage in just war.

### Right Intention

Aquinas says that for a war to be just, “it is required that those who wage war should have a righteous intent: that is, they should intend either to promote a good cause or avert an evil.” This is a poor statement of what he means by the right intention constraint. The rule would be clearly arbitrary and absurd if taken as stated here. If, as it is stated, this rule held that a war could have a right intention simply by being waged in order to promote *some* good cause or to avert *some* evil, then it would be far too permissive. Taken literally, Aquinas’ statement of the rule would have it that wars fought for any good or to avert any evil, no matter how trivial or arbitrary, would have a right intention.

This is not only absurd on its own, it is also not the meaning of right intention that Aquinas intends. As we’ve seen, Aquinas holds that just rulers must govern with the aim of serving the common good. Moreover, the common good simply is the harmonious composition of the community into its natural order. The common good is served when all members of a community wholeheartedly embrace their respective role and its attendant duties. Just as with Augustine, the good is a disposition of parts to come together harmoniously. It is realized by the proper motives of individuals not simply by their intentions. Thus, any ruler or subject who does

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<sup>79</sup> *Summa Theologiae* IIaIIae:64, art. 7, corpus, in *ibid.*, p. 264.

not wholeheartedly embrace his or her respective role in the just social order is violating the common good.

For this reason, Aquinas' right intention rule must be read as similar to Augustine's interiority constraint on just war. The rule is that just wars must be fought with the intention of serving the global good and from the motive of service to the global good. Again, the intention of an act is its chosen end whereas the motive of an act is the desire from which the act is taken. For Aquinas, in a just war, one must intend to serve the peace and be moved by a desire to serve the peace for its own sake. Aquinas suggests this when he elaborates on the right intention rule by relying on two quotes from Augustine, the first of which states which intentions are just in war and the second stating which motives are unjust in war.

Among true worshippers of God, those wars which are waged not out of greed or cruelty, but with the object of securing peace by coercing the wicked and helping the good, are regarded as peaceful.

The desire to do harm, the cruelty of vengeance, an unpeaceable and implacable spirit, the fever of rebellion, the lust to dominate, and similar things: these are rightly condemned in war.<sup>80</sup>

Read this way, the right intention rule is derived from the vision of the good that forms the basis of Aquinas' teleological conception of justice. For Aquinas, as for Augustine, the good is constituted, in part, by the intention of people to serve the common good as the highest good in political and social life. War is not different; it should be fought with the intention of serving the global good.

Because the common good is constituted, in part, by proper motives among individuals, one cannot consistently intend to serve the common good while at the same time not being motivated by respect for the common good. Only acts that intend to serve the common good

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<sup>80</sup> Quoted in *Summa Theologiae* IIaIIae:40, art. 1, corpus, in *ibid.*, p. 241.

from motives that recognize the common good as the highest good can themselves be consistent with the common good. Again war is no different; it should be waged from the motive of service to the global good.

### Soldiers and the Duty to Obey

Aquinas does not discuss the duties of the individual participants in war, i.e. soldiers, in the section of the *Summa Theologiae* dedicated to the rules of just war. That section is devoted solely to outlining the duties of rulers in war. We can, however, get a sense of what Aquinas thinks the duties of soldiers are from his discussion of political obedience and sedition in *Summa Theologiae* IIaIIae:104 and 42 respectively.

It is clear that for Aquinas it is the soldier's primary duty to execute the commands of his legitimate authority. This follows from Aquinas' conception of the good and the nature of legitimate authority. Legitimate authorities are princes whose commands are sovereign over their communities and their members. This kind of political hierarchy is necessary for the creation and preservation of the common good and is required by the natural inequalities between people. Thus, the subjects of a legitimate ruler are bound to obey their ruler's commands. As Aquinas says, "inferiors are bound to obey their superiors by virtue of the order of natural and Divine law."<sup>81</sup>

Soldiers should be no exception. Indeed, Aquinas states explicitly that soldiers are bound to obey the commands of their legitimate rulers in things related to war: "a soldier must obey his commander in things pertaining to war." This is precisely the soldier's role in the communal organization. Their purpose for being is to wage war when called upon by their legitimate king and in the manner the king commands. Armies are raised by kings for the purpose of protecting

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<sup>81</sup> IIaIIae:104, art. 3, corpus, in *ibid.*, p. 58.

the commonwealth against attack upon command of the king. In this respect, soldiers *qua* soldiers are parts of the community that are to be used by the rulers for the sake of the preservation of the communal whole. Aquinas expresses this view of the soldier in his discussion of the self-love of Angels. Here he says,

For we observe that the part naturally exposes itself in order to safeguard the whole; as, for instance, the hand is without deliberation exposed to the blow for the whole body's safety. And since reason imitates nature, we find the same imitation among the political virtues; for it belongs to the virtuous citizen to expose himself to the danger of death for the conservation of the whole body politic; and if man were a natural part of the state, then such an inclination would be natural to him.<sup>82</sup>

The duty of soldiers to fight for the sake of the common good is grounded in the soldier's membership in the community. As a part of the whole body politic, a soldier is bound to expose himself to danger for the sake of the whole. And, as we've seen, since the preservation of the whole requires the vesting of authority to raise and direct armies to the sovereign, the soldier is obligated to fight upon the command of the sovereign. As Aquinas puts it, "a soldier who defends the king's castle completes both a work of courage by not shirking the peril of death for a good end, and a work of justice by rendering a service owed to his lord."<sup>83</sup>

Moreover, just as rulers are obligated to act from the motive of concern for the common good of peoples, so too subjects are to act from the motive of respect for the authority of their ruler. The good of obedience is not realized simply by following orders but by doing so from the motive of reverence for the legitimate authority of one's superiors.<sup>84</sup> This is constitutive of the social harmony that is part of the essence of the good. Thus, soldiers should obey from the motive of reverence for their superiors.

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<sup>82</sup> *Summa Theologiae* I:60, art. 5, corpus, in *The Basic Writings of Saint Thomas Aquinas*, edited by Anton C. Pegis (Indianapolis, IN: Hackett Publishing, 1997), p. 563.

<sup>83</sup> *IaIIae*:104, art. 2, ad. 1, in *Aquinas: Political Writings*, *ibid.*, p. 61.

<sup>84</sup> *Ibid.*, ad. 4, p. 63.

Recall that for Augustine the soldier's duty to obey can be absolved when the ruler's commands are clearly contrary to God's will. Indeed, when this occurs, the subject is obligated to not obey. Obedience in such a case would be wrongful.

Aquinas agrees. The duty to obey is not absolute. For Aquinas, subjects are bound to disobey commands from their legitimate authority when they are contrary to God's will. For Aquinas, this is because the ruler himself has a superior, i.e. God. One is bound to obey God over one's human king.

Aquinas states that this rationale for absolute obedience to God entails that one is obligated to disobey orders when the order violates the will of another higher up in the relevant human chain of command. Thus, if a military commander gives a soldier an order that violates the will of the prince, for example, then the soldier's obedience should be given to the highest relevant authority, i.e., the prince, and the soldier ought to disobey the subordinate commander's order. Whenever one has conflicting commands from one's relevant superiors, one ought to obey the higher authority and disobey the lower one.<sup>85</sup>

Recall also that for Augustine subjects are always bound to obey whomever happens to occupy the office of king at a given time, no matter how they acquired the position or how they govern. Aquinas, however, claims that a ruler can be illegitimate and therefore not deserving of obedience if they have acquired power illegitimately. Aquinas says that, "he who seizes power by violence does not become a ruler or lord truly; and so anyone can reject such authority when the opportunity arises."<sup>86</sup> Contrary to Augustine, for Aquinas, merely occupying a position of authority is not sufficient for the possession of authority to issue binding commands.

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<sup>85</sup> See *IaIIae*:104, *art. 5, corpus*, in *ibid.*, p. 68-9.

<sup>86</sup> *Scripta super libros sententiarum II, Dist. 44, quaest. 2, corpus*, in *ibid.*, p. 73.

More strikingly, for Aquinas, a ruler who fails to govern according to his purpose as ruler loses the rights of authority and ought to be disobeyed by his subjects. Aquinas tells us that a ruler ought to be disobeyed “when what is commanded by the ruler is contrary to the purpose for which the ruler was appointed: for example, if some sinful act is commanded contrary to the virtue which the ruler is ordained to foster and preserve.”<sup>87</sup> As we’ve seen, for Aquinas, the fundamental virtue which rulers exist to foster and preserve is the good life of the political community, or the common good. Therefore, the view is that whenever a ruler issues a command that is contrary to the common good, his subjects ought to disobey him.

Aquinas applies this view to the authority of tyrants. A tyrannical ruler (i.e., a ruler who governs with the intention of serving his private interests) is not deserving of obedience and ought to be disobeyed. This is because the tyrant has lost his legitimacy by governing not with the intention of protecting the common good but by seeking his private good. The authority of the tyrant is contrary to the common good. In such a circumstance, it is possible that disobedience, indeed open rebellion, could be in the service of the common good. Thus, disobedience to a tyrant can be obligatory. As Aquinas says,

Tyrannical rule is not just, because it is not directed to the common good but to the private good of the ruler, as the Philosopher shows at *Politics* III and *Ethics* VIII. Disruption of such a government therefore does not have the character of sedition...Indeed it is the tyrant who is guilty of sedition, since he nourishes discord and sedition among his subjects in order to be able to dominate them more securely. For this is tyranny: a form of government directed to the private good of the ruler and the injury of the community.<sup>88</sup>

Disobedience, however, can be indirectly harmful to the common good, even when it is done with regard to illegitimate authorities or tyrants. The act of disobedience can cause widespread disorder within the community. One instance of disobedience can disrupt the more

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<sup>87</sup> *Ibid.*, p. 73-4.

<sup>88</sup> *Summa Theologiae*, IIaIIae:42, art. 2, ad 3, in *ibid.*, p. 250-1.

general harmony that is constitutive of the common good. Aquinas, therefore, adds that disobedience is only permissible when its damage to the social harmony is less severe than continued obedience to the illegitimate authority or tyrant would be. Disobedience should only be done when it better serves the common good. One should not disobey a tyrant when, as he says, “the tyrant’s rule is disrupted so inordinately that the community subject to it suffers greater detriment from the ensuing disorder than it did from the tyrannical government itself.”<sup>89</sup>

Despite this caveat limiting the permissibility of disobeying orders contrary to the common good, it is remarkable that Aquinas claims that subjects are obligated to disobey orders from superiors when those orders are contrary to the common good. For Aquinas, only orders that are consistent with the common good are actually binding on subjects. Does this commit Aquinas to the view that political subjects ought to privately review all orders from their superiors and privately decide whether the orders are contrary to the common good prior to obeying them, and, if they are contrary to the common good, refuse to obey when doing so would not cause more damage to the common good than would obeying them? More simply, is it the subject’s responsibility to ensure that she only act in the manner that best serves the common good, regardless of the commands of her superior?

If Aquinas answered this question affirmatively then he would deny that the prince has any unique authority over the community and a unique responsibility for creating and protecting the common good. This is because the view that political subjects ought to scrutinize the orders of their superiors in terms of their impact on the common good would entail the view that subjects share responsibility for creating and preserving the common good with the sovereign. On this view, subjects and sovereigns would be equally responsible for the common good and

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<sup>89</sup> *Ibid.*

the “orders” of the sovereign would be merely proposals that subjects were obligated to privately review and to refuse to follow in the appropriate circumstances when they are contrary to the common good. This view of the relation between sovereign and subject denies that the “orders” of the sovereign are independently binding on the subject. Here, it is the common good that is binding on subjects, not the authority of the king, and it is the responsibility of all members of the political community to ensure that the common good is realized and preserved.

It is clear that this is not Aquinas’ view. This view would contradict his views of the nature of political authority and the distribution of responsibility for the common good discussed above. Moreover, Aquinas explicitly denies that subjects ought to scrutinize the orders of their superiors to determine if they are appropriate prior to obeying them. Though a subject ought to disobey orders contrary to the common good, a subject should not review their orders to see if they are contrary to the common good. A subject ought to obey orders out of reverence to her authority for the sake of the common good and refrain from usurping that authority by reviewing the authority’s orders to see if they are appropriate. Yet, should a subject receive an order that is obviously contrary to the common good, then she ought to disobey provided disobeying would not cause more harm than obeying. For Aquinas, it is only when an order is obviously unjust that a subject has grounds for disobedience. Only orders that are unjust on their face ought to be disobeyed. This is how Aquinas reconciles the duty to obey superiors and the unequal division of responsibility for the common good with the supremacy of the common good.

That this is Aquinas’ view is revealed in his discussion of the obligations of an executioner ordered to execute an innocent man. Aquinas tells us that it is only when the sentence is manifestly unjust that the executioner should not obey his orders.

...if the sentence contains an intolerable error, the executioner who is to carry out the sentence of the judge who has condemned an innocent man should not obey him;

otherwise the torturers who slew the martyrs would be excused. If, however, the sentence does not contain a manifest injustice, he does not sin if he carries out the judge's command, for he has no right to scrutinize the judgment of his superior; nor is it he who slays the innocent man, but the judge at whose behest he acts.<sup>90</sup>

Applying this view of political obligations to soldiers, they are obligated to obey orders from their legitimate superiors provided that the orders do not contradict God or those higher in the political chain of command and the orders are not patently contrary to the common good.

Crucially, what this view of the obligations of soldiers entails is that a soldier can engage in an unjust war and be acting in full accord with his duties. A soldier can justly engage in an unjust war. If a war is unjust, it does not follow that a soldier is not obligated to participate in it. Soldiers are not responsible for ensuring that they only participate in just wars. It is only when a war or a given act of war is patently unjust from the point of view of the soldier that he is obligated to refuse to participate.

### *Jus in Bello*

The three rules of war that Aquinas offers at IIaIIae:40 (i.e, legitimate authority, just cause, and right intention) are properly seen as *jus ad bellum* rules. That is, they are rules that govern the just resort to war. They provide guidance as to whether war should be initiated at a given time, by a given person, and against a given enemy.

As with Augustine, there is no programmatic discussion of the types of means that are allowed or disallowed in war found in Aquinas' corpus. Aquinas, however, clearly insists that there are moral limits on the methods of war. In fact, he does discuss the permissibility of one type of action in war: ambushes.<sup>91</sup> For Aquinas, ambushes are morally questionable because they can seem to involve deliberate deception, or lying. Aquinas argues that ambushes are morally

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<sup>90</sup> *Summa Theologiae* IIaIIae:64, art. 6, ad. 3, in *ibid.*, p. 262.

<sup>91</sup> IIaIIae:40, articulus 3, in *ibid.*, p. 245-6.

permissible. He distinguishes ambushes from outright deception of the enemy. Outright deception, which includes failing to abide by covenants made with the enemy, would be wrong. As Aquinas says, “No one ought to deceive an enemy in this way, *for there are certain rights of war and covenants which should be observed even among enemies...*” [emphasis added].

However, Aquinas does not elaborate on these “rights of war.” As with Augustine, it is this absence of a developed theory of *jus in bello* that makes it possible to think a theory like Aquinas’ cannot ground strong moral constraints in just war. Still, if his theory is similar to Augustine’s in the ways I have argued that it is (that is, if the theory is a teleological one guided by the conception of the global good described above), then the justification of the constraints on war would be the same as the justification of the constraints on the just resort to war. In other words, the rules of legitimate authority, just cause, and right intention would have the same rationale as the constraints on the methods of war. What would be disallowed in war would be anything that is not conducive to the production of a global harmony of just kingdoms.

Again, Aquinas appears to say as much through the use of a quote from Augustine. Aquinas quotes approvingly Augustine’s proclamation in his Epistle 189 that nothing should be done in war that would not be productive of peace: “Be peaceful...in making war, so that, in vanquishing those against whom you fight, you may lead them to the benefit of peace.”<sup>92</sup>

As with Augustine, what is missing in Aquinas is any systematic discussion of what acts of war would be inconsistent with the goal of peace between perfect communities. However, as was claimed above in reference to Augustine’s theory, the fundamental principle of *jus in bello* that war ought to be conducted so as to realize peace would seem to ground a principle of Necessity which holds that the violence of war ought to be limited to only what is necessary for

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<sup>92</sup> IIaIIae:40, art. 1, ad. 3, in *ibid.*, p. 242.

the realization of peace. This is important for, among other reasons, it will be argued in the conclusion of this dissertation that a principle of Necessity like this can ground a principle of Discrimination in war.

## Conclusion

This analysis of Augustine and Aquinas' theories of just war shows clearly that their theories of justice and their views of the just war form a systematic unit. This systematic unity includes their Anti-Individualist commitments. For both Augustine and Aquinas the common good of political communities is the fundamental value underpinning their theories of justice and, in turn, their theory of just war. The common good is distinct from and overrides the private interests of abstractly conceived individuals. Individuals are obligated to serve the common good even at the expense of their private interests as mere individuals. The political community is thus ethically prior to the individual. The Classical Theory of just war is thus an Anti-Individualist theory.

This Anti-Individualist basis of the Classical Theory is evident in the content of its principles of just war. As we have seen, the Classical Theory holds that political authorities are uniquely fully responsible for the justice of their wars while their political subjects, especially soldiers, are primarily obligated to obey commands from their superiors pertaining to war. This view of the distribution of authority and responsibility for war within a political community is based on the natural ordering of political communities, or the common good. Authority over and responsibility for war ought to be unequally distributed between political authorities and their subjects because the common good requires it. The common good is a harmony of the parts of a political whole and trumps the good for individuals privately conceived. This view is clearly Anti-Individualist.

What justifies war according to the Classical Theory is also inconsistent with Individualism. For Augustine and Aquinas, war is only justified when it serves the common good of political communities and the harmony between them. Because the common good is the good of a political body and is distinct from the good of private individuals, the just war, according to the Classical Theory, aims to serve the interests of political communities and not mere individuals. In fact, both Augustine and Aquinas prohibit wars fought by private persons for private ends. For them, just war can only be a public act undertaken for the public good.

Augustine and Aquinas' statements of the Classical Theory leave much to be desired with respect to the theory of *jus in bello* however. Although they do state that a just war must be conducted so as to realize the global good as peace between harmoniously composed commonwealths, they do not provide us with specific, substantive constraints on permissible methods of war. Importantly, they do not develop a principle of Discrimination.

This shortcoming to the Classical Theory leads us to the next chapter. Francisco Vitoria is the first systematic just war theorist to develop a principle of Discrimination in war. On the one hand, Vitoria will accept much of the substance of the Classical Theory including its Anti-Individualism. Importantly, he will defend the view that political authorities are uniquely fully responsible for the justice of their wars and their soldiers are obligated to serve in war upon command. This is what later theorists will call public war. Vitoria explicitly defends this view by appeal to the supremacy of the common good as the good of supra-individual political bodies.

On the other hand, however, Vitoria will defend a principle of Discrimination in war that states that it is always impermissible to deliberately target noncombatants in war while it is permissible to target combatants, including soldiers, fighting in an unjust war because they are personally acting contrary to their duties. This view relies on the assumption that soldiers are

obligated to not serve in wars that are unjust even when they are ordered to do so by their legitimate political authority. The theory of Discrimination therefore denies that soldiers are obligated to serve in war upon the command of their political superiors. Vitoria's just war theory is thus the first example of a Dualist theory of just war. He simultaneously defends two, distinct views of the distribution of responsibility for the justice of war within a political community. This Dualism is the result of the fact that Vitoria's defense of his principle of Discrimination relies on an Individualist theory of justice that is inconsistent with the Anti-Individualism that underpins the bulk of his just war theory, including his theory of public war. The theory is thus foundationally incoherent.

Vitoria's attempt to add a theory of Discrimination to the Classical Theory is therefore deeply problematic and will leave future theorists with a problem of reconciling public war with a theory of Discrimination. As we will see in the chapters to come, all Individualist attempts at this reconciliation will fail.

## Chapter 2

### Dualist Theories (1): Vitoria's Just War

#### Introduction

In the previous chapter, we saw that the Classical Theory of the just war places responsibility for all rules of war, both the *jus ad bellum* and the *jus in bello*, in the hands of political authorities and not in the hands of individual political subjects. For the Classical Theory, political subjects, including soldiers, are morally obligated to obey orders to participate in war when issued by their legitimate political authority independently of the justice of the war.

Since what gives political sovereigns the authority to wage war is the intrinsic goodness of peaceful relations between harmoniously constituted monarchical political communities, i.e. the global good, the Classical Theory is grounded Anti-Individualistically. It is the supreme goodness of a specific global order of supra-individual commonwealths that can justify war and ground the duty of subjects to serve in war. In this sense, the Classical Theory holds that the interests of supra-individual entities can trump the interests of individuals privately conceived. Political bodies can use their individual members as their moral instruments and deliberately kill other individuals in war for the sake of the interests of the political body.

This is decidedly different from the orthodox contemporary theory of the just war. The most influential statement of systematic just war though in recent decades, Michael Walzer's *Just and Unjust Wars*, offers a Dualist theory in that it asserts two distinct distributions of responsibility for war within a political community. In particular, this theory holds that political authorities are responsible for abiding by *jus ad bellum* rules, not their subjects, while soldiers and their commanders share responsibility for the *jus in bello* rules. With respect to the *jus ad bellum*, this theory accepts the Classical Theory's division of responsibility between political

authorities and soldiers, but with respect to *jus in bello*, this theory departs from the Classical Theory and distributes responsibility equally between authorities and soldiers.

The question I will attempt to answer in this chapter and the following two is, “How did we get here from there?”, or, more specifically, “How did just war thought move from the Classical Theory to the contemporary Dualist theory?” My answer will not be flattering to the just war tradition. I hope to show that the Dualism of modern theories of the just war is a symptom of a philosophical contradiction that has crept into the foundations of just war thought in recent centuries. The contradiction occurs between Individualism and Anti-Individualism, that is, between the view that the rights and/or basic interests of equal, private individuals are the basis of justice and limit absolutely what is permissible for political communities to do, and the view that the rights and/or basic interests of political communities permit them to use individuals for their own supra-individual ends. The contemporary Dualist theory and its predecessors are committed to both views at the same time.

Walzer’s Dualist theory is only one theory of the just war that is the product of this contradiction. As we will see in this chapter and the next, this contradiction has produced a variety of Dualist theories. Earlier versions did not do nearly as well in managing this contradictory foundation. Most versions, those of Vitoria and Grotius in particular, are more flagrantly incoherent and clearly impossible to put into practice. As we will see in chapter 4, the contemporary Dualist theory at least recognizes, albeit quietly, its incoherent ground by explicitly dividing responsibility for its rules of war. Though this makes the contemporary Dualist theory more practicable on its surface, it is still fundamentally inconsistent.

In this chapter we will see how Dualism entered into the just war tradition. In the work of Francisco de Vitoria we see the introduction of Individualism into part of just war theory, while the rest remains grounded in an Anti-Individualism in the vein of the Classical Theory.

Vitoria (1485-1546) was a Spanish theologian who served as Prime Chair of Theology at the University of Salamanca from 1526 until his death.<sup>1</sup> From this position he had a tremendous influence on contemporary political affairs as well as the development of Late Renaissance and Early Modern European thought. His devoted students included such influential figures as Domingo de Soto, Luis de Molina, and Francisco Suarez.

Though Vitoria published nothing during his life, his work survives in the form of dictations of his lectures from his students. As is clear in virtually all of his works, Vitoria accepted the basic Scholastic methods of philosophy and, as could be expected, was a committed Thomist. These commitments are most clearly demonstrated in his commentary on Aquinas' *Summa Theologiae* given in his theology courses. Thus, as we will see, his views on war bear many strong similarities to Aquinas'. Vitoria also gave many *relectiones*, or re-readings. These are lectures to a broad academic audience often on a topic of contemporary social and political relevance. My discussion of Vitoria will rely mainly on three of these re-readings: *On Civil Power*, *On the American Indians*, and *On the Laws of War*. Vitoria's relevant philosophical innovations (and failings) are revealed in these three works.

As is evident in these three pieces, the body of Vitoria's work is overwhelmingly preoccupied with two basic issues. One is the political authority of civil governments and the attendant duties of political subjects. This became a controversial topic as a result of recent

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<sup>1</sup> There is not much extant literature on Vitoria's biography and historical significance. I rely here on Pagden and Lawrance's "Introduction" in *Vitoria: Political Writings* (New York: Cambridge University Press, 1991).

justifications of revolution made popular by Late Renaissance republican philosophy, as well as Lutherans and Calvinists. Against these “heretics and schismatics,” Vitoria aimed to show that political subjects ought not to question the authority of their rulers, especially their kings.

Vitoria’s other preoccupation is with the justifiability of the Spanish conquest of the New World. This topic led Vitoria to produce innovative work on the nature of the just war and the law of nations. It is this work that has caused him to be dubbed by some the “father of international law.”

Vitoria is recognized as the first to develop clear and robust rules of *jus in bello*. In particular, Vitoria defends a strong principle of Discrimination in just warfare: a moral restriction on who may and may not be deliberately targeted in a just war. For Vitoria, what grounds this restriction is the right of individuals not to be killed except when they have acted personally wrongly so as to give others a right to use defensive or punitive violence against them. A person who has not personally done anything relevantly wrongful to make them worthy of defensive or punitive violence can never legitimately be deliberately killed or maimed. Thus, in a just war one can never deliberately attack those who are innocent of the injustice that gives one a just cause for war. Only those who share blame for the injustice in question are potentially legitimate targets. For Vitoria, noncombatants in a political community waging an unjust war are always innocent of the injustice of the war and, because of this, they are always immune from deliberate attacks on their person. Combatants, including soldiers, fighting in an unjust war, however, may be killed because they are not innocent of the injustice of the war. This view presupposes that soldiers are responsible for ensuring that they do not fight in an unjust war even when ordered by their legitimate authority to do so.

At the same time, however, Vitoria accepts the Classical Theory's view of the responsibility for the overall justice of war. For Vitoria, the political sovereign is responsible for ensuring that their wars abide by the rules of *jus ad bellum* and *jus in bello*. Political subjects, on the other hand, are bound to participate in war when ordered to by their legitimate political authority and those orders are not patently unjust. For Vitoria, what justifies war is the necessity of defending the common good against unjust harm and punishing those who harm the common good. In these endeavors, individual subjects are seen as the moral instruments of their political communities, to be used for the commonwealth's ends upon the command of their political authority. This view of the obligations of soldiers entails that a soldier fighting in an unjust war is not necessarily personally acting wrongly. On the contrary, he could be doing what is ethically required of him. If he can nevertheless be deliberately attacked, it cannot be because he has personally acted in such a way as to make him liable to attack.

In this way, Vitoria's theory of just war is a Dualist theory in that it attributes to soldiers two distinct sets of ethical responsibilities. I hope to make clear below that these two strands of Vitoria's thought are inconsistent. He holds simultaneously that subjects of legitimate political authorities may be used, even killed, when it is necessary to protect the common good *and* all individuals have the absolute right not to be killed when they have personally done nothing wrong that renders them liable to be killed. These two views are based on two incompatible theories of justice. Vitoria holds that the interests of political communities trump any supposed interest that individuals have not to be deliberately killed *and* that individuals have an absolute interest in not being deliberately killed. More simply, he holds that the interests of supra-individual political communities are supreme and that the interests of private individuals are

supreme. He is simultaneously an Anti-Individualist and an Individualist. This contradiction accounts for his Dualism.

### *Jus ad Bellum* and Legitimate Political Authority

We begin with the basic question that all just war theories attempt to answer, “When is war justified?”

In a striking departure from the Classical Theory, Vitoria asserts early in *On the Law of War* that all individuals have the authority to use violence in defense of their person and their property. Thus, war, or at least violence, between private individuals for private reasons can be justified in some cases. Importantly, for Vitoria, individuals need not appeal to anyone in order to engage in such defensive violence. This means that any person may legitimately use defensive force against an attacker or thief when force is the only way of thwarting the attack or protecting private property. This is a right of all individuals and is part of the inherent authority a person has over himself and his property. As Vitoria says, “any person may wage war without any other person’s authority, not only for self-defense but also for the defense of their property and goods.”<sup>2</sup>

It is important to dwell on what is entailed by this view. To say that someone has the *authority* to do some act is to say something different than that they are permitted to do that thing in particular circumstances. To say that something has the authority to do some act is to attribute to that thing sovereignty over the decision to do that act or not. If a person has the authority to do something, he or she has moral charge over the decision to act or not. Therefore, authority does not grant a mere permission to a person, it grants them moral responsibility over the decision to do it or not in all relevant circumstances. To have authority over an activity is to have the right to

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<sup>2</sup> §3, in *Vitoria: Political Writings*, edited by Anthony Pagden and Jeremy Lawrance (New York: Cambridge University Press, 1991), p. 299.

do it in some circumstances if one chooses but also the moral responsibility for that choice. If the authority-bearing agent acts righteously, he is to be praised. If he acts wrongly, he is to be blamed. Others cannot be held responsible in the same way for actions over which they do not have authority, for it is not their place to make decisions regarding such matters.

This is not usually recognized in contemporary discussions of the relation between authority and just war. As we have already seen, a standard principle of just war theory is what is known as the Legitimate Authority rule and it states that only those who have the authority to engage in war can possibly wage a just war. Typically, just war theorists reduce the principle of legitimate authority to simply a necessary condition of a just war, a rule like any other of the *jus ad bellum*. But the Legitimate Authority rule also serves the function of fixing the scope of moral responsibility for the other rules of war on the authority-bearing agent or agents.

Therefore, Vitoria's assertion of the private authority of individuals to wage defensive war entails that the individual is responsible for ensuring that his use of defensive violence is just. In a private war, that is, a war between individuals acting under private authority, it is the individual participant's duty to ensure that he uses violence in the appropriate circumstances and in the appropriate ways. Should he fail to do so, he is to blame. For Vitoria, in a private war, anyone who fights only defensively is fighting with a just cause while everyone else is fighting unjustly. In such a case, the praise and blame is distributed individualistically according to how each person uses his authority to wage private war.

Crucially, Vitoria also argues that commonwealths, in addition to individuals, have the authority to wage and declare war. Two things distinguish this authority from the individual authority to wage defensive war. First, commonwealths, but not individuals, have the right to *punish* unjust attackers, not merely thwart their attack. That is, a commonwealth can pursue

attackers even after their attack has been thwarted for punitive reasons whereas a private individual cannot. For Vitoria, individuals do not have the authority to punish others, only commonwealths do.

Second, and more importantly for our purposes, the authority of commonwealths to wage and declare war is not an attribute of all the individuals that compose it; rather, it is an attribute of a supra-individual public body that is composed of individuals as its parts. In this sense the authority is not merely a derivative or sum of the individual authority of persons. It is foundationally distinct from the individual authority to use violence in self-defense. For Vitoria, then, there are two distinct kinds of entities with the right to make war without another's authority: individuals and commonwealths.

If a man cannot give up his right and ability of self-defence and of using his own body for his own convenience because this power belongs to him by natural and divine law, by the same token the commonwealth also cannot by any means be deprived of its right and power to guard and administer its affairs against violent attack from its enemies, either from within or from without.<sup>3</sup>

That Vitoria holds the commonwealth to be a supra-individual entity is clear from his avowed Thomistic sympathies regarding the matter. Vitoria states clearly that the commonwealth is a supra-individual thing; an irreducibly social whole composed of individuals as its ontological parts. Vitoria defines the commonwealth shortly after his assertion of its authority to wage and declare war as a “perfect community” and as such it is “lacking in nothing” and “complete in itself.”<sup>4</sup> Such a community is more than just a set of individuals organized a particular way. It is a complete body in itself; an ontological whole composed of individuals as its parts. Thus, to attribute the authority to wage and declare war to the commonwealth is to attribute that authority to the political whole and not its individual parts.

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<sup>3</sup> *On Civil Power*, §11, in *ibid.*, p. 18-9.

<sup>4</sup> *On the Law of War*, §7, in *ibid.*, p. 301.

This view of the commonwealth is more clearly stated in *On Civil Power*. Here, Vitoria also distinguishes the private right of self-defense from the public right of commonwealths to war. He makes it quite clear that commonwealths are ontological wholes and their rights are foundationally distinct from the rights of individuals. He asserts the view, also expressed by Aquinas, that just as an individual may use and sacrifice its parts to protect the whole body, so may a commonwealth use its individual parts to protect the commonwealth. This authority of the commonwealth includes the right to “compel and coerce” its members to fight for its sake.

[E]very man has the power and right of self-defense by natural law, since nothing can be more natural than to repel force with force. Therefore the commonwealth, in which ‘we, being many, are one body, and every one members one of another’ as the Apostle says (Rom. 12: 5), ought not to lack the power and right which individual men assume or have over their bodies, to command the single limbs for the convenience and use of the whole. Individuals may even risk the loss of a limb if this is necessary to the safety of the rest of the body; and there is no reason why the commonwealth should not have the same power to compel and coerce its members as if they were its limbs for the utility and safety of the common good.<sup>5</sup>

If commonwealths have the authority to wage war in certain circumstances, then who or what is responsible for the justice of the wars of commonwealths? If a commonwealth exercises its authority in a manner that goes beyond what is permitted by justice, who or what do we blame?

Vitoria’s answer to this question is more complicated than it is in Augustine and Aquinas. The reason for this complication is that Vitoria distinguishes the authority of the commonwealth from the authority of the sovereign, or head of state. For Augustine and Aquinas, the sovereign was an essential part of the commonwealth. Both Augustine and Aquinas see the commonwealth as, naturally, a *monarchical* political community.<sup>6</sup> Vitoria, however, sees the commonwealth and

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<sup>5</sup> §7, in *ibid.*, p. 11.

<sup>6</sup> This may be slightly unfair to Aquinas. As we have seen in the previous chapter, Aquinas’ good political community is a quasi-monarchical, “mixed” commonwealth.

the sovereign as separate entities and argues that the sovereign receives its authority when the commonwealth delegates its authority to the sovereign. In this way, the authority of the commonwealth is prior to the authority of the sovereign. However, Vitoria argues that this does not mean that the commonwealth has any authority over the sovereign. Indeed, Vitoria is even less sympathetic to rebellion and disobedience than is Aquinas.

Relying heavily on Aristotle, Vitoria argues that membership in commonwealths is a part of mankind's natural purpose, or *telos*. The commonwealth is, as he says, "the most natural community, the one which is most conformable to nature."<sup>7</sup> Vitoria argues that this is revealed by the fact that membership in a commonwealth is a necessary condition for the development of men in accordance with their nature. The commonwealth makes possible the survival of the individual as well as his virtue, both intellectual and moral. Life completely outside of civil society is all around a "dreary and unlovely thing."<sup>8</sup>

The commonwealth cannot exist, however, without civil power, without, that is, the power to govern itself and its individual parts so as to serve the interests of the commonwealth, or the common good. If the members of the commonwealth were not subject to such an authority, they would each pursue their private interests and, in turn, destroy the commonwealth.

If all members of society were equal and subject to no higher power, each man would pull in his own direction as opinion or whim directed, and the commonwealth would necessarily be torn apart. The civil community would be sundered unless there were some overseeing providence to guard public property and look after the common good... Just as the human body cannot remain healthy unless some ordering force directs the single limbs to act in concert with the others to the greatest good of the whole, so it is with a city in which each individual strives against the other citizens for his own advantage to the neglect of the common good.<sup>9</sup>

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<sup>7</sup> *On Civil Power*, §4, in *ibid.*, p. 9.

<sup>8</sup> *Ibid.*

<sup>9</sup> §5, in *ibid.*, p. 9.

Thus, the authority of the whole of the commonwealth over its members is part of the natural purpose of the commonwealth. There cannot be a commonwealth without civil power.

Unlike for Augustine and Aquinas, this natural authority of the commonwealth is simply the authority of the whole over its parts, not the authority of any individual or set of individuals over the others. Just as an individual is sovereign over himself, the commonwealth is sovereign over itself. “If no one was superior to any other before the formation of cities, there is no reason why in a particular civil gathering or assembly anyone should claim power for himself over others.”<sup>10</sup> Vitoria tells us that the authority of the commonwealth includes the authority to issue laws that are binding in conscience on its members, the authority to punish transgressors of these laws, and the authority to wage and declare war.<sup>11</sup>

Vitoria, however, argues that commonwealths ought to delegate their natural authority to some executive, either to a body of men, or, preferably, to a monarch. The authority of this sovereign executive is the result of a “transfer” of that authority from the commonwealth.<sup>12</sup> Unfortunately, Vitoria does not explain how this transfer is completed. However, Vitoria asserts two things about it that seem to prefigure contractarian theories of political authority. He says, first, that the commonwealth bears responsibility for its transfer and is bound to ensure that only a just sovereign is granted authority. As he says, “the commonwealth is held responsible for entrusting its power only to a man who will justly exercise any authority or executive power he may be given.”<sup>13</sup> If the sovereign acts unjustly towards foreign parties, the commonwealth as

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<sup>10</sup> §7, in *ibid.*, p. 11.

<sup>11</sup> See, for example, §8, in *ibid.*, p. 17 where Vitoria summarizes the powers of the commonwealth: “the commonwealth has the power to administer and govern itself and its citizens in peace and to compel any who breach that peace and contain them in the bounds of civil duty.”

<sup>12</sup> §8, in *ibid.*, p. 16.

<sup>13</sup> §12, in *ibid.*, p. 21.

such can be held responsible. Second, he says that the power of the sovereign “is none other than the commonwealth’s power administered through the sovereign.”<sup>14</sup> This suggests that the sovereign is the *agent* of the commonwealth, not its principal.

However, Vitoria’s argument for the delegation of authority from the commonwealth to a sovereign is, it seems to me, at odds with these quasi-contractarian statements. The reason why commonwealths ought to transfer authority to a sovereign is that the commonwealth cannot manage its own affairs without a sovereign. Were a commonwealth to attempt to govern itself directly, it would fall apart. Thus, commonwealths must delegate authority to a sovereign body.

Though the commonwealth has power by divine law over the individual members of the commonwealth, as has been proved, it is nevertheless quite impossible for this power to be administered by the commonwealth itself, that is to say by the multitude. Therefore it is necessary that the government and administration of affairs be entrusted to certain men who take upon themselves the responsibilities of the commonwealth and look after the common good. It is irrelevant whether this be a number of men, as in an oligarchy, or a single man, as in a monarchy...<sup>15</sup>

It is for this reason that Vitoria holds that the authority of the sovereign over the commonwealth is based in natural law. Because the sovereign is necessary for the existence of the commonwealth as such, the sovereign’s authority is part of the natural purpose of the commonwealth. Thus, as Vitoria argues, just as the power of the commonwealth is natural so is the power of the sovereign natural. As he says, “we must say about royal power exactly what we have asserted about the power of the commonwealth, namely that it is set up by God and by natural law.”<sup>16</sup>

For this reason, Vitoria holds that once authority has been granted to a particular monarch, the commonwealth loses all power and is in absolute subjection to the king. Because

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<sup>14</sup> §8, in *ibid.*, p. 14.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, p. 17.

the power of the sovereign is natural and independent of the power of the commonwealth, commonwealths cannot rescind the authority of a king that has been duly granted authority.<sup>17</sup> Even a tyrant is not to be opposed by his subjects.<sup>18</sup>

Vitoria's restriction of the authority to wage and declare war to the commonwealth and, in turn, its legitimate rulers means that his discussion of the principles of the *jus ad bellum* is a discussion of what renders such actions by legitimate rulers just or unjust. It is a discussion of what rules legitimate authorities are responsible for adhering to. Since, as we've seen, the commonwealth and its legitimate authorities are ontologically distinct from the set of individuals who compose a political community, then the responsibility for adhering to these rules is not that of the individuals who compose commonwealths or are subject to their legitimate authorities. To repeat, specifying who has legitimate authority to wage war in the just war tradition has the dual purpose of specifying who may wage war legitimately and also of limiting the scope of ethical responsibility for waging war to the given legitimate authority.

The precise character of Vitoria's rules of the *jus ad bellum* is not relevant to my argument, so I will not discuss them all in detail. The rules are

1. Legitimate Authority—Only those who have legitimate authority over a commonwealth may wage and declare war.
2. Just Cause—War may only be justly waged in defense of a commonwealth against unjust attack or as punishment for unjust attacks.
3. Proportionality—War ought only to be waged when its negative effects do not outweigh the benefits that the war aims to achieve.<sup>19</sup>

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<sup>17</sup> §10, in *ibid.*, p. 18-9.

<sup>18</sup> §23, in *ibid.*, p. 42.

<sup>19</sup> For Vitoria's statements of this rule, see *On the Law of War*, §33, in *ibid.*, p. 314, and *On Civil Power*, §13, in *ibid.*, p. 21.

In addition to being the unique responsibility of the sovereign, what is crucial to point out here about Vitoria's *jus ad bellum* rules is the fact that they conceive of just war as a relation between supra-individual public bodies and justify war by appeal to the interests of such bodies. For Vitoria, as for Augustine and Aquinas, just wars are fought solely for the sake of the common good, not for any private good. It is the peace and well being of the commonwealth that is to be defended and harms to which are to be punished by just wars. Wars by commonwealths for the sake of any other interests are unjust. This is what it means for a commonwealth to have just cause for war. Just cause for war is not a private thing, but a public one. As Vitoria says, "the purpose of war is the peace and security of the commonwealth."<sup>20</sup> Thus, when a prince has legitimate authority over a commonwealth, it is his duty to wage war only when it is necessary to protect the common good of his people. In particular, he must never wage war for his own private gain. To govern a people for private ends is the essence of tyranny. Only rulers who rule for the sake of the governed public are just.

The prince must order war and peace for the common good of the commonwealth; he may not appropriate public revenues for this own aggrandizement or convenience, still less expose his subjects to danger. This is the difference between a legitimate king and a tyrant: the tyrant orders the government for his own profit and convenience, whereas the king orders it for the common good, as Aristotle demonstrates. The prince has his authority from the commonwealth, and must therefore exercise it for the good of the commonwealth; and laws must not be framed for the convenience of any private individual, but for the common utility of the members of the commonwealth. . . . Therefore the laws of war ought to be for the common utility, not for the utility of the prince. This is the difference between free men and slaves, as Aristotle shows in *Politics* 1253b15-1255b40. Masters use their slaves for their own convenience, without consideration of the slaves' convenience; free men, on the other hand, do not live for the convenience of others, but for themselves. For a prince to abuse his position by forcing his subjects into military service and by imposing taxes on them for the conduct of wars waged for his convenience rather than the public good, is therefore to make his subjects slaves.<sup>21</sup>

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<sup>20</sup> *On the Law of War*, §1, in *ibid.*, p. 298.

<sup>21</sup> §12, in *ibid.*, p. 303.

It follows then that when Vitoria argues “the sole and only just cause for waging war is when harm has been inflicted,”<sup>22</sup> in the case of wars waged and declared by commonwealths the harm in question must be a harm to the common good as such, not to any private good. Though Vitoria does not specify precisely what harms constitute just cause for war, the harm must be attributable to the commonwealth as such, not solely to a private individual, especially the prince. It is only in this way that a war could be said to serve the common good.

#### The Duties of Soldiers

But if just wars can be wars that defend and punish harms to the common good, and the authority to wage these wars is in the hands of the prince or commonwealth not its individual subjects, then what is the place of the interests and will of the subject or soldier in a just war? For Vitoria, the soldier lacks the authority to decide when to go to war and, in a just war, his life and well being is put on the line for the sake of the common good. The soldier is the instrument of the commonwealth. He is the servant of a supra-individual public thing, to be used and sacrificed for its sake. In this respect, Vitoria’s just war is thoroughly Anti-Individualist.

Vitoria argues that typical subjects are not morally required to examine the reasons behind the sovereign’s decision to wage and declare war. Concern with such matters is simply not part of the subject’s civic responsibility. It is solely the sovereign’s as well as anyone the sovereign asks for assistance in examining the matter. Aside from other high ranking officials and those who counsel the sovereign, “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”.<sup>23</sup>

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<sup>22</sup> §13, in *ibid.*, p. 303.

<sup>23</sup> §25, in *ibid.*, p. 308.

For Vitoria this is because of the nature of political sovereignty and the authority it grants the prince or commonwealth over its subjects. His reasons for excusing subjects from responsibility for the decision to wage and declare war are the same reasons he uses to defend the authority of the commonwealth and the prince to wage and declare war. As he says, “it would be impossible, and inexpedient, to put the arguments about difficult public business before every member of the common people.”<sup>24</sup> This is to say that it is in accordance with natural and divine law that the common people be denied authority and, in turn, responsibility over matters of war. Thus, for Vitoria the assertion of the commonwealth’s authority to wage and declare war restricts responsibility for the decision to the commonwealth or its political sovereign and takes it away from subjects. Simply put, war is the sovereign’s responsibility, not the subject’s.

This division of responsibility over the decision to wage and declare war means that the subject’s moral duties in war are not relative only to the justice of the war itself, but are relative primarily to the commands of his sovereign. The subject’s overriding duty is to obey orders to serve in wars declared by his legitimate sovereign. Such orders have an intrinsic moral force that is independent of the justice of the war. The subject’s primary moral concern should not be with the justice of the war they are asked to be participants in but with the legitimacy of the authority under which the order to participate is made.

In cases where a subject has reason to doubt the justice of his sovereign’s war, he is still obligated to serve because obedience to legitimate authority is an independent moral duty. To think otherwise is to assume that, “If I am in doubt whether the prince’s war is just or whether the cause of a particular war is just, it follows immediately that I must doubt whether or not I may lawfully fight.” But, Vitoria argues,

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<sup>24</sup> *Ibid.*

I admit that it is never lawful to act against a conscientious doubt, so that if I am in doubt whether I should act or not it is a sin to act. But it is incorrect to deduce that if I am in doubt as to whether the cause of war is just, I must therefore doubt whether I may lawfully make war, or fight in that war. In fact, we must deduce just the opposite: if 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. In the same way, if an officer of the law is in doubt whether the judge's sentence is just, it is quite invalid to conclude that he must doubt whether he may lawfully carry out that sentence; on the contrary, indeed, he knows very well that he is required to carry out the sentence of his superior.<sup>25</sup>

This is not to say that for Vitoria subjects are always obligated to obey commands from their legitimate sovereign to serve in war. In cases where the subject believes the sovereign's war is patently unjust, that is, when the war appears unjustified on its face, subjects are not only permitted to not serve but are obligated not to.<sup>26</sup> For Vitoria, to participate in a war that one is convinced is unjust is to act in bad faith and is always wrong.

