

THE MORALITY OF NATIONAL DEFENSE:
AN ARISTOTELIAN-THOMIST ACCOUNT

by

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ABSTRACT:

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The Morality of National Defense: An Aristotelian-Thomist Account

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In current just war theory debates, some scholars claim that a moral right to defend a nation cannot be demonstrated. Others claim that any case for the morality of even defensive war must reflect standards of interpersonal morality. This dissertation goes back to the natural law tradition behind just war theory to offer a moral argument in favor of national defense that is not based on an individualist account, but also rejects absolute accounts of national sovereignty, with its attendant problems. National defense is usually but not always just.

I defend arguing from “a tradition” in MacIntyre’s sense, and distinguish Aristotelian-Thomist natural law, my tradition, from post-Grotius and “new” natural law.” I defend the tradition against Hume’s attack on moving from “what is” to “what ought to be.” I stress the natural law revival in jurisprudence since the weakness of positive law to deal with World War II intra-state crimes became clear at Nuremberg.

As the tradition differs sharply from much current moral reasoning, I elucidate five areas of difference: a social approach vs. individualism, an architectural approach vs. an exploration of intuitions, primarily subjective vs. primarily objective evaluation, belief in human nature vs. a denial of it, and a stress on justice vs. subjective human rights.

I ground individual defense in a morality based on the objective value of human (and other forms of) existence and the *telos* of flourishing individually and as groups. I argue for a proportionate use of force to defend property. I base the justice of defending a state on its

necessity for human flourishing, its natural duty to defend its citizens, and the necessity of defense for ongoing existence.

I next argue against opposing positions, in terms of their own traditions, primarily Jeff McMahan and David Rodin. I critique both for rejecting the morality of defense against innocent threats, for bad derivations of individual rights, and for objective approaches to morality. I further critique McMahan for his claim liability to be killed can rest on a responsibility less than culpability. I then critique Rodin on a variety of internal logical grounds.

“Fires will be kindled to testify that two and two make four. Swords will be drawn to prove that leaves are green in summer.”

[G.K. Chesterton, *Heretics* (1905, pp. 304-05)]

TO SCHOLARS AND TEACHERS, FAMILY AND FRIENDS

Who have helped me see the meaning and importance of the common good

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CHAPTER I

DEFENSE AND THE NATURAL LAW

“The true soldier fights not because he hates what is in front of him, but because he loves what is behind him.”

—GK Chesterton¹

Every contemporary work on war begins with a proclamation of the inhuman ugliness of it. This recent custom is right and good. War appears to be, on its face, the ugliest of large-scale human endeavors. Its bottomless miseries and savage injustices fill our books, screens, and stages as we try to make some kind of sense of what appears to be shrieking madness acted out by people who, at least when a war is launched, appear relatively sane. Huge scientific, technological, and organizational advances, applied to (and to some extent growing out of) war, have only magnified the ugliness for those involved—and those involved, in the theaters of modern wars, vastly outnumber combatants.

Our paradox is this: most of us also find some wars worth fighting. It was not long ago that poets, among their war laments, could also praise heroes fighting abroad to right some wrong—or fighting an advancing invading force. And the poets only put into words the thoughts and beliefs of people. This was hard enough when axes, arrows, and bullets could lead to a nasty

¹ Chesterton, G. K. (1911, January 14.) *Illustrated London News*. Retrieved from <http://truthlife.net/quotes/g-k-chesterton-quotes/>

quick death, or a slow death of relentless pain. Since war has been industrialized, the horror seems much greater. But despite all this, the idea of pacifism as a universal moral imperative, though far from vanquished, has not won the day. For most of us, if my country is attacked without sufficient reason, it ought to be defended. That leads naturally to a moral option, or even duty, of defending friendly countries unjustly attacked.

But there is competition for the title of ugliest large-scale human endeavor, including the organized slaughter of large groups internal to, and by, a state. The conscience of much of the world was shocked by the Nazi attempt to exterminate the Jews of Europe. A look at a certain kind of history reveals that this horror was preceded by the *Holodomor*, the organized and directed famine (supplemented by death trains to what amounted to starvation camps) in Ukraine and other parts of the Soviet Union, with a probable death toll in the range of 14.5 million human beings (Conquest 1986, p. 306). A survey of the late twentieth century reveals that the slogan, “never again!” has not exactly overwhelmed the whole world: Cambodia, Ethiopia, and Rwanda have also seen slaughters or famines organized by states. Large-scale abuses of human beings in the Balkans, relatively minor in scale compared to these latter atrocities, have generated responses that most in the western world think worthwhile even if belated or badly done.

Even if many of us are dubious when politicians proclaim that a superpower is defending itself, the notion of really defending one’s state still seems good to most of us—at least if it is possible. And even if many of us have become highly doubtful of the calls of politicians to end human rights abuses abroad, especially after Iraq, Afghanistan, Libya, and Syria early in this century, not a few will argue that when a whole section of a country is being systematically slaughtered (rather than brutally repressed), there is a duty for powerful nations to intervene.

Neither the horrors of war nor the cynicism of politicians have convinced everyone that war is always best avoided, although what we should do with that thought is often far from clear.

If some kind of guidance is available for whether, when, and how wars ought to be fought, it is obviously worth having. In a western university, those who ask these questions will be directed to a course studying just war theory. Pundits who write opinion columns and bloggers sharing more than their most recent pop-culture-inspired thoughts will also glance at the books and articles that comprise this theory or tradition today. I want to offer a very minor contribution to today's discussions, in response to a controversy within the theory today, and particularly two currents within that controversy. The controversial subject, surprisingly, is whether the defense of a nation-state can be justified at all. One current says yes, but only if that defense can follow the norms we discover in our interpersonal relationships, especially norms about self-defense. Another current says no, only harsh, "genocidal"² aggression may be permissibly resisted. Both of these ideas, I believe, lead in the wrong direction, and also give a bad impression to those seeking guidance about the morality of going to war.

1.1 In the Beginning Was a Tradition

The original western just war tradition³ took for granted the justice of most defensive wars (and defined unjust defensive wars by implication: a country justly attacked had no right to defend itself, but should agree to some kind of just settlement of the claims of the attacker). It was offensive wars that had to prove themselves before the bar of justice, and the proof was meant to be difficult. The structure itself of the theory made the proof of justice difficult, at least since Thomas Aquinas distilled earlier wisdom into his "pithy summary" (Boyle, 2003, p. 328)

² David Rodin uses this term, and so it is fair to use it in connection with his theory. It should be noted, though, out of fairness, that his use of the term is idiosyncratic (as well as, I will argue, unacceptably vague).

³ I consider that the vast majority of cultures have some kind of tradition, or traditions, concerning this subject, but my focus is on the western tradition, broadly construed.

of the earlier tradition in the late thirteenth century. Of course, arrogance, jingoism, hypocrisy, and sometimes fear made it easy for scholars or courtiers to twist the facts or appeal to dubious truths, but it is noteworthy that this did not always happen. As Michael Walzer writes,

So the rulers of this world embraced the theory, and did not start a single war without describing it, or hiring intellectuals to describe it, as a war for peace and justice...But...I will cite one heroic moment...some time around 1520, the faculty of the University of Salamanca met in solemn assembly and voted that the Spanish conquest of Central America was a violation of natural law and an unjust war...Certainly there were not many moments like that one, but what happened at Salamanca suggests that just war theory never lost its critical edge. The theory provided worldly reasons for going to war, but the reasons were limited—and they had to be worldly. (2002, p. 926)

It is also worthy of note that this faculty who insisted on this worldly form of justice included Catholic theologians, some of them Dominican monks, who spoke in the name of a tradition most famously codified by one of the Dominican monks they most revered. At times, then, this tough, highly restrictive set of questions, the original *jus ad bellum* core of just war theory, was thoughtfully applied to offensive wars, even those waged in the name of God by Catholic monarchs, and those wars were found wanting. It seems not to have been formally applied to defensive wars, except in one case: where the theory held that one state deserved to be attacked, and thus could not justly defend itself.

Now, in today's academy, the *jus ad bellum* criteria are often applied first to the defensive rather than the offensive side, already an innovation, and in a new way. Instead of asking "does this side deserve to be attacked," the question has become, "is it just to resist an attack, even if the attack itself is unjust?" For Aquinas and other early scholars in his tradition, it

appears that the answer to this question was so obvious that there was no point in the discussion: yes. (As a qualification, they might certainly have mentioned the folly of fighting a defensive war one seemed sure to lose if the aggressor could be bought off.) Today, many continue to defend the justice of (most) defensive wars, but the climate of opinion is decisively different.

In response to this change of emphasis, my aim here is to take part in a *ressourcement*—a “return to the sources.” Just war theory was first formulated in the setting of an Aristotelian natural law or virtue ethics tradition. That tradition, which I will call hereafter the Aristotelian-Thomist tradition (or often, “the tradition”) can, I believe, shed light on issues of importance to contemporary just war theory. Not only that, but the benefit may run in both directions. The tradition shows many signs of life, but its practitioners seem not to have paid much attention to today’s urgent question, whether defensive wars can be just. The attempt to answer it may shed light for defenders of the tradition, and, I would hope, will provoke additional and renewed interest.⁴

The first question this project may provoke is, why begin within any tradition? In investigating any claim, should we not instead “first divest ourselves of allegiance to any one of the contending theories and also abstract ourselves from all...particularities of social relationship...” in order to “arrive at a genuinely neutral, impartial, and, in this way, universal point of view”? (MacIntyre, 1988, p. 3). This might be a more common method than announcing one’s allegiance to a tradition: David Rodin, for example, states, “It is tempting to think that such

⁴ More broadly, Robert Sokolowski complains about the Catholic side of the tradition that it has shown too little concern for politics: “political philosophy...has been short-changed in Catholic philosophy in the past century, during the Thomistic revival following the encyclical *Aeterni Patris* of Pope Leo XIII in 1879...What was done in political philosophy added up to a relatively small achievement in this field, compared, say, with the work that was done in metaphysics, philosophy of science, ethics, and the philosophy of man. This lack of interest is rather strange, since political life originally provided the context for philosophy, in the life of Socrates and in the writings of both Plato and Aristotle” (2001, p. 505-06).

a defense [of a “foundation of common morality”] could only be achieved by deriving its norms from, and reducing them to, one or another of the classic moral theories...Not only do I not attempt such a derivation, I do not give my allegiance to any of the standard theories as a working methodology” (2002, p. 9). Rodin is somewhat unusual in his clarity on this question, one which many contemporary scholars simply ignore. Yet, even in ignoring the question, many of his contemporaries at least implicitly give the same answer.

This question will recur below. Here I will simply say that I find Alasdair MacIntyre’s extensive argument on the subject of neutrality convincing. It leads him to the conclusion that for questions of ethics, “there is no...neutral ground,...there is no place for appeals to a practical-rationality-as-such or a justice-as-such to which all rational persons would by their very rationality be compelled to give allegiance. There is instead only the practical-rationality-of-this-or-that-tradition...” (1988, p. 346). This does not mean, he insists throughout *Whose Justice? Which Rationality?* and *Three Rival Versions of Moral Enquiry*, that no rational persuasion is possible among adherents of different traditions, but that persuasion is apt to be dialogical, and to take place over time as adherents of one tradition find that their own tradition cannot answer, or cannot answer adequately, a question that another tradition does solve on its own terms (2007, pp. 276-77). If that is so, one way to advance a dialogue among traditions is to show how a particular tradition can answer live questions, both showing how its answers cohere on its own terms and showing how opposing traditions provide less adequate answers, if possible on their own terms (1990, pp. 221-36). That is another description of my project.

1.2 Plan of the Work

In the remainder of this introductory chapter, I begin by discussing how we arrived at the current state of the discussion on national defense within just war theory, which I then briefly

sketch. Next I look at the natural law tradition. I offer a brief outline of its origins and history, including a sharp break in what is called “natural law” that began in the early seventeenth century. I then consider and reject a recent innovative take on natural law, and conclude this section with the briefest of looks at a long controversy in philosophy that touches the root of the natural law idea, the “is to ought” question introduced by David Hume. I then offer a somewhat extended set of reasons for working within the Aristotelian-Thomist tradition. This is followed by a short appeal to readers from other traditions in the shape of a description of the kind of dialogue I am seeking to engage in and cultivate. Finally, in the spirit of Aquinas, who always began each article in his *Summa Theologica* with a list of objections that were commonly offered or could be offered to his own thesis, I set out briefly the objections to my thesis that I will attempt to counter.

My approach is bound to strike some readers, perhaps especially those used to certain modern analytic approaches to moral issues, as rather strange. In an attempt to mollify such readers, or at least to prepare them, in chapter 2 I lay out some of the reasons for the odd differences, offering some brief thoughts on individualism, the need for philosophical foundations, subjective and objective approaches to ethics, the question of human nature, and the relationships among rights, justice, and the common good.

With that groundwork laid, in chapter 3, I present a positive account of the Aristotelian-Thomist tradition’s case for national defense. The foundations of the case lie in a view of nature, including human nature, the nature of society, and the nature of politics. Although the tradition does not really treat the defense of a nation as an outgrowth of self-defense, I present the tradition’s case for individual self-defense, which does bear on the question. Because some scholars today deny that property may be justly defended, and this is quite relevant to national

defense, I present the tradition's case for a just defense of property. Putting these elements together, I then present a case for a just defensive war, analyzing the conditions necessary for such a war.

Having presented and defended my positive thesis, I then pivot in the rest of the dissertation to shift to consider a set of objections to it, predominantly embodied in the work of Jeff McMahan and David Rodin. In chapter 4, I address broad tendencies common to both, and shared by a number of other scholars. The first of these is "reductionism," or the belief that moral questions in war can be "reduced" to questions answerable through the application of principles of morality governing the conduct of individuals. McMahan is clearly an avowed reductionist, and Rodin's account in its underlying structure seems somewhat reductionist, I claim—although his conclusion is that reductionism fails. Another issue on which both agree is that threats (in the shape of persons) who are fully morally innocent may not be killed. A methodology common to both is a reliance on a largely "objective" account of actions and their moral evaluation. I provide arguments against reductionism (as currently practiced), against these authors' "innocent threat" claim, and against largely or fully objective approaches to morality.

In chapter 5, I turn to McMahan's specific arguments. After acknowledging some of the force of his argument against Walzer (and his argument in the seminal *Just and Unjust Wars*), I argue that his key concept of an assumption of risk that makes one liable to defensive action is radically underspecified. I then consider Lazar's argument against this entire notion of McMahan's, exemplified in his 2009 *Killing in War*, and McMahan's defense, which I argue misses the force of Lazar's attack. I conclude the chapter with a specific argument against the objective approach as used by McMahan.

Finally, in chapter 6, I offer a set of critiques of Rodin, based largely on *War and Self-Defense* (2002), but also on “The Myth of National Defense” (2014), a recent update. My arguments against Rodin focus on his logic. I contend that his conclusions cannot be supported by the kind of arguments he offers. I begin by posing some overall questions against his arguments. I then turn to his treatment of individual rights, arguing that there are a number of grave inconsistencies. Looking at the state level of his argument, I claim that Rodin grants the state rights internally that he does not grant it externally, in an inconsistent fashion. I critique the “genocide exception” (in which Rodin allows for rare instances of permissible defense of one’s nation) for its original impracticable sparseness and its later vagueness, and I also argue that Rodin’s call for a universal state ignores his own criticisms leveled against existing states. I pose two final sets of arguments, against Rodin’s particular version of objective moral analysis, and an illustrative attack on one of his arguments against the “analogical strategy” for supporting a right of national defense.

1.3 The Conundrum of National Defense

An important debate in contemporary just war theory academic circles concerns an issue that, as I have noted, never arose in the theory’s classical beginnings or in its seminal medieval synthesis, and would have startled its early philosophical compilers and theorizers: whether a state generally has a right to defend itself from an invasion, and if so, under what circumstances, and whether that right can be coherently defended. As Seth Lazar writes, for contemporary scholars, “Although common sense morality and international law view national defense as the paradigm case of justified warfare, grounding this consensus is surprisingly difficult.” (2014, p. 12). In the beginning it was not so. John Finnis describes the late medieval synthesis thus: “[Francisco Vitoria and Francisco Suarez] consider self-defense a ground so obviously just that it

scarcely needs argument,” (1996, p. 21), and Aquinas, in his article on war in the *Summa Theologica*, does not even mention defense as a just cause (II-II, q.40 a.1, *co.*)⁵—yet arguments in line with these older formulations of the theory can easily be constructed. That, in fact, is the contribution I hope to make here—a detailed traditional natural law argument for the right of national defense—while comparing that argument with others in the contemporary debate and evaluating their comparative merits. Before defining my point of view and setting out those arguments, however, the stage needs to be set with a brief examination of the major positions in the current controversy about national defense.

1.3.1 *The Background of the Problem*

First, the background: there are quite a number of contributors to the current debate, with convoluted relationships among them. The seminal figure who revived just war theory for the non-Catholic world in the 1970s is Michael Walzer, whose book *Just and Unjust Wars* (2000, first published in 1977), is often seen as representative of “conventional” or “traditional” just war theory. This “conventional” theory is intertwined with international law, and has “unabashedly statist foundations” (although Walzer disputes this characterization). However, Walzer made one key move to distinguish himself from the conventional view: he focused on “not sovereigns, but subjects, as the morally relevant entities in war” (Fabre and Lazar, 2014, p. 1). He defended the

⁵ However, in the first part of the corpus of his response, in which he argues for the criterion of the requirement of the authority of the ruler to declare war, he states that it is the “business [of those in authority] to have recourse to the sword of war in *defending the common weal* against external enemies” (emphasis added). A note on citation of the *Summa Theologica*: all quotations in this dissertation are from this and not his other famous *Summa*, and all are also from either Part I (“I”) or Part II, but this second part is divided in two: the first part of Part II (“I-II”), and the second part (“II-II”). Each part consists of numbered “questions” (“q.”), which are divided into numbered “articles” (“a.”). Each article begins with objections (“arg.” 1, 2 etc.), continues with a short summary response (“s.c.” for the Latin “on the contrary”) followed by a full response (“co.” the “corpus”), and concludes with replies to each objection (“ad.” 1, 2, etc.). With this impressively detailed outline, any citation can be quickly found. Thus, for example, the citation “S.t. I-II, q.94 a.2, *ad.*1” indicates the first part of Part II, question 94, article 2, reply to objection 1.

conventional rights of states, but claimed they were ground in the rights of individuals. Fabre and Lazar, on the same page, trace the conventional version of the theory, which Walzer modified, back to “the founders of public international law—Grotius, Pufendorf, Wolff, and Vattel.”

One step back from these founders of international law, of course, are the founders and keepers of the moral branch, or rather the moral trunk, of just war theory, the scholastics and late scholastics, with Thomas Aquinas at their head. Walzer’s revival of just war theory in some important ways short-changed these earlier theorists, especially in the *ius ad bellum* branch of the theory (justice in going to war), for which he more or less substitutes international law. The relative lack of attention by Walzer especially to the (difficult) moral roots of the theory has left the field open to widely different interpretations.⁶

The use of international law as a rough substitute for the moral strictures of *jus ad bellum* theory has other issues. “Why is it wrong to begin a war?” Walzer asks starkly (2000, p. 22). But perhaps sometimes it is right to begin a war (e.g. when there is a crying need for humanitarian intervention). In addition, hearkening back to international law has at least two obvious issues: first, law must simplify and advert to procedures; and second, international law is heavily affected over time by—the outcomes of wars, particularly major ones. Thus victorious nations have shaped international law far more than those that have lost. The Charter of the United Nations, for example, gives five major powers at the end of World War II permanent seats on the Security Council, where they can veto resolutions that run contrary to their national interests or that are critical of their actions or those of their allies, giving them a vastly disproportionate share in deciding what will count as legal or illegal actions.

⁶ In *Just and Unjust Wars*, Walzer mentions the difference between the *jus ad bellum* and the *jus in bello* divisions of just war theory at the beginning of chapter two, but never to my knowledge lists the *ad bellum* criteria, and simply uses “aggression” as the sole paradigm case of an unjust war.

Walzer, then, was both a conventional theorist and an early revisionist. Other revisionists, though, took him as their target, urging a more thoroughly individual-centered rather than state-centered view of rights in war. Some early attacks on his version of the *ius ad bellum* gave way to a predominant focus, for some twenty years, on the *ius in bello*—“just conduct in war” (Fabre and Lazar 2014, pp. 2-3). David Rodin’s book *War and Self-Defense* (2002), a “swingeing critique of the principle of national defence” (Fabre and Lazar, 2014, p. 3) renewed the question of whether individual rights form the basis for states’ actions in war, and issued the challenge to justify a right of national defense to which contemporary political theorists and philosophers have recently been responding.

An important set of these responses to Rodin’s challenge, including an updating of the challenge by Rodin himself, has been gathered by Cecile Fabre and Seth Lazar between the covers of *The Morality of Defensive War* (2014). Indeed, I will refer rather often to this collection of essays, which in many ways represents the current state of debate on many of the themes I will be discussing in this dissertation. In the schema as set out by these authors, the most salient current division on the issue of national defense, is between “reductionists” and “exceptionalists” (this is Fabre and Lazar’s terminology, 2014, p. 4, although Lazar attributes the term “reductionism” to Rodin (2014, p. 13).

First, reductionism. In Lazar’s formulation, “the reductionist theory of the ethics of war states that permissible acts of killing in war are permissible under the relevant principles of ordinary interpersonal morality” (2014, p. 13). To put the reductionist position another way, the principles of personal morality are also the principles that govern the morality of war, although war is of course a much more complicated activity than individual self-defense. Put yet another way, there is no special “morality of war” distinct from the principles of morality generally.

Lazar argues that “[r]eductionism is the default philosophical approach to thinking through the ethics of killing in war” (2014, p. 12), although it has been under attack at least since Rodin’s assault in 2002.

What if reductionism fails? Lazar’s position is that if reductionism cannot deliver “a plausible set of conclusions about when national defense is permitted,” then we should, one, revise our beliefs about what is just in national defense, or else, two, “face the significant challenge of developing a different theoretical model for justifying warfare—an exceptionalist model, which views war as an exception to the regular moral landscape, to which principles apply which apply to nothing else but war” (2014, p. 13).

Rodin argues in *War and Self-Defense* (2002), along the lines later re-formulated by Lazar, that reductionism fails to justify killing by the state in most wars, even most defensive wars. Rodin’s choice, however, is Lazar’s first option: revise our views of what is acceptable in wars of defense. He embraces a kind of “semi-pacifism”: the right of national self-defense does not justify war except against somewhat rare wars of major or “political” aggression (see chapter 6). Other reductionists, notably Jeff McMahan, respond to the critiques differently, arguing that at least in some cases there is a way, even in the case of “political aggression,” to prove the existence of the right, at least for many wars, on “reductionist” grounds.

Fabre and Lazar appear to identify as “exceptionalist” the points of view presented in Part III of their compendium, identified as those that “appeal not only to individual human rights, but also to other, more collectivist values” (2014, p. 4). The writers presented in Part III are also identified as those who “feel the pull of state and community” (2014, p. 7), although clearly they feel that pull in quite distinctive ways. The current debate, then, engages a range of reductionists

and their critics, with a range of prescriptions about defensive war, and a range of “exceptionalists,” with similar differences in the outcomes of their thinking.

At least some and perhaps all of the writers in Part III of the volume, it is worth noting, see two dangers in regard to “the pull of state and community.” On the one hand, they evince at least a disquiet (and sometimes a much stronger feeling) toward the conventional nineteenth and early twentieth century state of conceptions of international law that saw states as holding an unquestioned authorization to make war if leaders felt it to be in their interests, without needing to show concern for the interests of the individual human beings involved. As Christopher Kutz puts it, his aim is to “recover some of the moral ground of sovereignty without retreating to Westphalian statism” (2014, p. 231). Another concern is a clear desire to avoid appearing to slide into the romantic nationalism that seems to be historically related to fascism. Emerton and Handfield, for example, note that their view “denies any romantic or non-contingent reason” for the value of states (2014, p. 44) and that they reject “romantic notions of the ‘common life’” (2014, p. 62), and a “romantic nationalist” view (2014, p. 65).

For the tradition, this choice between reductionism and exceptionalism is not an acceptable one. It appears to assume, first, that “the principles of morality generally” are what we get when we consider our individual intuition as individuals, and the tradition supplies quite a different method of deriving moral principles (which does not call intuitions completely invalid by any means, see chapter 2). Second, it implies that having discovered the principles of morality, we have to then carve “exceptions” to them to account for the morality of war. But the tradition approaches the difference between interpersonal and interstate (and state to individual) morality differently, largely because it is not interested in the abstraction that is “the state of

nature,” where atomistic individuals would interact if they did not happen to be embedded in societies. For the tradition’s account of the morality of (at least) defensive war, see chapter 3.

1.3.2 A Note on Various Senses of Reductionism

Different notions of “reductionism” need to be distinguished. Rodin’s original use of the term (2002, p. 124) is rights-centered, suggesting that perhaps the defensive rights of states could be conceived as “reduced” to the rights of individuals. We might, for example, “see national-defense as simply the application, *en masse*, of the familiar right of individuals to protect themselves and others from unjust lethal attack.” He offers Walzer’s words in illustration: “citizens defend one another...the government is merely their instrument” (quoted in Rodin 2002, p. 127). Here the focus is on the defensive rights of states. (Applying reductionism is difficult, because one can argue, as McMahan does, that the way the right of self-defense operates differs because the situations are different: see 2004, pp. 76-77. Rodin appears to take a much tougher view: restrictions on individual self-defense simply apply on the level of the state, with far less “give,” see 2004, p. 96.)

There are at least two other ways the term has been used. “Reductionism” could also refer to a way of viewing a defensive war precisely as a war. Lazar uses the term in this way when he writes, “Reductionists believe that *justified warfare reduces to an aggregation of acts* that are justified under ordinary principles of interpersonal morality” (2014, p. 12, emphasis added). On the next page, however, Lazar’s definition focuses on principles of action: in “the reductionist theory,” “permissible acts of killing in war are permissible under the relevant principles of ordinary morality.” Although presumably there is a great deal of overlap among these notions, I will use the last-mentioned unless otherwise indicated.

1.4 The Natural Law Tradition: Some Initial Questions

My goal is to offer, based on the tradition of the natural law, a defense of the right of nations, unless they have committed grave injustice, to defend themselves against attack. This broad aim immediately raises several questions, which need to be addressed before I continue: first, what is “the tradition” as I am using the term? What are its key features? Second, since the term “natural law” is used by a range of philosophers and theorists in a wide variety of ways, what are the significant differences among them, and on which one am I basing my account? Third, why return to this tradition? The answers to these questions offered here are the briefest of sketches. I focus throughout on the tradition as it applies to ethics and political theory rather than jurisprudence, although I touch on the latter.

1.4.1 The Natural Law Tradition: the Foundations

A convenient beginning for the natural law tradition is the work of Aristotle. To oversimplify greatly, the basic approach of the *Nichomachean Ethics* is to ask what is good for man as man. A provisional early conclusion is that “the good for man is an activity of the soul in accordance with virtue [or excellence]” (2004, p. 16). Russell Hittinger, in a brief note on Aristotle, ties the good of man to “nature” as he makes an obvious (though sometimes disputed) point: “the employment of a philosophy of nature represents Aristotle’s method when, in the first book of the *Ethics*, he provides an inventory of human powers and their objects and thereby arrives at what constitutes the most excellent life. He does not justify his philosophy of nature there, but he straightforwardly applies it” (1987, p. 193). For Aristotle, there is a human nature, and it should be considered not only in terms of what we observe human beings doing, but much more importantly in terms of human potentialities for excellence: “morally fine and just conduct” (2004, p. 5). Thus, we can be guided by a rational consideration of human nature toward an

understanding of that possible excellence—and, as with athletic and other kinds of excellence, education and training can help us to embody it.

Although some great philosophers have denied that there is a human nature, or that it is knowable, others have affirmed it. I am standing with the latter—but that does not mean I think there is a simple answer to the question “what is human nature?” Hannah Arendt writes that “It is highly unlikely that we, who can know, determine, and define the natural essences of all things surrounding us, which we are not, should ever be able to do the same for ourselves—this would be like jumping over our own shadows” (1998, p. 10). The difficulty is real.

Regardless of Arendt’s argument here (to which I will return), every time we use the adjective “human” in phrases like “human nature” or “human condition” (or “*anthropos*” in anthropology, etc.), we appear to be making claims about what all humans are generally like. If not, does the initial word mean anything in these phrases? As Chesterton notes humorously but seriously, “If we talk of a certain thing being an aspect of truth, it is evident that we claim to know what is truth; just as, if we talk of the hind leg of a dog, we claim to know what is a dog” (1905, p. 293). When we speak of “human this” and “human that,” it certainly sounds like a claim to know what is a human. Sartre, who wrote “Existentialism is a Humanism,” cannot, in my view, escape from Chesterton’s *bon mot*.

Thomas Aquinas famously adopts Aristotle’s approach to ethics within a Christian framework, leading to a new synthesis that remains the basis of what Alasdair MacIntyre (1990, p. 181) calls “the Aristotelian-Thomistic tradition.” Aquinas’ approach, while thoroughly Aristotelian, adds Christian virtues to the ancient Greek ones, reinterprets some of the virtues, restates the notion of a natural law, and also provides an increased emphasis on the moral quality of an individual act as well as the moral quality of the actor, among other developments. While

there are a number of non-Thomists who look to Aristotle for inspiration up to the present, as well as a huge number of approaches laying claim to the label “natural law,” it is this revised Aristotelian-Thomist tradition that I take as a framework here.

1.4.2 The Natural Law Tradition: Pre- and Post-Grotius

Having claimed this branch of the tradition (in my view its trunk), I offer three points concerning different versions of natural law tradition: first, I follow Richard Tuck and Charles Taylor in seeing a sharp, highly influential break in the natural law tradition beginning with Grotius. In Tuck’s telling, the story begins with the rise of ethical skepticism in a Europe newly divided by Reformation and Counter-Reformation. In a pluralist world, Montaigne along with other skeptics argued, “there is not so much one moral law to be found, which the fortune or temerity of chance hath granted to be universally received, and by the consent of the unanimity of all nations to be admitted.” Aristotle’s attempt to enumerate such universal laws and their accompanying virtues was held up to ridicule, with examples of societies that offered sharply different accounts of the virtues as evidence (Tuck 1988, p. 97).⁷ Grotius then generated a great deal of interest by offering a way out of this kind of total ethical skepticism:

According to Grotius, there are moral universals, but they are minimal by comparison with those of Aristotle—amounting in effect to two: that all men have the right to defend themselves and to acquire possession of the necessities of life; and that no man has the right to wantonly to injure another. If it is your life or mine, I am to prefer my own; but otherwise I am not to attack you. (1988, pp. 100-101)

⁷ It is worth pointing out the both Aristotle and Aquinas following him were aware of this issue and addressed it. Aquinas in *Summa* I-II, q.94 a.4, asks “Whether the natural law is the same in all men?” He posits the objection to this thesis that in Aristotle’s *Ethics*, “nothing is so universally just as not to be subject to change in regard to some men,” and notes that according to Julius Caesar, “theft, although it is expressly contrary to the natural law, was not considered wrong among the Germans.” I will set out the complex substance of Aquinas’ answer in my discussion of Lisska below.

Having placed this revolution in understanding of the natural law in the context of Galileo's rejection of Aristotle's science and Descartes' radical doubt about the outer world, Tuck goes on to describe Hobbes' appropriation (slightly more skeptical than Grotius's) of this rule of the two "natural law" principles at the heart of his own political theory (1988, pp. 104-105).

Taylor also notes the break that begins with Grotius: "I start with the new vision of moral order. This was most clearly stated in the new theories of Natural Law which emerged in the seventeenth century" (2005, p. 3). He describes a new view of human beings, and a new "picture of society" that emerges in Grotius' writings, one founded on the natural rights of individuals and their consent (in "the original contract") to be ruled (2005, pp. 3-4). Taylor notes that "[i]n light of what has later been made of this contract theory, even later in the same century by Locke, it is astonishing how tame are the moral-political conclusions that Grotius draws from it." Grotius aimed "to undercut the reasons for rebellion being all too irresponsibly urged by confessional zealots" (2005, p. 4). Regardless of Grotius' motivations, the new theory turned out to have wide applications—yet by sharing the name of "natural law" with the earlier theory, it led to considerable confusion.

One obvious difference between Hobbes' notion of the natural law, along with much that calls itself "natural law" after Hobbes, and the Aristotelian/Thomist tradition that preceded it is a radical stripping down of the content of the good and evil that law can be said to enjoin and proscribe: gone from the bedrock of natural law itself are many of the virtues, along with the idea of potentialities to be perfected (no "fine...deeds" are now encouraged by the natural law), and we are left with simple rules conducive to the survival of society. It is true that for Hobbes, there are virtues that are conducive to peace, and in Locke and other enlightenment thinkers, versions

of natural law are built up into elaborate moral schemes. However, the difference in foundations makes them radically different frameworks.

Hittinger points out another difference in Hobbes' view, again radical and again part of a wider trend:

Th[e] method [of “resolutive analysis and compositive synthesis” adopted by the new seventeenth century sciences following Galileo] was applied beyond physics to humane matters. In *De Homine*, for example, Hobbes takes man as he is, a thing of “meer nature,” and reduces the appearances to stable and predictable modes of quantity. Once we have done this...we find a stimulus-response mechanism that endeavors to augment its power. What is first, then, is natural laws as “lower” laws rendering men amenable to the sovereign. In *De Cive*, man is rebuilt according to rules that are true laws. Hobbes explains: “Politics and ethics (that is, the sciences of just and unjust, of equity and inequity) can be demonstrated *a priori*; because we ourselves make the principles—that is, the causes of justice (namely, laws and covenants)—whereby it is known what justice and equity, and their opposites, injustice and inequity, are.” (2003, p. 13)

Not only are natural laws “lower” than in the older conception, but they appear to have migrated away from a “nature” (including a human nature) conceived as objectively capable of containing potentialities. Now natural laws originate in a more subjective place, the human mind, where certainty can reign if principles are synthesized by man himself and then built on one another in logical fashion. Hittinger continues,

this method of reduction and recomposition was not tied to materialist doctrines.

Continental rationalism and idealism also deployed methods of reduction to what is first in the mind, from which reality can be constructed, modeled, predicted. Hobbes could

find only ‘lower’ laws; other Enlightenment thinkers purported to find first principles of justice and equity. Whatever the differences, the trademarks are certainty and predictability, gauged by what is first in cognition...What better way to solve [the theologico-political] problem than to imagine men’s appealing to no authority other than what is first in the mind? (2003, p. 13)

Hittinger then rounds off a discussion of this “interiorization” of “nature” and natural law with a brief description of the reversal of outcomes that results from this migration: “natural rights, for so many modern advocates, turn out to be nothing other than immunities against the order of law...the natural law becomes “temporal,” the temporal becomes “secular,” and the secular becomes the sphere in which human agents enjoy immunity from any laws other than those they impose on themselves” (2003, pp. 14-15).

My concern here is simply to stress the enormous differences between the earlier and later branches of “natural law.” The branch inspired by Grotius is enormously reduced in the scope of its ambition compared to the earlier branch, and has almost nothing inherent in it to do with the concept of virtue or excellence (in the brief description of the Grotian simplification above, the only virtues reason can discover in nature are not killing others, except in self-defense, and not wantonly injuring others). The term natural law is still in use, but the entire approach has changed from rationally discerning in nature a wide-ranging set of potentials for excellence to rationally determining in nature the absolute minimal necessities of social life.

In addition, potentialities, which are complex, have been banished from nature, which is always reduced to what is simple. Teleology is banished not only in physics but in human affairs too. Finally, there is a movement from exterior to interior, from reading from a “nature” believed to be an order built into things themselves (including humans), regardless of what people think

about it or choose to do, to an approach fundamentally based on what is in the human mind).⁸

While recent differences have arisen in the Aristotelian-Thomist tradition, the earlier break that begins with the Grotian simplification is a very sharp one that needs to be borne in mind. (I am greatly oversimplifying the post-Grotius development of the idea of natural law.)

1.4.3 The “New” Natural Law

My second point on different versions of the tradition concerns a relatively new version of the Aristotelian-Thomist synthesis, what Russell Hittinger (an opponent) calls “the new natural law theory” or “the Grisez-Finnis natural law system (1987, p. 6) and Robert George (an adherent) names “the new classical theory” of natural law (1999, p. 231). This new version or new theory begins with Germain Grisez’s seminal article “The First Principle of Practical Reason” (1965), and receives important elaboration in John Finnis’ *Natural Law and Natural Rights* (1980) and *Fundamentals of Ethics* (1983). An important application of the theory to the field of ethics and war is a book by the latter two in collaboration with Joseph Boyle, *Nuclear Deterrence, Morality and Realism* (1987). For some, this is now simply “natural law theory,” which is why I need to consider it somewhat extensively (and even where I disagree, that will advance my arguments by showing where I stand in opposition to it).

Hittinger notes appreciatively that, “Finnis’s *Natural Law and Natural Rights*...has done as much as any other single work to bring the subject of natural law back to the forefront of scholarly attention” (1987, p. 5). Yet both the proponents and the Aristotelian-Thomist opponents of the new theory agree that it involves a radical revision of the foundation of natural law theory, or at the very least a sharp reinterpretation of Aquinas’ method. Finnis and Grisez agree with Hume that moving from what “is” to “ought to be” violates principles of logic. As

⁸ The Grotian approach is nicely summarized in Leo Strauss’ remark that “the moderns built on low but solid ground” (quoted in Bloom, 1987, p. 167).

Robert George puts it, “Grisez and Finnis...deny any rational basis of an identification of ‘the natural’ with ‘the morally good’...One cannot derive the moral ‘ought,’ according to Grisez and Finnis, from the ‘is’ of human nature (or the human condition, or human being)” (1999, p. 60.) Thus, their quite complex response attempts to rebuild natural law theory first on a series of direct, pre-moral, *practical* perceptions of “basic goods.” Finnis gives the following list of basic goods: “life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness and religion” (1983, p. 51). As Finnis puts it, each of the various goods is, “what it is worthwhile for human beings to seek to do, to get, to have and to be...” (1983, p. 12). These goods, they hold, are at least substantially those pointed to in Aquinas’ “first principle of practical reason,” that “good is to be done and pursued, and evil is to be avoided” (*Summa* I-II, q.94 a.2, *co.*). The article quoted here is the second of six articles in Question 94, the well-known section in which Aquinas sketches out his views on the natural law.

In an original and influential fashion, Grisez interprets this “first principle” not as a directive concerning moral choices, but as an indicative statement of our ability to grasp, in a pre-moral fashion, that “goods” (see Finnis above) are to be pursued. In Hittinger’s summary, this first principle “represents practical reason’s innate capacity to grasp goods as ‘possibilities’ of fulfillment, and, as such, it directs us to goods rather than specifying moral norms which guide choices” (1987, p. 30). The goods, in turn, for Grisez and Finnis, are “*per se nota*,” self-evident, as Aquinas states about the precepts of the natural law (*S.t.* I-II, q.94 a.2). All the above is “pre-moral,” in the Grisez-Finnis system, which now adds a separate “first principle of morality”: as Grisez puts it, “In voluntarily acting for human goods and avoiding what is opposed to them, one ought to choose and otherwise will those and only those possibilities whose willing is compatible with a will toward integral human fulfillment” (quoted in Hittinger 1987, p. 50). As Finnis

restates, “the master principle of ethical reasoning is this: Make one’s choices open to human fulfillment: i.e. avoid unnecessary limitation of human potentialities” (1983, p. 72).

As noted, with this new and elaborate scheme of pre-moral goods and a separate principle of morality that builds on those goods (and “modes of responsibility,” see Hittinger 1987, pp. 56-59 for a listing and discussion), Grisez and Finnis claim to avoid a mistaken move from what is to what ought to be done. The fundamental question raised by this re-schematizing of natural law (what Finnis calls “this delicate academic issue,” 1983, p. 10) is first whether the revised basis of the theory works convincingly as part of a natural law theory at all, and second how faithful the new theory is to the earlier Aristotelian-Thomist tradition—although Finnis and Grisez claim openly to be revising rather than simply developing or interpreting Thomist thought, as Hittinger immediately admits (1983, pp. 8-9 and elsewhere).

Here, “the tradition” will not refer to the Grisez/Finnis system. I continue to appreciate many of the emphases of Grisez and Finnis, for example their stress on the positive role of the natural law and their rejection of legalism, and to affirm with them the core of the tradition they, for the most part, build on. However, I offer here a few very brief remarks on why I reject many of their theoretical innovations. In objecting to the alleged discovery of a “pre-moral” first principle of practical reason (which he abbreviates as “Fppr”), Hittinger notes that “the older Scholastic ethicists reserved the Fppr for the beginning of moral reflection” (1987, p. 50). He also complains that “Grisez is prepared to separate question 94 [the article on the natural law, where Aquinas’ “Fppr” is stated]...from the preceding questions which set forth Aquinas’s understanding of the teleological principles governing man’s natural end” (1987, p. 20).

I would add that Grisez appears to separate this article from much of the rest of the *Summa*, indeed from the *Summa*’s very structure, in treating the first principle of practical reason

as “pre-moral.” A glance at the table of contents of *Summa* I and *Summa* I-II, as well as careful reading of them, show that *Summa* I treats both God and man from a theoretical point of view, whereas *Summa* I-II is about moral issues from start to finish. The substantial section on law comes near the end of *Summa* I-II, and there seems little reason to suppose that the subject of the “pre-moral” would crop up at the end of the major section on moral issues, as Aquinas is well known for the careful organization of his material.

More substantively, the first principle of practical reason uses the terms “good” and “evil.” Now, Grisez is correct in his emphasis on the fact that more than just “moral goodness” in the modern sense is included in Question 94, Article 2, when he writes, “The works obviously are means to the goods. And what are the objects of the natural inclinations? Not merely morally good acts, but such substantive goods as self-preservation, the life and education of children, and knowledge” (1965, p. 184). Yet the very structure of the article, as well as the rest of Question 94, and Aquinas’ other teaching, should make it reasonably clear that “good is to be done and pursued” is a moral injunction. Morality for Aquinas includes “pursuing goods,” including what are thought of in modern terms as “pre-moral” goods. Aquinas ranks the “precepts of the natural law” in three ascending grades, starting with what man has in common with “other substances,” namely “seek[ing] the preservation of its own being;”⁹ then moving to what man “has in common with other animals,” such as “sexual intercourse, education of offspring, and so forth;” and finally moving to man’s more specific “inclination to the good, according to the nature of his reason,” which includes an inclination to know about God and to live in society, which again have subsidiary precepts such as “to avoid ignorance, to shun offending those among whom one has to live, and other such things...” (I-II, q.94 a.2, *co.*).

⁹ Note that this most fundamental category of a (at least potentially) good and pursuit-worthy inclination will come up later as the immediate reason for which an individual may justly kill in self-defense.

In each one of these levels of action, what turns out to be enjoined by the principle involved is, quite explicitly for Aquinas, a moral act. To establish this point, I need to back up slightly: Question 18 of this same Part of the *Summa* (I-II), deals with the good and evil of human acts, in general. In Articles 5 and 8 of Question 18, Aquinas distinguishes voluntary actions that “are called human or moral, inasmuch as they proceed from the reason” (Article 5) from involuntary and indifferent acts (“...it may happen that the object of an action does not include something pertaining to the order of reason; for instance, to pick up a straw from the ground, to walk in the fields, and the like: and such actions are indifferent according to their species,” Article 8). It is deliberate acts concerning significant subjects that are moral acts. But significance comes in a far broader range than in many modern theories. For example, in the same question, in Article 5, Aquinas states, “The conjugal act and adultery, as compared to reason, differ specifically and have effects specifically different; because the [first] deserves praise and reward, the other, blame and punishment” (Reply to Objection 3).

Sexual intercourse, then, pertaining to the second level in Article 2 of Question 94, that which we share with animals, is a moral act for Aquinas, either good (in which case it in fact even “deserves praise and reward”) or evil. Descending to the first level, that which we share with other substances, specifically self-preservation, when we look forward in the *Summa* to Aquinas’ famous discussion of an individual act of self-defense, he states in clearly moral terms, “Therefore this act, since one's intention is to save one's own life, is not unlawful, ... And yet, though proceeding from a good intention, an act may be rendered unlawful, if it be out of proportion to the end. ... ‘it is lawful to repel force by force, provided one does not exceed the limits of a blameless defense’” (II-II, q.64 a.7, *co.*). It is lawful or moral because of its *telos*, its

end, of preserving a human life, see Question 18, Article 4: "...the goodness of a thing [or action, as the discussion here concerns human actions] depends on its end."