But since subjects are not required to examine the justification of the war, if there is any doubt as to whether a war is just or not, subjects are obligated to serve when ordered to by their legitimate authorities. This, coupled with Vitoria's insistence that sovereigns ought not to explain and justify their wars to the public, means that most participants in wars waged and declared by legitimate authorities are not only innocent but righteous soldiers. They are doing what is morally required of them. Anything less than complete obedience would be wrongful. Only in cases where a war appears patently unjust do subjects who participate have anything to account for. In all other cases, subjects are acting in accordance with their duties. The injustice of a war, therefore, does not necessarily taint its participant in any way.

This means that the participants on all sides of a conflict between commonwealths can be acting rightly even though one or all sides is engaged in an unjust war. Though it cannot be the

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<sup>25</sup> §31, in *ibid.*, p. 312. Vitoria here affirms Augustine's view of the duty of soldiers to serve in an unjust war articulated in *Contra Faustum*.

<sup>26</sup> §22, in *ibid.*, p. 307.

case that all sides of a conflict can have a just cause for war, it could be, indeed, it would seem to be a regular occurrence, that the *soldiers* on all sides of the conflict between commonwealths are justified in fighting. In as much as the soldiers on all sides are following orders from their legitimate authority and they do not find their wars patently unjust, the soldiers on all sides are morally upstanding. Therefore, soldiers on all sides of a war can confront each other as equally morally praiseworthy servants of the common good even when one or all of their wars are actually unjust. This is a version of what later theories will call the moral equality of combatants. It is made possible here because, for Vitoria, the duties of soldiers are not relative to the justice of the wars they fight but are relative primarily to the commands of their legitimate authorities. Although Augustine and Aquinas do not assert it, this moral equality of combatants follows from their views as well.

Unfortunately, Vitoria's statement of this moral equality is misleadingly worded. He seems to claim that the soldiers in an unjust war can be innocent of the crime of the war because they are *excused* as a result of their ignorance of the facts pertaining to the decision to wage war. This is often how Vitoria is understood. However, the argument should be read as asserting the *justifiability* of the soldier's service, not its exculpatory character, as he says at its conclusion. Remember, Vitoria holds that ignorance of the justifiability of the sovereign's decision to wage war leaves subjects with the duty to serve even in unjust wars, not merely an excuse for serving. Subjects with what he calls "invincible error" are therefore morally required to serve when ordered to by their legitimate authority.

[W]here there is provable ignorance either of fact or of law, the war may be just in itself for the side which has true justice on its side, and also just for the other side, because they wage war in good faith and are hence *excused* from sin. Invincible error is a valid *excuse* in every case. This is often the position of subjects: even if the prince who wages war knows that his cause is unjust, his subjects may nevertheless obey him in good faith, as

explained in the previous article. In such situations, the subjects on both sides are *justified* in fighting, as is well known. [emphasis added]<sup>27</sup>

A few sections later, Vitoria reiterates the point, this time rendering it unequivocally as the assertion of the justice of a soldier's service in wars that are unjust.

[S]ubjects neither must nor ought to examine the causes of war, but may follow their prince into war, content with the authority of their prince and public council; so that in general, even though the war may be unjust on one side or the other, the soldiers on each side who come to fight in battle or to defend a city are all equally innocent.<sup>28</sup>

Before proceeding to issues of *jus in bello* in Vitoria's theory, we should close this section by noting an apparent tension within the theory of *jus ad bellum* that will be relevant in the following chapters. As we have seen, Vitoria views the commonwealth as a supra-individual body that has the authority to use its individual members in war for the sake of the common good. This view is fundamentally the same as the views of Augustine and Aquinas. However, as we have also seen, Vitoria departs from Augustine and Aquinas by asserting the private right of individuals to defend their person and property against unjust attack with violence. Thus, for Vitoria, individuals have the right to use violence to defend their private interests against unjust attacks independently of the authority of the commonwealth or sovereign.

There is a tension between these two views, however, because to use a person in war as a moral instrument is to subject them to threats of death. If a person has an absolute right to defend themselves against unjust violent threats of harm, he would seem to have a right to examine the cause of the commonwealth's war and refuse to participate in those wars when they are unjust. In this sense, there could be no obligation to serve in war upon the command of the sovereign. A soldier's duties in war would be relative to the justice of the war, not to the commands of the sovereign. If Vitoria's theory of the rights of the commonwealth is to be consistent with the

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<sup>27</sup> §32, in *ibid.*, p. 313.

<sup>28</sup> §48, in *ibid.*, p. 321.

rights of the individual he asserts, he would have to hold that the interests of the commonwealth trump the interests of the individual. He would have to assert that although private individuals have rights to self-defense, the interests of the commonwealth outweigh these rights. Despite his occasional Individualist sympathies, in order to be consistent, he would have to be read as a thoroughgoing Anti-Individualist.

### *Jus in Bello* and the Killing of the Innocent

As we can see, Vitoria's construction of the *jus ad bellum* requirements of the just war are very much in the vein of the Classical Theory. Vitoria grants authority to wage and declare war to the political sovereign, not to its subjects, and he links just cause for war with the protection and defense of the common good, not the private good. This is not to say that there are no significant differences between Vitoria and the Classical Theory on the issue of the *jus ad bellum*. There are. However, these particular similarities are striking.

Also similar to the Classical Theory, Vitoria restricts responsibility for the *jus in bello* to the political sovereign. The political sovereign is not only responsible for ensuring its wars are waged for just reasons but also for ensuring that the methods employed in its wars are just. Thus, for Vitoria, as with the Classical Theory, all the principles of the just war, both the *jus ad bellum* and the *jus in bello*, apply uniquely to the political sovereign, not to its subjects.

That this is Vitoria's view of responsibility for the *jus in bello* is clear from the fact that he never draws a distinction between his discussion of responsibility for the *jus ad bellum* and responsibility for the *jus in bello*. He enumerates both his rules of *jus ad bellum* and *jus in bello* immediately following his discussion of the political sovereign's authority to wage and declare war. He never suggests that anyone but the political sovereign is responsible for both sets of rules. Rather, his discussion of *jus in bello* speaks only of the interests and rights of the

commonwealth in war, suggesting that, for him, it is the sovereign that is responsible for *jus in bello* as it is with responsibility for the *jus ad bellum*.<sup>29</sup>

However, it is in Vitoria's construction of the content of the moral limitations of just warfare, the substance of his rules of the *jus in bello*, where he dramatically departs from the Classical Theory and the introduction of Dualism into the just war tradition occurs. In particular, Vitoria attempts to insert a principle of Discrimination—a moral distinction between things and/or people so as to render the targeting of one group in a just war more morally problematic than the targeting of the other—into the *jus in bello*. Such a principle was not articulated in the Classical Theory and, in introducing it, Vitoria unwittingly chooses to ground it in principles of justice that are radically different from (indeed, inconsistent with) the principles that ground the rest of his just war theory.

What is Vitoria's principle of Discrimination and how does he justify it? For Vitoria, as for many just war theorists, the two morally relevant groups to be distinguished are those who are innocent of the injustice that is the cause of the war and those who are non-innocent of that injustice. In practical terms, the distinction between the innocent and the non-innocent is thought by Vitoria to line up fairly neatly with the distinction between non-combatants and combatants respectively. Non-combatants are generally innocent and combatants are generally non-innocent. For Vitoria, the principle of Discrimination renders deliberately killing innocents, i.e. non-combatants generally, wrongful and deliberately killing non-innocents, i.e. combatants generally, permissible in a just war.

Vitoria's argument for this theory of Discrimination is made in absolute terms. He argues that it is absolutely wrong to intentionally kill innocent persons in a just war, no matter the

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<sup>29</sup> §15-§19, in *ibid.*, p. 304-5.

circumstances. Thus, he claims that there is at least one absolute constraint on what is allowable in pursuit of a just cause in war. The deliberate killing of the innocent is always off limits in war.

In defense of this prohibition of killing the innocent, Vitoria gives four arguments. He argues, first, that it is always wrong to kill the innocent in war or in peace; second, that what justifies the war cannot justify killing the innocent; third, it is unjust to punish persons who are not guilty of the crime worthy of punishment; and, fourth, that permitting the killing of the innocent in war would lead to absurd consequences. Thus, Vitoria can only be read as asserting that intentionally killing the innocent is simply beyond the pale, even in the execution of an otherwise just war.

First, it is never lawful in itself intentionally to kill innocent persons. This is proved, in the first place, by Exod. 23: 7, where it says ‘the innocent and righteous slay thou not’. Second, the foundation of the just war is the injury inflicted upon one by the enemy, as shown above; but an innocent person has done you no harm. Ergo, etc. Third, within the commonwealth it is not permissible to punish the innocent for the crimes of the evil, and therefore it is not permissible to kill innocent members of the enemy population for the injury done by the wicked among them. Fourth, the war would otherwise become just on both sides, since it is clear that the innocent would also have the right to defend themselves.<sup>30</sup>

It is important to stress that this prohibition of killing the innocent even in a just war entails that deliberately killing an innocent person cannot be justified even if it is necessary for the sake of the common good. This point is revealed by the fact that, for Vitoria, a just war is only fought for the sake of the common good. This is the interest of a supra-individual commonwealth. If the rights of innocent individuals limit what commonwealths are permitted to do in war, then the rights of innocent individuals trump the interests of commonwealths.

Though Vitoria never asserts it as a principle, it is clear that he thinks the innocent in war are generally non-combatants and the non-innocent are generally combatants. This is clear from

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<sup>30</sup> §35, in *ibid.*, p. 314-15.

the fact that his examples of innocents are children, women, travelers who just happen to be in the enemy's territory at the time of war, clergy, monks, and farmers. Vitoria consistently refers to this group as non-combatants and thereby implies that what sets them apart from the guilty is the fact of their non-combatant status. When he discusses examples of killing the non-innocent he consistently refers to this group as combatants.

Vitoria distinguishes the killing of enemy combatants from the killing of non-combatants and claims that in the course of a just war there is no moral requirement to discriminate between combatants. In war, all combatants can be killed indiscriminately. He says, "In the actual conflict of battle, or during the storming or defense of a city, in short so long as matters hang dangerously in the balance, it is lawful to kill indiscriminately all those who fight against us."<sup>31</sup> The same obviously does not go for non-combatants who are always immune from deliberate attack on their person.

Furthermore, Vitoria argues that we are permitted to kill enemy combatants even after the war has ceased and victory has been attained. Obviously again, the same does not go for non-combatants. This is because the combatants are guilty of a crime and one of the just causes for war is the punishment of injury to the common good. Therefore, combatants may be punished for their crimes with death so long as it is proportionate to their crime and consistent with the aim of peace.

After victory has been gained and the matter is beyond danger, we may lawfully kill all the enemy combatants. The proof of this is that war is not only ordained for the recovery of lost possessions, but also for the avenging of injury, and therefore one may lawfully execute *those responsible for the injury inflicted*. Furthermore, we have the same right against our fellow members of the commonwealth when they commit crimes, and therefore we must have this right against foreigners, since (as discussed above) by the

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<sup>31</sup> §45, in *ibid.*, p. 319.

laws of war the prince has the same authority over the enemy as a judge or legitimate prince.<sup>32</sup> [emphasis added]

Vitoria also tells us that captured combatants may be executed while captured non-combatants may not.<sup>33</sup>

Rather oddly, however, Vitoria permits the “plundering” of the innocent in a just war. By “plunder” he means the deliberate destruction or appropriation of private property. He explicitly allows for the indiscriminate destruction of property belonging to members of the enemy community, including its innocent members. For Vitoria, any property that may strengthen the enemy’s war effort can be plundered. He explicitly mentions money, crops, and livestock as fair game for destruction.<sup>34</sup> Worse, Vitoria permits the enslavement of the innocent in a just war. He argues that in any circumstance where it is permissible to plunder the enemy, it is permissible to enslave them, including the innocent.<sup>35</sup>

Despite these rather stunning exceptions to the immunity of the innocent, it is clear that Vitoria thinks we ought to treat combatants differently from non-combatants in war and this is because combatants and non-combatants differ with respect to their culpability for the injuries that give one a just cause for war. We may deliberately target combatants in an unjust war because they are generally non-innocent while we may not target non-combatants because they are generally innocent.

Vitoria, however, does not tell us exactly why it is that combatants in an unjust war are generally blameworthy. There would seem to be two possible justifications for his holding them responsible, only one of which is a plausible reading of him.

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<sup>32</sup> §46, in *ibid.*, p. 320.

<sup>33</sup> §43 and §49, in *ibid.*, p. 319 and p. 321-2.

<sup>34</sup> §39, in *ibid.*, p. 317. See also *On Civil Power*, §12, in *ibid.*, p. 21.

<sup>35</sup> §42, in *ibid.*, p. 318-9.

First, Vitoria could hold that as a member of a commonwealth that has declared and waged an unjust war, the combatant is culpable simply as a result of his membership in the wrongful social body. On this view, one could blame the commonwealth as such and then hold that the guilt of the commonwealth distributes to its individual members as a result of the ontology of their membership. This is surely a version of collective responsibility that many today find repugnant but, since Vitoria does view people as members of ontological social wholes called commonwealths, it should not be ruled out as a possible component of his thought.

However, this cannot be the view of the responsibility of combatants in unjust wars at work in Vitoria's principle of Discrimination because, as we've seen, he holds that large numbers of the members of a commonwealth that wages and declares an unjust war are innocent of that injustice, i.e. the non-combatants. But the view of collective responsibility under consideration here would have to distribute blame to all members of political bodies engaged in an unjust war, not just the combatants. This view of combatant responsibility would also hold noncombatants responsible for unjust wars. Therefore, it cannot ground a workable principle of Discrimination of any kind, let alone one that would classify combatants as blameworthy and non-combatants as innocent. Moreover, in at least one passage Vitoria draws a distinction between the guilt of a commonwealth and the guilt of its individual members and acknowledges that a commonwealth can be guilty of wrongdoing, yet its individual members innocent.<sup>36</sup> Thus, this justification for holding combatants in an unjust war responsible for the injustice of the war must be rejected as a ground for Vitoria's principle of Discrimination.

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<sup>36</sup> See *On Civil Power*, §12, in *ibid.*, p. 21. Vitoria here argues that a commonwealth can be at fault for the injustices committed by its sovereign because it is the commonwealth's responsibility to only appoint just sovereigns. However, he argues that this fault of the commonwealth permits the plundering of the *innocent* members of the commonwealth. Thus, the blame of a commonwealth is not necessarily distributed to its members.

The alternative justification of combatant culpability is the view that has grounded the principle of Discrimination in orthodox just war theory since Vitoria's time. The idea that it is morally relevant to the ethics of war whom among the enemy is blameworthy for the injury that constitutes just cause for war is derived from a common conception of the rights of individuals and the justifiability of private defensive or punitive violence. The view is that the individual right to life prohibits, among other things, the deliberate killing of people except in certain circumstances. One of these exceptional circumstances is when a person unjustly attacks another and the only way of thwarting their attack is with the use of life-threatening violence. Another circumstance, though less often defended these days, is when killing another is proportional punishment for their wrongdoing. In these cases it is thought to be permissible to deliberately kill an individual person.

Notice that, on this view, in both cases of justified killing (the defensive and the punitive) it is the individual's personal behavior that has caused him or her to lose his right not to be killed. In both cases the individual must do something that is severely immoral in order for him to be liable to be killed. It would be unjust to defend oneself against an attacker whose attack is justified and it would be unjust to punish a person with death who has not done any wrong or a wrong for which death is not a proportionate punishment. In this way, the innocence or culpability of the individual target of violence is thought to be central to the permissibility of killing.

It is reasonable to think this is the view at work behind Vitoria's principle of Discrimination. This view would render the guilt or innocence of potential targets in war relevant to the ethics of killing in war and allow us to hold some members of a community engaged in an

unjust war responsible and others innocent, thereby grounding a potentially useful principle of Discrimination.

This interpretation of the ground for Vitoria's principle of Discrimination is also clearly suggested by his arguments in defense of the impermissibility of killing the innocent as such. His defense of this principle rests on the assertion that people may only be killed when they have done something to make them morally liable to be killed. As quoted above, he claims that a just cause for war cannot give one license to kill innocent individuals because innocents have no moral responsibility for the unjust harm that gives one a just cause for war. This implies that one is only liable to be killed if one is responsible for the unjust harm that constitutes a just cause for war and that some members of a commonwealth that carries out that unjust harm are innocent. Vitoria also argues that just as it is always unjust to punish a person for a crime that they are personally innocent of committing, it is also unjust to punish an innocent person in war for the crime that gives one a just cause for war. This also implies that one is only liable to be killed if one is responsible for the unjust harm that constitutes a just cause for war and that some members of a commonwealth, i.e., the noncombatants, that carry out that unjust harm are innocent.<sup>37</sup> Moreover, Vitoria argues that combatants in an unjust war may be executed because they are among those responsible for the injury that gives one just cause for war. This also implies that a person's blameworthiness for certain wrongs is what justifies killing a person in war.

It is important to emphasize the apparent consistency of this view of the justifiability of killing in war with Individualism. This view of the justifiability of violence against persons is grounded in the rights of individuals and allows for killing on condition that the victim is

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<sup>37</sup> §35, in *ibid.*, p. 314-5.

personally responsible for some relevant injustice. Individuals have the right not to be killed; but this right is theirs to lose. Unless a person is culpable for committing some relevant wrongdoing, they maintain the right not to be killed.

This view does not justify killing a person for the sake of the good of another, especially the good of a supra-individual thing. This view would prohibit killing an innocent person simply in order to protect the power or honor of the king, for example. More to the point, this view would also prohibit killing an innocent person simply for the sake of the common good.

That Vitoria appeals to this view to justify killing in war and ground his principle of Discrimination is deeply problematic. The view is in direct conflict with his defense of the rights of commonwealths to wage and declare war for the sake of the common good. As we've seen, this right of commonwealths entails their right to use their members as servants of the common good and sacrifice them for its sake. According to this view, the interests of commonwealths trump any supposed right of the individual not to be killed. Indeed, this view of the rights of the commonwealth denies the absolute right of individuals not to be killed, for it asserts the duty of individuals who are subject to a legitimate political authority to serve in war when ordered to by that authority. This duty is grounded directly in the order of nature and this order holds the commonwealth to be prior to the individual. In this way, for Vitoria, justice in war is not a matter of the rights of individuals but the rights and interests of supra-individual public bodies.

Moreover, as we have seen, according to Vitoria's theory of the rights of commonwealth, soldiers fighting in an unjust war are not necessarily acting unjustly. Soldiers are obligated to serve in war upon their sovereign's command largely independently of the justice of the war. Thus a soldier can participate in an unjust war yet personally be innocent of any wrongdoing because he is acting in full accordance with his duties. The blame for an unjust war does not

necessarily touch the individuals who carry it out. According to this view then, innocence cannot serve as a reason to prohibit targeting noncombatants and permit targeting combatants in a just war.

What this shows is that Vitoria has two views of the distribution of responsibility for the justice of war at work in his just war theory. On the one hand, Vitoria clearly argues that subjects are not responsible for such matters. Their overriding duty except in special cases is to obey orders to serve in wars declared and waged by their legitimate sovereign. It is therefore readily possible for soldiers, i.e. combatants, in an unjust war to be not only innocent of the injustice of the war, but acting righteously.

On the other hand, Vitoria attempts to justify killing combatants in just war on the grounds that combatants are generally culpable for their participation in an unjust war. This must be because he thinks combatants personally act unjustly when they participate in the unjust war. But this could only be the case if the soldier shares responsibility for the decision to wage and declare war. Only if soldiers are responsible for ensuring that their wars are just could they be held responsible for unjust decisions to wage and declare war by their political authority. Therefore, we must attribute Vitoria with the view that subjects *are* responsible for this decision, not some distinct authority. Subjects, for Vitoria, are the authority.

But then Vitoria's justification for his principle of Discrimination is based on a view of the responsibility of political subjects that is fundamentally opposed to his justification of the right of commonwealth's to wage and declare war. The theory of the rights of commonwealths denies subject's responsibility for the very decision that the theory of Discrimination assigns them. This is Vitoria's Dualism. And as with all other Dualist theories we will survey, Vitoria's gives soldiers and other political subjects an incoherent set of duties when it comes to war. The

moral world this theory constructs for them is simply impossible to navigate. They are both morally bound to participate in war when ordered to by their legitimate political authority when the war is not patently unjust, and they are morally bound not to participate in any unjust war.

It should be clear too that Vitoria's Dualism is the result of two contradictory theories of justice that Vitoria appeals to in defense of his just war theory. The view that soldiers are obligated to serve in war upon command is based on an Anti-Individualism similar to the Classical Theory. Vitoria argues that soldiers have this obligation to serve because, ultimately, they are parts of political bodies and the interests of the political body overrides whatever interest the soldier has in his private life. The view that it is never permissible to deliberately target the innocent in war yet it is permissible to target combatants because they are not innocent is based on an Individualist theory of justice that holds that the rights of individuals, conceived of as private persons, trump the interests of political bodies and that individuals are always responsible for the justice of public acts they participate in. Vitoria's just war theory is thus both an Anti-Individualist theory and an Individualist theory. These two theories of justice are contradictory and this explains the Dualist contradiction in the content of Vitoria's theory of the just war.

Conclusion: Vitoria's Dualism and the Contemporary Dualist Theory

The contemporary Dualist theory of the just war (e.g., Michael Walzer's) gives responsibility for the *jus ad bellum* to political authorities and denies it to subjects including soldiers. At the same time, the contemporary Dualist theory assigns responsibility for the *jus in bello* to soldiers and their commanders, though not to civilian subjects of the political authority.

Vitoria's theory is not Dualistic in the same respect. As we've seen, Vitoria formally restricts responsibility for the decision to wage and declare war to the political authorities and

denies it to subjects. And Vitoria follows in the tradition of the Classical Theory in that he also restricts responsibility for the *jus in bello* to the political authorities and denies it to subjects, especially soldiers. In terms of his most direct statements regarding responsibility for the rules of the just war, Vitoria unifies responsibility for war in the political sovereign. He conceives of war as a relation between supra-individual public bodies, i.e. commonwealths, whose sovereign rulers are responsible, with few exceptions, for ensuring that their wars are waged for just reasons and employ just means. Soldiers and other subjects are seen principally as moral servants of the sovereign's will. This division of authority is seen as constitutive of the natural order and is therefore intrinsically good.

However, unlike the Classical Theory, Vitoria introduces an important constraint on the means of war, i.e. the impermissibility of deliberately targeting innocent individuals. In doing so, he introduces an alternative and contradictory theory of political authority. According to his defense of the impermissibility of targeting the innocent, the innocent are not liable to be killed for they have done nothing morally relevant to make them lose their right not to be killed. The innocent cannot be sacrificed for the common good. The non-innocent, on the other hand, are liable to be killed because of their responsibility for the injustice that is just cause for war. The ethics of killing in war is thus of a piece with the ethics of killing in private, domestic life. For Vitoria, those who are generally innocent in war are non-combatants and those who are generally non-innocent are combatants. However, this division of responsibility entails that combatants are always responsible for the justice of the wars they participate in. Combatants that participate in an unjust war are acting wrongly and are liable to be deliberately attacked. In order for this to be possible combatants, including soldiers, must not be obligated to serve in war upon command and must be personally responsible for ensuring that they only participate in just wars.

Combatants, and by extension soldiers, must be seen as always sharing authority over the decision to wage and declare war.

These two views of political authority at play in Vitoria are irreconcilable. In the chapters below, I will attempt to show that the history of just war thought since Vitoria can be explained in large part as a struggle to mitigate this conflict while maintaining much of the basic content of Vitoria's just war theory. Following Vitoria, a basic question modern systematic just war theorists have to answer is, "Is there a coherent foundation that can be put beneath a theory of the just war that posits both of the following things?"

- 1) Political sovereign's are uniquely responsible for the justice of war while subjects are obligated to serve in war upon command

and

- 2) a principle of discrimination in just war that prohibits targeting the innocent yet permits targeting combatants.

This is the fundamental challenge modern just war theorists have inherited from Vitoria and have sought to answer affirmatively.

In the next two chapters, we will see how modern just war theorists have attempted to meet this challenge. These theorists do not reject Vitoria's introduction of an ethics of private violence based on the rights of individuals into an otherwise coherent theory based on the rights of supra-individual public bodies over the individual. Rather, modern just war theorists have attempted to ground the entirety of just war theory in the rights of individuals while maintaining the right of supra-individual public bodies to wage war. As with modern theories of political justice generally, the history of modern just war theory can be characterized as the repeated attempt to eschew from its bedrock the intrinsic goodness of the subject's subservience to legitimate political authority, replace it with the equal rights or basic interests of private

individuals, and still develop a plausible theory of just war. In other words, modern just war theory has attempted to eliminate the Classical foundations from the theory, replace them with Individualism, yet still produce a plausible theory of the just war committed to both 1) and 2).

I hope to ultimately show that this strategy is a dead end. Ultimately, a theory of just war that is consistent with Individualism must give up on 1). A truly Individualist theory must hold that the responsibility for the justice of war is in the hands of every individual would-be participant in that war. This explains why, as we will see, those who have attempted to ground 1) in Individualism have always ended up contradicting it when defending their principle of Discrimination. As will be revealed in the following two chapters, this is especially true of Grotius and Walzer.

## Chapter 3

### Dualist Theories (2): Grotius' Just War Theory

#### Introduction

A Dualist Theory of the just war is any theory that contains two distinct distributions of moral responsibility for just war among the members of particular communities at war. As we will see in the next chapter, Walzer's Dualist theory formalizes its dualism by explicitly asserting that political authorities, and not their subjects, are responsible for the *jus ad bellum* rules of war while soldiers and their commanders are responsible for the *jus in bello* rules. This contemporary Dualist theory attempts, though unsuccessfully, to justify its division of moral responsibility in a coherent and systematic theory of justice.

In the previous chapter, however, we saw an example of a Dualist theory that divides moral responsibility for war very differently than does the contemporary theory. This division of responsibility is not explicitly formalized within the theory or coherent and, thus, its mere existence is much more embarrassing than it is for the contemporary theory. Vitoria's theory asserts that political communities and their legitimate rulers have moral responsibility for both the *jus ad bellum* and the *jus in bello*, while subjects of those authorities, especially soldiers, can be their moral servants in war and are obligated to follow their authority's orders into and during war. Yet, at the same time, Vitoria, defends a theory of Discrimination in war that commits him to the view that subjects, including soldiers, are morally responsible for the justice of the wars they participate in regardless of the orders of their political authorities. These two views of responsibility in war are in direct conflict.

As was argued in the previous chapter, this inconsistency is the result of two incompatible theories of justice at work in Vitoria's thought—an Individualist Theory and an

Anti-Individualist Theory. The strand of Vitoria's theory that grants moral responsibility for both the *jus ad bellum* and the *jus in bello* rules to legitimate political authorities and treats subjects as moral instruments of those authorities in war is grounded Anti-Individualistically in that it is based on the assertion that individuals are obligated to serve the common good of a supra-individual political community that they are parts of even when doing so puts their basic private interests at stake. However, the strand of Vitoria's thought that holds participants in war are always morally responsible for their participation in war is grounded Individualistically in that it is based on the assertion that individuals are obligated to never unjustly use violence against others even under the orders of their political authority. This view makes all participants in war morally responsible for their participation in war regardless of the commands of their legitimate political authority. These two views of justice in war cannot be reconciled.

In this chapter we turn to what I hope to show is another Dualist theory of just war, that of Hugo Grotius. A Dutchman, Grotius was born in 1583 to a family of wealthy oligarchs who were shareholders in the Dutch East India Company and members of the board of one of its "chambers." Because of his skills as a student and scholar, Grotius was tapped to be an advisor and secretary to a prominent Dutch politician, Jan van Oldenbarnevelt. Deeply involved in the political conflicts embroiling the recently liberated United Provinces at the time, Grotius and Oldenbarnevelt participated in the plotting of a coup against the royalist establishment and their Calvinist backers. For this, Oldenbarnevelt was beheaded and Grotius was sentenced to life imprisonment in 1618. In dramatic fashion, Grotius escaped from prison in 1621 and fled to France. Grotius lived in exile for the rest of his life, mostly in France, where he published most of his significant works. In 1635, Grotius was appointed Sweden's ambassador to France. Eventually, Grotius' position elicited criticism and he visited Sweden to defend himself in 1645.

On his return voyage, however, his ship was wrecked on the coast of the Baltic and Grotius was killed.

Grotius' most significant work is his *De Iure Belli ac Pacis, The Rights of War and Peace*. First published in 1625, the book offers a comprehensive theory of just war grounded in a systematic moral and political theory. The work was immediately successful and proved to be profoundly influential in early modern Europe as it was recognized at the time as a great innovation in moral and political philosophy. Indeed, the book was seen as so important that in 1661 the University of Heidelberg endowed a chair for the sole purpose of producing a commentary on the work and in 1691 an edition of the book was published with critical responses by five commentators. By the middle of the 18<sup>th</sup> century the book had been issued in at least fifty-six Latin editions and translated into multiple French, Dutch, English, and German versions plus one Italian and one Russian. In 1749, in his history of moral philosophy, Jean Barbeyrac would describe the work as a turning point between the end of ancient and medieval moral thought and the birth of modern moral philosophy. This sentiment is not prevalent today, however, and Grotius is considered principally a scholar of international law, not a systematic moral and political philosopher let alone an innovative one. As Richard Tuck has argued, however, the contemporary status of Grotius “ignore[s] the genuinely innovative qualities of his moral theory, qualities that entitle him to an essential place in the history of political theory.”<sup>1</sup> It is not my goal here to argue for or against a particular place for Grotius in the Western canon, but I do hope my reading of him below will suggest that Tuck has a better appreciation of Grotius' merit than does the conventional wisdom.

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<sup>1</sup> “Introduction,” in Grotius, Hugo, *The Rights of War and Peace*, edited by Richard Tuck (Indianapolis, IN: Liberty Fund, Inc., 2005). See also Tuck's *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (New York: Oxford University Press, 1999), esp. Ch. 3.

Though this chapter will analyze only *The Rights of War and Peace*<sup>2</sup>, Grotius produced other significant works. Grotius wrote subversive works in Christian theology and a more well-known and posthumously published work called *De Iure Praedae, The Law of Prizes*, a chapter of which had been published in 1609 as *Mare Liberum, The Free Sea. The Law of Prizes* discusses the principles of justice governing the Dutch East India Company's confrontations with local powers in the Indian Ocean and the China Sea. In it, many of the themes later more fully articulated in *The Rights of War and Peace* are first expressed.

My goal here is to show that the theory of just war Grotius offers in *The Rights of War and Peace* is an incoherent Dualist theory. Like Vitoria's Dualism, the Dualism of Grotius' theory is not explicitly formalized in his theory or coherent and, thus, recognizing it will prove to be an embarrassment. Like Vitoria and the Classical theorists, Grotius attempts to articulate a coherent and systematic theory of just war. Unlike these previous theorists, however, Grotius attempts to ground the entirety of his theory in an Individualist theory of justice, that is, a theory that is ultimately based on the equal rights and interests of individual persons abstractly conceived. Grotius abandons entirely the Anti-Individualism of the Classical Theory of just war found in Augustine and Aquinas, and what is left of it in Vitoria, and seeks to develop a theory founded entirely in Individualism. Contemporary philosophers Walzer and McMahan, whom we will discuss in chapters 4 and 5, also pursue this strategy with varying degrees of success.

Though Grotius did not recognize it, his theory is a Dualist theory in that he defends the right of legitimate political authority to wage and declare war and to use its political subjects as moral instruments in war. Subjects of such legitimate political authorities are obligated to obey the commands of their authority into and during war. This view entails an unequal division of

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<sup>2</sup> The edition I will rely on is *ibid*. The text is a reprint of the original English translation of Jean Barbeyrac's 1738 French edition.

moral responsibility for war in that the political authority has full moral responsibility for the war and its conduct while the primary responsibility of soldiers is to obey the commands of their political sovereign.

Yet, at the same time, Grotius' theory of Discrimination in war, that is, his theory of who may and may not be legitimately attacked in war is based on a view of responsibility in war wherein all participants, including soldiers, are morally responsible for the justice of the wars they participate in. For Grotius, all individuals are morally obligated to not participate in unjust wars, even when they are commanded to participate in them by their legitimate political authority.

There are thus two, incompatible views of moral responsibility for war in Grotius' theory. According to him, subjects of legitimate political authority are morally obligated to participate in wars waged by their authority *and* they are morally responsible for the justice of the wars they participate in. To put the point in Grotian terms, combatants in war can be both the mere moral instruments of their political sovereign *and* fully responsible assistants to their sovereign.

In this sense, Grotius' Dualism is very similar to Vitoria's. However, Grotius' Dualism results from very different philosophical problems within his theory than does Vitoria's. Grotius does not attempt to defend the right of legitimate political authorities to use their subjects in war as their moral instruments by appealing to a fundamentally Anti-Individualist theory of justice as does Vitoria. Rather, Grotius attempts to ground this view of political obligation in a tacit or explicit contract between individuals made out of self-interest in a state of nature. He argues that individuals originally constituted political authority over themselves with authority to wage war on behalf of the public in order to have their private rights protected. It is thus in the original design of political associations that there be an exclusive authority with the right to wage war

and to use its subjects as moral instruments in war. Subjects can thus be obligated to serve their political sovereign in war as a result of their tacit or explicit consent to such political arrangements. Grotius' defense of political obligation thus utilizes, perhaps for the first time in Western philosophy, a modern, thoroughgoingly Individualist and contractarian view of political justice. Unlike in the case of Vitoria then, there is no foundational contradiction in Grotius between his defense of the political obligation of soldiers to serve in war when ordered to by their political authority and his view that all soldiers are morally responsible for the justice of the wars they participate in.

So, then, how does the Dualist contradiction occur in Grotius? I hope to show below that the contradiction is the result of 1) the fact that Grotius' contractarianism cannot justify political obligations of the sort that would render subjects the mere moral instruments of their political authority in war or in any other activity and 2) Grotius' tacit acknowledgement of this when, in his discussion of discrimination in war, he argues that soldiers are always morally responsible for the wars they participate in. In other words, Grotius' argument in defense of the political obligation of subjects to serve in wars waged by their political authority is self-contradictory. Such a duty cannot be justified on an Individualist, contractarian basis of the sort that Grotius employs. In fact, the duty to serve in wars waged by one's political authority contradicts the very basis Grotius attempts to give it.

It is thus not surprising that when Grotius turns to examine the duties of combatants in war he denies that they can have an obligation to serve in war as a result of their political subordination to a sovereign. To say otherwise would be to contradict the Individualist foundations of his theory. Grotius is thus forced to contradict what he initially claims are the duties of subjects in war when he turns to specifying the duties of soldiers in war. Unfortunately,

what we are left with then is an incoherent theory of just war that is impossible to abide by in its entirety.

### Private and Public War

To begin to understand Grotius' theory and its problems it is best to begin by discussing a distinction between two kinds of wars that Grotius develops. The distinction is between private and public war. To some extent, this distinction has been prefigured in the previous theories we have examined.

Private war is war that is waged between private persons who act without the authority of a public body. In private war, people fight as private persons; they are moral representatives of themselves only. Private warriors do not seek or possess approval from a public entity prior to becoming warriors. The essential feature of private war is that its individual protagonists act without public authority.

The authority of participants in private war to engage in war as private persons may be legitimate or illegitimate. In some cases private persons have the legitimate authority to engage in violence against other persons. In other cases they do not.

Grotius argues that prior to the creation of political authority with public courts established for the purpose of peacefully settling disputes between individual subjects in a disinterested manner, people maintain full authority to engage in private war against other persons (i III:I).<sup>3</sup> In other words, prior to the existence of public political authority individuals are in a state where they each possess complete private authority to defend themselves against

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<sup>3</sup> Following other commentators these numerals denote the book number, chapter number, and section number respectively of *The Rights of War and Peace*. The first numeral (i, ii, or iii) refers to the book number. The second numeral refers to the chapter number. The third numeral refers to the section number within the chapter. Thus, this citation refers to Book 1, Chapter 3, Section 1.

others as they see fit. This is the state of nature. Following the creation of political authority, however, individuals lose their full private authority to engage in private war. The creation of political communities entails the elimination of the private authority to seek justice through private violence (i IV:II). Precisely how and why Grotius thinks this transference of authority occurs will be discussed in the following section.

Grotius argues however that the establishment of political authority with public courts does not alienate entirely the private authority to engage in private war. Even when there are such political authorities, individuals still maintain private authority to make war against other persons in some circumstances. These circumstances are when an individual cannot appeal to a public authority for the peaceful settlement of his dispute with another, or, as Grotius puts it, “when the Way to legal Justice is not open” (i III:II). This may happen when a person cannot appeal to a public authority for help in time to avoid the harm he wishes the authorities to protect him from. This may also happen if the private person or persons an individual is in dispute with refuses to submit to the arbitration of a public court or if public courts refuse (presumably unjustly) to arbitrate a dispute. Lastly, it may also happen if individuals dispute in a territory where there is no civil government, such as on the sea, in the wilderness, or on desert islands.

However, even if a private person has the legitimate authority to engage in private war, they can still do so unjustly. Having the authority to engage in a particular war is a necessary condition for just war but it is not sufficient. Thus, to say that a private person has the legitimate authority to wage war is not to say that, if they do wage war, it is just. Having authority over an activity is not the same as having a right do it at any time and in any manner.

Recognizing that wars can be legitimately private, that is, one can engage in private war with legitimate private authority, yet be unjust is important because it brings into relief the true

nature of private, and public, war. As was highlighted in the previous chapter, granting an individual or entity authority over some activity is, most immediately, to grant them moral responsibility over their decision to engage in that activity or not and the manner in which they engage in it. The authority-bearing subject has sovereignty over the activity they have authority over. This sovereignty however does not give the agent a universal moral permission to act in any way they wish. Sovereignty brings its own moral responsibilities. If they use their authority in accordance with their moral responsibilities, they are praiseworthy. If they use that authority in violation of their moral responsibilities, they act unjustly and are blameworthy provided they are not excused.

Thus, the concept of private war attempts to specify a particular kind of scope to moral responsibility for war. In private war, the private persons who engage in war without public authority are those who are morally responsible for their activity. They are the private agents who are responsible for the justice or injustice of their wars.

Essential to the concept of private war is an equal distribution of moral responsibility for the justice of the war among its individual private participants. Since in a legitimately private war participants are acting under their own private authority, they each bear moral responsibility for the justice of their actions. Just as the authority to wage war is equally distributed among its participants so is moral responsibility for war. In a private war, it is up to its individual participants to ensure that their war is just. If the war should be unjust, blame for that injustice falls on all of its individual participants proportionate to their individual role in the war. Of course, participants in an unjust private war can be excused from blame, but they are nevertheless acting wrongly and, to avoid blame, a legitimate excuse must be forthcoming.

War is often thought to be both an essentially political act in the sense that its actors have an immediately political agenda and to be composed of many discrete acts of violence carried out over time. However, the distinction between private and public war employs a concept of war that is indifferent as to the nature of the goals of its actors and the scale and duration of violence involved. Thus, private war can be discrete acts of violence without any political goals. Perhaps the clearest example of private war is a case of private self-defense. As Grotius acknowledges, an individual can, in some circumstances, justly defend himself against an aggressor without appealing to a higher authority. Self-defense, then, can be an act of private war with a just cause. Likewise, the person who aggressively attacks the defender may also be engaged in private war in as much as he is acting only under his private authority, though his war lacks a just cause.

Private war need not be violence carried out by single individuals. It can be an organized effort involving multiple people. For example, a group of people who organize a defense of a household against aggressive attack can be engaged in private war. Such cases can involve only people who have the private authority to forcibly defend persons and property against unjust attack. Hence, they are acts of private war. In principle, there is no limit to the number of people who can be engaged in a private war (see i V:II:1-2).

Though private war needn't have a political agenda, it can. Violent acts of political rebellion, for example, could also be acts of private war so long as its perpetrators act under their own private authority. However, in Grotius' opinion such acts are almost always unjust because subjects of political authorities generally lack the authority to use violence against their political sovereigns (i IV:II and i IV:XIX).

Public war, on the other hand, is war that is conducted on both sides under the authority of a legitimate political sovereign (i III:I). It is war that utilizes the legitimate authority of a public body to employ violence. In public war, the agents of violence justly assert the authority of a political sovereign to use violence and to legitimately compel its agents to carry out the violence. Public warriors are not utilizing private authority to use violence but the legitimate authority of a public body. They are representatives, not of themselves, but of some legitimate political sovereign.

Unlike in private war where moral responsibility for the violence is attributed to the individual protagonists, in public war moral responsibility for the war is attributed to the legitimate political authority rather than to the war's individual protagonists. In a public war moral responsibility for the justice of the war is unequally distributed among the participants in the war. In a public war the political authority is what is fully morally responsible for ensuring that the war is just or not. The subjects of that authority do not share that responsibility. Rather, the subjects in a public war are primarily responsible for obeying the orders of their legitimate sovereign. This responsibility of subjects is largely indifferent to the justice of the war the subjects are being asked to participate in. Provided that the war is not flagrantly or obviously unjust, if subjects are ordered to engage in the war by their legitimate political authority, then they are not to be held responsible for the justice (or injustice) of the war itself. In this sense then, the moral responsibilities of soldiers in a public war are relative largely to the commands of their legitimate sovereign, not to the justice of the war.

Grotius argues that the authority to engage a public body in war, that is, to wage public war, is an essential component of political sovereignty, or what he calls the civil power (i III:VI). For Grotius, it is impossible for there to be a civil power without it possessing the authority to

engage a public body in war and to direct it in war. Grotius argues that the civil power consists in authority over

...general affairs or particular; what concerns general Affairs relates to the making or repealing of Laws, which extends as well to sacred Things...as to profane...The Particular Affairs are either directly publick or private, but considered as they relate to the publick Good. Those which are directly publick, concern either certain Actions, as the making of Peace, War, Treaties, Alliances; or certain Things, as Taxes, and such like, in which is comprehended that eminent Dominion which a State has over its Subjects, and their Goods, for the publick Use...Private Affairs are here the Differences of private Persons, so far as the Repose of the Society requires the Decision of them by publick Authority...

Grotius says explicitly that the civil power's authority over these matters is supreme in the sense that it is not subject to the power of any other thing. Thus, its decisions regarding matters it has authority over are binding on its subjects and do not require approval or consent by them (i III:VII).

Thus, essential to the concept of public war is the dutiful obedience to political authority of at least most of the war's participants. In a public war, a legitimate political authority legitimately compels its subjects into war and legitimately directs them in the conduct of war. In this way, public war entails a hierarchy of authority wherein the subjects of that authority are, with some exceptions, morally bound to obey their political superiors at least in manners pertaining to war. The subjects in public war are the moral instruments of the sovereign. They may be legitimately used by the sovereign for ends that are not necessarily their own.

This point is most clearly made when Grotius distinguishes between principals, assistants, and instruments in war (i V). Principals, assistants, and instruments are each possible efficient causes of war. They are who materially make war. However, the respective moral status of these efficient causes in the war varies depending on whether they are principals, assistants, or instruments.

The principal is the interested party or parties that act under their own authority to make war. They are the interested party who engage in war willingly and claim the authority to do so without the approval of any higher authority. In a private war, those who are not the interested party but come to the aid of others as private persons, whether as kin, neighbors, fellow private citizens, benefactors, or allies, are not the principal of the war but act as assistants. These assistants, as private warriors in private wars, are therefore morally responsible for their decision to participate in war.

In public war, by contrast, the principal is the supreme civil power. It is the civil power that is the interested party and who acts with full authority to engage in war. In a public war, those who participate as subjects of their supreme civil power are instruments, not assistants. The political subject in war acts as a member of a public body and under the authority and direction of a political sovereign. Though subjects in war act by their own will, their will, in this case, depends on the will of their sovereign whom sets the subjects in motion with morally binding commands. Subjects are therefore not morally responsible for the justice of the wars they participate in. As instruments of their civil power, they act under the obligation to obey the commands of their sovereign in things pertaining to war. On this point, it is worth quoting Grotius in full.

By Instruments, we mean not Arms, nor such like Things; but certain Persons who act by their own Will, but yet so as that their Will depends on another, that sets it in Motion: Such is a Son to his Father, being part of himself naturally; or a Servant, as a Part of his Master by Law. For as a Part is not only a Part of the Whole, in the same Relation as a Whole is the whole of a Part, but that very Thing which it is, because of the Whole on which it depends: So the Thing possessed makes in some Manner part of the Possessor...As a Servant is in a Family, the same is a Subject in a State, and is therefore the Instrument of the Sovereign.  
Nor can we doubt, but all Subjects may naturally be employed in War... (i V:III-IV)

It is clear that, for Grotius, political subjects in war have the duty to obey the orders of their political sovereign to participate in war despite the fact that doing so puts their lives and limbs at stake. Grotius says clearly that in such cases subjects are morally obligated to act in ways that are contrary to their basic private interests. He says explicitly that it is a soldier's duty to remain at his post even under the hazard of death (i IV:VII). And when the defense of a political society requires the use of a subject as a soldier, it is wrong for the subject to simply "quit the service of his country" (ii V:XXIV:2).

The distinction between private and public war is, most immediately, a distinction between two ways of delimiting the scope and valence of moral responsibility for war. In private war, individuals engage in war without public authorization. On some occasions individuals in private war legitimately possess the private authority to go to war, on other occasions they do not. If a private person does have legitimate private authority to go to war, he or she is fully morally responsible for the manner in which he or she uses that authority. The authority gives them the moral responsibility to use their authority justly. Thus, in a legitimately private war, moral responsibility for war distributes to all of the war's individual protagonists. In public war, on the other hand, full moral responsibility is vested in the legitimate political authority that is the principal of the war. This political authority has the authority to engage a public body in war and is therefore morally responsible for using that authority in full accordance with justice. The subjects of that authority, however, act as the moral servants of the authority and are morally obligated to obey the orders of that authority into and during war, not to ensure that the wars they participate in are fully just.

Public War and Legitimate Political Authority

Because Grotius believes that the public authority to compel service in war and the obligation of subjects to serve in war for the public good are essential components of political sovereignty, to understand his justification of public war we must understand his justification of political sovereignty.

So, how is political sovereignty justified according to Grotius? It is clear that for Grotius, political authority and the obligations of political subjects to obey their authority is ultimately grounded in an act of explicit or tacit consent to such authority on the part of its subjects motivated by their private desire for the benefits of peaceful, rational political society. Grotius' defense of political authority is thus contractarian. It is also Individualist in that it is based on the duty of individuals to fulfill their private promises and the fact that they freely consent to political subjection out of a desire to have their private rights and interests protected. Grotius' defense of political authority vested with the authority to wage war on behalf of its subjects is thus quite different from the defenses we have seen in the previous chapters. He does not believe that people are ontological parts of social wholes by nature or that it is part of natural justice that the good of the political community trumps their private good. Rather, he thinks that individuals are always prior to their political communities. For him, political communities are voluntary, not natural, associations of individuals. To whatever extent people are parts of public bodies it is only as a result of their "decision" to join them and that to whatever extent the good of the public body trumps their private interests it is because individuals have agreed to such terms out of self-interest.

In terms of the foundation of his moral theory, Grotius is a natural law theorist. He believes that there are absolutely binding moral requirements placed on human behavior that are grounded in nature. In particular, he holds that mankind is possessed of the natural desire for

peaceful, rational society with those like him. This natural desire grounds natural right. This desire is, as he puts it, the “fountain of right.” According to Grotius, we can discern what is a part of natural right by discerning what is necessary for or inconsistent with reasonable and social nature. Anything that is incompatible with peaceful rational society is contrary to natural right and, therefore, unjust. Whereas anything that is necessary for reasonable society is obligatory (*prol.* VI and VIII; i I:XII; i II:I:3).

According to Grotius, there are five duties that the natural desire for reasonable society grounds, that is, five duties that are necessary for reasonable society. These are the duty to 1) abstain from that which is another’s, 2) restore that which belongs to another and any profits derived from it, 3) fulfill promises to others, 4) repair unjust damages to others, and 5) bear and carry out punishments for violations of these duties (*prol.* VIII). These are the moral duties that all individual persons have toward others by nature. They are absolutely binding and universal.

Notice that this list of duties tells us what to abstain from doing to others, what we ought to do if we violate our duties to others, and that we can take on greater duties through contract. In this regard, then, it is a very *laissez-faire* list of moral obligations. Our fundamental natural duties as private persons are to leave others to enjoy their own rights as they see fit, to restore property to its rightful owner if it is in our possession, make reparations for unjust injuries to others and to be punished for such injustices, and to follow through with our contracts with others. Thus, with respect to the positive obligations we have to others, i.e. obligations that morally require contributions to the lives and well-being of others, provided we have done nothing wrong to them, we have none by nature. It is only if we accept them through private acts of consent that we can acquire positive obligations to others.

In a number of places, Grotius describes natural justice in negative terms as the leaving of everyone to take care of him or herself and to live as he or she wishes. Grotius states that though many philosophers have seen right as involving the management of the distribution of goods to persons or societies in accordance with what they are naturally fit for, in fact this is not a part of right. Strictly speaking, right is leaving others alone or doing for them what they may justly demand (*prol.* X; see also ii XVII:III:1). Since Grotius claims that people cannot demand that they deserve goods by virtue of some natural fitness, what people may justly demand of others must be limited to only the restitution of wrongs and the fulfilling of contracts.

And, in his discussion of the justifiability of private war, Grotius tells us that leaving others alone to take care of themselves is not contrary to natural right. It is however contrary to natural right to interfere with others in ways that violates their rights. As he says, “It is not then against the Nature of Human Society, for every one to provide for, and take Care of himself, so it be not to the Prejudice of another’s Right; and therefore the Use of Force, which does not invade the Right of another, is not unjust...” (i II:I:3; see also ii XVII:XVIII). The view then is that it is our natural right to be left alone so long as we respect the rights of others to be left alone. As will be discussed below, according to nature, the only occasions when we can forcibly interfere with others are when they have unjustly interfered or are currently unjustly interfering with us.

But what exactly is it that is ours by nature that others are to abstain from and that should they fail to abstain from we can justly use violence to protect? Grotius tells us clearly that it is our life, limb, liberty, and property that are naturally ours and that we have a right to be free from interference or injury by others. The law of nature, then, gives us a right to enjoy these things free from interference by others.

On the right to life, limb, liberty and property, Grotius says

It may be easily conceived, that the Necessity of having Recourse to violent Means for Self-Defense, might have taken Place, even tho' what we call Property had never been introduced. For our Lives, Limbs, and Liberties, had still been properly our own, and could not have been, (without manifest Injustice) invaded. So also, to have made use of Things that were then in common, and to have consumed them, as far as Nature required, had been the Right of the first Possessor: And if any one had attempted to hinder him from so doing, he had been guilty of a real Injury. But since Property has been regulated, either by Law or Custom, this is more easily understood, which I shall express in the Words of Tully, 'If every Member of the Body was capable of Reflection, and did really think that it should enjoy a larger Share of Health, if it could attract to itself the Nourishment of the next Member, and should thereupon do it, the whole Body would of Necessity languish and decay: So if every Man were to seize on the Goods of another, and enrich himself by the Spoils of his Neighbour, human Society and Commerce would necessarily be dissolved. Nature allows every Man to provide the Necessaries of Life, rather for himself than for another; but it does not suffer any one to add to his own Estate, by the Spoils and Plunders of another.' (i II:I:3; see also ii XVII:II)

Grotius distinguishes civil right, that is, the authority of a political sovereign to legitimately order its subjects to act in certain ways and the duty of subjects to obey such orders, from this set of natural duties. There is no civil right by nature. Civil right is a human invention. However, civil right is grounded in natural right. The way civil right is grounded in natural right is that civil right was implemented through an act of consent on the part of those subject to civil right. The duty to fulfill promises is a part of natural right and, therefore, when people have agreed to be subjects of a political authority and promised to obey its orders, civil power is founded. Thus, people are not naturally subjects of a civil power, but become so after consenting to it. As Grotius says

...since the fulfilling of Covenants belongs to the Law of Nature...from this very Foundation Civil Laws were derived. For those who had incorporated themselves into any Society, or subjected themselves to any one Man, or Number of Men, had either expressly, or from the Nature of the Thing must be understood to have tacitly promised, that they would submit to whatever either the greater part of the Society, or those on whom the Sovereign Power had been conferred, had ordained. (*prol.* XVI)

Thus, consent is the immediate ground of the duty to obey civil law. The binding character of acts of consent is grounded in the law of nature, which, in turn, is grounded in nature itself. As

Grotius puts it, "...the Mother of Natural Law is human nature itself...And the Mother of Civil Law is that very Obligation which arises from Consent, which deriving its Force from the Law of Nature, Nature may be called as it were, the Great Grandmother of this Law also" (*prol.* XVII; see also ii XXII:XIII).

Grotius makes the same point when he distinguishes natural right from voluntary right. Natural right is, as we have said, that which is necessary for or repugnant to peaceful, rational society. Voluntary right, however, is derived from the will. Voluntary right can be derived either from human or divine will. When it is derived from human will it can ground household rights such as the right of a father over his son or a master over a servant. More to the point, however, human voluntary right can ground civil right, that is, the political authority of a civil power. It is the voluntary agreement of people to be subject to a civil power that is the original of civil right (i I:XIV).

Why and to what end do people choose to form political societies? Answering this question will enable us to see why Grotius believes political authorities have the powers that they do.

Generally speaking, it is clear that for Grotius people desire to form political societies because they recognize that in their natural condition they are worse off than they would be under the subjection of a civil power of certain kinds. Outside of political society, people are more disadvantaged than they are within it. Though natural right gives us the right to take care of ourselves, it turns out that we cannot do this as effectively as we can as members of political communities of certain forms. People thus form political societies out of self-interest. As Grotius makes the point,

For the Author of Nature was pleased, that every Man in particular should be weak of himself, and in Want of many Things necessary for living commodiously, to the End we

might more eagerly affect Society: Whereas of the Civil Law Profit was the occasion; for that entering into Society, or that Subjection which we spoke of, began first for the Sake of some Advantage. (*prol.* XVII)

In precisely what respect and why life outside political society is less commodious than life within it is less clear in Grotius' work. However, given the totality of Grotius' remarks on this issue, the most reasonable reading of his view is that in his natural condition, given his limited strength, it is difficult for men (i.e., male heads of households) to protect their private rights by their own private efforts. That is, left to his own devices and with only his own private power, man's rights are at great peril from injury by other private individuals. Because he could secure, and thereby enjoy, his private rights more effectively if he lived in a political society wherein a civil power protected his rights from injury by others by using, upon command, the collective force of all the members of the community to thwart such injuries, he finds such a political society desirable. Therefore, in constituting political society, man aims to more effectively enjoy his private rights by placing himself under a civil power with the authority, among other things, to employ its subjects in defense of the rights of his subjects.

We can glean this reading of Grotius by considering his three clearest statements regarding the intentions of the individuals who constitute political authority and, in turn, the design of political society. The first statement comes when Grotius defines the state as "a compleat Body of free Persons, associated together to enjoy peaceably their Rights, and for their common Benefit" (i I:XIV). A bit later, Grotius tells us that "the Design of Society is, that every one should quietly enjoy his own, with the Help, and by the united Force of the Whole Community" (i II:I:3). And later still, Grotius tells us that men united themselves in civil society, "out of a Sense of the Inability of separate Families to repel Violence" (i IV:VII).

The first two of these statements tell us that in constituting political society, individuals aim to protect their natural rights, that is, to be able to enjoy their rights peaceably or free from threats of harm, and to have their rights protected by the collective force of all the members of the community. It is fair to presume that for Grotius the protection of the united force of the whole community is precisely what makes civil society more effective at protecting private natural rights than man's natural state, and is therefore the sole feature of civil society that makes it desirable to individuals. In other words, individuals create civil society solely so that the whole of the society can be used to protect the rights of its individual parts.

The reason that individuals are better able to peaceably enjoy their rights when they have the protection of a whole community than they are without it should also be obvious from the third statement above. The united force of the whole community is stronger than the force of a private household and is therefore better able to protect individual households. It is the recognition of this that led men, i.e. male heads of households, to form political communities whose task is thus to use the united force of its members to protect all its individual members from violations of their natural rights to life, limb, liberty, and property.

In willingly agreeing to form political societies, men thus agree to be put under moral constraints in addition to their natural duties. Generally speaking, men agree to obey a civil power whose moral duty, as we have seen, is to use its subjects and their property to serve the public good. This puts men in a form of moral servitude akin to slavery in that the political subject is morally bound to obey his civil power. As Grotius says, "The Union of many Heads of Families into one People or State, gives such a Body of Men the greatest Power over its Members, because this is the most perfect of all Societies" (ii V:XXIII). This power of the body over its parts is similar to the power of a master over his slave.

We have already treated of those who are at their own Liberty and Disposal; there are others, who are in Circumstances of Obedience and Submission, such as Sons in Families, Slaves, Subjects, and likewise every individual Member of a State, if compared with the Body of the State of which he is a Member. (ii XXVI:I)

For Grotius, this subjection of individuals to a political authority is necessary for realizing the end they seek in forming political society. They could not effectively utilize the united force of the whole community without putting themselves under the control of some authority whose decisions they are obligated to obey. As Grotius explains

[I]n Matters for which each Association was instituted, the whole Body, or the major Part in the Name of the whole Body, oblige all and every the particular Members of the Society. For it is certainly to be presumed, that those who enter into a Society are willing that there should be some Method fixed of deciding Affairs...(ii V:XVII)

Thus, in matters pertaining to war, among other things, when people are members of political societies they are in a state of moral servitude to their political sovereign. This is why public war is possible for Grotius. Subjects have agreed to be put at the service of a political sovereign for the sake of protecting their private rights. They may therefore be used and sacrificed in war upon the command of their sovereign and are obligated to obey those commands.

#### Civil Power and the Public Good

Though it is true that for Grotius subjects are in a state of moral servitude to their political authority by virtue of a social contract, that contract also grounds specific obligations that are binding on the political authority. Political sovereigns are not morally permitted to govern in any way they please. Rather, in all their activities as political sovereign, especially in war, the sovereign is to serve the public good. The sovereign *qua* sovereign is obligated to only act in the way that will best serve the good of the community as a whole. In particular, political sovereigns are not to govern in a manner that is beneficial to their private interests only.

Grotius makes this point when he distinguishes private right from what he calls eminent right. Eminent right is the right of a community or its civil power to use its members and their property for the public good. Grotius asserts that eminent right trumps private right (i I:VI). In other words, if it is necessary to sacrifice private rights to protect the public good, justice requires the violation of private right. This point is reiterated in a number of places. For instance, when Grotius specifies the activities that political authorities have authority over, he clearly says that each activity is to be directed towards the public good, not the private good (i III:VI). And, in his discussion of the duties of sovereigns in war, he tells us clearly that it is the duty of the sovereign to protect the public good, not the private good. As he says succinctly, “it is a Sovereign’s Business to have greater Regard for the Whole than the Part” (ii XXV:II).

It is crucial to emphasize that, for Grotius, the public good that political authorities are to aim at is not reducible to the set of private goods of all its members. In war, as well as in all matters it has authority over, Grotius makes it clear that the political sovereign is not obligated to protect the interests and rights of all its individual subjects. On the contrary, Grotius argues that political sovereigns should not wage war when only a relatively small proportion of its subjects are threatened by injury. In such cases, the sovereign ought to let those subjects suffer injury without violent assistance by the public. This is because the sovereign must have regard for the good of the whole community, and not simply each of its respective parts. Presumably this is because seeking to protect the relatively small parts of the community would risk harming a greater part by engaging it in public war. As Grotius says,

A prince is not always obliged to take up Arms, whatever just Reasons of Complaint any particular Subject of his may have; unless all or most of his Subjects would be Sufferers on that Account. For it is a Sovereign’s Business to have greater Regard for the Whole than the Part; and the larger the Part is, so much the more does it approach to the Nature of the Whole. (ii XXV:II)

Thus, there is a difference between the public good and the good of each individual subject and where there is conflict between the two, the public good trumps the private good.

Indeed, Grotius argues that the sovereign can be obligated to directly participate in the sacrifice of the life and limb of some of its subjects to unjust injury by foreign powers. Grotius claims that if a foreign power should unjustly demand that a political authority hand over one of its subjects to the foreign power for capital punishment, a political authority ought to hand over the subject if doing otherwise would put the public in peril (ii XXV:III:1). Thus, it is a right of political authority to sacrifice the life and limb of its subjects, including the innocent, for the sake of the public good.

It should be clear also that the same principle, i.e., that the subjects are obligated to sacrifice their life and limb for the sake of the public good upon the command of their political sovereign, is underlying the duty of subjects to serve in war. Given that service in war is threatening to life and limb, and that not all threats of injury that are just cause for public war will entail a risk to the life of all subjects, the duty to serve in war is a duty that puts the public good above that of the private rights of subjects. Subjects may, indeed, in some cases, ought to, have their lives and limbs legitimately sacrificed through service in war for the sake of goods that are not their own, privately construed. In other words, subjects are obligated to put their life and limb on the line, upon the command of their sovereign, for the sake of the public good, not their, or another's, private good.

Grotius also claims that subject's private property may be used for the sake of the public good in war or other matters. If the state requires the use of some private property for an urgent public need, it may legitimately expropriate that property (i I:VI; ii XXV:III:4). Subjects are thus

obligated to give up their private property for the public good upon the command of their sovereign.

And, of course, all of these political obligations entail the loss of private liberty on the part of subjects for the sake of the public good. A person does not enjoy private liberty who may be forced to give up his labor and property upon the command of another for ends that are not his own. As Grotius admits, such is the state of subjects in political society. Grotius, as we have seen, consistently compares slaves with political subjects with regard to their respective liberty (ii XXVI:1). Indeed, Grotius asserts that political subjects lose their right to determine what is best for themselves altogether. He tells us that the political authority has the right to require subjects to act virtuously, not merely to act in accordance with the law of nature. Though, Grotius says, a private person may be morally obligated to help the poor, he may not, nevertheless, be compelled to do so by other private persons. However,

We are to observe that the Case is not parallel between Subjects and Subjects, and between Sovereigns and their Subjects. For one equal cannot compel another, unless it be to that, which by the strictest Right he owes him. But a Sovereign can oblige a Subject to other Things also which any Virtue directs, because that is a Power included in the Right of Sovereignty as Sovereignty...and therefore...it seems much more likely that a Subject may be forced to do what Charity demands of him. (ii XXV:III:4; see also i IV:VII)

As we can see, for Grotius, though subjects constitute political society out of a desire for greater protection of their private rights to life, limb, liberty, and property, political society does not guarantee protection of these private goods. On the contrary, subjects give up their private rights to these goods altogether to the authority of their political sovereign to be used for the sake of the public good. In the case of private liberty, the sovereign's authority as such entails a loss of it. In the case of life, limb, and property, the sovereign's authority entails the authority to use them at its discretion for the public good. Thus, the sovereign's duty to protect the public good is

not the duty to protect the private rights of his subjects first and foremost. Rather, it is the duty to sacrifice the private rights of his subjects for the public good when necessary.

It is essential to explain Grotius' account of how this could be so. Given his contractarian ground of political authority and the duty of subjects to obey such authority, one can be forgiven for assuming that Grotius holds that it is the duty of political sovereigns to protect the private rights of all subjects with the united force of the whole community. After all, Grotius tells us that the desire to have their private rights protected is the motivation driving private individuals to constitute political society. For Grotius to assert that it is not the protection of the set of private rights of subjects that is the sovereign's duty, but, rather, the protection of the interests of the public is surprising.

How does Grotius introduce this public thing and its interests into his theory? The answer is that, for Grotius, the contractual process that begins with individuals in a state of nature and ends with the constitution of a civil government with authority over a body of people is a complicated, multi-staged process necessarily involving the creation of a supra-individual public body with its own interests and rights. The process is not a one-step affair, as it is for Hobbes, wherein people in a state of nature contract, in a single act, to put themselves under the authority of rulers. Rather, what happens for Grotius is, first, individuals in a state of nature constitute a people, or public body, by a contract of association. This public body is a supra-individual body with its own rights and interests that has authority over its parts. This public body, next, elects, by majority-rule, a particular form of government of its choice that puts the body itself under the authority of a particular ruler or body of rulers.

In other words, private persons in the state of nature give up their private liberty and authority to a public body when they form, by consent, such a body. Then, this public body gives

up its unique liberty and authority to a ruler or set of rulers when it consents to be so subjected. Thus, civil government is created by a duality of contractual acts of the alienation of liberty and authority—one by a set of private persons and another by a public body. In the end, individuals fall under the authority of the body politic of which they are a part and this body politic comes under the authority of a specific ruler or set of rulers that it chooses. Following more recent commentators, we could refer to these two contracts as horizontal and vertical contracts respectively.

The distinction between these two acts of consent in the creation of civil government is clearly made by Grotius. In his discussion of how authority over persons can be created by consent Grotius explicitly distinguishes between acts of consent that he calls association and those he calls subjection (ii V:VIII:1). Among associations he explicitly includes marriages and he says that there are others but does not list them, although given his remarks they would seem to include private business partnerships and corporations (see ii V:VIII:1; ii V:XVII; ii V:XXII). Most importantly, he calls “The Union of many Heads of Families into one People or State” a contract of association (ii V:XXIII).

The association of individuals, i.e. male heads of households, into a people creates a very special relationship. This association not only gives the “Body of Men the greatest Power over its Members,” that is, authority of the whole over the parts, it also, by necessity, creates a distinct ontological entity that is more than the sum of its individual parts. Grotius describes this entity in the language of Aristotle and the Thomists as “the most perfect of all Societies” (ii V:XXIII). This entity must be created, for it is this entity that has the authority over its parts.

This point is made immediately following the above description of the association that creates a people when he tells us that once persons become members of a people, there is no

“outward Act done by any Person, which does not either by itself, or by some Circumstances or other, refer to this Society.” This suggests that, in forming a people, individuals become essentially parts of that society; they are no longer mere private individuals but parts of a greater social whole. And earlier, in his discussion of instruments employed by principals, Grotius tells us that sons in families, servants of masters, and subjects in states are ontological parts of social wholes: “For as a Part is not only a Part of the Whole, in the same Relation as a Whole is the whole of a Part, but that very Thing which it is, because of the Whole on which it depends: So the Thing possessed makes in some Manner part of the Possessor” (i V:III-IV).

More clearly, however, the point is made a few chapters later when Grotius tells us more explicitly what the ontological relationship is between a people and its members. For Grotius, a people is a thing that is ontologically distinct from its parts and has authority over those parts.

...the People is one of those Kind of Bodies that consist indeed of separate and distant Members, but are, however, united in Name, as having...one Constitution only, according to Plutarch; *Spiritum unum*, one Spirit, as Paulus speaks. Now this Spirit or Constitution in the People, is a full and compleat Association for a political Life; and the first and immediate Effect of it is the sovereign Power, the Bond that holds the State together, the Breath of Life, which so many thousands breath, as Seneca expresses it. For these artificial Bodies are like the natural. The natural Body continues to be still the same, tho' its Particles are perpetually upon an insensible Flux and Change, whilst the same Form remains...(ii IX:III:1)

It is this supra-individual public body that has authority over its parts and to which its individual parts owe obedience for its sake, not their private sake. Immediately after telling us that it is by an act of association that individuals constitute a people, Grotius tells us that individuals are obligated to provide assistance to their country when it is in need even when doing so is contrary to their private interests (ii V:XXIV). And, Grotius clearly tells us that it is this thing that its individual parts are in a state of servitude towards (ii XXVI:I).

The authority of the public body over its parts is exercised through the will of the majority of its parts. The decisions, then, of the majority create binding obligations for the totality of the parts. This is the method of deciding affairs that all associations have (ii V:XVII).

Individuals thus give up their private liberty when they constitute public bodies. However, the public body can give up its rights as well by an act of public consent. This is a form of what Grotius calls a contract of subjection. Contracts of subjection, as opposed to contracts of association, occur when a person or group immediately places itself under the authority of another person or persons. Grotius says that contracts of subjection are either private or public (ii V:XVII; ii V:XXVI). They are private when private persons enter into them such as when a private person consents to be the slave of another (ii V:XXVII). They are public when a public body enters into them. In essence, public contracts of subjection are public, not private, acts. The only example of public contracts of subjection Grotius provides is the consent of a people to be subjected to a ruler or set of rulers. This is the act that constitutes legitimate political authority by contract (ii V:XXXI). Again, it is a public, not a private act; an act committed by an antecedently constituted public body that is more than the sum of its individual parts.

In this sense, then, when a public body constitutes a civil government, it places the public body into a state of subjection that is distinct from the subjection of each of its individual members. Those members became bound to obey their political body when they constituted their political body, and when that body alienates its liberty and authority to a ruler, each of its members are bound to obey its decision and, in turn, bound to obey the ruler that has been given authority over the public body by the public body. This is the manner in which people come to be under political authority through contract.

Grotius argues that the public body has the right to alienate its liberty to anyone it so chooses and to constitute any form of government it wishes. It may choose a form of limited government wherein the ruler's authority is constrained in a number of ways or it may choose to alienate entirely all authority to a single absolute monarch. In principle, there do not appear to be any constraints on the appropriate form of government a people ought to appoint over them. Unlike the Classical Theorists and Vitoria, Grotius does not hold monarchy to be the best or most natural form of government. As he says,

It is lawful for any Man to engage himself as a Slave to whom he pleases... Why should it not therefore be as lawful for a People that are at their own Disposal, to deliver up themselves to any one or more Persons, and transfer the Right of governing them upon him or them, without reserving any Share of that Right to themselves?

And he asserts the general principle,

But as there are several Ways of Living, some better than others, and every one may chuse which he pleases of all those Sorts; so a People may chuse what Form of Government they please: Neither is the Right which the Sovereign has over his Subjects to be measured by this or that Form, of which divers Men have divers Opinions, but by the Extent of the Will of those who conferred it upon him. (i III:VIII:1)

But, because the public body and not a set of private individuals grant authority to political sovereigns, or rulers, whatever particular form of government the body selects, the duty of the sovereign is always most fundamentally to protect the good of the public, not the set of private individuals that compose the public. This accounts for that fact that, as we have seen, it is the principal duty of sovereigns to serve the public good as a supra-individual object and to sacrifice the good of private members of that body for the sake of the public when necessary. As the objects of political rule, people are not mere private individuals, but parts of a political whole. For Grotius, however, unlike for Augustine, Aquinas, and Vitoria, this social body is not a natural body but an artificial one constituted by the consent of private individuals. It is a private act of consent that constitutes these public bodies and which generates obligations of service on

the part of its members to the public body. And it is the public body that grants authority to governments and gives those governments the obligation to protect its interests and rights as distinct from the interests and rights of private persons.

### *Jus ad Bellum* in Public War

When is war justified according to Grotius? In terms of his theory of *jus ad bellum*, Grotius' rules of war can be listed as three. These rules are necessary conditions for a just war.

They are

- 1) Just Cause—Wars must only be waged in response to an unjust injury or imminent threat of such injury sufficient to give the victim just cause to wage war for defense, punishment, or the recovery of property.
- 2) Proportionality—The aim of wars must be proportionate to the injury received.
- 3) Prudence—Considering all the possible consequences of all available courses of action, war must be most likely to produce the greatest good possible in the circumstances.

I expect this last rule will be unfamiliar to most readers. As it is not immediately relevant to our purposes here, I will not elaborate on it. However, it will state that it is a fundamental rule that Grotius uses to ground guidelines for war that are more familiar such as Last Resort and Likelihood of Success.

Notably absent from this list is any principle that restricts the intentions or motives of war's participants. Unlike in the Classical Theory where such internal characteristics of those who engage in war are a central focus, Grotius tells us that though such things are morally significant and it is morally problematic to go to war out of, for example, hatred or greed, one may justly go to war from any motive or with any intention. States of character are not necessary conditions for just war according to Grotius (ii XXII:XVII:1-2; see also ii IV:III; ii XX:XVIII). Grotius' theory is thus not a virtue theory of just war; it is a theory focused strictly on actions and their external circumstances.

In terms of what constitutes just cause for war, Grotius tells us that at the most general level, it is only “an Injury received” (ii I:I:4). It is clear that what Grotius has in mind by an injury received is not just any harm to one’s interests. Rather, what he has in mind is an *unjust* harm to one’s basic interests (see ii XVII:1). He explicitly refers to St. Augustine who, as we saw in Chapter 1, held that it is the iniquity of the opposing side that gives one a just cause for war. Thus, for Grotius, as for Augustine, Aquinas, and Vitoria one can only have a just cause for war if one has been unjustly harmed in particular ways.

Importantly, Grotius claims that if one is harmed justly, for example, if one is justly attacked by another, then one does not have a just cause for war and any defensive violence one employs against a just attacker is unjust violence (ii I:XVII:1). This means that, at most, only one side in a war can have a just cause. Anyone who violently opposes a party with a just cause lacks a just cause for war (ii XXIII:XIII:1-2).

However, one can still have a just cause for war against an unjust harm when the party committing the harm is morally innocent through some excuse. Though one cannot wage war against a just injury, one can wage war against an unjust, though innocent, injury (ii I:III).

Now, Grotius tells us that there are two particular kinds of unjust harms that can give us just cause for war. These are attacks or imminent threats of attack against our persons, i.e., our life or limb, or against our property. Harms of these sorts can give us one of three just causes for war. When such harms are happening or are imminent we have just cause for war from self-defense. When they are not currently happening but have happened in the past against our property only, we have just cause for war for the recovery of our property and any profit unjustly derived from it. And when they are not currently happening but have happened in the past to our life, limb, or property, we can have just cause for war for punishment. Thus, there are three

possible just causes for war in response to unjust injuries or imminent threats of unjust injury to our life, limb, or property: self-defense, the recovery of what is ours, and punishment (ii I:II:2).

These just causes for war are grounded in natural right.

Grotius tells us that these just causes can justify private as well as public war. However, he says that there are some differences between public and private war with respect to the applicability of these just causes. He explicitly refers to two differences (ii I:XVI). First, in a private war for self-defense, the just cause for war is only fleeting in that it dissipates as soon as the victim can appeal to public authorities for assistance against the threat. However, in a public war there are no higher powers common to all parties to which to appeal and, therefore, just cause for war in defense against injuries or threats of injuries have greater continuity across time as each attack and counter-attack is carried out.

Second, only public wars can have punishment as a just cause. This is because, upon the creation of public authorities, private persons alienate their right of punishment to public authority. Thus, given the establishment of public authority, private persons can no longer wage war for punishment. Only public authorities can justly wage war for punishment.

There are three other differences between just cause in private and in public war that Grotius does not here list but that are clear from his more substantive discussion of just cause for war. These differences are essential to understanding Grotius' just war theory.

First, in a private war, the possessors of just cause can only be private persons, whereas in public war, the possessors of just cause can only be public authorities, not their private subjects. In other words, what has just cause differs in private war and public war. In private war, private persons can exercise just cause and, in public war, public authorities exercise it. There is thus an ontological distinction between the moral entities that justly engage in private and public

war. In private war it is a private person, or set of private persons. In public war it is a public authority with authority over a public body and its individual members. This is because, for Grotius, private persons have full rights of war by nature, but when they form a political body their rights of war are curtailed and their political authority possesses the full rights of war. Thus, we see in Grotius' theory a version of Walzer's so-called "domestic analogy" that will be discussed in the following chapter.

In the case of the right of self-defense, Grotius tells us that the constitution of civil society entails the alienation of the private right of self-defense in the sense that the state may legitimately require us to not defend our rights privately for the sake of the public good. According to Grotius, this is because the giving up of the full right of private self-defense is necessary in order for there to be a state at all. If we maintained the full right of private self-defense we could not have a fully realized state but would remain in the state of nature.

Indeed all Men have naturally a Right to secure themselves from Injuries by Resistance, as we said before. But civil Society being instituted for the Preservation of Peace, there immediately arises a superior Right in the State over us and ours, so far as is necessary for the End. Therefore the State has a Power to prohibit the unlimited Use of that Right towards every other Person, for maintaining publick Peace and good Order...for if that promiscuous Right of Resistance should be allowed, there would no longer be a State, but a Multitude without Union, such as the Cyclops were, every one gives Law to his Wife and Children. A mob where all are Speakers, and no Hearers. (i IV:II)

Yet, for Grotius, the civil power maintains the full right of defense against injury in a public war (ii I:XVI). As he says, the principal of a public war is the civil power, not a set of private persons (i V:I).

In the case of punishment, Grotius says clearly that though private persons have the right to punish violators of natural right by nature, when they form civil society they give up this right entirely. This is so for essentially the same reasons that the private right of self-defense is given up. Grotius argues that if private individuals maintained the private right of punishment, unified

civil society would be impossible (ii XX:VIII:4; ii XX:IX:4; ii XX:XL:1; ii XXI:III:1). Yet, again, for Grotius the civil power maintains the full right of punishment and the civil power is not reducible to the rights of a set of private persons (ii I:XVI). In wars for punishment, it is the civil power that exercises the right of punishment, not any set of private persons.

Similarly, in the case of wars for the recovery of property, Grotius tells us that in constituting political society, individuals give up the private right to recover lost property through violence and instead must defer their rights of recovery to public courts set up to adjudicate disputes over property. Anyone in a public body who privately seeks to recover their legitimate property by violence ought to be seen as a robber (ii VII:II:2). Grotius does not explicitly tell us why the alienation of the right of recovery occurs when political society is formed but we can presume that it is for the same reasons as the right of self-defense and the right of punishment is alienated, i.e. that if private persons maintained the full right political society would be undermined. But, similar to the case of the right to self-defense and punishment, once political society is constituted it is the civil power that has the right to recover property through war.

Second, for Grotius, in a private war, the object of just war, that is, the good or right the war aims at protecting, is the protection of private interests. But, in a public war, the object of just war is the protection of the public good. This point is, in part, a reiteration of what was said above about Grotius' view of the duties of political sovereigns in war and in all other matters it has authority over. As we have seen, Grotius believes that private persons have by nature the authority to use violence to protect their private rights but that when they constitute political communities they alienate that right to their political sovereign. That sovereign, however, is not obligated to use its authority to protect the private rights of all of its individual subjects. Rather,

the sovereign is obligated to use its authority to protect the public good (i III:VI; ii XXV:II). The public good, as Grotius understands it, is not reducible to the private good of all the individual members of the public but is the good of a supra-individual public body that its members are parts of. This is clear from Grotius' insistence that sovereigns are not to go to war to thwart injuries to all of their subjects when doing so threatens the public good (ii XXV:II), and his claim that a sovereign ought to directly participate in the unjust harm to one of its private subjects when doing so saves the public from harm (ii XXV:III:1).

This is even true of public wars for punishment. According to Grotius, punishment is not to be carried out simply for the sake of causing a wrongdoer to suffer. Rather, punishment ought to aim at some good that is consequent to the punishment itself (ii XX:IV-V). At least in the case of public punishments, that is, punishments carried out by public authorities, the punishment ought to aim at the public good. This is clear from Grotius' assertion that the public punishment of private wrongdoers out to be omitted when carrying out the punishment would cause harm to the public good (ii XX:XXII-XXIII). Thus, public punishment is only justified when it serves the public good. Public war for punishment must, then, serve the public good, not the private good.

Third, for Grotius, in a private war, provided the war is just and private persons have not made contracts with other private persons requiring their service in war, a participant is merely *permitted* to serve and never obligated to serve. In public war, on the other hand, the political sovereign can be *obligated* to wage war, not merely permitted. Likewise, as we have seen, the subjects of political authorities are obligated to serve in public wars when commanded to by their sovereign, not merely permitted. In this way, there is an importantly different set of moral rights and duties at play in private war and in public war. According to nature, participants in just

private war are exercising permissions to engage in war in certain circumstances, while in just public war participants are, at least sometimes, discharging duties to engage in war.

This point is also, in part, a reiteration of the above discussion of the responsibilities of political authorities and the obligations of subjects. As we have seen, for Grotius, it is consistent with our natural obligations to leave others alone to fend for themselves (i II:I:3). Though natural right permits engaging in private war not only to defend our own private rights but also to defend the private rights of others (ii XXV:I:1), there is no obligation to assist others in the defense of their rights when doing so puts one at risk of injury (ii XXV:VII:1). Thus, given that engaging in war always puts one at risk of injury, private persons do not naturally have the obligation to engage in private war.

The moral situation is different however for public authorities. For them, they are obligated to defend the public bodies they have charge over from injury, not merely permitted to do so (ii I:VIII; ii XXIV:VII; ii XXV:I:2; ii XXV:II). If they should fail to do so, they have violated their duties. Thus, if war is the only way to protect the public from serious injury, it is the sovereign's obligation to declare and wage war against the enemy. This is because of the contractual duties that the sovereign has accepted as the sovereign authority over a public body. This duty does not become supererogatory when discharging it puts the sovereign at risk of injury. This means that the sovereign is obligated to wage war and put his (as well as his subject's) life and limb on the line for the sake of the public good.

Turning now to Proportionality in war, Grotius sees proportionality as an entailment of justice in the cause of war. Proportionality, for Grotius, is a kind of "fit" between the injury that is just cause for war and the aim of the war that is its response. The just war, as we have seen, must be a response to an unjust injury, but the aim of the response must not be disproportionate

to the injury in some sense. The just cause, in some cases anyway, carries with it constraints on the gravity of the response. When a war seeks damages against the enemy that do not “fit” the injury received in the sense that the war seeks to harm the enemy in a way that unreasonably exceeds the wrong the enemy has committed, then the war is wrong and ought not to be waged.

Unlike most commentators, however, Grotius tells us that in cases of wars of defense against injury, there is no Proportionality requirement. According to Grotius, in principle, one may defend oneself or a people against any injury with any amount and degree of defensive violence against the party that commits the injury. He tells us that a person may defend himself against a box on the ear by killing the aggressor (ii I:X). Thus, for Grotius, the justice of defense against injury has no internal proportionality constraint. For good reason, most theorists have disagreed with this however and found that justice in defense does limit the aims of defensive violence allowable relative to the gravity of the injury.

However, Grotius does find there to be Proportionality requirements internal to the justice of punishments and the recovery of property. In the case of wars for punishment, Grotius tells us that just punishments, in war or in domestic justice, must be tailored so as to “fit” the gravity of the crime (ii XX:XXVIII). One must not punish wrongdoers in a manner that unreasonably exceeds the gravity of their wrongdoing. Grotius does not specify exactly how proportionality in punishment is to be observed or give a list of examples of punishments that are disproportionate to their crimes. However, he does tell us that just punishment need not be literally equivalent to crimes, e.g. a literal eye for an eye, but should inflict harms upon the wrongdoer merely proportionate to the gravity of their wrongdoing (ii XX:XXXII).

In wars for the recovery of property, there is also a kind of proportionality requirement. One may only seek to recover the property that has been unjustly taken or its equivalent in value

as well as any profits derived from it (ii XVII:V). In simple terms, one must only recover what the usurper owes and what the usurper owes is equivalent to what he has unjustly deprived the victim of. One who has had their property stolen or damaged does not have a right to recover any amount of property belonging to the thief or vandal. Wars for the recovery of property must aim only at a sum of property proportionate to that lost.

### *Jus in Bello* in Public War

What, for Grotius, is allowable in war? We must begin our answer to this question by stating Grotius' view of the relation between the justice of war and justice in war, between the *jus ad bellum* and *jus in bello*. For Grotius, any act of war done without just cause is itself unjust. "...if the Cause of the War be unjust...all the Acts of Hostility done in it are unjust in themselves," as he says (iii X:III; see also ii I:XVIII). In other words, as long as one commits acts of war without just cause for war, one commits unjust acts of war. Therefore, only parties to war that have just cause for war, can possibly conduct a war justly. In order to meet the criteria of *jus in bello*, one must first meet the Just Cause rule of *jus ad bellum*. One cannot fight an unjust war, i.e. a war without just cause, justly.

This is in line with the Classical Theory of just war as well as Vitoria's theory. All of these views, as well as Grotius', argue that one can only have just cause for war against an enemy if that enemy has committed certain injustices. But, a party that engages in war with just cause has done nothing to give their enemy a just cause for war against them. Thus, any act of war committed by the enemy against a party fighting with just cause is itself unjust.

As we will see in the following chapter, this is an important difference between Grotius and his predecessors, on the one hand, and the contemporary just war theory as articulated by

Walzer on the other. For the contemporary theory, there is a logical distinction between *jus ad bellum* and *jus in bello* such that it is possible to fight an unjust war justly.

Turning now to the substance of Grotius' theory of justice in war, his rules of *jus in bello* can be listed as three. They are

- 1) Necessity—All acts of war must be necessary in order to achieve the just cause of the war.
- 2) Discrimination—Just wars must only deliberately target those who 1) have wrongly participated in the injury that is just cause for war and 2a) are thereby guilty of a capital crime or 2b) it is the only way we have of defending our lives and estates against the injury that is just cause for war.
- 3) Prudence in Unintentionally Violating Discrimination—We may knowingly, though unintentionally, injure those the rule of Discrimination prohibits attacking or knowingly risk injuring those people only when it is most likely that those acts will cause more good than harm overall.

Only the first two rules are immediately relevant to our purposes here. Again, I will not discuss the third rule pertaining to Prudence in war.

As with the rules of *jus ad bellum*, the rules of *jus in bello* are grounded in the law of nature (iii I:I).

Because the rule of Necessity grounds important components of the rule of Discrimination, I will begin by explaining it before turning to the rule of Discrimination and its exceptions. My discussion of Necessity will be more cursory than my discussion of Discrimination because, along with being more complicated, it is in Grotius' defense of Discrimination in war that his Dualism will ultimately be revealed.

The meaning and justification of the rule of Necessity is straightforward. The rule says that, in a just war, the permissible courses of action available are limited to only those that are necessary to achieve the just cause. Given that a war meets the *jus ad bellum* criteria, it does not follow that one may pursue any aims against the enemy in war or that one may unleash all

manner of destructiveness against the enemy. Rather, one may only pursue the end that is just cause for war and do only what is necessary in order to obtain that end. This means that a party to a just war must wage their war in the least destructive manner conducive to obtaining the just cause. In particular, one must not deviate from the pursuit of the just cause in war either deliberately or through negligence. Thus, one may not take the opportunity to pursue other desirable ends through war that are not the just cause or lapse into wanton destruction that has no necessary connection to obtaining the just cause. What exactly this rule prohibits will depend on the case—on the just cause at hand and what is necessary to obtain it in the circumstance. But, the rule is clear in its general meaning and will normally provide strong limits on the just conduct of war.

The rule of Necessity is justified because war is only morally allowed as a means to a just end. No one ever has a right to war as such, but only when, among other things, it is necessary to achieve certain just causes. Moreover, as Grotius notes, war is a bad thing and is extremely undesirable in itself (ii XXIII:VI; ii XXIV:X:1). Therefore, when war is justified, it is only justified in order to achieve the just end and nothing else. Thus, a just war must be conducted only in the manner that is necessary in order to achieve the end that is just cause for war.

Grotius states the rule of Necessity explicitly. He says

...all Combats, which are not of Use for the obtaining of Right, or concluding a War, but merely for vain Ostentation of Strength, that is, as the Greeks call it, Rather a show of Strength, than a warlike Action, are wholly repugnant to the Duty of a Christian, and Humanity itself. Therefore all Magistrates ought strictly to forbid these Things, for they must render an account for the unnecessary shedding of Blood to him, whose vicegerents they are; Sallust, tho' a Pagan, commends those Generals, who purchase Victory with the least Blood. (iii XI:XIX)

Turning now to the principle of Discrimination, it is an attempt by Grotius to constrain whom may be deliberately attacked in a just war. For Grotius, some targets are legitimate objects

of deliberate attack in war and some are not. The principle of Discrimination is an attempt to specify this distinction with respect to persons and their property.

As we saw in the previous chapter, Vitoria asserts a principle of Discrimination that draws the line between legitimate and illegitimate targets of deliberate attack in war between those who are wrongly participating in the unjust harm that is just cause for war and those who are not, or between the innocent and the non-innocent respectively. For Vitoria, one may attack anyone in a just war when it is necessary to protect the public good and they are wrongfully participating in the injustice that is just cause for war. A person may not be deliberately attacked who has not wrongfully contributed to the injustice that is just cause for war. Those who are wholly innocent of the crime that instigates the war in the sense that they have not wrongfully participated in it are not to be deliberately attacked. For Vitoria, the innocent are generally all noncombatants on the unjust side while the non-innocent are all combatants on the unjust side.

Grotius' principle of Discrimination is similar to but importantly different from Vitoria's. Like Vitoria, Grotius attempts to draw the line between potentially legitimate and illegitimate targets of deliberate attack in war between those who have wrongfully participated in the injustice that is just cause for war and those who are wholly innocent of that crime respectively. For Grotius, the principle of Discrimination states that only those may be deliberately targeted in a just war who 1) have wrongfully participated in the injury that is just cause for war and 2a) they are thereby guilty of a capital crime or 2b) it is the only way of securing our lives and estates.

For careful readers of Grotius, this construal of his principle of Discrimination may seem overly stringent. This is because in Grotius' most direct expression of his rule of Discrimination he only asserts conditions 2a) and 2b). As he says, "No Man can be justly killed with Design, unless for a capital Crime, or because we cannot really secure our Lives and Estates without

doing it” (iii XI:II:1). There is no mention here of condition 1), i.e. that legitimate targets of deliberate attack be wrongful participants in the injury that constitutes just cause for war.

As it can seem unclear where condition 1) is coming from and, more importantly, it is crucial to my critique of Grotius to attribute condition 1) to him, I must explain and justify this reading of Grotius’ principle of Discrimination. Condition 1) makes being a wrongful participant in the unjust injury that is just cause for war a necessary condition for a person to be a legitimate target of deliberate attack in war. From what we said above regarding the just cause for war it is obvious that those against whom war may permissibly be waged must have acted in some way wrongfully in as much as we have just cause for war against them. Just cause for war is a response to particular acts of injustice by the enemy. It is their injustice that defines the enemy as a legitimate target of war. Those who have not committed the relevant wrongs cannot be legitimate targets of violence because they have done nothing to give others just cause for war against them. And, as we have already noted, for Grotius, without just cause, no act of war is justifiable.

Grotius tells us repeatedly, however, that though those against whom war may be waged must have committed a relevant injustice, they need not be blameworthy for that injustice. Thus, a person who attacks me wrongly, though innocently, can still be a legitimate target of defensive violence. As he says, with respect to an aggressor, “If the Person be no Ways to blame,...I don’t therefore lose that Right that I have of Self-Defense: For it is sufficient that I am not obliged to suffer the Wrong that he threatens to do me, no more than if it was a Man’s Beast that came to set upon me” (ii I:III; see also iii I:II.1). Therefore, it is not necessarily a person’s blameworthiness for an injury that is just cause for war that renders them a legitimate target of intentional attack but simply the wrongfulness of their actions. That they have committed an

injustice that constitutes just cause for war, whether innocently or culpably, is what makes them a possibly legitimate target of intentional violence in war.

Importantly, a person does not become a possibly legitimate target of intentional violence who has not done any relevant injustice. People who are abiding by the law of nature are not legitimate targets of deliberate attack. Therefore, a person who justly attacks another does not himself become a legitimate target of deliberate attack for he has not done anything wrong so as to give others just cause for war against him (ii I:XVIII:1). To put it plainly, for Grotius, any person who is treating others in full accord with their natural duties as human beings cannot be justly deliberately attacked.

Conditions 2a) and 2b) of the principle of discrimination ought to be understood as applying to wars for punishment and wars of defense against unjust injury respectively. Condition 2a) tells us whom may be the target of deliberate attack in a war for punishment and condition 2b) tells us who may be the target of deliberate attack in a defensive war. Thus, for Grotius the demands of Discrimination vary depending on the cause of war: In a war for punishment, discrimination is one thing, whereas in a war for defense against injury it is another.

Interestingly, Grotius does not provide us here with a principle of Discrimination for wars for the recovery of property. I believe this is because when Grotius discusses what is allowable in public wars for the recovery of property he argues that the constraints on who may be deliberately attacked in war for the recovery of property are so strong that, practically speaking, conducting a just public war for the recovery of property is not possible. Grotius' view of public wars for the recovery of property seems to be that though one can acquire a right to war for the recovery of property, one will not be able to engage in such a war against a public body without violating justice in the conduct of war. In other words, public wars for the recovery of property

can be justified by the rules of *jus ad bellum* but they cannot be waged in a manner consistent with the rules of *jus in bello*.