In both the lowest and the middle levels of human actions, then, the goods to be pursued are morally good. In the third level, man's "inclination to the good, according to the nature of his reason," this is even more clear. In fact, the pursuit of any significant end through deliberate action is either more or less good or evil for Aquinas, consistently throughout the *Summa*. This is a "moral" goodness. Note what Aquinas says in I-II, q.18 a.9: "consequently every human action that proceeds from deliberate reason, if it be considered in the individual, must be good or bad." (Peter Kreeft's footnote to this text pushes the point home: "Therefore most deliberate acts of most people most of the time have positive moral value. Eating, reading, working—these are good by being natural and rightly directed toward a good end" [1990, p. 420].) It is hard to see, in light of this fact, how the first principle of practical reason could be rightly interpreted as a "pre-moral" principle in terms of Aquinas' thought.¹⁰

In general, I find the critiques of significant parts of the Grisez-Finnis revision of natural law, especially that of Hittinger (whose entire 1987 book is a careful consideration and critique of the theory), to be convincing. Yet the new natural law proponents clearly see themselves as in important ways taking part in the Aristotelian-Thomist tradition. Many of their concerns are similar. Although their theory of the "goods" is flawed, those goods are shared by the rest of the tradition, and often a focus on the goods in the new natural law leads to a conclusion similar to

¹⁰ This question of the moral value of ordinary actions will come up later with McMahan's Conscientious Driver scenario, where the driver is said to lack a subjective (or objective) "justification" for driving (2009, p. 165). Aquinas would say there are three possibilities concerning prudent driving: (1) the activity is indifferent, or outside the sphere of moral evaluation, like picking a twig off the ground, (2) the activity is praiseworthy, because good: thus it might be useful, virtuous, or merely pleasant, all of which are "good" (*S.t.* I, q.5 a.6), or (3) the activity is evil because it is aimed at doing something immoral. In McMahan's scenario, the tradition would hold that driving for some fun purpose is good—unless one is avoiding a duty thereby.

one that would be reached by others in the tradition. In addition, I consider them to be excellent sources for the tradition through time. Thus, I consider writers involved to be a part of the Aristotelian-Thomist tradition in their conclusions (much of the time), even if not in their methods—but for that latter reason, I cannot really use them in support of arguments. I will quote occasionally from the three major earlier expositors of the new theory, and from its proponent Robert George, concerning natural law, but mostly for a discussion of the history of the tradition.

1.4.4 Lisska: Natural Law and the Is/Ought Problem

My third point concerning versions of the theory, again a sketch, concerns a possible resolution within the natural law tradition of the vexing “is/ought problem articulated by [David] Hume, developed by [Immanuel] Kant, and stated anew through [G. E.] Moore’s ‘naturalistic fallacy’” (Lisska 1996, p. 39; see also pp. 56-81 and pp. 195-201). First, it is at least arguable that Aquinas never commits the “naturalistic fallacy.” As a number of writers have pointed out, for Aquinas, the first principle of practical reason is a “first principle,” comparable to first principles from which one reasons in other fields, such as geometry. Grisez emphasizes this point, and his view that “...from the agreement of actions with human nature or with a decree of the divine will, one cannot derive the prescriptive sentence, ‘they ought to be done.’ Aquinas knew this, and his theory of natural law takes it for granted.” He goes on to stress his own point that “practical reason” is as much a part of who we are as theoretical reason:

The intellect is not theoretical by nature and practical only by education. To be practical is natural to human reason. Reason is doing its own work when it prescribes just as when it affirms or denies. The basic precepts of natural law are no less part of the mind's original equipment than are the evident principles of theoretical knowledge. Ought

requires no special act legitimatizing it; ought rules its own domain by its own authority, an authority legitimate as that of any is. (1965, pp. 194-95)

Finnis, of course, agrees with this way of expressing the matter (as George puts it, “Finnis...argues that the distinction is one that Hume himself muddled and sometimes ignored, and the great classical philosophers for the most part strictly respected” (1999, p. 28, note 2, citation omitted). Kreeft, similarly, argues in a comment on *Summa* I, q.79 a.12 that “St. Thomas does not commit what G.E. Moore calls ‘the naturalistic fallacy’ of deducing ‘ought’ conclusions from ‘is’ premises only. Rather, he holds that we naturally know self-evident first principles in both the theoretical (‘is’) and practical (‘ought’) orders, and we use these to judge conclusions in both orders” (1990, p. 282). The list of philosophers making this point could be expanded.

Yet this does raise the question: for those who disagree with the “new natural law” (everyone before Grotius and many since), the natural law is not just *known* by nature, but grounded in it in some way. How can this be, without violating a clear principle of logic?

I argue first that the beginning of the natural law is to argue that there is some good in the existence of things, and especially human beings. Aquinas’ first principle of (natural) law is that “good is to be done and pursued, and evil is to be avoided” (*S.t.* I-II, q.94 a.2). But clearly the notion of “goodness” is already included here. Aquinas immediately states that “whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done or avoided.” What is good for a human being? Aquinas goes on to list some goods at various levels: self-preservation (a good attempted by all living things at almost all times), reproduction and the raising of offspring (a good shared with almost all other animals, especially those large enough to be seen), and the seeking of various kinds of knowledge and to live harmoniously with others of our kind (goods he identifies with our

rational nature, our specific difference from other animals). The first of these goods is founded on the underlying goodness of existence. The other goods seem to imply that, but also the goodness admits of degrees, and “ought” to be increased where possible. A human being who shows no concern for knowledge or harmonious living with others may be guarding the good of existence, but is not achieving more specific human goods. But when we look at our world we see examples of all kinds of behavior, many in violation of such precepts—so how can such “goodness” be said to be grounded in nature?

One major aim of Anthony Lisska’s *Aquinas’s Theory of Natural Law: An Analytic Reconstruction* (1996) is to offer a convincing answer to this latter question in terms of contemporary analytic philosophy. As he expresses his aim, “Aquinas...argued for a realist ontology. None the less, the method of conceptual analysis common to analytic philosophy will assist in the process of understanding the realist foundation for Aquinas’s metaphysics” (1996, pp. 83-84).

Here I offer a mere gesture at Lisska’s reconstruction, the key part of which involves “dispositional qualities.” In Chapter 4 of the book, he offers ten “major philosophical presuppositions in Aquinas’s natural law theory.” These include, “4. Essential properties fundamentally are dispositional in character,” “5 The dispositional theory of essential properties entails a metaphysics of finality,” “7. Moral properties are based upon dispositional or developmental properties,” and “8. A ‘metaphysics of morals’ is possible” (1996, p. 85). Lisska ties “essential properties” to the recent philosophical work of Saul Kripke and Hilary Putnam relating to “natural kinds.” As Michael Ayers sets out the concept, “Membership of the kind is determined by the presence of a presumed underlying common nature which may be unknown to us, rather than by the satisfaction of a definition consisting of a list of those properties which we

happen to use as criteria...” (Lisska, 1996, p. 98). However, the theory also requires “dispositional properties.” Such a property is “a potentiality directed towards a specific development or ‘end’. A disposition is a capacity to ‘do something’ which an object possesses.” Here, as Lisska notes elsewhere, is a sharp distinction from most modern philosophical views of essences. “Since the time of Descartes, an essence has been considered, for the most part, as a static collection of properties. In the twentieth century, Russell and Quine’s analysis of class through defining properties is part of the Cartesian legacy.” (1996, p. 162).

If essential properties are dispositional, then we have “a metaphysics of finality.” This suggests, as Lisska puts it, that “the ends appropriate to human nature are built into the very nature or essence which determines a human person. The end is not a ‘non-moral good’ to be attained which is common to many teleological theories such as classic utilitarianism...[but] a constitutive aspect of the very nature of the dispositional property.” This, Lisska points out, is expressed in Aristotle and Aquinas in terms of the “act/potency relation” (1996, p. 87).

Later in his account, Lisska draws out an implication of these points, namely that they provide,

a way around the naturalistic fallacy. With a static view of essence, a value necessarily is added to a fact. The fact is the set of defining properties. The value added is an additional component to the fact. In effect, this is what Moore claimed with his ‘open question’ argument. That a value was added to a natural fact...destroyed the possibility of any form of ethical naturalism...how did one know which value to add? And what was the justification of the addition? With a dispositional view of essence, however, the value is the terminus of the development of the dispositional properties. It is not an extrinsic

joined to a fact. On the contrary, the value is built right into the fact as end or perfection to the disposition or potency. (1996, pp. 162-63)

Intriguingly, Lisska's solution provides a possible reconciliation with Grisez's concerns (although at the price of adopting metaphysics of some kind, among other philosophical costs). Grisez writes at one point, "...human persons are unlike other natural entities; it is not human nature as given, but possible human fulfillment which must provide the intelligible norms for free choices" (quoted in Hittinger 1987, p. 19). But if human nature is as Lisska describes it, that nature simply *is* "possible human fulfillment," and thus human nature can indeed, if rightly understood, "provide the intelligible norms for free choices."¹¹

A final, quite important point from Lisska is that Aquinas' version of the natural law tradition, like Aristotle's, is not intended to provide overly specific conclusions in particular cases. Lisska builds this point on Columba Ryan's "suggestion considering natural law as a philosophical theory explicating the condition for the 'possibility' of law...What Ryan suggests is that any metaphysical foundation is general, theoretical, and responds to basic questions about propositions." Because of this, natural law is not suitable for providing extremely fine-grained specifications for action (1996, p. 81). Lisska repeats this point in his conclusion: "There is a radical particularity in Aristotle and Aquinas involving moral situations that is opposed theoretically to the rule-bound directions of most post-Enlightenment moral theory...especially...of most rule deontological normative systems" (1996, p. 253). This is certainly in accord with important statements by both Aristotle (2004, p. 5) and Aquinas (see Lisska 1996, p. 254 for some examples). Even in Question 94, the heart of his discussion of the natural law, Aquinas warns:

¹¹ For another look at this large subject, see Jensen, 2015, especially chapters 4-6, entitled "Inclinations," "Good," and "Nature."

The practical reason...is busied with contingent matters, about which human actions are concerned: and consequently, although there is necessity in the general principles, the more we descend to matters of detail, the more frequently we encounter defects.

Accordingly then in speculative matters truth is the same in all men, both as to principles and as to conclusions...But in matters of action, truth or practical rectitude is not the same for all, as to matters of detail, but only as to the general principles: and where there is the same rectitude in matters of detail, it is not equally known to all (*S.t.* I-II, q.94 a.4).

Although this is not a work of philosophy, it rests on (though without attempting to prove) a philosophical system. Thus, I want to conclude this section with a mere gesture at a *reductio*, an extreme statement of what I see as the problem with the “is/ought” problem.

Aquinas says a number of times that being is interchangeable with goodness. For something to exist is a kind of absolute minimal goodness (see especially *S.t.* I, q.5 a.1). There are many levels of goodness, and, for Aquinas, the fulfillment of a potential that is a *telos* is a kind of intensification of both being and goodness. The lower levels may legitimately be brought into service of the higher—we may end the tree’s existence to make a desk, or train a dog to watch our sheep—but this may not be done for no reason: torturing of animals, or wanton destruction of trees or rivers, would violate this “objective goodness.” This, I believe, is the foundation of the natural law. These ideas can easily be mocked as ancient and medieval silliness, vulnerable to many objections. But, if one does so on the basis of Hume’s “is/ought” problem (2007, p. 302), at least as it is usually understood, there is an issue that ought to be acknowledged. To say in a strict way that one can *never* reason legitimately from what is to what ought to be, as Hume certainly seems to say, is to commit oneself to the notion that nothing in existence and observable by the senses has any discoverable objective value—for if it did, one could reason

from that value to a conclusion that the value ought to be preserved, or increased—for that is the nature of value.¹²

Hume illustrates this extreme position nicely in the *Treatise of Human Nature*: “tis not contrary to reason to prefer the destruction of the whole world to the scratching of my finger” (2007, p. 267). (“Let the world perish...,” as far as reason is concerned.) *Reason*, then, for those committed to Hume’s viewpoint here, sees no objective value in existence, nor flourishing—if we think they have value, these notions are just feelings we have, or instincts or conventions perhaps, but at any rate not a reality in the things or individuals. To bring the point down from Hume’s near-cosmic scale, if you see someone torturing a small child, and you could easily stop him, you may do so due to your feelings or due to convention, but if Hume is right, you fundamentally have no other *reason* to intervene.

Aquinas would analyze the situation very differently: existence is good, and higher or more intense existence is better, so the existence and flourishing of the child have very high objective importance. If you can stop the torturing of the child it is an objective duty based on the goodness of the child’s existence. To adopt Hume’s critique seems to involve denying any possibility of moral realism, for moral realism must surely mean that at least some things have intrinsic or objective value. To deny the latter seems to entail being a moral relativist. It appears to me—and this is simply my own suggestion—that the implicit foundation of utilitarianism (if one says it is true) is that human pleasure or utility is an objective good. The implicit foundation of Kant’s ethics (on the same proviso) seems to be that a human being is worthy of being treated

¹² For us in the tradition, it does seem rather dogmatic to assert that the world has no objective value. It would appear to be more consistent with skepticism to simply assert that it cannot be proved, and perhaps this is what Hume means to claim. Still, as many philosophers have pointed out, we simply do not live or think on the sole basis of what we can definitively prove. (We tend to rely on testimony that “such and such people are [our] parents,” for example. See Davies, 2004, p. 39 for this example and an extensive list of similar examples from Elizabeth Anscombe.)

as an end, not a means. If you deny the objective value of human utility or of a human being's dignity, then you are a utilitarian or Kantian only through a completely subjective choice, and again, you are a relativist at bottom.

1.5 The Aristotelian-Thomist Natural Law Tradition: Why Use It?

As I asked in the introduction, why even query how the Aristotelian-Thomist tradition applies to questions of war? There my question was about traditions as such, but here my question is, on the issue of national defense, why be interested in this particular tradition and insights it may offer? (Note: from this point forward, I use “the tradition” interchangeably with “the Aristotelian-Thomist tradition” in referring to the version of the tradition which I endorse.)

First, there is revived interest in the natural law idea, as well as in the tradition. In the field of jurisprudence, the Second World War and the Nuremberg trials led to a revival of the idea of natural law in the second half of the twentieth century, according to Anthony Lisska (1996, pp. 8-9). Legal positivism failed to provide a foundation for the charge of “crimes against humanity,” or indeed any coherent legal way to address the most serious moral atrocities of that war. Yet despite the renewed interest, until recently the idea of natural law was deeply controversial at best. As Ronald Dworkin wrote in 1982, “Natural law insists that what the law is depends in some way on what the law should be. This seems metaphysical or at least vaguely religious...If some theory of law is shown to be a natural law theory, therefore, people can be excused if they do not attend to it much further” (quoted in Lisska 1996, p. 36). Yet Lisska writes later in the same work that the changed attitude since 1982 makes that worry seem “strangely out of date” (1996, p. 250). Robert George echoes the theme of renewed interest, writing, “The revival of interest in practical reason has brought in its wake renewed

philosophical attention to theories of natural law...natural law theory is once again a competitor in contemporary philosophical debates about law, politics, and morals” (1999, p. 31).

Second, the raging controversies in just war theory at this time stand in an intriguing relationship to MacIntyre’s famous parable at the beginning of *After Virtue*, and his claim that the language of morality, cut off from its roots, no longer possesses the coherence it did within its original milieu. While MacIntyre’s suggestion concerns ethics in general, just war theory is a particular instance (one he touches on, 2007, p. 6) of his wider concern. To me, it is a paradigmatic instance, as the questions raised by scholars with “broadly Kantian” concerns in just war theory (such as McMahan and Rodin) use language that would have been used by Aquinas and his successors, but in ways that show that the concepts no longer have the same intellectual framework they had for him. The concepts have remained, in a fragmentary sort of way, but deprived of the framework where they once were at home, they no longer cohere as they once did. Exploring this issue in just war theory illustrates MacIntyre’s point in an intriguing way.

Finally, as noted at the beginning of this chapter, I am convinced of the lack of a neutral standpoint or “neutral ground” for assessing ethical questions (MacIntyre 1988, p. 346).¹³ Thus, it makes sense for me to address the question of national defense from within the tradition I believe to offer the best answers to moral questions generally, rather than attempt to find some neutral ground that I do not believe exists, and build on it. I hope to make clear that the tradition offers a coherent picture of reasons and conditions for national defense.

¹³ This puts me at odds with Grisez, Finnis, and Boyle, and George attacks MacIntyre on this very point (1999, pp. 249-58). For these theorists, the first principles of practical rationality, and much else, are *per se nota*, self-evident. However, a careful reading of Boyle’s account of the difficulties of defending the self-evidence of these notions (1999, pp. 18-28) suggests that while appeals can be made in the abstract to their self-evidence, in practice, due to the difficulties that arise in the grasping and application of these principles (difficulties that arise in some cases precisely from the tradition the person grows up in), arguments will proceed based on grounds within traditions—which is, largely I think, MacIntyre’s point.

1.6 The Shape of this Dialogue

My response to rival accounts faces an immediate and profound problem: I am consciously attempting a discussion that reaches across a boundary between two traditions. I am thinking here of MacIntyre's chapter entitled "Liberalism Transformed into a Tradition," 1989, chapter 17, and of his book *Three Rival Versions of Moral Enquiry*, 1990. To discuss rival traditions in this manner is to appeal to Thomas Kuhn's idea of rival paradigms, each of which in some way, at least for its adherents, provides an adequate or at least appealing reconciliation of the various data available (1962). My greatest difficulty, then, is that I cannot appeal to a set of neutral, agreed-upon principles all my readers will share. I stand in a tradition, with its own assumptions and principles that differ from those of many of those whom I wish to reach with my ideas. The time-honored neo-Kantian liberal phrase "most of us believe..." is not available to me at all here, or will be available only in far more limited areas than it is to someone appealing to those who are already part of her tradition.

Traditions rise over long periods of time, from foundations through periods of growth and articulation to high points of achievement (and sometimes fade into obscurity or die). We might imagine Aristotelian-Thomism and neo-Kantian liberalism as rival cities in a common valley, facing each other, each attracting trade and inhabitants and workers. Each one builds in its own settled area. Perhaps one set of buildings, far more than the other, is susceptible to floods or earthquakes or other disasters due to its situation or building materials or building techniques—perhaps one is built on sand—but this will hardly be immediately apparent to its inhabitants. For inhabitants of either, the notion of building where and as those in the other city build would seem somewhat mad—but it must be remembered that this feeling is mutual. The remark, from either

side, “why not see it our way,” is unlikely to convince. And yet each of us, if we have some familiarity with our own tradition, knows that it has weaknesses at various points.

Alasdair MacIntyre discussed this kind of fundamental disagreement in light of the thought of John Henry Newman in a recorded but not yet published lecture: “Newman, reflecting on the debates in which he had been involved, advanced an argument about arguments. Only in mathematics and logic, he contended, are there arguments with compelling force, just by themselves, as arguments. Elsewhere, what compelling force a particular argument has depends upon backgrounds, beliefs, and attitudes that individuals bring with them to the evaluation of that argument. It’s these, what Newman called ‘that large outfit of existing thoughts, principles, desires, likings, and hopes, which make me what I am,’ that determine what weight an individual gives to this or that type of consideration. It’s differences in these that underlie radical philosophical disagreements.” (MacIntyre 2012)

No frontal logical assault on an argument from another tradition, if these considerations are correct, has any serious hope of convincing anyone. In what follows, I cannot claim that any rival argument is absurd, for they almost never are on their own terms. To make that claim would require appealing to my own fundamental principles, which are precisely those my rivals do not admit. But that does not mean argumentation is impossible. What I can do (and all I can do) is to call into question parts of those rival arguments, one at a time, claiming to find weaknesses—failures to conform well enough to our lived experience or shared language; or inconsistencies—failures to apply their own logic in all parts of an argument. Likewise, failure to define key terms in ways necessary for them to make sense in the arguments offered. In a way this is to fight on enemy territory, with the enemy’s weapons. It is a form of intellectual guerrilla warfare that necessitates knowing my rivals’ terrain and weapons and strategy. Or, returning to my “rival

cities” architectural metaphor, I do not appeal to timeless shared principles of city planning or building, for the most part, but I can ask: is there a foundation under this building? If so, what is it? Is this method of assembling a building from its materials (the arguments) satisfying? Is it consistently applied throughout? Will these materials (arguments) withstand stress? Seth Lazar, calls his argument against McMahan’s “responsibility account” an “internal” argument, an argument that relies on McMahan’s own definitions and arguments (2010, p. 189). That is what I am, for the most part, trying to do.

My arguments in chapters 4 through 6 will come piecemeal, then—and appear all the weaker for that to the convinced adherent of one of my rival paradigms. I appeal, then, to the reader who differs from me: do not treat any argument as if it were meant to be a blockbuster bomb that levels all resistance, or a boxing punch that knocks out an opponent. Each argument, coming from within and on rival terms, is meant to chip away at the opposing whole, to cast doubt, to weaken one block of an opposing edifice. Each argument can of course be rejected (as would just as much be the case if the attack were in the other direction). I hope that the cumulative effect casts considerable doubt on the neo-Kantian individualist account of justice in warfare, and that the reader might at least consider, when all is said, whether the account I offer in chapter three, for all its incompleteness, might be a better account overall.

A final consideration here is that when perfection (or a mathematics-like demonstration) is not to be looked for, concerning the big questions we still need to choose. How shall we do so? According to Taylor, what we are looking for in such questions is “what it means to ‘make sense’ of our lives.” He adds, “the result of this search...yields the best account we can give at any given time, and no epistemological or metaphysical considerations of a more general kind

can justify setting this aside. The best account in the above sense is trumps.” Taylor calls this, “the BA principle” (1989, p. 58).

1.7 A Preliminary List of Objections

In the spirit of Aquinas, who began each article in the *Summa* with objections to his own thesis in that article, I will list here the objections that I believe would or will be raised against my account, each of which I will address in subsequent chapters: 1. Only persons who are liable, that is morally responsible in some way for the threat they pose to myself, may be killed in self-defense (or in defense of a nation). 2. Only persons who are culpable, that is objectively guilty of wrongful intention to do harm, may be permissibly killed in self-defense (or in defense of a nation). 3. The rules of ordinary interpersonal morality cannot justify even a defensive war, unless it is “genocidal.” 4. States have no rights of self-defense in the sense that individuals have them, or, “The right of national self-defense is a myth, unsupported by coherent moral reasoning (Rodin, 2014, p. 74). 5. Just war theory has betrayed its promise to “combine moral principles with a pragmatic sense of political realism” (Rodin 2002, p. 189). The first of these comes from Jeff McMahan and the remainder from David Rodin. I even entertain a hope that some objections will be dealt with by my positive arguments without my realizing it.

CHAPTER II

THE TRADITION TODAY: A FEW INITIAL CLARIFICATIONS

Every man in the street must hold a metaphysical system, and hold it firmly. The utmost possibility is that he may have held it so firmly and so long as to have forgotten all about its existence. This latter situation is certainly possible; in fact, it is the situation of the whole modern world. The modern world is filled with men who hold dogmas so firmly that they do not even know that they are dogmas.

—G. K. Chesterton¹⁴

To base an argument concerning the morality of a nation-state's defense of itself on the natural law, or the Aristotelian-Thomist tradition,¹⁵ is bound to strike some readers as both archaic and deeply wrong-headed, like a defense of motherhood rooted in a defense of the 1950s family, or like a call for a return to monarchy. It may have the appearance of a nostalgic attempt to return to a bygone age, and one that also employs a methodology not only largely alien to contemporary theoretical discourse, but also long discredited. This inevitable reaction can perhaps at least be mitigated through a few beginning clarifications. And even before offering

¹⁴ (1905, pp. 301-02)

¹⁵ I use the term here with the provisos in Chapter 1, and as in that chapter, I will often call it “the tradition” in what follows.

those, I should state firmly that I do not propose that we discard the modern age and everything in it. As MacIntyre remarks, “we are all of us inescapably inhabitants of advanced modernity, bearing its social and cultural marks” (2007, p. xi). Like Taylor (cf. 1989, p. 511) I believe we have learned important things from the modern age, including the radical Enlightenment, even though the retrieval of some of what we have discarded is vital.

The initial clarifications offered in this chapter are addressed to the sharp differences between the tradition and most contemporary approaches to just war theory. They offer sketches and quite brief defenses of the tradition’s approach and its differences with the predominant approaches today. I am in no way attempting to write a full account of any of these points, something that would require a book (or many volumes) for each.¹⁶ I am offering these sketches to give the reader some idea why the argument looks so different from most contemporary arguments, and some notion of the reasons for the differences. I am also preparing the ground for future arguments. I will also defend those differences dialogically in subsequent chapters, both in my attempt to show positively that the tradition provides a good fit with our lived experience (as well as having internal consistency), and in my critiques of recent writers in the attempt to show

¹⁶ In addition to the works cited below, I refer the interested reader to the following books. For a historical overview, see Heinrich Rommen’s classic *The Natural Law* (1998, first translated 1947) and of course MacIntyre’s *After Virtue* (2007). A good brief overview of Aquinas’ thought that is highly relevant here is Feser’s *Aquinas: A Beginner’s Guide* (2009). The five broad topics addressed in the present chapter overlap a great deal, especially the last four. On individualism vs. the tradition’s understanding of a balance between individual and community, see the works of Maritain, especially *Scholasticism and Politics* (1960, first published in English in 1940). For a rather different, more recent treatment, see MacIntyre, *Dependent Rational Animals* (1999). For the remaining topics, MacIntyre’s *Three Rival Versions of Moral Enquiry* (1990) offers an interesting treatment of differences in methodology, especially the appeal to foundations. To see the methodology in action, including treatments of subjective vs. objective approaches, human nature and teleology, and rights and the common good, see McNerny, *Ethica Thomistica* (1997), or for a more in-depth treatment of the same topic, his *Aquinas on Human Action: A Theory of Practice* (1992). Also recommended are Jensen, *Knowing the Natural Law* (2015), Flannery, the difficult and quite technical but excellent *Acts Amid Precepts* (2001); and Hittinger, *The First Grace* (2003). For an Aristotelian-Thomist account of moral action that makes few concessions to a modern vocabulary, see Long’s *The Teleological Grammar of the Moral Act* (2015).

that their approaches do not fit as well with that experience. These initial clarifying comments will concern the following issues: individualism (as a creed and as a method); methods (especially the relationship of moral theory to larger frameworks); subjective vs. objective descriptions of moral choices; human nature, teleology and essences; and rights. Without at least some attempt to describe these differences, readers may be left with little idea why the arguments I make have the form and content they have.

2.1 Individualism as Creed and Method

The concept of “the individual” is often said to trace back to the ancient Greeks¹⁷—perhaps an oversimplification, but a useful one. Yet clearly classical Greek (perhaps nascent) individualism was not ours. An interesting reversal in perspective that took place at some point between their time and ours will help to illuminate the difference. Socrates, in Plato’s *Republic*, offers an idea that apparently is swiftly and easily accepted by his listeners, but that makes no sense at all to moderns: let us look for justice in society as a whole, he suggests, and if we find it there we will be able to define and see it more easily on the smaller scale of the individual mind or soul (1987, p. 117). Figure out the mural and you will understand the Moghul miniature of the same subject. The order in man reflects in some way the order of the greater whole, a theme that resonated in the Western world as late as Shakespeare, but is now as alien as the notion that a human sacrifice might improve the crop yield.

The method of modern just war analogizing is, in general, the polar opposite of that of Socrates. Modern just war analogizing often asks what our intuitions are about an individual case of possible self-defense, and says (Fabre and Lazar, 2014, p. 4) that as we can see the moral

¹⁷ See for instance Dumont, 1982, pp. 27-28. Dumont describes a belief in a “surge of individualism” in Hellenistic Greece that is widely accepted by scholars, but insists that “philosophy itself” from the pre-Socratics onwards “must by itself have fostered individualism.”

principles at stake more clearly at this level, or are surer about them, we can clarify our notions of the principles and then apply the clarified principles at the larger scale of the interaction between polities.¹⁸ The modern confidence in the clarity of understanding of principles at the two levels is reversed from the tradition's standpoint.

This reversal is one sign of the radical difference between the tradition and various aspects of the modern project in their approaches to the relationship between the individual and the community, and in fact to their answers to the question of what the individual is. The modern project, which is largely “modern liberal individualism” in MacIntyre’s phrase (2007, p. 266), almost always begins conceptually with the individual. Furthermore, the community can be legitimated only on individualist grounds. By contrast MacIntyre, speaking for the tradition, writes of early modernity’s “newly invented social institution, the individual” (2007, p. 228), here seen as the individual conceived apart from his or her origins in a family and other groups, and apart from any role in society.

Of course modern liberal individualism has some great achievements to its credit, achievements that are not to be despised. I think of Milton’s celebration of freedom of the press in the *Areopagitica*, J. S. Mill’s arguments in favor of liberty of thought and life in *On Liberty*, and Hayek’s description of

that individualism which, from elements provided by Christianity and the philosophy of classical antiquity...has since grown and spread into what we know as Western civilization...the respect for the individual man *qua* man, that is, the recognition of his

¹⁸ The exact wording is, “The individual moral reasons invoked in these examples...are typically ones in whose foundations and force we have considerably more confidence than the political/collective level reasons that they are supposed to illuminate.”

own views and tastes as supreme in his own sphere...and the belief that it is desirable that men should develop their own individual bents.” (2007, p. 68).

Hayek goes on to ascribe to this individualism “the marvelous growth of science which followed the march of individual liberty” (2007, p. 69), and the amazing rise in the lifespans and living standards even of the poor (2007, p. 70). Like Taylor, I am not at all interested in denying “the moral imperatives which are felt with particular force in modern culture. These emerge out of the long-standing moral notions of freedom, benevolence, and the affirmation of ordinary life, whose development I traced...from the early modern period through their Deist and Enlightenment forms” (1989, p. 495). Perhaps some form of Western civilization less committed to liberal individualism could have matched these achievements, or caused less concomitant suffering, but no one knows, and the counterfactual history would be tendentious indeed. Better to acknowledge the achievements in all simplicity.

And, like modern individualism, the tradition does indeed value the individual. In fact, the modern concept of individual human dignity, the foundation of so much modern theorizing about democracy and ethics, is borrowed directly from the tradition, which (unlike much modern theorizing) openly gives an account of the reason for that dignity. From the Greek side, we are animals capable of giving an account of ourselves and of achieving various perfections much higher than those of any other animals. The Judeo-Christian revelation, seen as supplementing and often confirming the work of reason in Plato and Aristotle, raises the individual to an even

higher level when it says human beings are made in the image of and destined for union with God, something which colors the tradition in its Thomist version.¹⁹

It is not the importance attached to the individual that the tradition questions in liberal individualism, but, first, the cutting loose of the individual conceptually from a good that is greater than individual choice, or to put the same issue another way, the insistence on the moral autonomy of the individual. The tradition holds, with Kant, that “*Sapere aude!*” or, “dare to know!” (1991, p. 54) is a good thing: but when it comes to fundamental moral laws, the point is to dare to become a seeker and discoverer of, not a creator of them. Second, the tradition questions the method, noticed above in just war theory, that takes for fundamental building blocks individuals somehow situated outside of communities, and takes its bearings from the supposed rights and intuitions of such individuals.

For the tradition, part of that good that is greater than individual choice involves the importance of the organized community, which is never seen as an alien and accidental creation of individuals. Conversely, the individual is seen, with the rarest of exceptions, as always embedded in a community in ways that shape what the individual can see, think, or hope to accomplish. All of an individual’s thoughts and intuitions will be molded by this fact of embeddedness. The tradition assumes the primordial nature of community, and strives to maintain a balance from the start between the needs of a community and of the individuals who cannot possibly flourish without it.

First, the individual. It seems odd, from the tradition’s point of view, to take the autonomous individual human being as the starting point for our evaluation. It is odd because we

¹⁹ Aquinas famous statement in the prologue to Part I-II of the *Summa* combines the two: “man is said to be made to God’s image, in so far as the image implies an intelligent being endowed with free-will and self-movement.”

are born helpless and utterly dependent. We learn language (without which it is not clear that we can think at all) only with the extensive help of and intensive interaction with others (natural as the process is, in an isolated individual it never takes place). We obtain from others close to us not only language but a mental picture of what the world is like and how people should behave. This nurture, care, and shaping by other human beings provides a foundation without which the usual modern superstructure, the conscious building by the individual of a personality shaped by individual choices, is impossible. We gain much of our identity, at the deepest level, from these shaping influences, and we cannot leave them entirely behind.

Ironically, as Taylor points out, one of the ideas we gain from all these shaping influences in the modern era is the notion that we are individuals first and part of various social groups second:

...individualism has come to seem to us just common sense. The mistake of moderns is to take this understanding of the individual so much for granted that it is taken to be our first-off self-understanding “naturally.” Just as, in modern epistemological thinking, a neutral description of things is thought to impinge on us first, and then values are added, so here we seize ourselves first as individuals, then become aware of others and of forms of sociality...

On the contrary, what I propose here is the idea that our first self-understanding was deeply embedded in society. Our essential identity was as father, son, and so on, and as a member of this tribe. Only later did we come to conceive of ourselves as free individuals first. This...involved a profound change in our moral world, as is always the case with identity shifts. (2005, pp. 64-65)

Taylor's point here concerning "our essential identity" applies not only to the Aristotelian-Thomist tradition, but to most traditions, in other parts of the world as well.

Taking the individual as the unit of analysis seems to begin with the imaginary "state of nature" narratives that are the founding myths of modern liberal individualism. These stories, in which solitary adult human males in occasional conflict (like smarter orangutans in Rousseau's version, as Robert Wokler points out, 1988, p. 127) bargain in some way to achieve cooperation, is the apparent font of this modern way of looking at individuals and society. Exempting Rousseau's version, which appears to attempt quite seriously to be historical, these stories are clearly devices, methods of abstraction in order better to understand. However, the device in each case makes enormous hidden assumptions about what these individuals could be like, the greatest of which is that it is quite natural to be a solitary adult, endowed with language and the thought that flows from it, and enjoying an unlimited freedom but no (Hobbes) or very few (Locke) obligations.²⁰ (For Rawls, too, the individual who goes into the original position takes some baggage with her, see the section, "The Circumstances of Justice": 2005a, pp. 126-30.) While the authors of these contractarian thought experiments do not present them as history, scholars in the tradition would stress that despite the name "state of nature" for Hobbes and Locke, these are highly *unnatural* ways to think about human beings.

For all its influence on us, the concept of the autonomous individual in a state of nature is quite a bad fit with the reality of our experience. A description of a "state of nature" that followed human experience would be one in which men, women, and children find themselves embedded in families, linguistic communities, cultures, and political communities. The idea

²⁰ This critique, elaborated in the next paragraph, seems to go back at least to Rousseau, as pointed out by Allan Bloom (1987, p. 562).

behind the state of nature model appears to be Galileo's idea, wildly successful in the study of the motion of bodies, of "resolutive analysis and compositive synthesis": break down a larger whole into its constituent parts, and having understood the parts and their interaction, reconstitute the whole in an understanding way.²¹ The hoped-for simplification to constituent units does not work for human beings, because factors that can come only from the social world are inevitably smuggled into the "simple" model of the individual. The recomposed model of society is actually built with "individuals" heavily shaped by society, an incurable case of circular reasoning. Yet this model has become the floor on which much of our mental furniture sits, and the ubiquity of the impossible individual in the model—autonomous, utterly free, defined by self-referential choices—is, for many of us, axiomatic. (She forms, to give just one example, the fundamental unit in much neoclassical economic theory.)

Modernity's picture of the individual is deeply unbalanced, according to modern writers in the Thomist tradition. As MacIntyre puts it,

the self for which [the kind of regard for others enjoined by the natural law] is problematic could only be a self which had become isolated from and deprived of any community within which it could systematically enquire what its good was and achieve that good. What for the kind of ancient and medieval moral enquiry and practice which Thomism embodied was the *exceptional condition of the deprived and isolated individual became for modernity the condition of the human being as such.*" (1990, p. 193, emphasis added)

²¹ See Hittinger, 2003, pp. 12-13. Note that Aquinas uses this model as a way of illuminating rational action for the individual, see Jensen, 2015, pp. 8-12.

Contrary to much liberal individualism, then, from the tradition's viewpoint, someone who lives as an atomistic individual and reasons accordingly is an oddity, a morality built on a theoretical foundation composed of such individuals ought to be considered "exceptional," and the "ordinary principles of interpersonal morality" (Lazar, 2014, p. 12) need to include, from the start, an admission of the value of the community.

Closely related to this concern about an unreal and unhelpful picture of the individual is the tradition's lament for the loss of the old conception of a common good. William Cavanaugh's account begins with Hobbes: "The foundation of the state in Hobbes is not a common good but rather a shared evil: the fear of death." United by this fear, individuals "in the state of nature do not occupy a common space, for each has a *jus in omnia*, a right over everything," and in these circumstances they are enemies. But Hobbes' solution does not recreate a common good. As Cavanaugh writes, individuals in Hobbes' account "do not depend on one another, but are connected only through the sovereign, like spokes to the hub of a wheel." Hobbes rejects Cardinal Bellarmine's statement that members of commonwealths depend on each other, like the members of the body of an animal. Instead, Hobbes writes, each member "depend[s] only on the sovereign, which is the soul of the commonwealth," and as the body dissolves into its elements without the soul, so the commonwealth dissolves if the sovereign is removed (Cavanaugh 2004, p. 252, internal citations omitted).

Hobbes leaves the common good entirely dependent on the sovereign, an impossibility from the tradition's point of view. Yet Locke's account does little more for the common good, according to Cavanaugh. Locke wants peace in society, so the contentious question of an end for society must be avoided:

What is common is therefore redefined as follows: “The commonwealth seems to me to be a society of men constituted only for the procuring, preserving, and advancing their own civil interests. Civil interests I call life, liberty, health, and indolency of body; and the possession of outward things, such as money, lands, houses, furniture, and the like.” As A. J. Conyers comments, for Locke “What is left to discuss in the public arena, therefore, is not the common good that creates society at the level of common affections and common goals, but merely the resolution of differing material interests.” (Cavanaugh 2004, p. 252, internal citations omitted).\\

Cavanaugh summarizes, touching on a number of points made above:

The classical sixteenth- and seventeenth-century theories of sovereignty that gave definition to the [modern] state do not yield much in the way of the common good. The foundational anthropology is strictly individual, such that the goal of the state is to secure the non-interference of individuals with each other’s affairs. A new type of space is invented in which individuals relate to each other through the mechanism of contract, as guaranteed by the center. Public and private interest is seen to coincide, but the discourse thus shifts from good to will and right. The body politic does not pursue a common good, but seeks to liberate the individual to pursue his or her own ends. (Cavanaugh 2004, p. 254)

For the tradition, the point of community is that in it, individuals participate more or less fully in a “common good” (more or less fully realized) without which their potential as human beings is radically underdeveloped. As Robert Sokolowski writes concerning fully-formed political communities (not simply of families or villages or tribes),

Aristotle says that “the one who first established [such a community] is the cause of the greatest goods,” because founders make possible for man a civilized and virtuous life, a life lived in view of the noble, the good, and the just, a life in which human excellence can be achieved and the worst in man can be controlled: “For man, when perfected, is the best of all animals, but when separated from law and justice, he is the worst of all.” (2001, p. 508, internal citations omitted)

In somewhat technical Aristotelian language, John Nieto writes that the good of a man as an individual is only his own good, not shared with anyone else; whereas the common good is the good of a man as a part of the whole which is the political community (“the city”), a good in which he participates. “With reference to his appetite [love] for the city’s good, the citizen is animated by the very essence of the city, insofar as he loves this good as belonging to the whole” (2007, p. 125). The common good is greater than his private good, but it is that because many others share it with him, and “insofar as he is an agent in common with others,” or “a citizen” (2007, p. 130), not because it is simply the good of a larger and more powerful unit to which he may need to be sacrificed (2007, pp. 126-27). A “city” worthy of the name cultivates the virtue of love for the common good in each citizen (2007, 124). The tradition emphasizes the naturalness of social units like family, village, and tribe, and considers the independent political unit to be potentially the place of the highest human flourishing.²²

The importance of the common good goes further. As Jensen states, for Aquinas, “every [individual human] inclination is *directed* to the shared good” (2015, p. 114, emphasis added). One of the specific examples he offers is the inclination to reproduce ourselves, which is directed

²² The tradition is well aware that many states go awry and fail to encourage this potential human excellence in important ways.

not only to the existence of new individuals, but to the “continued existence of the species,” and in fact of the nation. A second example is the inclination to nourishment,” which is also an inclination “toward the existence of this individual as a member of the species.” (2015, pp. 114 and 115, internal citations omitted). A final example is the inclination to seek knowledge: “The inclination, we might say, is to know the truth not simply as an individual but as a human being, or as a rational creature... This knowledge is realized more fully yet in union with others, that is, by knowing together with others we know more fully or completely (2015, p. 116). The motivation behind this inclination to goods that are shared is love: “...Aquinas argues that the love of God and others is a natural love... Similarly, the love we have for other human beings... corresponds to a natural inclination found in all things. Indeed, this love is based upon the natural inclination to love oneself” (2015, p. 113, internal citations omitted).

Note that in the tradition’s account, there is a motivation in the theory for individuals to act in ways that further the good of their communities. As many modern writers in the tradition note, there seems to be no obvious reason in the various theories of modern individualism for the individual, liberated to pursue his or her own ends, to care about the good of the whole community. That good has no clear foundation in the “ordinary principles of interpersonal morality” (Lazar, 2014, p. 12) as understood in modern individualist discourse, which assures me of the negative obligation not to harm others, but only in order that I can be as autonomously free as possible. Taylor points out that there is both a Kantian and utilitarian emphasis on freedom so conceived (1989, pp. 82-85). The Aristotelian *telos* of the common good was rejected by these theories at the beginning.²³ If I am as free as possible, the derivation of concern for the good of

²³ In an undergraduate class I taught not long ago, a student asserted that all human actions, without exception, are undertaken out of self-interest, and even apparently altruistic ones reduce to self-interest. Many students agreed, and none would publicly disagree. The notion does not live solely in theories only

the whole from my complete freedom coupled with my one negative obligation not to harm others will be at best rather complicated, with less than intuitive results.

Why should the individual care about society's good? What is the motivation of the individual in today's theories? The two dominant families of theories of morality today are utilitarian and Kantian in their roots. The underlying motivation in utilitarianism is pleasure or happiness. As Taylor points out a number of times (e.g. 1989, pp. 83 and 85), we all quite naturally desire to pursue our own happiness, but why we should pursue the happiness of others is problematic for the theory. As MacIntyre puts the utilitarian dilemma in terms of preference satisfaction,

if it is practically rational for me to maximize my own preferences, then, so long as I am rational, I can have an interest in maximizing the preference satisfactions of others only so long as that maximization conduces somehow or other to the satisfaction of my own preferences. But social life is often such that there will be relatively few others in whose preference satisfaction it is rational for me to take an interest...sometimes...there are others whose preferences are such, that if their preference satisfaction is maximized, my own [preferences] will remain unsatisfied. (2009, p. 44)

MacIntyre concludes that the two rational goals of maximizing my own preferences and those of as many others as possible are inherently in conflict. Kant, quite differently, and in reaction to utilitarian ideas, "insists on seeing the moral law as one which emanates from our will" (Taylor, 1989, p. 83). This is a rational will, certainly, not an arbitrary one. But what if I will something that is pleasant for me personally, rejecting the rigors of Kantian rationality and

a few people read, but has been largely adopted by much of the wider culture. Besides the consciously religious minority, how many resist this trend, and on what basis?

duty? Kant would tell me I have fallen into contradiction—but clearly fear of contradiction is insufficient motivation for many of us to turn away from some intense pleasure or to carry out some painful or arduous duty, as the good of society as a whole might require.

I think Taylor argues persuasively that we are in fact motivated by what he calls “hypergoods”: “goods which not only are incomparably more important than others but provide the standpoint from which these [other goods] must be weighted, judged, decided about” (1989, Chapter 3). One of the strongest hypergoods going today is “the moral outlook of universal and equal respect” (1989, p. 67). Yet, as Taylor writes, “qualitative distinctions” have been largely excluded, “for epistemological and moral reasons,” from much modern moral philosophy. Although that philosophy is attempting to describe a way to reach the good society, it “adopts a procedural conception of reason” in order to get there (1989, pp. 86-87). Thus, modern philosophical “theories of obligatory action... [seem to be] motivated by the strongest moral ideals, such as freedom, altruism, and universalism,” but “what these ideals drive the theorists towards is a denial of all such goods” (1989, p. 88). Our moral theories, then, either have no convincing explanation for why we should sometimes act self-sacrificially for the good of the greatest number (utilitarian theories), or else (as in deontological theories) insist on the procedural character of moral reasoning and thus “the priority of the right over the good” (Taylor, 1989, p. 88), including the common good.²⁴

²⁴ See Frowe for a concrete example: she denies that we owe any “duties of care” to our fellow citizens beyond what we owe to “all persons” (2015, 138). Any request for self-sacrificial action, say of soldiers in battle to risk death, appears to be baseless in such a framework. Likewise, the slightest degree of greater concern for fellow citizens over humans in remote parts of the world is ruled out. It seems odd that the legitimacy of greater concern for members of our immediate families is admitted in this theory and others like it, but beyond that, we seem obligated to leap to the universal level—which is strangely different from the experience of most human beings through time.