On this matter, Grotius claims that when a public body acquires a debt to another, it is permissible to consider the subjects of that public body private debtors. Thus, the obligation to restore what is owed can be transferred from the public to its members and those who are owed by the body can claim restitution from its members (iii II:II; see also ii XVII:VI-IX). However, for Grotius, this right of recovery does not entail a right to use violence against the subjects of public bodies when they refuse to give what is owed. Though one may have the right to property in their possession, one does not have the right to execute that right violently. Therefore, if the subjects of a public authority that refuses to restore what is owed are prepared to fight in defense of that property, even though their violence would be unjust, one ought not to attempt to execute the right of recovery, for killing those subjects in such a case would be unjust (iii II:VI). Therefore, it seems that, according to Grotius, one may not justly go to war against a public body for the recovery of property.

In the case of discrimination in wars for punishment, Grotius' rule of Discrimination tells us that only those who are guilty of a capital crime may be deliberately attacked. However, Grotius' view of the practical implications of discrimination in war for punishment ultimately ought to be seen as in line with his view of discrimination in wars for the recovery of property. That is, though he holds that one can have a right to war for punishment, he does not seem to allow for the just use of violence against public bodies to execute that right. For Grotius, public wars for punishment can meet the rules of *jus ad bellum* but they cannot meet the requirements of *jus in bello*.

This becomes clear when we consider what Grotius considers, practically speaking, to be justice in the execution of punishment against public bodies. When Grotius specifies who among a public body that has committed a capital crime is personally guilty of that crime, he limits their number so severely that it is hard to see how wars for punishment against a public body could be justly waged. According to Grotius, the only members of a public body that has committed a capital crime who can be themselves unequivocally guilty of that crime and worthy of death are its political leaders (iii XI:V). However, Grotius argues that not every unjust war committed by a public authority constitutes a capital crime. He argues that unjust wars committed out of loyalty to an ally, that are not fought cruelly, that are undertaken for empire, and that were, at the time they were committed to, objectively difficult to judge just or unjust, are all not to be considered capital crimes on the part of their principals (iii XI:VI). Thus, only wars waged by public authorities that are in some way extraordinarily unjust could be instances where those authorities are guilty of capital crimes.

Concerning the subjects of political authorities, Grotius says that they are not guilty of a capital crime who are forced to participate in a public crime against their will (iii XI:III). Thus, a subject who is coerced into participating in an unjust war is not guilty of a capital crime and cannot justly be killed as punishment. Grotius also argues that those who participate in an unjust public war out of a sense of duty to their public authority are not guilty of a capital crime (iii XI:XVI:4; see also iii IV:XIII:2). Thus, a subject who believes he owes his public his service in war is not guilty of a capital crime, even though his war is unjust, and cannot be justly killed in war as punishment. It is therefore difficult to see how a war for punishment against a public body could be justly executed. Assuming such wars will require the killing of the soldiers of the

criminal community who are either being forced to fight or who are fighting out of loyalty to their side, such wars would seem to require committing injustice.

Furthermore, Grotius argues that the virtuous person will avoid war for punishment altogether and be prepared to forgive his enemies their crimes rather than punish them to the fullest extent that natural law will allow. For Grotius, the virtuous person will only engage in war for defense against injury, not for punishment. As he says,

An Enemy then who hath not Respect purely to what human Laws allow, but what is really his own Duty, and what the Rules of Virtue require, will spare even his Enemy's Life; and will put no Man to Death unless to save himself from Death, or something like it, or to punish personal Crimes that deserve Death. Nay, and to some of those that deserve it, either from a Principle of Humanity, or some other good Reason, he will either remit all Punishment, or at least the capital Part. (iii XI:VII:4)

For these reasons, Grotius ought to be viewed as deeply suspicious of the possibility of justly conducting a war for punishment. Because, as we have already seen, he rejects the possibility of justly conducting wars for the recovery of property as well, the only type of war that he is really open to possibly being justly carried out is a war for defense against injury.

Turning to wars of defense against injury then, Grotius' rule of Discrimination holds that only those may be deliberately targeted in war who have wrongly participated in the injustice that is just cause for war and attacking them is necessary in order to secure ourselves and our property. When war is a defense against unjust injury, we may only deliberately target those who wrongly participate in the threat and need to be attacked in order to thwart the threat. In other words, conditions 1) and 2b) of the principle of Discrimination are what apply to defensive wars.

The condition that, in defensive wars, it be necessary to attack all targets of deliberate violence in order to thwart the threat that is just cause for war is simply an application of the rule of Necessity discussed above. For Grotius, one is not permitted to attack anyone among the class of people who are wrongly participating in the unjust attack that one seeks to thwart. Rather,

following the rule of Necessity, one should only attack those who need be attacked in order to thwart the relevant threat. Thus, one should attack the smallest number of wrongful participants to the threat necessary in order to thwart the threat. To use defensive violence wantonly against all wrongful participants to the threat is an unjust form of indiscriminate violence.

The most important question regarding Grotius' principle of Discrimination in defensive war is, "In a defensive war against a public body, who among the aggressive community meets condition 1), i.e. who is a wrongful participant in the threat that is to be thwarted?" Answering this question will demarcate the class of persons who are possible legitimate targets of deliberate attack in defensive public war.

It is appropriate to attribute Grotius with the view that it is the combatants in the aggressive community that are wrongful participants in the threat and the noncombatants that are not. Though Grotius does not employ the conceptual dichotomy of combatants/noncombatants, his discussion of the matter reveals that it is, at least roughly, the distinction he sees as the mark of the wrongful participant/non-wrongful participant distinction in a public war for defense against aggression. For Grotius, when a public body engages in an injury against another such as to give others a just cause for war, the combatants in the aggressive community are those who wrongfully participate in the injury that is just cause for war while the noncombatants are not. Thus, for Grotius, only combatants can be deliberately attacked in a defensive public war and noncombatants cannot.

Grotius tells us which members of a public body are not wrongful participants in any injury that is just cause for war. Among these he lists, women, children, and the elderly (iii XI:IX), priests and scholars (iii XI:X), farmers (iii XI:XI), merchants and tradesmen (iii XI:XII), prisoners (iii XI:XIII), and those who surrender (iii XI:XIV). Grotius makes it clear what sets

this group apart. He says that the distinguishing characteristic of these people is that they are not participants in the military apparatus that constitutes the unjust threat against others that is just cause for war. As he says, those are not to be deliberately attacked

...whose Manner of Life is wholly averse to Arms. By the Laws of War, only those that are in Arms, and do resist, are to be killed, according to Livy, that is, that Law which is agreeable to Nature. So says Josephus, It is just that they should suffer by Arms, who have taken up Arms, but the Innocent should not be touched. (iii XI:X:1)

The relevant distinction then for Grotius is between those who are “in Arms” and those “whose Manner of Life is wholly averse to Arms.” This is, at least roughly, the distinction between combatants and noncombatants.

The reason why Grotius holds that combatants on the unjust side of a defensive war may be deliberately attacked while noncombatants may not is that the combatants are personally acting wrongly in the relevant way while noncombatants are not. For Grotius, by taking up arms and joining in the unjust threat that is just cause for war, combatants act wrongly. The injustice that their public body commits against others by engaging in unjust aggression is something that they, as combatants in that aggression, have each personally committed. The wrong that their public commits in an aggressive war is a wrong that is attributable, at least in some measure, to all its combatants. Noncombatants, however, in a public body that commits aggression cannot be attributed with that wrong. As noncombatants, the aggression their community commits is not something they personally commit. Unlike combatants, noncombatants have personally acted in accordance with natural right and there can be no just cause for war against them.

Noncombatants, as noncombatants, have not done any relevant wrong.

That Grotius thinks it is the wrongfulness of combatant’s participation in an aggressive war that renders them possible legitimate targets of deliberate defensive attack is clear for a number of reasons. First, it is the only reading of him that is consistent with his broader theory of

just cause for war. As we have seen, for Grotius, one can only have a just cause for defensive war against another who is committing or threatening to commit unjust aggression. One even has just cause for war against those who innocently commit or threaten to commit unjust aggression. However, one cannot have just cause for war against another who justly commits or threatens to commit violence against others. Thus, for Grotius, it is only by *unjustly* attacking others that one gives others a just cause for defensive war. By *justly* attacking others one maintains one's rights to be free from injury by others.

Therefore, in order to be consistent with his theory of just cause, Grotius' principle of Discrimination would have to be read as asserting that the reason combatants in an unjust war may be deliberately targeted while noncombatants may not is that the combatants, though not the noncombatants, are personally committing an injustice by participating in an unjust war.

Second, Grotius argues repeatedly and in detail that subjects of legitimate political authorities ought not to participate in unjust wars that their sovereign wages and orders them to participate in. Thus, for Grotius, any soldier who participates in an unjust public war acts contrary to their moral duties. Any combatant in an unjust public war is personally acting unjustly. They are wrongful participants in an unjust war that gives others just cause for war.

Grotius claims that subjects of political authorities who are consulted by their superiors regarding whether or not war ought to be waged are under the same moral responsibilities as their authorities and ought to abide by the rules of just war as outlined in Grotius' theory (ii XXVI:II). Moreover, subjects, even when not consulted by their superiors, should not engage in wars that their superiors order them to participate in when those wars are clearly unjust (ii XXVI:III). Rendering the duty of subjects not to participate in unjust wars more stringent still, Grotius argues that subjects should not engage in wars when they are unsure whether the war

their superiors order them to participate in is just or not (ii XXVI:IV). Thus, for Grotius, subjects are only obligated to participate in wars their political superiors order them to participate in when those wars are demonstrably just. As he says, from the point of view of political subjects whose service in war is requested by their political superiors, "...if the War be unjust it is no Disobedience to decline it" (ii XXVI:IV:5). Thus, any subject who engages in an unjust war, even when following the orders of their legitimate political superiors, is acting unjustly.

It is for this reason that Grotius explicitly denies the possibility of the moral equality of combatants, that is, the possibility of soldiers on opposing sides of a public war confronting each other as equally morally innocent (ii XXVI:IV:3-4). Contrary to Vitoria, who held that in a war between commonwealths, though both sides cannot have just cause for war, the soldiers on both sides can share the same moral status as equally dutiful political subjects, Grotius says such a thing is not possible because the soldiers on the side without just cause will always have a different moral status than the soldiers on the side with just cause. This is because soldiers should only participate in just wars and should refuse to participate in unjust ones. A soldier fighting in an unjust public war is personally acting unjustly while a soldier fighting in a just war is acting justly. Thus, for Grotius, it must be the case that the permissibility of a soldier's participation in war is relative to the justice of the war they are being asked to serve in and not to the commands of their legitimate political sovereign.

Therefore, since Grotius claims that combatants in an unjust public war personally commit injustice by participating in the unjust war and unjust wars constitute just cause for defensive war against those who are unjustly injuring or threatening to injure others, the reason Grotius thinks only combatants can be legitimate targets of deliberate attack in public war and noncombatants can not must be that combatants are wrongful participants in the injury that

constitutes just cause for war while noncombatants are not. For Grotius, it is the wrongfulness of combatant's participation in an unjust war that makes them possibly legitimate targets of deliberate attacks and distinguishes them from noncombatants in the community engaged in the unjust war. It is the moral failings of combatants in unjust wars, i.e. the violation of their duty not to participate in unjust wars, which make them liable to deliberate attack. This is why Grotius' principle of Discrimination justifies deliberately attacking combatants in defensive public wars and prohibits deliberately attacking noncombatants in such wars. Combatants in unjust wars meet condition 1) of the principle of Discrimination whereas noncombatants do not.

### Grotius' Dualism

We can now see the basic structure and content of Grotius' just war theory. And we can now see its most devastating problem. On its face, Grotius' theory falls victim to the same inconsistency as does Vitoria's. That is, on the one hand, in public war legitimate political authorities are morally responsible for adherence to the rules of just war theory and their subjects are not so responsible. Political authorities may use their subjects for the sake of the public good and subjects are morally obligated to obey the commands of their sovereign into and during war. In this sense, soldiers are the instruments of their political authority in war. On the other hand, in public war soldiers are morally obligated to only participate in just wars and ought to refuse to obey orders to participate in unjust ones. Soldiers thus share moral responsibility for adherence to the rules of just war theory with their political authorities. In this sense, soldiers in war are the assistants of their political authority. Thus, at one and the same time, soldiers are obligated to serve in wars when ordered to by their political authorities regardless of the justice of the war *and* soldiers are fully morally responsible for the justice of the wars they participate in regardless of the commands of their political authorities. Grotius' theory is thus a Dualist theory in that it

has two distinct views of moral responsibility for war. Grotius' theory is also incoherent in that the two views of moral responsibility are mutually exclusive: it would be impossible for a soldier to abide by the theory in its entirety.

As in Vitoria's theory, this problem is revealed in Grotius by analyzing his theory of political authority in war and his theory of Discrimination in war. On his theory of political authority in war, we have seen that he distinguishes public war from private war on the grounds that in public war the war is waged by a legitimate political authority who may use its subjects at its discretion for the sake of the public good, whereas in private war participants act under their own private authority and are morally responsible for the war. As Grotius tells us, in a public war the principal is the legitimate political authority and the subjects employed by the authority in war are its mere instruments. According to Grotius, "As a Servant is in a Family, the same is a Subject in a State, and is therefore the Instrument of the Sovereign. Nor can we doubt, but all Subjects may naturally be employed in War..." (i V:III-IV). As instruments, subjects in war are not morally responsible for the justice or injustice of the war their principal wages and are obligated to obey the commands of their sovereign. As he says, it is a soldier's duty to remain at his post even under the hazard of death (i IV:VII). And when the defense of a political society requires the use of a subject as a soldier, it is wrong for the subject to simply "quit the service of his country" (ii V:XXIV:2). In a private war, by contrast, there are no mere instruments but only principals and assistants. In a private war, all participants are either the interested parties who wage war or are those who come to the aid of the principal by their free choice and for which they are morally responsible.

Thus, in a public war moral responsibility for the justice of the war is vested in the hands of the political authority and not in the hands of its subjects who are obligated to obey the

commands of their sovereign. In a private war, by contrast, moral responsibility for the justice of the war is distributed equally to all its participants. This entails that in a public war it is at least possible for soldiers to justly participate in an unjust war waged and declared by their legitimate sovereign. If a subject's legitimate political authority wages a war that is unjust and orders its subjects to participate in the war, subjects can still be morally obligated to serve in the war regardless of the justificatory status of the war. Subject's moral responsibilities in war are relative primarily to the commands of their legitimate sovereign and not to the justice of the war. Hence, subjects can justly participate in an unjust war.

However, according to Grotius' defense of his principle of Discrimination, in public war combatants fighting in an unjust war are legitimate targets of deliberate defensive violence because they are personally acting wrongly. What makes it permissible to deliberately attack combatants serving in an unjust war is their moral failure to refuse to be combatants in an unjust war. According to Grotius, subjects of legitimate political authorities are obligated to refuse to serve in unjust wars even when ordered to by their political superiors. Subjects thus have no obligation to serve in war upon the command of their legitimate political authorities but are obligated to only serve in just wars regardless of the commands of their political sovereign. This is why Grotius denies the possibility of the moral equality of combatants in a public war: combatants in an unjust public war, as such, are acting wrongly whereas combatants in a just public war, as such, are acting in accordance with their duties. Thus, Grotius' defense of Discrimination in war entails that subject's moral responsibilities in war are relative to the justice of the war and not to the commands of their legitimate political authority.

These views of the moral obligations of political subjects in public war entailed by Grotius' theory of public war and his theory of Discrimination in public war are incompatible.

Subjects can either be morally obligated to serve in war upon the command of their political sovereign independently of the justice of the war or they can be morally obligated to not serve in all unjust wars, but they cannot be both.

To clarify exactly why this is it will be helpful to look at the matter from the point of view of soldiers. According to Grotius' theory of public war, soldiers are the mere instruments of their legitimate political authority and are obligated to serve in war upon the authority's command. Their moral obligations as soldiers are largely relative to the commands of their political superiors. Whether a soldier should serve in a war or not depends mainly on whether their legitimate political authority orders them to. This is what it means to be the mere instrument of political authority.

Yet, according to the view underlying the principle of Discrimination, soldiers are obligated to ensure that the wars they participate in are just and, should a war proposed by their authority be unjust, they ought to refuse to participate. On this view, the commands of their political authority are not morally decisive. Instead, what is decisive from the point of view of the soldier is the justice of the war their authority proposes. It is their moral responsibility as soldiers to determine whether the authority's proposals meet the standards of justice. Soldiers are thus not moral instruments of their sovereign. Rather, soldiers are a kind of assistant to their sovereign; they are persons who are free to choose whether or not to assist the principal of war and are morally responsible for that choice. There is thus no division of moral responsibility between the sovereign and the subject in public war. All are equally morally responsible for the justice of the wars they collectively undertake. In the end, much of the significance of the distinction between public and private war evaporates here. In terms of the distribution of

authority and, in turn, moral responsibility for war, there is no meaningful distinction between public and private war.

Therefore, Grotius' theory of just war provides soldiers with two opposing answers to the question, "Am I obligated to participate in the war my sovereign commands my service in?" On the one hand, the answer is "Yes, I ought to serve because my principal moral obligation is to obey the commands of my sovereign, except, perhaps when the war is patently unjust." On the other, the answer is, "No, I am never obligated to simply obey the commands of my sovereign pertaining to war. My principal obligation is to determine first whether the proposed war is justified or not. If it is justified, I may justly serve. If it is not justified I am obligated to not serve." These two answers to the question provide soldiers with a moral universe that is impossible to successfully navigate. The commands of the superior are, for them, both morally binding and not morally binding.

We can see these two conflicting accounts of moral responsibility for public war at work in other elements of Grotius' theory. Specifically, when we examine Grotius' comments regarding the duties of political sovereigns to inform their subjects of the reasons for their decisions we find two contradictory views. When Grotius claims that subjects are morally responsible for the justice of the wars they are asked by the superiors to participate in and that there can be no moral equality of combatants in public wars, he relies on these claims to ground another claim. The claim is that it is the duty of political authorities to make public their reasons for proposing war. This is a political authority's duty because subjects are morally responsible for the justice of the wars they participate in and, therefore, in order to make informed decisions they must have the case for war laid out before them so that it can be independently evaluated. Transparency in public decisions regarding war is thus a matter of justice.

This point is directly contrary to Vitoria who, we've seen, argued that it would be contrary to the public good to have to bring subjects into the public decisions regarding war. According to Vitoria, "it would be impossible, and inexpedient, to put the arguments about difficult public business before every member of the common people."<sup>4</sup> Grotius, however, explicitly denies this. According to Grotius

Nor is that which some produce to the contrary of any great Importance; that if this should be allowed, the State would soon be ruined, because it is generally not convenient to let the People into the Reasons of the Prince's Designs, for tho' this be true of the Motives, yet it is not so of the justifying Reasons of War, which should be made plain and demonstrable, and consequently, such as should and ought to be laid before all the World. (ii XXVI:IV:5)

And it is clear that Grotius thinks the obligation of political authorities to make their reasons of war public is grounded in the fact that the war's would-be participants are morally responsible for the justice of any war they participate in. Justice in public war is not solely the responsibility of the sovereign but is also the responsibility of his subjects.

And therefore Declarations of War used...to be made publick, and the Reasons for it precisely expressed, that so all Mankind, as it were, might judge of the Justice of it. Prudence, (according to Aristotle) is indeed a Virtue peculiar to the Prince, but Justice belongs to every Man as he is a Man. (ii XXVI:IV:7)

Elsewhere, however, Grotius expresses another view of the responsibilities of political authorities and their subjects for public business. Grotius argues that it is permissible for political authorities to lie to their subjects. According to Grotius, a sovereign's deliberate deception of the public is permissible when it is in the interests of the public good. According to Grotius, "...it is not a criminal Lye, when he who has an absolute Right over all the Rights of another, makes use of that Right, in telling something false, either for his particular Advantage, or for the publick

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<sup>4</sup> "On the Law of War," in *Vitoria: Political Writings*, Anthony Pagden and Jeremy Lawrance (eds.), (New York, NY: Cambridge University Press, 1991), §25, p. 308.

Good” (iii I:XV:1). And again, “True is the saying of Quintilian, Sometimes the common Good requires that some Falsehoods should be maintained” (iii I:XV:2).

This view is in line with Grotius’ view of public war and the unique responsibility of the sovereign to protect the public good. As we have seen, Grotius believes that political authorities are obligated to protect the public good and to use their subjects as instruments to that end. According to Grotius, these obligations of the sovereign give them a right to lie to their subjects when it is necessary for the public good. But, this view would mean that in matters pertaining to war, if the sovereign believes it is necessary to protect the public good, he may lie to the public about the justifying reasons for war. There is thus no obligation on the part of political authorities to be transparent regarding public war.

Thus, there are two contradictory views regarding the duties of political authorities to be transparent in public decisions regarding war. These two views are the product of the two contradictory views of the authority and moral responsibilities of political sovereigns and their subjects regarding the justice of war. On the one hand, political authorities have the authority to use their subjects as mere instruments in war and are fully morally responsible for the justice of their wars while their subjects are not. On the other hand, subjects share authority and moral responsibility for the justice of public war with their sovereign and are to be viewed as assistants to their sovereign in public war. Again, we see Grotius’ Dualism revealed.

#### Problems for Contractarian Public War

How to account for the presence of Dualism in Grotius’ theory? Why does Grotius make the mistake of introducing two inconsistent views of the distribution of moral responsibility for public war within a political community?

Ultimately, the roots of Grotius' Dualism are the product of contradictions within his theory of political justice. Unlike in the case of Vitoria's Dualism, Grotius' Dualism can be glimpsed in the foundations of the whole of this theory of just war, not just when comparing his principle of Discrimination with the rest of his theory. The explanation of this pervasive Dualism in Grotius is that it is the product of the contradictions involved in his defense of the political obligation to serve in war at the behest of the sovereign for the sake of the public good. This political obligation is actually undermined, not supported, by Grotius' contractarian defense of it. It is here where Grotius becomes a Dualist by committing himself to the view that subjects are and are not obligated to obey their political authorities into and during war.

As we have seen, Grotius defends political authority and the duty of soldiers to obey that authority into and during war by appeal to natural right. Natural right, according to Grotius, gives all individuals the private right to not have their life, limb, liberty and property harmed by others and obliges them to abide by all contracts. By itself, natural right does not ground any political obligations, that is, it does not entail any civil right. There is no natural political obligation. Rather, political obligations, when they exist, are the product of voluntary agreements freely made by individuals. When entered into, the terms of such agreements are binding on individuals because of the natural obligation to abide by the terms of all contracts. In this way, political obligations, where they exist, are derivative of natural obligations.

Grotius argues that individuals willingly place themselves under the authority of political associations out of their private desire to protect their natural rights. From the point of view of the state of nature, a person's natural rights are in greater peril than they would be as members of a public body designed to use the collective force of the whole body to thwart and punish threats and injuries to their private rights. For this reason, people willingly form political communities

and place themselves under public authority. This gives them the duty to obey the will of their particular authority and, when ordered to, fight in the service of their political community. This is how subjects become the mere instruments of their political authority.

The problem, however, is that the same reasons that justify the constitution of political authority and the political obligation to go to war for the public body also justify disobeying that authority whenever the authority orders actions that would violate natural right. Because in Grotius' view natural right is more fundamental than civil right, the authority of political sovereigns to direct their subjects in all matters cannot be absolute and must be constrained by natural right. Subjects cannot be bound to obey their political authorities when they issue commands that violate natural right. Thus, subjects must be obligated to review the commands of their political authorities to see if they are consistent with the law of nature before agreeing to obey them. This means that the authority of political sovereigns is severely limited, perhaps it is even inappropriate to call it political authority at all, for moral responsibility to govern the community in accordance with the law of nature is not, after all, abdicated from the subject to the ruler. On the contrary, the so-called subject must retain moral responsibility for the governance of the community and is obligated to subject their so-called sovereign's decisions to a private moral review. If the subject has reason to think the authority's orders are contrary to natural justice, the subject is obligated to refuse to obey. The subject is thus an independent authority in the political order, not a mere instrument of the political sovereign.

Indeed, Grotius asserts something very early in the treatise that is tantamount to an admission of this. In his discussion of when subjects ought to obey their political authority, Grotius' immediately asserts the general rule that is guiding for subjects. The rule is that *subjects*

*ought to obey only orders that are consistent with natural right and ought not to obey orders that violate natural right.*

But the main Question is, What is lawful for Subjects to do against their Sovereign, or those that act by his Authority. This is allowed by all good Men, that if the civil Powers command any Thing contrary to the law of Nature, or the Commands of God, they are not to be obeyed. (i IV:I)

Thus, it is clear that Grotius thinks political obligations are constrained by the law of nature. Not only should the political authority not violate the law of nature but neither should subjects participate in such violations under the direction of their sovereign. But this means that subjects must retain a form of authority over their sovereign and, in turn, moral responsibility for their participation in public affairs. The political obligations of subjects are not to simply obey the orders of the sovereign but to ensure that the sovereign acts justly and to never obey orders that are contrary to justice. This entails that the authority of political sovereigns is not unique and political subjects are not their mere instruments. On the contrary, on this view, political subjects are a kind of assistant to their sovereign and maintain moral responsibility of their participation in public actions. Thus we see Dualism, not only with respect to public war, but with respect to all political obligations at the very center of Grotius' theory of political justice.

To put the point another way, recall Grotius' distinction between public and private war. In public war, political authorities are responsible for the justice of their wars and may compel the service of their subjects in war while subjects are obligated to obey the directions of their sovereign into and during war. As Grotius says, in public war, political authorities are the principal and their subjects are their instruments. In private war, however, there are no instruments but only principals and their assistants. Those who come to the aid of the principal in private war are not obligated to follow the orders of the principal into and during war but are obligated to ensure that their assistance is consistent with natural right. If the principal is waging

an unjust war, all are obligated to refuse to assist the principal. Anyone who assists a principal waging an unjust war is acting unjustly. In private war, both principals and assistants have responsibility for ensuring they do not wage an unjust war.

Although Grotius defends a theory of public just war wherein subjects are reduced to mere instruments of the sovereign, as we have just seen, he also claims that subjects should never obey orders that violate natural right. This latter view entails that subjects are responsible for the justice of the actions of their public authority and are obligated to never participate in unjust public actions. This also entails, however, that wars waged by political authorities are never truly public wars. If subjects are always responsible for the justice of the public actions of their sovereign, then they are never mere instruments and should be conceived of as assistants. Grotius' assertion of the responsibility of subjects to never participate in public actions that violate natural right entails the denial of the possibility of public war. All wars would have to be essentially private wars. There is thus a Dualism at the heart of Grotius' theory of political justice: political subjects are both obligated to obey the orders of their sovereign *and* not obligated to obey the orders of their sovereign. Subjects are both instruments of and assistants to their sovereign.

The reason for this foundational Dualism in Grotius' theory of political justice is that, according to Grotius' contractarian theory of political obligations the only universally binding moral rules are the laws of nature and these laws do not contain any political obligations. Political obligations are created voluntarily through private contract. Thus, if there were to be any absolutely binding political obligation to obey the dictates of political authority, it would have to be possible for individuals to alienate their duty to obey the law of nature. In other words, the political obligation to obey would have to trump the private, natural obligation to not

violate natural right. This is because political authorities can violate natural right. Since the commands of political authorities can violate natural right, the absolute duty to obey them would require the abdication of responsibility for abiding by natural law. But such a thing would not be possible within the framework of Grotius' contractarianism because it holds the law of nature to be the only absolutely binding, universal moral law, not the commands of political sovereigns.

Thus, Grotius' defense of the obligation to obey political authorities is itself Dualistic. Though he concludes that subjects have the obligation to obey their political superiors, his argument in its support ends up providing reasons that contradict it and that give subjects responsibility for the justice of their sovereign's commands. The same reasons that Grotius uses to justify political authority also justify disobeying political authority when it commands things contrary to justice. The moral foundations of the theory of political justice end up limiting political authority such that subjects can never alienate responsibility for not violating those foundations to their political authority and, instead, subjects must always maintain the authority to disobey any political authority that attempts to violate natural right. According to Grotius' theory of political justice, subjects are bound to obey their political authority and are obligated to review the orders of their political authority and disobey any order inconsistent with justice.

This pervasive Dualism can also be revealed if we consider why Grotius thinks subjects should sacrifice their own life, limb, liberty, and property for the sake of the public good in war. As we have seen, Grotius' theory of just public war asserts that such sacrifices are the duty of subjects when ordered into war by their legitimate political sovereign. As we have also seen, the law of nature gives all people the absolute right to not have their life, limb, liberty and property violated by others. So, why should subjects participate in public actions that violate their own natural rights? As we know, according to Grotius, subjects should make such sacrifices when

ordered to by their political sovereign because such are the terms of their explicit or tacit social contract. They have agreed to make such sacrifices when ordered to by their legitimate political sovereign and they have done so because they see political subjection of this kind to be better able to secure their private rights than their condition in the state of nature. In other words, out of a desire to have their life, limb, liberty and property more secure people willingly place themselves in a political condition wherein they are obligated to sacrifice those same things upon the command of another.

We may grant that from the perspective of the state of nature a person's private rights will be more secure under absolute political authority of the kind entailed by Grotius' theory of public war. Still, the problem is that at the moment when a political authority in fact orders the sacrifice of a subject's private rights the subject would seem to have a justification for disobedience. The same self-interest that justifies the creation of political authority would also justify disobeying orders that violate that self-interest. It can readily be in our best private interest to disobey an order to sacrifice our lives, limbs, liberty, and property. Certainly, it will always be in our best private interest to disobey an order to that puts our lives at stake. As private beings, all of our interests depend on our being alive. No self-interest could be exchanged for our lives. In the context of service in war, refusing to become cannon fodder is always the best choice from the point of view of self-interest. Therefore, there is an implicit Dualism underlying Grotius' defense of the duty of subjects to sacrifice their private interests in war. Though subjects are supposed to be obligated to make such sacrifices, the reasons Grotius gives in support of this duty end up giving support for the refusal to make such sacrifices.

It could be argued that Grotius avoids this problem of self-sacrifice by appealing to the greater significance of the public interest. Grotius argues that if the interests of the public body

are at stake, it is the duty of the member of that body to sacrifice his private interests for the sake of the public good *because the public good is more important than the private good*. As we have seen, Grotius makes this point repeatedly in his work. The problem though is how could the public good be validly given greater importance than the private good within the framework of Grotius' contractarianism?

Grotius attempts to answer this challenge by asserting that though individuals constitute civil society out of self-interest, once they create their political association, they create a new public entity of which they are a mere part. In other words, the original social contract changes the essences of its signatories from mere private individuals and turns them into members of a supra-individual public body. The original social contract, the contract of association, creates a new essentially public entity and thereby changes the ontological status of the individuals party to it in such a way that their private interest becomes essentially linked to the interests of their public body. Upon becoming members of a public body people can no longer isolate their private interests from the interests of their community. The interests of the community become their personal interests. Therefore, when subjects are ordered to sacrifice their private rights for the sake of the public good there is no longer any conflict, for the creation of civil society rendered their private rights relatively insignificant, perhaps even meaningless, in comparison to the public good.

As we have seen, Grotius argues that the original social contract entails the creation of an irreducibly public body of which its members are mere parts. Grotius even claims that it is this relationship between the social whole and its parts that creates the obligation of the parts to serve the whole. As he says,

The Union of many Heads of Families into one People or State, gives such a Body of Men the greatest Power over its Members, because this is the most perfect of all

Societies: Nor is there any outward Act done by any Person, which does not either by itself, or by some Circumstances or other, refer to this Society. (ii V:XXIII)

And, when Grotius discusses why subjects are mere instruments of their political authority, he appeals to the special ontological relationship between the subject and the state. The subject is a mere part of the whole state and as such is reduced to its mere servant.

By Instruments, we mean not Arms, nor such like Things; but certain Persons who act by their own Will, but yet so as that their Will depends on another, that sets it in Motion: Such is a Son to his Father, being part of himself naturally; or a Servant, as a Part of his Master by Law. For as a Part is not only a Part of the Whole, in the same Relation as a Whole is the whole of a Part, but that very Thing which it is, because of the Whole on which it depends: So the Thing possessed makes some Manner part of the Possessor... As a Servant is in a Family, the same is a Subject in a State, and is therefore the Instrument of the Sovereign. (i V:III)

This is why Grotius thinks subjects can be obligated to sacrifice their private rights to life, limb, liberty and property for the sake of the public good upon the command of their sovereign. Though they originally implemented civil society out of a desire to protect their private rights, upon creating civil society they changed their ontological character such that they are no longer merely private persons with private rights. Rather, they are essentially members of a public body whose interests they share. They cannot separate their private interests from the public interest and demand that the public protect their private rights. On the contrary, their private interests as understood in the state of nature are no longer significant and they are bound to do what is necessary to protect the public even when doing so requires the sacrifice of their private lives, limbs, liberty and property. In effect, the contract that creates civil society turns subjects into ontological beings of the same sort as Augustine, Aquinas, and Vitoria held them to be by nature.

Though this may be an accurate rendering of Grotius' argument in defense of the duty of subjects to obey self-sacrificial orders by their political authority, it cannot be reconciled with

Grotius' broader contract theory. Leaving aside the problem of how it is that a contract between private persons made out of self-interest can create a social whole that reduces its signatories to its parts, according to Grotius' contractarianism, the interest individuals have in contracting together to create civil society is not just some material interest they happen to have but is a *moral* interest. They do not aim to satisfy some desires they arbitrarily have but aim solely and specifically to protect their natural rights. Put simply, the aim of the original social contract is to protect natural justice. Nature does not contain any public bodies and natural justice does not include any political obligations. By nature, people are mere individuals with the private rights to life, limb, liberty, and property. Whatever social bodies do exist and whatever political obligations they give to their members are the result of voluntary agreements. Natural justice is the only universal moral law and all valid political obligations must be derived from it. This means that political obligations cannot violate natural law. Political obligations must be constrained by the demands of natural right. Just as one cannot abdicate responsibility for not violating others natural rights to a political sovereign, as we saw above, a person also cannot engage in social contracts that violate his own natural rights. Since the content of natural law tells us that individuals, not public bodies, have the right to life, limb, liberty and property, there cannot be political obligations to sacrifice these rights. These rights are essentially private and *the public good can never be more important than these private rights*. In the end, given this framework to Grotius' contract theory, any political subject asked by their political sovereign to sacrifice their life, limb, liberty or property for the sake of the public good could legitimately refuse on the grounds that natural justice grants them absolute rights to such things and natural justice is absolutely binding. The grounds for refusal then are not just that they do not want to

sacrifice their life, limb, liberty or property, but that they have a right to these things and the political authority, however constituted, has no authority to force them to give them up.

Therefore, whatever the ontological nature of the contract that originates civil society, it cannot create political obligations that trump natural right. Natural right does not provide any political obligations but rather places limits on the terms of any social contract. One can always legitimately refuse to obey orders by any political authority that entails the violation of one's natural rights. Since orders to fight in war entail the violation of a subject's natural rights by turning them into mere instruments of another and putting their life, limb, liberty and property on the line, subjects will always have legitimate grounds for refusing to participate in war.

In this way, despite Grotius' attempts around the problem, there is an implicit Dualism within his view of the political obligations of subjects to sacrifice their basic rights by serving in war upon the command of their sovereign. On the one hand, subjects are responsible for serving the interests of their political communities by obeying the commands of their political sovereign even when such commands require the sacrifice of their life, limb, liberty and property. On the other, subjects have the natural and inalienable right to life, limb, liberty and property and can legitimately resist any attempt to violate them. Though Grotius attempts to reconcile these two tenets of his theory, it is a futile effort.

Such are the origins of Grotius' Dualism. Grotius defends the political obligation of subjects to serve in war upon the command of their sovereign for the sake of the public good. Yet, his contractarian defense of this obligation fails as it introduces reasons that actually require its denial. The same reasons Grotius gives for originating political obligations through his version of the social contract provide reasons for rejecting the obligation to serve in public war. Thus, there are two conflicting accounts of the political obligations of subjects that pervade the

foundations of Grotius' theory of political justice. Grotius can thus find grounds within his contractarianism for supporting a just war theory that is itself Dualistic. The Dualism we have uncovered in the content of his theory of the just war has origins in the Dualism of his theory of political justice.

To put this conclusion in terms that are better suited for the broader argument of this dissertation, the particular brand of Individualism at the foundation of Grotius' theory of justice cannot justify the political obligations that Grotius' attempts to derive from it. In particular, the duty of subjects to serve in war upon the command of their sovereign for the sake of the public good contradicts Grotius' Individualism. This political obligation violates the rights that Grotius attributes to all individuals by nature. In fact, the substance of Grotius' defense of this political obligation is in important ways Anti-individualist. To justify it, he appeals to the rights and interests of supra-individual entities that he variously refers to as public bodies, peoples, and states. Grotius asserts that the interests of these political bodies trump the interests of their private members. Grotius' theory of just public war thus violates his Individualism by contradicting its particular moral content and by appealing to an Anti-individualism to justify it. As an attempt to ground a theory of just public war in an Individualism and to leave behind entirely the Anti-individualism of the Classical Theory and Vitoria's theory, Grotius' theory is a failure.

Conclusion: Grotius, Individualism, and Dualist Theories

As will be discussed in the following chapter, the most significant contemporary systematic theory of just war (i.e., Walzer's) is explicitly Dualist. It forthrightly asserts that moral responsibility for abiding by the *jus ad bellum* rules of just war lies with legitimate political authorities and not with subjects of those authorities. With regard to the *jus ad bellum*

components of just war theory, subjects are obligated to follow the judgment of their political authority and obey orders to participate in war. However, subjects do share responsibility with their political authorities for abiding by the *jus in bello* rules of just war theory. In the conduct of war, soldiers are obligated to ensure that they fight justly. There is thus an explicit division of moral responsibility for the justice of war in contemporary orthodox just war thought.

Grotius' theory of just war is also Dualist, however he appears to be largely unaware of it and his Dualism renders his theory much more baffling. Grotius maintains that in public war political authorities, and not their subjects, are morally responsible for ensuring that their wars are just. Subjects are responsible for obeying the commands of their sovereign into and during war. Simultaneously, however, Grotius maintains that political subjects are responsible for ensuring that the wars they participate in are just. Any soldier who participates in an unjust war acts unjustly. Thus, for Grotius, responsibility for just war is distributed in two incompatible ways. On the one hand, in public war only political authorities are responsible for the justice of their wars and, on the other, all members of the political community are responsible for the justice of their wars. Grotius' Dualism thus renders his theory radically unworkable. In this respect, Grotius' theory is very like Vitoria's.

However, the roots of Grotius' Dualism are very different from Vitoria's. As we saw in the previous chapter, Vitoria defends both of the following principles.

- 1) Political sovereigns, not their subjects, are responsible for the justice of their wars and soldiers are obligated, with some exceptions, to serve in war upon the sovereign's command.
- 2) It is permissible to target combatants fighting in an unjust war and prohibited to target the innocent.

Vitoria defends 1) by appealing to an Anti-Individualism that asserts the natural goodness of supra-individual commonwealths whose members are its ontological parts and wherein authority

is hierarchically structured. But this view makes it difficult to defend 2), i.e. to develop a principle of Discrimination in war that prohibits targeting the innocent yet permits targeting combatants fighting in an unjust war. Vitoria attempts to mitigate this difficulty by asserting that combatants in an unjust war are not innocent because they are morally responsible for ensuring that they only participate in unjust wars. But this view of the responsibilities of soldiers in war is Individualistic and runs counter to the Anti-Individualist view of their responsibilities upon which his just war theory is based. In this way, Vitoria produces an incoherent Dualist theory of just war.

Grotius does not attempt to build his theory of just war on Anti-Individualist foundations and seeks instead to build on an Individualist bedrock. As we have seen Grotius also defends both 1) and 2). However, if we were hoping for a fundamentally Individualist theory of just war that coherently grounds 1) and 2), we do not find it in Grotius. Grotius' attempt to accomplish this fails. Though Grotius asserts both 1) and 2), his argument in defense of them is incoherent. In Vitoria's case, his defense of 1) was coherent, but in defending 2) he contradicts his defense of 1). In Grotius' case, his defense of 1) was incoherent and required violating his particular view of Individualism upon which his theory of political justice is based. Grotius' defense of 2) also contradicts 1), but he can find grounds for contradicting 1) within his self-contradictory defense of 1). Grotius' Dualism thus pervades the entirety of his theory of just public war. Unlike Vitoria, Grotius' problem is not so much with finding a coherent defense of 2) but with finding a coherent defense of 1). The failure of Grotius' theory of just war is that, given his Individualism, coherently justifying the authority of political sovereigns to wage and declare war and the duty of subjects to obey orders to participate in war, i.e., public war, is impossible. Though he tries,

Grotius cannot defend such a view of political obligations in war in a manner consistent with his Individualism.

The challenge of producing an Individualist theory of just war that coherently defends both 1) and 2) will be taken up in the following chapter by Michael Walzer. Here again, however, it will be argued that the theory fails to coherently ground both 1) and 2) in an Individualism. Walzer's purported Individualist defense of 1) is actually Anti-Individualist. The idea that responsibility for just war lies with political authorities, not with subjects, and that subjects are obligated to serve in war upon the command of their sovereign is actually based on the fundamental rights of supra-individual entities Walzer calls political communities. Walzer, however, defends 2) on Individualist grounds. Walzer's attempt to place Individualist foundations beneath his theory of just war is thus unsuccessful and he instead produces an incoherent theory in the vein of Vitoria.

In chapter 5, the concern will become whether there is any Individualist theory that can ground 1), or a theory of public war. My conclusion will be that no Individualist theory can coherently justify public war. Individualists must give up on the possibility of there being political authority with the authority to wage and declare war and the duty of subjects to serve in war upon the command of their sovereign. Individualists must therefore fundamentally reformulate the structure and content of just war theory. The difficulty for Individualists, it will then be argued, is that this reformulated theory has unacceptable implications for political society.

## Chapter 4

### Dualist Theories (3): Walzer's Just War Theory

#### Introduction

In the previous two chapters, we examined two systematic just war theories that are each Dualist in character, that is, they each contain, respectively, two distinct views of the distribution of responsibility for the justice of war within the political communities at war. In both cases, the Dualism of these theories proved incoherent. The two views of responsibility they each posit are mutually exclusive. These theories thus provide practical guidance that is impossible to abide by. On the one hand, according to these theories, legitimate political authorities are solely responsible for the justice of the wars they wage and declare while their subjects are obligated, with some exceptions, to obey the orders of their sovereign. On the other, subjects are responsible for the justice of the wars they are asked by their sovereign to participate in and are obligated to refuse to serve in unjust wars.

According to Vitoria's theory of just war, legitimate political authorities are responsible for ensuring that the wars they wage and declare are just while subjects, especially soldiers, are obligated to obey the commands of their sovereign. This view is defended on Anti-Individualist grounds akin to Augustine and Aquinas. Simultaneously, Vitoria argues that combatants in an unjust war waged and declared by their political sovereign are not innocent because by participating in an unjust war they are acting contrary to their moral obligations. Noncombatants, however, are not violating any relevant moral obligations. He can thus find reasons to discriminate between combatants and noncombatants in a political community engaged in an unjust war. This view is defended on Individualist grounds. However, his defense of his theory

of Discrimination contradicts the vision of political authority and moral responsibility for war entailed by his broader theory of just war. His theory is thus Dualist and incoherent.

Grotius' Dualism, by contrast, has much deeper, more foundational origins. Though Grotius' defense of his theory of Discrimination also contradicts his broader theory of public just war and reveals a Dualism in the content of his rules of just war theory, Grotius' defense of public just war is itself Dualist in character. Grotius' Dualism can thus be found in the foundations of his theory of legitimate political authority and the duty of subjects to obey the commands of their sovereign into and during war. Though Grotius attempts to ground this view of political obligations in an Individualism that posits the natural rights of all persons to life, limb, liberty and property, the supposed duty to obey one's political sovereign cannot be coherently grounded in it. This is because the duty to obey political authority requires the abdication of the natural duty to not violate the rights of people from the individual to the political authority. Because Grotius bases political authority on the absolute, natural rights of individuals, this alienation of responsibility cannot be coherently accomplished. Thus, Grotius' theory of political responsibility cannot be founded on his Individualism. As a result of this problem, Grotius produces an incoherent, Dualist theory of political justice wherein political authorities, not their subjects, are responsible for the justice of public acts *and* subjects are responsible for the justice of public acts. This foundational Dualism finds itself expressed in the content of Grotius' just war theory.

In this chapter, I hope to show that the just war theory of Michael Walzer is another example of a Dualist and incoherent theory. That the theory is Dualist is not in question. Walzer explicitly recognizes the Dualism of his theory and formalizes it in the content of the theory. That the theory is incoherent, however, is more controversial. Thus, my main task will be to

reveal and explain the inconsistency of the theory. Revealing the inconsistency will not prove terribly difficult, however, because Walzer acknowledges the incoherence of his theory, although in an apologetic fashion. Explaining the inconsistency will be where the difficulty arises.

One of the difficulties this explanation faces is the sheer pluralistic nature of Walzer's work. At times Walzer can seem to be applying theoretical stances as different and varied as Kantian, utilitarian, communitarian, and virtue theory to the ethics of war.<sup>1</sup> For this reason, he is difficult to pin down and attribute any one systematic view to. This being said, Walzer describes his just war theory as having one particular theoretical form that is supposed to generate the particular ethical prescriptions he endorses. My explanation of Walzer's incoherence traces this form and pinpoints its failings.

In sum, my account of Walzer's incoherence is that although he depicts his theory as having a coherent Individualist foundation in the individual rights to life and liberty, Walzer actually bases substantial parts of his theory on the rights of supra-individual entities. Some of his theory, specifically the theory of *jus ad bellum*, is based on the ultimate value of irreducibly social entities that he calls political communities. According to this component of his theory, the survival and freedom of political communities is the highest good, higher even than the survival and freedom of private individuals. Walzer's theory of *jus ad bellum* is therefore based on a strong Anti-Individualism. Yet, Walzer bases other components of his theory, specifically the theory of *jus in bello*, on the ultimate value of private individuals. According to this component of his theory, the survival and freedom of private individuals is the highest good, higher even than the survival and freedom of political communities. It is for this reason that the theory

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<sup>1</sup> Walzer has described his own practical philosophy as pluralistic. See *Spheres of Justice* (New York: Basic Books, 1983) and *Interpretation and Social Criticism* (Cambridge, MA: Harvard University Press, 1993).

produces incompatible practical guidance in certain situations—the *jus ad bellum* and the *jus in bello* have distinct and incompatible foundations.