As Sokolowski sums up the dilemma of liberal individualism from the perspective of the tradition, “the modern state, the one described by Hobbes and glorified by Hegel...presents a great human problem and an ominous threat to the human person. It is a formula for organizing deracinated human beings” (2001, p. 517). Even more sweepingly, “Modern individualism—what is called liberal individualism—harms the person slowly and silently through a notion of freedom as absence of any and all constraints on the individual’s choice; liberal individualism thus undermines its own moral preconditions of self-control, self-governance, and internal, moral freedom” (2001, p. 524).²⁵ Sokolowski is claiming that liberal individualism, ironically, harms individuals. If choice without content has overwhelming importance in the theoretical description of the individual, the individuals who are inevitably shaped by this theory are constantly and subtly directed away from the possibility that good choices are better than the unbridled ability to choose. From the tradition’s point of view, individuals are taught to undervalue or not value what is actually good for them.

In contrast, the tradition saw the motivating force of the individual to be love (defined most fundamentally as “willing the good of another,” *S.t.* I-II, q.26 a.4). Everything naturally loves (and should love) itself, according to the tradition, and, as Aquinas quotes Aristotle, “The Philosopher says (*Ethic.* ix, 8): ‘Love for others comes of love for oneself’” (*S.t.* I, q.60 a.3). He also quotes the Bible in support of the naturalness of love for one’s own kind: “That seems to be a natural property which is found in all, even in such as devoid of reason. But, ‘every beast loves

²⁵ Sokolowski’s characterization is too sweeping to apply to many liberal theorists, no doubt; yet I would argue it does appear to characterize the immense importance and range of personal choice for many adherents of liberalism.

its like,’ as is said, Sirach 13:19” (*S.t.* I, q.60 a.4).²⁶ He goes on to state in the latter article that love extends outward:

Thus a man loves his fellow townsman with a social love, while he loves a blood relation with natural affection, in so far as he is one with him in the principle of natural generation. Now it is evident that what is generically or specifically one with another, is the one according to nature. And so everything loves another which is one with it in species, with a natural affection, in so far as it loves its own species.

Thus, the driving force of the tradition is love, in one form or another. Any independent political state should be seeking a common good, and should educate its citizens to love the common good. And, as Aquinas puts it, rather radically, “the primary purpose of human law is to cause friendship between men...” (*S.t.* I-II, q.99 a.2, quoted in Pieper 2002, p. 93).

In a final note, I wish to return to Socrates’ question of perceptions at the individual and societal levels. I suggest that reversing Socrates’ method, or beginning with abstract individuals in a society-less state and seeking out our intuitions about those individuals, can lead to confused reasoning about the social level. For one thing, as noted above concerning the “state of nature” stories, it appears to be difficult or perhaps impossible to separate from our intuitions about an individual case the formation of those intuitions by our experience in society—the hoped-for “pure” individual data are always polluted by our social experience.

Another problem to bear in mind with reasoning from individual analogies is that being slightly “off” on a very small scale can lead to enormous errors on the larger scale. Aristotle

²⁶ With our greater set of ethological examples to draw on, we are of course more intensely aware of the exceptions to this rule than the ancient and medieval worlds. As with “birds of a feather flock together,” the description was probably never meant to be understood absolutely.)

warns about this problem in terms of time in *The Politics* (1992, p. 306), but consider the point on the spatial dimension: if you reverse the murals to miniatures example in Socrates' story noted above, a small error in proportions in a miniature painting will become quite large if the painting is blown up. If the clarity of our moral intuitions on the micro level is actually slightly off, the consequences for moral reasoning at the macro level are likely to be substantial.

2.2 Foundations and Methods, Intuitions

Originality was not a key concept for the ancient and medieval worlds, even if much original work was done. An original approach appears to have come about as an accidental side-effect, at least in many cases, of attempts to see not only what was correct about one's predecessors, but also what was incorrect or missing. It seems not to have occurred to most ancient and medieval thinkers that "newness" in itself was a value in thought. A philosopher was a lover of wisdom, and thus the first place to look for wisdom was in the works of one's predecessors. While this is sometimes depicted as slavish reliance on authority, the caricature involved cannot be taken seriously by those actually acquainted with the works involved and the progression from one thinker to the next. It is even a commonplace of medieval thought that "the proof from authority is the weakest form of proof,"²⁷ and while Aquinas cites an authority in almost every answer in the *Summa*, such citations are almost never considered to be dispositive by themselves, and are always followed by a close-reasoned analysis. Yet the citation of authority has a point: as Peter Kreeft puts it, "the medievals...believed in doing their homework and in learning from their ancestors" (Kreeft 1990, p. 18). Learning from one's ancestors was a prerequisite to being part of a tradition.

²⁷ Aquinas himself quotes this common saying with approval in *S.t.* I, q.1 a.8.

In addition, the metaphor of building, so important to Aristotle, was just as vital to any medieval philosophical or theoretical work. Each piece of a work needed to fit logically with the other pieces, and each work made sense insofar as it was part of a larger project and contributed to it. The *Summa* itself is a grand, open-ended, dynamic synthesis of knowledge that considers and refines the work of Aquinas' predecessors, in a period of over a thousand years, on a wide range of topics. None of Aquinas' works attempts to "start afresh" in isolation from other thinkers or from the other pieces of his life's work.

Thus from within the tradition it seems more or less incomprehensible to conduct a moral inquiry that is not consciously part of a larger project, and ethics is seen as incomprehensible outside of a philosophical framework. David Rodin is one contemporary just war scholar who seems at first glance to see the question this way (though even this appearance is somewhat unusual).²⁸ I focus on Rodin's discussion of this issue here because, to his credit, he addresses it and urges its importance. Rodin claims in his introduction to build his theory on "our common morality," though he immediately notes that this is a difficult notion that raises many questions. One of those questions is, "can the common morality be given an adequate philosophical foundation when challenged by competing meta-ethical or first-order theories..." (2002, p. 7). For a moment, he appears to be claiming a firmly rooted place in the tradition of "our common morality." But the moment passes, as he then asserts, "Our moral outlook does indeed require a rigorous foundation, but it will not find one here" (2002, p. 8). He then (as I noted in Chapter 1) firmly repudiates the idea of working within a tradition:

²⁸ There are a variety of approaches to this question in contemporary just war theory. In the co-written introduction to Fabre and Lazar, Fabre is said to "reaffirm... her individualist, cosmopolitan framework" (2014, p. 5). Yitzhak Benbaji's "unique argument" is described as contractarian (2014, p. 7). Anna Stilz writes "we" about Kantians (2014, p. 216). And so forth. This is in sharp contrast to some contemporary works that launch into argumentation without laying any obvious philosophical groundwork: McMahan's *Killing in War* is an obvious but not at all egregious example.

It is tempting to think that such a defense [of “a foundation of common morality”] could only be achieved by deriving its norms from, and reducing them to, one or another of the classic moral theories—consequentialism, Kantian deontology, Aristotelian virtue ethics—or some other theory. I do not, however, accept this assumption...I do not give my allegiance to any of the standard theories as a working methodology. (2002, p. 9)

Rodin goes on to explain that his work is one of “moral exploration,” and to have “any hope of being true” it must recognize “a plurality of sources of normativity.” He offers examples of consequentialist thinking over-riding a Kantian deontological principle, and of the converse, ending this paragraph with, “Any moral exploration which is alive and true to our moral experience must acknowledge the force of each...even at the cost of admitting conflicting moral judgments and insoluble dilemmas” (2002, p. 9).

From the standpoint of the Aristotelian-Thomist tradition (and perhaps even from the broader Western tradition, which has largely insisted on some kind of consistency in argumentation), this rejection of foundations cannot lead to a coherent outcome. I will address Rodin’s point at greater length in Chapter 6, but here I will simply ask, if consequentialist considerations can be called into play in my argument any time my “moral experience” leads me to reject a “broadly Kantian” conclusion (2002, p. 87),²⁹ as the argument here seems to state, then on what basis can I ever hold firm on a deontological point if pressed? And the question continually raises its head, how can I appeal for the most part to one form of justification, but sometimes to another that contradicts, in a fundamental way, the first? Or if I do so, how can I use the term “morality” in the singular in the resulting work?

²⁹ Rodin writes of a “broadly Kantian understanding of rights” (2002, p. 87) but the descriptor seems to fit nicely with the work as a whole.

One solution might be to explain why deontological considerations hold generally, and on the other hand why and in what cases they are sometimes overwhelmed by consequential ones, and what is the relationship between these two apparently opposing kinds of considerations. This would be one way at least to attempt to provide a unified account of what we ought to do, but I do not see that Rodin ever does this. Quite a few scholars in modern just war theory, like Rodin, dispense with the notion that an overall philosophical framework is necessary for a work of moral theory.

Besides the lack of any explicit connection to an overall moral philosophy, many writers in modern just war literature often seem to base important parts of their arguments on the moral intuitions of their readers, as elicited by “simplified hypothetical cases...which, once examined in light of other intuitions and considered judgments, may shed light on more complex political and social dilemmas” (Fabre and Lazar, 2014, p. 4). Fabre and Lazar call this (on the same page) “the methodology of contemporary analytical moral and political philosophy.” From the standpoint of the tradition, this reliance on moral intuitions to drive an argument is closely related to the earlier issue of a lack of explicit connection to an overall philosophical commitment or stance, but raises its own, separate problems.

Now, the existence of our moral intuitions is indeed important. Taylor, although not writing explicitly from within the tradition, draws out their importance and reality in a helpful way. He notes first that some of them are “uncommonly deep, powerful, and universal” (1989, p. 4). “They are so deep that we are tempted to think of them as rooted in instinct,” he continues, citing, like Rodin (2002, p. 8), the rules against manslaughter as examples. He then cites the “naturalist” attempt to treat moral intuitions as simple instincts. We don’t live this way, he claims, for an instinctive reaction like nausea is never something to argue about, whereas “we

argue and reason over what and who is a fit object of moral respect.” Assimilating moral intuitions to “brute” reactions like nausea is “utterly different from the way we in fact argue and reason and deliberate in our moral lives” (1989, p. 6). Even the attempts of some philosophers who refuse to question the “ontological accounts” that appear to lie beneath our moral intuitions “nevertheless scrutinize and criticize our moral intuitions for their consistency or lack of it. But the issue of consistency presupposes intrinsic [or moral realist] description. How could anyone be accused of being inconsistently nauseated?” (1989, p. 7). Taylor ends this discussion by insisting that while our intuitive moral reactions sometimes must be disciplined, with some of them being “neutralized,” this is only to purify our intuitions of feelings that would otherwise skew our judgment. “It is never a question of prescind[ing] from our reactions altogether.” In fact, our moral intuitions give us access to a world in which the claims about moral reality can be discussed and debated (1989, p. 8). These arguments for the general importance of moral intuitions are fully consonant with the tradition.

Of course for Taylor one of the grave failings of much modern philosophy is its unwillingness to discuss the “moral ontology” that is implied by our moral intuitions (1989, p. 8). One issue with the use of intuitions, then, is their use without reference to the ontological framework implied. It can’t really make sense to accept the intuition as deeply important but ignore the meaning the intuition strongly implies. This concern of Taylor’s is quite similar to the concern I expressed earlier about moral theorizing without an overall philosophical stance. The tradition, in contrast, finds certain moral intuitions to be self-evident, or derived from others that are self-evident, but it consistently strives to give an account of why this is so.

A second and closely related issue is the question of what shapes our intuitions, especially on disputed points. For Aristotle and Aquinas, our perceptions of the broad outlines of

what is morally excellent and good are widely shared, but for a number of reasons, the details can be cloudy and disputed. In illustration of this, as I noted, Rodin points out that manslaughter is “an event of grave moral significance” in “almost all cultures” (2002, p. 8). That fact is surely significant, but, we may also ask, when is killing a human being considered justified? There are significant differences across cultures in the answers to that question (Taylor 1989, p. 5), such that people within one culture will often have different intuitions (for whatever reasons) from those in other cultures.

Other influences on our intuitions can include religious or philosophical preferences. Does it not matter for intuitions in a particular case that intuition-bearer Adelle was raised as a Calvinist Christian, heavily influenced by classical liberalism, and converted to Catholicism ten years ago, while intuition-bearer Brian was raised in an atheist family with utilitarian leanings, a stance he grew up to accept? Surely it does. Aquinas adds that our thinking can be mistaken (even if we are philosophers), and we can be misled by temporary lapses in goodness, or by vices: some strong desire for a good that diverts us from what we ought to do leads us astray. MacIntyre (2009, pp. 6-8) offers an extensive discussion of reasons given by Aquinas for this lack of clarity in the details of the natural law as perceived by people in various cultures. This latter idea may sound harsh to a deontological or utilitarian thinker today, but is it irrelevant to intuition-bearer Charlene’s notions about sexual ethics that she has secretly cheated on her husband during every business trip of the last 15 years, and plans to continue doing so? If political figure Daniel appears to be a habitual liar, does that affect our trust in his intuitions about the requirement of truthfulness? Psychologists speak of “cognitive dissonance,” a mismatch between beliefs and activities, one result of which is often that we adjust our thinking (and thus our intuitions) to fit with the activities we habitually engage in with pleasure. All these

sources of influence seem to call into question the neutrality of moral intuitions—yet without their neutrality, how can we appeal to them as standards in disputed questions?

A third question that arises about the use of intuitions is, “who is ‘we’?” It is common in contemporary just war theory, as in much modern analytic philosophy, to phrase an appeal to an intuition with the words, “most of us think...”³⁰ This has the air of an appeal to authority (or why is it mentioned?), a sort of democratic approach to morality. Unfortunately, many and perhaps the vast majority of authors who regularly practice this kind of appeal fail to specify who “we” are. The seemingly democratic aspect of the approach, however, is implausible. By “most of us” these writers surely do not mean the *hoi polloi*. For one thing, they rarely cite survey results, which would be a natural thing to do if that was what was meant. But in addition, the beliefs they cite with approval are often not those of the *demos*, and are certainly not those of “most humans living today.” Most Americans, for example, seem to believe you may shoot a person who breaks into your house at night simply on the grounds that you feel endangered (to be fair, probably because they believe you *are* most likely in danger), and a huge majority believes that laws should allow private citizens to obtain permits to carry concealed weapons in public.³¹ Most Latins traditionally believed (and most Arabs still believe, if my conversations with hundreds of Arabs over a decade or so are representative) that a husband has every right to kill a man who is having an affair with his wife if he finds good evidence thereof. The hundreds of millions of inhabitants of sub-Saharan Africa are largely agreed that homosexual acts are morally wrong,

³⁰ As a random example from hundreds available, see Quong, 2012, p. 48: “Suppose Albert is about to murder Betty in order to inherit her fortune. *Most people believe* that Albert is now liable to defensive harm at the hands of Betty...” (Emphasis added). But while this example may well be true world-wide, in many other cases the phrase is used to buttress statements of dubious popularity.

³¹ For example: “Gun rights/regulations poll,” 2012, April. *IPSOS Public Affairs*. Retrieved from <http://www.ipsos-na.com/download/pr.aspx?id=11545>. In this nationwide U.S. poll conducted for Reuters, 87 % are in favor of the use of force “to protect selves from danger in home,” and 75% are in favor of laws allowing concealed weapons permits.

and it appears to foreign residents that a majority also believe that “necklacing”³² is the right way to deal with street theft. A billion and a half Muslims, decent and good people that they undoubtedly are, hold a variety of beliefs that seem more or less repugnant on many U.S. and UK university campuses today. Are these included in the group, “most of us”?

What is actually meant by this kind of appeal to intuitions? Alasdair MacIntyre quotes Derek Parfit, challenged on his claims about personal identity based on some rather exotic thought experiments, as responding that “these cases arouse in most of us strong beliefs. And these beliefs are not about our words but about ourselves.” MacIntyre in turn retorts that, “the appeal to ‘most of us’ depends for its strength upon who ‘we’ are” (1990, pp. 198-99). In an earlier work, MacIntyre noted

the recent redefinition of the task of moral philosophy as that of rendering coherent and systematic ‘our’ intuitions about what is right, just, and good, where ‘we’ are the inhabitants of a particular social, moral, and political tradition, that of liberal individualism. So a concept of tradition is reintroduced as part of the necessary *de facto* background to normative enquiry.” (1988, p. 176)

Since the “we” of humanity at large is clearly not meant by these writers, yet they often do not specify which “we” they mean, MacIntyre’s apparently harsh attack has some force. It seems rather plausible that most of these writers are actually referring to fellow liberal individualists. This, then, is a third problem: rather than getting at some kind of universal or near-universal moral response through an appeal to “our” intuitions, we are in fact getting the

³² This generally involves beating the purported thief senseless or nearly so, tying his hands, putting an old tire around his neck, dousing him with gasoline, and lighting him on fire. Residents hear of such happenings regularly, and not infrequently see them, even if they are only occasionally reported in the Western press.

responses of a particular socio-economic group with a particular kind of education, a group that thus already shares a common set of ideas about the world. To build arguments on the intuitions of a particular socio-economic group moves us no closer to a sense that we are approaching the truth than taking a survey of philosophy professors at leading universities would do (although perhaps some believe this would help with the discovery of truth).

Helen Frowe has defended the use of the “simplified hypothetical cases” used to elicit our intuitions, which she calls “fictional examples,” as helping us to form judgments that are free of “illicit influences” that might arise from the use of historical examples (2011, p. 2). She adds that “I...on occasion, make assumptions about how most people would react to a particular moral problem.” However, she notes, “where I make these assumptions, they are explicit, and the conclusions that I draw from them are explicitly hypothetical” (2011, p. 3). Frowe’s point about illicit influences seems to me to work as a reason to be careful about the illustrative use of historical examples, but at the same time, the judgments we form even about these hypothetical cases depend on all the *licit* influences I mention above, something that is only occasionally mentioned in connection with their use. And while Frowe’s conclusions in this work may be explicitly hypothetical, Fabre and Lazar make it clear in the quotation above that in their edited volume, the conclusions from such cases are used to found, or buttress, or drive the arguments forward (something also true of Frowe’s 2015 book *Defensive Killing*). This is often the case in contemporary just war theory scholarship.

A final difference between the tradition and most modern just war theory in terms of intuitions concerns their status. At the conclusion of the introduction to *War and Self-Defense*, Rodin resolves a question about whether intuitions can be overridden by asserting that in choosing our most basic principles, “we seem to be forced back upon a reliance on intuitions...”

(2002, p. 13). Aquinas' moral theory, beginning as it does with a principle that is "*per se nota*," known from the very statement of the principle, might seem similar at first glance (*S.t.* I-II, q.94 a.2). But in fact Aquinas is claiming that we *know* the first moral principles, not that we choose them intuitively. In this instance, he is claiming that the first moral principle is as fundamental in and clearly true for practical reasoning as the principle of non-contradiction is in speculative reasoning. The modern notion of moral intuitions is not part of the tradition's roots, but it can find a place in the tradition, with the proviso that intuitions cannot be considered to be isolated building blocks that can be used to construct a moral theory about a particular issue. The tradition has a moral theory, and a wider ontology to which that theory is tied, and intuitions about particular cases and issues may find a place within that theory.

2.3 Subjective vs. Objective Evaluations of Moral Choices

Recent modern just war theory discussion tends to identify different modes of moral evaluation in terms of Derek Parfit's terminology of fact-relative, belief-relative, and evidence-relative justification, and spends a great deal of time in fact-relative mode. As Jonathan Quong explains these terms,

an act is wrong or impermissible (I will use these terms interchangeably) in the *fact-relative* sense when it would be wrong if we knew all the relevant facts. An act is wrong in the *belief-relative* sense if it would be wrong if our beliefs about the facts were true. Finally, an act is wrong in the *evidence-relative* sense when our act would be wrong if the relevant facts were what the available evidence gives us sufficient (or apparently sufficient) reason to believe they are. I will use the term *justified beliefs* to indicate that a person's beliefs are rational in light of the available evidence, that is, to indicate when a

person believes what she has sufficient (or apparently sufficient) reason to believe.

(Quong 2012, p. 48)

On the question of terminology, I prefer “subjective” and “objective” because these terms emphasize that it is the subject who must choose what to do. (Note: Heidi Hurd, Kimberly Kessler Ferzan, and Russell Christopher, quoted in subsequent chapters, also frequently use the latter terms.) Conversely, to speak of “fact-relative” accounts suggests that we may indeed sometimes or often know all the relevant “facts” (we can sometimes get close but often can never be sure, and facticity is not a simple topic); and contrasting “evidence” and “belief” seems to needlessly complicate the issue. When I use “subjective” to describe reasons for action, I mean that the agent believes she understands the facts to be a certain way based on the evidence available to her at the time.

Quong’s use of the term “evidence-relative” is another reason I choose to use “subjective” and “objective.” He writes that according to an “evidence-relative” account, “a person can only become liable to defensive harm when he acts in a way that: (1) meets the minimum conditions of voluntariness (or moral responsibility in McMahan’s sense); (2) is evidence-relative impermissible; and (3) results in a threat of harm that is fact-relative impermissible” (2012, p. 59). But conditions (1) and (3) both discuss “facts” the knowledge of which is quite likely not available to the victim at the moment when she is required to act. This does not achieve the kind of description closely tied to evidence *available to the agent who believes she needs to defend herself* that might have made the term attractive to the tradition.

Why does the tradition choose to operate in a primarily subjective mode? The answer goes back to the kinds of actions that fall under moral evaluation in the tradition. For Aristotle, “moral goodness is concerned with feelings and actions, and those that are voluntary receive

praise and blame, whereas those that are involuntary receive pardon and sometimes pity too” (2004, p. 50). At the beginning of his discussion of moral responsibility in Book III of the *Nicomachean Ethics*, he writes that actions can be considered involuntary either due to compulsion or ignorance, a distinction echoed by Aquinas in the *Summa* (II-II, q.66 a.4). An interesting note is that an action that has caused unintended harm is considered to be involuntary “only when it causes the agent subsequent pain and repentance” (2004, p. 52, echoed in *S.t.* I-II, q.19 a.6).³³ It is voluntary actions, then, that are to be morally evaluated according to Aristotle. Such actions, or “human actions” for Aquinas, are undertaken “for a purpose, with some end in view” (McInerny 1997, p. 1).

There are several instances of “involuntariness through ignorance” in Aquinas’ discussion of moral problems, and the ignorant agent, if not responsible for his ignorance (*S.t.* I-II, q.19 a.6), is not held guilty of the sin or moral fault in such cases. For instance, the finder of what seems to be an abandoned treasure, “if the thing found appears to be unappropriated, and if the finder believes it to be so, although he keep it, he does not commit a theft” (*S.t.* II-II, q.66 a. 5). Perhaps surprisingly, he also states that “if a man’s reason errs in mistaking another for his wife, and if he wish to give her her right [of sexual intercourse] when she asks for it, his will is excused from being evil” since his ignorance, which is “without any negligence,” makes what would otherwise be adultery “involuntary” in the tradition’s terms and thus not sinful (*S.t.* I-II, q.19 a.8). (Kreeft’s footnote to this text states that “such an example is perhaps more credible in the Middle Ages, which had no electric lights, than in modern times,” 1990, p. 427. But of course many people could not afford candles either, so the interiors of houses would often be

³³ I have argued previously that President George W. Bush’s failure to ensure that political planning for the aftermath of the invasion of Iraq took place fails this provision for involuntariness. Rather than showing “pain and repentance,” Bush gave medals to those responsible for the particular failures. White, 2010, 154-55.

quite dark after sunset.) In the tradition, the fundamental moral fact when someone acts to the best of her ability but is mistaken is the underlying moral innocence of the agent. This is not to say nothing should be done when the mistake is discovered, as I noted: the mistake is not counted as such unless there is “pain and repentance” if and when the mistake becomes known. An item taken by mistake must be returned to its owner when she is found, and so forth. (Sometimes the mistake cannot be rectified—the world includes such woes.)

This identification of the kind of action worthy of moral discussion seems to be of a piece with the Aristotelian/Thomist epistemology, which simply assumes that the healthy and experienced person’s perceptions are reasonably likely to be accurate, and are at any rate the best thing we have to go on when we make choices. If something goes wrong with our perceptions, we need to account for and deal with that to the extent possible when we learn about it later, but we act based on where we are with what is apparent to us, unless we know we are sick or under some bad influence such as drugs or alcohol. Most people are relatively sane. Most of the time, our senses do not deceive us, and they give us information on which we should act. The voluntary actions we undertake are based on this information from the senses.

If I assume for the moment that I want to make moral choices, I am not helped by discussions of a sort of Kantian noumenal realm of what actually occurs (an idea that apparently would not have made sense to Aristotle or Aquinas), even if I believe it exists, for I have no access to it. (And a scenario which describes “Innocent Threat” attacking “Victim” is operating in just such a noumenal world.) I have no immediate access to “the truth” as it might be known to God or even to some independent panel or court that can call and cross-examine witnesses and sift their evidence. I have to take the world as I find it and judge for myself by what I can see and deduce. So I use the information I have. Occasionally this will lead to mistakes, even quite

serious ones, but calling these sins or immoral choices makes the latter term refer to something that is no longer part of voluntary action, the action as I was able to see it. (Interestingly, David Rodin, in his consideration of consequentialism, writes that the “primary role of a theory of moral evaluation is not backward looking judgment of past action, but forward-looking assessment of how one ought to act,” 2002, p. 11. This appears to put him in agreement with me concerning the main purpose of a discussion of moral choices.)

The value of this predominantly subjective approach is its intense human focus: it evaluates human action fundamentally according to what the acting human knows or has reason to believe she knows—without giving up the possibility of later discovering mistakes. The one evaluating a scenario subjectively puts himself directly into the shoes of the acting person, with all the limitations that every person faces in a real situation of moral choice. (I discuss this issue in more detail in chapters 4 through 6.)

2.4 Human Nature, the Human Essence, and Teleology

With confidence and some subtlety, sociobiologists such as E.O. Wilson declare their views on “human nature”: in fact, one of Wilson’s books (2004) is entitled, *On Human Nature*. *Homo sapiens* is seen by sociobiologists as one species among many. Who doubts the existence of canine, equine, and feline natures? If they have natures, why not humans? The fact that we are studying ourselves no doubt makes it admittedly more difficult—it is a reflexive act in some sense—yet what does the name “anthropology” mean but the account of human beings, i.e. what human beings are like?³⁴ Another way to ask “what are x’s like?” is “what is the nature of x’s?”

³⁴ The first sentence on the website of the American Anthropological Association’s website is, “Anthropology is the study of humans, past and present.” American Anthropological Association. (2017, March). <http://www.americananthro.org/>.

As Taylor notes, however, many sociobiologists consider values to be simply our projections onto a neutral world (1989, pp. 54-55, and footnote 4). While the sociobiologists' claim that there is a human nature might appear congenial to the tradition, the vision of that nature, and especially of the relation of that nature and ethics, fits poorly with the tradition's view of it. In addition, Richard Dawkins, who counts himself among sociobiologists, insists in *The Selfish Gene*, "be warned that if you wish, as I do, to build a society in which individuals cooperate generously and unselfishly towards a common good, you can expect little help from biological nature...we are born selfish...let us understand what our own selfish genes are up to, because we may then at least have the chance to upset their designs..." (1999, p. 3). Dawkins not only denies that a decent morality has a basis in human nature, he insists that we must actively work to subvert any morality that would come from nature. Where the moral resources for this struggle will come from, or why it should interest or motivate us, he does not say. (As a reminder, the tradition does not see morality as arising from a simple observation of behavior, as I will discuss in detail below.)

At least one political scientist is seeking the roots of ethics in human nature. Robert McShea, Professor Emeritus of Political Science at Boston University, has applied ethology to the study of humans in his book *Morality and Human Nature*. He writes that *homo sapiens*, like other species, has a "species nature" (a term known to scholars of Marx) and what matters to humans is a consequence of that nature. In his view, values are based on our emotions as well as our ability to live with simultaneous awareness of our past, present and likely future feelings. While this is not natural law theorizing *per se*, it bears some intriguing resemblances to it, in the attempt to draw out ethical implications from human nature understood through observation and reflection.

Of course, there is a widespread denial in some branches of contemporary philosophy that anything coherent can be said about human nature—or that it even exists. This question is a profound one, and I am not claiming to offer anything like a definitive demonstration that there is a human nature and we can know it, something quite beyond my expertise. Nonetheless, as I belong to a tradition that affirms both that we have a nature and we can know something about it, I must offer a sketch (and only a sketch) of a defense of these propositions against at least a few of the famous philosophers who denied them. As noted in Chapter 1, Hannah Arendt does not deny in principle that human nature exists, but expresses doubt that we could ever define it:

The problem of human nature...seems unanswerable in both its individual psychological sense and its general philosophical sense. It is highly unlikely that we, who can know, determine, and define the natural essences of all things surrounding us, which we are not, should ever be able to do the same for ourselves—this would be like jumping over our own shadows. Moreover, nothing entitles us to assume that man has a nature or essence in the same sense as other things. In other words, if we have a nature or essence, then surely only a god could know and define it, and the first prerequisite would be that he be able to speak about a “who” as though it were a “what”...the fact that attempts to define the nature of man lead so easily into an idea which definitely strikes us as “superhuman” and therefore is identified with the divine may cast suspicion upon the very concept of “human nature.” (1998, pp. 10-11)

In his well-known essay “Existentialism is a Humanism,” Jean-Paul Sartre (1957) makes a similar claim, but slightly stronger: not only is the concept of human nature unknowable and inherently suspicious, it quite simply does not exist. Sartre claims first that as an artifact is produced by an artisan for a purpose, so the earlier conception was that God produced man with

a purpose in mind. We can say of the artifact that “its essence—that is to say the sum of the formulae and the qualities which made its production and its definition possible—precedes its existence.” In a similar way, he says, in that earlier approach, “each individual man is the realisation of a certain conception which dwells in the divine understanding” (pp. 289-90). Thus, Sartre continues,

Atheistic existentialism...declares...that if God does not exist there is at least one being whose existence comes before its essence, a being which exists before it can be defined by any conception of it. That being is man...man first of all exists, encounters himself, surges up in the world – and defines himself afterwards. If man as the existentialist sees him is not definable, it is because to begin with he is nothing. He will not be anything until later, and then he will be what he makes of himself. Thus, there is no human nature, because there is no God to have a conception of it. Man simply is. (1957, pp. 290-91)

Ironically, one might contend, Sartre’s argument, at least here, depends on the non-existent God. The analogy ‘God is to man as man is to tool’ seems to control the argument. Since there is no God, Man, to fill the void he left, is promoted to a kind of God, or a kind of parody of the nominalist God, one with no nature, just absolute will and freedom. But why is this analogy (with a putatively non-existent God) so important for the concept of a nature? Though humans did not make or design trees, and atheists do not believe in a tree-designing God, no atheist I am aware of seems troubled by the concept of an arboreal nature. Even granting Sartre his atheism, might we not be like trees instead of tools, and have an uncreated nature, like so many other things in the cosmos? Do we really have unlimited freedom to make ourselves into anything we like?

Arendt's claim, at least in the 1998 text quoted above, does not depend on atheism.³⁵ Its summary, that such knowledge of human nature would be for us "like jumping over our own shadows," is a kind of negative version of a Chesterton paradox. How could a man lift himself by his bootstraps? How could the sun light itself, or an eye see itself? It has to be said immediately that the idea that knowing oneself is at least difficult, in the "individual psychological sense" Arendt mentions, is an ancient one. The Delphic oracle would not have commanded it if everyone already did it: "Know thy name!" would make no sense as an instruction. It seems part of the point of many of Plato's dialogues that most of Socrates' interlocutors seem not to know themselves very well at all. Aristotle remarks that "most people" ignore the fact that virtuous deeds must be done in order to become virtuous, but nonetheless "imagine that they are being philosophical" by studying virtue in a merely theoretical way (2004, p. 38). The Hebrew prophet bewails our self-ignorance: "The heart is deceitful above all things, and desperately wicked: who can know it?" (Jeremiah 17:9). The gospels are full of descriptions of hypocrites who think they have become or have always been good, but are certainly not. To this extent Arendt is quite right. As Robert Burns exclaimed, "Oh wad some Pow'r the giftie gie us, to see oursels as others see us!"³⁶

On the other hand, is it not one unique mark of human beings that we *try* to define our nature (especially in Arendt's second, philosophical sense)? We are the only animal of whom we have solid evidence that we wonder about our nature, and why it (along with other things) is the

³⁵ However, she does give a rather similar response to Sartre's in a footnote to her discussion (1998, p. 11): "The answer to the question 'What am I' can be given only by God who made man. The question about the nature of man is no less a theological question than the question about the nature of God; both can be settled only within the framework of a divinely revealed answer." This assertion is odd: something exists in the universe but we could only know its nature if God (who may not exist) reveals the answer? We have come close to Sartre's claim here. The claim pushes a question we can ask about ourselves into an unknowable realm via an assertion about God.

³⁶ From "To a Louse," in Noyes (Ed.), 1967, p. 158.

way it is. (And what other animal is at all troubled by Jeremiah's concerns, or those of the gospels?) Aristotle's statement that human beings have a "rational element in their souls" (2004, p. 29) does seem to indicate a rather obvious distinction between us and other animals, even if Aristotle is here not offering a definition of human beings as such. We have no evidence that any other animal does the creative and reflective kind of thinking that humans do. We want an account of things, a *logos* or *ratio*, and we go on restlessly seeking one in a way that seems to be part of our identity as humans. As Chesterton said analogously of one of the discoverers of early Paleolithic cave paintings, "he had dug very deep and found the place where a man had drawn the picture of a reindeer. But he would dig a good deal deeper before he found a place where a reindeer had drawn a picture of a man" (2008, p. 33).

Yet certainly Arendt has a point in saying that our study of other "things" around us has an objectivity that our study of ourselves can never achieve. (Her point is real even if in this particular text she exaggerates the certainty of that objective exterior knowledge—this notion of scientific certainty is one of the major targets of Thomas Kuhn's entire idea of a scientific paradigm in *The Structure of Scientific Revolutions*, 1962.) As Taylor writes, "one crucial fact about a self or person...is that it is not like an object in the usually understood sense. We are not selves in the way that we are organisms or we don't have selves in the way that we have hearts or livers" (1989, p. 34). But granted that point, on the one hand, can we not hope to achieve at least limited success in an objective study of ourselves as a species? This would not be "assuming we have a nature...in the same sense as other things," for the tradition sees sharp distinctions between the natures of non-living matter, of plants, of animals, and of humans. It would mean deducing a nature from observations over time of many humans (including ourselves), who just like other species and classes of beings exhibit some common features. (Arendt's work is filled

with generalizations that result from such observations. For example, “speech is what makes man a political being,” 1998, p. 3.)³⁷

Simple “objective” definitions of what it means to be human (featherless biped, “tool-using animal”) do not sum up *homo sapiens* very convincingly. Yet in reply to both Sartre and Arendt, do not humans in fact do certain characteristic things, even if they are much more complex and variegated than what trees do, and are there not apparent limits to what they can make of themselves, at least in view of history to this point? Human beings have done astonishing things, but it is easy to think of deeds that no one would believe a human could perform. Some of the broad points in the vast complex that is “humanity” surely include thinking, wondering, language use, reflection on the world, knowledge-gathering, ritual, sociability, a rudimentary ability to try to put myself in your shoes, and so on. It’s not clear any other animal can do many of these. (Taylor notes an experiment where a chimpanzee with paint on its face sees the paint in the mirror and rubs it off, clearly recognizing its “self” in the mirror, and remarks, “Obviously this involves a very different sense of the term [self] from the one I wish to invoke” (1989, pp. 32-33). Humans create images and narratives, name things, are “subcreators” as Tolkien argues (1966, pp. 46-55), shape the world—and ourselves too, as Sartre insists. Yet there is no reason to think we are “nothing” before we start shaping ourselves, any more than an acorn is “nothing” before it grows into a tree.

If the efforts, in poetry and narrative prose, of thousands of years of writers mean anything, there is some agreement on what makes human beings different from other species,

³⁷ Again I refer to the Chesterton quotation from Chapter 1 about those who refer to a dog’s hind leg—is that not a claim to know what a dog is? If we are going to be truly skeptical about human nature, should we not refrain from speaking of “what makes man a political being”? The claim that man *is* “a political being” appears to be a claim about human nature, not a claim about the human condition (which Arendt claims in her human nature discussion that we actually *can* study and know).

even if part of that difference is a much more radical open-endedness than any other kind of being we know of. Even Sartre and Arendt implicitly differentiate the human species from others, Sartre on the basis that man is the “being [who] ...defines himself ... [who] will be what he makes of himself” (as quoted above); Arendt, implicitly, on the basis that “we...can know, determine, and define the natural essences of all things surrounding us,” which nothing else seems to do.³⁸ These “humans are X” claims are too extensive to be ignored, even in those writers who deny that there is a human nature.

And along with this imperfect attempt at objective knowledge of ourselves, can we not add an inner perspective no other species appears able to express? This inner perspective, subjective knowledge, is explored by Thomas Nagel in “What is it like to be a bat?” (Nagel, 1974), as well as others, including Gabriel Marcel with his distinction between “problems” and “mysteries” (Marcel, 1948). Nagel argues for an irreducible complexity to subjective experience as such, so that “the fact that an organism has conscious experience at all means, basically, that there is something it is like to be that organism...We may call this the subjective character of experience” (1974, p. 436). Nagel argues that bats, a “fundamentally *alien* form of life” (1974, p. 438) have an experience that we could not comprehend without becoming bats—which would make us no longer human. Similarly, a human being born deaf or blind would undeniably have experience, Nagel says, but we could never fully enter into theirs, nor they into ours (1974, 440).

³⁸ One objection Arendt seems to have to the concept of “human nature” is that it would deny the “plurality” she insists on in humanity (1998, pp. 7-8). “If men were endlessly reproducible repetitions of the same model, whose nature or essence was the same for all...Plurality is the condition for human action because we are all the same, that is, human, in such a way that nobody is ever the same as anyone else who has ever lived, lives, or will live” (1998, p. 8). If this is the objection, I can only see it as an intense exaggeration—if it were approved and taken literally we would have to deny ourselves the use of the word “human,” because the adjective would simply mean “utterly unique.” Socrates and Xenophon differ sharply, but they are human, and Bucephalus is equine but differs vastly from many horses. Though the problem of the one and the many is real, I am not sure what thinker ever claimed that sharing a common nature involves being identical, but certainly the tradition repudiates the idea.

Marcel describes the problem of deciding for myself whether some meaningful “being” exists. “I,” however, am part of the problem (2002, pp. 14-16). “This difficulty never arises at a time when I am faced with a problem to be solved...In such a case I work on the data, but everything leads me to believe that I need not take into account the *I* who is at work...” (2002, p. 17). “A mystery is a problem which encroaches upon its own data, invading them, as it were...” (2002, p. 19). Both thinkers, it seems to me, have from very different perspectives offered necessarily incomplete descriptions of the mysterious aspect of subjective knowledge of ourselves. We have such knowledge about no other kind of creature (in fact, in one very strong sense each one of us has such knowledge only of herself), but the very fact that we have it is a window onto reality that would not exist if we could somehow live a life endowed with only objective knowledge. It is a window into an inner reality.

Putting the two kinds of imperfect knowledge together may not give us certainty, but it does give a kind of synoptic (if not perfectly clear) vision of human beings that we can have for nothing else. Why should this attempt not have at least a chance to steer between the Scylla of making a “who” into a “what” and the Charybdis of making the “who” into a god, Arendt’s fear? While Arendt is right about the difficulty of studying mankind, many tasks of philosophy are difficult, but that should not in itself “cast suspicion upon the very concept” of whatever difficult task we are considering.

Another concern about the concept of human nature is that culture seems to shape the kinds of things we think and do, which could call into question the notion of a shared nature or essence all humans might have. The tradition acknowledges this from the beginning, and is not embarrassed by it, as I mentioned in Chapter 1. That is the case in part because of a factor that touches on an apparent concern of both Arendt and Sartre: the tradition does not see (and never

saw) the human “essence” as static and simple, but complex and dynamic. As Lisska emphasizes, the notion of a static essence seems to go back to Descartes and his insistence on the importance for philosophical inquiry of “clear and distinct ideas” (1996, p. 50), as well as to the widespread rejection of Aristotelian teleology around this time. Lisska traces the Cartesian heritage on this topic into recent times: “Since the time of Descartes, an essence has been considered, for the most part, as a static collection of properties. In the twentieth century, Russell and Quine’s analysis of class through defining properties is part of the Cartesian legacy” (1996, p. 162). The tradition holds instead, as Lisska puts it, that an essence “can be described...as a set of dispositional properties. A disposition is, by definition, tending towards its completion or end.”

One reason Aristotelianism of any kind is often said to be discredited is that science has discredited teleology. Sometimes this is based on a simple misunderstanding. Feser writes, “[i]t is important to understand (again, contrary to a common misconception) that most final causality is thought by Aristotelians to be totally unconscious. As Aquinas writes, “although every agent, be it natural or voluntary, intends an end, we should realize nevertheless that it does not follow that every agent knows or deliberates about the end.” The ascription of a “final cause” to some non-thinking entity (it “intends an end,” above) means, for Aristotelians and Thomists, that it has “a natural inclination toward something” (2009, p. 19, internal citations omitted).

While I will not here defend (though some, like Feser, do in a sophisticated way) a teleology of non-living bodies, I believe teleological language, of one kind or another, appears to be the most realistic way to talk about living things. Contemporary ethologists such as Richard Dawkins regularly use strikingly similar language because it expresses what they want to say about animal behavior. I do not mean simply the metaphor of “the selfish gene,” the title of his

best-known work. Throughout that work he considers the tendencies of animals to behave in certain typical ways. Early on he says that “we animals are the most complicated and perfectly designed pieces of machinery in the known universe” (1999, p. viii). It is clear from the book that what we are perfectly designed to do, from Dawkins’ point of view, is to learn and then engage in various behaviors (including some of competition and cooperation) that enhance the survival of our genes (and incidentally ourselves). For Dawkins, animals are also “survival machines” (a highly teleological designation, since the goal is the key to the description) and,

the obvious first priorities of a survival machine, and of the brain that takes the decisions for it, are individual survival and reproduction...Animals therefore go to elaborate lengths to find and catch food; to avoid being caught and eaten themselves; to avoid disease and accident; to protect themselves from unfavorable climatic conditions; to find members of the opposite sex and persuade them to mate; and to confer on their children advantages similar to those they enjoy themselves. (1999, p. 62)

Whether Dawkins would agree or not, this is typical Aristotelian (and Thomist) language for the inclinations of animals. Young animals seem designed or programmed, metaphors Dawkins uses throughout the work, to want to learn to accomplish these tasks, or else to come to do them instinctively. These behaviors are not incidental to belonging to a given species, they are built into each individual from the moment of conception in its genetic “form.” (It seems to me that for Dawkins, genes fill much of the role for any animal that the “form” fills for Aristotle.) Although he takes the viewpoint of the gene to be the crucial one, it seems that animals that successfully perform the kinds of functions just listed are successful animals, whose “perfect design” has succeeded in the world: they have achieved what they were “meant” (by their genes) to achieve. Aristotle would say such animals have been “perfected” or “completed,” that their

“potencies” have been actualized. Lisska, restating Aristotle’s concept in different language, would say that their dispositional properties have been fulfilled, they have achieved what was built into their essences or natures from the beginning. The language of Dawkins on the one hand and of Aristotle and Lisska on the other is different, but the concept of an animal achieving what its design means it to achieve is simply teleological.

Both Aristotle and Aquinas would say that human beings, along with other animals, have all these potencies that Dawkins lists (and more), and that, as human individuals, fulfilling these potencies contributes to our flourishing. What they would add (and Dawkins might agree) is that the distinctive potency of a human being is rational thought, and therefore even the potencies we share with animals should be fulfilled in a thoughtful or rational way, in light of the need to live with others, which is the distinctively human way. There are a vast number of these potencies related to our rational and social nature, and each of us, in infinitely varied ways, seeks to activate and master some set of them.

It must be noted that not only will each individual tend to work more on some potencies than on others, but also activating and mastering each one of these is not a task with a single correct outcome: as McInerney writes for the tradition, “It can now be seen how baseless that fear [of a call to uniformity of life] is. The moral ideal, whatever the ranking of its constituent goods, is open to an infinity of realizations. We need have no fear that the moral code is a cookie cutter” (1997, p. 34). Later he offers a specific example: “That a man should love and honor his wife covers all husbands, but the infinity of ways in which uxorial affection can be expressed and deepened prevents any interesting predictions about it. The moral order is protected on its borders by negative precepts, but in the interior positive precepts suggest the inexhaustible openness of the human good” (1997, p. 113). But the field of potential achievements is not

offered without guidance. Unless we are troubled by some severe disability or disturbance, most of us seek this activation and mastery of at least some core set of potentialities, along with our more eccentric completions or perfections. In doing so, one of the things we must learn very early is to recognize that each of our inclinations is most completely fulfilled if it is oriented to a common good, as mentioned previously.

This, generally, is flourishing or fulfillment in this world.³⁹ Human nature is the set of inclinations that, rightly understood, lead us to do all these things, as well as the inclination to think about what we are doing. Although there are very many ways to be a successful and flourishing animal, there appears to be a seemingly infinite variety of ways to flourish as a human being.

2.5 Rights, Justice, and the Common Good

A harsh response to the modern philosophical regime of individual natural rights, inherent rights, would be to deny with MacIntyre that they exist, and to point out the difficulties created by asserting that they do. As MacIntyre puts it, “there are no such rights, and belief in them is one with belief in witches and in unicorns.” He goes on to assert that “every attempt to give good reasons for believing that there are such rights has failed.” Is the existence of such rights self-evident? “[W]e know that there are no self-evident truths” (2007, p. 69).

Ronald Dworkin, one of MacIntyre’s targets in the extended passage quoted above, notes in the introduction to *Taking Rights Seriously* Jeremy Bentham’s famous rejection of natural rights, that they are “nonsense on stilts.” He argues that “the ruling theory of law” (a combination of legal positivism and utilitarianism) opposes natural rights because,

³⁹ Of course Aquinas would add that fulfillment of human beings is only partial in this world, as our ultimate end is “loving union with God” (see, e.g., Jensen, 2015, pp. 100-01).

...natural rights can have no place in a respectably empirical metaphysics. Liberals are suspicious of ontological luxury. They believe that it is a cardinal weakness in various forms of collectivism that these rely on ghostly entities like collective wills or national spirits, and they are therefore hostile to any theory of natural rights that seems to rely on equally suspicious entities. But the idea of individual rights that these essays defend does not presuppose any ghostly forms... (1977, p. xi)

Dworkin claims that the individual rights he refers to are “political trumps held by individuals... That characterization... does not suppose rights have some special metaphysical character, and the theory defended in these essays therefore departs from older theories of rights that do rely on that supposition” (1977, p. xi-xii). But if “political trumps” are granted by political constitutions and laws, as “political” seems to suggest, they can be taken away by the same means as they are granted. If they are not so granted or so vulnerable, then the “trumps” metaphor does not seem to have taken away their “metaphysical” or ghostly character. Later in the book, Dworkin speaks of “moral rights,” but says, “I shall not be concerned, in this essay, to defend the thesis that citizens have moral rights against their governments,” but will “explore the implications of that thesis for those... who profess to accept it” (1977, p. 184). MacIntyre’s attack seems to have some validity: Dworkin offers no explanation of what kind of entity rights are.

This awkward fact of the “ghostliness” of natural rights (as opposed to merely conventional or legal rights) should be truly embarrassing to moral philosophers who build their theories on the existence of various rights, skipping the laying of any foundation of their intellectual structures and moving straight to the building of the first floor, as it were. To scholars in the tradition, natural rights look like metaphysical entities, and entities rather recently detected by humans at that. There is no need for every scholar who builds on the existence of natural or

moral rights to re-describe their nature, as it would be sufficient to simply cite the work where this has been done. Not citing any such foundation, as too many scholars do, seems vulnerable to Taylor's concerns about moral "inarticulacy" and its results (1989, pp. 53-90).

MacIntyre and Taylor are far from alone in offering this critique of the lack of attention to the foundations of rights in contemporary moral theory. I offer one more example, this time a summary from a one-time president of the American Philosophical Association (Western Division): "we are brought face to face with one of those singularly lamentable lacunae in nearly the whole of contemporary moral and political philosophy: there just does not seem to be any reasoned accounting for why and on what grounds we human beings can be properly said to have rights..." (Henry Veatch, quoted in Lisska 1996, p. 226).

The Aristotelian/Thomist tradition begins with language about justice, not rights. What is "right" or "just" for Aquinas is "a relation or proportion among persons or things which in some way equalizes them" (Lisska 1996, p. 230). Interestingly, the Spanish Dominican Suarez, an important figure in that tradition (and according to some, one who caused some damage) appears to be pivotal in the move to thinking about rights as subjective, as possessions of persons. Grotius and Hobbes elaborate on this notion in Suarez' account, and modern subjective rights theories are launched (a brutal condensation of the story).⁴⁰

Aquinas scholar Jacques Maritain in the mid-twentieth century argued that the tradition's language of justice could be translated into the (no longer new) language of rights, and that those in the tradition would thereby gain a far greater audience. Although Maritain was a "member of the French delegation to UNESCO" involved in drafting the 1948 International Declaration of

⁴⁰ I am relying largely on Lisska's account here (1996, pp. 230-232), which borrows from that of Finnis. Milbank, among others, traces the notion of a subjective right back to William of Ockham and philosophical nominalism (2012), but might agree with Lisska and Finnis that the full expression of the concept of subjective rights arrives with Suarez.

Human Rights, Lisska allows that Maritain's work has had little influence outside scholasticism, and that "analytic rights theory, in particular, has considered Maritain's work with indifference at best and hostility at worst." In part this may result from the openly religious roots of Maritain's rights theory (Lisska 1996, pp. 227-28). Even within the tradition, Maritain's work on rights has not been taken up in any definitive way, although a few scholars have begun to do some kind of translation from justice to rights.

Lisska suggests one way to translate. Taking the "human essence as a set of dispositional properties," he analyzes Aquinas scheme in *Summa* I-II, q.94 a.2 as dividing those properties into "living dispositions," "sensitive dispositions," and "rational dispositions." A set of duties toward oneself and others can be derived from these dispositions, he argues. These include protecting one's own life and bodily integrity (and not harming those of others), seeking the truth about the world, and so on, all of which are directed to human flourishing. "Using this analysis of a human person," he concludes, "a human right becomes a 'protection' of the duties based upon the development of the dispositions. It is a quality or power a person possesses because of the very constitution of the human essence" (1996, pp. 234-35).

As Lisska points out, there is no unified account of the rights that might be derived in this manner. He traces the accounts of several natural law scholars, including Finnis, Veatch, and Nussbaum, to fill out the picture of human rights thus derived.⁴¹ Veatch wants to restrict the rights thus derived to negative rights, whereas Nussbaum, going back to Aristotle, derives a set of positive rights from the capacities of human beings to flourish. Although Lisska often agrees with Veatch, on this issue he sides with Nussbaum—but clearly there is no easy way to delineate what rights are achieved through such derivations (1996, pp. 238-46).

⁴¹ Finnis' account of human rights is similar to others like Veatch who are more fully in the Thomist tradition, although if his derivation is, in fact, quite different.

The translation from “right” to “rights” appears to lead to enormous changes in emphasis, as Taylor points out. It might seem to be a minor change, Taylor says, in the case of the prohibition of the taking of innocent life, for example, to move from “what is right” to “having a right.” In both cases, the action of intentionally killing the innocent was prohibited. The difference lies “in the place of the subject,” Taylor notes. A law is to be obeyed, so in the former case, persons are “fundamentally...*under* law” (including the natural law). The possessor of the “subjective right,” on the other hand, “can and ought to act on it to put it into effect.” He has greater responsibility, and greater freedom, and the prohibition on killing an innocent is now connected to autonomy (1989, pp. 11-12). The negative side of this development may be a lesser sense of being part of and having obligations to a community, which appears to be an important part of MacIntyre’s complaint about the move to natural rights in *After Virtue* (2007, pp. 66-70). One of MacIntyre’s complaints is that the concept of such rights actually seems to work against the vision of a common good: “Human rights thus understood are characteristically claimed *against* someone else. The relationship envisaged between them and shared conceptions of a common good had become sufficiently indirect for them to be deployable without invoking such conceptions...” (1990, p. 164).

I agree with Lisska and Maritain that we can, in effect, translate a natural law understanding of what is right into the language of subjective rights, including limited positive rights. Nonetheless, to begin with rights appears to mask a more fundamental reality, that of the human dignity on which they must be based or else fail to make sense as strong limitations on our freedom. As Taylor puts it, every culture gives us,

an account of what it is that commands our respect. The account seems to articulate the intuition. It tells us, for example, that human beings are creatures of God and made in his

image, or that they are immortal souls, or that they are all emanations of divine fire, or that they are all rational agents and thus have a dignity which transcends any other being, or some other such characterization; and that therefore we owe them respect... Our moral reactions... seem to involve claims, implicit or explicit, about the nature and status of human beings. From this second side, a moral reaction is an assent to, an affirmation of, a given ontology of the human. (1989, p. 5)

However, the dangers of the translation should be borne in mind. A belief in rights must not turn us, in our own minds, into atomistic individuals.⁴² In addition, it does appear most sensible to consider “rights-language” as second-order language (something Lisska’s account clearly does). This aspect of rights is, I believe, apparent in debates over the details of clashing rights. When we discuss incredibly convoluted situations (see, for example, Tyler Doggett’s “Recent Work on the Ethics of Self-Defense,” 2011, throughout), the serious question we are asking is surely not, to put it flippantly, “is there a right hovering somewhere in the mind or body of each human being who is born that is qualified in the following ways: a, b, c, d, e, ...” The question that matters is how each person could act justly, given the facts of human dignity on the one hand and the sometimes very difficult world we live in on the other. The language of rights, I contend, unless it is a sterile legalism, expresses an underlying reality of justice.⁴³ Justice is only a concept that applies to a plurality of human beings who are in some kind of relationship, and it only has some metaphysical purchase if each human being matters profoundly in some way.

⁴² A well-known warning against too much emphasis on individual rights, and against a tendency for the average person to think of her rights as absolute, is Mary Ann Glendon’s *Rights Talk* (1991).

⁴³ Thomson contends that arguments for a limitation on the right of self-defense based on justice are necessarily circular (as quoted and reported in Rodin, 2002, pp. 71-73. But that is rather different from my contention, which is that the notion of subjective rights expresses a sense of justice between human beings, and both sets of ideas are based on an underlying notion of the value, worth, and dignity of human beings.

CHAPTER III

THE NATURAL LAW TRADITION’S CASE

FOR NATIONAL DEFENSE

“...neither is a man to be called quarrelsome because he defends himself...”

—Thomas Aquinas⁴⁴

Acts of defense that are worth moral evaluation are, for the tradition,⁴⁵ voluntary. It is voluntary actions in matters pertaining to reason that are “moral or human” (*S.t.* I-II, q.18 a.9), and thus whose goodness or evil may be usefully studied. As Cavanaugh puts it, “the voluntary serves as morality’s threshold” (2006, p. 128).⁴⁶ Among such actions, only those are fully and truly good that are good in each of the various ways an action may be evaluated: “in order for an action to be good it must be right in every respect: because good results from a complete cause, while evil results from any single defect” (*S.t.* II-II, q.110 a.3, *co.*).⁴⁷

⁴⁴ (*S.t.* II-II, q.42. a.2, *co.*)

⁴⁵ As noted in Chapter 1, “the tradition” refers to the Aristotelian-Thomist tradition, as specified there, unless otherwise indicated.

⁴⁶ Cavanaugh says a great deal to explain the importance of this precept and what can go wrong in moral analysis when it is not fully followed. See 2006, chapter 4.

⁴⁷ Aquinas has a subtle and many-sided theory of the goodness (or lack of goodness) of a human action. First, and strangely for modern thinkers, an action can be said to be “*ontologically* good; even a murderer’s bullet must be a *good* shot” (Kreeft, 1990, p. 415, emphasis in original), but this is not part of the moral calculation as we now understand that. It also needs to be the right kind of act—murder or adultery are always wrong, but “taking what belongs to another” might be either “taking food to avoid starving” or “theft,” and killing might be self-defense, rather than murder. To be good, an act must be

Yet actual defensive actions (which excludes the less straightforward category of “carrying the fight to the enemy” in a defensive war), whether by individuals or states, enter the arena of moral evaluation with an immediate advantage: defense is generally good and right, a quality that is in general only lost if the agent or nation has committed some prior grave fault that precludes a right defense, or if the contemplated defense is against some proper authority that is using force rightly. Defensive actions can be performed for bad reasons, or in a disproportionate way, or they can be wrong due to circumstances, but in general there is nothing inherently wrong with defensive action as such. (Defense is seen fundamentally as self-preservation, and thus sharply different from punishment, a point that will be expanded on in what follows.) To restate the claim in terms of rights, there is a rationally grounded right of self-defense that belongs to existing individuals and nations, imperfect as they are, unless they have forfeited it by violating grave obligations or by some unusually serious and immoral action.

This is a rather large claim. In what follows in this chapter, I do not attempt to provide rigorous foundations for it, but to indicate where its foundations lie. I will apply the tradition’s reasoning to cases of defense under four main headings: the ultimate foundations of the right of

done with the right intention, i.e. for a right end (intention is the willing of an end). Finally, it must be done in the right circumstances. Failure in any of these latter three dimensions can lead to a morally bad act, and Aquinas considers multiple instances of acts that are mixtures of good and evil in these various dimensions (*S.t.* I-II, q.18, and see Kreeft, 1990, footnote on p. 415). Of course there can be greater or lesser goodness in each category as well. See also McNerny, 1997, pp. 78-89 for a wide-ranging discussion of this topic, and Long (2015) for an even more extended treatment. As a comparison, consider the scenario offered by J.J. Thomson (1991, pp. 293-94) in which Alfred, intending to maliciously kill his wife, unknowingly gives her the medicine that is the only cure for her disease. Thomson offers an evaluation on a single dimension: it is “permissible.” Aquinas would describe the act on at least two dimensions: he would say the most fundamental description is of the end intended: it is an attempted murder. (Cavanaugh 2006, chapter 4, is excellent on the moral dimensions of an action: see especially section 4.3.1, “Morality’s depth and volitional states.”) This is the case despite the fact that Alfred is performing an act that we, learning what happened later, may describe as materially good. (If there were circumstances posited, these might make a moral difference as well, although none are mentioned in Thomson’s account.) In a simple act, the intended result, the end, is always the decisive feature for moral evaluation for Aquinas.

self-defense (both individual and national), justice in individual self-defense, the right of individuals to defend property, and finally, the right of a state to defend itself and its territory. I note some contemporary objections along the way, but leave detailed analysis of the objections to later chapters.

Many of my criticisms of current theories are aimed at “reductionist” accounts of national defense (see chapter 1). A recurrent theme in my critique of such accounts is that while they claim to build on the rights of the individual in abstraction from any state, the details of their view of what is right on the individual level reveal that in fact, on that level, there is an unspoken reliance on action by the state. I claim that if this is the case, the argument from the individual to the interstate level becomes unconvincing at best.

3.1 Foundations: Nature, Humanity, and Society

To begin with, the tradition sees existence as good.⁴⁸ The material cosmos is good:⁴⁹ its existence is wonderful and awe-inspiring, and every part and aspect of it should be treated with

⁴⁸ Note that the account in this chapter is not given in terms of the existence of God. It is hard to conceive of a Thomist who does not believe in God, although Aristotelians, or perhaps neo-Aristotelians, who place little emphasis on God seem to exist, as Martha Nussbaum’s work attests. However, I hold with Lisska that an account of the natural law does not require reference to God’s existence (1996, pp. 123-25). McNerny appears more insistent on the place of God in Aquinas’ scheme (1997, pp. 26-31), but even he stresses the natural base of it: “the Aristotelian conception provides [Aquinas] with the natural base on which to erect his account of the graced and supernatural life to which we are called... Thomas held that some such account as Aristotle had given captures basic naturally knowable truths about the nature of the good human life. Grace presupposes nature and does not destroy it,” p. 31). Bracketing the question of God does not mean it is unimportant! Concerning the goodness of existence itself, mentioned here in the text, it is affirmed in ringing terms in Genesis 1, but Aristotle affirms it without giving any religious reason for it. I find a similarly non-religious affirmation of the goodness of existence in scientist Douglas Hofstadter’s writing of “how the most substantial and familiar of objects or experiences fades away, as one approaches the infinitesimal scale, into an eerily insubstantial ether, a myriad of ephemeral swirling vortices of nearly incomprehensible mathematical activity. This in me evokes a cosmic awe” (quoted in Taylor, 1989, p. 348).

⁴⁹ Aquinas develops this notion throughout the *Summa*, beginning in I, q.5 a.1, “Whether Goodness Differs Really from Being,” where he begins by citing Augustine’s statement, “inasmuch as we exist we are good.” Here we are in deep philosophical waters, far beyond the scope of this dissertation to begin to

respect and even reverence (which does not rule out killing bacteria and charging tigers if need be). This goodness and deserved respect and reverence, however, admit of degrees. All living things are on an even higher level of being than the non-living parts of the cosmos. Plants (and other odd, non-animal life forms) are extraordinarily complex, and able to take raw materials into themselves, transforming their material into living substances, and to reproduce themselves. Animals are a step higher yet: their sensations are far more complex, they move and act. In the animal world, those with the greatest complexity and intelligence deserve the highest respect—but human beings transcend the animal category through our ability to reason: to wonder, to think about what we are doing, to give an account of it in language, to ask why. Thus, human beings deserve the most respect of material beings within the cosmos.⁵⁰

Plants, animals, and humans have built-in dispositions to develop or perfect themselves. Rather than contradicting Aristotle on this point, modern science reinforces it: every living organism beyond the simplest, if given even a partly favorable environment, moves itself constantly toward some kind of maturity or completion: a *telos*. For higher animals, a great deal of training from other members of the species, their conspecifics, as well as play, is needed for this completion or fulfillment to take place. We higher animals who call ourselves humans⁵¹

chart. Feser (2009) provides one introduction to Aquinas' metaphysics, and offers a wide-ranging "Further Reading" section. McNerny and O'Callaghan's SEP article "St. Thomas Aquinas" has a wide-ranging bibliography that is an additional resource.

⁵⁰ Feser describes this hierarchy of goodness, 2009, pp. 105-107. As he writes, "each of these levels of ...being represents a higher level of goodness or perfection than the preceding one because it incorporates the perfections of the lower levels while adding perfections of its own" (pp. 107). At each level, there can be examples of increased perfection in terms of that level or within a given kind: we habitually write of "higher" animals (in contrast to sponges); some cats are excellent hunters, and so on.

⁵¹ MacIntyre insists that "It is not just that our bodies are animal bodies with the identity and the continuities of animal bodies...Human identity is primarily, even if not only, bodily and therefore animal identity" (1999, p. 8). He earlier points out that "Aquinas, unlike most moderns, often refers to nonhuman animals as 'other animals'" (1999, p. 6). Acknowledging from the outset certain moral deficiencies of Aristotle's thought, *Dependent Rational Animals* is largely an attempt to draw out some of the

need the most of this training (and of the training that is play). The most important such training humans receive is the ethical training designed to move us from what we are as immature individuals to fulfilled or perfected individuals, a *telos* that is both far more complex and far more various in humans than in any other animal. Moral goodness for humans is an inner quality of fulfillment of potential that is both achieved and expressed in choices that increase the fulfillment and flourishing of ourselves and other human beings, while showing due respect to lower levels of being.

Because we humans are rational, we can apply reason (in a broad sense) to all our actions, not just the instinct or inarticulate reasoning that other animals seem to apply, and it is this application of reason that discovers our distinctive good as humans.⁵² We can apply our reason to actions that concern our mere survival as organisms (such as eating, resting, and defending ourselves if attacked), to actions that concern our familial relationships (sexuality and child-raising), and to actions that concern our interest in knowledge and our wider social relationships (such as seeking a true account of our existence and learning how to live well among others).⁵³ Part of what reason tells us is discussed above in the sketch of our relations to the cosmos. It also tells us that other human beings are like us in important ways, and that they too have a *telos* of flourishing. It tells us we need others even to survive, much less flourish even

implications of what we share with other animals for ethics, guided by Aristotle (although “at certain points I will be turning Aristotle against Aristotle, sometimes with the aid of Aquinas,” 1996, p. 8).

⁵² Aquinas mentions in an objection the kind of reasoning animals seem to apply: a hound at a crossroad will seek the scent at the first two available paths and then run confidently on the third, “as though he were reasoning by way of exclusion,” but he answers in effect that there is “wisdom” of a kind in their instincts (*S.t.* I-II, q.13 a.2, quoted in Kreeft, 1990, pp. 410-412, and paraphrasing footnote 116). MacIntyre, in *Dependent Rational Animals* (1999), while agreeing with Aquinas that human use of language makes a crucial difference in the kind of reasoning we are able to perform (p. 54) argues throughout that we often overstate our differences from other animals, and thereby lose sight of crucial facts about ourselves and the virtues we need to live well precisely as human beings.

⁵³ Both the overall framework here and the examples in the previous sentence come from Aquinas’ article on the natural law, *S.t.* I-II, q.94 a.2.

materially, and that we can achieve far more perfecting of ourselves together, in society, than we could individually out of it. Even our reasoning, including our reasoning about goodness, is made far more perfect in society, and over time.⁵⁴

Another way to put that broad last point about our fellow human beings is that social life can lead to a shared or common good. But such a social life, reason and experience teach us, needs rules or laws, and properly designed, these can help us to flourish, individually and as a group. One reason we need rules or laws is that we can easily go wrong without them, choosing goods for ourselves at the wrong time and in the wrong way (pursuing sexual pleasure through rape or incest or pedophilia, for example, or pursuing comfort and food through robbing others at gunpoint, or a sense of dignity through violent quarrels) at the expense of our true good and the goods of others. Even if we did not easily go astray in such ways, at the level of social complexity needed for true human fulfillment some coordination is needed, which makes rules and government necessary—which is why the reason for the existence of government is the flourishing of the human beings who make up the societies that are governed (as well as the flourishing, as much as possible, of the natural environment).⁵⁵ While government is necessary and its reason for existence is the flourishing, as much as possible, of all those included in the state, it has been clear since the earliest roots of the tradition that, in the same way that many individuals choose lesser or false goods to pursue, so many governments ignore their *teloi* and act for the good of some small group. Goodness is always a question of potential more or less (often much less) actualized.⁵⁶

⁵⁴ In the last sentence, I am paraphrasing ideas expressed by Goyette, 2013, pp. 142-43.

⁵⁵ See especially Goyette (2013), Nieto (2007), and Sokolowski (2001).

⁵⁶ This point is emphasized by Sokolowski (2001), and William Cavanaugh (2004). In fact, Cavanaugh goes much further than this, claiming that the modern state cannot by its nature be the “keeper of the

3.2 Justice in Individual Self-Defense

In this section, I will offer an account of the moral justification behind the tradition's affirmation of a right of individual self-defense, and the context (or limitations) of that right. After offering a sketch of some ancient evidence for belief in the justice of self-defense, I will offer an analysis of what is entailed by Aquinas' famous article on self-defense.

Why so much attention to this terse, dense article by Aquinas? It is not that the tradition claims any particular divine revelation for this or any other passage: Aquinas' writings, though greatly admired, are always seen as corrigible, or at least capable of improvement. Yet despite that fact, scholars and others in the tradition hold that he achieved an astonishing balance and clarity on a wide range of issues, synthesizing previous thinking from an incredible array of earlier thinkers into a coherent whole. Since medieval authors did not use footnotes, the sources of their thinking must be discovered by scholarship, although it was surely evident to other medieval scholars.

A quick glance at any article in the *Summa* reveals only a thoughtful discussion of a subject, but a knowledge of the underlying scholarship adds the insight that it is generally a summary that incorporates the strongest points, on that particular question, of a tradition going back to the Hebrew Bible and the pre-Socratics (as incorporated by quotation into the sources medieval authors were able to access), including the Arab commentators, and resolving

common good" (p. 267). Although I believe Cavanaugh's argument must be borne in mind, I do not believe in the impossibility of the leaders of a modern state seeking the common good, nor that if the thinking of all of the citizens of a modern state took in all the insights of the tradition, that their state would become unrecognizable to us.

difficulties among those accounts.⁵⁷ On ethical questions especially, Aquinas is deeply practical, a man whose theories seem to incorporate some of the breadth of human experience attributed to Shakespeare's plays and poetry (although utterly devoid of their eloquence, except to the extent that complete simplicity can be eloquent).⁵⁸ As Alasdair MacIntyre writes in 2006, in the prologue to the third edition of *After Virtue*, "I became a Thomist after writing *After Virtue* in part because I became convinced that Aquinas was in some respects a better Aristotelian than Aristotle, that not only was he an excellent interpreter of Aristotle's texts, but that he had been able to extend and deepen both Aristotle's metaphysical and his moral enquiries" (2007, p. x). On the issue of self-defense, I think it is clear that Aquinas' short article has to be unfolded and developed, a task in which the scholars I discuss and quote below have been engaged. I find an explicated and developed version of Aquinas' thoughts on this subject to be the most satisfying beginning of an account of a moral act of self-defense of any of the theories on offer.

3.2.1 *Ancient Roots of the Tradition's View of Self-Defense*

First, though, because the tradition grows from deep roots, and finds some of its intellectual nourishment at that depth, it is useful to begin with some of what the ancient world thought about self-defense, starting with the Hebrew Bible and early commentaries on it. As with

⁵⁷ For examples of discussions of how Aquinas synthesized earlier insights into thoughtful new positions, consider Flannery's account of the sources on which he drew in the self-defense article (2013, entire) and Jean Porter's discussion of his use of sources in his account of the natural law (2009, pp. 61-73).

⁵⁸ Catholic philosopher Kreeft claims that Aquinas' greatness as a philosopher rests on "truth, common sense, practicality, clarity, profundity, orthodoxy, medievalism, and modernity," a list he then explicates over the next four pages. He concludes, "Of course St. Thomas cannot be the be-all and end-all of our thought...but he can be a beginning." (1990, pp. 11-14). The Southern fiction writer Flannery O'Connor offered this in a letter to a friend: "I read [the *Summa*] every night before I go to bed...for the life of me I cannot help loving St. Thomas" (quoted in Kreeft, 1990, 11). Philosopher Kevin Flannery says of the idea of double effect reasoning, "The idea struck me as correct and even luminous right from the beginning, its air of paradox only serving to heighten its luminosity." It is only fair to add that Flannery only achieved what he considered a satisfactory understanding of the principle "after many, many abortive attempts to answer...questions about the nature of intention..." (2001, p. xiii).

the Greek and Roman roots of the tradition, there is clear evidence here that defense of one's person and those of near relatives (at least) with force, up to the level of lethal force if necessary, was considered to be justified. The Hebrew Bible states that if a thief is killed in the night by the householder, the latter incurs no bloodguilt and no penalty (Ex. 22:1-3). This brief legal text needs some unpacking. First, presumably in daylight the man might have been presumed to be invited, and at any rate neighbors could be called to help subdue a thief.⁵⁹ The Talmud's interpretive gloss here is important: "What is [the] reason for the law of breaking in? Because it is certain that no man is inactive where his property is concerned;⁶⁰ therefore this one [the thief] must have reasoned, 'If I go there, he [the owner] will oppose and prevent me; but if he does, I will kill him.' Hence the Torah decreed, 'If he come to slay thee, forestall by slaying him.'" Similarly the Talmud enjoins a duty to kill if necessary to prevent "a murder, the rape of a betrothed woman, or pederasty" (Kopel, Gallant, and Eisen 2007, hereafter KGE, p. 107. My discussion of the ancient writings on this issue follows this article closely). In the case of burglary, the assumptions are that (a) everyone knows that any householder would, rightly, use force in resisting the theft of his property, and (b) therefore that the kind of person who would break into a house that might be occupied was a person ready to commit murder, and was likely to be armed, so that (c) the use of force, up to lethal force in the dark of a house, was clearly justified.

Ancient Greek law, at least in Athens, seemed to make quite similar assumptions about the justice of self-defense. In a speech in Athens in 352 BC, Demosthenes referred to a statute of the city reading, "If any man while violently and illegally seizing another shall be slain

⁵⁹ I owe this thought to Thomas Cavanaugh. It is in an excerpt from a talk given at Notre Dame, unpublished manuscript, sent in a private communication to the author in 2014.

⁶⁰ The thought appears almost identical to Aristotle's "no man suffers an injustice willingly" (quoted by Aquinas in *S.t.* II-II, q.66 a.4).

straightway in self-defence, there shall be no penalty for his death.” Demosthenes also insisted that homicide could in some instances be “justified” (at least using a strong form of description, even if not necessarily using the modern “justified/excused” distinction). Other ancient Greek instances of agreement that killing in self-defense is at least sometimes justified could be cited, including Plato’s *Laws*. (KGE 2007, p. 105).

The Romans seem to have broadly agreed with the ancient Hebrews and Greeks. The Twelve Tables of Roman law, posted in the Forum in 449 BC but later apparently destroyed, contained the following laws in Table VIII: “Table VIII: 12. If a theft be committed at night, and the thief be killed, let his death be deemed lawful. 13. If in the daytime (only if he defend himself with weapons)” (KGE 2007, pp. 108-09).

Cicero, arguing for the innocence of an accused official on grounds that he was defending himself, appealed to a number of factors in a speech prepared to be given at the official’s trial, including an “inborn law,” the “meaning of swords,” and the silence of the law when arms are raised (a notion different from the general use of the phrase when it is quoted today). His claim, a ringing endorsement of the general rightness of the use of lethal force to defend one’s own life, was the following:

What is the meaning of...our swords? Surely it would never be permitted to us to have them if we might never use them. This, therefore, is a law, O judges, not written, but born with us—which we have not learned, or received by tradition, or read, but which we have taken and sucked in and imbibed from nature herself; a law which we were not taught, but to which we were made—which we were not trained in, but which is ingrained in us—namely, that if our life be in danger from plots, or from open violence, or from the weapons of robbers or enemies, every means of securing our safety is honorable. For

laws are silent when arms are raised, and do not expect themselves to be waited for, when he who waits will have to suffer an undeserved penalty before he can exact a merited punishment. The law very wisely, and in a manner silently, gives a man a right to defend himself . . . the man who had used a weapon with the object of defending himself would be decided not to have had his weapon about him with the object of killing a man.

(quoted in KGE 2007, p. 110)

3.2.2 Aquinas' Account of Individual Self-Defense

These ancient laws and commentaries form a part of the background of Aquinas' brief but very dense article on self-defense,⁶¹ which also drew on earlier medieval accounts (see Rommen p. xxi and pp. 30-39, Porter pp. 63-67, and Cavanaugh 2006, pp. 4-5). It is intriguing that in *S.t.* I-II, q.94 a.2, the heart of Aquinas' natural law account, he places self-preservation among the most fundamental goods, those shared with all other organisms. Like Cicero, but on more developed philosophical grounds, Aquinas makes self-preservation, the aim of self-defense, a fundamental part of the natural law at its most basic level. This notion of a basis in nature for the rightness of defense is repeated in *S.t.* II-II, q.64 a.7, the famous self-defense passage that apparently initiates the principle of double effect.⁶² There he writes, "Since what is intended is the conservation of one's own life, such an act is not illicit: it is natural for each thing to preserve itself in existence for as long as it is able." As science popularizer Bill Bryson puts this notion of the naturalness of all things seeking to preserve their existence, concerning lichens:

⁶¹ Cavanaugh's *Double Effect Reasoning* (2006) contains an excellent first look at the vast literature that has grown up around this short article. Cavanaugh begins with a chapter on the historical development of double effect reasoning after Aquinas, and in subsequent chapters describes and analyzes contemporary versions.

⁶² Thomas Cavanaugh points out that several articles in the *Summa* are involved in double effect reasoning (1997, p. 21, footnote 1). Flannery points out that "We tend to read *ST* II-II, q.64 a.7 as a tract on intention and side effects...but, in fact, intention and side effects come into it only as necessary conditions of licit killing" (2001, p. 186).

“[their] impulse to exist, to be, is every bit as strong as ours...Like virtually all living things, they will suffer any hardship, endure any insult, for a moment’s additional existence. Life, in short, just wants to be” (2004, p. 336).⁶³ I offer this remark as a suggestive comparison only: living things certainly do appear to hang on to life with grim determination. And, if flourishing is the goal of an organism, life is a prerequisite to that flourishing.

Before I offer an account of the moral thinking in Aquinas’ short article, I must discuss the puzzle of “intention.” Aquinas modifies the most ancient branches of the tradition in light of Christian developments in the interim: Augustine had appeared to rule out homicidal self-defense by private individuals, while allowing it for public officials. Aquinas’ response, though not presented as such, might seem creative: in Cavanaugh’s words, “Aquinas interprets Augustine as not permitting the *intentional* taking of an aggressor’s life” by a private individual (Cavanaugh 1997, p. 2, emphasis added), but allows this homicide if it is “outside the intention” of the defender. (Public officials, on the other hand, are allowed to intend to take life.)

Here is an extended quotation from the article itself:

...the act of self-defense may have two effects, one is the saving of one’s life, the other is the slaying of the aggressor. Therefore this act, since one’s intention is to save one’s own life, is not unlawful, seeing that it is natural to everything to keep itself in “being,” as far as possible. And yet, though proceeding from a good intention, an act may be rendered unlawful, if it be out of proportion to the end. Wherefore if a man, in self-defense, uses more than necessary violence, it will be unlawful: whereas if he repel force with moderation his defense will be lawful... Nor is it necessary for salvation that a man omit

⁶³ Some may be concerned about this reasoning as an instance of the “is/ought” problem. See Chapter 1 for a discussion of this issue as it is addressed in the natural law literature.

the act of moderate self-defense in order to avoid killing the other man, since one is bound to take more care of one's own life than of another's. But as it is unlawful to take a man's life, except for the public authority acting for the common good...it is not lawful for a man to intend killing a man in self-defense, except for such as have public authority...(S.t. II-II, q.64 a.7).

3.2.3 The Problem: Never Do Evil Intentional Killing is Wrong

As modern philosophers often note, killing in self-defense raises an obvious question: how it can be right to kill another human being? The problem is acute for a student of the tradition, which rules out "lesser evil" justifications by enjoining us never to do evil. And, as I noted at the beginning of this chapter, good is "integral": "in order for an action to be good it must be right in every respect: because good results from a complete cause, while evil results from any single defect" (S.t. II-II, q.110 a.3, *co.*). As McNerny notes, consequences can only work in one direction for the tradition: if an ordinarily or inherently good action seems as if it will lead to bad consequences in a particular time and place, that means it should not be performed here and now, but the opposite does not hold: "wrong actions are in themselves evil and can never become good in any time or place or other circumstances. Thus it is said that negative precepts oblige always and everywhere" (1997, p. 88).

The second half of the problem is that Aquinas, in this very article, states that "it is not lawful for a man to intend killing a man in self-defense." But, at the same time, "Nor is it necessary for salvation that a man omit the act of moderate self-defense in order to avoid killing the other man..." The "act of moderate self-defense" kills the attacker in the case under consideration. (The larger "question" Aquinas is addressing here, question 64, is murder, and this article asks if a self-defense killing is murder.) Aquinas says both that it is permitted to kill

someone in self-defense, but that a private citizen is not allowed to *intend* to kill someone at all. The combination appears quite strange. (Although this steps outside of Aquinas' writings, a further puzzle is that most of the vast literature on "double effect reasoning," especially outside the "new natural law" literature, deals with actions that seem to be aimed, as acts, at a thing that can be called good—the destruction of a military target, the saving of the life of a patient, and so on—whereas this act, as an act, seems aimed at the death of the assailant.)

Aquinas himself has previously dealt with one issue some may raise, the non-violence counseled in the gospels. He considered this issue in the question on war (*S.t.* II-II, q.40 a.1). Objection two⁶⁴ in that article states that "...it is written (Matthew 5:39): 'But I say to you not to resist evil...'" Aquinas' answer is, "Such like precepts, as Augustine observes..., should always be borne in readiness of mind, so that we be ready to obey them, and, if necessary, to refrain from resistance or self-defense. Nevertheless it is necessary sometimes for a man to act otherwise for the common good, or for the good of those with whom he is fighting." Here in the self-defense article Aquinas adds that "one is bound to take more care of one's own life than of another's," implying that the prohibition on resisting evil has limits, such that while it may be praiseworthy to go beyond them at times, it is not required of all at all times.⁶⁵

But that still leaves the problems I outlined. I begin by rejecting several solutions. First, Aquinas is not saying, as some have proposed, that only accidental killing of an aggressor meets his criteria. Cavanaugh rightly denies, on two rather convincing grounds, this interpretation of

⁶⁴ A reminder to the reader: Aquinas offers objections to each of his theses in the *Summa*, at the beginning of each article. After the detailed setting out of his own position, he also offers a rebuttal of each objection. Kreeft points out in his introduction to the *Summa*, "...it is essential to see the form of the *Summa* as a real, living dialogue, a structured and summarized debate..." (1990, p. 20). It is said that his opponents were careful to note his objections, as he was wont to pick the strongest possible against each thesis.

⁶⁵ Those required not to resist might be monks or priests, for example.

Aquinas' article. First, it was already widely acknowledged "an agent is not responsible for consequences that accidentally result from an action." Second, Aquinas in the next article of the same question considers such a case—which makes no sense if he has disposed of it in this one (2006, p. 7).

Another flawed solution, I believe, is Cavanaugh's interpretation that what is permitted is only an action that *risks* the death of the aggressor. Cavanaugh deploys a scenario in which the attacker and defender having swords, but the attacker has "far greater endurance." The defender realizes this early in the fight, and also realizes that "the only way I can preserve my life is to kill him." (In an earlier version, 1997, pp. 11-12, he mentions a "neck-severing sword stroke" as a prohibited means here for the private individual, because it is "proportioned to the preservation of one's own life only insofar as it is proportioned to the taking of the aggressor's life.") Cavanaugh continues, "I may not do so because I may not intend his death" (2006, p. 10).⁶⁶

Now, many defenses merely risk harm to the attacker, and these do seem to be covered by Aquinas' article. Long points out that a kind of truly accidental case (he is not directly addressing Cavanaugh) does occur, and would be covered by Aquinas' overall argument: "There is a scuffle, one shoves aside an assailant, and the assailant receives a contusion which causes internal bleeding and subsequent death" (2015, p. 116). Perhaps in a sword fight such as

⁶⁶ I do not believe this meshes well with Cavanaugh's statement on the next page that "the private individual...may risk killing the aggressor by defending himself with such force that the aggressor's death is a foreseeable consequence." When dealing a series of sword strokes against a determined opponent (unless one is vastly more skilled, in which case there is no real problem) one had better make many of them likely to kill if they get through the opponent's defenses, or one is not convincingly defending one's life. Also, the tactical bomber "wills [the deaths of non-combatants] as a concomitant" to his intention of destroying the military installation (2006, p. 139). However, he "foresees, but does not intend the...non-combatant deaths...that follow with causal necessity from his destruction of the military installation" (2006, p. 116). Perhaps the issue here is, as he writes on this same page, in footnote 22, "the harmful effect cannot be the sole cause of the good." But taken at face value, this simply rules out self-defense against a determined attacker, unless, at the risk of appearing overly subtle in description, we say the cause of the good of self-preservation is the termination of the attack, not the death of the assailant.

Cavanaugh describes, a spirited defense without any one stroke aimed at severing the head of the attacker might somehow lead to his death nonetheless. But this is only one kind of case.⁶⁷

The problem is that there are many self-defense situations where not going “all in” with one’s defense will fail in the fundamental purpose of the act, preserving one’s life (or the life of someone one is protecting). Even in Cavanaugh’s 1997 story, where attacker and assailant seem fairly evenly matched except for the factor of endurance, failure to attempt a lethal stroke seems quite likely to cost the defendant’s life sooner or later, unless a minimal sort of sword stroke accidentally kills the attacker (but that, as Cavanaugh states, is not the point of the article). But in many scenarios, that fairly even matching of attacker and defender is missing, and this leaves us with a different kind of case entirely. As Long puts it,

But St. Thomas’s formulation also pertains to the case in which killing is not a mere consequence, but in which a *deliberately and per se lethal means of defense is chosen because it alone is proportionate to the end of moderate defense...*⁶⁸ For example, the

⁶⁷ Alexander and Ferzan (in 2008, in an introductory article; and in 2009, in a book) “reconceptualize the criminal law” (2008, p. 376) in a way that highlights the importance of risk. A crime in their view is an act that “demonstrates insufficient concern for others,” which is performed by “choosing to unleash a risk of harm to others for insufficient reasons” (2008, p. 376). Without endorsing their entire, wide-ranging theory, I believe there is much to commend it, including its emphasis on volition, and, here, the issue of risk. In “Justifying Self-Defense” (2005), Ferzan takes on the issue of objective and subjective accounts of the justification of self-defense, deploying the notion of risk in useful ways. Part of her conclusion there is that, “Self-defense is a preemptive act. As such, law and morality cannot judge the rightness of the conduct by its result. Rather, the rightness of the conduct must be viewed through the prism of risk” (2005, p. 749). Overall, the emphasis on risk in Alexander and Ferzan’s work is salutary—but there are clearly times when a self-defense action creates a risk for the aggressor that approaches certainty.

⁶⁸ Space precludes a discussion here of the long and intricate topic of proportionality. The terminology is significantly different from much modern terminology, which tends to treat necessity and proportionality as separate issues. See Frowe (2015) for wide-ranging discussions, often separate, of the two (note the two terms in the index). In Aquinas’ account, only that violence which is necessary to prevent grave harm to the attacker can be “proportionate,” that is, in “proportion to the end”—and that end is to prevent grave injury or death to the defender. (If it were not necessary, it could not be proportionate.) This relationship of proportionality to necessity appears to be similar in an extremely rough way to the “internalist” account of proportionality given by Frowe (2014, pp. 88-89), although in real life, “parachuting off a cliff” might entail such a serious level of risk as to change the moral calculation.

felon's axe-bearing hand descends toward the neck of one's child, and there is only an instant to stop him; *none other but a shot to the head* will so incapacitate the nervous system as to assure that the axe does not slay or maim one's daughter. One knows that such a shot to the head is by its very nature, *per se*, ordered to kill..." (2015, p. 116, first emphasis in original)

Kevin Flannery agrees with Long. Concerning Aquinas' statement that one is not obliged to "omit the act of moderate self-defense in order to avoid killing the other man," Flannery says the statement would be superfluous "unless it meant that, even knowing that an act will *quite likely* kill, one might perform it without that knowledge or thought bringing the death of the assailant within one's intention. But if this is the case, one can actually be thinking that a particular act will kill and yet perform it morally." This is so, Flannery says, because "he believes that this action, performed in the way he is performing it, is *the only way he can preserve his life*" (2001, p. 170, emphasis added).

It is easy to imagine a multitude of such examples. An almost certainly lethal stroke or gunshot is necessary to save one's life, and one attempts such a stroke or gunshot, or dies. The act cannot be "out of proportion to the end," for the end is saving one's life, and this is the act that can achieve the end. Nor is it "more than necessary violence," for it is necessary if the end is to be achieved. If it succeeds, Aquinas' article appears reassuring: "Nor is it necessary for salvation that a man omit the act of moderate self-defense in order to avoid killing the other man." But in what sense can such an action not "intend" the death of the other man?

3.2.4 *The Meaning of Intention*

What, then, is the meaning of “intend” and “intention”? Again, there are unacceptable proposals. Cavanaugh quotes Boyle (whose interpretation here appears to be consistent with that of Grisez, Finnis, and other “new natural law” theorists) as saying, “The doctrine of the double effect presupposes at least this: that one can direct his intention to the good effect of his action and withhold it from the bad effect if the latter is not a means to the former” (Cavanaugh 1997, p. 6, internal citation omitted). Cavanaugh rejects the argument, and denies that Aquinas held it. He quotes Pascal’s withering satire in which a Jesuit advises a young nobleman that one can “stroll about” a dueling ground, rapier at one’s side, “directing one’s attention” away from fighting a duel and towards walking around, so that if one is “attacked” one is not really dueling (1997, p. 6). Quoting Jonathan Bennett, he concludes that, “[i]f there were such a method of intention, it would found a ‘morality of gestures and poses’” (Cavanaugh 1997, p. 6, internal citation omitted). In his 2006 *Double Effect Reasoning*, Cavanaugh offers a wide range of possible but unsatisfying approaches to this question (pp. 59-72, but also pp. 73-93 with its discussion of unacceptable versions of the intended/foreseen distinction). If Cavanaugh is correct about these other approaches, as I believe he is, it is no wonder that double effect reasoning has a bad reputation among many modern philosophers and theorists. It is easy to get wrong.