I argue further that the reason Walzer fails to produce a coherent theory is that the tenets of his theory of *jus ad bellum* cannot be based on the rights of individuals as he conceives them. To be specific, Walzer's theory of *jus ad bellum* holds that political authorities are responsible for the justice of war while their subjects are obligated to serve in war upon the command of their superiors. This view of the responsibility for war could not be justified on the same individual rights as Walzer uses to ground his theory of *jus in bello*. This is why he appeals to an Anti-Individualism, i.e., the overriding intrinsic value of political communities as such, to defend his theory of *jus ad bellum* and produces an incoherent theory.

For this reason, the problem with Walzer's theory can appear similar to the problem with Grotius'. Walzer, like Grotius, attempts to ground his theory in the rights of private individuals. However, despite his own description of his theory, Walzer actually bases his theory of *jus ad bellum* on the rights of supra-individual political communities, not the rights of private individuals. His theory of *jus in bello*, however, in particular his principle of Discrimination is based on the rights of private individuals. In this respect, the problem with his theory is more akin to Vitoria's than Grotius'. Both Vitoria and Walzer selectively appeal to incompatible theories of justice—one Individualist, the other Anti-Individualist—in defense of the content of their theories.

#### Walzer's Dualism

Because the incoherence of Walzer's theory occurs between the foundations of his theories of *jus ad bellum* and *jus in bello*, we should begin by examining Walzer's depiction of the relation between these components of his theory.

Unlike Vitoria and Grotius, Walzer tells us clearly and repeatedly that his theory of just war is a dualist theory. For Walzer, what this means is that the relation between justice and war has two fundamentally distinct and logically independent categories. These two categories are the *jus ad bellum*, justice of war, and the *jus in bello*, justice in war. The justice of a war in the terms of one category has no necessary connection to its justice in the terms of the other. One may wage a just war (i.e., a war consistent with the rules of *jus ad bellum*) unjustly (i.e., in violation of the rules of *jus in bello*), and one may wage an unjust war (i.e., a war in violation of the rules of *jus ad bellum*) justly (i.e., consistently with the rules of *jus in bello*). Walzer begins his discussion of the morality of war by asserting this categorical division.

*Jus ad bellum* requires us to make judgments about aggression and self-defense; *jus in bello* about the observance or violation of the customary and positive rules of engagement. 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.<sup>2</sup>

Walzer calls this “The dualism of *jus ad bellum* and *jus in bello*.”

This view runs counter to every theory we have examined thus far. Augustine, Aquinas, Vitoria, and Grotius all deny that there is a logical independence of *jus ad bellum* and *jus in bello*. For all these philosophers, though one may fight a just war unjustly in the straightforward sense that one can have a right to pursue war against another yet adopt means that are unjust, one may never fight an unjust war justly. They all agree that if a war is unjust then there are no just means that one can employ to execute it. A war without a just cause, for instance, entails that everything done in that war is itself unjust. In this sense, according to these views, there is a logical dependency between *jus ad bellum* and *jus in bello*.

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<sup>2</sup> *Just and Unjust Wars*, fourth edition, (New York, NY: Basic Books, 1977), p. 21.

Walzer tells us that the logical independence of the *jus ad bellum/jus in bello* is not an assumption; he will give a justification for it. “It is my purpose,” he says, “to see war whole, but since its dualism is the essential feature of its wholeness, I must begin by accounting for its parts.” The account he gives of this dualism is, ultimately, developed by his defense of the entirety of his theory of just war. It is intended to be the product of the foundations and structure of that theory. However, we can begin by noting its immediate origins within the theory.

The dualism of the *jus ad bellum* and *jus in bello* is the result of an explicit Dualism within the theory. That is, the principles of *jus ad bellum* and *jus in bello* are logically independent of one another because responsibility for abiding by these parts of the theory is unequally divided between members of the political groups that engage in war. For Walzer, political leaders are responsible for abiding by the *jus ad bellum* while their subjects, including soldiers, are obligated to obey their leader’s commands, and political leaders and their soldiers are jointly responsible for abiding by the *jus in bello*. Responsibility for the *jus ad bellum* and the *jus in bello* is thus distributed in two distinct ways. The *jus ad bellum* is binding only on political leaders while the *jus in bello* is binding on political leaders and soldiers, that is, every individual person participating in a public war.

This Dualism of moral responsibility for the *jus ad bellum* and the *jus in bello* is most clearly presented in Walzer’s discussion of Erwin Rommel’s decision to burn Hitler’s order to execute all enemy soldiers encountered behind German lines. Walzer views Rommel’s decision as praiseworthy and sees Rommel as having ‘fought a bad war well, not only militarily but also morally.’ As Walzer explains,

The reason for this has to do with the distinction of *jus ad bellum* and *jus in bello*. We draw a line between the war itself, for which soldiers are not responsible, and the conduct of war, for which they are responsible, at least within their own sphere of activity... We draw [the line] by recognizing the nature of political obedience. Rommel was a servant,

not a ruler, of the German state; he did not choose the wars he fought but, like Prince Andrey, served his ‘Tsar and country.’...[B]y and large we don’t blame a soldier, even a general, who fights for his own government. He is not the member of a robber band, a willful wrongdoer, but a loyal and obedient subject and citizen... We allow him to say what an English soldier says in Shakespeare’s *Henry V*: “We know enough if we know we are the king’s men. Our obedience to the king wipes the crime of it out of us.” Not that his obedience can never be criminal; for when he violates the rules of war, superior orders are no defence. The atrocities he commits are his own; the war is not. It is conceived, both in international law and in ordinary moral judgment, as the king’s business—a matter of state policy, not of individual volition, except when the individual is the king.<sup>3</sup>

If responsibility for *jus ad bellum* and *jus in bello* is divided in this way, then there is a logical independence of *jus ad bellum* and *jus in bello*. Given Walzer’s Dualism of *jus ad bellum/jus in bello*, it would make sense to say that an unjust war can be fought justly. For it would be possible for political leaders to violate the rules of *jus ad bellum* in taking their political community to war, yet, in that war, they and their soldiers conduct themselves in a manner consistent with the rules of *jus in bello*. The Dualism of responsibility for *jus ad bellum* and *jus in bello* enables their logical independence.

But this division of moral responsibility is quite awkward. Walzer is explicitly offering two views of the responsibilities of soldiers for the justice of the wars they fight. Walzer’s view is that with respect to *jus ad bellum* soldiers are moral servants of their political leaders in that they are obligated to follow their leader’s commands. When under orders, soldiers may justifiably obey commands that violate *jus ad bellum* requirements. Yet, soldiers are obligated to ensure that they never violate *jus in bello* requirements even when ordered to by their political leaders. In the conduct of war, soldiers may not justifiably obey commands contrary to justice. Under the *jus in bello*, they are not the moral servants of their political leaders. Rather, they are autonomous individuals with full responsibility for their conduct. Though, as we have just seen,

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<sup>3</sup> *Ibid.*, p. 38-9.

he describes the fighting soldier as a “loyal and obedient subject and citizen,” he also insists that soldiers “are not mere victims or servants bound to obedience; they are responsible for what they do.”<sup>4</sup> Though, as we will see below, he describes soldiers as the “human instruments” of their political communities,<sup>5</sup> he also says, “soldiers can never be transformed into mere instruments of war.”<sup>6</sup> Thus, for Walzer, soldiers in war occupy two distinct moral roles, they are moral servants of their political leaders and they are not their servants. These distinct roles are supposed to be occupied with respect to two distinct requirements of justice, the *jus ad bellum* and the *jus in bello*. In this way, Walzer hopes to make his Dualism coherent.

In this chapter we will examine Walzer’s theoretical ground for his Dualism and challenge its coherence. Ultimately, it will be argued that the reasons Walzer gives for his view of the scope of responsibility for *jus ad bellum* and his reasons for the scope of responsibility for *jus in bello* are in fact mutually exclusive. His reasons for holding soldiers not responsible for the *jus ad bellum* also render soldiers not responsible for the *jus in bello*. And his reasons for holding soldiers responsible for the *jus in bello* also render them responsible for the *jus ad bellum*. Walzer’s assertion of a line between *jus ad bellum* and *jus in bello* is actually arbitrary and without coherent justification. It serves merely to mask a deep incoherence in Walzer’s theory of just war.

Before turning to the argument for this conclusion it is important to recognize that Walzer himself acknowledges a conflict between the *jus ad bellum* and *jus in bello*. Walzer closes *Just and Unjust Wars* by clearly admitting that his theory of war produces inconsistent moral prescriptions. In certain situations, which we will explore below, Walzer says his theory of *jus ad*

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<sup>4</sup> *Ibid.*, p. 40.

<sup>5</sup> *Ibid.*, p. 36. Walzer also refers to soldiers as “political instruments” at *ibid.*, p. 29.

<sup>6</sup> *Ibid.*, p. 311.

*bellum* permits actions that his theory of *jus in bello* prohibits. In these situations, he says, “our judgments are doubled, reflecting the dualist character of the theory of war...we say yes *and* no, right *and* wrong.” Walzer tells us that this reveals “the ultimate incoherence of the theory of war,”<sup>7</sup> and that “the world of war is not a fully comprehensible, let alone morally satisfactory place.”<sup>8</sup>

This conclusion is foreshadowed throughout the text. For instance, at the moment Walzer introduces the dualism of *jus ad bellum* and *jus in bello*, he warns us that the two may not cohere. As he says, “The dualism of *jus ad bellum* and *jus in bello* is at the heart of all that is most problematic in the moral reality of war.”<sup>9</sup> He tells us that there is a “tension between ends and means, *jus ad bellum* and *jus in bello*.”<sup>10</sup> And he cautions, “I am not sure whether the moral reality of war is wholly coherent.”<sup>11</sup>

Walzer closes Part Two, which articulates the substance of his theory of *jus ad bellum*, which he calls the theory of aggression, by saying there are tensions between it and the theory of *jus in bello*. Though the theory of aggression is itself coherent, he argues that it is not coherent with the war convention, or the *jus in bello*. “Here,” he says, “there appear to be tensions and even contradictions that are internal to the argument for justice.”<sup>12</sup>

Walzer’s attitude toward this incoherence is remarkable. Rather than treating its revelation like an admission of failure, he wishes to accept it as reality. Rather than serving as a call for a reevaluation of his theory, he wants it to be faced with resignation. For him, the

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<sup>7</sup> *Ibid.*, p. 325.

<sup>8</sup> *Ibid.*, p. 327.

<sup>9</sup> *Ibid.*, p. 21.

<sup>10</sup> *Ibid.*, p. 21-2.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*, p. 123.

“ultimate incoherence of the theory of war” is not a problem for the theory of war; it is a problem with the world. It is simply true that justice in war requires incompatible courses of action; sometimes acts of war really are both “right *and* wrong.” This incoherence is simply “the moral reality of war.” To agents who are faced with the irreconcilable dilemmas that the theory produces for them, we cannot offer solutions, but only sympathize with their agony. As he says, “A moral theory that made their life easier, or that concealed their dilemma from the rest of us, might achieve greater coherence, but it would miss or it would repress the reality of war.”<sup>13</sup>

Whether or not the moral reality of war is really incoherent, we can all agree that any theory that produces inconsistent practical prescriptions must have a theoretical contradiction in it. What is remarkable is that Walzer never attempts to clearly diagnose the origins of this practical contradiction within his theory. Though Walzer suggests that the theory’s practical contradictions are a product of a contradiction between his theory of *jus ad bellum* and his theory of *jus in bello*, he does not explain precisely how these theories contradict each other. What follows is an attempt to find and explain the contradiction in Walzer’s theory.

#### *Jus ad Bellum* and the Theory of Aggression

Walzer’s foremost and, as far as I can tell only, rule of *jus ad bellum* is a principle of just cause. It is

- 1) Just Cause—War is only justified to thwart and/or punish aggression or the imminent threat of aggression.

Crucially, Walzer defines aggression as any violation of the political independence or territorial integrity of an independent state. For Walzer, aggression is a violation of rights. States have the right to political independence and territorial integrity. It is these rights that make aggression

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<sup>13</sup> *Ibid.*, p. 326.

unjust, or as Walzer calls it, a crime, and justifies war in response. It is only as a response to aggression that war can have a just cause.

Walzer interprets this principle as permitting, most clearly, defensive wars against foreign aggression. But he also argues that the rule permits preemptive wars against imminent threats of aggression, interventions in wars for national liberation to defend the secessionists, interventions in civil wars wherein a foreign power has antecedently intervened, and humanitarian interventions to end massive atrocities. Walzer's view of just cause has been repeatedly criticized for being too restrictive. In particular, many commentators have argued that there ought to be just cause for a broader spectrum of wars for humanitarian intervention.<sup>14</sup> That being said, I am not interested here in the debate over what a just cause principle should be, but in Walzer's systematic justification for the one he puts forward.

Walzer's principle of just cause is the product of a systematic theory of justice in international relations that Walzer refers to as the theory of aggression. It is this theory that explains and justifies the rights of states and the crime of aggression. According to the theory of aggression, the rights of states to political independence and territorial integrity are not to be conceived as the rights of national governments as such. By themselves, governments have no rights. Rather, states rights are the expression, most immediately, of the rights of political communities, or what Walzer sometimes calls peoples, or nations. These social entities are what possess the right to political independence and territorial integrity and from which governments

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<sup>14</sup> See Beitz, Charles, "Bounded Morality: Justice and the State in World Politics," *International Organization* 33 (1979), 405-424; Doppelt, Gerald, "Walzer's Theory of Morality in International Relations," *Philosophy and Public Affairs* 8, no. 1, 3-26; Luban, David, "Just War and Human Rights," *Philosophy and Public Affairs* 9, no. 2, 161-181; Wasserstrom, Richard, "Review of Michael Walzer's *Just and Unjust Wars*," *Harvard Law Review* 92, 536-45.

do, or do not, derive their legitimacy. Aggression is a crime, for Walzer, because it violates, by definition, the rights of political communities.

Walzer describes the political communities that have these rights as composed of individual men and women who are associated together in such a way as to form a distinctive “common life.” This common life is a set of “shared experiences and cooperative activity.” Unfortunately, Walzer’s characterization of the common life is not much more detailed than this. However, it is clear that what he has in mind by the concept of “common life” is the particular cultural and political activities that constitute a distinct people and set them apart from others. It is their cultural and political way of life.

Walzer also describes the common life as the result of the history of relations between individuals. It is in this sense an historical community. The shared experiences and cooperative activities that constitute common lives develop over time. Walzer refers to this historical process as a “contract.” However, he makes it clear that it is not a literal contractual process but merely a metaphor to describe the coming together of individuals freely and over time to form their own political associations with their own distinctive character. As he says

State rights are not constituted through a series of transfers from individual men and women to the sovereign or through a series of exchanges among individuals. What actually happens is harder to describe. Over a long period of time, shared experiences and cooperative activity of many different kinds shape a common life. “Contract” is a metaphor for a process of association and mutuality...<sup>15</sup>

And, in a response to critics of *Just and Unjust Wars*, Walzer restates the same point.

The real subject of my argument [for state’s rights in *Just and Unjust Wars*] is not the state at all but the political community that (usually) underlies it...[T]hat community rests most deeply on a contract, Burkeian in character, among “the living, the dead, and those who are yet to be born.” It is hard, therefore, to imagine the assembly at which it

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<sup>15</sup> *Just and Unjust Wars*, *ibid.*, p. 54.

was ratified. Contract, as I wrote in the book, is a metaphor. The moral understanding on which the community is founded takes shape over a long period of time.<sup>16</sup>

For Walzer, this common life is profoundly morally important. Why and how it is important will be discussed in the following section. But for the moment we should note that, for Walzer, it is the common life that grounds the rights of political communities and, in turn, states to political independence and territorial integrity. The moral significance of common lives is where political communities and states derive their moral significance. He makes this point repeatedly. “The moral standing of any particular state,” he says, “depends upon the reality of the common life it protects...If no common life exists, or if the state doesn’t defend the common life that does exist, its own defense may have no moral justification.”<sup>17</sup> “[T]he right of a nation or people not to be invaded derives from the common life its members have made on this piece of land...”<sup>18</sup> “It is for the sake of this common life that we assign a certain presumptive value to the boundaries that mark off a people’s territory and to the state that defends it.”<sup>19</sup> According to the theory of aggression, therefore, in a just war, that is, a war with just cause, what is being defended are the rights of a common life that forms the character of a distinct political community. The only occasions for justly waging war is to protect the basic interests of these types of communal entities. The interests of common lives make aggression a crime and wars against aggression just.

Furthermore, for Walzer, the common life is also the ground of political obligations for its individual members, in particular, the obligation of members to fight in war upon the command of their political authority. As we saw above, Walzer’s view that soldiers are not

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<sup>16</sup> “The Moral Standing of States: A Response to Four Critics,” in *International Ethics*, edited by Charles Beitz, et. al. (Princeton, NJ: Princeton University Press, 1985), p. 218-9.

<sup>17</sup> *Just and Unjust Wars*, *ibid.*, p. 54.

<sup>18</sup> *Ibid.*, p. 55.

<sup>19</sup> *Ibid.*, p. 57.

responsible for the justice of the wars they fight, for the *jus ad bellum*, is based on the view that soldiers are obligated to fight when called upon by their political authority. Soldiers are not obligated to ensure that the wars they participate in are just, but are merely obligated to obey orders from their political superiors to fight. The responsibilities of soldiers are relative to the commands of their sovereign, not to the justice of the war they are ordered to participate in. For Walzer, soldiers have this political obligation because of the moral significance of the common life of which they are members and which justifies war against aggression. Just as a state has the right to wage war against aggression, the state also has the right to use its subjects in war and those subjects are obligated to serve in wars when commanded to by their state. Protecting the political independence and territorial integrity of the political community upon the command of the political authority is the duty of the soldier.

This point is made when Walzer argues that the triggering of this political obligation to fight is what compounds the severity of the crime of aggression. Aggression is such an extraordinary crime not simply because it violates the rights of communities but also because it forces individual men and women to fight and die in resistance against it. It forces them to do so because they are obligated, as members of a political community, to do so. As Walzer says, “The wrong the aggressor commits is to force men and women to risk their lives for the sake of their rights. It is to confront them with a choice: your rights or (some of) your lives.”<sup>20</sup> “The state that does resist, whose soldiers risk their lives and die, does so because its leaders and people think that they should or that they have to fight back. Aggression is morally as well as physically coercive...”<sup>21</sup> “Aggression is a singular and undifferentiated crime because, in all its forms, it challenges rights that are worth dying for.” Explaining which rights are worth dying for, Walzer

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<sup>20</sup> *Ibid.*, p. 51.

<sup>21</sup> *Ibid.*, p. 52-3.

says, “The rights in question are summed up in the lawbooks as territorial integrity and political sovereignty.”<sup>22</sup> As we have seen, these rights are based on the moral significance of political communities and their distinctive common lives. Thus, it is the rights of political communities for which individual lives are worth sacrificing.

Importantly, Walzer makes it clear that he does not see the decision to participate in war against aggression as freely made by each participant. For him, it is not the case that each participant privately decides that it is worth fighting against the aggression they face for the sake of the community. What actually happens is that most participants, i.e., soldiers, are ordered to fight by their state and that they are obligated to obey those orders. For Walzer, soldiers in wars against aggression are victims not only of the injustice committed by the aggressor community but also of the political establishment of their state that conscripts them into its service. This is what Walzer means when he writes of “the tyranny of war.” As he says, we can understand aggression “as the exercise of tyrannical power, first over [the aggressor’s] own people and then, through the mediation of the opposing state’s recruitment and conscription offices, over the people they have attacked.”<sup>23</sup> “Hence the peculiar horror of war: it is a social practice in which force is used by and against men as loyal or constrained members of states and not as individuals who choose their own enterprises and activities.”<sup>24</sup> Thus, for Walzer, aggression turns (most of) those who fight against it into the political pawns of their own political community, mere instruments to be sacrificed for the sake of the integrity of the common life.

This conscription, this rendering of subjects into mere instruments, is not necessarily unjust, however. It is the legitimate response of a political community threatened with

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<sup>22</sup> *Ibid.*, p. 53.

<sup>23</sup> *Ibid.*, p. 31.

<sup>24</sup> *Ibid.*, p. 30.

aggression. Political communities have the right to use (at least some of) their members in wars against aggression for the sake of the good of the community. Walzer makes this point when he distinguishes mercenaries from soldiers. He claims that mercenaries as such have no duty to serve anyone in war and cannot be legitimately forced by anyone to fight. Soldiers, on the other hand, are bound to serve a particular political authority and may be legitimately forced by that authority to fight. Unlike a mercenary, in the case of a soldier, “We assume that his commitment is to the safety of his country, that he fights only when it is threatened, and that then he has to fight (he has been “put to it”): it is his duty and not a free choice.”<sup>25</sup> The crucial difference between mercenaries and soldiers

...is the extent to which war (as a profession) or combat (at this or that moment in time) is a personal choice that the soldier makes on his own and for essentially private reasons. That kind of choosing effectively disappears as soon as fighting becomes a legal obligation and a patriotic duty. Then ‘the waste of life of the combatants is one which,’ as the philosopher T. H. Green has written, ‘the power of the state compels. This is equally true whether the army is raised by voluntary enlistment or by conscription.’<sup>26</sup>

This is why Walzer describes aggression as “morally as well as physically coercive.”<sup>27</sup> It turns (most of) its individual protagonists into agents who are obligated to fight and die and who may legitimately be forced to fight and die by their political authority. They are obligated to serve upon the command of their sovereign and, if they refuse, may legitimately be forced to serve against their will.

The duty of soldiers to obey orders to serve in war is derived from the interests and rights of the common life that constitutes their political community. How this derivation is made, we will discuss below. But it is clear that the duty to obey is grounded in the moral significance of the common life. The view as he expresses it is that the rights of political communities to

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<sup>25</sup> *Ibid.*, p. 27.

<sup>26</sup> *Ibid.*, p. 28.

<sup>27</sup> *Ibid.*, p. 53.

political independence and territorial integrity give states the right to wage war in their defense and to use their members as instruments in those wars. As Walzer says, it is the rights of the common life “for which individuals are sometimes sacrificed.”<sup>28</sup>

It is for these reasons that Walzer asserts that soldiers on the battlefield confront each other as moral equals, that is, as persons who have done nothing wrong by fighting, but are merely acting in accordance with their political obligations. This moral equality of soldiers is indifferent to the justice of the wars they participate in. Even if a soldier is fighting in an unjust war, as long as he or she is obeying orders from political superiors, he or she is acting dutifully. Thus, the moral status of soldiers on opposing sides of any conflict between states or political communities is always the same. As he says

The level of hatred is high in the trenches. That is why enemy wounded are often left to die and prisoners are killed—like murderers lynched by vigilantes—as if the soldiers on the other side were personally responsible for the war. At the same time, however, we know that they are not responsible. Hatred is interrupted or overridden by a more reflective understanding, which one finds expressed again and again in letters and war memoirs. It is the sense that the enemy soldier, though his war may well be criminal, is nevertheless as blameless as oneself. Armed, he is an enemy; but he isn't my enemy in any specific sense; the war itself isn't a relation between persons but between political entities and their human instruments. These human instruments are not comrades-in-arms in the old style, members of the fellowship of warriors; they are “poor sods, just like me,” trapped in a war they didn't make. I find in them my moral equals.<sup>29</sup>

And, later, Walzer reiterates the point: “the moral status of individual soldiers on both sides is very much the same: they are led to fight by their loyalty to their own states and by their lawful obedience.”<sup>30</sup>

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<sup>28</sup> *Ibid.*, p. 54.

<sup>29</sup> *Ibid.*, p. 36.

<sup>30</sup> *Ibid.*, p. 127. This reading of Walzer on the basis of the moral equality of soldiers runs counter to the reading of many of his commentators. Many have seen Walzer's moral equality of soldiers as based on the claim that soldiers are always coerced into military service and, if they are fighting an unjust war, are therefore not culpable for their wrongdoing (see Mapel, David, “Coerced Moral Agents?: Individual Responsibility for Military Service,” *The Journal of*

What this view of just war entails then is that wars are actions undertaken between political communities, not simply actions between individuals or sets of individuals. The rights that justify war are the rights, most immediately, of communities of certain kinds. Thus, wars are inter-communal in character, not straightforwardly inter-personal. As he says, “[W]ar itself isn’t a relation between persons but between political entities and their human instruments.”<sup>31</sup> And, later, “The victim of aggression fights in self-defense, but he isn’t only defending himself, for aggression is a crime against society as a whole. He fights in its name and not only in his own.”<sup>32</sup>

War is thus analogous to, not reducible to, a relation between individuals. In war, communities confront each other in the way individuals do in private conflicts. International society is a society of communities in the way domestic society is a society of individuals. This is what Walzer refers to as the “domestic analogy.”

If states do possess rights more or less as individuals do, then it is possible to imagine a society among them more or less like the society of individuals. The comparison of international to civil order is crucial to the theory of aggression... Every reference to aggression as the international equivalent of armed robbery or murder, and every comparison of home and country or of personal liberty and political independence, relies upon what is called the *domestic analogy*. Our primary perceptions and judgments of aggression are the products of analogical reasoning.<sup>33</sup>

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*Political Philosophy*, 6(2), pp. 171-189, 1998; McMahan, Jeff, “Innocence, Self-Defense and Killing in War,” *The Journal of Political Philosophy*, 2(3), pp. 193-221, 1994, and *Killing in War* (New York: Oxford University Press) 2009: 112-13; and McPherson, Lionel, “Innocence and Responsibility in War,” *Canadian Journal of Philosophy*, 34(4), pp. 485-506, 2004). On this reading of Walzer, soldiers in an unjust war are acting wrongly, but are excused because they act under the coercive pressure of their governments. According to my reading of Walzer, however, soldiers in an unjust war have nothing to be excused for; they are acting in full accordance with their duties as soldiers.

<sup>31</sup> *Ibid.*, p. 36.

<sup>32</sup> *Ibid.*, p. 59.

<sup>33</sup> *Ibid.*, p. 58.

Just as individuals have rights, so “Nations have similar rights in international society, above all the right not to be ‘blotted out,’ deprived forever of sovereignty and freedom.”<sup>34</sup> Though Walzer doesn’t himself put the analogy in these terms, the analogy would seem to commit him to it: Just as the individual may defend himself against certain attacks by using and risking the parts of his body, so may a community defend itself against certain attacks by using and risking the individuals who make up its parts.

What Walzer’s theory of aggression presupposes then is the justice of a world of separate and distinct peoples wherein each enjoys political autonomy. The just world is a world of independent political communities constituted by their distinct common lives that are each able to determine their own political destinies free from external coercive interference by others. What is wrong with aggression is that it violates the rights of communities to be politically independent and to carve out for themselves a place on earth where they can practice that independence and make it a reality. As he says,

The theory of aggression presupposes our commitment to a pluralist world, and that commitment is also the inner meaning of the presumption in favor of resistance [to aggression]. We want to live in an international society where communities of men and women freely shape their separate destinies.<sup>35</sup>

And, later, he says, “...the survival and freedom of political communities—whose members share a way of life, developed by their ancestors, to be passed on to their children—are the highest values of international society.”<sup>36</sup>

#### The Rights of Political Communities and the Rights of Individuals

Though the rights of political communities to political independence and territorial integrity and their right to use their members as instruments in war are immediately derived from

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<sup>34</sup> *Ibid.*, p. 113.

<sup>35</sup> *Ibid.*, p. 72.

<sup>36</sup> *Ibid.*, p. 254.

the moral significance of political communities themselves and the common lives that constitute them, Walzer says they have a deeper, ultimate foundation. This foundation is the rights of individuals to life and liberty. The rights of political communities are derived from these rights of individuals. This point is made clearly and repeatedly throughout *Just and Unjust Wars*.

Walzer says, for instance,

The [rights to political independence and territorial integrity] belong to states, but they derive ultimately from the rights of individuals, and from them they take their force. “The duties and rights of states are nothing more than the duties and rights of the men who compose them.” That is the view of a conventional British lawyer, for whom states are neither organic wholes nor mystical unions. And it is the correct view.<sup>37</sup>

In the preface to the work, Walzer summarizes the foundations of the moral theory it contains.

He says, “I want to suggest that the arguments we make about war are most fully understood...as efforts to recognize and respect the rights of individual and associated men and women. The morality I shall expound is in its philosophical form a doctrine of human rights...”<sup>38</sup> In the course of developing that doctrine, he says, again, “Individual rights (to life and liberty) underlie the most important judgments that we make about war.”<sup>39</sup> He says that the justifications of military interventions “reflect deep and valuable...commitments to human rights.”<sup>40</sup> And, he says repeatedly that the original purpose of states is to protect the individual rights of their citizens: “[S]tates are founded for the sake of life and liberty...”<sup>41</sup> and, “States exist to defend the rights of their members...”<sup>42</sup>

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<sup>37</sup> *Ibid.*, p. 53.

<sup>38</sup> *Ibid.*, p. XXIII-IV.

<sup>39</sup> *Ibid.*, p. 54.

<sup>40</sup> *Ibid.*, p. 108. Walzer reiterates this view in subsequent work. For instance, in the preface to *Spheres of Justice* (New York: Basic Books, 1983), p. XV, he says, “...the theory of justice in war can indeed be generated from the two most basic and widely recognized rights of human beings—in their simplest (negative) form: not to be robbed of life or of liberty.”

<sup>41</sup> *Ibid.*, p. 61.

<sup>42</sup> *Ibid.*, p. 136.

How are the rights of political communities and the political obligation of their members to serve in war upon the command of their sovereign based on the rights of individuals to life and liberty? How could the substance of Walzer's theory of *jus ad bellum* be based on the rights of individuals to life and liberty?

As we have already seen, Walzer explains the creation of political communities and their rights in contractarian terms. As he says, the process by which states gain their rights from the rights of individuals "is best understood...as it has commonly been understood since the seventeenth century, in terms of social contract theory."<sup>43</sup> He claims that it is the consent of individuals to be members of particular political communities that gives those communities their rights. As he says, "The rights of states rest on the consent of their members."<sup>44</sup> But this consent cannot be explicit as there is no literal contract upon which the political community is founded. As he says, "'Contract' is a metaphor for a process of association and mutuality." This can suggest that the consent to membership in a particular community is offered tacitly in some sense. On a reading like this, it is by living in and "belonging to" a particular political community that a person reveals her consent to membership in it.

This consent of the members of political communities is morally significant because individuals have the right to determine their own social and political circumstances. As Walzer says, people "are morally entitled to choose their form of government and shape the policies that shape their lives."<sup>45</sup> In his reply to critics, Walzer says that the rights of political communities are derived from "the rights of contemporary men and women to live as members of a historic community and to express their inherited culture through political forms worked out among

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<sup>43</sup> *Ibid.*, p. 54.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*, p. 53-4.

themselves.”<sup>46</sup> We can presume that the individual right to liberty entails this right to choose a political community. Personal liberty thus grants people the right to join whatever political community they wish. Thus, assuming individuals express a sufficient degree of consent in their “choice” of political communities, the rights of the community are grounded in the rights of the individual. This is how the crime of aggression can be fundamentally a crime against the rights of individuals. By violating the integrity and independence of a political community one consequently violates the rights of the individuals who compose the community to freely “choose” their own political community.

This gives us an account of the basis of the moral significance and rights that Walzer attributes to political communities vis-à-vis foreign parties. So stated, it seems as though the basis of Walzer’s theory of *jus ad bellum* is the rights of private individuals as such. Walzer appears to be working within an Individualist frame, basing the rights of political communities on the rights of individuals conceived as fundamentally private beings with no essential connection to a particular political community.

But Walzer’s articulation of his justification of the rights of political communities in *Just and Unjust Wars* can be profoundly misleading. Though he describes his own position as consistent with an Individualist position, his actual position is Anti-Individualist at crucial points. In particular, when Walzer attempts to justify the obligation of soldiers to serve in war upon command, he adopts a clearly Anti-Individualist stance.

Unfortunately, Walzer never directly explains how it is that soldiers are obligated to serve in war upon command in *Just and Unjust Wars*. However, Walzer does point us to previous work of his for the substance of his views on the origin of the obligations of soldiers to fight in war.

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<sup>46</sup> *Ibid.*, p. 219.

The only place in *Just and Unjust Wars* where Walzer acknowledges the issue of the foundations of the political obligations of soldiers to serve in war is in a footnote to his discussion of the origins of the rights of political communities.<sup>47</sup> Here, he tells us that the issue is related to the origin of the rights of political communities and that he has discussed the matter in earlier work. Along with another article, Walzer points us to his essay “The Obligation to Die for the State.”<sup>48</sup>

The reference to this essay is extremely important, as it is here that Walzer argues against the possibility of deriving the obligation to serve in war from a contract between self-interested private individuals. He calls this the liberal contractarian method and argues that any liberal contractarian theory cannot justify an obligation to die for the state. According to Walzer in this earlier essay, the only kind of political theory capable of grounding an obligation to die for the state in terms of the interests of the political subject is one that posits an essential connection between the political community and the individual. Only when the individual who is called upon to sacrifice himself for the sake of the community is seen as essentially a part of the communal whole can it justifiably be said that individuals are obligated to die for the community. For, in such a case, the continued existence of the community is, in some form, the continued existence of the individual. In this way, the interests of the community can trump the interests of private individuals and soldiers can be the servants of their political authority.

Walzer describes a kind of non-liberal “contract” that could generate an essential connection between the individual and the community as one in which the individual is transformed into a new person with a new character. He says,

Into the state, according to this interpretation, a man brings the life which he has received from the bounty of nature and which is wholly his own. From the state, that is, from the

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<sup>47</sup> *Ibid.*, p. 54-5.

<sup>48</sup> in *Obligations: Essays on Disobedience, War, and Citizenship* (Cambridge: Harvard University Press, 1970), pp. 77-98.

shared experiences and general will of the political community, he receives a second life, a moral life, which is not his sole possession, but whose reality depends upon the continued existence of his fellow-citizens and of their association.<sup>49</sup>

And,

A good society is one in which the new man, a moral member of a moral body, achieves his fullest development. The very instincts of pre-social man are overwhelmed and above all the instinct for self-preservation. When the state is in danger, its citizens rush to its defense, forgetful of all personal danger. They die willingly for the sake of the state, not because the state protects their lives—which would be...absurd—but because the state is their common life. So long as the state survives, something of the citizen lives on, even after the natural man is dead. The state, or rather, the common life of the citizens, generates those “moral goods” for which...men can in fact be obligated to die. The character of the political community obligates the citizen who participates in it to die on its behalf and it simultaneously provides him with a motive for dying.<sup>50</sup>

Importantly, Walzer refers here to the “common life,” the same phrase he uses to describe the character of political communities in *Just and Unjust Wars*. It is clear in this earlier article that the common life is literally common; it is a supra-individual ontological entity with a life and interests that are its own and cannot be reduced to its parts. Indeed, here the common life is ontologically prior to its individual parts; it is what makes the parts what they are. So long as the common life persists, something of its individual member persists even after he or she has died. However, if the common life were to perish, something of its individual members would perish as well even if they were not literally killed.<sup>51</sup> It is for this reason that its members could be obligated to die for the sake of the common life. On this view, the obligation to die is not based on the private rights to life and liberty, but is based on the fact that the individual is essentially a

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<sup>49</sup> *Ibid.*, p. 91.

<sup>50</sup> *Ibid.*, p. 92.

<sup>51</sup> Walzer also makes this point in *Just and Unjust Wars* in a footnote to his discussion of the policy of demanding unconditional surrender. Against the views of Montesquieu and Rousseau who argued that it is possible to destroy a state and not destroy any individuals, Walzer argues that to destroy a state is, in some sense, to destroy the individuals who are its subjects. As he says, “if the citizen is killed or the state destroyed, something of the man dies too.” *Ibid.*, p. 113.

part of the political community and, as a result, the interests of the community have a moral force that the private interests of the individual do not.

Since Walzer refers us to this earlier essay in *Just and Unjust Wars* by way of pointing to the connection between the origin of the rights of political communities and the obligation of soldiers to serve in war upon the command of the sovereign, and Walzer never suggests that his thinking has departed from this earlier argument, we ought to view it as expressive of Walzer's view of the origin of the rights of political communities and the political obligation to serve in war at work in *Just and Unjust Wars*.

This reading of Walzer finds further corroboration in a more recent essay of his. In his paper, "Involuntary Association," Walzer argues that people are not perfectly free to choose what groups to associate with.<sup>52</sup> Some associations are involuntary; we do not choose to be members of some groups, membership in them is inherited. Among these involuntary associations are political communities. He says, "We are born citizens (unless we are very unlucky) and are rarely invited to agree to our citizenship."

Membership in involuntary associations brings with it moral obligations, among them is the duty not to abandon the association arbitrarily. Like membership, these obligations are not chosen but given. The duty not to exit is especially stringent with respect to political membership. Walzer argues that, as a citizen of a republic, a person is morally bound to actively protect the community from external threats. This duty could include putting one's life on the line to protect the community by engaging in battle against an enemy. "If the republic is under external attack, we may well be bound (there are difficult arguments here) to sign up as soldiers and march off to fight its enemies."

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<sup>52</sup> in *Freedom of Association*, edited by Amy Gutman (New York, NY: Princeton University Press, 1998), pp. 64-74.

According to Walzer in this later essay, the duty to serve in war is not something that a person places upon him or herself through voluntary contract, explicit or tacit. Rather, a person has this duty placed upon them by the fact of their membership in a political community, a membership that they did not choose but inherited. We can freely abide by this duty, when we have it, but we cannot freely accept the duty itself. Acting in accordance with duties such as these “is a mode of action simultaneously free and unfree. How so? Because we have neither determined nor chosen the right thing that we are now bound in conscience to do.”

Given these considerations, we ought to revise our original understanding of the “contract” that Walzer describes in *Just and Unjust Wars* as originating the rights of political communities.

The historical process of mutuality and association that creates the political community is also a process by which the individuals party to it are transformed from pre-social, fundamentally private beings into new beings with distinctive social and political characters who are bound to one another and cannot exist without the continued existence of the community itself. In other words, the social “contract” creates a supra-individual political entity whose members are its ontological parts. The common life created by the “contract” is literally common; it is the life of a supra-individual social entity. Since, according to the theory of *jus ad bellum*, it is the rights of the common life that are at issue in just wars, it must be Walzer’s view that wars are ultimately justified by appeal to the value of these irreducibly social entities. Further, since the members of political communities are obligated to sacrifice themselves for the sake of the community upon the command of the community’s authority, it must also be Walzer’s view that the interests of this supra-individual thing trump the private interests of its members.

Therefore, rather than operating within an individualist frame, as it originally appeared, Walzer's theory of *jus ad bellum* is based on a strong Anti-Individualism wherein the interests of political communities not only have intrinsic value but this value trumps the deepest interests of individuals, privately conceived. It is not the rights of private individuals that are the ultimate ground of the rights of political communities but the rights of fundamentally communal entities that have individuals as their ontological parts. For the theory of *jus ad bellum*, the highest values of justice are the basic interests of supra-individual political communities, not the rights of individuals. That Walzer's theory of *jus ad bellum* is founded in this way is also further corroborated by his justification of the deliberate targeting of non-combatants in supreme emergencies discussed below.

Reading Walzer this way, we can more clearly understand how it is that the substance of his theory of *jus ad bellum* is grounded. As we have seen, his theory of *jus ad bellum* conceives of just war as a defense of the rights of political communities to territorial integrity and political independence. These rights are said to be analogous to, not reducible to, the rights of individuals. Wars are conceived of as relations between political entities and their human instruments. There is a moral equality of soldiers in war because the individuals who wage war are the servants of their political authorities and are obligated to serve at their behest.

All these tenets of Walzer's theory of *jus ad bellum* are derived from the rights of individuals but only in the sense that individuals have become essentially members of political communities. Their lives and liberties have been literally collectivized and transferred to the common life that now constitutes their identities as individuals. Political communities have the rights to integrity and independence because they are supra-individual entities that their members cannot be entirely distinguished from. Soldiers are obligated to fight in war for the sake of the

political community upon the command of their sovereign because they are parts of the community and, as a result, the interests of the community trump their private interests. The rights of political communities are analogous to the rights of individuals and war is an inter-communal relationship because common lives are irreducibly social and their members are essentially parts of the social whole.

Adopting this reading of Walzer, we can note striking similarities between Vitoria's theory of just war and Walzer's theory of *jus ad bellum*. Vitoria conceives of just war as a relation between supra-individual bodies he calls commonwealths whose members are obligated to serve in war upon the command of their political authority. In public war, for Vitoria, responsibility for the justice of the war is vested in the hands of the political sovereign, not in the hands of the subject; subjects are the instruments of the sovereign. For Vitoria, this conception of just war and the political duties of its individual protagonists is dictated by natural law. Although Walzer does not base his view on a conception of natural right akin to Vitoria's view, at bottom, Walzer shares Vitoria's view of war at the level of the *jus ad bellum* and bases it on the intrinsic rights of supra-individual common lives.

#### *Jus in Bello* and the War Convention

Turning now to Walzer's theory of *jus in bello*, he provides four rules that comprise its content. These are

- 1) Necessity—All acts of war must be necessary in order to achieve military victory.
- 2) Proportionality—The harm done by any act of war must not be disproportionately severe when compared to its contribution to the bringing about of military victory.
- 3) Discrimination—Combatants in war are the only legitimate targets of deliberate attack and noncombatants are never legitimate targets of deliberate attack.

- 4) Double Effect—Acts which knowingly cause harm to noncombatants are permissible when the harm is unintended and due care is taken to avoid or minimize the harm to noncombatants.

Only rule 3), the principle of Discrimination, and its justification is relevant to my purposes here, so I will not comment on the remaining rules. Indeed, Walzer himself pays scant attention to the rules of Necessity and Proportionality, focusing mainly on Discrimination and what constitutes violations of it.

We may begin by noting Walzer's view of the origin and basis of all the rules of *jus in bello*. He calls the collection of rules that constitute *jus in bello* "the war convention" and claims that its substance is the product of "a kind of practical casuistry" conducted over centuries by politicians, lawyers, jurists, and philosophers.<sup>53</sup> It is not, however, a set of mere conventions, a non-absolute set of generally recognized norms of conduct. Rather, he says, the war convention is founded on absolute and universal moral principles. As Walzer says, the war convention is "a set of restrictions that rest in part on the agreements of states but that also have an independent foundation in moral principle."<sup>54</sup>

The principles upon which the war convention is founded are human rights, specifically, the individual rights to life and liberty. As he says, "The theory of *jus in bello*...is founded on the rights of life and liberty."<sup>55</sup> "A legitimate act of war is one that does not violate the rights of the people against whom it is directed. It is, once again, life and liberty that are at issue..."<sup>56</sup> And, again, "The standards of permissibility [in war] rest on the rights of individuals..."<sup>57</sup> Thus, according to Walzer's description, the rules of *jus ad bellum* and the rules of *jus in bello* are all

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<sup>53</sup> *Ibid.*, p. 44-5.

<sup>54</sup> *Ibid.*, p. 131. See also *ibid.*, p. 47.

<sup>55</sup> *Ibid.*, p. 124.

<sup>56</sup> *Ibid.*, p. 135.

<sup>57</sup> *Ibid.*, p. 143.

derived and grounded in the same individual rights to life and liberty. The whole of the content of his just war theory is said to have this single, unitary foundation.

Furthermore, Walzer claims that the justification of the rules of *jus in bello* presuppose the theory of aggression, the *jus ad bellum*. In this sense, the rules of *jus in bello* build upon the justification of the rules of *jus ad bellum*. This is clear from the fact that Walzer claims that the theory of *jus in bello* presupposes the moral equality of combatants. As he says, “[The war convention] 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.”<sup>58</sup> More clearly stating the point, Walzer says, “The war convention rests first on a certain view of combatants, which stipulates their battlefield equality.”<sup>59</sup> Since the moral equality of combatants is grounded in Walzer’s theory of *jus ad bellum* where it is argued that the use of soldiers as instruments is morally justified by the political obligations of subjects to serve in war upon the command of their sovereign, the claim here is that the theory of *jus in bello* presupposes the theory of *jus ad bellum*.

Though these statements entail a continuity between Walzer’s theory of *jus ad bellum* and his theory of *jus in bello*, Walzer, however, asserts a certain discontinuity between them. As we have seen, according to Walzer, the *jus ad bellum* and the *jus in bello* are logically independent of one another. A political community can wage a war that violates the rules of *jus ad bellum* yet conduct the war in a manner consistent with the rules of *jus in bello*. As we have also seen, this logical independence of the *jus ad bellum/jus in bello*, is the product, most immediately, of Walzer’s Dualism, that is, his division of moral responsibility for the justice of war between two distinct aspects of the communities that engage in it. For Walzer, political

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<sup>58</sup> *Ibid.*, p. 45.

<sup>59</sup> *Ibid.*, p. 137.

authorities are responsible for ensuring that their wars abide by the rules of *jus ad bellum* while their subjects are obligated to serve in any war they are ordered to serve in by their political sovereign. At the same time, political authorities and their soldiers are responsible for ensuring that their conduct in war abides by the rules of *jus in bello*. For Walzer, with respect to the *jus ad bellum*, soldiers are the mere instruments of their sovereign whose moral obligations are relative only to the commands of their sovereign. Yet, with respect to the *jus in bello*, soldiers are autonomous individuals whose moral obligations are relative only to the justice of the activities they are participating in.

It is crucial that we understand how Walzer justifies his Dualism. Why are soldiers responsible for not violating the rules of *jus in bello* yet not responsible for participating in violations of the rules of *jus ad bellum*? We know that Walzer holds soldiers are not responsible for participating in violations of *jus ad bellum* because of his conception of the rights of political communities and the nature of political authority as outlined in his defense of the theory of aggression. For Walzer, at the level of *jus ad bellum*, war is a relation between political entities and their human instruments because of the contractual process that originates political communities and the political obligations of their members. Why does Walzer not think the same of war at the level of *jus in bello*? Why, in the conduct of war, are soldiers no longer mere instruments of their political authorities, but fully responsible autonomous individuals?