I believe Long offers the best, if rather technical, account of “intention” in this article. Briefly: relying on Aquinas’ account of “The good and evil of human acts, in general” (*S.t.* I-II, q.18), and in particular article 7 of that question, he states that the paradigmatic case of a human act, the “very *unit of currency* for Thomas’s consideration” of such acts, is one in which the “object” (or, elsewhere, “the external object”) “is *per se* ordained to the end” (2015, p. 92, emphasis in original). (I offer the following translation of “object”: the external action as a physical action, but described in relation to the reason for which it is undertaken.) He goes on to

state that “natural or essential order is discernable both in the case wherein the achievement of X [the end] by its very nature requires the performance of Y, and in those cases where, although there is perhaps more than one way to achieve X, nonetheless Y of itself and essentially tends toward X” (p. 93, emphasis omitted). Such actions, for Aquinas, are morally defined by the end. For example, both Jack the Ripper and many surgeons have opened up chest cavities for their purposes. But in the surgeon’s case, “we do not say that there are two simple acts with two distinct moral species [that is, accurate descriptions]: we do not say that first there is an act of opening the chest cavity (with the moral species of butchery) followed by an act of surgery (whose moral species is that of a medicinal or healing act)—but only one act, with one medicinal species...this opening of the chest cavity is *medical* (p. 94, emphasis in original).

But in a paradigmatic human act, he notes, “intention” for Aquinas is “the movement of the will...to the end,” not to the means (for the latter movement of the will is “choice”) (p. 95). Thus when Aquinas tells us “a private citizen may not *intend* to kill in self-defense...we are being told that the very purpose of such justifiable action cannot be merely the killing of someone. For the aim of defense is not simply to kill, but to ward off an assault and secure life and safety from harm” (pp. 112-13, emphasis in original). Thus, in Long’s telling, Aquinas has alerted his medieval readers clearly enough, and us if we listen carefully, that he does not mean the private citizen must not “intend” the assailant’s death in the broader sense of “doing something while meaning to do it,” but in the narrow sense of doing something with an end in view which is the ultimate reason for the act. If the ultimate reason for a defensive act were to be to procure the death of the assailant, then a wounded and surrendering or retreating assailant would be killed even though the necessity of defense has now lifted (p. 113).⁶⁹ The surgeon’s

⁶⁹ For Aquinas, such an act would not be “proportioned to the end” of defense.

cutting open of his patient's chest is a medical act, not butchery, due to his "intention," and for the same reason, the defender's sword thrust or gunshot is, due to his intention, a "defensive act" not a "wrongful homicide" (p. 115).⁷⁰

To be clear, although Long stresses intention, he is at pains to avoid "intentionalism," used here in an "Abelardian" sense in which the question of the moral worth of an action is decided purely by the agent's intention (2015, pp. 39-40). Long notes that intentionalism is "not a straw man but a constant tendency of much moral criticism and even Catholic dissent over the past hundred years (and indeed, all the way back to Abelard)" (2015, p. 43). While the intention is often vital for the right description of an action, a right intention cannot exist alone for Aquinas. This is because the intention is the object of the *internal* act, of the will, but for every act that is carried out there is also "an object of the *external* act" (Long 2015, p. 78, emphasis added). This object, Long explains, "includes both the more formal aspect of the relation to reason, and the more material aspect of the act itself and its integral nature" (2015, p. 85). (I remind the reader of my own translation of "object": the external action as a physical action, but described in relation to the reason for which it is undertaken.) Long goes on to say that "we can consider the object in a generic way, apart from any further ends sought by the agent—but not apart from the in-built *per se* ordering of the acts themselves, which is why we can say that some of these [acts themselves] *fall under negative precept*, even apart from considerations of further ends to which an agent might order them" (2015, p. 85, emphasis added).

⁷⁰ I note that I have here dealt with two of the last three factors in Aquinas' description of a human act, the object and the intention. There are also circumstances (see footnote near the beginning of this chapter that discusses various aspects of an act for Aquinas). In the case of Thomson's parable of Alfred the would-be poisoner mentioned there, Alfred intends the death of his wife but gives her medicine that cures her. That the pill is medicine is an accidental circumstance of which Alfred has no awareness.

I stress Long's "anti-intentionalism" because otherwise the above account of his thinking risks a serious misunderstanding. Some objects, according to Long, are simply impermissible, in modern terms, because of an "integral nature" that is wrong. Thus, for example, in Long's account, to understand the craniotomy operation performed on a fetus, "we must know what the object of the external act is...in this instance the action bears upon one who is not the patient, and does so in a way to cause harm rather than to heal." Because of this, it is not "a medical act...it directly and principally impacts a living human person in such a way as to harm and indeed to kill..." The fetus is not only "free of morally culpable conduct, but it is free of conduct *tout court*, free even of merely 'performative' guilt..." (2015, p. 45). Long's outcome here is the same, it appears, as Jensen's (see Long 2015, p. 45), the same as Flannery's (2001, pp. 183-85 and pp. 223-26), and the same as Cavanaugh's (2006, pp. 68-71 and p. 114), even if the reasoning is subtly different.

But what of self-defense, in which, at times (i.e. whenever a normally lethal means of self-defense is chosen as the only one available that will save the life of the defender or those she is protecting), the death of the attacker is included in the "external object" of the defensive act? The vital point to understand here for Long is that it is not "killing" *tout court* that is simply and always wrong. As he states, the "lethality" of a legitimate defensive act "can licitly enter into the object of the act as such because killing is not absolutely speaking an act under negative precept, but is only under negative precept where it does not fall under the form of just punishment, the form of just war, or the form of just defense" (2015, p. 117). What is simply and always wrong, and never to be done, is "intentionally killing the innocent" (2015, p. 131), but this means not just morally innocent but also innocent in the sense Anscombe brought out: not harming (see

footnote 29 below). The fetus is both: it is morally innocent, and it is “not harming.” It is “the classic innocent bystander at the wrong time and place” (Long 2015, p. 45).

3.2.5 But Why is it Just?

If Long’s account is accurate, as I believe it is, we have now shed some light on a puzzle but are left with our original question: how can it be just to kill another human being? First, the tradition rejects both Rodin’s “culpability” account (2002, and see chapter 4) and McMahan’s “agent-responsibility” account (2009, and see chapters 4 and 5). In the last chapter, I stressed that in general, the tradition treats a proposed action from the standpoint of the acting person, whose limited and imperfect knowledge of the circumstances and actors involved (not counting willful ignorance) is in general what she must rely on. Flannery reflects this aspect of the tradition when he notes of Aquinas’ account,

Thomas does not insist that you must ascertain culpability before using force; in fact, the scenario he has in mind seems to exclude such verification since, if you had time to perform it, you would probably not need to employ lethal force in order to preserve your life. And, in any case, he gives no indication that the philosophical basis of his position has to do with the moral status of the attacker; all indications are that it has to do rather with the obligation to ‘take more care of one’s own life than another’s.’” (Flannery, 2001, p. 175)

Flannery’s first point in this passage is that you simply do not have time to ascertain the culpability of the attacker in the scenario Aquinas implies, so if you act it will not be on that basis. His second point is that Aquinas leaves out any consideration of the possibility that the attacker is not culpable. Aquinas was well aware of this possibility on non-culpable attackers:

see for example *S.t.* II-II, q.57 a.2, *ad.* 1, just seven questions earlier in the *Summa*, where Aquinas uses and amplifies Plato's example in *The Republic* of not returning a weapon to a madman (Plato, 1987, p. 66). Aware of the possibility of non-culpable attackers, he could easily have discussed the point if he considered it to be morally relevant.

The tradition is not concerned with the culpability or responsibility of the attacker in the case of a sudden attack. One important reason for this is that the defender is not in any way seeking to punish the attacker—defense is not a quasi-judicial act (nor is the defender in a position of authority over the attacker), but one of self-preservation. A prerequisite for punishing is certainly a strenuous attempt to determine some kind of liability or culpability, but the defender, as Flannery points out, has no time and no ability to do so, and would (in many cases) lose her life if she tried. Such attempts to determine liability or culpability appear, *prima facie*, to belong to a judicial process, or perhaps a process where there is parental or managerial authority, rather than a sudden interaction between citizens.

But even if the judicial mode were to be required of the defender, the algorithm of justice has another set of branches besides “culpable/not culpable.” If the judicial process discovers that a violator of rights is not guilty by reason of insanity, the violator is not released to harm others because she is, after all, not culpable. Rather, she is locked up, often for life, an act so offensive to the right of liberty that an ordinary person may kill (a non-official) rather than submit to it according to David Rodin (2002, pp. 47-48). The state uses extreme and ongoing force if necessary on the guilty, but also on the dangerous who are not guilty. The tradition sees this as the right of the individual as well in the extreme situation of defense of one's own life.

3.2.6 *The Positive Moral Case*

The “first principle of practical reason,” or of the natural law, as Aquinas states early in his article on the natural law, is that “good is to be done and pursued, and evil is to be avoided” (*S.t.* I-II, q.94 a.2, *co.*). As I have noted, the corpus of the same article continues by indicating that one of the fundamental goods to be pursued is the preservation of my own life:

Because in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances: inasmuch as every substance seeks the preservation of its own being, according to its nature: and by reason of this inclination, whatever is a means of preserving human life, and of warding off its obstacles, belongs to the natural law.

Good is to be pursued, including this good of preserving my life. This is, as it were, the first and simplest duty we have under the natural law, and in a sense Aquinas merely repeats it with the statement in the self-defense article, “one is bound to take more care of one’s own life than of another’s.”⁷¹ Long queries whether this latter statement might conflict with the New Testament saying, “Greater love than this hath no man: that he lay down his life for his friend.” He asks,

But in relation to what does one define the love as objectively so great, save that what man is chiefly and proximately entrusted with is his own life? Moreover, formally speaking, one can only guarantee the rectitude of *one’s own* actions, and in this sense all who seek to act rightly realize the need to “take more care of one’s own life than of another’s.” But the chief sense of St. Thomas’s proposition is clearly teleological: one has governance of one’s *own acts* only because of the gift of life bequeathed to one...Hence a man is bound by positive precept to care for himself...there will be

⁷¹ This looks, in modern terms, like an “agent-relative” moral assertion.

cases—especially when others whom one is bound to care for depend upon one for their good—when one is obligated to defend oneself against wrongful assault...normally a layman will be obliged to defend himself. (2015, p. 111, footnote 4)

The first duty is to oneself, and, in the likely case that others depend on one, there is a duty to them as well. But what of the attacker? First, as Long emphasizes, my first responsibility is to myself, to keep myself alive. If I fail to do so, all the other instances of pursuing good, including perhaps for those to whom I owe special duties of care, will be lost.

I may also fairly assume (unless this is not true, a stipulation usually explicit) that this is an unjust attack. As I noted in chapter 2, what is “right” or “just” for Aquinas is “a relation or proportion among persons or things which in some way equalizes them.” In a quotation Lisska provides from Aquinas to illustrate this, on the same page, “natural right” is done when one person provides goods “so that what is received is proportionate to the amount paid” (Lisska 1996, p. 230). But if I have done nothing to deserve being attacked, injustice is being done—and it is just to resist this wrongful attempt.

If this is so, it is a grave injustice, one aimed at taking from me the fundamental good that allows me to pursue any others, my life. To the best of my knowledge, this is a grave objective wrong. As David Mapel notes, in Elizabeth Anscombe’s account it is an “objectively unjust danger”⁷² that justifies self-defense (Mapel 2004, p. 83).

As I stated at the beginning of this subsection, the question of the attacker’s guilt or responsibility or lack thereof are fundamentally not my concern in the moment of being attacked—but what if I happen to be quite sure that the attacker is innocent? As Long (2013)

⁷² I discuss this point again in chapter 6, so here I will merely note my claim that Anscombe is not being an “objective moralist” concerning self-defense here, in the sense I attack in chapter 4.

notes, for the tradition, “[o]ne may not directly kill an innocent even to save one’s own life,” but an “assailant is at least performatively culpable of destructive agency...” (p. 131). In a footnote to this passage, Long states that the rule against directly killing the innocent applies to those who are “both morally and performatively innocent.” He contrasts the innocence and lack of agency of the human fetus with “the case, for example, of the man with a brain tumor who becomes subject to aggressive outbursts and whose action renders him a lethal threat. The action is not morally imputed to him, but dangerous and wrongful action is imputed to him not as moral agent but qua agent simply speaking” (p. 131, footnote 56). I believe this latter point is correct. Even if one *knows* that an assailant is not morally responsible or culpable for the attack (a rather rare circumstance), he is (like a dangerous, charging animal) the agent threatening the defender’s life. It is not his mere presence that threatens harm, but his actions. His attack is an objective injustice, contrary to the balance and harmony intended in the world. My just concern for my own life allows me, subject to proportionality constraints, to take necessary measures to preserve it, even if that includes measures quite certain to kill the assailant if nothing less will save my life. (As I understand the tradition, if I can see that two or more persons are hurtling toward me with every appearance of innocence, and their destruction would save my life, I may not do so due to the requirement of proportionality—but for one, this is not the case.)

3.2.7 Concluding Remarks on Individual Self-Defense

Two final points of interest concerning the individual self-defense narrative of Aquinas: first, it does not attempt to show justice on a small scale, in an interpersonal setting that is somehow prior to the social setting, so that the principles of justice on a large scale can be derived from it. In fact, Aquinas concludes the short paragraph of the corpus of this article by

distinguishing the private citizen from the public official, who is allowed to *intend* to kill in self-defense for the sake of the common good, but is still bound not to kill out of private animosity.

Second, the question may be asked, what about protecting others? Even in this article on personal self-defense, Aquinas notes that those officially charged with the public good have a duty to protect others, but such a duty seems to be clearly stated only for those who are considered to participate in the common good of the state or political unit concerned—certainly citizens, and apparently by extension also all those within the recognized boundaries of the state. Similarly, in his article on war, he states that those charged with protecting the common good must do so, but the common good discussed seems to be that of the nation that they govern, rather than any universal common good. Nonetheless, the tradition recognizes cases where defense of others is either required or praiseworthy.

Moving down from the level of government, parents are also charged with the protection of their children, and there are other relationships where the tradition would see a duty to protect. Yet where there is no clear duty, is it right for a government or an individual to interpose? Aquinas' article on self-defense does not give much explicit guidance. The tradition praises the protection of the weak by the strong, but leaves such acts open to prudence and courage. There is a limit to what anyone can reasonably hope to accomplish, there are concerns about our limited knowledge of and authority in a given situation, and there is also a limit to how much risk anyone can be expected to take on where there is no clear duty involved. The duties we owe others grow weaker as we move outward from our inner circles of relationships and the communities of which we are members, but if we can help those with no connection other than our shared humanity, that is highly praiseworthy for the tradition. Callousness toward the sufferings of others, even those with whom we have no obvious connection, is blameworthy.

To summarize, while there continues to be a great deal of controversy over Aquinas' exact teaching in this article, I believe the following is reasonably clear. First, Aquinas' account, in its requirement that a defender "not intend" to kill an assailant, is a refinement of an earlier, more permissive view with roots in Athens and Jerusalem at least. Both the older ("Athens and Jerusalem") and newer (Aquinas) versions base the view that defense is just on the grounds of the dignity of being human and the naturalness of the desire to stay alive (although both versions also denied any absolute rightness to lethal self-defense, insisting on what we would call, in modern terms, proportionality and necessity requirements). Second, the "no intention" requirement (a) allows homicidal violence under restrictive conditions, especially that of a proportionate defense, and (b) is not infinitely malleable: the intention is connected to the means for Aquinas. Third, the account does not require knowledge of culpability on the part of the assailant, whose liability to defensive action is sufficiently demonstrated for the purpose of defense through his attacking the presumably innocent defender. Finally, there is a place for protecting the lives of others to whom we have no clear duties, but such praiseworthy acts are matter for prudence and courage, and our precise duties cannot be laid out in advance.⁷³ While

⁷³ Frowe (2015, p. 135) attempts to lay out carefully delineated duties in a rough and provisional way, but, even given those qualifications, I do not believe it works. In "River," she writes, "Five people are drowning on a life raft in dangerous waters. Runner can pull the life raft to shore, but will suffer the loss of his leg in doing so." She continues, "Let's stipulate that for any cost lower than the loss of his leg, Runner would be required to rescue the five." But life is not a video game where blades flash out of the sky in a regular rhythm, neatly slicing off legs of avatars of unskilled players. If a shark is in the water, or if there are nasty currents and rocks, Runner has no way of knowing whether he will lose a leg or his life—and either of these would prevent him from even carrying out the rescue. It is actually quite impossible to describe, "any cost lower than the loss of his leg" in realistic terms. In another example, McMahan writes of a threat by a minimally responsible person that "will cause me to be paralysed unless I cause him to be paralysed instead" (2011, p. 554). Due to the threatener's merely minimal responsibility, if I can divide the burden, I have a duty to do so: "In that case, he may be liable only to be paralysed below the arms, and I must accept the loss of a finger." No risk scenario in real life is remotely predictable and quantifiable in such neat ways. "Death is an indivisible harm," writes Lazar (2010, p. 207, footnote 62), and all serious risks involve the possibility of such an indivisible harm. Non-acrobats: do a back flip off a three-foot high platform onto your lawn. You risk a broken ankle, or a broken neck. Taking a risky action does not mean calculating "I will likely lose a leg or a finger," but knowing I might suffer

this summary does not answer all the questions modern ethicists raise about Aquinas' account of individual self-defense, it appears to me to provide an admirable starting point for thinking about the subject.

3.3 The Just Individual Defense of Property

The question whether an individual may defend significant property with force, or at least its threat, is significant in its own right but matters greatly in modern just war theory because a number of theorists deny the right both to the individual and to the state. The defense of property is a live issue. A state where no citizen was prepared, at any level, to defend significant property with force is somewhat hard to imagine—but if such a state were to exist and thrive at all, presumably the state would be performing this function for citizens of protecting property (as much as possible) and remedying robbery (by apprehending and punishing robbers with the use of as much force as needed). But if this is the case, then we already rely on the use of force at the individual level to defend our property—it is just that we delegate this defense to the state. If so, then force and the threat of force are necessary to defend property, and the fact that citizens do not always threaten or use force is a red herring: the salient moral fact is that individuals flourish to some extent in society because force is being used to protect their property.

The tradition, in general, authorizes the defense of property by an individual with a threat of force and, if necessary, its use. (I should state immediately that this does not mean shooting purse-snatchers as they run away with five dollars in change and some credit cards.) As with

death, or serious harm, or perhaps nothing. Since this is so, just what moral lessons can we realistically derive from completely unrealistic scenarios? What is the translation process? Both Frowe and McMahan take these examples as the straightforward bases on which to build moral conclusions, but that simply makes no sense.

self-defense, I am not generally required to defend my property, but it is right to do so if I so choose and if the property has serious value for me and those who depend on me.

Many modern theorists do not accept this notion for private citizens. One example is Rodin, who argues against such a right (with very narrow exceptions) first on proportionality grounds: a life may be lost if I defend my “lesser interest” of property. He also argues (rather strangely from the tradition’s point of view), that there is a possibility of redress and reconstruction of what is stolen or destroyed, even in a “state of nature” (2002, pp. 42-48). Some years later, Rodin’s argument on the same subject (but now applied to war) depends on the notion that one person is, at least in some measure, responsible for the evil done by another:

“Defensive action is impermissible when it foreseeably *produces* harmful effects that are disproportionate to the good one is seeking to achieve. In a conditional threat situation, the aggressor will inflict additional (lethal) harms as a consequence of the defender’s action to resist the direct threat. These additional harmful consequences of defensive action must be factored into the proportionality calculation when determining the permissibility of defending against the direct threat” (2014, p. 82, emphasis added).

The context is a threat by the thief or aggressor, at least an implicit one, to escalate violence, and the claim is that at least some of the ensuing violence is the responsibility (discounted, as Rodin states in the same passage) of the defender—indeed, Rodin states here that the defender *produces* the harm that results from the aggressor’s action. This appears to be a widely held belief today in some circles, even if, I suspect, much less widely held among the world’s people. But it is simply implausible: if A threatens B, and B attempts a defense, and A inflicts damage, the actions of A are A’s, and A’s responsibility. That does not mean B has no reasons to be concerned, of course, but B can also be concerned about what a lunatic might do,

without believing he could “produce” or was responsible for the lunatic’s action. As I note in chapter 6, police forces of the most liberal countries today generally order lawbreakers causing or threatening mayhem to lay down their weapons, and if there is ensuing escalation, the courts count the resulting harm as the criminal’s responsibility. Again, the police have a responsibility not to be reckless, but what our system does not do is to hold them to Rodin’s standard.

Here I will present a sketch of the tradition’s view of why defense of property is allowed, beginning with ancient views in the tradition. In the ancient world, the first distinction to note here is that between theft and robbery, something usually clear in modern English as well. The words for theft, in ancient Hebrew and Greek and medieval Latin, referred to something secretive and thus non-violent; robbery was open, and it was violent at least in the sense of coercion through the threat of violence. Often enough it was violent in actuality, regardless of the actions of the victim.⁷⁴ (The kind of person willing to kill for gain is almost sure to be armed, and seems likely not to be worried about moral issues like proportionality, even if they applied to the immoral act of armed robbery.) Ancient stories and wisdom generally consider armed robbery a heinous crime, resistance to it (if practicable) justified, and the control of it by government highly praiseworthy.⁷⁵

Theft, clearly not considered as bad as robbery by the tradition, should be discussed first. In his question discussing the two crimes, Aquinas begins, interestingly, by defending the institution of private property, but in a far from absolute fashion. He claims that “the ownership

⁷⁴ Welch (1996) provides a fascinating discussion. For just one (contemporary but fictional) example of unwarranted violence against a victim, consider the parable of the Good Samaritan. The story begins with a traveler on the road between two cities (Jerusalem and Jericho), who is beaten and “left half dead” by highway robbers (Luke 10:25-37). This part of the story apparently did not seem far-fetched to anyone who heard it, and in parts of the world today still would not be.

⁷⁵ There was a kind of “Robin Hood” exception to this rule, as Welch (1996, pp. 146-47) points out. When armed robbers came from an oppressed group and focused their predations on the oppressors, they appear to have often gotten a great deal of sympathy from the oppressed group members.

of possessions” is not based on the natural law. Instead, it “is not contrary to the natural law, but an addition thereto devised by human reason” (*S.t.* II-II, q.66 a.2, *ad.* 1). In fact,

...according to the natural order established by Divine Providence, inferior things are ordained for the purpose of succoring man’s needs by their means. Wherefore the division and appropriation of things which are based on human law, do not preclude the fact that man’s needs have to be remedied by means of these very things. Hence whatever certain people have in superabundance is due, by natural law, to the purpose of succoring the poor (*S.t.* II-II, q.66 a.7, *co.*).

Aquinas states that in regard to the use of material goods, what an owner may rightly do is sharply limited: “man ought to possess external things, not as his own, but as common, so that, to wit, he is ready to communicate them to others in their need” (*S.t.* II-II, q.66 a.2). He goes on to state in article 7 of the same question that in case of extreme need, “it is lawful for a man to succor his own need by means of another’s property, by taking it either openly or secretly: nor is this properly speaking theft or robbery.” He notes in reply to one objection, “It is not theft, properly speaking, to take secretly and use another’s property in a case of extreme need: because that which he takes for the support of his life becomes his own property by reason of that need.” This background concerning the legitimate use of property and the relative nature of possession is vital to an understanding of theft for Aquinas. The ownership of property is not absolute, and should not be seen as such by the owner. A starving or desperate person may not morally be prevented from taking what he desperately needs, and protection of trivial amounts of property through force can easily be seen to be disproportionate.

Protection against theft in the ancient world involved walls and locked doors, but also weapons in case someone dug (in the case of mud walls in the Middle East) or broke through.

But a successful theft by definition was non-violent and unknown at the time it was occurring, and thus could not be resisted by force. What could be so resisted was robbery—or theft that went wrong, waking up or surprising a victim, and leading to an attempt to use force by the thief—who, because armed in the course of thieving, is better considered a robber in such a case. In the “self-defense” article just a few pages earlier in the *Summa* than the “theft and robbery” article, Aquinas initial argument for self-defense was an assertion of the householder’s right of defending his *house* on the authority of scripture, with an *a fortiori* case for his defense of his life (*S.t.* II-II, q.64 a.7). But the justice of defending the house (and its contents) is stated quite casually, without any explanation apparently deemed necessary. We can reconstruct an explanation: clearly the average house may contain property of significant value even today, and was more likely to do so before modern banking, as well as family members who could be seriously harmed by an armed intruder.

How is resisting robbery (or theft that turns into robbery) just? My answer turns on the question of threats of violence. Aquinas notes, quoting Aristotle, “no man suffers an injustice willingly” (*S.t.* II-II, q.66 a.4). Aquinas uses this quotation to show (a bit oddly) the involuntary nature of both theft and robbery from the standpoint of the victim—theft is an “involuntary” giving up of property on the victim’s part through ignorance, and robbery through violence, including its mere threat. (I do not “voluntarily” hand over my money when threatened by a gun, even if no physical violence takes place.)

To assess the importance of threats of violence, consider an encounter between a group of bandits and a property owner on a road between towns in the ancient world. Assume that the property involved was of significant value for the owner and (as was obviously not always true) honestly gained. Assume that the owner has hired armed guards to accompany him (in effect, the

ancient world implicitly authorized the defensive use of force to guard property). Security between towns was much poorer than it is today in most of the world. Yet like today, most people most of the time consider whether fighting, either to rob or to resist being robbed, is at least somewhat likely to succeed or not. If the property-owner, with his servants and their ready-at-hand weapons, seems to have significantly more (effective) force available than the robbers lying in wait, the robbers are unlikely to try robbing that particular group. The silent threat of an overwhelming and effective defense does the trick of providing security for the property owner. If the opposite is true, and well-armed robbers greatly outnumber defenders, again their threat, which may consist merely of walking onto the road with weapons visible, will likely do all the work—the owner of the goods is unlikely to resist, hoping that a swift surrender will lead to the robbers showing mercy, as it may or may not. The threat conveyed by the view of the weapons possessed by either side is thus an important part of the accomplishment of the crime, or of the defense.

Robbers were and are armed not only in order to dispatch or abuse their victims more effectively, but also because they think resistance is likely, or at least possible, and being and appearing to be an armed robber strongly suggests a willingness to do violence against the innocent. In the context of confronting victims and making demands, their weapons simply *are* a threat of violence, a violence most⁷⁶ of the ancient world would say was in the service of grave injustice. If the robbers are caught, they expect harsh punishment from the authorities, whether or not they have used the weapons.⁷⁷

⁷⁶ But note the Robin Hood exception discussed by Welch (1996), see previous note.

⁷⁷ Welch (1996, pp. 149-50) points out that the two “thieves” on crosses beside Jesus were actually “robbers” according to the Greek text, as was Barabbas, the person the crowd asked to be released in honor of the Passover rather than Jesus. Penalties were far higher for robbery. Modern laws make the

When are threats insufficient? While extreme disparities in force may mean that physical violence is less likely to take place, several factors may lead, instead, to the actual use of physical force. One is when the scales are not tipped too far to one side or the other and the robbers or the owner are willing to take the risk of fighting. Another is if the robbers have a reputation for beating unconscious,⁷⁸ slaughtering, violating, or selling into slavery⁷⁹ their victims. If death is likely anyway, the cost of fighting is low by comparison.

But, as noted, the property-owner and his guards, being armed, also deliver an unspoken but very real threat: if you attack, we will fight back, and you will suffer. For the ancient world generally, this threat of violence (or use of force) was seen as an entirely different thing from the threat or violence of the robbers. It would be seen to be in the service of justice, not injustice. If a group of robbers attacked and were beaten back, the loss of life of either the robbers or of the guards of the property was seen as due to the *robbers' injustice*, not to the provocation provided by the property-owner's traveling under arms. The threats delivered before the conflict were seen to have a completely different moral status, since one set of threats threatened injustice, the other, the protection of justice. Similarly, to carry out the threat served either injustice, in the robbers' case, or justice, in the defenders' case.

The tradition endorses most of these ancient beliefs concerning theft and robbery. It does not accept the crueler punishments of the ancient world, but it does accept that property as well as bodily life and integrity may be protected with the threat and, if necessary, the use of force, even lethal force. The use of force (by a private person) without a preliminary threat (i.e. if the

same distinction: there are higher penalties for "armed robbery," whether or not the weapon is discharged, than for furtive theft.

⁷⁸ Note again the story of the Good Samaritan (Luke 10:25-37).

⁷⁹ An ugly possibility in the ancient world that is rarer today but far from unknown. In the story of Joseph, his brothers sell him to merchants who appear to accept casually the acquisition of a slave (Genesis 37).

robbers demand surrender and as they wait for an answer some private guards shoot them full of arrows without warning) would have been condemned by Aquinas, I believe, on the basis of the self-defense teaching developed above: a proportional defense by a private citizen allows, if at all possible, a chance for the attacker to retreat. But the just use of force cannot make one side responsible for the unjust use of force by others.

While it is not always acknowledged, we tend to implicitly accept the same analysis in the modern world when it comes to the police, authorized private security guards, drivers of armored cars and trucks, and so forth. Police officers, in service of the common good (like private security company personnel on behalf of modern property owners), through their uniforms, insignia, and display of their weapons silently, deliver a threat, presumably a just threat, on behalf of the modern state: if you break the law or reject our authority when the demands of the law are at stake, you will face the use of force. Similarly, most modern theorists appear to believe that lawful threats of the use of force by police officers, as well as their necessary and proportionate uses of force, serve justice, not injustice. Mainstream just war theorists do not typically claim that police or security guards need to consider the possible escalation of force by criminals when they issue orders while attempting to stop an armed robbery from taking place. (For example, Rodin, 2002, pp. 43-46, finds the use of force in the protection of property impermissible, but ignores the constant threat and use of force by the state for that same purpose. Is it only impermissible for private citizens?) Clearly a consistent application of such a rule would simply end law enforcement (since the reputation for the escalation of violence would be rewarded by non-use of force by police), throwing at least part of the society involved into some kind of “state of nature.” This is apparently not desired

domestically. (As Aquinas puts it, “if men were to rob one another habitually, human society would be undone,” *S.t.* II-II, a.66 a.6.)

This analysis of robbery provides two important lessons. First, threats are relatively clear messages, even if unspoken, and they matter. I believe this obvious feature of life, that threats often achieve goals in conflict situations, even without visible follow through, needs emphasis. In many situations of conflict the force is so tilted to one side that no fighting takes place because the threat, often simply embodied in the display of weapons (and backed by a warlike reputation or appearance), enables one side or the other, the aggressor or defender, to achieve what it desires. (As Aristotle notes in the *Politics* concerning a well-defended city, “an enemy will not even attempt an attack in the first place on those who are well prepared to meet it,” 1992, p. 424.) On the other hand, relatively even levels of threat convey a similar message: fighting will be too costly. NATO military exercises and May Day parades with rows of tanks and missiles during the Cold War were boasts, but also threats. They were displays of force that conveyed the message, “you would be foolish to attack us.” Just war theory analyses that leave out such threats miss a vital part of warfare.

Second, threats can be just or unjust. Treating all threats as morally equal, as if they were simply physical facts to be quantified, conflicts with our belief in the need for police forces and courts and other forces of order, all of which issue ongoing threats without regard for how threatened criminals may respond. It is inconsistent to accept the existence of the latter but treat international threats, defensive and offensive, just and unjust, as devoid of moral differences.

3.4 When is a State’s Self-Defense Just?

Turning from the individual to the nation-state, according to the natural law tradition, it is just for every nation-state (with limited exceptions), by virtue of being a nation-state, to defend itself (its people and territory) against armed aggression. In the exceptional case, a just defense cannot be mounted because of serious injustice committed by that nation—either grave violations of the rights of other nations, or exceptionally grave violations of the rights of its own people—with more violations in progress or extremely likely to occur, and no reasonable hope that the nation will remedy or cease to commit these violations when called upon to do so. The justice of defense (which is not absolute) exists whether the nation-state is democratic or not.

The justice of the defense of the political community is based on the enormous value of and inescapable need for such communities in human life: they are guardians of the common good. An individual must seek to preserve the good of her own existence, and to do so she must breathe, eat, sleep, learn language, seek knowledge, and so on, and if necessary resist attempts to kill her. She cannot pursue the goods before her if she is continuously robbed or if someone kills her. To say, as the tradition does, that she should pursue her good is to say that she must resist attempts to deny her the possibility of doing so.

Analogously, for the tradition the point of government is to defend and further the common good of a political community. In section 2.1, I offered these thoughts of Sokolowski concerning Aristotle: political communities,

make possible for man a civilized and virtuous life, a life lived in view of the noble, the good, and the just, a life in which human excellence can be achieved and the worst in man can be controlled: ‘For man, when perfected, is the best of all animals, but when separated from law and justice, he is the worst of all.’ (2001, p. 508, internal citations omitted)

I went on to emphasize that the goods that can be achieved in such communities, i.e. with governments (for we have no evidence, over thousands of years of experience, that large communities can exist without these), are shared goods that are not merely the sum of the individual goods involved. The goods, including for example knowledge, can be greatly increased for the individuals in a community over what they might be for individuals struggling for survival in the natural world. (It is not only universities, but all the knowledge preserved by and passed on through them that is lacking in a state of nature.)

The sanction for the existence of governments is not, fundamentally, divine command, nor is it that individuals contracted or might have contracted with each other to create governments. Rather, it is our own needs. It is the nature of humans to be social, and the nature of social communities to require coordination. We cannot achieve our good, our flourishing, without communities, and those communities must have direction in order to achieve coordination. For a summary of Aquinas' thought on the subject, see Bigongiari 1966, pp. vii to xi. But the tradition, at its best, is not unmoved by the modern articulation of the importance of the individual and the need for safeguards against or within government for individual dignity. Here Maritain has done some of the vital work of expressing this need in more modern terms with his call for "organic democracy" (see 1960, entire.) Since the existence of these governments is vital for the communities they govern, their defense of those communities is necessary.

Of course, like most actions, defense is subject to proportionality requirements. There are phases of defense. In the attack on Pearl Harbor, some soldiers shot back at the attacking planes. If U.S. forces had been prepared, an immediate counter-attack against the Japanese fleet might have been possible, a second phase. Attacking Japanese forces in other theaters, or demanding

satisfaction from the Japanese government, was a possible further development, a third phase. Repelling aggression, the first phase, is the least problematic from the tradition's standpoint. An aggression, even if unprovoked, does not authorize "total war" against the attacker in the tradition's view. Although carrying the war to enemy territory may be called for, that stage of "defense" is subject to more stringent requirements (as I have argued in an unpublished paper).

Nor is the justice of defending territory absolute. If minor disputed territory is seized, negotiations may be called for. The launching of a war may be unjust, in the circumstances. In this regard, the Aristotelian-Thomist tradition must be distinguished sharply from that identified by Fabre and Lazar in *The Morality of Defensive War*. Their introduction to that work begins, "Conventional just war theory traces its roots to the founders of public international law—Grotius, Pufendorf, Wolff, Vattel—and forms the justificatory core of the contemporary law of armed conflict." They go on to write of the "unabashedly statist foundations" of this conventional theory, which can be seen in that,

the right to wage war in national defence is held by sovereign political communities, that the agency of individual combatants is subsumed under that of their political community, and...since there is no authority higher than the sovereign that can judge the rights and wrongs of a conflict, belligerent states and combatants should be regarded as equals on the battlefield." (2014, p. 1)⁸⁰

⁸⁰ As Leo Gross put it in 1948, in an essay on the occasion of the tercentenary of the Peace of Westphalia, "To [the treaty] is traditionally attributed the importance and dignity of being the first of several attempts to establish something resembling world unity on the basis of states exercising untrammelled sovereignty over certain territories and subordinated to no earthly authority" (1948, 20). He goes on to state that the treaty, "represents the majestic portal which leads from the old into the new world" (p. 28, internal citation omitted), but laments that, "In this era the liberty of states becomes increasingly incompatible with the concept of the international community, governed by international law independent of the will of states" (p. 39). Stéphane Beaulac argues that attributing this set of ideas to the Peace of Westphalia "in

The Aristotelian-Thomist tradition, however, was formed before Bodin and Hobbes created the modern theory of state sovereignty. It is radically dissimilar to the “natural law” theory of Wolff,⁸¹ for example, and was always opposed to notions such as the legal positivism of John Austin,⁸² which heavily influenced the pre-World War II notions of international law that are the background of Fabre and Lazar’s attack.⁸³ For a bracing example of a positivist rejection of natural law in all its forms, consider Lassa Oppenheim’s attack in 1908:

Enormous as the importance and the function of the theory of the law of nature has been for the past, it is for our times not only without any value whatsoever, but directly detrimental...It prevents the proper criticism of the existing positive law...It offers a

effect, is a myth” (2004, p. 210). For the tradition, however, liberty is never absolute—it is for the sake of some good.

⁸¹ As Koskeniemi writes, “...early classicists do recognize the existence of an over-riding, pre-existing normative system of divine and/or natural law. But they assume this law to be of a very general nature. Its function is exhausted in the way it liberates States to create a society of their liking among themselves...For [Christian] Wolff, natural law is restricted to only very few general maxims. Most important of these is the duty of the State to preserve and protect itself. Natural duties towards other States are secondary...Wolff’s natural law is a Hobbesian instrument of the “self”. It does not lay down any goals external to the self’s pursuits” (2006, pp. 108-09, internal citations omitted). In the tradition, though, the demands of morality are not so attenuated.

⁸² Especially in the first few chapters of *Aquinas’s Theory of Natural Law*, Anthony Lisska discusses the renewed interest in the natural law in the fields of philosophy and jurisprudence after World War II. In a key passage he notes that the Nuremberg trials, with their charges of “Crimes against Humanity,” appeared to have no theoretical foundation in legal positivist systems such as Austin’s, leading scholars to a renewed search for “rational justifications of law beyond the theoretical accounts common to legal positivism” (1996, pp. 8-9).

⁸³ For a different view, consider Koskeniemi: “It is sometimes suggested that a universalist conception of international law represented by Enlightenment jurists fell due to the rise of ‘positivism’ in the late nineteenth century. This is not an adequate image of the structure of colonial law” (2004, pp. 130). Koskeniemi objects to this characterization because, “In the first place...the leading international jurists were not ‘positivists’ in any clear sense but made constant use of arguments about morality or natural law,” and, “In the second place, this gives too much credit to the ‘universalism’ of earlier jurists such as Grotius or Vattel...their ‘universalism’ was a projection of their Western humanism, a secular variant of the Christian view of a single God” (p. 131). Yet this was a “natural law” thoroughly pressed into the service of a belief in Western superiority, as Koskeniemi is at pains to argue. It might be argued that my own view of the natural law tradition is too “idealistic,” cherry-picking the most desirable features of the tradition. I would argue that the tradition provides coherent foundations for moral theory, but that its proponents in the past made mistakes influenced by their cultures (and, sometimes, lack of virtues). I focus on features of the natural law that, first, can be acknowledged as viable today, and second, are in harmony with its key principles.

breach through which the deniers of the law of nations can easily come in and attack the very existence of an international law. And therefore...the place of the theory of the law of nature is...in museums... (1908, p. 329)

The tradition, like many other theoretical structures, proposes that there is a moral limit to the authority of the governments of states in the sphere of international action, and thus that the notion of a relatively unlimited “Westphalian sovereignty” of states to do as they please (except as constrained, perhaps, by treaty obligations into which they have voluntarily entered) is morally unacceptable and forms an unacceptable basis for legal thinking as well. (To what extent this is a caricature of actually held beliefs among international jurists prior to World War II is beyond the scope of this dissertation.) One result of this insistence on moral standards applicable to all nations is that, like the authors in Fabre and Lazar’s volume, scholars in the tradition deny that “belligerent states...should be regarded as equals on the battlefield” (the more complex question of the “moral equality of combatants” will be considered later). There is a rational order to the cosmos, difficult as it may be, at times, to discern its details, and in terms of morality, that order constrains the actions of states. The tradition is not to be identified with the “conventional just war theory” with “unabashedly statist foundations” that Fabre and Lazar rightly decry (2014, p. 1).

There is an odd inconsistency in many discussions of the rights of individuals and states to defend themselves. We often discuss the right of the individual to defend herself in this way: here is a right, we say, and we do not ask, except cursorily if at all, whether the right-bearer is even a minimally decent person, and whether some minimum of decency is needed to have the right. (The questions of whether the attacked person has criminally provoked the attack and the related question of whether the attacked person is a wanted murderer are quite different

questions.) We simply assume that even a good-for-nothing drug-addicted bullying scoundrel of an individual, one who has contributed nothing to society and in fact is very much a net loss to it, if she has not provoked an attack and is not resisting a legitimate arrest, has an unimpaired right to defend herself. But then we debate what kind of nation has a right to defend itself, if in fact any does. If political communities are necessary in some way for the human flourishing of all their citizens, then this implies an enormous value even of imperfect states. If they have such value, why must they be submitted to questioning to which individuals are immune? (I mean this remark as a *reductio*—defense is not an absolutely just thing in all circumstances, for either individuals or communities.)

As with individual self-defense, I begin with the historical record of the tradition. It, along with the whole ancient world, assumes the necessity of preparations, at least, for the defense of the political unit. (The preparations are sometimes sufficient to keep aggression away, but in moral terms, one who approves preparations to use force in defense of persons and goods generally approves its actual use.) The Hebrew Bible presents the patriarchs as leaders of fighting men. Under the “judges”⁸⁴ and then under the kings of ancient Israel and Judah, leaders led the people and then the army into defensive (as well as offensive) battles whose rightness is only questioned if there is a specific divine command to refrain from defense. When Plato has Socrates design his ideal city in conversation with companions in *The Republic*, after the first, primitive design, with its very simple life (rejected by Glaucon as a life fit for a “community of pigs”), the next iteration of the city needs “an army, which will go out and defend the property and possessions we have just described against all comers” (1987, p. 124). The New Testament parables of Jesus assume that kings as well as householders will defend themselves against

⁸⁴ I refer to the “Book of Judges” in the Hebrew Bible. The title “judge” is seriously misleading, as these were political, military, and to some extent religious leaders as well as “judges” in the modern sense.

aggression, against their property as well as their persons and those of the citizens of their countries, if they can, and offer no condemnation of such defense (see Luke 14:31, Matthew 12:29, and parallel versions of these parables). This appeal to authority does not exhaust the tradition's arguments, of course.⁸⁵

For the tradition, defense of the whole panoply of goods involved in being a people, their common good, from aggressive attack involves the activity of government—in fact, it is one of the primary functions of government, as Aquinas notes in his seminal article on war:

...And as the care of the common weal is committed to those who are in authority, it is their business to watch over the common weal of the city, kingdom or province subject to them. And just as it is lawful for them to have recourse to the sword in defending that common weal against internal disturbances...; so too it is their business to have recourse to the sword of war *in defending the common weal against external enemies* (*S.t.* II-II, q.40 a.1, emphasis added).

That is a very compact statement, as is typical of Aquinas. The chain of reasoning that leads to the legitimacy of purely defensive action by a state is very short, and so obvious to major scholars in the tradition (including Aquinas) that the steps are often assumed rather than stated. I offer the following attempt at reconstruction of the chain, with some explanations: (1) The state (of some kind)⁸⁶ is necessary for full human flourishing. (2) The function of the state is to provide a framework for the human flourishing of the individuals in it, and (3) part of how it does so is to protect their lives and property from external (as with internal) aggression. To

⁸⁵ Although some of these texts seem to offer reasons for aggressive behavior, I believe the most fundamental moral note in them is defense of the kingdom or polis.

⁸⁶ Here I mean simply an independent political unit. Clearly the governments of some of these are less ideal than others, and aspiration to a better one is rarely out of place.

develop these thoughts further, there is no convincing political unit (even today) higher than the state to protect it from aggression, and friendly allied states willing to commit their own forces are not always available—nor would they be likely to be willing to defend a pacifist state, if such a thing could exist except as a client of another state, without significant compensation. The world includes individuals willing to commit crimes, and organized groups (including states) willing to do the same. A world in which no decent person or state would use force to protect the common good (as Aquinas notes about a world of habitual armed robbery, mentioned above, *S.t.* II-II, q.66 a.6) could not be a world where decent people flourished.