The answer is that Walzer conceives of combat as fundamentally and immediately a relation between private individuals who are in equal possession of the basic rights to life and liberty. On the battlefield, there occurs a direct interaction between individual men and women that is unmediated by any antecedent political obligations. In the conduct of war, men and women confront each other simply as men and women, as mere individual human beings. Since,

according to Walzer's description of his theory, their humanity and the absolute rights they have as human beings is at the foundation of all moral and political obligations, the rules of combat therefore derive immediately from human rights and constitute absolute restrictions on the conduct of war between political communities.

Walzer makes this point most clearly when he discusses five firsthand accounts of combat experience wherein a combatant recounts a reluctance to attack an individual enemy soldier. According to Walzer's interpretation, what underpins this reluctance to open fire on the enemy in all five cases is the recognition of the enemy as a mere human being. What caused all five men to hesitate to shoot was their recognition of the enemy as a person with a right to life. As Walzer explains, "For what does it mean to say that someone has a right to life? To say that is to recognize a fellow creature...whose person is as valuable as my own." Though a person can alienate their right to life in certain circumstances, "the alienation is temporary, the humanity imminent." According to Walzer, it is this recognition of the humanity of the enemy soldiers in combat that is at "the heart of the war convention."<sup>60</sup> Thus, the war convention rests on the understanding of combat as a relation between private human persons each with an equal right to life.

It is for this reason that moral responsibility for the conduct of war is distributed individualistically. In a relation between mere individuals who have absolute rights, responsibility for the just treatment of those individuals falls on every individual party to the relationship. In a strictly inter-personal relationship, a person cannot violate the rights of another and claim that they were obligated to because they were acting under orders from their political authority. Here, the buck stops with the individual: the rights of human beings override any

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<sup>60</sup> *Ibid.*, p. 142.

political obligations a person may have and bind every person to their strict observance. A person is obligated to never violate the rights of another she is in a direct relationship with even when ordered to by her political authority. Thus, in the conduct of war, soldiers are responsible, along with their superiors, for not violating the rights of the individuals against whom they are fighting, regardless of the orders of their superiors.

Since combat is a relation between individual human beings with rights not to be killed, the question of whom may legitimately be deliberately attacked in war and who may not, that is, the principle of Discrimination, must be derived from a view of when it is permissible for one person to deliberately attack and kill another and when it is not. What, according to Walzer, makes it permissible to deliberately kill a person and how can one impermissibly kill a person in war?

In answer to this question, Walzer asserts a general principle. As he puts it, "...no one can be threatened with war or warred against, unless through some act of his own he has surrendered or lost his rights."<sup>61</sup> Thus, for Walzer, though individuals have the right not to be killed, they can lose that right if they act in a way that entails the loss of that right. When a person behaves in a certain way she can make herself liable to be killed. The question then is, what acts can a person commit that cause him or her to lose their right to life and make them liable to be killed?

For Walzer, the only relevant thing a person can do to lose her right to life and become liable to deadly attack is to violently threaten another person's life or liberty. As soon as a person constitutes a threat against the life and liberty of another person, she makes herself liable to be killed in defense of the victim's rights. This is why Walzer thinks that soldiers in war are always

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<sup>61</sup> *Ibid.*, p. 135.

permissible targets of deliberate attack. Simply by taking up arms against their enemy, soldiers have lost their rights to life and become liable to be killed. As Walzer says, “Simply by fighting, whatever their private hopes and intentions, [soldiers] have lost their title to life and liberty.”<sup>62</sup> A person “...can be personally attacked only because he already is a fighter. He has been made into a dangerous man...”<sup>63</sup> People become liable to deliberate attack, “...when they are actually engaged in activities threatening and harmful to their enemies.”<sup>64</sup> Because soldiers in war are, as such, engaged in activities threatening and harmful to their enemies, they are liable to deliberate acts of violence. Thus, “The first principle of the war convention is that, once war has begun, soldiers are subject to attack at any time (unless they are wounded or captured).”<sup>65</sup>

Noncombatants, on the other hand, are, as such, not engaged in any activities threatening or harmful to their enemies. Thus, noncombatants have done nothing to alienate their right to life and are not liable to be deliberately attacked. The morally relevant feature of noncombatants is just that they are noncombatants, that is, people “who are not currently engaged in the business of war.”<sup>66</sup> Thus, “The second principle of the war convention is that noncombatants cannot be attacked at any time. They can never be the objects or the targets of military activity.”<sup>67</sup> And, again, noncombatants “...are men and women with rights and...they cannot be used for some military purpose, even if it is a legitimate purpose.”<sup>68</sup>

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<sup>62</sup> *Ibid.*, p. 136.

<sup>63</sup> *Ibid.*, p. 145.

<sup>64</sup> *Ibid.*, p. 146.

<sup>65</sup> *Ibid.*, p. 138.

<sup>66</sup> *Ibid.*, p. 43.

<sup>67</sup> *Ibid.*, p. 151.

<sup>68</sup> *Ibid.*, p. 137.

Walzer distinguishes his view of the origins of soldier's liability to attack from the issue of the moral innocence/non-innocence when he acknowledges a difficulty in justifying soldier's loss of their rights. As he says,

States exist to defend the rights of their members, but it is a difficulty in the theory of war that the collective defense of rights renders them individually problematic. The immediate problem is that the soldiers who do the fighting, though they can rarely be said to have chosen to fight, lose the rights they are supposedly defending. They gain war rights as combatants and potential prisoners, but they can now be attacked and killed at will by their enemies.

The reason, he continues, that soldiers, despite their moral innocence, can justifiably be killed by their enemies is that, "Simply by fighting, whatever their private hopes and intentions, they have lost their title to life and liberty, and they have lost it even though, unlike aggressor states, they have committed no crime."<sup>69</sup>

Thus, Walzer's principle of discrimination in war is based on a particular theory of self-defense between individual persons. According to Walzer, though all people have the equal right to not be killed, one can deliberately attempt to kill another when the other has antecedently threatened one with imminent harm. When a person constitutes a threat of imminent harm against another, that person loses his right not to be killed and defensive violence may be used against him. The loss of the right to life occurs even when a person justly threatens another. The moral character of the threat and the blameworthiness of the threatening person are irrelevant to the issue of the maintenance of the right to life. Simply by threatening another, a person loses his right to life.<sup>70</sup>

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<sup>69</sup> *Ibid.*, p. 136.

<sup>70</sup> This theory of justified violent self-defense has been convincingly attacked for its insensitivity to the justifiability of and blameworthiness for threats. According to this criticism, if a person justifiably threatens another with imminent harm, she does not surrender her right not to be attacked and is not liable to violent harm. Therefore, violent self-defense against a just attacker is not justifiable. See, for example, McMahan, Jeff, "Innocence, Self-Defense and Killing in War,"

It is for this reason that Walzer believes that the principle of Discrimination is equally binding on all parties to war, even to those who are fighting an unjust war. Though soldiers may be participating in an unjust war, they are not responsible for that injustice but are obligated to participate and, therefore, all soldiers on the battlefield are moral equals. What justifies their killing of each other is that, as soldiers at war, they constitute a threat to their enemies. They are thus equally justified in killing each other. But they cannot be justified in killing anyone else; for all others who are not soldiers in war and have a noncombatants status have done nothing to lose their right to life. Thus, all soldiers are equally prohibited to deliberately kill or harm noncombatants.

In this way, Walzer grounds his theory of *jus in bello*, in particular, his principle of discrimination, in the rights of private individuals. These rights are the deepest values of his theory of *jus in bello* and they ground absolute limits on the conduct of war between political communities. According to the theory of *jus in bello*, the rights of private individuals trump the rights of political communities in war.

Walzer's theory of Discrimination is another feature of his theory of just war that distinguishes him from the other theories we have examined thus far. Vitoria and Grotius both defend a principle of Discrimination in war that permits attacking soldiers and prohibits attacking noncombatants. However, Vitoria and Grotius agree that the principle is only binding on those engaged in a just war. For both Vitoria and Grotius no acts of violence committed in an unjust war can be justified, even the attacking of enemy soldiers. Only those engaged in a just war are permitted to attack the enemy soldiers. This is because both Vitoria and Grotius base their principle of Discrimination on a theory of Just Cause that holds only people or entities that

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*The Journal of Political Philosophy* 2 (1994): 193-221; and Rodin, David, *War and Self-Defense* (New York: Oxford University Press, 2002), esp. Ch. 4.

have unjustly participated in certain unjust injuries may be deliberately attacked. A person who justly threatens another has done nothing to cause him to lose his right to not be killed. Only a person who unjustly threatens another could possibly lose his right to not be killed. Therefore, for both Vitoria and Grotius, only soldiers fighting in an unjust war are liable to be killed, whereas soldiers fighting in a just war are not liable to be killed.

The problem we discovered with both Vitoria and Grotius' principle of Discrimination is that it is not consistent with their broader theories of justice in war. For both Vitoria and Grotius, soldiers are the moral instruments of their political authorities and are not responsible for ensuring that the wars they participate in are just. Rather, as the instruments of their sovereign they are obligated to participate in wars their sovereign orders them into. Thus, soldiers participating in an unjust war have not necessarily personally done anything wrong. On the contrary, they may be acting righteously; they could be fulfilling their duties as servants of their political sovereign. Thus, contrary to what Vitoria and Grotius' principle of discrimination says about them, soldiers in an unjust war have done nothing that entails a loss of their right to life. They could not be liable to be killed.

Walzer's theory of Discrimination avoids this problem. Like Vitoria and Grotius, Walzer's theory of *jus ad bellum* commits him to the view that soldiers are the instruments of their political authorities and are not responsible for ensuring that the wars they participate in are just. He too holds that soldiers are obligated to serve in any war their sovereign orders them into. Thus, a soldier participating in an unjust war has done nothing morally wrong provided he is following the orders of his political superiors. Unlike Vitoria and Grotius, however, Walzer's theory of Discrimination is based on a theory of self-defense that holds the justifiability of threatening acts to be irrelevant to determining a threatening agents liability to defensive attack.

For Walzer, anyone who threatens another, justly or unjustly, culpably or not, loses his right to life and is liable to defensive attack. For Walzer, merely constituting a threat is sufficient to render a person liable to be killed. Thus, all soldiers in war, despite being equally justified in participating in the war, are equally liable to be killed. In this way, Walzer's defense of his principle of Discrimination does not conflict with his broader theory of just war in the respect in which Vitoria and Grotius' principle does. However, as will be demonstrated below, the principle does conflict with his broader theory of just war in other respects.

#### Supreme Emergencies and the Incoherence of Walzer's Theory

We can now begin to see the incoherence of Walzer's just war theory. Walzer has two distinct views of justice at work in his theory. On the one hand, according to his theory of *jus ad bellum*, just war is based on the rights of supra-individual political communities whose interests trump the private interests of individuals. This is why war is a relationship between political bodies and their human instruments. On the other hand, according to his theory of *jus in bello*, just war is based on the rights of autonomous, private individual human beings whose interests trump the rights of political communities. This is why combat is a relationship between mere individual human beings. In this way, the basis of justice in his theory of *jus ad bellum* is different from the basis of justice in his theory of *jus in bello*. According to Walzer's theory of *jus ad bellum*, what matters most are the basic interests of supra-individual political communities. According to Walzer's theory of *jus in bello*, what matters most are the basic interests of individual human persons.

This conflict is brought to the fore in Walzer's discussion of the ethics of supreme emergencies. Supreme emergencies, Walzer admits, pose particular trouble for his theory. For

Walzer, it is in cases of supreme emergencies that “the ultimate incoherence of the theory of war” is revealed.<sup>71</sup>

The inconsistency in the theory that occurs in supreme emergencies is that, in such cases, Walzer’s theory of just war both permits and prohibits the deliberate targeting of noncombatants. In a supreme emergency, according to Walzer, a political community can be both permitted to deliberately target noncombatants and prohibited from deliberately targeting noncombatants. As we will see, these inconsistent practical demands are the product of the tension between Walzer’s theory of *jus ad bellum* and his theory of *jus in bello*, between his theory of just ends in war and just means in war. What happens in supreme emergencies is that the achievement of just ends in war can require the violation of just means in war. When this happens, according to Walzer, the theory cannot prescribe a coherent course of action and “our judgments are doubled.”

Political communities experience supreme emergencies when they are faced with the most severe acts of aggression possible. Supreme emergencies occur when an aggressor seeks to subjugate or exterminate a political community as such and the achievement of those ends is imminent, that is, a strong practical possibility. What is under imminent threat in a supreme emergency is not just the rights of political communities but the very existence of the community as a people. Here, a whole nation is faced with the imminent possibility of being “blotted out”; the common life of a people imminently threatened with utter destruction.

This is the most severe kind of aggression a political community can face because, as we have seen, the theory of *jus ad bellum* is based, most immediately, on the rights of political communities. According to Walzer’s theory of *jus ad bellum*, war is only justified in order to

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<sup>71</sup> *Just and Unjust Wars*, *ibid.*, p. 326.

protect the rights of political communities. In a supreme emergency, the aggressor thus threatens the ultimate harm to a political community.

What happens when a political community is faced with a supreme emergency and the only hope of defeating it is by employing means that violate the theory of *jus in bello*, in particular the prohibition against deliberately attacking noncombatants? On the one hand, Walzer argues that the political community is justified in overriding the rules of war and may deliberately attack noncombatants. According to Walzer, this is because the rights of a political community are more important than the rights of individual human beings. Walzer struggles to make this claim and it is worth quoting his struggle in full.

[I]t is not usually said of individuals in domestic society that they necessarily will or that they morally can strike out at innocent people, even in the supreme emergency of self-defense. They can only attack their attackers. But communities, in emergencies, seem to have different and larger prerogatives. I am not sure that I can account for the difference, without ascribing to communal life a kind of transcendence that I don't believe it to have. Perhaps it is only a matter of arithmetic: individuals cannot kill other individuals to save themselves, but to save a nation we can violate the rights of a determinate but smaller number of people. But then large nations and small ones would have different entitlements in such cases, and I doubt very much that that is true. We might better say that it is possible to live in a world where individuals are sometimes murdered, but a world where entire peoples are enslaved or massacred is literally unbearable. For the survival and freedom of political communities—whose members share a way of life, developed by their ancestors, to be passed on to their children—are the highest values of international society.<sup>72</sup>

If we deconstruct this passage, we find that the reason supreme emergencies can justify violations of the principle of Discrimination is simply that the basic interests of political communities trump the basic interests of sets of individuals. As Walzer says, this is not because the interests of communities affect the interests of a large number of individuals. For this would mean that a community composed of more individuals than another would have more permissive defensive rights. Rather, the point Walzer is making here is that when we compare the intrinsic

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<sup>72</sup> *Ibid.*, p. 254.

value of a political community, any political community, with the intrinsic value of a set of private individuals, any set of individuals, the value of the political community will always transcend the value of the set of individuals. This is why he thinks it is possible to live in a world where individuals are murdered but not in a world where whole communities are murdered. Though Walzer says that this is to attribute to “communal life a kind of transcendence that I don’t believe it to have,” he nevertheless attributes communal life with this transcendence. An indeterminate number of individuals, even innocent bystanders, can be sacrificed when it is necessary for the survival or freedom of a political community. According to the argument here, the highest values of the theory of justice at work in his theory of just war are the survival and freedom of common lives, not the survival and freedom of individuals.

On the other hand, however, Walzer does not think that this entirely justifies the violation of the principle of Discrimination in supreme emergencies. Walzer maintains that it is always wrong to deliberately target noncombatants in war. He consistently calls such acts “murder.” This is why he thinks that in supreme emergencies “our judgments are doubled...we say yes *and* no, right *and* wrong.” Though supreme emergencies can justify violations of the principle of Discrimination, such violations can never be justified. They cannot be justified because they are violations of the rights of individuals to life and liberty. These rights, as Walzer has argued, are the basis of justice. Their violation is therefore always morally intolerable. As he says of acts that violate the principle of Discrimination,

We recognize their horror only when we have acknowledged the personality and value of the men and women we destroy in committing them. It is the acknowledgement of rights that puts a stop to such calculations and forces us to realize that the destruction of the innocent, whatever its purposes, is a kind of blasphemy against our deepest moral commitments. (This is true even in a supreme emergency, when we cannot do anything else.)<sup>73</sup>

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<sup>73</sup> *Ibid.*, p. 262.

It is now clear that Walzer's explanation of why there is no coherent answer to the question of the permissibility of deliberately targeting noncombatants in a supreme emergency is that he is holding that there are two distinct things that are highest values of justice. On the one hand, we can justifiably override the prohibition against deliberately targeting noncombatants in supreme emergencies because the survival and freedom of political communities is the highest good, higher even than the survival and freedom of individuals. On the other hand, we cannot justifiably override the prohibition against deliberately targeting individuals because such acts are violations of the rights of individuals and the rights of individuals are the highest good, higher even than the rights of political communities. At one and the same time, the survival and freedom of political communities are the highest values of international society *and* the survival and freedom of individuals are our deepest moral commitments. When we face a conflict between both these values, as we do in supreme emergencies, there is no unequivocally right way to act.

But this is all clearly confused. Walzer's view is patently incoherent. The reason Walzer's theory produces unworkable practical prescriptions in supreme emergencies is that, according to his discussion, two distinct things are of utmost concern in war: the rights of political communities and the rights of individuals. Walzer acknowledges that these two things are distinct in as much as he acknowledges that there can be an irreconcilable conflict between them in supreme emergencies.

This conflict is not simply the product of his discussion of supreme emergencies. Rather, it is the product of the substance of his theory of just war. According to his theory, as we have seen, war is at once a relation between political communities and their human instruments *and* a relation between mere individuals with the rights to life and liberty. Although Walzer claims that

the entirety of his theory of just war is based on the individual rights to life and liberty, this is not so. His theory of *jus ad bellum* is based on the rights of supra-individual entities he refers to as common lives. These irreducibly social political entities are the deepest values of his theory of *jus ad bellum*. His theory of *jus in bello*, however, is based on the rights of individual persons. These rights limit absolutely what is morally permissible for political communities to do in war. The rights of individuals are thus the deepest values of his theory of *jus in bello*. This theoretical tension is simply played out in his discussion of supreme emergencies.

#### Why the *Jus ad Bellum* Can't be Based on the Rights of Individuals

Why, despite his claim that the theory has a coherent ground in the individual rights to life and liberty, does he fail to accomplish this and instead appeal to the fundamental value of supra-individual political entities to justify parts of his theory?

I submit that Walzer has to claim that the interests of political communities transcend the interests of individuals because, contrary to his argument, the rights of political communities and the duties of soldiers upon which his theory is based cannot be justified by appeal to the rights of private individuals as he conceives them. In other words, the rights of political communities and the political obligations of their members cannot be derived from Walzer's view of the rights of individuals to life and liberty. Walzer's assertion of the preeminence of the interests of political communities and not the interests of individuals in his discussion of supreme emergencies can be seen as a tacit recognition of this problem.

The fact that Walzer's theory of the rights of individuals cannot justify the rights of political communities and the political obligations of soldiers that he posits can be made clear when we compare the theory of justified defense of individual rights at work in his theory of *jus*

*in bello* with his theory of the rights of political communities at work in his theory of *jus ad bellum*.

Walzer's theory of the rights of private individuals underpinning his theory of *jus in bello*, conflicts with the rights of political communities and the political obligations of soldiers at work in his theory of *jus ad bellum* in two respects.

First, according to Walzer, when private individuals interact, responsibility for not violating the rights of others is distributed individualistically. That is, respecting the rights of individuals is the obligation of all individuals. This responsibility cannot be alienated to a political authority to whom subjects owe obedience regardless of the justice of the authority's commands. A person cannot justifiably violate the rights of another person even when his legitimate political authority orders him to. That Walzer is committed to this view is clear from the fact that he claims soldiers are responsible for not violating the rules of *jus in bello* because these rules are grounded in the individual rights to life and liberty.

This view is inconsistent with Walzer's view of the rights of political communities and the political obligations of soldiers in his theory of *jus ad bellum* in that it is his view that the responsibilities of soldiers are relative to the commands of their political superiors not to the justice of those commands. As he states clearly, political subjects are obligated to serve in war when ordered to by their political authority regardless of the justice of the war. Therefore, Walzer could not possibly base this view of the obligations of political subjects on the same view of justice upon which his theory of *jus in bello* is based. For the view of justice underlying his theory of *jus in bello* renders all political subjects responsible for not participating in violations of the rights of individuals and thereby gives them the duty to disobey all rights-violating orders. In this way, his theory of *jus in bello* undermines his theory of *jus ad bellum*.

For this reason, though Walzer says the theory of *jus in bello* presupposes the moral equality of soldiers, the substance of the theory actually undermines the moral equality of soldiers. The moral equality of soldiers is based on the idea that soldiers are obligated to serve in war upon the command of their sovereign regardless of the justice of the war. However, the substance of the theory of *jus in bello* makes it impossible for there to be an obligation to serve in war upon the command of one's political sovereign regardless of the justice of the war. According to his theory of rights underpinning the *jus in bello*, soldiers would always be responsible for ensuring that the sovereign's orders with respect to *jus ad bellum* do not violate individual rights and any soldier participating in a war that does would be acting unjustly.

From this perspective, it is clear that Walzer's assertion of a logical independence between the *jus ad bellum* and the *jus in bello* lacks a coherent justification. As we know, the logical independence of *jus ad bellum/jus in bello* is based most immediately on Walzer's Dualism, i.e., the claim that political authorities and not their subjects are responsible for abiding by the *jus ad bellum* while soldiers and their political authorities are jointly responsible for abiding by the *jus in bello*. However, what we have revealed is that Walzer's reasons for viewing soldiers as instruments of their political communities under the *jus ad bellum* and his reasons for viewing soldiers as fully autonomous individuals under the *jus in bello* are mutually exclusive. If soldiers are instruments of the political communities under the *jus ad bellum*, then they are instruments of their political communities under the *jus in bello*. And, if soldiers are fully autonomous individuals under the *jus in bello*, then they are fully autonomous individuals under the *jus ad bellum*. Walzer's assertion of a division of responsibility for the *jus ad bellum* and the *jus in bello* is simply arbitrary and serves merely to mask this deep conflict within his theory.

Second, the theory of justified violent self-defense that Walzer appeals to in defense of his principle of Discrimination is inconsistent with his view of the rights of political communities and the political obligations of soldiers. The theory of justified violent self-defense that Walzer posits to defend his principle of Discrimination in war is very permissive. It permits people to violently defend themselves against even justified attacks. Even if a person were justified in taking up arms against another, the target of their attack, according to Walzer, would be justified in fighting back. For Walzer, anyone who threatens another with imminent violence, for whatever reason, is liable to deliberate defensive attack. The problem is that this theory of justified self-defense contradicts the theory of political authority and the political obligations of soldiers underpinning the theory of *jus ad bellum*.

According to Walzer's theory of *jus ad bellum*, soldiers are obligated to obey orders by their political sovereign to participate in war. Thus, soldiers may have their lives threatened in war for the sake of their political community and upon the command of their sovereign. Moreover, political authorities have the right to coerce their subjects into adherence to this political obligation. This is the sense in which war is morally as well as physically coercive for Walzer; soldiers are obligated to be used in war and may be used against their will if they refuse.

This view of political authority and the obligations of soldiers entails that, in certain circumstances, soldiers are obligated to face imminent destruction without resistance. Soldiers may not permissibly refuse to serve in war simply because it would mean facing death. This is because facing the threat of death in war is their duty; they may not shirk that duty simply because fulfilling it is dangerous. Refusal would be a violation of their duty to their political community and its political authority.

Moreover, even if a soldier refuses to serve, she may nevertheless be legitimately forced to face imminent destruction by her political authority. If this forced conscription of subjects into war is legitimate, then it cannot be the right of subjects to resist conscription by force of arms simply because the conscription would put them at risk of imminent destruction. If forced conscription is legitimate, then non-resistance to that conscription must be obligatory.

Thus, according to Walzer's theory of political obligations at work in his theory of *jus ad bellum*, it is not permissible for a person to use defensive violence against anyone who, justly or unjustly, threatens her with imminent violence. There are at least some instances where a person is obligated to face threats of imminent and deadly violence without resistance.

However, as we have seen, Walzer's theory of justified self-defense at work in his theory of *jus in bello* rejects this. To repeat, according to his defense of the principle of discrimination, any person who threatens another with imminent harm is liable to be killed. If we applied this view universally, then not only would soldiers always be justified in attacking the soldiers on the opposing side of the battlefield, but they would also be justified in refusing to serve in war and in attacking the political superiors on their own side who attempt to coercively conscript them. Since it is permissible to attack any threat of imminent harm and one source of imminent harm in war is a soldier's own political establishment, soldiers are always permitted to refuse orders to serve in war and to violently resist any attempt to force them to serve.

Thus, Walzer's theory of justified self-defense underlying his principle of discrimination undermines his theory of *jus ad bellum*. The theory of political authority and the political obligations of soldiers in Walzer's theory of *jus ad bellum* could not be grounded in the same theory of individual rights that grounds his theory of *jus in bello*.

This explains why, despite his claims to the contrary, Walzer argues that the survival and freedom of supra-individual political entities are the highest good, not the rights of private individuals, in order to justify his theory of *jus ad bellum*. Given his view of the rights and responsibilities of individuals at work in his theory of *jus in bello*, it would be impossible to justify his tenets of *jus ad bellum* by appeal to them. But the tenets of his theory of *jus ad bellum* could be justified, and Walzer chooses to so justify them, by appeal to the transcendent significance of irreducibly social political communities. This is why Walzer fails to coherently ground the entirety of his theory in the private rights to life and liberty and produces instead an inconsistent theory of war.

The ultimate problem in Walzer's theory is similar to the problem we revealed in Grotius' theory. Grotius argues that soldiers are the moral instruments of their political authorities in public war and are obligated to serve in any war their authority orders them to participate in regardless of the justice of the war. Yet, Grotius also argues that subjects of political authorities are always responsible for not participating in unjust public actions even when ordered to by their political authority. This inconsistency in Grotius' theory, it was argued, is the result of the failure of his attempt to ground the obligation of subjects to obey their political authority into and during war in the rights of individuals and the contractual process that he holds is the origin of political authority. Given that, for Grotius, political obligations are derived from the natural rights of individuals and these rights obligate all individuals to never violate the rights of others, it is not possible for individuals to alienate their responsibility for abiding by the dictates of natural justice to their political authority and become their mere instruments. Put simply, the rights and responsibilities of individuals preclude the political obligation to serve in war upon the command of a political authority. Grotius' inconsistency is

the product of this failure of his argument in defense of political authority and the political obligations of subjects.

Walzer's theory faces a similar problem in that he attempts to derive the rights of political communities and the obligations of soldiers to serve in war when ordered to by their political authority in the rights of individuals. Given that, for Walzer, individuals are responsible for not violating the rights of individuals and individuals have the right to violently resist any imminent threat against their life or liberty, political subjects could never be obligated to serve in war upon the command of their sovereign. According to Walzer's view of the rights of individuals, they would always have the right to refuse to serve in war and to resist any attempt by their political authority to coerce them into service. Put simply, the rights of individuals preclude the political obligation to serve in war upon the command of any political authority. This is why Walzer fails to ground his theory coherently in the rights of individuals.

## Chapter 5

### The Individualist Just War Theory

#### The Incoherence of Modern Just War Theory

What the previous chapters of this dissertation have revealed is that modern just war theory is incoherent. To repeat, the incoherence is evident in the substance of the theory when we consider that just war theory attempts to defend two inconsistent things. The theory defends both

- 1) *A theory of public war* wherein responsibility for the justice of war belongs uniquely to the political sovereign and, with some exceptions, soldiers are morally obligated to serve in war upon the command of the sovereign

and

- 2) *A theory of Discrimination* in war wherein deliberate attacks against innocent people in a just war are prohibited yet deliberate attacks against combatants are permitted because combatants are not innocent.

These two components of the theory do not jibe with one another. If the theory of public war is true, then soldiers are not responsible for the justice of the wars they fight. The theory of Discrimination, however, holds that soldiers are responsible for the justice of the wars they fight. Thus, these two components of just war theory posit two conflicting accounts of the moral responsibilities of combatants, or more specifically, soldiers.

According to the principles of Discrimination of Vitoria and Grotius, soldiers are responsible for the justice of the wars they participate in and if they should participate in an unjust war they have committed a serious moral wrong. On this view, soldiers in an unjust war can be targets of deliberate attack because they are committing a wrong that renders them personally liable to deliberate violence, yet noncombatants always maintain their immunity from attack because they have committed no relevant wrong.

According to Walzer's principle of Discrimination, though soldiers, as servants of their political communities in war, have not committed any wrong by fighting, they become legitimate targets of deliberate attack merely by taking up arms and threatening their enemy on the battlefield. This is because, for Walzer, a person loses her immunity from attack when she threatens another with violence, even if the threat she poses is justified. Posing an imminent threat of harm to others is sufficient to render a person a legitimate target of deliberate attack.

Both these theories of Discrimination are inconsistent with the theory of public war. According to Vitoria and Grotius' theory of Discrimination, all combatants in war are morally responsible for ensuring that they only participate in just wars. However, according to the theory of public war, which both Vitoria and Grotius defend, soldiers are morally bound to serve in war upon the command of their sovereign. According to the theory of public war, soldiers are not responsible for the justice of the wars they fight but are primarily responsible for obeying the orders of their political authority. Even if soldiers fight in an unjust war, therefore, they have not necessarily done any wrong but may be merely fulfilling their political obligations.

According to Walzer's theory of Discrimination, though combatants in war are not morally responsible for ensuring that they only participate in just wars, they nevertheless lose their immunity from attack by becoming violent threats against others. Threatening others with imminent violence is sufficient to make one liable to deliberate attack. However, according to the theory of public war, which Walzer defends, soldiers may be legally obligated to sacrifice their lives in war and coerced into military service. Soldiers cannot resist such attempts to conscript them simply because the conscription is a threat to their lives. The fact that their political establishment threatens them with imminent harm is not sufficient to make the political establishment legitimate targets of deliberate violence. A person can be morally obligated to

submit to coercive attempts to put him in grave danger. Moreover, Walzer argues that soldiers in war are responsible for not violating the principles *jus in bello*, including the principle of Discrimination, and ought to disobey all orders that violate them. For Walzer, this is because individuals are always responsible for not violating the rights of other individuals. But, again, this view is inconsistent with the theory of public war in that it makes it impossible for a soldier to be obligated to serve in war regardless of its justice. On the theory of Discrimination, all soldiers are responsible for not participating in unjust wars.

Orthodox modern just war theory thus describes soldiers as occupants of two distinct and inconsistent moral situations. This is what I have called the Dualism of just war theory. The theory of public war describes soldiers as instruments of their political authority who are morally bound to serve in war upon the command of their sovereign. At the same time, the principle of Discrimination and its various rationales denies that soldiers can be instruments of their political authority. Depending on the view we examine, the principle of Discrimination either holds that soldiers are always responsible for ensuring that they only participate in just wars or that any person can legitimately resist threats against their lives. In either case, there could be no obligation on the part of soldiers to engage in war upon the command of another.

What we have then in just war theory is a theory that is incoherent and impossible to put into practice consistently. Simply stated, the theory puts soldiers in an impossible moral situation.

The analysis of the history of just war thought that this dissertation has undertaken has revealed that this incoherence in the substance of just war theory is the product of the introduction of Individualism into the foundations of the theory. Again, Individualism is defined here as the view that the rights or basic interests of individuals are of equal and supreme value,

and the value of social and political relations is either derived from or secondary to those individual rights or interests. It is the confused place that Individualism has had in just war theory that explains the contradictions in the theory.

The theory of public war has its origins in the Anti-Individualist theories of St. Augustine and Thomas Aquinas, although its roots can be found much earlier. Augustine and Aquinas defend public war by appealing to the supreme value of peace between supra-individual political communities. It is the supreme value of harmoniously composed monarchical political communities and the peace between them that justifies war in certain circumstances and grounds the obligation of soldiers to serve in war upon the command of their sovereign. People, including innocents, can be killed in war because the value of a specific system of political and social relations trumps the value of individuals privately conceived.

Neither Augustine nor Aquinas develops a principle of Discrimination in war however. In fact, they do not articulate a substantive theory of *jus in bello* at all. It was the need for meaningful ethical constraints on the conduct of just war, in particular, the need for a principle of Discrimination that led to the introduction of Individualism into the foundations of just war theory.

Vitoria was the first to defend a substantive theory of Discrimination in war and he does so by appealing to an Individualist theory of justice. Vitoria argues that, when waging a just war, it is permissible to deliberately attack combatants because combatants are wrongfully engaged in an unjust war. It is, as stated above, the responsibility of combatants, including soldiers, to only participate in just wars. Anyone who fails to meet this responsibility commits a wrong that makes him liable to deliberate attack. Noncombatants, however, in the enemy community have not done anything relevantly wrong and are therefore immune from attack. Therefore, when a

community wages a just war against an enemy, who by necessity must be engaged in an unjust war, the community is permitted to deliberately attack combatants on the opposing side but prohibited from deliberately attacking noncombatants. This view is merely the application of a theory of individual self- and other-defense to the theory of justice in war.

However, Vitoria simultaneously defends a theory of public war on Anti-Individualist grounds similar to Augustine and Aquinas. For Vitoria, it is the supreme value of political communities, or commonwealths, as such that justifies war in certain circumstances and grounds the obligation of soldiers to serve in war upon the command of their sovereign. On this view, people, including innocents, can be killed when it is necessary to preserve the commonwealth and protect the common good. Thus, Vitoria defends the bulk of his theory, including the obligation of soldiers to serve in war, on strongly Anti-Individualist grounds yet defends his principle of Discrimination on strongly Individualist grounds. This is why he ends up simultaneously holding that soldiers are obligated to serve in war upon the command of their sovereign yet are obligated to privately review all orders and refuse to obey those that are unjust.

By contrast, Grotius' most profound contribution to just war theory is his attempt to eschew the Anti-Individualist foundations of the classical theories altogether and to base the theory, in a reformed version, on the rights of individuals as such. His is the first foundationally Individualist just war theory. Grotius attempts to defend a theory of public war by appeal to a contractarian theory of political justice. He argues that individuals have the supreme rights to life, liberty, and property and yet, because they have explicitly or tacitly consented to membership in a public body with a sovereign civil power that may use its members in war for the sake of the public good, subjects are obligated to serve in war upon the command of their

sovereign. In this way, subjects in war can be, as he puts it, the “instruments” of their political community.

However, Grotius simultaneously denies that subjects can be instruments of their political authority. He also argues that subjects should refuse to obey any orders that violate the rights of individuals. This is because the rights of individuals are supreme and inviolable and, thus, trump all political obligations to obey. On this view, people cannot be mere instruments of others but merely their assistants who are fully morally responsible for the justice of their service to their principal. If a person assists another, even a political sovereign, in committing violations of the rights of people, he is acting contrary to his natural duties.

This latter view of the obligations of political subjects is what Grotius appeals to in defense of his principle of Discrimination. Grotius, like Vitoria, argues that, when waging a just war, it is permissible to deliberately attack combatants on the opposing side but always impermissible to attack noncombatants. Again, this is because as long as one is waging a just war against an enemy who by necessity must be waging an unjust war, the combatants on the opposing side are committing a wrong that renders them liable to deliberate attack. Combatants, including soldiers, are responsible for not participating in unjust wars. When they do participate in unjust wars, they are therefore legitimate targets of deliberate attack. However, noncombatants have not committed any wrong that renders them liable to deliberate attack and are therefore illegitimate targets of deliberate attack.

This view of Discrimination is also the application of an Individualist theory of justified private self- and other-defense to war. On this view, the rights of individuals are supreme and responsibility for respecting these rights cannot be alienated from the individual to the sovereign. Thus, all political subjects, including soldiers, are responsible for not participating in public acts,

including war, which violate the rights of individuals. In this way, the Individualist rationale behind Grotius' principle of Discrimination undermines the possibility of public war. On Grotius' individualism, soldiers are not, and cannot be, the mere instruments of their political community. Thus, the Individualist foundations Grotius attempts to build this theory of just war on end up undermining his theory of public war and Grotius is of two minds regarding the obligations of soldiers in war. Though Grotius argues that soldiers are the instruments of their political authority, his Individualist argument, as he sometimes recognizes, makes this impossible.

Walzer, lastly, explicitly states that his theory of just war has Individualist foundations, i.e. the rights of individuals to life and liberty. In this sense, Walzer's project appears similar to Grotius'. However, as we have discovered, Walzer in fact defends his theory of public war on strongly Anti-Individualist grounds. Contrary to his description of the theory, Walzer actually argues that war can be justified and soldiers have the obligation to serve in war upon the command of their sovereign because of the supreme value of irreducibly social political communities. When the basic interests of political communities are threatened, communities can justifiably wage war in their defense and their members can be obligated to sacrifice their private interests and fight upon command on their community's behalf.

Walzer, however, defends his principle of Discrimination on Individualist grounds. He argues that it is permissible to deliberately target combatants in war and impermissible to deliberately target noncombatants regardless of the justice of one's war. Again, this is because it is permissible to attack anyone who threatens another, justly or unjustly, with imminent harm. Thus, it is always permissible to attack combatants in war and never permissible to attack noncombatants. However, this theory of justified self- and other-defense undermines Walzer's

theory of public war in that it would permit a soldier to resist the attempts by his own political establishment to serve in war. Moreover, Walzer argues that soldiers in war are responsible for not violating the principles *jus in bello*, including the principle of discrimination, and ought to disobey all orders that violate them. But, again, this view undermines this theory of public war in that it would be impossible for a soldier to be obligated to serve in war regardless of its justice. All soldiers would be responsible for not participating in unjust wars.

In this way, Walzer defends his theory of just war by appeal to two incompatible theories of justice—one Anti-Individualist, the other Individualist. He defends public war by appeal to the supreme value of political communities as such and he defends the principle of Discrimination by appeal to the supreme value of individuals as such. His theory thus looks much more like Vitoria's than Grotius'.

#### Individualism and the Rejection of Public War

We have found in these three systematic theories of just war a tension between their commitment to the theory of public war and their Individualist commitments. I wish now to argue that this tension is not peculiar to these theories but is inherent to the nature of public war and Individualism as such. Public war and Individualism are incompatible. If we are to construct a theory of just war on Individualist grounds, we must give up on public war. On any Individualist theory of just war, all participants in war, including soldiers, must be morally obligated to not participate in an unjust war and cannot be obligated to serve in war upon the command of a political sovereign even if the war is just. At most, a person can be *permitted* to participate in war (provided it is just) upon request but cannot be obligated to.

To be specific, the conflict between public war and Individualism is a conflict between their competing views of the nature and limits of political authority and, in turn, the distribution

of moral responsibility for public acts within a political community. For the theory of public war, responsibility for the justice of war can reside uniquely with the political sovereign and political subjects can be the instruments of their sovereign in war. For Individualism, however, neither of these things is morally possible. Political sovereigns cannot have unique moral responsibility over war and subjects cannot be mere instruments in war. For Individualism, this is because the rights or basic interests of individuals give them moral responsibility for all actions they participate in and preclude their use in war as mere instruments.

In defense of these claims, I will employ some of Grotius' conceptual baggage. I will rely on Grotius' distinction between public and private war and his related division of principal-agent relations into the principal-instrument and principal-assistant categories.

Private war, it will be recalled, is war that is waged by persons who act with their own private authority to do so. In private war, people either rightly assert the legitimate authority to employ violence as private persons or they have that authority despite their failure to recognize it. Private warriors have no moral responsibility to seek approval from another person or entity prior to becoming warriors. They are moral representatives of themselves only. Their reasons for employing violence may be just or unjust, but, in either case, private warriors have the authority to use violence as private persons.

Essential to the concept of private war is an equal distribution of moral responsibility for the justice of the war among its individual participants. Since in a private war participants are acting with their own private authority, they bear moral responsibility for the justice of their actions. Just as the authority to wage war is equally distributed among its participants, so is moral responsibility for war. In a private war, it is up to its individual participants to ensure that their war is just. If the war should be unjust, blame for that injustice falls on all of its individual

participants proportionate to their individual role in the war. Of course, participants in an unjust private war can be excused from blame, but they are nevertheless acting wrongly and, to avoid blame, a legitimate excuse must be forthcoming.

This is not to say that in a private war participants cannot be organized into a system of divided labor. A private war can have a principal and a set of agents who carry out the war. However, the nature of the principal-agent relationship is limited in a private war. The agents of the principal, to use Grotius' terminology, are *assistants* to the principal. As assistants the agents are morally responsible for ensuring that they do nothing unjust in carrying out the principal's wishes. The principal in a private war, in other words, has no authority, strictly speaking, over its agents. The agents maintain their private autonomy and are obligated to review the principal's orders in terms of justice and to refuse to carry them out when they are unjust. The agent, as a mere assistant, cannot justify carrying out an unjust order from her principal by claiming she is acting under orders, for she is not morally obligated to obey her principal's orders. A principal-assistant relationship is not a relationship wherein the principal can literally command the assistant to do anything. Rather, the principal can merely request the assistant's aid.

Public war, on the other hand, is war that is conducted under the legitimate authority of a political sovereign. It is war that utilizes the legitimate authority of a public body to employ violence. In public war, the agents of violence justly assert the authority of a political sovereign to use violence and to legitimately command its agents to carry out the violence. Public warriors are not claiming the private authority to use violence but, rather, the legitimate authority of a public body. They are representatives, not of themselves, but of some legitimate political sovereign.

Essential to the concept of public war is the dutiful obedience to authority of at least most of the war's participants. In a public war a legitimate political authority legitimately commands its subjects into war and legitimately directs them in the conduct of war. In this way, public war entails a hierarchy of authority wherein the subjects of that authority are, with some exceptions, morally bound to obey their political superiors at least in matters pertaining to war. The subjects in public war are the servants of the sovereign. They may be legitimately used by the sovereign for ends that are not necessarily their own and are obligated to follow the relevant orders from their sovereign. The nature of the principal-agent relationship in public war is thus very different from that of a private war. In public war, the principal of the war is a political sovereign and its agents can be their political subjects who are conceived of as *instruments*, not assistants, of the principal. In a principal-instrument relationship, the principal can literally command its agents to its bidding and the agents are morally obligated to obey.

This means that in a public war moral responsibility for the justice of the war is unequally distributed among the war's participants. In a public war the political authority is what is fully morally responsible for ensuring that the war is just or not. The subjects of that authority do not share that responsibility. Rather, the subjects in a public war are primarily responsible for obeying the orders of their legitimate sovereign. This responsibility is largely indifferent to the justice of the war the subjects are being asked to participate in. Provided that the war is not obviously unjust, if subjects are ordered to engage in war by their legitimate political authority, then they are not to be held responsible for the justice (or injustice) of the war itself. In this sense, the moral responsibilities of soldiers in a public war are relative mainly to the commands of their legitimate sovereign, not to the justice of the war.

The reason Individualism undermines public war is that Individualism is antithetical to all instances of principal-instrument relationships between persons or groups. The rights or interests of individuals that Individualism conceives as supreme will inevitably undermine any claim of authority of one person or group over another. This is especially clear when we consider principal-instrument relations in war and the rights/interests of individuals that the Individualist holds most dear are life and liberty.

We can begin to see the conflict between Individualism and principal-instrument relations when we consider the failure of contractarian arguments for absolute political monarchy. Following Jean Hampton<sup>1</sup>, the contractarian argument for absolute monarchy is an argument utilizing an *alienation* social contract, that is, a contract wherein the subjects consent to alienate their authority over themselves and their community to the sovereign permanently.<sup>2</sup> Under an alienation social contract, the sovereign is the absolute authority and its subjects have surrendered the right to disobey the commands of the ruler altogether. As Hampton describes it, on this picture the subject-sovereign relationship is conceived as a slave-master relationship. The sovereign has the absolute authority to command its subjects and the subjects have the absolute obligation to obey. In Grotian terms, we can call this subject-sovereign relationship an instrument-principal relationship.

As Hampton has shown, the reason contractarian arguments have failed to justify absolute monarchy is that they must postulate an overriding material or moral interest that all human beings have as private individuals and appeal to this interest in justifying their willing consent to absolute monarchical rule. The problem with this method is that the interests the

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<sup>1</sup> *Hobbes and the Social Contract Tradition* (New York, NY: Cambridge University Press, 1986).

<sup>2</sup> See *ibid.* pp. 3-4 and 256-7.

contractarian posits as the fundamental reason for instituting absolute monarchy ultimately undermines the slave-master conception of the subject-sovereign relationship. This is because the same interests that are supposed to justify the sovereign's authority can also be used to justify disobedience to the sovereign when his commands contradict those interests.<sup>3</sup> Thus, the overriding private interests of individuals that the contractarian argument uses to ground its argument for absolute monarchy simultaneously justify disobedience to the sovereign and, thus, deny the possibility of absolute monarchy. There cannot be a legitimate slave-master relationship between subject and sovereign because individuals cannot alienate their authority to pursue their overriding private interests. So long as individuals have an overriding private interest that is the foundation of political justice, as all contractarian arguments must hold, individuals will have the right, perhaps even the duty, to evaluate the actions of their leaders, to criticize them, and to disobey them when they are contrary to those interests.

As Hampton shows with meticulous care, this problem is evident in Hobbes' social contract argument. For Hobbes, the overriding private interest that governs human action is the *material* interest in self-preservation. People recognize that they will have their lives better protected in a society ruled by an absolute monarch than in the state of nature. People thus appeal to their private interest in self-preservation and agree to be ruled by an absolute monarch. The monarch, however, has, by necessity, the authority to command subjects to do things contrary to their self-preservation such as to punish them and to use them in war. But, according to Hobbes' argument for absolute monarchy, subjects would have to be justified in disobeying such orders for they have an overriding private interest in self-preservation. Indeed, Hobbes even recognizes this when he admits that subjects always maintain the right to resist the sovereign's attempts to

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<sup>3</sup> See *ibid.* pp. 262.

threaten their lives. But then there is not absolute monarchy. The contractarian nature of Hobbes' argument precludes such political arrangements.

We have seen the same structural problem in Grotius' argument for absolute sovereignty. Unlike Hobbes, Grotius attributes individuals with overriding *moral* interests, i.e. rights, which they have by nature as private persons. These include life, liberty, and property. They also have the obligation not to violate these same rights in others. People recognize that they will have their rights protected better under the absolute authority of a civil power than in the state of nature. People thus willingly contract to put themselves under absolute political authority. Grotius specifically equates the subject-sovereign relation with a slave-master relation. This authority, however, has, by necessity, the authority to command its subjects to do things contrary to theirs and others overriding private interests. Given that the authority to do so is supposedly grounded in these same overriding private interests, subjects would have to be justified in disobeying all commands that violate people's private rights. Indeed, Grotius recognizes this when he insists that subjects must never obey orders that violate natural right. Thus, Grotius' argument for absolute political authority actually undermines it. Like Hobbes, the contractarian nature of Grotius' argument precludes master-slave (or principal-instrument) relations between sovereigns and subjects.

What this shows is that contractarian theories of justice cannot justify absolute monarchical political authority, that is, they cannot justify a slave-master form of subject-sovereign relationship. The only type of social contract that such theories can justify is what Hampton calls an *agency* contract. Under an agency contract, the sovereign is not the master of the subjects but is merely their agent. The people are not the slave of the sovereign but are its

principal.<sup>4</sup> In the following section, we will explore the nature of this principal-agent relationship more closely. But speaking generally, the important point here is that, according to the logic of contractarian philosophy, people can only give *conditional* authority over themselves to another. That is, they can only justifiably grant authority to another on condition that the authority effectively pursues particular ends. These ends are, at a minimum, the rights or interests that Individualism posits as the foundation of justice. Thus, the subjects give the sovereign (or whatever we would call it now) a particular goal or goals that he can either succeed or fail to serve. The authority to judge whether the sovereign has succeeded or failed remains with the subject. Thus, the subject has the authority to review, criticize, and disobey the sovereign when the sovereign's orders violate individual rights. Subjects may even be justified in violently rebelling against the sovereign in some circumstances.

To put the point in terms more useful for the argument of this dissertation, no contractarian theory can justify alienating responsibility for respecting the foundational rights or interests of individuals from one person or group to another such that one becomes the principal and the other the principal's mere instrument. No one can have unique responsibility for abiding by the foundational tenets of justice who can also literally command others who are obligated to obey those commands. This is because the foundational tenets of justice are the private rights or basic interests of individuals who, because they are all equal, always maintain the authority to pursue those interests and can therefore privately review the orders of others and disobey when those orders are contrary to the rights or basic interests of individuals. It is thus morally impossible for principal-instrument relations between people or groups to exist.

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<sup>4</sup> See *ibid.* pp. 3-4 and 266-284.

It is crucial to note that this problem for the contractarian argument for absolute sovereignty is not peculiar to contractarianism as such, but to the Individualist pretensions of early modern contractarian philosophy. What makes it impossible for there to be a legitimate contract alienating authority from the individual to the political sovereign is not the limits of contracts as such. Rather, it is the fact that under early modern contractarian theory individuals have an ontological priority, their rights or interests are supreme in the theory of justice, and individuals have a natural authority to determine when their rights or interests are being respected. Here, the individual is conceived as morally and ontologically prior to the political community. The rights or basic interests of individuals are, necessarily, the highest values and, thus, nothing can trump these interests. This means that the justification of all political relations must be derived from or secondary to the rights or interests of individuals. Therefore, all political relations must respect the rights or basic interests of individuals. Since there are no natural hierarchical relations of authority, all individuals have, by nature, the authority to judge when their rights or basic interests are being served. It follows from these tenets of Individualism that people cannot alienate authority over themselves and their rights or basic interests to another such that they become the other's mere instrument. People must always maintain the authority to evaluate the "orders" of others and to disobey them when they are contrary to individual rights or basic interests. Thus, the failure of contractarian arguments for a master-slave (or principal-instrument) conception of sovereign-subject relations is, most fundamentally, the entailment of the Individualism of such theories, not simply their derivation of political authority from a contract.

Indeed, Hampton makes a similar point. As she says, the logic of contractarian arguments for absolute political sovereignty fails but "there is perhaps an even deeper reason why this

methodology forces any theorist using it to advocate an agency relationship between ruler and people.” This reason is that social contractarian theories are committed to a moral and ontological Individualism. As she says, any traditional social contract theorist is committed to the view “that individuals are not in any intrinsic sense defined or created by the state, but rather create the state, such that they are conceptually prior to it.” She continues,

Using an argument in which pre-state individuals agree to create a state for certain reasons makes sense only to those who oppose the Aristotelian view that the polis is conceptually prior to its citizens. For the traditional contractarian, the state is perceived as our creation, designed to serve us in certain ways. But if it is our creation, then it is extremely unlikely that we should, given our individualistic interests and the private reasons governing our actions, alienate our power to it. This would mean giving up our roles as its creators and maintainers, surrendering, as it were, our conceptual priority, and it does not seem that there is any reason a group of individuals could have to want to do this. Indeed, for any social contract theorist, the state’s justification for each individual derives from a reason intrinsic to that human being’s nature that the state has had no role in creating. Were the state to destroy somehow the individual’s ability to act on that reason, it would destroy something essential to the very humanity of that person, and a destruction of something so fundamental to one’s nature is not something any human being could plausibly be said to want.<sup>5</sup>

But even if we can imagine a person who wants to be the slave of another, the real problem for the Individualist is that a person could not *justifiably* be the slave of another. Master-slave or principal-instrument relations are simply inconsistent with Individualism, not because people could not want to be subservient to others but because Individualist justice precludes obligations of subservience. To justify the relegation of a person or group to the status of instrument would be to deny their fundamental value as individuals who have natural authority over themselves and whose private basic interests are supreme. If we are committed to Individualism, we must deny the possibility of legitimate principal-instrument relationships between people or groups.

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<sup>5</sup> *Ibid.* pp. 263-4.

Applying this logic to the theory of public war, we find that Individualism cannot justify public war precisely because in public war there is a principal-instrument relation between the political authority and its agents in war. In public war, soldiers are the mere instruments of their sovereign who can be commanded to serve and directed in the conduct of war.

The conflict between Individualism and public war occurs at two points in this soldier-sovereign relationship envisioned by public war. One is the supposed unique authority the sovereign has over the justice of war. The other is the supposed right that the sovereign has to use and sacrifice the soldier in war.

Let us consider the former conflict first. Just as Individualism must deny the authority of the sovereign to act as it sees fit generally and the subsequent duty of subjects to obey the sovereign's orders regardless of their justice, so must Individualism deny that any thing can have unique authority over war such that its agents are obligated to follow its orders into and during war. Moral responsibility for the justice of war cannot be vested in the hands of an authority while its agents are obligated to serve upon the authority's command. This is because wars can be just or unjust. On an Individualist view, the most basic way war can be unjust is when it violates the rights or interests of those individuals who are its targets. Just as a person can unjustly violently attack another person in domestic life, so too can a community unjustly attack another group of persons in war. So long as Individualism is committed to the universal duty to respect certain interests or rights of individuals, war can be unjust. Indeed, when war is unjust, it is a very grave injustice, for it, at the very least, threatens the lives of individuals and this is not a trivial harm. Now, there could be versions of Individualism that would deny that there is a universal duty to respect the rights or interests of others. Hobbes' ethical egoism would seem to preclude a concern for the justice of war so long as we are not its victims. However, such a view

is idiosyncratic and I will not bother to criticize it. The vast majority of Individualist theories of justice are committed to the universality of the duty to respect the rights or interests of individuals. The point here is that such views entail that justice is applicable to war; a war can violate the rights or interests of individuals and, when it does, it is unjust.

So long as war can violate the rights or interests of individuals, Individualists must hold that political subjects, including soldiers, are responsible for ensuring that the wars they are asked to participate in are just. Soldiers cannot be obligated to serve in war upon the command of the sovereign but must evaluate the sovereign's decision to wage war and decide privately if the war is just or not. If the war is just, then participation is permissible. If the war is unjust, then refusal to participate is obligatory.

We have seen this point made by Grotius and it is precisely the point where he explicitly contradicts his commitment to public war. Though Grotius defends public war and the use of subjects in war as the instruments of the political sovereign, he simultaneously denies that soldiers have an obligation to serve in war upon command. For Grotius, soldiers cannot be obligated to serve in an unjust war and are responsible for ensuring that any war they participate in is just. Soldiers ought to refuse to participate in wars that violate the natural rights of individuals. This denial of public war is an entailment of his Individualism. Because the rights of individuals are the foundations of justice and all political relationships are derived from these rights, these rights serve as moral constraints on the actions of public bodies and the rights of political authorities. Because the individual is prior to the political community and responsibility for respecting the rights of individuals belongs to all individuals by nature, the responsibility for the justice of war cannot be alienated from the individual to the sovereign. Thus, Grotius' Individualism contradicts public war.

Many other Individualist political philosophers have explicitly denied the possibility of public war. Kant, for example, suggests that the use of soldiers as mere instruments is a violation of soldier's autonomy. As he says, "the hiring of men to kill or to be killed seems to mean using them as mere machines and instruments in the hands of someone else (the state), which cannot easily be reconciled with the rights of man in one's own person."<sup>6</sup> According to this view, people cannot be mere instruments of war because people have the absolute right to act for reasons that they give themselves as autonomous beings. This is especially true with respect to acts of killing others. Thus, a person cannot be obligated to obey orders to serve in war but must maintain the authority to decide for her self whether a given war is worthy of participation in.

Another contemporary advocate of autonomy, Robert Paul Wolff, argues similarly. For Wolff, given that the overriding interest individuals have is for autonomy, it is morally impossible for them to be subject to the authority of another. As he says, "For the autonomous man, there is no such thing, strictly speaking, as a *command*."<sup>7</sup> That is, there can be no obligation to do something another tells you to do *because they tell you to do it*. Thus, Wolff argues that service in war upon the command of another cannot be obligatory. Wolff explicitly recommends a system of national defense wherein all are permitted to follow governmental directives but never obligated to. For him, soldiers should be legally free to disobey whenever they wish because they have a moral right to do so.<sup>8</sup>

Robert Nozick who defends Individualism of a Lockean type also explicitly denies the possibility of public war. Locke himself, it should be noted, defends the possibility of public

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<sup>6</sup> "Perpetual Peace: A Philosophical Sketch," in *Political Writings*, edited by H. S. Reiss (New York: Cambridge University Press, 1991).

<sup>7</sup> *In Defense of Anarchism* (Berkeley, CA: University of California Press, 1998), pp. 15.

<sup>8</sup> See *ibid.* pp. 80.

war.<sup>9</sup> Nozick, however, argues that the foundational rights and responsibilities of individuals make it impossible for soldiers to be exempt from the duty to ensure that they only participate in just wars. Because all individuals have by nature the duty to respect the rights of individuals and all political relations are derivative of these rights, individuals ought to refuse to participate in any unjust war and are obligated to review all orders to go to war in terms of their justice. As he says,

It is a soldier's responsibility to determine if his side's cause is just; if he finds the issue tangled, unclear, or confusing, he may not shift the responsibility to his leaders, who will certainly tell him their cause is just. The selective conscientious objector may be right in his claim that he has a moral duty not to fight; and if he is, may not another acquiescent soldier be punished for doing what it was his moral duty not to do?...[S]ome bucks stop with each of us; and we reject the morally elitist view that some soldiers cannot be expected to think for themselves. (They are certainly not encouraged to think for themselves by the practice of absolving them of all responsibility for their actions within the rules of war.)<sup>10</sup>

Contemporary just war theorists have by and large followed this reasoning. Walzer's view that soldiers are not responsible for the justice of the wars they participate in has come under strong criticism. Many have argued that soldiers are in fact obligated to ensure that they only participate in just wars. A soldier who fights in an unjust war is acting wrongly. Of course, he may be excused from blame for his wrong, but he has done wrong nonetheless. Whether or not a soldier has been ordered to serve by his political leaders is irrelevant to whether or not it is permissible to serve.<sup>11</sup> Jeff McMahan, for instance, argues that it is morally impossible for a

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<sup>9</sup> *Second Treatise of Government* (Indianapolis, IN: Hackett Publishing, 1980), see § 88, § 131, and § 139.

<sup>10</sup> *Anarchy, State, and Utopia* (New York, NY: Basic Books, 1974), p. 100.

<sup>11</sup> Advocates of this view include Mapel, David, "Coerced Moral Agents?: Individual Responsibility for Military Service," *The Journal of Political Philosophy*, 6(2), 1998, pp. 171-189; McMahan, Jeff, "Innocence, Self-Defense and Killing in War," *The Journal of Political Philosophy*, 2(3), 1994, pp. 193-221, and *Killing in War* (New York: Oxford University Press, 2009); McPherson, Lionel, "Innocence and Responsibility in War," *Canadian Journal of*

person to alienate his responsibility for not unjustly attacking and killing people to an authority who may legitimately command him to serve in war. As he says, “No individual can transfer his rights of autonomy to the state in such a way that he ceases to be an autonomous agent and thus becomes exempt from moral constraints such as the prohibition of intentionally attacking and killing people who are innocent in the relevant sense.”<sup>12</sup> Thus, the duty all individuals have as private persons to not unjustly attack and kill people trumps all antecedent political obligations. Thus, public war is morally impossible.

The other locus of the conflict between Individualism and public war occurs between the theory of public war’s commitment to the duty of soldiers to risk their lives in war upon command and Individualism’s commitment to the soldier’s supreme value as a human being. The problem here is not, as it was above, that according to Individualism soldiers are always responsible for ensuring they do not participate in collective acts that violate other’s rights or interests. Rather, the problem is that the soldier has his own supreme rights or interests that give him a universal right to refuse to be sacrificed upon the command of another. The soldier is a person and persons, according to Individualism, are supreme. They cannot be mere instruments that can be used and destroyed by others, especially by political sovereigns. Their private rights serve as inviolable constraints against the actions of political authorities and the overriding purpose of political community is to protect the private rights of its citizens. But given that service in war necessarily puts a soldier’s life at risk, and life is a necessary condition for the enjoyment of all rights or interests, the soldier would always be permitted to refuse to serve

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*Philosophy*, 34(4), 2004, pp. 485-506; and Primoratz, Igor, “Michael Walzer’s Just War Theory: Some Issues of Responsibility,” *Ethical Theory and Moral Practice*, 5(2), 2002, pp. 221-243.

<sup>12</sup> “Collectivist Defenses of the Moral Equality of Combatants,” *Journal of Military Ethics*, 6(1), 2007, pp. 54.

regardless of the justice of the war he is commanded to fight in. The rights of individuals thus make the obligation to serve in war, even a just war, morally impossible.

This latter tension between Individualism and public war has been largely ignored in the recent literature on just war theory. The point, however, has been made before. Hegel, for instance, argues that the conception of political society as civil society, that is, as a system of relations wherein individual rights are supreme and inviolable and society is simply an instrument for the protection of these rights, cannot justify the duty to serve in war. The duty to serve in war is the duty to die, or at least risk dying, for the sake of society. A political society that is justified by appeal to the rights of its members cannot justify the duty of those members to die for its sake. No one could be obligated to die for the sake of his or her private interests. As Hegel says, “It is a grave miscalculation if the state, when it requires this sacrifice [service in war], is simply equated with civil society, and if its ultimate end is seen merely as the *security of the life and property* of individuals. For this security cannot be achieved by the sacrifice of what is supposed to be *secured*—on the contrary.”<sup>13</sup>

Walzer makes the same point in his essay, “The Obligation to Die for the State.” As he says, “Any theory which, like Locke’s, begins with the absolute independence of freely willing individuals and goes on to treat politics and the state as instrumental to the achievement of individual purposes would seem by its very nature incapable of describing ultimate obligation [the obligation to die for the state]. This is certainly true when individual purposes reach no

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<sup>13</sup> *Elements of the Philosophy of Right*, edited by Allen Wood, (New York, NY: Cambridge University Press, 1991), § 324, emphasis in original. See also Hegel, *Early Theological Writings*, trans. T. M. Knox (Chicago, 1948), p. 165: “The preservation of the city can only be important to [its citizens] as a means to the preservation of their property and its enjoyment. Therefore, to expose themselves to the danger of death would be to do something ridiculous, since the means, death, would forthwith annul the end, property and enjoyment.” Quoted in Walzer, “The Obligation to Die for the State,” *ibid.*, p. 89.

further than bodily safety or physical welfare or the appropriation and enjoyment of physical objects.” He continues, “Indeed, the great advantage of liberal society may simply be this: that no one can be asked to die for public reasons or on behalf of the state.”<sup>14</sup>

For these reasons Individualism undermines public war. The conception of the sovereign-soldier relationship as a principal-instrument relationship that the theory of public war is committed to cannot be sustained on Individualist grounds. Because Individualism holds that the rights or basic interests of individuals are supreme in the theory of justice and, because they are equal, individuals are naturally responsible for ensuring that they only engage in acts that do not violate the rights or basic interests of individuals, public war is morally impossible. Individuals cannot alienate their responsibility to act justly toward others such that the individual becomes an instrument of the other and, because war puts the lives of its participants at risk, individuals would always be permitted to refuse to participate in war regardless of the justice of the war. Thus, for the Individualist, there can be no obligation to serve in war, even a just war, upon the command of another.

It follows from this that the only type of theory of just war that an Individualist can coherently maintain is a theory of private war. In private war, individuals maintain the private authority to act for their own reasons and the attendant responsibility to always act in ways consistent with the rights or interests of other individuals. Moral responsibility for the justice of war is equally distributed to all individual participants in war. There are no principal-instrument relations in war in the sense that no one is obligated to participate in any way simply because they have been ordered to. All participants are morally obligated to refuse to participate in acts of

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<sup>14</sup> *Ibid.*, p. 89.

war that are unjust. At most, a person can be permitted to serve in war upon request (provided the war is just) but is not obligated to.

Since it reduces just war to a relation of individuals, the theory of just private war must then be the mere application of a theory of just violence between private persons (e.g. a theory of self- and other-defense) to large groups of individuals. Just as an individual can, in certain circumstances, justly engage in deliberate violence against other individuals in private life, so too can large groups of individuals engage in war against others in analogous circumstances. Such a theory is the only kind of just war theory available to the Individualist because it reduces war to a relation between individuals who can justify war by appeal to private rights or basic interests and who are always morally responsible for the justice of their violence. This is the true Individualist theory of just war.

#### McMahan's Theory of Just Private War

Importantly, such a theory has emerged in the recent just war literature. Partly as a response to Walzer and his unwillingness to attribute soldiers in war with responsibility for the justice of the wars they participate in, contemporary just war theory has taken a turn toward the theory of private war. This is most clearly illustrated in the recent work of Jeff McMahan. As we have seen, for McMahan, public wars, wars that vest full moral responsibility for the justice of war in the hands of legitimate political authorities and not in the hands of its subjects, are not morally possible because the responsibility of every person to not intentionally unjustly attack and kill other persons cannot be alienated to another, especially to a political authority.

McMahan articulates a systematic theory of just war that is a theory of private war. He conceives of just wars as morally continuous with ordinary cases of justified self- and other-defense in domestic life. He states this position clearly in a number of places.

First imagine a case in which a person uses violence in self-defense; then imagine a case in which two people engage in self-defense against a threat they jointly face. Continue to imagine further cases in which increasing numbers of people act with increasing coordination to defend both themselves and each other against a common threat, or a range of threats they face together. What you are imagining is a spectrum of cases that begins with acts of individual self-defense and, as the threats become more complex and extensive, the threatened individuals more numerous, and their defensive action more integrated, eventually reaches cases involving a scale of violence that is constitutive of war.<sup>15</sup>

This is precisely how McMahan wants us to conceive of just war. He says, “I believe that the morality of defense in war is continuous with the morality of individual self-defense. Indeed, justified warfare just *is* the collective exercise of individual rights of self- and other-defense in a coordinated manner against a common threat.”<sup>16</sup>

Clearly, this is a theory of private war. Here, war is reducible to a relationship between private individuals who are individually responsible for the justice of their respective wars, and just war is simply the application of the theory of private self- and other-defense to large groups. This theory is a radical rejection of just war theory. Just war theory conceives of war as literally public, that is, as a relation between irreducibly social political bodies, authority over which is vested in the hands of a political sovereign that has full moral responsibility for the justice of war, and just war is the application of a theory of justice between public bodies and of their respective communal rights. In addition to a rejection of these theoretical tenets of just war theory, the theory of private war also must eschew much of the ethical substance of just war theory. The orthodox conception of the principles of Legitimate Authority, Just Cause, Proportionality, Last Resort, and Right Intention would either have to be significantly revised or eliminated altogether. Significant rethinking of the relation between the *jus ad bellum* and *jus in*

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<sup>15</sup> “War as Self-Defense,” *Ethics and International Affairs*, 18(1), 2004, p. 75.

<sup>16</sup> “The Ethics of Killing in War,” *Ethics*, 114(4), 2004, p. 717. See also *Killing in War*, pp. 155-8.

*bello* components of just war theory would also have to be done. I will not dwell on the particularities of these reforms required by Individualism in this dissertation.

I would like to comment, however, on the responsibilities of combatants that the theory of private war entails. Because the theory of private war distributes responsibility for the justice of war to all its participants, combatants in war are morally obligated to only participate in just wars and in just acts of war. Thus, all combatants in war are individually responsible for both the *jus ad bellum* and *jus in bello* rules of war. No one has unique responsibility for the justice of war and no one can be obligated to serve in war upon the command of another. In this sense, the theory of private war does not posit a principal-instrument relation between sovereigns and soldiers but holds that the soldier is merely the assistant of the sovereign, or principal.

As we have seen, modern just war theory has two inconsistent views of the obligations of soldiers. Modern just war theory holds that soldiers are both not responsible for the justice of war and responsible for the justice of war. This is the Dualism of just war theory and it does not provide a coherent vision of the duties of combatants in war. McMahan's theory of private war, however, provides a coherent set of responsibilities to all combatants, including soldiers. In this respect, the theory of private war can be viewed as having an advantage over orthodox just war theory. It is not a Dualist theory. The theory of private war thus achieves a level of coherence that has been lacking in just war theory for centuries.

The theory of private war achieves this coherence by eschewing the Anti-Individualist foundations of just war theory as well as systematically purging the theory of just war of all components that are inconsistent with Individualism. Looking back at the history of just war thought that this dissertation has surveyed, we can see the ascendancy of the theory of private war to the status of just war theory as the culmination of the introduction of Individualism to the

foundations of just war theory beginning in the sixteenth century. In the theory of private war offered by McMahan, we see finally the articulation of a systematic and coherent Individualist just war theory. No longer are there any vestiges of the Anti-Individualism of Augustine and Aquinas, nor the inconsistencies of the failed attempts to ground public war in Individualism in the vein of Grotius.

In effect, McMahan's greatest success is his reception of the Individualist ethics of the theory of Discrimination in just war theory first articulated by Vitoria as the theory of just war proper. As we have seen, the ethics of the theory of Discrimination in just war theory is the ethics of private war. According to the theory of Discrimination, deliberate attacks against persons are only justified when the target has acted in such a way as to become liable to deliberate attack. On this theory, war is a relation between individuals who are responsible for not violating the rights of others. When they do violate those rights, in particular by unjustly attacking or threatening to attack others, they become liable to defensive violence. Importantly, for the theory of Discrimination combatants act wrongly when they participate in unjust wars even when they are obeying the orders of their political superiors. As we have seen, this ethics of war is inconsistent with the theory of public war that modern just war theory is committed to. McMahan's innovation is his complete rejection of the theory of public war and his application of the justification of killing underpinning the theory of Discrimination to the whole of war. For McMahan, just war simply is the justice of deliberately attacking persons who have made themselves liable to attack by acting in ways contrary to specific responsibilities they have as private persons. From my perspective, this makes McMahan's theory of just war arguably the most coherent systematic just war theory offered in Western philosophy since perhaps the Middle Ages.

This tremendous success notwithstanding, I would like to raise concerns about the Individualist theory of just war and its rejection of public war. I believe the theory has extreme, and very troubling, consequences for the possibility of political authority.

#### Political Authority and the Rejection of Public War

I will proceed by looking at three necessary conditions for political authority that are commonly offered and show how Individualism undermines them. The first of these supposed conditions I do not wish to assert as a necessary condition for political authority but merely to show that those who have made such an assertion on Individualist grounds are guilty of a contradiction. The second condition for political authority I do believe to be an essential component of political authority and, thus, to reject it is to reject the possibility of realizable political authority. As for the third condition, I am unsure whether it should be seen as a necessary condition for political authority. Even if it is not a necessary condition, its rejection, I hope to show, is nevertheless an extreme move.

#### *The Authority to Use the Collective Force of the Community*

For early modern contractarian theories of political justice, one of the essential rights of legitimate political authorities is the right to order its subjects to engage in violence or threats of violence against internal and external threats to the public when necessary. Subjects do not have the private authority to determine when it is necessary that they be employed in public violence but are obligated to obey the orders of the sovereign. This right of political authority is crucial because early modern contractarian philosophy conceives of political society as primarily a security association created to protect its members from harm by using, when necessary, the collective force of the entire community. On this view, people implement political society in order to better protect themselves from harm. Political society offers better protection than does

the state of nature specifically because the social contract binds all members to come together to protect one another and their association with violence upon command. Thus, authority over public violence and the right to order subjects to engage in violence are necessary components of political authority.

We saw this point made by Grotius when he says, “the Design of Society is, that every one should quietly enjoy his own, with the Help, and by the united Force of the whole Community.”<sup>17</sup> It is clear that, for Grotius, the individuals party to the social contract give authority over the “united Force of the whole Community” to the civil power, or the political sovereign, such that they are obligated to obey its orders regarding the employment of their collective force.

Hobbes defines the commonwealth as “One person, of whose Acts a great Multitude, by mutuall Covenants one with another, have made themselves every one the Author, to the end he may use the strength and means of them all, as he shall think expedient, for their Peace and Common Defence.”<sup>18</sup>

Locke claims that by consenting to membership in a political society, a person “has given a right to the common-wealth to employ his force, for the execution of the judgments of the common-wealth, whenever he shall be called to it...” For Locke, the very purpose of the legislative and executive power, or the political sovereign, “is to judge by standing laws, how far offences are to be punished, when committed within the common-wealth; and also to determine, by occasional judgments founded on the present circumstances of the fact, how far injuries from

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<sup>17</sup> *The Rights of War and Peace, Ibid.*, i II:1:3.

<sup>18</sup> *Leviathan*, edited by Richard Tuck, (New York, NY: Cambridge University Press, 1991), Ch. XVII, p. 121.

without are to be vindicated; and in both these to employ all the force of all the members, when there shall be need.”<sup>19</sup>

Rousseau tells us that people form political society because “the only way in which they can preserve themselves is by uniting their separate powers in a combination strong enough to overcome any resistance, uniting them so that their powers are directed by a single motive and act in concert.”<sup>20</sup> A necessary condition for this unity of powers is the relinquishing of authority over all the members to the sovereign: “Just as nature gives each man an absolute power over all his own limbs, the social pact gives the body politic an absolute power over all its members; and it is this same power which, directed by the general will, bears, as I have said, the name of sovereignty.”<sup>21</sup>

More recently, Nozick describes states as particular forms of mutual protection associations and explains their creation by people in the state of nature as instruments for their protection. In a state of nature, “Groups of individuals may form mutual-protection associations: all will answer the call of any member for defense or for the enforcement of his rights. In union there is strength.”<sup>22</sup> For Nozick, authority over when members need or deserve defense and when members ought to come to the aid of their fellows is vested in some procedure created by the association and designed to adjudicate such matters. Thus, it appears that in mutual protection associations members are subject to the authority of the procedure of adjudication their association employs. When the association demands member’s assistance in accordance with the determination of the agreed upon procedure, members would seem to be obligated to give their assistance. This is how the union gives strength.

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<sup>19</sup> *Second Treatise of Government, Ibid.*, § 88

<sup>20</sup> *The Social Contract* (New York, NY: Penguin Books, 1968), Book I, Chapter 6, pp. 59-60.

<sup>21</sup> *Ibid.*, Book II, Chapter 4, p. 74.

<sup>22</sup> *Anarchy, State, and Utopia, Ibid.*, p. 12.

What is noteworthy is that in all these views of political authority, there is a principal-instrument relation between the sovereign and the subject with respect to the violence that is necessary for political society. These are theories of not only public war, but of public violence. All of these views render political subjects the instruments of their political authority with respect to the violence necessary for the society's internal political affairs and its external relations. For these theories, an essential purpose of political society is the offering of protective violence to its members and their society. All members of the political community are obligated to participate in this protective violence when necessary and the authority to determine when this violence is necessary is vested in the hands of the sovereign. When the sovereign determines a subject's violent service is necessary, the subject is obligated to engage in violence. In this sense, all political subjects are potential violent instruments of the political authority.

As we have seen, however, Individualism prohibits principal-instrument relations between political authorities and their subjects. If the theory of political justice is founded on Individualism, political authorities cannot use their subjects as instruments. Political subjects must always maintain the authority to decide privately when to obey the commands of their sovereign and are obligated to disobey commands that are contrary to the foundations of justice. Moreover, political subjects cannot be obligated to die or to risk dying upon the command of their sovereign even when those commands are not contrary to the foundations of justice. Thus, political subjects cannot be obligated to engage in violence upon the command of their sovereign. Subjects are always permitted to refuse to engage in public violence, even just public violence. Simply put, political authorities cannot have authority over public violence.

This is an extreme conclusion. We can begin to see this by noting how this view undermines the purpose and nature of political society that the early modern contractarian

philosophy advocated. If political society is simply an association designed so as to protect its members and their association by using the united force of all members and authority to determine when and how members are to protect one another belongs to the political sovereign, then political society is inconsistent with Individualism. According to Individualism, no person or entity can have the unique authority to decide for others when it is appropriate to engage in violence and to legitimately command that they engage in violence. Thus, political society as it is conceived by early modern Individualist contractarian theories of justice is unjustifiable on its own terms.

Importantly, the conflict between Individualism and these conceptions of political society is independent of the particular form of political authority they posit as legitimate. Even if we deny (as Hampton has shown we must) that Individualism is consistent with absolute monarchy, and we restrict legitimate forms of sovereignty to popular sovereignty, these conceptions of political society still run afoul of Individualism. Locke and Rousseau, for instance, each deny the legitimacy of absolute monarchy and argue that only certain forms of popular sovereignty are consistent with the rights of the community. The problem though is that, for them, the popular sovereign still has absolute authority over public violence. For Locke, the democratically elected legislative and executive branches of government have absolute authority over public violence and can use their subjects as violent instruments. For Rousseau, the general will of the body politic has absolute authority over public violence and can use its members as violent instruments. In either case, the sovereign-subject relation is a principal-instrument relation.

The conflict between Individualism and these conceptions of political society is fundamentally a conflict between Individualism and the rights these views grant to political authority, whatever form that authority may take. Even if political authority remains with the

public body, so long as the public body has the authority to command its members to engage in public violence, the rights of the public body are inconsistent with Individualism. Simply put, if we are Individualists, then political society cannot justifiably be an organization wherein members unite their collective force under the authority of a sovereign for their mutual benefit.

*The Authority to Violently Enforce the Public Will*

This conflict between authority over public violence and Individualism extends to all forms of political society that have a unique political sovereign. Even if we do not conceive of political society as merely a mutual protection association as do the early modern social contract theorists, as long as we wish to posit the existence of a unique political sovereign within the community, Individualism will undermine it. In this sense, Individualism is inconsistent with the rights of political authority as such. This reveals the severity of the implications of the Individualist rejection of public war.

To demonstrate this, I will argue that the possibility of fully realized political authority requires a principal-instrument relation between the sovereign and some set of violent agents. However, the Individualist rejection of public war makes such relationships morally impossible. Thus, the Individualist must reject the possibility of fully realized political authority.

To draw this conclusion, I will defend the following general principle.

(1) The existence of fully realized political authority requires

A) an unequal division of moral responsibility between the political authority and its agents over the justice of the violent exercise of that authority in the sense that the political authority is fully responsible for its just violent exercise and its agents are not and

B) violent agents of political authority have the obligation to risk their lives upon the command of the political authority in the violent enforcement of the authority's will.

In other words, political authorities need violent instruments. That is, they need agents of violence who are obligated to employ violence upon command independently of the justice of those commands and despite the danger that their obedience poses to them personally. If there cannot be this principal-instrument relation between political authorities and their violent agents, there cannot be fully realized political authority.

Why is (1) true? By its nature, political authority is coercive. Political authority necessarily places limits on the conduct of its subjects and the organization of the social order it has authority over. These limits are physically binding in the sense that the political authority may forcibly thwart attempts to violate them and seek to forcibly punish those who do violate them. If this force is resisted, the political authority may resort to violence to subdue and, when the resistance is severe enough, maim or kill the resister. In this sense, political authority is intrinsically violent; its commands are backed by the threat of violence and it is willing to employ preemptive or punitive violence against violators of its will when necessary. Without this use of violence, there is no fully actualized political authority. Political authority is always backed by the threat and, at least occasionally, engages in violence. Any political authority, in as much as it is fully actualized, is violently coercive.

The reason this violence is part of the nature of political authority is that, without it, political authority could not realize one of its essential functions. The purpose of political authority is, in part, to order our social worlds in certain ways. Unless political authorities had the brute power to create and protect this order against those who seek to upset it, they would be socially superfluous in important respects. If there was no threat of violent consequences for violating the orders of the political authority and resisting attempts by the political authority to enforce obedience to those orders, the authority would be impotent to effectively exert its will

over its subjects. Of course, there can be other means of enforcing political authority aside from force and violence. Political power can be exercised in the form of charisma or the use of reasons, symbols, and rituals that subjects generally recognize as authoritative. It is even arguable that no political authority could have or maintain its authority without the effective use of these non-violent means. However, without any means of violently and coercively enforcing itself against those not compelled by its non-violent forms of power, political authority cannot be fully actualized.

Since violent coercion is a necessary function of political authority, it follows that legitimate political authority must have the legitimate authority to employ violence on some occasions. In other words, the authority to use violence is a necessary part of legitimate political authority. This is not to say that this use of violence is always just, however. Legitimate political authorities can use violence unjustly when, for example, the force is unnecessary, disproportionate, or employs means that are themselves abhorrent such as torture. That being said, any legitimate authority must, nevertheless, have the right to decide when it is appropriate to use violence to enforce itself on its subjects.

Now, (1) says that in order for political authority to be realized there must be A) an unequal division of moral responsibility between the political authority and its agents over the justice of the violent enforcement of the will of the political authority and B) violent agents of political authority are obligated to engage in violence upon command despite the risk of harm that violence poses to the agents personally. Let us consider condition A) and B) in turn.

Condition A) says that a necessary condition for effective political authority is that there be an unequal division of moral responsibility over violence between authorities and their agents in the following sense: the political authority is fully responsible for ensuring that the violence

used in its enforcement is just while the agents of the authority are not. The violent agents of the political authority are responsible primarily for diligently obeying the orders of their authority. In other words, an agent of violence for a political authority is not responsible for ensuring that he *only* violently enforce just orders. Rather, the duties of the violent agents of political authority are relative primarily to the commands of their authority, not to the justice of the authority's commands.

This does not mean that it is never appropriate for a political authority's violent agent to disobey an order on grounds that the order is unjust. We can concede that such disobedience may at times be not only permissible, but even the duty of the agent. However, this need only be in certain extreme cases where, for instance, the order is patently unjust. Aside from such extreme cases, violent agents are morally bound to obey the orders of their authority. The division of moral responsibility between the authority and its agents need not be absolute. Sometimes, agents do wrong in following orders. But, according to condition A), it is not always wrong for a violent political agent to obey an order to commit violence, even extreme violence, which is unjust.

Why does political authority require this unequal division of moral responsibility over public violence? The answer is that if we distribute responsibility in other ways we will distribute authority in such a way that the ostensible political authority no longer has any unique authority over the violent enforcement of its will.

Consider the equal distribution of moral responsibility between political authorities and their agents over violence that the Individualist rejection of public war is committed to. Suppose, for instance, there were an equal distribution of responsibility between authorities and their agents for the just violent enforcement of the law. In such a case, the political authority and its

agents are equally responsible for ensuring that only just laws are violently enforced. The political authority must be sure it only issue just commands to use violence and its agents must be sure they only follow just commands to use violence. In other words, the authority and the agent are equally responsible for assessing the authority's laws in terms of justice. Should a law be unjust, the authority should not command that it be violently enforced and, if it does command that it be violently enforced, the agent should not violently enforce it. In this sense, the authority-agent relation would not be a principal-instrument relation, but a principal-assistant relation.

The problem with this is that, if true, there would no longer be a meaningful distinction between the authority and the agent with respect to the authority to use violence to enforce the law. The authority would have no right to order the agent to commit violence and, thus, the agent would have no duty to abide by the orders of the authority to commit violence. In effect, the authority over public violence itself would be equally distributed between the two. They would be each equal, independent political authorities over public violence.

To clarify this, consider an example. Suppose a political authority that employs radically democratic procedures issues a law prohibiting the carrying of concealed firearms. Imagine that in a fully participatory referendum, the citizenry votes by an overwhelming majority to ban the carrying of concealed firearms. Thus, the political authority issues the command to all law enforcement agents that they are to stop the carrying of concealed firearms by anyone in the community suspected of doing so. Suppose, further, that a specific police officer personally views the law as unjust and even agitated and voted against its passage. Shortly after the passage of the law, however, this police officer is called upon to arrest a man who is carrying a concealed firearm. Suppose, yet further, that this officer has good reason to believe that this armed man will

violently resist the officer's attempt to enforce the law, perhaps even open fire. In this situation, should the officer enforce the law that his political authority issues yet he deems unjust?

Suppose we hold to the Individualist view that political authorities and their agents are equally responsible for violently enforcing just laws: our general answer then would be that the police officer should never violently enforce an unjust law and he is privately responsible for determining which laws are just and which unjust. Since the officer is convinced that the law is unjust, he would then view it as his duty to not violently enforce the order of the authority. In his mind, he would be obligated to simply let the man carrying the concealed firearm continue to break the law.

Thus, by giving full moral responsibility to the police officer to only violently enforce just laws, we take the authority to issue binding laws and the power to violently enforce them away from the ostensible political authority. In effect, the political authority loses the unique authority to violently enforce its will on subjects who resist it. With respect to the violent enforcement of the law, the professed authority becomes just another voice in the political discourse. Its laws are merely proposals that its agents are obligated to review and privately decide whether to violently enforce or not. The agents of the authority become not merely agents but an army of independent authorities with a veto power over the violent enforcement of the public will and an obligation to wield that power whenever the public will is unjust. The problem, in other words, is that there is no longer any political authority in the political order with the unique authority to use violence to enforce its will. That authority is itself distributed to all individuals engaged in the system of law enforcement.

Thus, (1) A): if there is to be fully realized political authority we must unequally divide moral responsibility between the authority and its agents for the just violent enforcement of the

authority's commands. Specifically, we must attribute full moral responsibility to the political authority for the just violent enforcement of its commands and deny such responsibility to its agents.

To be clear, this point applies to all forms of political authority, even to all forms of popular sovereignty. In the early seventeenth century, in response to the notion that soldiers are morally responsible for only participating in just wars and ought to refuse to participate in any war that is not just, Francisco Suarez argued that such an idea undermines the ability of the monarch to effectively assert his authority. As he said, "as a result of such disobedience, it would become impossible for princes to defend their rights, and this would be a serious and general misfortune."<sup>23</sup> Surely, Individualism undermines the rights of princes. The problem I am here illuminating, however, is that the reason that the Individualist cannot justify principal-instrument relations between sovereign and subject (i.e. monarchy), also makes it impossible to justify principal-instrument relations between any sovereign and its violent agents. The violent agents of political authority must be merely the assistants of the sovereign. Thus, even if there is popular sovereignty, the logic of Individualism undermines the ability of the public to have full authority to violently enforce its will on its members.

Let us turn our attention now to condition B): in order for political authority to be realized the violent agents of political authority must be obligated to risk harm to themselves in carrying out violence upon the command of the authority. In other words, the violent agents of political authority cannot be absolved of the obligation to engage in violence upon command because that engagement is dangerous to them personally. If the personal danger political agents

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<sup>23</sup> "A Work on the Three Theological Virtues," in *Selections from Three Works*, edited by Gwladys Williams (London: Oxford University Press, 1944), p. 833.

of violence endure were sufficient grounds to disobey, then political authority could not be fully realized.

As we have seen, the Individualist rejection of public war is based, in part, on the view that the rights or interests of the agents of political authority justify their disobedience when the obedience is antithetical to those rights or interests. Since participation in war risks severe harm to the participant, soldiers are always permitted to refuse to participate even in just wars. The value of the violent agent herself is sufficient to justify disobedience in all cases. Thus, any violent agent of political authority could be permitted to participate in public violence upon request but is never obligated to.

This view makes the possibility of realized political authority even more remote than the Individualist view that there is an equal distribution of moral responsibility for the justice of violence between the agent and the political authority. As we've seen, the equal distribution of responsibility for public violence between authorities and agents is still consistent with the existence of an obligation on the part of the agent to engage in violence requested by the political authority. Provided that the violence requested is just, a violent agent of a political authority could still be morally obligated to carry it out. It is simply that it is the responsibility of the agent to privately determine if the order is just or not prior to carrying it out.

By contrast, the view that violent agents are permitted to disobey orders whenever carrying them out is dangerous to them personally undermines all (or nearly all) obligations to participate in violence requested by a political authority. As long as the participation in violence is dangerous, the agent will have sufficient grounds for refusing to participate. There is thus no obligation to participate in public violence even if the violence is just.

The reason this makes political authority impossible to realize is that political authorities will not be able to demand that its violent agents engage in violence in any (or nearly any) circumstance. Political authorities will simply be unable to possess a cadre of violent agents that are bound to enforce its will even when the authority's will is justified. All political agents of violence are permitted to refuse to engage in violence on the grounds that engaging in violence puts them in danger.

Consider again the case of the law enforcement agent considering whether or not to enforce a law against carrying concealed firearms. Given that, in this case especially, enforcing this law puts the police officer in severe danger, he would be justified in refusing to enforce the law and allowing the law-breaker to continue breaking the law. We can even suppose now that the law against carrying concealed firearms is just and that the officer agrees that it is just. Nevertheless, given the danger he would face in attempting to enforce the law, he would be morally permitted to refuse to do so. The general conclusion I wish to highlight here is that in any case where enforcing the law is known to be dangerous, law enforcement agents are permitted to refuse to obey. Thwarting robberies in progress, assaults, arresting persons with records of violence against law-enforcement agents, etc., would all be cases where police officers are permitted to refuse.

This permission to refuse could arguably extend to a much wider range of law-enforcement actions than those that are known ahead of time to be extremely dangerous. The fact is that the enforcement of any law can be dangerous. A routine traffic stop can turn deadly. Perhaps the Individualist justification of the refusal to engage in violence upon command would permit a refusal to engage in these more routine acts of law enforcement as well.

Even if we confine the justification of refusal to acts of law enforcement that are known ahead of time to be extremely dangerous, there is still here a strong rejection of authority over violence and, in turn, the authority of political sovereigns to enforce themselves on their subjects. Law enforcement agents would be permitted to walk away from incidents where enforcing the law is known to be dangerous. There would be no moral complaint a political authority could render against its agents who refuse to carry out a just order simply because doing so would put them in personal danger. In such a circumstance, the political authority to use violence to enforce its will is simply not realized in the hands of the ostensible political sovereign.

Thus, (1) B): if there is to be fully realized political authority, the authority must have the legitimate authority to command its agents to carry out acts that put them in grave peril. The rights or interests of the agent, as a human person, cannot justify disobedience to the authority in such circumstances.

Here, again, this point applies to all forms of political authority, even to forms of popular sovereignty. Even if the public body is sovereign, according to the Individualist rejection of public war, the public will not be able to legitimately possess violent agents who are the public's instruments. The sovereign's violent agents will only be the sovereign's assistants. As assistants, the agents will be permitted to refuse to enforce the will of the sovereign whenever such enforcement is dangerous to them.

It follows from the above that if political authority can be legitimate and its authority ought to be realized, then an unequal division of moral responsibility between political authorities and their agents and the obligation of those agents to risk great danger upon the command of their authority is also legitimate. We cannot have fully realized political authority otherwise. Unless we are willing to give up on the possibility of realized legitimate political

authority, we have to admit that violent agents of political authority are not morally responsible for ensuring that they only follow just orders to use violence and they can be obligated to put themselves in danger upon command. In other words, we cannot conceive of the relation between political authorities and their violent agents as a principal-assistant relationship. Political authorities need violent instruments, i.e., individuals whose obligation is to employ violence upon the command of the political authority, despite the dangers of doing so, and who are not responsible for only obeying just commands to commit violence.

It follows further that if political authority can have the authority to wage and declare war on behalf of its subjects, then the agents it employs in war are not responsible for ensuring that they only participate in just wars and are obligated to face extreme danger in war. Their duty to serve their political authority can trump a duty they are purported to have to not engage in unjust violence against persons and any supposed right they have to preserve their own life and limb. If we asserted otherwise, then the political authority would not have fully realized authority over war.

### *The Monopoly on Legitimate Violence*

Another respect in which the Individualist rejection of public war threatens the realization of political authority has to do with the possibility of political authority possessing a monopoly on legitimate violence. Many have argued that a necessary condition for the existence of political authority is the possession of the authority to determine what acts of violence subjects are permitted to engage in. On this view, a political authority asserts a monopoly on legitimate violence in the sense that it claims that no acts of violence are permissible without its prior authorization. No political subject has the private authority to decide when violence against others is appropriate and to act on those private judgments. Political authority requires that this

right be alienated to the political sovereign. This view is asserted by Nozick: “A state claims a monopoly on deciding who may use force when; it says that only it may decide who may use force and under what conditions; it reserves to itself the sole right to pass on the legitimacy and permissibility of any use of force within its boundaries; furthermore it claims the right to punish all those who violate its claimed monopoly.”<sup>24</sup>

From the perspective of early modern contractarian theories of political justice this monopoly on legitimate violence is necessary for the existence of political authority because the primary goal of political society is to take authority over legitimate violence away from individuals and grant it to the political sovereign. For these theorists, what makes political society desirable from the point of view of the state of nature is primarily this monopolization of violence by the political sovereign. This is because in the state of nature everyone has the private authority to employ violence in defense of themselves and others and to punish others for their violations of right. This equal distribution of authority over legitimate violence is what makes the state of nature less desirable than life in political society. In a condition where every individual has the private authority to decide when violence is legitimate, individuals are in great peril. Individuals in the state of nature will be prone to mistakenly decide that violence is justified or to maliciously engage in violence and this makes the state of nature very dangerous. Thus, political society’s primary goal is to create a monopoly on legitimate violence and thereby avoid the dangers of the state of nature.