Expanding slightly on points one and two above, as I noted in Chapter 2, for the tradition, the state (meaning simply some form of political association) is the necessary condition of flourishing for all the individuals in it. (This is to presume a rather unromantic view of the lives of groups of hunter-gatherers.) Coordination of efforts would be needed even if all the individuals in a community were good, but since everyone needs guidance and many are rather far from good naturally, and the moral education provided in families ranges from excellent to dreadful, laws (which must be at least imperfectly enforced) help create both virtue and order. The good of those individuals in the political unit, the common good, is also the shared good of the individuals in it, but it is much more than simply the summed up rights and conveniences of those individuals, because each one can flourish far more in a governed society than he or she could alone, as can be seen by comparing the state of the arts and sciences in any society with what that state would likely be if humans were scattered around the face of the planet in tiny groups. (All of the progress achieved in these areas appears to have been achieved under imperfect governments—even liberal democracies have grave flaws and substantial room for improvement—so a perfect government is not necessary for progress.) It seems that better

governments might well have facilitated even more progress in these areas.⁸⁷ (To be sure, the existence of governments has always facilitated some evils as well, but the “state of nature” should not be romanticized—even hunter-gatherers oppress and sometimes kill each other.)

To put this argument another way, individuals may use force, if necessary, to resist anyone who would deny their pursuit of the most fundamental goods. To say that they have these goods and they are vital is also to say that they may fight against attempts to deny them—to deny this latter duty is to make nonsense of the importance of the goods. In a similar way, the fundamental task of governments, for the tradition, is to protect the common good of citizens against internal and external enemies of the good, and in the extreme case, this involves the use of force, against criminals or invaders. To deny the rightness of all force is to deny the possibility of government. Agreeing on the stipulated reason for the existence of government, Aquinas and ancient authorities in the tradition saw no need to make the argument for the rightness of defensive force when it was needed: if you say life is a good thing on this planet, there is no need to make a further argument for oxygen and water, given the known facts of biology, because the argument for oxygen and water is already implied by the goodness of life on the planet.

Because of the transcendence of the common good of a community, it is right to defend it against unjust attacks exists even if individual morally innocent soldiers and innocent civilians

⁸⁷ Emerton and Handfield condemn “what we call ‘romantic’ collectivist views, whereby some political collectives instantiate intrinsic goods that can be overwhelmingly greater than individual goods,” because “[s]uch views are rightly associated with some of the worst political horrors of the twentieth century” (2014, p. 41). Does the description in this paragraph constitute such a view? I would argue that it does not. First, the goods of the political community are shared goods of the individuals in them (see Chapter 2). Second, the basis of the value of the political community is the value of the individuals that make it up. Finally, the tradition has always denied (a) that the individual is to be sacrificed to create a more perfect state (Lenin’s dictum about breaking eggs to make an omelet, as well as some of the notions of fascism), as well as (b) that one group of human beings is better than another (Nazism). However, even if the tradition’s defense of the importance of states may not be “romantic,” it almost certainly qualifies as “non-contingent,” the other quality rejected by Emerson and Handfield’s “prosaic statism” (2014, p. 44). The need for a state is built into human nature.

may die in the course of a defense against aggression. The justice of defense does not depend on the individual culpability of soldiers on the aggressive and unjust side. According to the tradition, the soldiers who attack a country unjustly are liable to be killed simply because they are participating in an unjust attack.

Concerning point three above, the protection of the lives and property of citizens, experience shows that just as some individual human beings try to subject others to their wills in ways that deny them flourishing, such as enslavement, kidnapping, and rape, so states that have taken over other states in the past have often treated at least many of the inhabitants of the victim states quite badly. An individual slave can rarely be said to flourish even under the best of masters, as she is treated as a thing to be used by her enslaver, and her resources and efforts are directed by force or its threat to the fulfillment of the desires of the enslaver. The inhabitants of states taken over by others have often been treated at the very least as *de facto* second class citizens under their new governments. Resources that might have been used for the benefit of the inhabitants are re-directed to the benefit of the conquering nation. This can be a drastic change in the well-being of the vast number of individuals in the state that is invaded, and possibly of their descendants as well. In the ancient world, defeat often meant death or effective slavery. The twentieth century saw the return of this kind of result with a vengeance, from the war on the kulaks in Ukraine, to the famine created there, to the enslavement of much of Europe by Nazi or Soviet forces (and this list could go on). Since the Soviets were victors, their oppressive domination of Eastern Europe lasted a generation—and perhaps it could have (as it seemed to many observers at the time that it surely would have) continued much longer. Looking farther back in history would provide plenty of examples of huge numbers of people treated at least somewhat like slaves, for long generations, as a result of conquest.

There are exceptions. Some takeovers have exchanged one egregious tyranny for another, inflicting no net loss on most of the inhabitants of the invaded nation. Sometimes there are benefits for the conquered, especially with time. Sometimes an invasion reunites the members of a linguistic or ethnic or religious group in a way that makes some of the inhabitants of the conquered country quite happy. A takeover may right an old wrong. But unprovoked takeovers by force that lead to generally happier outcomes are exceptions.

We are entitled to ask why any country would be willing to risk the lives of its soldiers and perhaps of its citizens at home in a war of conquest. Is it not likely for the sake of some gain for the invaders at the expense of the conquered group as a whole? Among the powerful countries in the world, the United States is widely regarded as a reasonably benign and well-meaning one, so it can serve as an example at one extreme of the spectrum. Did the Iraqi people in 2003 have no reason to suspect that the United States planned to benefit at their expense (in terms of oil company profits and strategic position at least) from the invasion of Iraq? Did those Afghans who wished to preserve a highly religious version of their traditional culture not have good reason for concern that the United States would attempt to mold that culture in a direction it wanted, allowing Islamic culture as long as it violated liberal cosmopolitan norms as little as possible? And what of the long-term deals for military bases that United States government seemed (and still seems) to seek in the region, deals that would have likely involved local people in clashes of super-power muscle-flexing that had little to do with their own interests?

American liberals may be tempted to think that Iraq under Saddam or Afghanistan under the Taliban were so badly governed that any governing arrangement would be better, but this would be simplistic. In Iraq under Saddam there was, except during rather limited periods of rebellion against him, relative stability, a functioning economy, relative religious freedom and

tolerance for diversity (which was in fact reasonably high for the Arab world), and women's (relative) freedom to work and participate in public life. Most people were able to work and live normal lives. The years of chaos that have followed the U.S. invasion should surely cast doubt on the notion that it is easy to replace a "bad" government with something better. Afghanistan presents a more difficult set of issues, but given the clear Afghan antipathy to imposed solutions, and the ongoing recruiting success of the Taliban, it appears that the alternative to endless conflict has always been a homegrown Afghan government—meaning a government imposed by Americans seems unlikely ever to succeed in the long run. None of this would be shocking to students of Afghan history, however unwelcome it is to cosmopolitan liberals (and indeed Americans of almost any stripe are likely to be saddened by the thought that we simply cannot improve Afghanistan at any price we are willing to pay).

My point here has been that the assumption should be that, while there is no absolute right of national defense (see remarks above about proportionality and necessity) any state may well be justified in defending itself from any kind of aggression (Iraq under Saddam or Afghanistan under the Taliban), unless the state has engaged in extraordinarily grave injustice.⁸⁸ Modern just war theory spends a good deal of time asking what kinds of states (or other collective entities) may defend themselves (if any at all may), and what kind of invasions of territory may be resisted by force (Fabre and Lazar, 2014). Given the risks involved, and the likelihood that even the most benign of existing military powers are likely to attempt to extract

⁸⁸ I cannot offer a detailed analysis of the justice of the U.S. invasion of Afghanistan in 2001. It seems likely to me that the invasion met the "just cause" criterion, but failed the "reasonable chance of success" measure (since "success" must be considered in light of "the aim of peace"). I have wondered for years if an attack narrowly focused on Al Qaida bases in Afghanistan might have succeeded without, by replacing the Taliban with what looks to many Afghans like a series of puppet governments, sentencing the Afghans to a new civil war. I believe Afghanistan under the Taliban might have evolved. But I do not offer this as the fruit of painstaking analysis, merely as a friend of a number of Afghans.

resources, to change the culture in ways that are illegitimate for outsiders to do backed by force, or to procure strategic benefits with little regard for the interests of the people in a territory, resistance to even benign-looking invasions may be more morally credible, even on a *prima facie* basis, than some accounts suggest (a question I will address in more detail in coming chapters). In saying that, I am in no way endorsing the view that international morality coincides with international law. As Emerton and Handfield (who are not in the tradition) write, “the legal tradition has [quite rightly] come in for very serious criticism for an apparently fetishistic commitment to state-centric values” (2014, p. 42). International law has a tendency to exaggerate the rights of states against non-state actors.

On the question of what kind of political entity may morally defend itself, there is no hint in Aquinas’ early statement of just war theory that one form of government is more entitled to defend itself and its people from attack than another. This is despite Aquinas’ extensive discussion in other places of different forms of government (a discussion that owes a great deal to Aristotle). In the mid-twentieth century, Maritain argued strongly that the tradition is fully compatible with a kind of democracy (Maritain 1960, especially chapters III and IV).⁸⁹ Even here there is no argument, though, that a democracy might have a better moral claim to a right of self-defense than some other kind of government.

⁸⁹ Maritain argued for “organic democracy,” or “democracy of the person (1960, p. 99). He is clearly speaking not just of a set of procedures, but of a concept held by the persons involved. One passage gives at least a hint of what he means: “the relation of the individual to society must not be conceived according to the atomistic and mechanistic type of bourgeois individualism, which suppresses the social organic totality; neither must it be conceived according to the biological and animal type, characteristic of the communist and totalitarian doctrines, which engulf the person, as an histological element of Behemoth or of Leviathan, in the body of the social community or of the State, and which enslave it to the work of this totality. The relation of the individual to society must be conceived according to [a] type irreducibly human and specifically ethico-social,—that is, both personalist and communal,—and this will then mean an *organization of freedoms*. Now this is strictly inconceivable without those *moral* realities which are called *justice* and *civic friendship*...” (1960, p. 83, emphasis in original).

Democracies may well do a better job in many cases of safeguarding human rights, but there is no guarantee of this (especially when it comes to the rights of minorities). In addition, scholars in the tradition often evoke the concern that many democracies have discarded the notion of a common good in favor of maximal personal autonomy, whereas some traditional governments, or even authoritarian governments that have found a *modus vivendi* with traditional elements in their societies, may preserve at least the proclaimed goal of serving a common good. The tradition does not pick one form of government as automatically superior to another, or consider one form to have greater rights. And as Vitoria put it on behalf of the tradition long ago, having the “wrong” religion does not make a nation a candidate for conquest to remedy that issue: “as our adversaries admit, even if the barbarians [the natives of the Americas] refuse to receive Christ as their lord, they cannot for that reason be attacked or harmed in any way” (1991, p. 263—Vitoria makes various arguments to support this thesis, and also cites Aquinas, *S.t.* II-II, q.66 a.8, *ad.* 2, a few lines later). Existing political communities should not be attacked on the basis that their fundamental beliefs (even about their form of government) are wrong.

But, interestingly, this latter claim encounters difficulties today—think of Western rhetoric against the Taliban. Having non-Western fundamental beliefs, and acting on them, can generate or reinforce a liberal cosmopolitan insistence on enforcing individual rights. And certainly having the wrong government selection procedures can seem to open a country to the possibility of invasion in Western eyes. As Emerton and Handfield write, “The stereotypically liberal cosmopolitan ... [would say] the only collectives that instantiate value are those that promote individual welfare or rights, and thereby individual autonomy” (2014, p. 42). They go on to note that “[t]his view is morally universalist,” and indeed “a highly *individualistic* form of universalism” (2014, p. 43, emphasis in original). They then show that given such a set of values,

it is “relatively easy” to decide that a liberal democratic government is entitled to end human rights violations in a country whose government does not fit that description, and thus in practice liberal cosmopolitanism “set[s] a lower threshold than on the traditional account” (2014, p. 53: note that the use of “traditional” is different here than in my account).

Christopher Kutz (also not in the tradition) shares Emerton and Handfield’s concern over the possible de facto restriction of a defensive right to democratic states, but he casts an even wider net. He begins with the loss of the old theory of Westphalian sovereignty: “The problem of self-defense [by a nation-state]...emerges from the lack of a theory of sovereignty. If the state is conceived as an integrated moral personality, as in the traditional (Vattelian) model of sovereignty, then the justification of self-defense is neither more nor less problematic than in the individual case.” If states are “personalities,” then according to a “generally common-sense philosophical position,” they may deal with armed attacks that are analogous to grave attacks on individuals in a similar way: although there are qualifications, “[w]here there is a self to defend, the right of ‘innocent’ self-defense is, roughly speaking, axiomatic” (2014, p. 229). However, we are no longer sure that all states are such selves. “Since the Enlightenment,” he argues,

state authority is seen as legitimate only when grounded in a people’s capacity to rule themselves by law—when it emanates from the exercise of democratic agency. A state not so integrated—lacking either or both the horizontal solidarity of democratic will-formation or the vertical solidarity between people and appointed state leaders—might be thought to lack the moral personality grounding the right of self-defense. (2014, p. 230)

Kutz goes on to develop an account of the problems that arise from this restriction of rights to democratic states. For example, he looks at the mission creep that took place in the U.S.-led intervention in Libya, arguing that based on the authorization from the United Nations,

“it should have been limited to massacre-prevention.” However, given the preparations and the political logic of the military venture, “there was no natural limit to the mission” (2014, p. 232). The logic of the post-Enlightenment assumption that only democracies really respect the whole point of government, to gain the consent of citizens so as to embody their political autonomy, leaves Western democratic powers susceptible to the belief, perhaps rooted in hubris, that, more often than not, we are morally entitled to intervene in non-democracies so as to improve the lives of their people.⁹⁰

The Aristotelian-Thomist tradition agrees with Kutz on this point, as well, I should say, on the practical thrust of his 2014 chapter. (This does not mean, as I stress earlier in this chapter, that we must return to a “Westphalian” model of unbridled sovereignty.) However, the tradition sees the overall issue of which states may defend themselves from its own perspective, which is linked to the overall legitimacy of states and their existence. The tradition accepts that peoples quite naturally have governments and thus states (just as, we might say, they quite naturally have languages and families).⁹¹ What makes these governments more or less just is not the procedure by which they were chosen, but the justice of what they do.⁹² But while the basic idea of justice seems to be universal, the details of what counts as justice are quite different in different

⁹⁰ Kutz, writing in September 2012, writes of a “mostly successful intervention in Libya, though its long-term prospects remain troublingly unclear” (2014, p. 232 and footnote 5). For some of us who watch the Middle East, the notion (not Kutz’s) in 2011 that removing a dictator would almost automatically lead to a better outcome in a Middle Eastern country reflects a mind-boggling combination of hubris, lack of local knowledge, and inability to learn the most basic lessons of very recent history. As this is written in 2016, Libya has suffered five years of chaos, including a struggle with a branch of ISIS.

⁹¹ This is in no way to deny that point, made forcefully by Benedict Anderson (2006) among others, that the existence of states has strongly shaped the self-awareness of peoples, as well as shaping their language and culture. It *is* to deny that we have any coherent notion of what a world of seven billion people might look like without any states.

⁹² I cannot deny that as a child of a liberal democracy, I am partial to such governments. But is there empirical proof that this method of choosing governments leads to greater justice, internally and externally, than other methods? It would be difficult to prove, and any attempt would be susceptible to concerns about who gets to define justice.

cultures. Flannery, among other scholars in the tradition, traces this thought back to Aristotle, and also insists that it not moral relativism. Early on Flannery gives a simple modern example: the penalties for drunk driving differ sharply between Italy and the United States, but both laws can (and should) be seen as connected to the natural law, “since protection of life pertains to natural law and such arbitrary determinations are specific ways of protecting life” (2001, p. 73). Aristotle, like Plato, Flannery says in a later passage, sees that the mere enacting of a law does not mean it is just, and a just law “reflects the contours of human nature, and there are certain aspects of that nature that do not change” (2001, pp. 189-90). But that is only part of the story.

On the other hand, [Aristotle] recognizes a range of constitutions, each with its proper justice, thereby ensuring that justice exist not in a Platonic ideal realm with within the concrete world where people actually attempt to govern and to pursue justice. His is a sort of threshold theory of what constitutes a just regime with just laws: he holds that, given particular circumstances—its geographic location, the character of its people, its history, and so on—a regime that has as its goal the good of the citizens should be obeyed as just...justice derives its sense from the particular political entity in which it is sought.” (2001, p. 190)

This idea that there are universals, but there is a range of possible ways to pursue them, is echoed by Emerton and Handfield, who urge liberal cosmopolitans to be “very cautious” about applying the standards of human well-being that have developed in today’s liberal states to “very different institutional arrangements and the patterns of human life that have arisen within them.” In the places where these very different patterns obtain, “the established paths to the realization of such ultimate values as health, wealth, and wisdom may be very different” from those in our own societies (2014, p. 45).

The dangerous assumption that only those states with governments that, like ours, seek their citizens' consent through elections are truly entitled to defend themselves would seem to have as a corollary the notion that the citizens of non-democracies, not having truly consented to rule by their governments, will have no reason to fight for their governments except fear of them. Experience shows this corollary to be quite false (just as living under a non-democratic government can show that its people appreciate it in important ways, for reasons foreigners do not often grasp). Many existing non-democratic governments have managed tenacious, long-lasting defenses that appear to have vital support from their people. (And, when such governments are definitively overthrown, there is often tenacious resistance to the "democratic" forms imposed from outside.) This is an important sign that the underlying theorem may be false as well, despite our justified affection for our own, democratic, form of government.

A related fallacy is the notion that one government should be morally interchangeable with another without serious friction—or at least that decent people should not complain if it happens.⁹³ If we think about countries we know reasonably well (say our own or the UK or France, perhaps) it is startling how much of the government systems of each are contingent on accidents of history and culture—or if not accidents, at least factors that could easily have come out differently. Kutz's "somewhat silly" fable of a Canadian invasion of the U.S. (2014, pp. 234-35, apparently fleshing out Rodin's "bloodless invasion" notion (2002, pp. 130-32) with a humorous twist, illustrates the problem: even with two contiguous democratic countries with the

⁹³ Emerton and Handfield claim, for example, that a consistent liberal cosmopolitan is forced to accept that the only defensive privilege a liberal democratic state should enjoy against "purely political warfare" would be against an attempted forceful change to a non-liberal form of government (2014, pp. 53-56). I am also thinking of Chapter 7 in David Rodin's *War and Self-Defense* (2002). I will, in a subsequent chapter, develop and defend the claim that Rodin's chapter 7, in which he swats down various claims to ground the legitimacy of national defense in the common life of the attacked state, implicitly makes the claim in the text above.

same language and a history with multiple points of contact, the notion of replacing the government system of one with that of the other boggles the mind—we cannot really imagine such a takeover not generating resistance, both for the sake of keeping what is peculiarly “ours,” and, quite simply, in order to resist changes imposed by force. Conquerors force new schemes of government on the conquered, but must usually do so through the use or at least the threat of massive and ongoing force.

A final note: the tradition’s notion of national defense is included in the idea of justice, and thus legalistic claims cannot do all the work of establishing the justice of a defense. If a territory was in relatively recent memory unjustly seized from another polity, for example, and no compensation or other settlement was ever offered and accepted, any claim to defend that territory justly must address the issue: the unjust seizure in the past must be factored into a just resolution of the conflict. Margaret Thatcher’s claim of a purely defensive war to recover the Falklands, for example, was questionable at best for this reason. I believe the conflict between Israel and the Palestinians requires the same kind of moral exploration of the recent past before we can identify any kind of pure “defensive” actions.

In conclusion: this chapter has offered a brief look at the Aristotelian-Thomist tradition’s view of personal self-defense, defense of property, and defense of one’s country. In some cases these have been taken for granted in the tradition, and the chain of reasoning involved has had to be constructed. Along the way, a handful of objections have been addressed. Objections from current just war theorists must now be addressed in greater detail.

CHAPTER IV

THE RISE OF A REDUCTIONIST, OBJECTIVIST WORLD

“As they start with one set of first principles, I start with another... Truth certainly, as such, rests upon grounds intrinsically and objectively and abstractedly demonstrative, but it does not follow from this that the arguments producible in its favour are unanswerable and irresistible. These latter epithets are relative, and bear upon matters of fact; arguments in themselves ought to do, what perhaps in the particular case they cannot do. ... I cannot convert men, when I ask for assumptions which they refuse to grant to me; and without assumptions no one can prove anything about anything.”

—John Henry Newman⁹⁴

In chapter two I considered some of the general differences between the approach of the Aristotelian-Thomist tradition (subsequently in this chapter, “the tradition”) to moral issues and those of much modern philosophy. Then in chapter three I provided, from the viewpoint of the tradition, an account of individual self-defense, followed by an account of national self-defense. I attempted to show (coherence, satisfying outcome...).

⁹⁴ Newman, 1955, pp. 318-19. I owe a debt of gratitude to Alasdair MacIntyre for a recorded talk in which he drew attention to this section of the essay.

In the remainder of this dissertation, in the spirit of Aquinas (who habitually, after providing reasons for his own account on any question, offered reasons not to accept, at least fully, the accounts of others), I will provide responses to several current discussions of national self-defense, focusing on those of David Rodin and Jeff McMahan. I cannot discuss either fully, but I will address major issues involved in their accounts that concern the issue of national (and therefore to some extent individual) self-defense. While each of these major scholars has written fascinating and impressive works, they differ in the impact they make on current just war theory thinking. Rodin's account makes national self-defense nearly impossible as his argument unfolds. McMahan's account also hardly leaves any plausible room for national self-defense, though for quite different reasons (nor is this his intention).

I remind the reader of section 1.6, "the shape of this dialogue." I have made no claim to offer a neutral and rational account of self-defense; nor do I claim now to offer a neutral, rational critique of the accounts of others. I do not believe such an account and such a critique are possible. Rationality must operate with fundamental principles, and those are disputed. If it is to be coherent, an extended argument must rest on the same set of fundamental principles throughout. While Rodin says he does not "give my allegiance to any of the standard [metaethical] theories as a working methodology" (2002, p. 9), for my critiques that follow I proclaim openly my own allegiance to the Aristotelian-Thomist tradition. In order to offer a critique that has any hope of being considered, I do so as much as I can from a standpoint internal to my opponents' positions (Lazar 2010, p. 189), questioning whether necessary foundations have been provided, whether transitions and variations are principled or ad hoc, whether consistency has been achieved, whether there is a strong fit with the way we live our lives, whether acknowledged rules of logic have been blurred.

Here, then, is a road map of the rest of the dissertation. In the remainder of chapter 4, I begin by situating Rodin and McMahan's accounts in the context of recent just war scholarship, noting a few of their commonalities and differences. I next offer critical analyses of three issues on which Rodin and McMahan take more or less similar stances. After that, I plunge into analyses of some selected arguments they make, beginning with McMahan in chapter 5 and concluding with Rodin in chapter 6. In chapter five, I critique McMahan, focusing on his inadequate response to Lazar's devastating critique of *Killing in War* (2009), but also applying Russell Christopher's argument to his objective stance. In chapter six I turn to Rodin, critiquing a number of aspects of his account, as updated in his 2014 article in *The Morality of Defensive War* (2014), entitled "The Myth of National Self-Defence," but focusing on his 2002 book *War and Self-Defense*. While Rodin's position on liability to be killed has shifted since 2002 (see Lazar 2009, p. 702), he has not repudiated his 2002 book and its conclusions.

4.1 The Rise of the Reductionist World, and its Current State

4.1.1 A Reductionism Timeline

To situate Rodin's and McMahan's accounts, I begin by going back to the book that began the revival of just war theory in the twentieth century (outside of Catholic seminaries) was Michael Walzer's *Just and Unjust Wars* (2000). Few if any would consider denying him credit for this revival. Yet it provoked responses, especially by just war theory "revisionists," who were concerned that Walzer's account seemed to subsume the rights of individuals under the rights of states. States have a right to defend themselves against aggression, analogous to that of individuals. But if individual rights are fundamental, what of the individuals who are either drafted into armies or propagandized into service, of either the aggressing or defending side? How can they be justly killed, when in many cases they are, individually, morally innocent?

Walzer famously proclaimed the “moral equality” of combatants,⁹⁵ (2000, pp. 34-41, 127, 136, 229) and rather strictly separated the *ad bellum* from the *in bello* considerations of just war theory. Soldiers may kill each other, in pursuance of war aims laid down by their leaders, without any great moral concern over whether any particular soldier is guilty or not. But this appears to leave the rights of individual soldiers in a highly unsatisfactory state, in addition to leaving the relation of those rights to those of the state in the wrong order, so to speak: the liberal tradition sees individual rights as fundamental, and the rights of states as derived from them. In Walzer’s account, it seems that the right of self-defense belongs to the community (see, for instance, 2000, pp. 61-63. Note in particular point 1 of the “legalist paradigm,” “There exists an international society of independent states. States are the members of this society, not private men and women” (2000, p. 63). The legalist paradigm is then modified in the remainder of chapter 4, where it is first described, and in chapters 5 and 6. Walzer stresses that the ultimate reason for the rules is the protection of individual rights. Nonetheless, his account is largely based, as he puts it, on “the domestic analogy,” in which states are the rights-holders, analogously to individuals within a state (2000, p. 58). The rights of individuals and of states are, perhaps, in tension.

McMahan is a prominent theorist who has been working for many years to rebuild just war theory on individualist foundations. Seth Lazar cites his “his fifteen-year-long critique of Walzerian just war theory” (2010, p. 181), and says he “has done more than anyone else to

⁹⁵ In *Just and Unjust Wars*, I do not believe Walzer wished to deny that in some real sense, the acts of soldiers on the opposing sides, where one side is clearly more just than another, are morally different, although this would be the literal sense of his words. Yet his focus seems to be on what can be expected of human beings acting in the real world. See my discussion in chapter 5. As Lazar points out (2010, p. 180, footnote 3), “Walzer...opposes an excessively theoretical approach to the ethics of war: ‘Response to Jeff McMahan,’ *Philosophia* 34 (2006): 19–21.”

explicate [the] foundations” of this view,” with which he also associates Rodin⁹⁶ and Tony Coady as prominent scholars involved in the effort (2009, p. 702). This effort came to be identified (by Lazar and Fabre working on a hint from Rodin, 2014, p. 4) as “reductionism”: the attempt to reduce the right of national defense to the rights of the individuals involved—or to put it another way, to assemble or construct the national right from individual rights. (More broadly, this is the view that all morality is essentially for individuals.) But one problem is at the heart of the effort: if we acknowledge the rights of individual soldiers, what of those who are morally innocent, especially those not fighting on the putatively just side? McMahan began to expound the notion that it is unjust to kill an innocent attacker. He addressed this question in the essay, “The Problem of the Innocent Attacker” (1994). He first required, Lazar notes, that an attacker be culpable in order to be liable to defensive killing:

In his early work, [McMahan] believed liability presupposed culpability—not just agent-responsibility—for an objectively unjustified threat. He acknowledged that many unjust combatants would not be culpable for fighting, and conceded that just wars might be in practice impossible. Recently, however, he has rejected this view, and he now argues that agent-responsibility is sufficient for liability to be killed. (Lazar 2010, p. 188, internal citation omitted)

Rodin, in *War and Self-Defense* (2002), working implicitly from liberal individualist premises, also argued that an innocent attacker may not be killed, in an account that bore some similarities to McMahan’s. However, he then argued that even defensive wars are, for the most

⁹⁶ Note Rodin’s interesting position: he seems to believe that only individualist foundations could justify war, but that they fail to do so. His evolution away from culpability and toward “agent-responsibility” as grounds for liability to be killed, at some point between 2002 and 2008 does not appear to have changed his view on the need for individualist foundations, and their failure, see Rodin 2014.

part, unable to be justified. In effect he took up the premises of the reductionist project but said, not so fast: you can't get there from here. On the basis of individual rights, not even a defensive war can be justified, except in the case of a "genocidal" invader (I discuss Rodin's "genocide exception" in chapter 6 below).

McMahan then seems to have taken up Rodin's challenge, implicitly accepting that culpability was too strong a requirement, and attempting "reduction" on a new basis. Beginning with "The basis of moral liability to defensive killing" (2005), and culminating in *Killing in War* (2009), McMahan constructed his "responsibility account" of liability to be killed, including in war. In this account, persons who take risks of wrongfully harming others assume a certain responsibility when the harms become imminent, and where the harm is indivisible, even the tiny difference in responsibility of the one who took the risk makes him or her the one liable to the indivisible harm. Applying this notion to war, in effect, soldiers who invade another country all took a risk when they joined the army now unjustly invading, and so each one shares sufficient individual responsibility to be liable to be killed by defending soldiers. Lazar mounted a withering assault on that account (Lazar, 2010). Lazar accused McMahan of holding combatants and non-combatants to different standards, and claimed the dilemma could only be resolved in a consistent fashion by relaxing the liability standard (to allow for combatants to be convincingly targeted), opening the door to total war against civilians, or tightening it (to protect civilians), leading to pacifism in practice. I analyze McMahan's less than convincing response in chapter 5.

4.1.2 The Current State of Reductionism (McMahan and Rodin)

In 2014, Rodin and McMahan were still basically where they were in 2002 and 2009, with minor revisions. The largest of these revisions is seen in Rodin's shift from a requirement of culpability for liability to be killed in 2002 to a view closer to that of McMahan in 2008 and in

more recent years. Recently both scholars contributed to the edited volume *The Morality of Defensive War* (Fabre and Lazar, eds, 2014). Rodin's contribution is a take-no-prisoners reaffirmation of his original conclusion, albeit with different emphases. In 2014, for example, he downplayed the parallel between self-defense for an individual and national self-defense: "the phenomenology of war is quite at odds with that of personal self-defense" (2014, p. 87). He offers a new emphasis on conditional threats and a challenge, the "lesser aggression" notion (see chapter 6 below). In his contribution to the 2014 volume, McMahan constructs an elaborate and complex response to the lesser aggression challenge, but surrenders neither his reductionist nor his just war credentials. Other reductionists on the scholarly battlefield include, perhaps most prominently, Helen Frowe in her 2015 *Defensive Killing*.

The publication of *The Morality of Defensive War* also puts a number of other attitudes toward the reductionist project on display and, to a certain extent, into dialogue with that project. Lazar, for example, was in 2014 continued to be, like Rodin, as much a pessimist about any attempt at a reductionist solution to the problems of a morality of war as he was in 2009. While he makes no concrete suggestions about what might take reductionism's place, he does not embrace Rodin's solution, which lies "somewhere between just war and pacifism" (2014, p. 5). Included in the volume, along with the strongly individual-based views noted above, are the views of four scholars who, the editors say, "though recognizing the force of [revisionist] objections to conventional just war theory, nonetheless feel the pull of state and community" (Fabre and Lazar, 2014, p. 7).

McMahan and Rodin: shared problems

Writing from within the tradition, I find serious problems with both McMahan and Rodin's analysis of the issue of national defense. On several points, they agree in their

approaches, and the objections from the tradition's point of view are thus similar. Both agree that it is not morally permissible to kill an innocent (or "non-responsible") threat, both are reductionists, and both take an objective approach to moral evaluation. I will address these three issues in the remainder of this chapter. I will address issues where they differ separately in subsequent chapters.

4.2 Innocent (and Other Nonculpable) Threats

Both McMahan and Rodin agree (although they come to the conclusion by different routes) that it is not morally permissible to kill someone who bears no responsibility for the threat they pose to you, even if they will otherwise almost certainly kill you. I begin here with McMahan, who in 1994 wrote of "The Problem of the Innocent Attacker" (1994a) in one essay, and "Innocence, Self-Defense, and Killing in War (1994b) in another. At that point he claimed to find no good justification for defensive killing of such persons: "the Moral View does not obviously have the resources to justify self-defense against Innocent Attackers" (1994b, p. 219). However, he admitted that this position was against commonsense morality: "most people believe that self-defense against an Innocent Attacker is permissible" (1994b, p. 201), and, "most of us believe that it is permissible to kill an IA in self-defense and an Innocent Projectile in self-preservation" (1994a, p. 265). But in 2009, he has solved the problem to his own satisfaction.

In *Killing in War*, McMahan offers a discussion of persons who may be "Innocent Threats" ('IT's) considered subjectively, even if "in objective terms [such a threat] acts impermissibly" (2009, p. 163). In what follows, McMahan argues that some of these threats, although "epistemically justified" (2009, p. 164), have nonetheless taken risks through choices they made that eventually made them threats. While such agents are "blameless," they are "nevertheless responsible for their choices, and...this responsibility, however minimal, is a basis

for liability to defensive action” (2009, p. 167). (Note: Lazar calls this minimal responsibility, “agent responsibility,” see my chapter 5.)

But some threats are utterly “nonresponsible,” and “a Nonresponsible Threat is not liable to defensive force” (2009, p. 169). Of course, if they are not liable, it is impermissible to use such force against them. As McMahan notes, this is a “highly counterintuitive” claim (2009, p. 169). His justification is basically that such a person is morally indistinguishable from an innocent bystander, whose killing (most agree) is impermissible (2009, p. 169-73). (In the remainder of this section, I shall at times refer to both ITs and Nonresponsible Threats as NCTs, or Nonculpable Threats, since I believe both ITs and Nonresponsible Threats fit that bill, and the same arguments used below apply to both.)

What is the point of this discussion, with its difficult conclusion? In rejecting Walzer’s “moral equality of soldiers,” McMahan, as one of the leaders of the movement to refound just war theory on a foundation of individual rights, was left with an obvious problem: as Walzer points out, “individual soldiers on both sides...are led to fight by loyalty to their states and by their lawful obedience. They are most likely to believe that their wars are just, and while the basis of that belief is not necessarily rational inquiry but, more often, a kind of unquestioning acceptance of official propaganda, nevertheless they are not criminals...” (2000, p. 127).⁹⁷ So if McMahan is to base the morality of killing soldiers on their rights and underlying moral status (rather than that of the state they represent), and at the same time reject pacifism, he needs to allow defensive killing against soldiers who to all appearances are morally innocent. As Lazar points out (2010, p. 188), McMahan originally believed that just wars might be impossible for contingent reasons, since liability to be killed rested on the basis of the culpability of individual

⁹⁷ He concludes, “...they face one another as moral equals,” but it appears to be clear in context that he is not using the phrase in the objective sense to which McMahan objects so strongly, but in a subjective sense.

soldiers on the unjust side, but with time he moved to his “agent-responsibility” account. As I discuss that account extensively in chapter 5, I set it aside for the moment. I believe my concerns with McMahan’s account, shared below in my critique of Rodin’s, are rather similar.

I turn now to Rodin, whose claims about Innocent Threats are related but established differently.⁹⁸ Rodin claims to discover a “principle that defensive force must manifest an attitude to the aggressor as a subject” (2002, p. 94). Treating every person as a “moral subject” sounds like a good rule for life, and it is. But Rodin next claims that due to this moral rule, culpability in the attacker is a requirement for the use of lethal force by the defender (2002, pp. 88-89).

This is because even NCTs have rights, and in Rodin’s view, you are only liable to defensive harm if you have forfeited the right not to be harmed. The only way to forfeit a basic right is to be morally at fault. If someone is not morally at fault, she has not forfeited her rights: “a person’s right may be infringed or forfeited only on the basis of something that the person is or does as a moral subject” (2002, p. 88). Rodin quotes Nagel in support of this assertion. Nagel writes, “whatever one does to another person intentionally must be aimed at him as a subject, with the intention that he receive it as a subject. It should manifest an attitude to *him* rather than just to the situation, and he should be able to recognize it and identify himself as its object” (quoted in Rodin 2002, p. 88). Rodin then goes on,

if one is to be justified in *inflicting harm* in an act of defense...the threat must derive from him as a moral subject, not just as a physical entity...when one kills a culpable aggressor there is precisely such a connection between the existence of the wrongful

⁹⁸ Rodin later moved away from requiring culpability and closer to requiring McMahan’s “agent-responsibility,” as Lazar points out (2009, p. 702 and p. 707, note 31). However, parts of my argument against Rodin in this section achieve some traction, I believe, against that view as well. The arguments against requiring culpability in an attacker in order to make it permissible to respond should hold against requiring responsibility as well. In addition, Rodin’s 2002 book is still available, and still influencing readers.

threat and the person against whom one directs defensive force: the aggressor is morally responsible for the threat.” (p. 88, emphasis added)

Rodin takes the prohibition on inflicting harm a step further a few pages on, apparently changing it to a prohibition on the *use of defensive force* against a non-culpable attacker. He notes “our principle that *defensive force* must manifest an attitude to the aggressor as a subject” (p. 94, emphasis added). We end up with “no defensive force,” “no inflicting of harm,” on nonculpable attackers.

This is not correct. Treating someone as a subject when they attempt or do something harmful or offensive has nothing to do with whether they are culpable, or even responsible, for what they are doing. Morality is properly concerned with how you respond to the *actions* of others, not to their actions-combined-with-inner-states. The action of responding or defending yourself in a moral way, in fact, is generally much the same for culpable and non-culpable attackers. Rodin makes the wrong connection between responding to an action and the agent’s inner state, and this is true even if agent-responsibility (see Lazar 2010) rather than culpability is the rule.

Rodin is wrong first because, as I have noted a number of times but Rodin never really acknowledges in *War and Self-Defense*, culpability is an inner reality that is difficult to guess, let alone establish (and determining responsibility may require extensive research). Sitting comfortably in our offices and classrooms, or later in a courtroom, we are free to perform the quite legitimate external moral evaluation of someone’s action (Bratman 1999, p. 109).⁹⁹ Yet we cannot require a victim to perform an external moral evaluation of an attacker. In a legal case, a

⁹⁹ Bratman, in this work, writes of internal and external assessments of agents and their actions, largely in terms of rationality. But the same point seems to hold for moral assessments.

court can take days or weeks trying to establish the culpability of a threatening person. A duty to discover it during a split-second choice to respond to an attack cannot be shuffled off by moralists on a defender. As Lazar notes humorously in the context of war, “there is no way for justified combatants to discriminate between innocent enemies and those who are indeed culpable for fighting. Until a new ‘revolution in military affairs’ complements laser-guided weaponry with guilt-seeking missiles, the culpability view of war threatens [sic] to make just killing impossible” (2009, p. 701).

And, as Rodin himself notes, quoting Kant, “ought implies can” (2002, p. x). It is often excruciatingly difficult to distinguish, sometimes at all, let alone reliably and swiftly, between culpable and non-culpable agents, but the distinguishing is necessary before one can treat them differently. Therefore it is, for the most part, impossible to treat them differently. What is impossible cannot be a moral requirement.

Rodin could argue that it is sometimes possible, which would provide some guidance at least, but how would that help in the vast majority of cases where it is not?¹⁰⁰ I address Rodin’s problematic suggestion of “assuming the worst,” that is, culpability in the attacker, in chapter 6. There I will also address McMahan’s claim that “if one is unjustifiably attacked by an unknown assailant, one can seldom know that the assailant is not morally innocent; but certainly one is entitled to presume that he meets the conditions of moral culpability,” 1994b, p. 214. Entitled to presume?

One sign of Rodin’s problem is that he is using Nagel’s formula contrary to Nagel’s own analysis. As Nagel goes on just a few sentences after Rodin’s quotation, “hostile acts” must

¹⁰⁰ I offer an analogy. If a court were to rule that non-verbal consent to a sexual act was virtually impossible to distinguish from non-consent, it would not make sense for that court to require or accept non-verbal consent as a defense against rape.

express attitudes which “in turn have as objects certain real *or presumed* characteristics *or activities* of the person which are thought to justify them” (Nagel 1972, p. 136, emphasis added). An NCT is clearly presumed to be involved in the activity of attacking the defender, so someone who turns out to be an NCT can be addressed as a subject by defensive action in Nagel’s framework. (This will almost certainly be true for attacking soldiers, which is the point both authors are working to illuminate.) As the rest of the essay makes clear, the line Nagel draws between those whom it is permissible and impermissible to kill is nowhere near Rodin’s; in fact, he uses Anscombe’s version of the “innocence” that makes one not liable to attack: “...moral innocence has very little to do with it, for in the definition of murder, ‘innocent’ means ‘currently harmless,’ and it is opposed not to ‘guilty’ but to ‘doing harm’” (Nagel 1972, p. 139). And when Nagel states (as Rodin footnotes on 2002, p. 88) that the defender (or in Nagel’s context, just soldier) should be able to explain his action to the victim of it, Nagel clearly does not mean that the action’s recipient would have to understand it at the moment or accept responsibility for what he was doing (Nagel 1972, p. 137). (Rodin notes the requirement in a footnote, but leaves it out of the main text because a utilitarian could be ready to explain an action that violated rights but met her criteria of maximizing utility in some way. My use above of the “explanation” criterion is different from the presumed utilitarian’s.)

I argue further that commonsense morality prescribes or allows the use of force to protect oneself or others in multiple situations, regardless of the culpability or responsibility of an attacker, yet that use of force nevertheless “manifest[s] an attitude to the aggressor as a subject.” Here are some examples of bad actions and morally as well as legally permissible responses: if your child is screaming uncontrollably, you may physically remove her from the ice cream shop. You do not need to establish her responsibility or culpability, then or later. If someone attempts

to punch you, you may raise your arm to block it, or flip him on his back if you know the appropriate martial art, without ever inquiring into his state of mind or responsibility for his action. You infringe his right not to be struck or thrown to the ground. If your parent has severe Alzheimer's, you may restrict his movements, against his wishes, despite knowing his lack of culpability for his condition. In each case, you use force against a person, restricting what the person may do against his or her will, but your morally permissible act treats the aggressor or offender as a subject. (Not to do so might look like this: severely beating the child, poking the eyes out of the would-be puncher, having your aging parent euthanized.)

Another point: although Rodin's rule here—defend with force if the attacker is culpable, don't if she is not—suggests that in general a culpable attack or act of abuse should get a more forceful response than a non-culpable one, or even that a more forceful act is appropriate when there is culpability present, this is not so. It is not good to scream at the culpable child, or slam the culpable puncher on the ground more forcefully than the nonculpable puncher, or restrict the movements of the aged culpable drug abuser¹⁰¹ more severely than the aged Alzheimer's patient. In general, a morally praiseworthy response to an attack or abuse is already, at heart, as gentle as it needs to be while still avoiding or defending against harm. That is because it is proportioned to the desired end of self-protection or defense rather than some other end.

Even the police, I suggest, have no need to know the culpability of harmful criminals, nor should they act more harshly toward culpable wrongdoers, nor more gently toward the non-culpable even if they do know. For example, an officer whose duty is to stop an armed shooter, or a possible dangerous mental patient, has no need to know anything of the shooter's inner state in deciding how much force is needed. (If anything, she may need to prepare to use more force

¹⁰¹ Assuming for the moment that this is both true and knowable.

on the mentally incompetent, who may be less inclined to listen to threats, the opposite of Rodin's notion.) The role of police is to protect society, by either stopping harmful acts or capturing criminals—or the insane. They do not and should not allow the non-culpable to perpetrate more harm, nor are they instructed to use less force against them. Even for the police, that is simply not the point of treating others as subjects.

Of course, there is a group of people who are meant to act (at a particular time) as Rodin's rule suggests they should: judges and juries, or anyone who has the authority to administer punishment and has reached the stage where it is required, say parents and school administrators and teachers. When punishment is called for, suddenly culpability matters immensely, and careful effort is needed to ensure that the culpable and only the culpable are punished. The non-culpable are treated quite differently at this stage. If we do something to the non-culpable that restricts their freedom, or if we fine them for damages inadvertently caused, we do not consider it punishment.¹⁰²

Finally, Rodin is guilty of a grave inconsistency here concerning the violently insane. As he points out, "we do incarcerate the criminally insane, and hence override or disregard their rights to liberty. What can justify this, if, as I have said, impinging on a person's basic rights must reflect some response to them as a subject?" (2002, p. 96). Imprisonment is truly a massive deprivation of rights: the removal of all freedom for the remainder of someone's life, in many cases. It deprives of rights almost as much as killing, and perhaps to an equivalent extent.

¹⁰² Rodin's thought in this context that "our reluctance to describe [the dangerously insane's] confinement as punishment may stem from considerations of compassion" (2002, p. 96) seems simply confused. We can feel compassion for anyone in any state, whether protecting ourselves or not; we punish those we believe are morally guilty—and while we want to protect ourselves as a society from the criminally insane, we do not believe that they are morally guilty. Our refusal to use the term "punishment" as a description of their incarceration comes, I suggest, from clarity, not compassion. Rodin seems to want to bring in "compassion" in order to imply that we *do* believe we are punishing the criminally insane, but we want to spare their feelings. This seems strained at best.