This is why, as we have seen, Grotius argues that where people maintain the private authority to defend themselves violently, there is no political society.

Indeed all Men have naturally a Right to secure themselves from Injuries by Resistance, as we said before. But civil Society being instituted for the Preservation of Peace, there

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<sup>24</sup> *Anarchy, State, and Utopia, ibid.*, p. 23.

immediately arises a superior Right in the State over us and ours, so far as is necessary for the End. Therefore the State has a Power to prohibit the unlimited Use of that Right towards every other Person, for maintaining publick Peace and good Order...for if that promiscuous Right of Resistance should be allowed, there would no longer be a State, but a Multitude without Union, such as the Cyclops were, every one gives Law to his Wife and Children. A mob where all are Speakers, and no Hearers.<sup>25</sup>

Whether or not a monopoly on legitimate violence is a necessary condition for political authority, I wish to show that the Individualist rejection of public war makes monopolies on legitimate violence unjustifiable. The reason Individualism undermines the possibility of a monopoly on legitimate violence is similar to the reason Individualism undermines the possibility of principal-instrument relations between political authorities and their agents. As we have seen, according to Individualism, no person can alienate moral responsibility over their participation in violent acts to another such that they become the mere instrument of the other, obligated to obey their commands independently of the justice of those commands. This is because the rights and duties of individuals that Individualism posits as the foundation of justice cannot be trumped by social and political obligations. Political obligations must be derived from or secondary to the rights of individuals. Political obligations thus cannot override the foundational rights of individuals.

Similarly, the reason Individualism undermines monopolies on legitimate violence is that the right to engage in just violence and the authority to privately determine when violence is legitimate must be among the rights of individuals that are the foundations of justice. So long as Individualism does not prohibit all violence, that is, it is not absolutely pacifist, Individualism must posit that all individuals have the right to engage in just violence and the private authority to judge what constitutes just violence. According to Individualism, all relations of authority are derivative from or secondary to this foundational right of individuals. Thus, no relation of

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<sup>25</sup> *The Rights of War and Peace, ibid.*, i IV:II.

authority can trump the right to privately decide when to engage in violence. Thus, no political authority could have the legitimate authority to require that its subjects never engage in violence that it does not authorize. Subjects would always have the right to engage in violence justified by the rights of individuals and to privately decide when they are justified in engaging in violence.

To see this, consider the following situation. Person T steals valuable property from person V at the point of a gun. Person V appeals to his political authority for the recovery of his property and for the punishment of person T. Following legitimate adjudication procedures the political authority is unable to recover the property from person T or to punish them because, say, person V is the only material witness to the alleged crime and person V's testimony is not sufficient, for some reason, to prove that person T stole from person V. The political authority thus concludes that person V does not have a right to the property now in the possession of person T and therefore offers no assistance in its recovery or in punishing person T for theft. However, suppose that person V knows with certainty that person T stole his property and is presently in wrongful possession of it. Suppose, further, that the rights of individuals permit the use of proportionate violence to recover stolen property and to punish thieves. Does person V have the right to use violence to recover his property from person T?

Assuming the state asserts a monopoly on legitimate violence, the state would assert that person V does not have the right to use violence to recover his property or to punish person T. Using its established adjudication procedures, the state has not authorized the use of violence by anyone against person T for any reason. Thus, the state claims that person V does not have the right to violently recover his property.

But if the state's authority to determine who can and cannot use violence and when is based on or secondary to the rights of individuals, as it must be on an Individualist account, and,

as we are supposing, the rights of individuals permit the use of violence against person T for the recovery of stolen property and the punishment of stealing, it would seem that the state cannot legitimately prohibit person V from using violence against person T. This is because the authority of the state cannot trump the foundational rights of individuals, and since the right to violently recover stolen property is a foundational right of individuals, person V would have a justifying reason to disobey the orders of his political authority and pursue vigilante justice against person T. There may be other reasons for person V not to disobey his authority and to abstain from vigilante justice. But these reasons cannot include the authority of the state to simply prohibit all from using unauthorized violence, including violence that is justified by the foundational rights of individuals. In other words, the state does not have a monopoly on legitimate violence; it does not have the unique authority to decide what acts of violence are legitimate and which are not. That authority must remain with the individual.

The central point here is that Individualism cannot justify the alienation of the authority to engage in just violence from the individual to the political sovereign. At most, the state and its adjudication procedures can be one method among many for individuals to employ violence in pursuit of their rights. When the state is ineffective in preserving the rights of individuals, individuals have the authority to pursue other means of preserving them. When an individual has had her rights violated and this violation constitutes just cause for the use of violence, yet the state fails to enforce her rights, the individual has the right to pursue violent means to recover her rights beyond the established procedures of the state. In other words, the individual has the right to pursue violent vigilante justice.

Moreover, the authority to determine when the individual has the right to pursue violent vigilante justice belongs to the individual, not to the state. The state's judgments on the issue are

not independently binding on the individual. The individual maintains the authority to review the judgments of the state, to criticize them in terms of justice, and to decide privately when the individual has just cause for violence. This is part of the private authority that individuals have prior to any political obligations and, thus, it cannot be alienated from the individual to the political authority. The individual may wrongly judge that she may engage in unauthorized violence and yet pursue violence. When this happens the individual is responsible for unjust violence. Nevertheless, she has the authority to judge when she is permitted to engage in violence and when not. The state simply cannot monopolize authority over violence.

The general conclusion that can be drawn is that without the alienation of the authority to engage in just violence from the individual to the sovereign, there is no departure from the state of nature in crucial respects. From the perspective of early modern social contract theory, Individualism prohibits the alienation of authority over violence from the individual to the sovereign and this means that the crucial difference between the state of nature and its absence cannot be legitimately achieved by a political society. The ethics of Individualism make it impossible to justify a complete departure from the state of nature. Thus, the Individualist rejection of public war entails a rejection of political authority in this respect: the state cannot justifiably monopolize legitimate violence.

#### McMahan's Just War Theory and Political Authority

These conclusions pose a challenge for McMahan and anyone who rejects public war on Individualist grounds. McMahan does not offer a systematic picture of the nature and purpose of political society. For this reason it is unclear whether he would be troubled by my argument that the Individualist rejection of public war undermines the authority to use the collective force of the community. McMahan does, however, make comments relevant to my concerns regarding

authority to violently enforce the public will and the monopoly on legitimate violence. Let us consider McMahan's views on these issues in turn.

As we've seen, McMahan argues that failing to hold combatants morally responsible for their participation in war because they are agents of political authority is always a mistake. For him, all combatants, even those that are agents of political authority, are morally responsible for ensuring they are participating in a just war and using just means. This is because, as we have also seen, on no occasion can a political authority have responsibility for the decision to attack and kill people while the agents of that authority are obligated to obey their decision. For McMahan, the duty to not intentionally unjustly attack and kill other persons trumps any antecedent duty to obey the orders of a political authority. This is a rejection of the justifiability of condition A).

McMahan even imagines a case where a political community engages in a fully participatory referendum on the issue of whether or not to engage in a particular war and by an overwhelming majority votes for war. Supposing that the war the public has voted to engage in is, in fact, unjust, McMahan says that it is the responsibility of soldiers in that community to not participate in the war. If they participate, they are acting unjustly. Again, this is because, for McMahan, no political authority, not even a radically democratic one, can ever morally command its subjects to engage in unjust life-threatening violence against persons. The right of persons to not be unjustly attacked and killed prohibits one's participation in an unjust war even when the war is being declared and waged by one's legitimate political authority. As he says

If you participate in a referendum on whether to go to war, that does give you a duty that you owe to the other participants to abide by the outcome of the vote. But that duty is not absolute. It can be overridden if fulfilling it would require you to violate other, even stronger duties. And it is clear that your duty not to engage in the intentional killing of innocent people outweighs your duty to abide by the results of a referendum in which you have freely participated. Those you would wrong if you were to fulfill the duty derived

from participation in the referendum would be wronged to a far greater degree than those you would wrong if you were to default on that duty.<sup>26</sup>

But if McMahan's rationale for rejecting the possibility of combatants not being responsible for the justice of the wars they are participants in were accepted, we would then have to reject the possibility of fully realized political authority. His rationale applies not only to combatants in war but also to any violent agent of political authority including police officers, bailiffs, corrections officers, judges, and many others. Since all these agents engage in the violent enforcement of a political authority's will against persons who, according to McMahan have rights not to be unjustly attacked or killed that trump all political obligations to obedience, these agents must be morally obligated to only use life-threatening violence to enforce just orders. According to McMahan, this is because it is more wrong to unjustly attack or kill innocent persons than it is to disobey one's political authority. To use life-threatening violence to enforce an unjust order would be to unjustly attack and, on occasion, kill innocent people.

To be clear, McMahan's argument only commits him to the view that responsibility for the use of *life-threatening* violence must be distributed equally between legitimate political authorities and their agents. It is only the severity of the wrong of unjustly killing, or attempting to kill, people that trumps all antecedent political obligations. An agent could still be obligated to obey orders to commit sufficiently less severe acts of unjust violence because committing them is a trivial wrong when compared to the gravity of the wrong of violating the antecedent political obligation. In other words, McMahan could hold that a legitimate political authority's violent agent ought to obey orders, regardless of their justice, to engage in relatively insignificant acts of violence such as pinching or perhaps even tackling and pinning a person, but ought to disobey all orders to engage in more severe, life-threatening acts of violence that are unjust.

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<sup>26</sup> *Killing in War, ibid.*, pp. 77-8.

However, since McMahan apparently thinks that political obligations to obey are grounded only in the fact of a political subject's having willingly taken part in a fully participatory referendum over the relevant issues, it is unclear if he believes there are any obligations to obey political authorities in non-radically democratic systems of political authority such as exist in most democratic societies including the United States. It is even unclear whether he thinks that a person who simply chooses not to vote in a participatory referendum her political society conducts has any obligation to obey the outcome of the referendum. There are independent reasons to reject this as a theory of legitimate political authority and the political obligations of subjects.

Nevertheless, even if we grant McMahan's view of legitimate political authority, it would still entail that no legitimate political authority can, in fact, have a unique authority to use life-threatening violence. The authority to use life-threatening violence would always be equally distributed between the authority and its agents. This entails that political sovereigns cannot realize the unique authority to use life-threatening violence to enforce its will on its subjects.

Recall the case involving the police officer ordered to enforce a law against carrying concealed firearms. Given that in this case enforcing the law will require the use of life-threatening violence and the officer is convinced that the law is unjust, according to McMahan's rationale, the officer should not attempt to force the law-breaker to abide by it. This is because if the officer should use life-threatening violence against a person violating the law, he would, in the officer's mind anyway, be unjustly using life-threatening violence against an innocent person. For McMahan this would implicate the officer morally. He would be an unjust purveyor of violence and death. On McMahan's rationale, if an order from a political authority involves

the use of life-threatening violence against persons, then it is the responsibility of the agent of the authority to ensure that the order fully complies with justice.

But, again, this would mean that the ostensible political authority in fact has no unique authority to use life-threatening violence to enforce itself on its subjects. Because the enforcement of political authority entails the threat and, on occasion, the use of violence, including life-threatening violence, the political authority must have moral responsibility for the employment of this violence, not its agents. Otherwise, there would be no unique political authority over life-threatening violence in the political order at all. In short, the problem with McMahan's view of the ethics of military service is that it entails a view of the ethics of law enforcement that takes away a necessary part of political authority.

Thus, McMahan's attempt to limit the authority of political sovereigns by asserting that their agents are not morally bound to obey them when they are ordering life-threatening violent acts against persons has very far-reaching consequences. If there is to be fully realized political authority at all, there must be occasions when the political authority can legitimately demand obedience from its agents in enforcing its authority with life-threatening violence and those agents are to dutifully obey those orders. Assuming that there is such a thing as legitimate political authority and this authority ought to be socially realized, McMahan's rationale for rejecting this division of moral labor must be wrong. It must be the case that, sometimes, the duty of agents of public violence to obey the orders of their political authorities trumps any duty they may have not to engage in unjust life-threatening violence.

Incidentally, the rationale other critics of public war have offered for their assertion of the duty of soldiers to only participate in just wars have gone much further than McMahan's. Igor Primoratz, for example, argues that a legitimate political authority's orders are not morally

sufficient to absolve a soldier from the duty to not participate in an unjust war because political authorities have no authority whatsoever to order their agents to do anything unjust, whether violent or non-violent. Political authorities, for him, are not morally different from any other person or institution. Just as I am not obligated to follow my employer's orders to act unjustly, so too I am not obligated to follow my political authority's orders to act unjustly. As he says,

[T]he fact that an individual is ordered, rather than merely invited, to join the armed forces, can't release him from the responsibility of doing his best to find out whether it would be morally right for him to do so. We are constantly enjoined to do all manner of things by other individuals, groups, and institutions—and we are always bound to do some moral thinking for ourselves and check whether we really ought, or indeed may, do their bidding. In this respect, the state has no special status that exempts its commands from independent moral evaluation.<sup>27</sup>

This seems to me to be a complete denial of political authority altogether. If this were true, then not only would soldiers have no duty to engage in an unjust war declared and waged by their authority, but no agent of political authority would have an obligation to do anything unjust, violent or non-violent, their political authority orders. This would render political authority completely unrealized. Both ostensible authorities and their agents would always be independent political authorities in themselves each charged with the duty to decide privately what should and should not be carried out. There would thus be no unique political authority at all at work within any political and legal institution.

This being said, the problem McMahan's (and Primoratz's) view of just war poses for the possibility of realized and effective political authority is actually much deeper than this. McMahan's work on just war only focuses on the issue of moral responsibility for life-threatening violence against others in a political community. That is, he is only concerned with the justifiability of condition A). This is a major shortcoming in his work on justice and war. The

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<sup>27</sup> "Walzer's Just War Theory," *ibid.*, p. 226.

fact is that to participate in war is more than simply to participate in attempts to kill or threats of killing other people. It is also to participate in conduct that subjects one's self to attempts to kill or threats of killing by others. Thus, the possibility of the justifiability of obligations to participate in actions that threaten one's own life is morally relevant to the discussion of justice in war. That is, the justifiability of condition B) must come under scrutiny.

Once this issue comes under scrutiny, McMahan's view, like all Individualist views, would seem to entail a rejection of the justifiability of obligations to participate in actions that put one's own life at risk. For McMahan, the individual's right to life is of paramount significance in the justice of war. Thus, an individual would seem to be permitted to refuse to participate in any war ordered by her political authority, even just wars, because war is threatening to the agent's life. There can be no obligation to serve in war, even a just war. A soldier can be permitted to serve but is always permitted to refuse to serve. For a view like McMahan's not only is a soldier obligated to privately review all orders to engage in war in terms of their justice and refuse to participate in unjust wars, but a soldier is always permitted to refuse to serve in any war because war is dangerous. Thus, McMahan's view entails a rejection of the justifiability of condition B).

Therefore, if a political community engages in a fully participatory referendum on the issue of whether or not to go to war and by an overwhelming majority votes for war, its soldiers are permitted to refuse to engage in war even if the war is just because the war puts soldiers in personal danger. As McMahan states, participants in a democratic referendum have an obligation to the other participants to abide by the outcome of the vote. But this duty can be outweighed by other considerations. Surely, the preservation of the life of the participant in the vote outweighs the duty to abide by its outcome. Soldiers therefore have no obligation to engage in war and,

thus, the political community would have no sound moral complaint to render against soldiers who refused to fight in a just war. In the extreme, this would make it perfectly permissible for soldiers to refuse to obey orders to defend their own political community against aggressive external attack.

This reveals the extent to which Individualism undermines authority over war. And as we have seen in the previous section, this logic also undermines authority over public violence generally. Our police officer contemplating whether or not to enforce a law against carrying concealed firearms would be permitted to refuse to do so even if the law is just. His right to not be forced to participate in conduct that threatens his own life would permit his refusal. This would make it impossible for political authority to be fully realized. Unless we are prepared to give up on the possibility of realized political authority, we must hold that agents of violence can be obligated to put their own lives on the line upon the command of a political authority.

Before moving on to the issue of monopolies of legitimate violence, it should be made clear that to take the view that violent agents of authority can be obligated to obey orders to engage in unjust life-threatening violence against others and to be obligated to obey orders that threaten their own lives, does not commit us to the view that fully realized political authority requires that there are no circumstances where an agent of political authority ought to disobey an unjust order to employ violence. We can admit that, on occasion, they ought to disobey without threatening political authority. What we must deny, however, is that political authority can exist while the occasions on which its agents ought to disobey the authority's orders to employ violence are coextensive with all occasions when those orders are unjust. It does not threaten the existence of political authority to hold that only in cases where the order to use life-threatening violence is obviously unjust must a violent agent disobey and in all other cases he ought to obey.

This is an important point as McMahan considers a case of criminal punishment to support his assertion of the limits of political authority over life-threatening violence. He considers the case of an executioner who knows, with certainty, that a prisoner set for execution is innocent and there is no possibility for the executioner to alert the authorities to the prisoner's innocence. McMahan argues that given this knowledge and the duty of the executioner to not unjustly kill innocent people, the executioner should not only refuse to execute the prisoner, but also help him escape. As McMahan says, "[The executioner's] duty not to execute an innocent person outweighs and overrides his institutional duty to perform the execution."<sup>28</sup>

McMahan may be right that in this case the executioner has a duty to disobey his authorities. However, it is a highly unusual case. The executioner knows, with certainty, that the prisoner is innocent. In this case, the executioner's knowledge is of an empirical matter. The executioner knows, with certainty, that the prisoner did not commit the crime for which he was convicted. We can suppose he knows, with certainty that the prisoner was not at the scene of the crime and could not have participated in it or maybe even that the executioner witnessed the crime and saw that it was not the prisoner. This is a specific sort of knowledge that gives the executioner a strong reason to reject the justice of the execution of the prisoner and his duty to carry it out. From the point of view of the executioner, this execution is obviously unjust.

It would be very different, however, if the executioner viewed the execution of the prisoner as unjust because, say, he morally disagreed with the application of the death penalty to the crime that the prisoner in fact committed. Suppose the prisoner was sentenced to death for second-degree murder and the executioner thinks second-degree murderers do not deserve the death penalty, though first-degree murderers do. Suppose, further, that he is right—second

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<sup>28</sup> *Killing in War, ibid.*, p. 73.

degree murderers do not deserve to die but first-degree murderers do. Should he carry out the execution? If we assume that political procedures that deserve loyalty gave rise to the legal applicability of the death penalty to second-degree murder and that the murderer was convicted and sentenced by appropriate legal procedures, I think that in this case the executioner ought to carry out the execution. He owes it to his political authority despite the fact that the execution, strictly speaking, would be unjust. If true, this means that agents of political authorities can be obligated to unjustly kill people. This is because it is not the responsibility of the executioner, as an agent of deadly violence for his political authority, to only carry out just death sentences. The full responsibility for imposing just death sentences falls on the political authority itself. This is so despite the fact that on some occasions the executioner ought to refuse to carry out executions on the grounds that they are unjust.

Therefore, it is consistent with the existence of fully realized political authority to hold that on some occasions agents of the authority ought to disobey orders to commit life-threatening violence but only in certain extreme cases. What the existence of political authority depends on is that violent agents of that authority are not obligated to disobey all orders to commit violence, including life-threatening violence, that are unjust.

We can turn now to the implications of McMahan's just war theory for the possibility of a monopoly of legitimate violence. McMahan considers the concern that his reasons for giving soldiers the duty to refuse to serve in unjust war they are ordered to fight in by their political authorities might permit them to engage in a just war that is not authorized by their political authorities. If soldiers can refuse to obey orders to fight, why can't they also refuse to obey orders not to fight?

McMahan argues that, except in extreme cases, soldiers ought not to engage in unauthorized wars, even if those wars have a just cause. For McMahan, this is primarily because when soldiers engage in war they do so, or are understood to be doing so, as agents of their state and its citizens. Thus, when soldiers engage in unauthorized war they “expose the state to all the dangers of war, commit the resources of the taxpayers to war without their consent, and establish a precedent for doing the same thing again in the future.”<sup>29</sup> These harms soldiers necessarily subject their political community to by engaging in unauthorized war give soldiers a duty to only engage in war that their political community has authorized. This duty could be overridden in extreme cases, but it will not be overridden in most cases where there is just cause for war yet the political authority fails to authorize war. Thus, it is generally impermissible for soldiers to engage in unauthorized war.

However, McMahan states that this prohibition of unauthorized war only applies to soldiers as such. There is nothing to prohibit people who are soldiers from going to war as private persons and not as soldiers of a particular state. If there is just cause for war and the soldier’s political authority fails to authorize war, the soldier can abandon his role as soldier and engage in war as a private person. As McMahan says,

Nothing I have said thus far implies that it is impermissible for individuals to fight in war without authorization from their state. I have argued only that individuals may not fight without authorization as soldiers—that is, as individuals who act officially as agents of the state in its military conflicts. If there is a war in which a soldier believes that he is morally required to fight and his government refuses to authorize the state’s military to fight, then he must somehow extricate himself from his role as a soldier. Once he ceases to be a soldier, it is permissible for him to join a war to fight for a just cause, as members of the International Brigades did in fighting against the Fascists in the Spanish Civil War.<sup>30</sup>

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<sup>29</sup> *Killing in War*, *ibid.*, p. 93.

<sup>30</sup> *Ibid.*, p. 94.

It is clear from this that McMahan believes that the members of a political society maintain the private authority to go to war. It is not a necessary condition for citizen's engagement in just war that their legitimate political authority authorizes the war. This entails that there is no monopoly on legitimate war in a political community. Though McMahan argues that there is something approaching a monopoly of legitimate war waged by the state-sponsored military, there is no such monopoly on war waged by the members of the community as such.

McMahan does not explicitly state why there cannot be such a monopoly but it seems clear that he believes that the individual's right to engage in just war as a private person cannot be alienated to a political authority such that the individual is prohibited from engaging in war without prior authorization by the political authority. The authority to wage just war and to judge when there is just cause for war always remains with the individual. As was argued above, this conclusion would follow from any non-pacifist Individualist perspective wherein all political authority is derived from or secondary to the rights of individuals. The rights of the individual would thus limit the rights of political authority. If the authority to wage just war is among the foundational rights of individuals, then there cannot be an obligation to only engage in war authorized by another, especially by the state.

This view has extreme implications and it is unclear whether McMahan fully appreciates them. The rationale here for rejecting monopolies on legitimate war undermines monopolies on legitimate violence generally. For the same reason a person has the authority to ignore the commands of their political authority and may go to war without authorization, a person would have the authority to engage in violence without authorization. Just as a citizen always has the authority go to war as a private person, the citizen always has the authority to engage in violence as a private person. The citizen can exercise this authority unjustly by, for instance, engaging in

violence that lacks a just cause, but the authority to determine what constitutes just violence is always distributed individualistically. There thus cannot be a monopoly on legitimate violence.

At the practical level, what this entails is that states and their procedures for adjudicating disputes between their members are simply one avenue among many which members have to pursue just resolutions to their disputes. If the state's adjudication procedures do not render their members just resolutions to their disputes and those disputes are over harms that constitute just cause for violence, members have the right to pursue vigilante violence in pursuit of justice. Moreover, the authority to determine when a person has just cause for violence and when the state has failed to justly resolve disputes is privately held by every member of the community. This entails that members of political communities have the authority to resolve their disputes with extrajudicial violence. The members of political communities can engage in unjust extrajudicial violence, but they nevertheless have the authority to pursue such violence based upon their private assessments of its justice. The state cannot prohibit extrajudicial violence as such on the grounds that only the state can engage in violence against its members.

In this respect, McMahan's theory of just war is a theory of just violence in the state of nature as conceived by early modern social contract theory. The same conditions that apply to the just use of violence in the state of nature apply always, regardless of the apparent existence of political communities in the contemporary world. I have argued above that McMahan's just war theory is a theory of private war and is the application of the theory of Discrimination in war in modern just war theory to war at large. The point here is that to take the theory of just private war as just war theory is to deny that human society has completely departed the state of nature. For Individualist philosophy, the theory of just private war is the theory of just violence in pre-political life. For the contractarian tradition, it is this pre-political life with its equal distribution

of authority over violence to all individuals that makes the institution of political authority and its monopoly on legitimate violence desirable. McMahan's view, indeed, all Individualist views, however, renders the departure from the state of nature impossible in this respect.

#### Conclusion: Concerns About Political Authority Over Violence

The goal of this chapter has not been to level a *reductio ad absurdum* argument against Individualism and its rejection of public war. It is not absurd, strictly speaking, to reject public war and the possibility of political authority over violence. My goal has been more modest. The aim of this chapter has been to show that the Individualist rejection of public war entails a rejection of the possibility of legitimate political authority over violence and that this places severe limitations on the scope of political authority. The Individualist theory of private just war is a quasi-anarchist philosophy. Most contemporary just war theorists who deny the legitimacy of public war have not been cognizant of the implications of their views for political authority. My aim has been to demonstrate these implications and show that they are extreme. I have succeeded simply if it is admitted that these implications must be accepted by anyone who rejects public war on Individualist grounds.

It is my hope, however, that the illumination of these implications will shift the burdens of justification in the debate over justice and war to some degree. At the very least, I think the implications of an Individualist perspective on just war should cause us to hesitate to think of the justice of war in Individualist terms. In this hesitation, I hope enough room opens for the consideration of alternative perspectives on just war, namely, Anti-Individualist perspectives.

Up to this point, I have deliberately omitted any evaluation of the quality of social life without a political authority with unique authority over public violence and focused solely on the theoretical implications of Individualism on political authority. Interestingly, some have

predicted that social life would not be harmed without authority over public violence. Robert Paul Wolff, for instance, argues that not only is political authority over war inconsistent with the rights of individuals, but that political authority as such is inconsistent with the rights of individuals. He is perfectly happy to accept the absence of not only political authority over violence, but of political authority itself. On the issue of the absence of authority over armed forces, Wolff tells us that this is nothing to be deeply concerned about. He says,

The idea of voluntary compliance with governmental directives is hardly new, but it inevitably provokes the shocked reaction that social chaos would result from any such procedure. My own opinion is that superstition rather than reason lies behind this reaction. I personally would feel quite safe in an America whose soldiers were free to choose when and for what they would fight.<sup>31</sup>

This point does not capture the full extent of the implications of Individualism on political authority however, implications that Wolff is clearly aware of. As we have seen, according to the Individualist rejection of public war, not only would members of the US military be free to choose when and for what they would engage in war, but law-enforcement officers and citizens of the US generally would be free to choose when and for what they would fight both foreigners and each other. Presumably, Wolff would feel perfectly safe in this America too.

In response to this, I will only briefly state why I would not feel safe. The idea of granting the members of the US military the right to refuse to fight in any war, the right of law-enforcement agents the right to refuse to violently enforce laws, and all US citizens (including soldiers and law-enforcement agents) the authority to engage in any manner of just violence makes me feel insecure. I want my armed forces (both the military and law-enforcement agencies) under control and I want my fellow citizens to lack the private authority to engage in private violence. This is, in part, because I worry about the ability of my country to defend itself

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<sup>31</sup> *In Defense of Anarchism, ibid.*, p. 80.

and its members against external or internal threats by summoning the necessary armed force upon command. This is the concern MacIntyre expresses about the implications of liberal morality, a component of which is Individualism, regarding national defense. As he says,

Every political community except in the most exceptional conditions requires standing armed forces for its minimal security. Of the members of these armed forces it must require both that they be prepared to sacrifice their own lives for the sake of the community's security and that their willingness to do so be not contingent upon their own individual evaluation of the rightness or wrongness of their country's cause on some specific issue, measured by some standard that is neutral and impartial relative to the interests of their own community and the interests of other communities. And, that is to say, good soldiers may not be liberals... So the political survival of any polity in which liberal morality had secured large-scale allegiance would depend upon there still being enough young men and women who rejected that liberal morality.<sup>32</sup>

But, more importantly, I also worry about the members of my community themselves independently deciding to threaten my country, its citizens, and other peoples. I believe that authority over agents of public violence is not only necessary to defend the public from external or internal aggression, but also to protect the public and external communities from those among us who fancy themselves legitimate agents of violence.

At this level, my concerns about the implications of the Individualist rejection of public war are of the same kind as the various social contract theorists raise about the insecurities attendant to the state of nature. McMahan is, in effect, defending the state of nature as a perfectly livable world.<sup>33</sup> It seems to me that what underlies this faith in the state of nature is a belief in a universal moral order and a universal ability of people to easily grasp that order and readily apply it impartially to their lives. On this view, people are generally obedient to the universal moral law without the need for coercion. Because of this, advocates of the state of nature believe

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<sup>32</sup> "Is Patriotism a Virtue?" in *Global Ethics: Seminal Essays*, edited by T. Pogge and K. Horton (St. Paul, MN: Paragon House, 2008), pp. 135-6.

<sup>33</sup> This charge may not apply to Wolff who defends *philosophical* and not *political* anarchism. See *In Defense of Anarchism*, *ibid.*, esp. ch. III.

people do not need to have authority over violence taken away from them and a cadre of violent instruments does not need to be maintained.

I do not share this faith. On my view, people are partial to some more than others. This is not necessarily because they are irrational. I believe that the ethical point of view is inherently partial in that it is based on socially embedded relations between particular people. For this reason, I believe there will be radical disagreements between people and groups over justice and the justification of violence. Therefore, a social world wherein political agents of violence are free to disobey orders and all private citizens have the authority to engage in just private violence will be a violent and unhappy place. I cannot defend these views here but, if they are true, we have good reason to fear the state of nature.

## Conclusion

Assuming that the previous chapter has raised sufficient doubts about Individualist just war theory and its commitment to an exclusively private theory of war, we may close by briefly considering whether there are any viable alternatives. The form of just war theory that stands as the relevant alternative because it avoids the implications that were found to be troubling in the previous chapter and has significant historical precedent is the theory of public just war. The theory of public war holds that political authorities can have full and exclusive moral responsibility over the justice of war and that political authorities may legitimately command their subjects to engage in war. This view of war, supposing it can be given a coherent justification, does not threaten to undermine the possibility of fully realized political authority nor the possibility of political authorities having monopolies on legitimate violence. In these respects, the theory of public war is consistent with conventional views of political authority.

Any defense of public war must meet at least two important challenges that have been revealed by the argument of this dissertation. First, because public war cannot be defended on Individualist grounds, an alternative theory of justice would have to be employed in its defense. If a defense of public war is to be successful it will have to make such a theory of justice defensible. Second, assuming we can give a sound theoretical defense of public war, it will have to be shown how this theory can produce a plausible theory of just war, in particular, it must be shown how such a theory can produce a plausible principle of Discrimination in war. As we have seen, Individualism was introduced into an otherwise Anti-Individualist public just war theory in order to justify a principle of Discrimination that permits deliberately attacking combatants yet prohibits deliberately killing noncombatants. This was Vitoria's significant (and problematic)

contribution to just war theory. Grotius and Walzer too employ Individualist ideals that contradict their commitments to public war in their attempt to defend a principle of Discrimination. It seems that many have been unable to see how a theory of public war could coherently justify a plausible principle of Discrimination in war. If a theory of public war is to be successful it will, at a minimum, have to show how it can coherently accomplish this.

I will not meet the first challenge here but will merely suggest what kind of theoretical positions would need to be justified in order to justify public war. I will, however, show how this theory can meet the second challenge, that is, I will show how it can coherently defend a plausible principle of Discrimination. With these ends in view, it will be illuminating to briefly discuss Rawls' view of just war in his *The Law of Peoples*.<sup>1</sup>

Though it is true that Rawls is not, ultimately, an Anti-Individualist, he does defend a theory of public war and a principle of Discrimination in just war that is consistent with the theory of public war. His justification of public war is foundationally an Individualist theory of justice. For this reason his defense of public war is unsuccessful for reasons similar to Grotius and Walzer's theories. However, Rawls' defense of public war points to a way of coherently defending public war and a principle of Discrimination that could be seen as a viable alternative to Individualism and private war.

Rawls argues that a war has a just cause when it is waged as defense against aggression. Importantly, for Rawls the subject of this right to war is all well-ordered peoples, not simply individuals. For Rawls, just war is a relation between peoples, not arbitrary sets of individuals (§2, and §13.2). Rawls defines a liberal people as a community with liberal political institutions, a specific cultural identity and attendant "common sympathies" among its members, and a moral

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<sup>1</sup> (Cambridge, MA: Harvard University Press, 1999).

nature (§2.1). Thus, liberal peoples are not simply sets of individuals but are particular institutional schemes composed of individuals with a common cultural identity and possessing a particular moral character.

Liberal peoples have specific interests as peoples with a moral nature. These interests are “to protect their territory, the security and safety of their citizens, and to preserve their free political institutions and the liberties and free culture of their civil society” (§2.3; see also §3.3). Rawls adds another interest that he associates with Rousseau’s *amour-propre*. This is a people’s proper self-respect or proper patriotism for themselves as a people. This self-respect or patriotism is a pride in their historical achievements and their culture (§3.3 and §5.1).

What is noteworthy about these interests is that, at least some of them, are inherently collective and are distinct from the private interests of the individual members of peoples. For Rawls, what a people fights to defend in a defensive war includes a certain cultural milieu and a particular civic identity. Just war for Rawls is war over the preservation of a particular community and its basic structure. A people fight a just war to preserve themselves as the particular kind of people they are. They are motivated in this by their proper patriotism. Thus, just war is not immediately a fight to preserve a set of private individuals.

Though decent peoples are not liberal, they qualify for membership in the Society of Peoples and have rights to war for self-defense. Among his reasons for extending this equality to decent peoples, Rawls claims that decent peoples are due respect as peoples. To deny them this respect is to mistreat them. Rawls appears to believe that decent peoples warrant a proper patriotism. The history and culture of such people are to be honored by its members and by others. This is, in part, why decent peoples have a right to self-determination and to war in self-defense. The following passage provides one of Rawls’ reasons for respecting decent peoples.

Leaving aside the deep question of whether some forms of culture and ways of life are good in themselves (as I believe they are), it is surely, *ceteris paribus*, a good for individuals and associations to be attached to their particular culture and to take part in its common public and civic life. In this way political society is expressed and fulfilled.

This is no small thing. It argues for preserving significant room for the idea of a people's self-determination and for some kind of loose or confederative form of a Society of Peoples. Recall that peoples (as opposed to states) have a definite moral nature. This nature includes a certain proper pride and sense of honor; peoples may take a proper pride in their histories and achievements, as what I call a "proper patriotism" allows... Liberal peoples must try to encourage decent peoples and not frustrate their vitality by coercively insisting that all societies be liberal. (§7.3)

Therefore, decent peoples seem to have the same interests as liberal peoples, including the interest in preserving their basic structure and civic culture, as well as the interest in being treated with respect by other peoples. It is these interests that a decent people may legitimately serve when it goes to war in self-defense. As Rawls says, "decent peoples... have something worth defending" (§13.2).

But what is really interesting in the above passage is that Rawls asserts that participation in one's own culture and civic life is itself good. Presumably, this good exists for all people who are members of a political society and culture, even a nonliberal society and culture. Indeed, Rawls uses this point to justify giving equality to nonliberal, yet decent peoples. For Rawls, the fact that there is value in participation in one's own particular political community and its civic culture argues for the right of nonliberal peoples to self-determination and defensive war. The question then is, "Why shouldn't the same fact justify the equality of all political societies and cultures, not simply liberal and decent ones?"

The answer is that respect for human rights marks the boundary between members of the Society of Peoples and nonmembers. No matter how good participation in one's own political culture is, it does not outweigh the obligation to respect human rights. Thus, a political community's right to self-determination is limited by its respect for human rights. Only basic

structures and civic cultures that respect human rights are worthy of equality and self-determination (§10.2). A people's political self-determination is undermined by human rights violations. The right to political self-determination and the right to war in self-defense apply only to societies that respect human rights.

For this reason, Rawls' principle of just cause gives only liberal and decent peoples the right to war in self-defense. Such communities have the right to go to war for the sake of preserving their basic structure and their civic culture. The right to war is the right to fight for the sake of these social structures and systems of relations. But only liberal and decent societies have this right to protect themselves because their basic structure and civic culture respect or make possible respect for human rights. Thus, the ultimate reason that liberal and decent societies have the right to protect themselves via war is that their institutions and cultures are necessary for human rights to be realized. Just war is thus war to protect cultures and institutions that are necessary for respect for human rights (§13.2). Though just war is immediately about preserving certain cultural and institutional arrangements, it is ultimately about respecting human rights.

Importantly, included in this right to self-defense is the right of peoples to conscript their members into military service and to use them as violent instruments in war. Thus, for Rawls, not only does the importance of a society's basic structure and civic culture justify going to war for its preservation, it also justifies using its own members as instruments of violence. Rawls claims that although this conscription is a violation of individual liberty, this violation is justified so long as it is necessary to preserve the political and social structures that make individual liberty possible. Thus, we may use the members of our community as instruments of war when it is necessary for the sake of the preservation of the cultural and political conditions that enable their liberty. In other words, we may violate a person's liberty only for the sake of their liberty.

As he says, “To trespass on citizens’ liberty by conscription, or other such practices in raising armed forces, may only be done on a liberal political conception for the sake of liberty itself, that is, as necessary to defend liberal democratic institutions and the civil society’s many religious and nonreligious traditions and forms of life” (§13.2).<sup>2</sup>

What we find in Rawls then is a theory of public war. For Rawls, political authorities have the authority to wage war and subjects have, in some cases, the obligation to serve in war. What justifies war and the obligation of citizens to serve is the value of certain kinds of basic structures and cultures. Though Rawls claims that membership in one’s own political community and culture is a good, it is not the good that grounds the justification of public war. What grounds the justification of public war are human rights, specifically the right to liberty. We fight, and use the members of our communities in these fights, to preserve social and political ways of life that preserve freedom. Just war, even though it turns individuals into instruments and therefore violates their freedom, is just nonetheless because it is done to preserve the conditions that make freedom possible.

Out of this theory Rawls defends a principle of Discrimination in war that permits deliberately attacking combatants in war and prohibits deliberately attacking noncombatants. Rawls’ argument for this principle is different from any we have seen thus far. Rawls claims that there are three relevant categories of members of aggressive communities that must be distinguished and treated differently. The categories are the state’s leaders and officials, its civilians, and its soldiers. Rawls claims that, for the most part, only the state’s leaders and officials are morally responsible for the injustice of their war. This blame does not belong to civilians and soldiers because we may assume that the state, as an outlaw state, is not well-

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<sup>2</sup> See also *A Theory of Justice*, revised edition (Cambridge, MA: Harvard University Press, 1999), §58.

ordered. Thus, the state was taken to war by its ruling elites, not by its non-elite civilians or its rank-and-file soldiers. The elites are the only ones to blame for aggression. Though Rawls does not say that this means we can deliberately target the elites in a just war, he does say that this means we cannot deliberately target civilians. Because civilians are not to blame for the injustice of the war, they are immune from attack.

Although soldiers, like civilians, are not responsible for the injustice of the war, soldiers, unlike civilians, may be deliberately attacked. This is because *soldiers need to be attacked in order to execute the just cause of the war*, i.e. to thwart the aggression that soldiers are carrying out. As he says, “The reason why [soldiers] may be attacked directly is not that they are responsible for the war, but that well-ordered peoples have no other choice. They cannot defend themselves in any other way, and defend themselves they must” (§14.1).

This justification of killing soldiers in war is the same justification Rawls gives of war itself. We may go to war when it is necessary to preserve a certain political order and its civic culture from aggression and we may kill enemy soldiers when it is necessary to preserve that same cultural and political order. This killing, notice, is explicitly the killing of innocent people. Thus, according to Rawls, we may use the members of our own society as instruments in war when it is necessary to preserve a well-ordered society, and we may kill innocent foreigners when it is necessary to preserve a well-ordered society. Contrary to Vitoria, Grotius, Walzer, and McMahan, it is irrelevant whether those killed have done anything to lose their rights. It is permissible to sacrifice people in order to preserve certain cultural and political orders. Note that there is no contradiction here between Rawls’ theory of public war and his theory of Discrimination. The reason a people may go to war is simultaneously the reason a people can kill enemy soldiers in that war.

Though Rawls says that the reason noncombatants are not to be deliberately targeted in war is that they are innocent of the crime of aggression, his justification of deliberately targeting soldiers is at odds with this. Quite explicitly, Rawls says soldiers may be deliberately attacked even though they are innocent. For Rawls, there is no distinction between soldiers and civilians in a community waging an aggressive war with respect to their moral innocence. Therefore, the reason that soldiers may be deliberately attacked while civilians may not cannot be that civilians are morally innocent while soldiers are not. For Rawls, what in fact distinguishes civilians from soldiers is the practical necessities of achieving the goals of a just war. To carry out a war in defense of a people against aggression, the aggressor's soldiers must be attacked whereas its civilians do not need to be attacked. Given that a just war is only a war that aims to thwart acts of aggression, then only the aggressor's soldiers could need to be attacked. Deliberately attacking civilians could not serve any just military purpose. Thus, when there is just cause for war there is just cause to kill soldiers but no just cause to kill civilians.

In this way, Rawls offers a theory of public war that coherently justifies a plausible principle of Discrimination in just war. This shows us that there is no contradiction between public war and reasonable Discrimination in war. In fact, Rawls shows us that a traditional principle of just cause in public war provides us with a clear moral reason to discriminate between soldiers and civilians.

Though the content of his just war theory is consistent in this respect, the theoretical foundations Rawls attempts to put beneath it do not support it. As we've seen, Rawls holds that in order to preserve its basic structure and civic culture, a well-ordered people may go to war using its members as instruments and may deliberately kill as many innocent people as necessary in the course of that war. This view clearly elevates the importance of well-ordered peoples

above that of individuals. To protect a people we may violate individual's liberties by conscripting them and using them as instruments in war, and we may deliberately take individual's lives despite the fact that they have done nothing to lose their rights. Indeed, because the use of people as instruments in war is more than merely the violation of their liberty, but is also the use of them as targets for the enemy in war, something Rawls is not cognizant of, Rawls' view entails that a people may sacrifice the lives (not merely the liberty) of its own members to preserve itself. Thus, for Rawls, a people may kill innocent members of the enemy community and sacrifice the lives of its own citizens to preserve itself. This could not be justified unless the value of well-ordered peoples trumped the value of individuals.

Rawls, however, has given us no reason for granting this supreme value to well-ordered peoples. In fact, his justification of the right of well-ordered peoples to self-determination and defensive war clearly contradict such a view. For Rawls, the ultimate reason well-ordered peoples are worth preserving is that they are necessary for the realization of human rights, especially individual liberty. For Rawls, these human rights are the supreme values of the Law of Peoples. But, if this were true, there could be no justification for sacrificing the lives of individuals for the sake of well-ordered peoples. Life is surely a foundational human right comparable to the value of liberty. Or, even if it isn't, life is surely a necessary condition for liberty. Thus, Rawls' view that individuals can be killed in war for the sake of their liberty is not valid from the point of view of human rights. To justify Rawls' theory of just war would require an appeal to something that is more important than life. This cannot be liberty. What good is liberty to the dead? Here, again, we find a failed attempt to justify public war on Individualist grounds.

So, how could public war be coherently defended? I think Rawls' defense of extending the right of self-determination and the right to defensive war to nonliberal though decent peoples points us in the direction. Rawls claims that membership and participation in one's own culture and common life is inherently good. If this is a good, then there would have to be value in the preservation of one's own culture and common life simply because it is one's own. If the value of these things could be given sufficiently greater significance than Rawls gives them, in particular, if they could be seen as worth dying and killing for, then we could find a coherent justification of Rawls' theory of public war.

Though it is unclear exactly why Rawls believes these things are good, recent communitarian theorists have defended their significance on the grounds that it is one's own culture and common life that provides a person with a system of meanings and lived relations that gives one a practical identity and the possibility of leading a meaningful life. Because of this, cultures and ways of life are inherently and supremely important. Without them, individuals lose their sense of self and the possibility of leading a meaningful life.<sup>3</sup> Thus, there is a strong reason for members of political communities to preserve their distinct common cultures and ways of life.<sup>4</sup> This reason might justify a people in sacrificing its members and killing innocent persons when it is necessary to preserve themselves against unjust harms or destruction. Moreover, because all members have an overwhelming interest in preserving them, political communities could justifiably create institutions and attendant political obligations that require their members to fight and die for the sake of the preservation of their common lives upon

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<sup>3</sup> See, for instance, Sandel, Michael, "The Procedural Republic and the Unencumbered Self," in *Communitarianism and Individualism*, edited by Shlomo Avineri and Avner de-Shalit (New York, NY: Oxford University Press, 1992), pp. 12-28.

<sup>4</sup> See, for instance, Taylor, Charles, "Irreducibly Social Goods," in *Philosophical Arguments* (Cambridge, MA: Harvard University Press, 1995) pp. 127-145.

command. In addition, on this view, the value of the preservation of distinct cultures and political ways of life would be equal for all peoples. Here, all peoples would have an equal interest in their self-determination and defense against aggression.<sup>5</sup>

In this way, a theory of public war could be grounded coherently in the value of political and cultural ways of life. On this view hangs the hope of avoiding the theory of private war and the Individualist evisceration of political authority.

This theory would depart from Rawls' theory of just war in a number of ways. Most importantly, it would grant all peoples, not simply well-ordered peoples, the right to self-determination and defensive war, and it would prohibit many of the humanitarian interventions to end human rights abuses that Rawls' theory permits.

However, this theory would have one important thing in common with Rawls' theory. Rawls has shown us how the theory of public war can consistently ground a plausible principle of Discrimination. Despite the fact that on this theory just war aims at preserving cultural and political communities as such and justifies killing innocent people to do so, it can still readily prohibit deliberately targeting noncombatants in war. So long as the theory holds that only defensive wars are just, then deliberate attacks against noncombatants would be contrary to the purposes of just war. In a defensive war, the only category of individuals who may permissibly be deliberately attacked are those who need to be attacked in order to preserve the community that is the victim of aggression. Those who need to be attacked are only the combatants fighting in an aggressive war and not the noncombatants.

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<sup>5</sup> For a defense of equal national self-determination along these lines see Walzer, Michael, "Nation and Universe," in *Thinking Politically* (New Haven, CT: Yale University Press, 2007) pp. 183-218.

I do not wish to claim here that this alternative theory of just war and the theory of justice underpinning it are wholly defensible. The only point I wish to make is that such a theory ought to be on the table in the still very much unfinished debate over justice and war.

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