But, parenthetically, Rodin ignores a problem of at least equal magnitude: if an apparently insane person wandering the neighborhood attacks a citizen or the police officer called to control the situation, we expect the officer to kill the insane person if necessary. This is precisely what Rodin denies that private citizens may permissibly do (in moral terms),¹⁰³ yet, while he calls for governments not to defend their citizens if the country is attacked,¹⁰⁴ he is silent about the government's defense of him and other citizens from the non-culpable insane who are violent.

Back to the (forceful) incarceration that follows the (forceful if necessary) arrest. Rodin offers one suggestion concerning the moral difficulty that, "Perhaps [this]...is simply a case in which the consequentialist considerations of protecting society from harm outweigh the rights of the innocent individual (the breakwater of the right is overwhelmed by the consequentialist flood). I think this may be partly correct" (2002, p. 96).

If this is even partly correct, what about the "consequentialist flood" for the individual who is meant, according to Rodin, to allow herself, and perhaps multiple others, to be killed rather than defend herself against the NCT? The flood is severe indeed in proportion to the defender: her life, and quite possibly the lives of others. Should Rodin not explain how he distinguishes between one consequentialist flood and another? And since this prohibition on the individual level is the root of the prohibition against killing invading soldiers from another country, why should not the "consequentialist flood" again overwhelm those soldiers' rights, allowing society to infringe their rights just as it does those of the violently insane? If the

¹⁰³ He does distinguish two kinds of insane person, though someone attacked would be unable to do so, a distinction I discuss below.

¹⁰⁴ He puts it just this strongly: "The right of national self-defense is a myth, unsupported by coherent moral reasoning" (2014, p. 74). Of course, he makes a "genocide exception" that I discuss in chapter 6.

occasional insane person provokes a consequentialist flood, in proportion why does an invading army not do the same? No explanation is offered.

Rodin goes on to write that, “If, on the other hand, we think that the dangerously insane do not have the right not to be locked up, then we must believe that there is something about the insane as subjects which explains this loss of right” (2002, p. 96). This is mysterious. What is that something? Rodin then refers to a distinction he has offered between mental disturbances with “internal” or “external” causes (2002, pp. 94-95). At a key point in that discussion, he writes,

The distinction I want to offer is between aberrant behavior whose cause lies entirely outside the psychological realm of the subject, for instance, in a blow to the head or low insulin level, and disturbed behavior which originates from, and accords with, the psychological dispositions and makeup of the subject, even if those dispositions are themselves the result of illness. It seems to me that we may not use lethal defensive force in the first case, but it may sometimes be permissible to do so in the second.” (2002, p. 95)

Leaving aside the complete impossibility of distinguishing between the two for a defender, first, I cannot see the moral relevance of this distinction (which he admits, in the same passage, “is problematic and will be controversial”). Illnesses generally come “from outside,” and such illnesses, as well as those that are genetic, are surely not things we are any more morally responsible for than those that result from blows to the head or a low insulin level. How can someone be responsible for a disposition that results from an illness for which he bears no responsibility? Second, the courts do not decide whether to punish or simply lock up or set free the criminally insane based on this distinction, nor does Rodin urge them to do so, thus his

appeal to the distinction does not solve the problem of inconsistency. (It is hard to imagine him, in any case, urging courts to free, or else try as mentally competent criminals, the mentally ill whose illness “accords with [their] psychological dispositions and makeup.”)

Neither Rodin nor McMahan convincingly refutes the commonsense moral notion (shared with the tradition) that, given my own innocence, I may defend myself lethally (if necessarily and proportionately) regardless of the possible moral innocence of an attacker. No negative treatment has to be quietly submitted to just because the person is not responsible or not culpable, and no bad treatment needs a harsher immediate response due to the culpability of the agent. If this were the case, a moral response would be far more difficult, and often impossible, in daily life—but it is not the case. (Nothing here, of course, suggests that supererogatory acts of allowing evil to be done to one are morally unacceptable, it is just that they are not required.)

Knowledge of culpability, to the best of our ability, must be acquired when it is time for punishing—but it is not necessary before that. (It is sometimes not even available long after the fact, or ever.) If we were incredibly wise and virtuous, perhaps we could administer punishment along with our self-defense, but moral codes generally forbid our trying this, likely because of our imperfect wisdom, knowledge, and self-control, and also because to punish is not the act of an equal—that is why authority is required for it. No authority is required for proportionate defense on the individual level—if it were, it would almost always be impossible. This principle is not warranted, and because of this, neither is the extension of the principle by McMahan and Rodin to international affairs.

4.3 What’s Wrong with Reductionism Generally

4.3.1 Reductionism: An Initial Critique

The term “reductionism” is attributed to Rodin by Fabre and Lazar in their joint introduction (2014, p. 4). The name sums up the efforts of some “revisionists” to respond to Walzer’s attempt, which failed in the revisionists’ view, to “vindicate...conventional principles—national defense, noncombatant immunity, combatant equality—by grounding them in a commitment to individual human rights” (Fabre and Lazar, 2014, p. 2). A core commitment of the reductionists is to “the thesis that the principles governing the justification of killing in war are identical to those that justify killing in ordinary life” (Fabre and Lazar, 2014, p. 4). As Helen Frowe describes it, reductionism “holds that we can judge the morality of war by thinking about what individuals are permitted to do to each other. The rules governing killing in war are simply the rules governing killing between individuals, most obviously...the rules regarding self-defense and other-defense” (2015, p. 123). She then notes that she is defending the idea that “there are domestic situations that are relevantly similar to war” (2015, p. 124). Reductionists such as McMahan have attempted to show how this grounding of a national right in individual rights might work. David Rodin appears to believe that a reductionist account is necessary if defensive war is to be justified, but has argued that it is not possible, except in highly limited cases. (Rodin considers an “analogical account” of national defense, but rejects it in a series of swift strokes in 2002, chapter 7). Seth Lazar suggests that the reductionist account fails, and that what we need is an “exceptionalist framework for war’s morality” because of this (Fabre and Lazar, 2014, p. 4).

In section 2.1, “Individualism as Creed and Method,” I began a critique of the method of reductionism without naming it. In fact, to some extent it is simply the method of modern liberalism itself. First Hobbes and then the other great social contract theorists, perhaps inspired to some extent by Galileo’s success at explaining physical phenomena through his method of

“resolutive analysis and compositive synthesis,” worked to do the same for society. Just as Galileo broke down physical systems into their constituent parts, and having understood the parts and their interaction, was able to reconstitute the whole in an understanding way, so Hobbes and his successors, one might say, worked their way analytically down to the individual human, who becomes, as modern political scientists would say, the unit of analysis. They then depicted the interactions of such isolated humans with each other in a “state of nature,” and finally synthesized the individual elements into a picture of the social and political whole (see Hittinger 2003, pp. 12-13, and also Berns 1972, pp. 397-399 for Hobbes’ method).¹⁰⁵

I argued in that section, in what I am sure is not an original idea, that while this works well in the study of the motion of bodies (atoms and molecules and planets, or the parts of an animal limb, for example), it is inescapably circular in constructing moral theories using human beings, not just because of our complexity but because the “bodies” that interact, individual human beings, are irremediably shaped in our experience and thoughts by their upbringings and surroundings. The method thus fails at step one, describing the individual parts, because we cannot accurately even begin to conceptualize an individual human being isolated from society. Our data at the individual level are thus not pure, and cannot be purified. We are completely unable to imagine human beings with no upbringing by parents and teachers and other caregivers. Anyone who has, as an adult, watched the endless gentle shaping of toddlers by their mothers and fathers (“no, don’t take her toy! Be gentle!”) and considered the further elaborate shaping that takes place over thousands of hours in school, has seen an important part of the background of every moral thought the children will have as adults. Language itself is taught and

¹⁰⁵ This is clearly a drastic simplification. One thing it fails to account for is what Shapiro (2003, pp. 10-11) calls the “workmanship theory” of knowledge, according to which we can have *a priori* knowledge only of what we create, such as human society (see also Strauss, 1988, p. 174).

ineluctably shapes all we think and do. Our pictures of what the world is are the same: we do not form them for ourselves out of whole cloth. Without some such shaping, it seems doubtful that a biological human individual would even be fully recognizable as human to us.¹⁰⁶ Not only that, there is no “neutral” moral upbringing or neutral moral language that we can imagine, even if there is considerable overlap among traditions. (Attempts at moral neutrality seem to founder as soon as they attempt to adjudicate a contested and difficult real-world issue: consider John Rawls’ famous abortion footnote in *Political Liberalism*, which simply asserts that “reasonable” people agree with him, 2005b, p. 243).

Applying this critique to the method of reductionism, the problem should be clear if I am right. Current attempts at reductionism generally claim to explicate an interpersonal morality by beginning with our “moral intuitions” (Rodin, 2002, p. 12), our “common-sense morality” or “pre-theoretic beliefs” (Hosein 2016, p. 2), our “individual moral reasons” (Fabre and Lazar, 2014, p. 4), “our ordinary moral rules” (Frowe 2015, p. 123), the “ordinary principles of interpersonal morality” (Lazar 2014, p. 12), or what “most of us believe” (McMahan 1994a, pp. 257, 265, 266, 272, 275, 281, 285, 287—but this kind of usage is far from unique to McMahan). As I noted in chapter 2, the tradition does not deny that these intuitions have some meaning and importance. It holds that “[m]oral philosophy is a reflection on human action in an effort to make explicit its implications with an eye to articulating on a general level certain normative judgments...St. Thomas, like Aristotle before him, came reflectively upon himself and others already on stage, acting, doing, deciding, being good and bad” (McInerney 1997, pp. 35-36). The

¹⁰⁶ To take just one case, there are numerous scholarly as well as news articles about “Genie,” a girl born in 1957 in California who was raised to the age of almost fourteen with almost no contact with humans other than her abusive father. With extensive help she learned to form simple sentences, but was never fully socialized, and after being returned to her mother’s care appeared to regress greatly. See for example, Curtiss, 1977.

tradition does, however, deny that our intuitions are unshaped, raw, “in-born” data. They are shaped by many things, including, e.g., our fundamental belief systems. (Someone like Rawls sees intuitions as needing to be corrected by attempts to reach a reflective equilibrium. But if they are already shaped by, e.g., our fundamental belief systems, which he wants to exclude from the “original position,” the problem from the tradition’s point of view remains: we go into the original position with intuitions that, the tradition claims, are already shaped by our fundamental belief systems—no one gets rid of this shaping by an act of will.)

Most relevantly for the reductionist attempt, which relies on our intuitions of how we should behave in “domestic situations that are relevantly similar to war,” all of our intuitions and widely agreed notions about how to behave in such situations are also ineluctably shaped by the fact of our life in a community with laws and various kinds of law-enforcement in the background. No one experiences “the rights of an individual” except as the member of a community, so the intuitions of a person who has lived outside of a community are simply not available by introspection to almost any scholar. Perhaps a strenuous effort, combined with some research into accounts of refugees who have fled from lawless areas, might get a person with a strong imagination close—but simply accessing one’s own intuitions as a citizen of a normal, lawful state will not do the trick. As Anna Stilz notes, arguing against Rodin’s notion that the use of lethal force is not permissible in defense of property, “our ideas about self-defence are in large part derived from the criminal law, which assumes an established, well-functioning background legal order.” She then applies that notion: “If a thief removes me from my house, I can appeal to the police and the courts to restore my house to me in due time. But the international system lacks an established legal order of this kind...For that reason, my privilege to act in defence of my property in the state of nature is correspondingly greater” (Stilz, 2014, p. 226).

But it is not only the courts. There is another element in our upbringing and subsequent background that is woven into our every thought on morality: there is also the presence of authorities lower on the scale, often in the background but present nonetheless, who come in from time to time and impose at least some order on our interpersonal relationships. We start with our parents and teachers, but by adolescence the police and other juvenile authorities are unavoidably in the background. Here is the problem: what do I think about the possibility of being pickpocketed or mugged? How might I rightly respond to attempted rape, or a home invasion (Rodin 2014, p. 84), or the destruction of my home (Rodin 2002, p. 45), or someone who “park[s] on my lawn” against my wishes (Emerton and Handfield, 2014, p. 46), or somehow prevents me from voting (Fabre, 2014, p. 104)? What are my intuitions about a proper, proportionate response to any of these acts? Are *my* intuitions those of a person who must provide her own deterrence (if it matters—Rodin 2014, pp. 85-87) and self-protection against possible harm?

I contend that our decades of experience with an authority structure in home, school, town, and state is inextricably woven into every thought we have about any one of these situations. These authorities advertise their willingness to exercise coercion either against us or on our behalf: emblazoned and color-coded police cars drive around our streets, police men and women patrol wearing badges, uniforms and visible weapons holsters, the news media inform us of criminals chased, caught, sentenced, and punished. We expect certain responses both to actions we might take and to actions that might be taken against us. Had we lived our lives, somehow, without any effective law enforcement, our attitude toward the defense of our bodies and property might be very different.

4.3.2 A More Analytic Restatement of the Critique

Let me restate this critique of reductionism in a more analytic way. First, I will consider the most consistent approach. Reductionists believe, when taking this approach, that we can discover moral rules that apply to individuals interacting among each other without laws (in a “state of nature”) by exploring our intuitions concerning such situations, along with our “commonsense morality,” checked against those intuitions and explored for consistency in various ways. From these resulting rules, we can deduce what the moral rules are for individuals involved in fighting between nations. We have gone from one anarchic state, a “state of nature” amongst individuals without law, to another: the international arena, which Hobbes famously proclaimed was a state of nature among states. What is true in one arena should be true in the other, for they are relevantly similar.

I will call the problem here the problem of the omitted middle level. These theorists have gone from the “individual state of nature” (call this level A), to the anarchic “society of nations (level C).” We cannot call the latter, “level B,” for we need that designation for the set of moral rules that apply in a state, where laws are enforced by an authority structure. All of our intuitions about level A are shaped by the omitted level B. But apart from soldiers involved in war, who have actually lived and made choices in level C (or something rather like level A at times), the only level on which any of the rest of us has ever lived is level B. (In ancient and medieval communities, and a few more recent, where law enforcement barely existed, or existed only as occasional punishment of offenses, intuitions about level A were far more reliable.)

The less consistent approach is not even to bother to specify a state of nature, but simply to posit problems in ordinary life and apply our intuitions from that life to situations in war.¹⁰⁷

¹⁰⁷ It is possible to straddle this line, sometimes simply offering a scenario, and sometimes specifying a “state of nature,” e.g. Rodin 2002, pp. 44-45, where he explicitly posits a state of nature, and most of the

But then the move from A to C has an obvious flaw: for the pincher/rapist (Frowe 2015, p. 127), or the house-invader, or the person who parks on your lawn, the answer is, call the police. Any intuition that I may not do X to any of these offenders is surely inescapably shaped or polluted by decades of training—X is not the right response, because what you need to do is to call the police. The duty to retreat (Rodin, 2002, p. 40), the duty to hand over your wallet to the mugger (McMahan, 2009, pp. 20-21), and on and on—these are fine rules on level B, and, arguably, they work reasonably well. However, it needs at the very least to be argued whether they would hold on level A, and without showing whether or not they do, it is an illegitimate move to apply them on level C.

4.3.3 Conclusion on Reductionism

What I have offered in this section is an internal critique of reductionism. To sum up, I also state the tradition's perspective. The tradition rejects the two horns of Lazar's dilemma, reductionism and exceptionalism. The tradition begins with an individual who is "a political animal," and has an account of morality that covers both the individual and political realms. Concerning reductionism, because it generally ignores or sharply downplays the dilemmas outlined above, reductionism as currently practiced does not offer significant guidance. For the tradition, no "exceptional morality" is needed for war: the state is bound by moral laws. The natural law provides some guidance concerning these laws, and it is sufficient to make clear that defense against aggression is one of the foundational requirements of the government of an independent polity, and for the most part such a defense is justified. (I will consider Rodin's counter-argument, concerning the "lesser aggression," in chapter 6.)

rest of the book, where he simply offers scenarios, leaving the reader unsure whether he means them to take place in a state of nature or not.

4.4 Looking at “Objectivism”

Both McMahan and Rodin are, for the most part, moral “objectivists,” that is, their most fundamental criteria when providing moral evaluations of actions are based on what is “objectively” the case. For example, in “The Basis of Moral Liability to Defensive Killing,” McMahan offers a discussion of an attempted murder (which fails due to an inadvertently unloaded gun) from an objective point of view (2005, p. 390). Later in the same article McMahan later lays out his “Responsibility Account” of liability to be killed, in which “the criterion of liability to defensive killing is moral responsibility, through *action that lacks objective justification*, for a threat of unjust harm to others...” (p. 394, emphasis added). McMahan then claims that his

conscientious driver satisfies this criterion because he is a morally responsible agent who has acted voluntarily in a way that foreseeably imposed risks on others and now threatens the pedestrian with unjust harm. And he acts *without objective justification* because, although he may act reasonably given his epistemic limitations, it is *not justifiable to drive a car that is in fact going to go out of control*. Yet he is in no way culpable for the threat he poses.” (pp. 394-95, emphasis added)

Somewhat later, in the “cell phone operator” case, McMahan claims that the cell phone operator (who without any knowledge that his act will lead to this outcome sets off a bomb merely by hitting the “send” button on his cell phone) “acts voluntarily and *without objective justification* (since his pressing the send button is *objectively unjustified*)...” (p. 398, emphasis added). McMahan goes on to claim that neither his “conscientious driver” nor an ambulance driver whose ambulance goes out of his control for reasons that have nothing to do with him is “*objectively...justified*. For in each case, however faultless or even meritorious the driver may be,

there is an *objective description* of what he will do unless he is killed—killing an innocent pedestrian—under which it is clear that his action is unjustified” (p. 398, emphasis added).¹⁰⁸ It seems rather clear that McMahan’s analysis depends in large part on such a point of view.¹⁰⁹

Rodin appears to be less explicit in his “objectivism.” However, his “central case” of justified self-defense, offered early on in his discussion of individual self-defense, includes a requirement that “the aggressor is fully culpable in making the attack” (2002, p. 29). This requirement is scarcely conceivable outside an objective approach, for the fact of the aggressor’s “full culpability” will almost never be known to the defender at the moment of attempted self-defense. Indeed, in *War and Self-Defense* (2002) generally, it is quite clear that the bulk of the analysis of issues of self-defense is conducted from an objective viewpoint.

In section 2.3 I discussed the tradition’s preference for a predominantly subjective point of view in moral evaluation, and gave some reasons for that preference. Here I will provide a deeper and more rigorous set of objections to the predominantly “objective” point of view, with a focus in a later chapter on McMahan and Rodin’s specific uses of an objective standpoint, but here, in this section, on the work of other moral theorists who either accept or reject the objective point of view, where the underlying issues can be seen with greater ease. I will also specify more clearly the tradition’s limited acceptance of an objective point of view.

4.4.1 The Objectivists and their Critics

As I noted in 2.3, Aristotle and Aquinas both discuss actions where, due to non-culpable ignorance or coercion of some kind, something quite outside the intention of the agent takes

¹⁰⁸ I am indebted to Ferzan 2012 (see pp. 676-80), for a discussion of McMahan’s approach that brings out this terminology.

¹⁰⁹ This is despite the fact that the next paragraph after the last quotation above begins, “This, of course, presupposes an objective account of justification” (p. 398).

place, but for both, such actions are subject to a different kind of evaluation from more typical actions. For both, “moral actions,” actions fully subject to moral evaluation, are knowing and voluntary.

An important factor in the objective point of view is the “first-order/second-order” distinction.¹¹⁰ “First order” considerations concern the act itself, in isolation from the agent who acts, and “second-order” considerations concern the agent, with all her internal baggage of thoughts, motivations, perceptions, and intentions. In *Double Effect Reasoning* (2006), Thomas Cavanaugh traces this distinction back to Alan Donagan’s 1977 *The Theory of Morality* (and earlier back to the second edition of J.S. Mill’s *Utilitarianism*: Cavanaugh 2006, p. 123, footnote 2). Cavanaugh notes Donagan’s statement that acts may be permissible or impermissible, and agents may be culpable or non-culpable when they act (Donagan 1977, p. 55). As Cavanaugh notes, Donagan goes on to claim that agents may culpably commit permissible acts, and non-culpably perform impermissible acts (Donagan 1977, p. 112). Cavanaugh writes concerning moralists who follow this way of thinking (including Bennett and Frankena, among others), that they “divorce the ethical assessment of actions from that of agents. Accordingly, they understand there to be a significant gap between the criteria for evaluating an action and those for evaluating an agent” (2006, p. 123). The tradition, in contrast, holds that actions that are not performed voluntarily (which includes the concept “knowingly”) are outside the scope of moral evaluation, as I will describe below. (Similarly, the criminal law, as Cavanaugh notes, treats such actions as outside the scope of punishment, see 2016, p. 17.) Thus, moral descriptions of acts, considered in isolation from the agents who perform those actions, are false descriptions, according to the

¹¹⁰ This is not to be confused with other uses of “first-order/second-order,” such as a description of normative ethics as first-order moral theory, and metaethics as second-order, b e.g., “first-order enquiry cannot wait for meta-philosophical foundations” (Rodin 2002, p. 9).

tradition. For many “objective” moral theorists, such descriptions are both accurate and the most important aspect of a moral evaluation.

Judith Jarvis Thompson, in her 1991 article “Self-Defense,” provides a clear example of the first-order/second-order distinction, of an “objective” approach to moral evaluation, and of a claim for the primacy of first-order considerations. Law professor Heidi Hurd, in her 1999 article “Justification and Excuse, Wrong-doing and Culpability,” claims that legal reasoning would be improved by, in effect, such an objective approach: one that simply divides actions into right and wrong (first-order), and culpable and non-culpable (second-order). This is quite similar to Donagan’s account. Where he makes first-order considerations about the action, and second-order considerations about the agent, Hurd follows just this line of reasoning but combines the adjectives into a kind of shorthand for four kinds of actions: “Once it is clear that we must distinguish wrongdoing from culpability, it also becomes clear that there are four possible categories of actions: (1) culpable wrong actions; (2) nonculpable wrong actions; (3) culpable right actions (3) culpable right actions;¹¹¹; and (4) nonculpable right actions” (1999, p. 1560). Hurd claims that this would provide greater clarity than our current vocabulary of “excused” and “non-excused,” “justified” and “not justified” (1999, 1560-61, footnote omitted). (I call this “a kind of shorthand” because Hurd’s terminology lumps together what Donagan keeps separate, the “agent acting” and the act, and her terms then label “actions” in a way that combines these notions. As I note below, the moral evaluation of the action seems to seep into moral evaluation of the agent as well, at least in terms of the terminology employed.)

¹¹¹ In a footnote (footnote 24, p. 1560) Hurd remarks, “This is a conceptual claim. It may turn out that one or more of these categories is empty. For example, while it is conceptually possible for persons to culpably commit right actions, it is also possible that, as an empirical matter, they simply never do. In such a case, the third category of culpable right actions would turn out to be empty.” However, she does put one hypothetical case, that of Sue (see below) in that third category of “culpable right actions” (p. 1565).

This predominantly objective approach is attacked by a number of writers. Law professor Kimberly Kessler Ferzan,¹¹² for example, suggests flaws in this methodology in a number of articles. Ferzan attacks a “rights-based” objective approach embodied in Thomson’s account, and specifically critiques McMahan’s account of “liability to be killed” as well. Russell Christopher provides objections to what he calls Thomson’s “strongly objective account of permissible self-defense” (Christopher 1998, p. 543). As Ferzan writes of Christopher’s intriguing time-based critique, “Russell Christopher convincingly argues that without a subjective element that distinguishes attacks from responses, the defender is liable to defensive force before the aggressor is” (Ferzan 2012, p. 686, footnote 59). I appropriate his critique in my next chapter against McMahan, whose approach is, in important respects, quite similar to Thompson’s.

Another intriguing piece of theorizing about action on which I will draw here is that of Michael Bratman, specifically *Intention, Plans, and Practical Reason* (1999). (Cavanaugh, 2006, draws heavily on Bratman.) While Bratman specifies that his action theory is specifically aimed at the question of rationality, on many points it can easily be adapted to issues of morality. Bratman argues at length that intentions are more than just desires and beliefs, they are “pro-attitudes.” Future-directed intentions are necessary to us because we are rational but limited, and we must make plans (partial, but not infinitely changeable) in order to coordinate our own activities, and to coordinate those in turn with the activities of others. No one accomplishes anything of significance without such intentions. As Bratman is attempting to explain why intentions matter in the rational evaluation of specific actions, his theory is quite compatible with

¹¹² First, in selecting these, of course, I ignore many other scholars with contributions in the field. Second, both Ferzan (2005, 2012) and McMahan (2005) critique “subjective” approaches, such as that of Greenawalt (see below). If such accounts are purely legal, I believe they may be workable: whether the law declares a mistaken self-defense “excused” or “justified” may be a matter of definition. Purely subjective *moral* accounts, if they exist, seems unworkable to me, and are not a major concern of mine here. I am not proposing one.

Aristotelian-Thomist notions that emphasize the importance of intentions for the moral evaluation of actions.

4.4.2 “Objective Evaluation”: Preliminary Considerations

I want to offer an argument against objective evaluation and against the first-order/second-order distinction as usually practiced; but first, I want to acknowledge that evaluating the act separately from the actor, along with the objective approach generally, is clearly appealing to many, for reasons that can be appreciated. Is the act not more important than the inner state behind it? At times we act well, even if our inner states are reprehensible. Perhaps we perform an act of kindness to someone we really dislike, and in fact, we can’t help despising him even as we act, and even wanting him to fail after we help him. Yet surely it is the action that really matters! It seems to smack of mystical navel-gazing to insist on the importance of the inner actor when what happens is a good or bad action. We cannot measure the inner state anyway, or even be sure it exists, but the action is visible, real. If the Vietnamese stopped the Cambodian genocide of the 1970s with bad motives, surely what mattered was stopping the genocide—should they not have stopped it until they could do so with pure hearts? Conversely, if the person who is killed in apparent self-defense turns out to be innocent, is that tragic fact not the devastating reality? Would it not be better to say the killer has excuses, and deal with them separately? Utilitarians, and consequentialists generally, seem to take this approach. (Another stream of thought in philosophy, perhaps starting with Augustine and culminating in Kant, seems to take the opposite view, that morality *simpliciter* is overwhelmingly or perhaps even only about the inner state—but space precludes my directly addressing this approach.)

Cavanaugh calls the notion that significant actions can be legitimately described in moral terms independently of the agent an error, but identifies some sources of it. The first source

begins with the true observation that “states of affairs are objectively good or bad.” Without any real “act” on my part, I can causally contribute to a good state of affairs—say “I walk down the street with a bag full of bagels and, without my knowing or willing it, one falls out and rolls down the sidewalk to a homeless hungry man” (2006, p. 132). The confusion, Cavanaugh claims, is to call an occurrence of this kind an “act” with a moral description. A second source of the error lies in “what [Jonathan] Bennett speaks of as the silence of first-order morality concerning agents’s beliefs, desires, and intentions” (2006, p. 133). Bennett claims that “the meanings of the transitive verbs in our standard repertoire [of first-order morality] are silent about what Agent knew or wanted, and therefore about what he intended; so the source of an emphasis on intention must be sought elsewhere.” Bennett offers the illustrative verbs “hurt,” “help,” “betray,” “reward,” and “harm” (Bennett 1995, p. 45, quoted in Cavanaugh 2006, p. 131). This is surely strained: why should a full description of every aspect of an action be packed explicitly into a single word? Surely no other part of our language is expected to bear such a burden, why should verbs? Cavanaugh rebuts Bennett’s notion, arguing convincingly that each of these actions can be performed with or without knowledge, with or without desire, intentionally or unintentionally, so that each word can be used in a range of ways—the bare word demands clarification, unless that is supplied by a context. In many cases, Cavanaugh points out, the connection to the agent’s “beliefs, desires, and intentions” is simply a “taken-for-granted presence” (2006, p. 133-34).

The arguments for one account rather than another may look at times like a mere logomachy, a battle over words. After all, everyone condemns murder, but just about everyone also understands that it is possible to kill in mistaken self-defense, and that the person who does so is not a murderer. Is it not just a matter of different descriptions of such actions? I will argue that such a dismissal would be too hasty: differing conclusions concerning grave issues are built

on these choices of approach. In addition, a scholar may attempt to follow an approach, but inadvertently smuggle vital considerations from another approach into her description without acknowledging the fact. If this is the case, then an evaluation apparently built on one scheme may only appear to succeed due to smuggled-in portions of another scheme. This is worth knowing about a theoretical framework in action.

An initial question that may be asked is, what is an objective description (which would have to precede an objective evaluation) of an action? I take it we expect such a description to provide the vital details of what “really happened,” without being swayed by the emotions or bias of one or another participant or observer at the scene that would surely lead to omissions or over-emphasis on one point rather than another. But if this is true, a reasonably objective description of a real-world event already presupposes a skilled or even virtuous human observer who is providing a kind of evaluation—that is, the evaluation of which details need to be included in the description. There are no “out of the box” descriptions available in real life, and therefore we want a very fair person, who is also a keen observer or clever investigator, and who is rather competent in the ways of the world (the tradition would call her “prudent”) to provide such a description of a real-world action. Without such an observer or investigator, we will not even be close to objectivity. Perhaps none of these qualities are required in a merely notional scenario created by a moralist—but how much good is a moral evaluation of an imaginary scenario, unless it can be applied to the real world? Yet in that application, we are back to needing an observer with special qualities.

Surely everyone prefers objective to subjective descriptions of actions, if the former are available. Of course, they are not available, really, when it comes to actions in the real world. The only way to describe any real-world action is from someone’s point of view. (And that

subjective point of view can be vital in interpreting what “really” happened.) The adjective “objective” never seems to refer, in moral theory, to an account of an actual action—although it may do so, in a qualified sense, in a courtroom summary of a case by a judge (who attempts to be as objective as possible).¹¹³ But in moral theorizing, an “objective” approach simply means we take our bearings from stylized, objective accounts of *imagined* actions, and then somehow translate our findings (if they are that) from the objective accounts to real situations.

But theorists in the tradition will immediately raise one caution concerning this procedure: in doing objective theory, we have been practicing moral reasoning with training wheels on, so to speak: in the stylized account of the imaginary action, we see the true moral status of each individual, as if attacking soldiers had huge scarlet “J”s or “U”s (for “just” and “unjust”) stitched to their coats or shirts (or “M” or “I” for “mad” or “innocent” in the case of ax-wielding attackers in private life). In sharp distinction from real life, there is no need to wonder about the moral status of any participant in such a scenario: all come with moral labels. If attackers were reliably so identified in real life, certain responses would become plausible (including, perhaps, those built on very fine distinctions) that are not at all plausible where they are not so identified. What do we do when we translate? But, unfortunately, the need for “translation” from an “objective” scenario back into the real world, which is completely lacking in reliable moral labels on actors, is often forgotten, or at least done in a perfunctory way. When that is the case, it appears to me that one result of the “objective” approach can be to smuggle into a moral evaluation an unwarranted sense of possible moral precision. Another result can be a theory that leaves vital parts of the awkward real world out of its calculations.

¹¹³ When legal thinkers such as Heidi Hurd write of “objective” evaluations, I treat this differently from the accounts of moralists. It is a required function of a court to achieve an evaluation of a real-world act that is as “objective” as possible. The aim is quite different for a moral theorist not writing about courtrooms.

Another question worth asking is why we are performing moral evaluation in the first place. As David Rodin writes, “of course, the primary role of a theory of moral evaluation is not backward-looking judgement of past action, but forward-looking assessment of how one ought to act” (2002, p. 11). A second role of such a theory, I suggest, is to offer guidance to courts as they assess guilt or innocence—a vital social role. But a court always looks backward as it evaluates a real-world action, rather than a theoretical action that may never happen. A third role, retrospective like the second initially, is to guide a moral evaluation of a particular action in the past, one’s own or that of another, in order to discover important moral lessons: but this, I claim, after a finding of moral guilt or innocence, is mostly useful for oneself or others if, as in Rodin’s statement, it offers lessons for the future, beginning with the issue of whether regret or restitution of some kind is called for or not. A moral evaluation for its own sake, that is, simply deciding what, in a given situation, would be the morally right action, without any attempt to provide even implicit future guidance to anyone, would seem to be a merely academic exercise, in the pejorative sense of that term. Morality is, essentially, practical reason, rather than speculative, in the tradition’s terms. The question of the “what” is always oriented to the “how.” (In what role for moral evaluation might a strictly first-order analysis, one that ignored the actor entirely, be the sole consideration? That is not clear to me.¹¹⁴)

4.4.3 “Objective”: *Separate Act and Agent; Act Paramount*

Alfred the would-be wife-poisoner

¹¹⁴ The evaluation of “the act,” absent consideration of the agent who acts, can be an important *preliminary* concern of a judicial system—if there is no innocent dead person, there is no subsequent question whether a murder has been committed. Therefore, the initial question is often whether the dead person is innocent (a kind of first-order analysis) and if so, this is followed by the question of the putative defender’s knowledge or ignorance, special circumstances, and so on (second-order). But courts do not make the question of “the act” paramount, nor do they generally consider that question alone—they put it into the context of the agent’s motivations and intentions and knowledge. See Hurd’s example of Susan below.

With these preliminary considerations in mind, here is one scholar's (brutally abbreviated) case for an objective approach to moral evaluation. I begin with Thomson, who, in a well-known 1991 article, offers a stark statement of such an approach in her tale of a would-be wife poisoner:

Here is Alfred, whose wife is dying, and whose death he wishes to hasten. He buys a certain stuff, thinking it a poison and intending to give it to his wife to hasten her death. Unbeknownst to him, that stuff is the only existing cure for what ails his wife. Is it permissible for Alfred to give it to her? Surely yes. We cannot plausibly think that the fact that if he gives it to her he will give it to her to kill her means that he may not give it to her. (How could his having a bad intention make it impermissible for him to do what she needs for life?) (1991, p. 293)

Thomson's approach here is objective: the focus is on the "real action," not the perceptions and intentions of Alfred who acts. In addition, I take it, Thomson is clearly doing "first-order" moral reasoning: the act (giving medicine) is considered in complete separation from the actor. What matters here is simply the act and its consequences, and the epistemic and volitional states of the acting person do not matter at all for the evaluation of the act. Separately, presumably, Thomson appears to endorse a consideration of the internal state or states of the agent, but she rather clearly finds it far less important: "I fancy we overrate the role of fault in many areas of moral theory," she states (1991, p. 286). At any rate, she goes on to propose "*The Irrelevance-of-Fault-to-Permissibility Thesis*: it is irrelevant to the question whether X may do alpha whether X would be at fault in doing it" (1991, p. 295). She also offers, on the same page, "*The Irrelevance-of-Intention-to-Permissibility Thesis*." In Thomson's account, the moral evaluation that has weight is that of the act in isolation, somehow, from the agent: it dwarfs into

insignificance the beliefs and intentions of the agent. Yet surely some readers are puzzled or even disquieted by Alfred's example. His intentions seem to be downplayed a bit too much, surely. If this is a picture of a moral act, hasn't something gone at least somewhat wrong?

Leaving this disquiet to the side for the moment, I point out that if the mismatch between intention and reality had gone the other way—if Alfred had intended to give medicine but, for no blameworthy reason, gave poison—he would have been “excused,” in the terms of modern moral theory. This latter kind of mismatch, in which an agent planning or attempting something good (or at least neutral) ends up, through ignorance, doing something bad, seems more common as a subject of moral theorizing. In either case, the intention of the agent aims one way, and the deed goes another. Recognition of the mismatch leads to the common distinction between “justified” and “excused” actions widely deployed in and very important to modern self-defense accounts: agents who ignorantly target the wrong person, or act under duress, can be “excused” but never “justified.” Yet I will suggest that this distinction is far from the last word in the moral evaluation of actions. As currently formulated, it often provides the wrong moral lessons.

Here is an example of an action with a mismatch (with less deadly possibilities) in the other direction from Alfred's: good intentions, bad result. Consider a neighbor who walks across the freshly poured concrete on your driveway on her way to your house, leaving deep footprints. It becomes clear that she had no good reason to know the concrete was freshly poured. There were no signs or barriers, let us say, and it was raining lightly so everything was wet—and from the living room window you glanced out and saw her entire gait change part way across the driveway, in a way that indicated her sudden realization that she was walking in wet concrete—she stopped, looked down, tried to tiptoe out of the concrete. (I am considering here non-culpable ignorance, but we could also look at an involuntary act, e.g. if the neighbor were sleepwalking.)

The neighbor's action runs in the opposite direction from Alfred's: she wishes some good thing (perhaps to have coffee with you, her friend), and yet she has, quite inculpably, done harm. (I am borrowing and adapting this story, and the later comparison with a tree falling on the wet concrete in the driveway, from Cavanaugh 2006, p. 128.)

My initial analysis will focus on these two examples, but I want to offer for later discussion another set of illustrative examples from Hurd's article mentioned above, in which she responds to the challenge of Professor Kent Greenawalt (in a 1984 article in the *Columbia Law Review*).¹¹⁵ Greenawalt proposed doing away with the justification/excuse distinction, replacing it with a distinction between "warranted actions" and "unwarranted actions for which the actor is not to blame" (Hurd, 1999, pp. 1551-52). In the course of her argument, Hurd discusses a group of cases offered by Greenawalt, of which I mention only a selection. The first is a self-defense case of a woman who "reasonably believes she is in imminent peril from a man who is circling her house," and apparently shoots him, not realizing "he is merely an innocent meter-reader." A second case "is that of the prison inmate who is justified in escaping confinement if he has a well-grounded fear of serious injury and intends to surrender as soon as he is clear of the danger." The prison guard who catches this inmate and returns him to his cell may be doing his duty, but, Hurd claims, he "does wrong" in doing so (Hurd 1999, p. 1553).

In a third kind of case, Hurd writes, Sue means to murder David. However, Greenawalt offers a complication: "If, unknown to Sue, David has begun to draw a gun to shoot her a split second before she shoots him, Sue's claim of self-defense is unavailing. Although the objective situation warranted her shooting in self-defense, Sue lacks that justification because she was

¹¹⁵ Hurd's article appears to be part of a kind of *festschrift* for the professor in the pages of the *Notre Dame Law Review*, see volume 74, no. 5 of the review.

unaware of the relevant facts when she shot” (Hurd 1999, p. 1555, internal citations omitted). In each of these cases I note that ignorance of the true facts creates a break between the intention of the actor and what she or he accomplishes. The woman who shoots the meter-reader is mistaken about the threat he poses, and has no intention of killing an innocent man. The guard is putting the escapee into high risk of harm, which he does not desire to do, by enforcing the legal penalty. Sue’s case reverses the other two: a morally bad intention is accidentally coupled with an “objectively” warranted action.

4.4.4 The Tradition: a Different Separation; Agent Paramount

Start with a “normal” action

Agent and action are not inseparable in the Aristotelian-Thomist approach, but when we can separate them, we must do so with care—and the agent’s intention is paramount. How does this work? To see how, let us begin with a “normal” rather than an abnormal action. To paraphrase the well-known legal saying that “hard cases make bad law,” we can say that “odd cases make bad theory.” In what I will call a “normal” act, we have match between actor (and the intention of the actor) and action. Many of the unusual cases above are mismatches between agent and action—let us put the mismatches to the side for a moment.¹¹⁶

Normally, and for the most part, we see things reasonably accurately (if we are physically and mentally and emotionally healthy) and what we intend or choose is what we do. To put that another way, actions are performed by actors. Generally human actors perform significant actions knowingly and willingly. Situations where the actor is ignorant of some key feature of the situation, or coerced into action, are not typical. We do not spend the bulk of each day

¹¹⁶ As Bratman states of certain unusual cases he is considering, “Such examples are quite fascinating. But I think we get a distorted view of future-directed intention if we take them as paradigmatic of intention” (1999, p. 12).

stumbling into wet concrete, putting salt in our coffee, and trying to shoot people with unloaded guns. Nor are we usually blindfolded and handcuffed, heavily drugged, or under hypnotic control of another. Normally, we choose what to do, and we know what we are doing.

In a *normal* action, as I am calling it here, there is no obvious boundary between the agent and the act. The acting agent, and the action that takes place, are like, perhaps, hand and glove. But that is not close enough. The relation is more like the shape of a particular sculpture and the wood it is made of—the two cannot be separated except conceptually. Say I am doing some target shooting, with normal care and without freak winds or sudden tornados. I have decided to do this because it is fun, and I would like to be a better marksman. In an empty field I place my target in a safe location, I aim, I shoot. Subjectively, what I intend, perceive, and feel is that “I am shooting at a target.” The objective description of the act is, “a man is shooting at a target,” or, “a target is being shot at.” How important or big is the difference between my acting and the act? Interestingly, Aquinas uses this closeness illustratively in the other direction: “God is in everything, ‘not as a part or a property but like the agent in an action’ (ST 1.8)” (quoted in Kerr 2009, p. 43). Clearly Aquinas wants to emphasize God’s presence in every part of his creation (in a way that does not exclude or obliterate the actual presence of the thing), and hits on an example of extreme closeness: the agent in her action.

After all, an agent acting does not launch “an action” into the world like a javelin, so that its arc can be followed in isolation from the agent. If she did, a police officer might ask the police artist, “draw the act the witness described—but leave out the person who did it.” (Sometimes an action is to throw something, or shoot a bullet—but it is not the action that flies through the air in such cases.) The action takes place as the agent acts, without any gap, the way, temporally, a window breaks as a thrown brick goes through it (I borrow the example from

Feser).¹¹⁷ In describing a normal action, we also describe the agent, acting. While it is perfectly acceptable intellectually to consider the normal act in isolation from the agent acting, it is an act of mental abstraction: the two are inextricably tied in reality. The action is what the actor is trying to (and in a reasonably normal act, usually manages to) achieve. And without the actor acting, there simply is no action. We cannot really tell “the dancer from the dance.”¹¹⁸

Describing one is describing the other: as Feser says about a brick breaking a window, “the brick’s pushing into the glass and the glass’s giving way are really just the same event considered under different descriptions” (2009, p. 21). Adapting that, we could say that the agent’s performing an act and the act’s taking place “are really just the same event considered under different descriptions.”

Not only that, but it is the intention (to act, or not act) that helps us recognize an action as specifically human. When we yawn and stretch, or scratch, or jump at a loud bang outside the house, these are acts that we recognize (when we think about it) as quite like those of the other animals we know. But when I decide to get some target practice, such an intentional act is different from a reflexive twitch or the act of digestion. It has at least a minimal moral status, either positive or negative. Perhaps it is an act of well-deserved sheer relaxation (positive), or conversely I am avoiding some important work I need to do (negative). In either case, I have so much time in a day, and I have made a choice with some of that time to act. “[A]ll the things that a human person consciously, purposely, and freely does are human acts” (McInerny 1997, p. 6). Again, “[i]t is necessarily the case that a human person who acts is engaged in moral action and

¹¹⁷ Feser notes, “In the case of the broken window, the key event in the causal series would be something like the pushing of the brick into the glass and the window’s giving way. These events are simultaneous...” (2009, p. 21).

¹¹⁸ William Butler Yeats, “Among School Children.” In Abrams *et al* (Eds.), Vol. 2, 1974, p. 1930.

thus is subject to moral appraisal” (McInerny 1997, p. 5—note that the moral appraisal of some acts is more weighty than that of others). So we in the tradition see it.

For everyone, it seems, it is such normal human acts, where the intention matches the performance, that give rise to praise and blame. For example, poisoning someone is usually such a chosen, knowing action. You may do it for patriotic reasons (you poison the water supply of the barracks of enemy troops who have taken over part of your country, adapting Anscombe’s famous “pumping” story, 2000, pp. 37-47). Presumably that is praiseworthy. Or, someone may do it for his greater convenience: if Alfred had managed a “normal” act and had acquired real poison, he might be giving it to get rid of an old cranky wife so he could run off with his girlfriend to the south of France. Killing his wife for such reasons is surely blameworthy. The praiseworthiness of the act is intimately tied, in general, to the praiseworthiness of the intention—or, saying almost the same thing in this context, of the actor.¹¹⁹

Without knowing the actor’s intention, we are unable to praise or blame. “It is a praiseworthy thing that the enemy soldiers have been poisoned—perhaps it was accidental, I have no idea how or why it happened,” would make no sense. Neither would, “it is blameworthy that the woman died, for whatever reason she died.” Nor would, “that soldier was drugged out of his mind and totally hallucinating when he did it, but what a heroic action it was to attack the enemy dugout so valiantly.” Praise and blame concern intentional actions—voluntary and done with significant knowledge—and they belong (in all normal actions) fundamentally to the actor,

¹¹⁹ In this short section, I cannot offer a full discussion of “intention,” although I think the common sense meaning will serve for the most part. For book-length discussions, see Anscombe, Bratman, and Cavanaugh. I rely on the latter two especially. Bratman argues at length that intentions are more than just desires and beliefs, they are “pro-attitudes.” Future-directed intentions are necessary to us because we are rational but limited, and we must make plans (partial, but not infinitely changeable) in order to coordinate our own activities, and to coordinate those in turn with the activities of others. No one accomplishes anything of significance without such intentions. On the other hand, intentions are often abused. The notion of “intention” has been manipulated, as discussed in section 3.2.4 above.

and secondarily to the act. You can praise an agent who tries to rescue a child under hostile fire but fails because he is shot—here, the act of saving the child is not accomplished, but the acted-upon intention to do so is praiseworthy. But the way to see that the praise and blame belong fundamentally to the agent, even if we often speak of “praiseworthy” or “blameworthy” actions, is to remove all knowledge of the observer and evaluator concerning the agent, and try to praise the act—it does not work.

The same logic is behind the use of the words “permissible” and “impermissible.” Clearly, these terms have a technical meaning in contemporary usage such as Thomson’s: they mean something like “morally right” and “morally wrong.” Yet the denotations and connotations of words used in a technical sense can guide how we feel about them, and whether we believe they are used well or badly. In light of that, I note that “permissible” comes from the transitive verb “to permit.” When we say something is “permissible,” the mental image behind the term includes the notion that something (or someone) “permits” an action. That which is implied to be granting or withholding permission appears to be the rules or laws of morality in some form. Let us say that something is a moral code.

In a normal action, where the intention matches the performance, it makes good sense to speak of the moral code “permitting” or “not permitting” an action—because there is no distance between the agent and the action. If the pill were poison, and Alfred intended to kill his wife with it, he, the agent, could ask before he did it, “is this act permitted? Does my Kantian moral code permit me to kill my wife so I can run off to the south of France with my girlfriend?” If his conscience were functioning and not numbed or crippled, it could tell him clearly, “no, such an act is impermissible, and you must not do it.” Similarly, if your neighbor had learned somehow that your driveway was freshly repaved, she, the agent, could coherently ask herself, or think of

asking herself, “is it permitted to make footprints in the fresh concrete, an act that delighted me as a five-year old?” As with Alfred’s case, a functioning conscience would tell her no, the driveway belongs to the neighbor and such an act would harm him: it would be impermissible, and she must refrain. The term “permissible” makes sense in a quite normal way in such “normal” situations, where knowledge is reasonably accurate and the will produces the act through a yes or no.

Moreover, the term “permissible” appears to be aimed primarily at the *actor* for a given situation. Only an actor, and never an act, can ask, “is it permitted?” We can somewhat whimsically imagine the moral code somehow embodied, as a goddess on a throne: after all, the moral code is to some extent embodied in words, so a person could represent it (as our parents and teachers did when we were young). If that were the case, the goddess Morality could grant permission to an agent to perform an act—but not to an act to perform itself, an incoherent thought. (We can and do personify actions: but note that “to personify” is to turn something, in imagination, into a person, offering yet more evidence that only a person can receive “permission.”) A permitted act only makes sense as the act of an agent, who is knowingly and voluntarily acting—absent that, the terms “permission” and “to permit” are meaningless. In my adaptation above of Anscombe’s pumping story, we can say the notion of permissibility happens to cover both “the intention of the poisoner” and “the act,” that is, “trying to kill enemy soldiers” and “the fact that enemy soldiers get poisoned.” But that is only because the two are unified. They are unified only when, as in a normal act, knowledge and will are present, and that is what makes it sound sensible to say that “the act is permissible.” Praise, blame, and permissibility are concepts that make sense applied to actions when actions are voluntary and knowing—and only then.

The tradition's principles

A brief summary of the argument above, in terms of the tradition's principles, is offered by Cavanaugh, who writes, "[t]he voluntary serves as morality's threshold" (2006, p. 128). He later clarifies that "the voluntary" is "knowing-willing" (2006, p. 142). This follows rather closely Aristotle's point at the beginning of Book III of the *Nichomachean Ethics*: "Since moral goodness is concerned with feelings and actions, and those that are voluntary receive praise and blame, whereas those that are involuntary receive pardon and sometimes pity too, students of moral goodness must presumably determine the limits of the voluntary and involuntary" (2004, p. 50). Aristotle includes ignorance as one of the markers of what is involuntary (2004, p. 52), so Cavanaugh's "knowing-willing" is thoroughly Aristotelian.

Cavanaugh quotes G.E.M. Anscombe in support and amplification of this view: "a rule as you consider it in deciding to obey or disobey it does not run: do not *voluntarily* do such-and-such, for you cannot consider whether to do such-and-such voluntarily or not....The voluntariness is presupposed in [the agent's] *considering whether* to do [the act]" (Cavanaugh 2006, p. 128, original emphases, internal citation omitted). Cavanaugh summarizes his case against the first-order/second-order distinction thus: "the first-order/second-order distinction faces a conceptually insuperable difficulty; namely, to speak of an act *necessarily constituted* by epistemic and volitional states without reference to those very states" (p. 130, emphasis added). But that last claim needs more work: I have argued the positive case, but I need to make the negative as well.

Move on to an abnormal action: a mismatch

I have now argued at some length that in "normal" actions as I have defined them here, that is, where intention and performance are so close that we speak of them interchangeably, and

perhaps see them as identical in our everyday thinking, and where the will of the agent is unthwarted and her knowledge reasonably accurate, the moral terms “praise,” “blame,” and “permissibility” are coherently applied to the act, but only because of the unity of agent and act, since they fundamentally apply to the agent. I have stated that it is only in such cases that these terms of moral evaluation are coherent, but more remains to be said to demonstrate that.

I began this whole section, after all, with two stories of mismatches of intention and performance, where ignorance (nonculpable in Driveway, left mysterious in “Alfred”) prevented their happy union. Alfred intends, culpably, to poison his wife. Your neighbor intends, innocently (and, for the tradition, praiseworthily), to pay you a visit. Neither achieves the intended outcome. We can all agree that Alfred is to be blamed for his intention, and your neighbor is not. We can all agree that Alfred cannot be praised for curing his wife, and your neighbor cannot be blamed for ruining your driveway. Furthermore, most of us can agree, I trust, that neither Alfred nor your neighbor is responsible for the outcome of his or her action¹²⁰ (certainly the criminal law would agree). But a whole school of moralists claim that Alfred’s *action*, considered apart from Alfred the agent, is “permissible,” and your neighbor’s *action* is “impermissible.” Let us add another, almost identical, notion here: according to these same moralists, your neighbor “wrongs” you—albeit non-culpably and excusably so. I offer three sets of arguments against these closely related notions.

An argument from the act of abstraction

My first argument concerns the mental act of abstraction, which is what, I claim, we do when we look at an action and ignore the agent who is performing that very action. I claimed above that the agent’s performing an act and the act’s taking place are really just the same event

¹²⁰ But see below for an exception.

considered under different descriptions. While it is perfectly acceptable intellectually to perform the act of mental abstraction of considering the normal act in isolation from the agent acting, we need to remember that we lose something in the abstraction. When we consider Socrates merely as a man, we no longer have his personality quirks and other marks, the various traits that make him different from other men, in our “man” description. The person acting is the human agent, and to the extent that we consider the “act” in isolation from the person who is acting, prescind from the qualities of the agent, to that very extent we (should) lose those qualities in our description of the act. It is fine to abstract from the acting person, but if you do it, you have taken away everything potentially moral from the action, because everything potentially moral belongs fundamentally to the actor.

Let us apply this argument from abstraction to an “action.” “An innocent person, Karl, is being killed,” for example, is an action description that prescind from the agent to look at the act. Without knowing anything more, we can say that this is an “evil” at least in the old, Aristotelian-Thomist sense that blindness is an evil: the world is being deprived of an innocent person, who is perhaps suffering, and that is bad. It is deeply regrettable. It is a privation of good. But, it seems, we cannot state whether a moral evil¹²¹ is taking place, because we do not know.

Now let us specify an agent. A boulder is falling on the innocent Karl. He is being killed, and that is bad and regrettable. But is a *moral* evil taking place? It seems the vast majority of moral theorists would say no. The specification of what kind of agent is acting makes it clear, now, that a moral evil is not involved in the act. Until we knew about the agent, we were in the dark about whether a moral evil was taking place.

¹²¹ Confusingly, it seems to me, Rodin calls events such as a tree crushing a house “moral evils,” or just “evils,” and contrasts this with “wrongs.” The crushing of the house “is not a wrong; it violates no one’s rights” (2002, p. 87). I prefer not to call the former “moral evils,” since that to me implies a moral flaw somewhere. Clearly, though we are making the same distinction.

Now let us say that our action description is, “John is killing the innocent Karl,” and that is all we know. We look at the act alone, without considering John’s perceptions or motivation. Again, do we know that a *moral* evil is taking place? How can we, unless we know something about the situation, and John’s knowledge, perception, and volition? Perhaps John is driving at a reasonable speed, and Karl trips onto the road between two parked cars, or falls off a bridge with no guard rail into John’s truck’s path. Or, straying closer to the heart of the domain of self-defense theory, perhaps Karl appears suddenly around the corner, dressed as and looking like a villain for some innocent reason, and John is (for innocent reasons) primed for an act of self-defense, and kills him. Or John is suddenly deranged by a tumor that has just now reached some tipping point in his brain, and he kills Karl without any volition.

In any of these cases, it is at least highly debatable that any moral evil is taking place, for surely one description of any of these actors named John would be “morally innocent” or “non-blameworthy.” If the actor is innocent, how can the action be morally evil? Who or what supplies the moral evil? To know with reasonable certainty that the act is a *moral* evil, it is not enough to know the act, or even the moral status of the victim—we need to get inside the agent. We cannot know the meaning of the dance without knowing something of the inner world of the dancer who is dancing it. You could claim that all these cases after the boulder are “immoral actions” but the agent is excused, i.e. he is not acting immorally at the time—but this might sound incoherent: “an immoral act is being committed, but not immorally.” This, I suggest, is what is done when moralists say “John is acting impermissibly but not culpably.” A moral description, “impermissible,” is applied to John’s action, as if John’s action existed apart from John.

Two linguistic arguments

I continue with two linguistic arguments. I claimed earlier that the family of words that cluster around “permissible” make no sense except when applied to an agent. I now add the claim that even with the agent alone, the application of the term “permissible” is incoherent in these “abnormal” cases of a mismatch between intention and outcome, where the action is involuntary because the agent is coerced or is (non-culpably) ignorant. Does “permissible for” apply to an actor who is coerced? That would make no sense: say you are involuntarily hitting someone (perhaps after being drugged, hypnotized, and commanded to hit). Does it make sense to say that you are permitted to do so, provided he is culpably attacking you? Surely not. Neither “permitted to hit” nor “not permitted to hit” can be sensibly applied to the actor here. How can anyone, or a moral code, permit or forbid that which the agent is not even choosing to do?

What about doing something in fundamental ignorance of what it is the case? Again, “permitted” makes no sense, even applied to the agent. “You are not permitted, in a non-culpably drugged state, to strike your wife thinking she is your kidnapper” gives no guidance, but that is what permission is meant to do, to tell you what you may or may not do. It simply makes no sense to say an agent is “permitted” to do “the opposite of what he is trying to do” or “the opposite of what he thinks he will do,” nor to withhold permission. What sense would it make for you (or the moral code) to permit or forbid that which the agent is unaware that she is doing? “Am I permitted to do this” is a question that cannot be brought to bear here.

Similar reasoning applies to the verb “to wrong.” If neither “permitted” nor “not permitted” makes sense, what role can the moral word “wronging” play in such cases? In a famous example, Alice accidentally takes Betty’s virtually identical umbrella and walks away with it (presumably leaving her own umbrella behind). As Ferzan writes, “our current conception of offenses would lead us to claim that Alice did wrong, but did so nonculpably” (2005, p. 714).

(Ferzan later in the article revises this to “she simply lacks culpability,” p. 728). For Hurd, Alice “does wrong, albeit nonculpably” (1999, p. 1564). The story is sometimes summed up as, “Alice wrongs Betty.” But “wrong” (outside a legal or philosophical journal where it may have acquired a technical (non-moral?) meaning) is an ineluctably moral term in normal usage.¹²² Although we see it used as Hurd and Ferzan use it in philosophy journals and political theory classes, we do not see it used in two places where we would expect it if this is good normal usage, namely the courts and everyday life. Courtroom verdicts never, to my knowledge, state that the defendant “wronged the victim” but is nonetheless excused. The verdict “not guilty” conveys no moral censure. And if Betty discovers the mistake in real life, she goes to Alice and says, “I believe you’ve made a mistake. If you look at that umbrella very carefully, you will see a very small mark...” It would be ridiculous of Betty to say to Alice when she discovers what happened, “you wronged me!” The moral language makes no sense in this situation: absent any moral fault in Alice, the moral blaming word “wronged” does not apply to her, nor does it make sense to ascribe it to “the act-considered-alone” either. After all, without the agent, there is no act. If the agent is not acting wrongly, how can the act itself be coherently described as a morally wrong one?

One way to deny any force to my arguments here would be the logomachy argument: to claim that “permissible” has nothing to do with “permitting,” or at the least is used in a highly technical sense, and the same for “wronged.” I am simply missing, the objection would run, the very specific meanings of these words as used in the moral analysis of these cases, probably because I am misled by the ordinary usage. I need to learn the technical meanings. But my argument here is not merely about specific words and whether they can have acquired technical

¹²² See previous note for Rodin’s use of “wrong” with this strong moral sense.

meanings over time. I am arguing about any attribution of *moral* good or evil (which is what these words express) to an action considered in abstraction from the agent performing that very action. As I and the tradition understand it, the qualities of moral good and evil can subsist in persons, and their actions can express and reflect and partake of these moral qualities, precisely *as their actions*, their actions as persons who are acting. I have never seen an argument explaining in any detail how an act, considered in complete isolation from the agent who is acting, can have the quality of *moral* good or evil—any more than the act of a boulder crushing someone has such qualities. An act can have the qualities of harming, causing suffering, and causing privation, and in that sense can be “evil.” The victim suffers them, regardless of the intentions or perceptions of the agent. But moral evil? Where would it be, if not in the agent who acts? (Perhaps, though I doubt it, some “objective” theorists will agree: if so, I suggest, they should stop using highly misleading, thoroughly morality-soaked words like “permissible” and “wrong” for acts-alone.)

An argument from the logic of responsibility

Last, I offer an argument based on the logic of responsibility. I note our agreement that neither Alfred nor your neighbor is responsible for the outcomes that occur. After all, that is why praise and blame do not apply—to the extent that either is responsible, he can be praised, or she can be blamed. To the extent that praise and blame have no purchase here, there is no responsibility for the good or bad outcome. But lack of responsibility is just that which rules out moral evaluation of an action. It cannot be an “impermissible” action if I am not responsible for it.

After all, why does the act of a tree falling on my fresh concrete not “wrong” me? Why is it not an impermissible act? Well, as we all agree, because the tree is not a moral agent. Why

not? Well, it is not aware of its surroundings, and it does not make choices. Trees are never responsible for any act. But to the extent that I become (a) unaware of the truth concerning my surroundings, or (b) unable to choose what I do, to that extent I, in the moment of “acting,” become like the tree—I lose the characteristics of a moral agent. If I completely lose either characteristic of a moral agent, I become, as an actor or agent and in relation to this action, equivalent for the moment to a tree. The tree is not responsible, not acting as a moral agent, and at that moment, neither am I. But then, does not my action in that period of time become equivalent to the action of a tree? If I am unable to exercise those characteristics that make me different from a tree, why is that specific action considered to be the action of an agent?

I note that we agree that a tree cannot commit or perform an impermissible act. But if the act can be separated from the human agent, why not separate the act of the tree, falling on my driveway, from the tree that falls, and say that the act of the tree is evil, even if the agent is nonculpable? If we say “because the tree is not a moral agent,” then, again, what of the person temporarily deprived of vital characteristics of moral agency?

One objection to this argument comes from Adam Hosein. He argues that “[i]t is ... plausible to think that I am responsible for where my body is, given that it is something closely identified with me as a person, and this includes responsibility for my body not being in, as Frances Kamm (1992, p. 47) puts it, the ‘morally inappropriate position’ of causing you harm.” Hosein notes in endnote 19 (to this passage), “I borrow the identification point from Victor Tadros’ (2011, p. 55) very similar argument: ‘It is the fact that I am responsible for what my body does, even when it is not a product of my agency, that gives rise to the permission to harm innocent attackers and innocent threats. And I bear that responsibility because my body *is me*’” (2016, emphasis in original).

I believe many modern moral theorists from a variety of persuasions, along with Aristotelians of all stripes, find this quite implausible. Any arguments in favor of this notion need to account for a number of factors. First, this goes against pretty much the entire stream of the “rich repository of first-order moral assessments or ‘moral intuitions’ which are the primary data of moral philosophy” embodied in domestic law (Rodin, 2002, p. xii), at least in the Western tradition. If “I am responsible for what my body does, even when it is not a product of my agency,” then the entire body of legal excuses, in use over several thousand years or so, should be thrown out the window.¹²³ Second, it is hard to conceive of anyone living this way. Psychologically, we simply cannot blame people for not knowing what they have no good reason to know, or doing what they cannot help doing, and we vehemently protest if we are blamed in such situations—in other words, this claim does real violence to our widely held intuitions. Finally, it simply proves too much. “My body is me” is a sentence with a clear but quite limited truth to it. Our bodies have involuntary reactions, and abilities and disabilities we did not choose. We roll in our sleep, and some of us grow beards. For that matter, our bodies are born and die. Ascribe moral responsibility to all such reactions, abilities, and disabilities, and completely involuntary actions, and you will need an entirely new theory of morality, and one that will not even be recognizable as such to the major theories that have held sway in the Western world.

Expanding Cavanaugh’s denial that the first-order/second-order schema works

I return to Cavanaugh’s denial that Donagan’s first-order/second-order schema “works,” for a specific examination of Donagan’s combination of terms. I begin by asking, what would it mean to “culpably commit a permissible act”? Did Alfred’s act, if he gave the pill in Thomson’s

¹²³ It is true that tort law sometimes requires compensation without asserting responsibility of the one who must pay. Whether this is a good or bad feature of the law is debatable, but it seems that tort law on this point prescind from the question of responsibility. Due to this, it does not offer any moral guidance on the question at issue: responsibility.

original story, the one that cured his wife, meet that description? I think we are entitled to grave doubt that it did, because “giving stuff” (the presumptive “permissible act”) is a very incomplete description of an action. A more complete description would be “buying stuff that he believed to be poison and giving it to his wife with the intention of killing her.” That, of course, is not morally permissible, because it is attempted murder. That is Hurd’s description of the act of Sue, who means to murder David but happens to shoot him when he has a loaded gun aimed at her, giving her an objective claim of self-defense (1999, p. 1566—and Hurd is a law professor as well as a moralist). The two actions are quite similar when the description is complete, and a complete description includes information about the intention of the person acting. Evidence of that intention, perhaps quite convincing, may become available—courts seek and find such evidence on a regular basis—why should moral theorists be uninterested?

Cavanaugh seems to be correct: once we have a reasonably complete description of a significant act committed *culpably*, it will turn out to be at least the *attempt* to perform an impermissible act. Such attempts are not morally “permissible”, regardless of significant and unusual facts that may alter somewhat our perception of the action (2006, pp. 128-29). Alfred’s attempt would be worse if it had succeeded.¹²⁴ Nonetheless, medicine and all, it is an attempted murder. Sue’s attempted murder succeeded (what she thought was a loaded gun in her hand in fact was one), and while our condemnation would be greater if her victim were not trying to kill her, her action is nonetheless, described as the action she attempted to carry out, attempted murder. It seems that any supposed culpable performance of a permissible act would turn out, if adequately described, to be impermissible because it would be an attempt to perform the impermissible, and such attempts are not permitted by a moral code.

¹²⁴ cf. *S.t.* I-II, q.20 a.4, for just one example of many from the tradition, which, along with consequentialists generally, reject’s Kant’s notion that nothing but a good will is intrinsically good.

What would it mean to “non-culpably commit an impermissible act”? As possible candidates for agents performing such “impermissible acts,” we have above John whose tumor sends him into a murderous rage in which he kills Karl, the driveway-walker, the householder who shoots the meter-reader, and the guard who returns the innocent escapee. In each of these cases, I suggest, calling the action “impermissible” works well if we have an incomplete description, but is quite problematic if our description is reasonably complete. I assume (like Western legal systems, at least) that more complete descriptions, if they include *relevant* additional facts about a human action, are better than less complete descriptions. An example of a less complete description might be, “killing an innocent man,” or “walking in your neighbor’s wet concrete.” A more complete description would include relevant facts about the agent’s perceptions and intentions in each case.

It is problematic to call these acts, described with reasonable completeness, “impermissible,” because neither a set of laws nor a moral code can intelligibly forbid them. I begin with lack of volition: neither laws nor moral codes forbid the commission of acts that the agent cannot avoid, such as John’s. Laws do not forbid “killing an innocent man or woman,” because time and again innocent people are killed in a way that involves no moral responsibility or guilt for the accidental killer, and the Western legal tradition, at least, recognizes that fact. Laws forbid recklessness that endangers the innocent, and the intentional killing of them (with degrees of guilt based on the kind of intention involved), but they do not simply forbid killing the innocent. Turning from law to morality, I am unaware of any moral code that would instruct persons that they must not commit acts such as John’s, that is, acts involving no volition. That is, I am unaware of any moral code that would describe acts involving no volition as “impermissible.” If such a code instructed its adherents to avoid acts such as John’s at all costs,

in many cases they simply could not live in such a way as to achieve that end. All actions involve at least tiny risks. (As Ferzan puts it, it would be nice if we lived “in a world in which we could choose not to impose risks,” but we do not (Ferzan 2012, p. 681, and generally, p. 676-81).

A similar argument applies to the set of cases involving non-culpable ignorance. Laws that involve the destruction of property or the killing of human beings always allow for ignorance when they define responsibility and guilt, that is, they do not simply and absolutely forbid “destruction of property” or “killing the innocent.” The reasons are similar to those above: if we allow people to walk and drive and defend themselves against attack, they may “commit” acts of destruction, or the killing of innocents, through non-culpable ignorance. The criminal law allows such actions to go unpunished, and gives them different names from acts committed with full knowledge (e.g. “homicide” rather than “murder”), which it would not do if it held them to be “impermissible.”

I believe coherent moral codes are the same. If something is “impermissible,” the moral code will forbid it beforehand. I am unaware of any real moral code that forbids human beings to act out of non-culpable ignorance, claiming that those who perform such acts are guilty of, for example, murder. Such a forbidding would be designed for some other kind of creature than human beings, a creature with an absolute duty to know everything relevant in its corner of the cosmos at all times. Applied to humans as we are, it would violate Kant’s pithy maxim that “ought implies can.” It would not be a coherent moral code.¹²⁵ Without any such code to appeal to, the force of the word “impermissible” seems to be reduced to “my intuitions reject it.”

¹²⁵ Clearly there are moralists who claim that certain acts are impermissible, generally based on some kind of intuition. I am claiming that such isolated intuitions do not add up to coherent moral codes. See chapter 6 for my claim that with Rodin’s eclectic approach to moral foundations, he does not offer us, in my terms, a moral code.

“Impermissible” is too weighty a word to mean “I don’t like it.” If that is what is meant, the word should be abandoned.

If this analysis is correct, it cannot be coherent to speak of “non-culpably committing an impermissible act.” Reasonably complete descriptions of acts, which are necessary for persuasive moral analysis, will always include the coercion or non-culpable ignorance of the agent, which will end up showing that neither “permissible” nor “impermissible” coherently applies to the agent’s act.

4.4.5 Why Thomson’s Description of Alfred’s Action Fails

Having offered a wide-ranging set of arguments against objective approaches, I come back now to Thomson’s specific question, concerning “Alfred,” “[i]s it permissible to give [that stuff] to [his wife]?” One fundamental problem here is that, in the situation described, it is a question no one could ever ask for himself—it can only be asked *for* someone else, but the question and answer cannot even be shared with the person about whom the question purportedly asks—and this combination means that the core notion of “permission” in “permissibility” has no application. If someone was told the act of “curing your wife while thinking you were poisoning her” was permitted, he would shake his head in bewilderment. If you explained to Alfred that it was morally permitted to try to poison his wife because what he thought was poison was her cure, you would endanger the wife’s life. Since he plans to kill her, this would alert him to the prospective failure of his plan, he would not give her the cure, and he might well try to kill her in some other way. It would be no more permissible to explain Thomson’s answer to Alfred than to give an ax to a violent madman—and an explanation of the morality of an action that must be kept secret from the agent is surely suspect.

When Thomson responds to her question by claiming the act is certainly “permissible,” to whom is the guidance in that answer offered? Surely not to Alfred, and an omniscient observer needs no moral guidance. “It is permissible” offers guidance to no one. To show this even more clearly, we can ask, as Thomson does in this same article concerning the terror bomber case (1991, p. 293), what it would sound like if Alfred, before acting, were to ask a professor of ethics for moral advice. Imagine Alfred asking, “Is it permissible to attempt to poison my wife with what is actually a one-shot cure medicine?” The professor replies, “Certainly.” Alfred thanks the professor, but has a follow-up question: “Is it permissible to try to cure my wife with poison?” The professor replies, “Definitely not.” As Thomson sums up her own question and answer session on the terror bomber case, “What a queer performance this would be!” (1991, p. 293).¹²⁶

It appears to me that one way Thomson goes wrong here is that, advertently or not, she is quietly shifting perspectives as she goes along. (I am indebted to Ferzan 2012, throughout, for her insistence on the importance of the perspective from which an evaluation is offered, and see in particular the first paragraph on p. 681.) Later in the same article, Thomson is discussing agent-relative permissions to kill. She writes, “But our question was whether it is permissible (and not merely excusable) for *you* to proceed in these cases” (1991, p. 308, emphasis added). Here we are back to the normal world, and the focus is, as it must be to be coherent, on whether the acting person is permitted, by some real moral code, based on a set of facts she sees, to act. The perspective that matters is the actor’s. We can imagine ourselves advising the actor that, if Thomson’s analysis is correct, “it would be wrong to do that.” Permissibility here is for the actor, and can be explained to the actor. In Alfred’s story, permissibility is not *for* Alfred. His

¹²⁶ We could actually sharpen this dialogue by pointing out that surely Alfred’s wife will only take the pill if he tells her it is medicine. His complete request for guidance would thus be, “Is it permissible to tell the truth accidentally while believing I am lying while giving my wife medicine that I believe is poison?” Thomson has constructed a wonderful conundrum, but its relation to morality is debatable.

perspective, she strongly implied, meant nothing; the only perspective that mattered was the omniscient observer's. Now the perspective is the normal one. Yet this shift has occurred without any acknowledgement by Thomson. (What we are really happy with after Alfred delivers the pill, I suggest, is the outcome, not the act, because the act is Alfred's, and it is evil as such. I will come back to "the outcome.")

Another weakness of Thomson's account is the tight focus on the instant at hand. Not only are the significant human actions that can be coherently morally evaluated voluntary and knowing, they are also often (and certainly here) part of long-term plans—which is another reason why intentions are actually important. Alfred, according to Thomson's own account, plans to kill his wife, not just to give her "that stuff." (He would not undertake the action, except with this intention in mind of killing his wife.) He had to go out to buy the "poison," and surely this was not an instantaneous decision either: it seems incredibly unlikely to imagine him accidentally finding himself in the medicine/poison shop and suddenly deciding to kill his wife. It seems much more likely that his intention to do her harm is part of a settled, long-term plan—which might involve running off to France with his girlfriend. Thus, if he gives her the stuff with the intention of killing her, when he notices that she is alive and healthy after an hour or a day he seems likely to try again to kill her. The "permissibility" verdict "yes" for Alfred is like telling a blind man driving a car "move the wheel ten degrees to the left," and then falling silent. What is true for an instant is useless in the longer term, and where humans have intentions (as in all significant actions), the longer term matters.

If we want to understand Alfred's action of "giving her that stuff," we need to know what he is thinking, intending, and planning over time. The "action" in the instant of attempting to

give poison is not really comprehensible as a human action unless we know more about Alfred. As Bratman puts it, pleading for a historical account of intending,

The ahistorical principle treats the assessment of *an agent* for non-deliberatively intending at t_I to A as an assessment of a time-slice of that agent at t_I . It ignores facts both about her original formation of this intention and about her rationality in retaining it from then until t_I . But such a time-slice picture seems inappropriate given the point...that we are planning agents, for whom the connection between reasoning and action tends to be spread out over time, and facilitated by the formation of prior, partial plans...The time-slice standard seems wrongly to ignore historical facts both about the formation and the retention of the agent's intention...time-slice agents...are always starting from scratch in their deliberations (1999, pp. 78-79).

Bratman's denial that a "time-slice" description is adequate arises in his discussion of a coherent understanding of intention, but his point surely applies to the assessment of the act itself. At every instant, we do not deliberate about what to do in that instant—it would be quite impossible to get through a day that way successfully. With her question, "Is it permissible for Alfred to give it to her?" Thomson asks us for "an assessment of a time-slice of [Alfred] at t_I ." But understanding a time-slice is not a very impressive understanding of an action even in purely physical terms. You could take a nanosecond time-slice of an aluminum bat striking a horsehide spheroid and analyze it, but you would have no idea after your analysis what a swing at a pitch looked like. *A fortiori*, to have a moral understanding of an action, knowing the history of the intention, not just a time-slice, is vital.

4.4.6 Hurd and the Negative Labeling of Non-culpable Agents

I want to consider now Hurd's use of the first-order/second-order schema and a problem I believe it causes there, which is the very troubling negative moral labeling of actors (and their actions), even though "they do all that morality can fairly ask of them" (Ferzan 2012, p. 682, footnote 49). The guard is the most obvious example: we as a society do not expect or want prison guards to let prisoners escape no matter how convincing stories their stories of danger and promises to return, yet Hurd states "if a prison inmate is in fact fleeing for his life with every intention of turning himself in when he is free of danger, then the prison guard in fact *does wrong* to prevent his escape, although, if he has no ability to assess the inmate's intentions, he may be *epistemically justified* in presuming the worst of them, rather than the best" (1999, p. 1553, first emphasis added, second in original).¹²⁷ Here it might seem to be the action that gets a negative moral label, at least if Hurd is following her rule that actions are right or wrong, but actors are culpable or non-culpable. And she does not consider the guard blameworthy. Yet can we say "the guard does wrong," meaning only his action, without placing a negative label on him? After all, "the guard" is the subject of the sentence, and the verb "does wrong" is about moral judgment or it means nothing. Furthermore, it is "he" who is "*epistemically justified*," and it is clear from parallel cases treated by Hurd that the guard himself is *not* "*morally justified*" in her understanding (see 1999, p. 1568). In fact, it seems that while Hurd's "right or wrong action, culpable or non-culpable agent" schema is derived from a first-order/second-order breakdown of act and agent, it has become blurred. The moral labels have a tendency to migrate from action to agent. The moral evaluation of the act leaks into the moral evaluation of the actor.

Now consider the mistaken act of self-defense in Hurd's description, in which the acting person, the home-owner, clearly gets the negative moral label. Let us assume for clarity's sake

¹²⁷ In other parts of the article, Hurd expresses some ambiguity about the guard's action due to his societal role. However, the sentence in the text is not ambiguous.

that the meter-reader has innocently given every impression of being an armed criminal intent on breaking in and doing harm: he forgot his badge or uniform, is catching up on meter-reading at dusk, has grabbed his teenager's realistic-looking bb-gun that was lying in the yard and put it in his pocket and forgotten it, and finally is running toward the home-owner's patio door to escape wasps that she cannot see. It is a high-crime neighborhood, the door is easily breakable, and she has been raped by intruders before.¹²⁸ Yet, while she is not to be blamed ("if culpability is a necessary condition of moral blame, then [such] actors...should be exonerated," 1999, p. 1564), she is still "not *morally justified*," says Hurd. She is not culpable, nor blameworthy, but she has failed to make the moral grade. While it seems that the first-order/second-order distinction should allow a deed to be considered separately from the doer, it is the doer who receives this negative label here. Morality is connected in normal people with feelings of guilt and contrition for wrongdoing, and the home-owner, in Hurd's terminology in this article, has *done wrong*. Should she feel guilt and contrition as a wrong-doer? (To be *epistemically justified* is cold comfort here. In fact, is it coherent to call someone a non-culpable wrongdoer? Both are terms of moral judgment applied to a person; one is positive, the other negative. How does an agent earn both a positive and a negative moral assessment for the same action?¹²⁹)

The language of moral failure in both of these cases comports oddly with our sense that, as David Rodin writes, "the primary role of a theory of moral evaluation is not backward-looking judgement of past action, but forward-looking assessment of how one ought to act" (2002, p. 11).

And as Aristotle similarly states in the *Nicomachean Ethics*, "[moral] philosophy is not, like the

¹²⁸ I apologize if this feels over-specified, but in Hurd's retelling the story appears to leave open the possibility that the householder exercised bad judgment. I want to focus on an action that was clearly epistemically justified.

¹²⁹ It is true that Hurd explicitly notes the need for a technical, legal set of terms that may not agree with ordinary usage, but provide clarity for legal purposes (1999, p. 1557). My concern is not so much with her schema as a legal one, a question I am not particularly qualified to assess, but with its being borrowed by moral theorists.

other [branches], theoretical in its aim—because we are studying not to know what goodness is, but how to be good men, since otherwise it would be useless” (2004, p. 33). If the guard or the homeowner were to ask a professor of ethics or of law beforehand, in search of such a “forward-looking assessment,” whether it was permitted to arrest an escapee with a good story or shoot a person acting and looking like the meter-reader, the answer would be, in the first case, “not only permitted but required,” and in the second, “permitted, without question.” Yet here, where both have done what morality either prescribes or fully permits, neither is “morally justified.”¹³⁰

Note that the phrase “morally excused” is not a possibility here. “Excused” is a kind of accidental bypass of the moral realm. As Rodin puts it, quoting Eric D’Arcy, “The effect of an *excusing* circumstance is to put the wrongful act *ex causa*, outside the court of moral verdict at all” (2002, p. 28, internal citation omitted). Of course, the verdict “not morally justified” is technically correct within this (legal) descriptive system—but then, if the system is appropriated by moral theorists, it appears to imply that Rodin’s statement about moral evaluation is actually the opposite of the truth: “the primary role of moral evaluation” is really “backward-looking judgement of past action.” That is problematic.

4.4.7 *The Thomist Account and Why it Works*

We are left with the need, if the tradition and I are right, of a good description of such an “abnormal” action, in which intention matches badly or not at all with an outcome due to the “involuntariness” of coercion or non-culpable ignorance. In keeping with the tradition’s focus on the acting human person, such a good description will be agent-centered. I offer such a description below, after noting Aquinas’ description of a “normal” act.

¹³⁰ See note above.

Aquinas, in his careful descriptions of a variety of actions by human beings, offers a theory that avoids the problematic results I have described above. To begin with, he identifies “human actions” as voluntary, a description that includes adequate knowledge of what is happening. He distills much of his theory of moral action¹³¹ into the rather long “question 18” of the first part of the second part of the *Summa Theologica*. I will focus on a summary in article 4, beginning with an objection Aquinas advances to his own thesis in that article: “Further, a good action may happen to be ordained to an evil end, as when a man gives an alms from vainglory; and conversely, an evil action may happen to be ordained to a good end, as a theft committed in order to give something to the poor. Therefore an action is not good or evil from its end.” The objector perhaps anticipates the first-order/second-order distinction, arguing that an end (what is intended) is not *necessarily* related to what an act is. (Aquinas argues that the end is an important source of the goodness of an act, although he acknowledges the objector’s point.) His reply ends with a quotation that he often turns to:

Nothing hinders an action that is good in one of the way[s] mentioned above, from lacking goodness in another way. And thus it may happen that an action which is good in its species or in its circumstances is ordained to an evil end, or vice versa. However, *an action is not good simply, unless it is good in all those ways: since “evil results from any single defect, but good from the complete cause,”* as Dionysius says (Div. Nom. iv) (*Summa Theologica* I-II, q.18 a.4, emphasis added).

In the body of the reply, Aquinas says the following:

Accordingly a fourfold goodness may be considered in a human action. First, that which, as an action, it derives from its genus; because as much as it has of action and being so

¹³¹ For Aquinas some actions are beneath moral evaluation, even if in some limited sense voluntary and knowing, because they “do not proceed from reason.” These are actions such as “picking up a [piece of] straw” (articles 8 and 9).

much has it of goodness, as stated above (Article 1). Secondly, it has goodness according to its species; which is derived from its suitable object. Thirdly, it has goodness from its circumstances, in respect, as it were, of its accidents. Fourthly, it has goodness from its end, to which it is compared as to the cause of its goodness.

For Aquinas, then, we can consider an action under a number of aspects, but for it to be “simply good,” it has to qualify as good under each. That allows for a mixed evaluation of one act, since the full appropriate description of the act may have many parts. (We are not forced, as Thomson appears to be forced, to state that if the outcome of the action is good, that the action is “permissible.”) And, as the objector notes, sometimes the intention behind an act is not clearly matched to the act itself.

Aquinas offers four ways for an action to be good or bad, but here I will discuss here only the last three mentioned above, the goodness (or lack of it) derived from “the object,” “circumstances,” and “the end.”¹³² For most actions, we look at all three aspects to make a moral judgment. I begin with the “object,” which is the immediate choice the agent is making, and usually defines the type of action it is. Examples Aquinas gives are “to make use of what is one’s own,” and “to take what belongs to another.” The first is good, although not at a very high level, and the second is usually theft (unless one is starving and steals food, in which case, since the ultimate reason for the existence of goods is their use by humanity, it is good). In effect this is the outward description of an act as an act—what it is about (*ST* I-II, q.18 a.2). It does not

¹³² The first way, the goodness of the act “as existing,” is truly odd to a modern sensibility, but makes good sense within Aquinas’ overall system. If we look at a murder, or an act of cheating on one’s spouse, the moral badness involved, Aquinas might say today, builds on a kind of pre-moral goodness. The murder may be accomplished by a skillful shot—and skill remains good even when, as here, it is tied to a bad end. The act of sexual intercourse is a fundamentally good thing for Aquinas, even if cheating on one’s spouse is not.

concern the inner state of the actor. Often, however, this is enough to define the moral status of an action: a theft is wrong, whatever additional motivation may be behind it.

The second way an action can be good or evil concerns circumstances. There are infinite possibilities here. When, where, and how one performs a permitted action can take away its moral goodness: drinking to “the point of hilarity” with friends (and stopping before drunkenness) is a good thing in itself, according to Aquinas: but surely this is not the case immediately before a major exam, or before driving (and it would be even worse before driving in heavy traffic). Think of any good (or even permissible) action, and surely one can think of an adverbial circumstance—a when, where, or how—that would make it foolish, dangerous, reckless, or likely to cause harm in some way. On the other hand, an action that is bad for other reasons does not become good from circumstances, although the circumstances may mitigate the badness. (Alfred’s action comes to mind: it is bad to attempt to poison one’s wife, and nothing makes that a good action: but the accidental circumstance that what he believed was poison was actually medicine greatly mitigates the overall evil of Alfred’s act, though not the inner evil of his intention.)

The third and most vital area of evaluation is “the end,” and here we deal with intention: what we will to achieve, the reason for which we are acting. Of course this is vital to any reasonably comprehensive understanding of any significant human action. When we see someone doing something, we assume intentions, and when the action seems odd, we wonder what the intention is—or how the person could be so “unintentional.” “Why on earth did you do that?” we ask. “Well, I didn’t see him, that’s why I turned,” or, “I thought you would think it was funny.” We appeal to intentions endlessly in explaining our actions to ourselves and others. Courts make many distinctions between guilt and innocence precisely by looking at intentions.

Morality is the judgment of human action, and in order to judge a particular action, we ask “why?” The intention is, in most cases, the agent’s answer to that question, and the heart of a human action.

Usually, the end coincides with the “object” of an action. In most willed actions of adult humans with normal mental health, when we intend and try to do something we choose some means to achieve it, and if we have a little common sense, the means are suited to the end intended. Comedies, and “Darwin award” videos, are full of means poorly chosen to achieve the end—but reasonably intelligent people rarely accidentally give life-saving medicine to their wives when thinking it is poison.

Aquinas’ account: when intentions and outcomes fail to match

Yet such mistaken or involuntary actions occur, and must be considered. Aquinas also offers a more detailed account of a mismatch of ends and outcome, such as Alfred’s case. Although Aquinas is considering a man intending to do *good* whose action is problematic due to his ignorance, the opposite of Alfred’s case (and more similar to Hurd and Greenawalt’s example of the householder who shoots the meter-reader), the answer shows how he would consider Alfred’s case as well. In *Summa* II-II, question 59 (which concerns “injustice”), article 2 asks “Whether a man is called unjust through doing an unjust thing?” The heart of Aquinas’ answer is that an action,

takes its species and name from its direct and not from its indirect object: and in things directed to an end the direct is that which is intended, and the indirect is what is beside the intention. Hence if a man do that which is unjust, without intending to do an unjust thing, for instance if he do it through ignorance, being unaware that it is unjust, properly

speaking he does an unjust thing, not directly, but only indirectly, and, as it were, doing materially that which is unjust: hence such an operation is not called an injustice.

Aquinas does not make a strong “first-order/second-order” distinction here, but he does consider those aspects of an action. The act, considered objectively (by God or someone with specific knowledge of the case who cannot intervene, that is, considered in its first-order dimension) is not just, but (second-order dimension) the man is just. However, a moral evaluation is not applied to the (first-order) action, because it is the act of an agent, and he did not act in an immoral fashion—the action itself “is not called an injustice.” Instead, the material of the act, so to speak, is “an unjust thing.” We might compare this to a great artist who buys (through no fault of his) paint that will in some way spoil after it dries. After he uses it, the paint spoils his well-done painting. It is the *outcome*, then, that we judge, but when the actor has done “everything morality requires,” we do not assign the actor quasi-responsibility for the outcome, even if it is terrible. He acted, but his intention, the heart of a “human action,” was good. Due to his non-culpable ignorance, this materially flawed action did not rise to the level of a “human action,” for such actions are voluntary in the full sense, and include knowledge that may be expected in the agent. Absent those conditions, the agent is not to be judged for an outcome that is due to his lack of knowledge, nor is a moral label to be attached to an action—insofar as it was an act, it was the act of a just man. Aquinas’ terminology, though odd to us, accords with the terminology of the criminal law, which never uses the language of moral condemnation for an action where the actor is not culpable.

We can apply this language of Aquinas’ account of a “mismatched” action to Alfred’s action in Thomson’s scenario. Any full description of what occurred will note that, like that of the mistaken just man, this action did not rise to the level of a “human action”—it is not a

voluntary act in the full sense. Alfred is, however, morally culpable for something very serious: the acted-on intention to kill his wife. Through what appears to be sheer luck, a circumstance prevented his action from achieving what he intended, and a good outcome occurred instead, for which Alfred clearly bears no responsibility. Alfred does “indirectly, and, as it were...materially that which is” (in this case) good. “[H]ence such an operation is not called” a good act, even though the outcome is good. Summarizing: overall it is not a voluntary action in the full sense. It is a materially good action through an accidental circumstance, but Alfred remains morally culpable for forming and acting on an intention to murder his wife. The question of “permissibility” or moral goodness cannot and need not exist on a single dimension.

Adding moral height and depth

Cavanaugh makes intention the marker of moral depth. To illustrate his meaning, he takes the well-known “tactical bombing/terror bombing” comparison and adds “sadistic bombing.” The terror bomber uses the deaths of civilians as a means to an end, which is already profoundly disrespectful of human dignity. But for the sadistic bomber “the terror and deaths of the non-combatants are ends in themselves, sought for their own sake” (2006, p. 139-41), demonstrating the moral depth of which an evil action is capable and its relation to the will of the agent. Cavanaugh quotes Thomas Nagel in support of the notion that aiming at evil for its own sake is worse than choosing it as a means:

to aim at evil...is to have one's actions guided by evil...But the essence of evil is that it should repel us. If something is evil, our actions should be guided...toward its elimination rather than toward its maintenance. That is what evil means. So when we aim at evil we are swimming head-on against the normative current. Our action is guided by

the goal at every point diametrically opposite to that in which the value of that goal points. (quoted in Cavanaugh 2006, p. 143-44, emphases in Nagel's text)

To agree that Nagel is right here is to agree that Aquinas is right that intention matters. What we aim at, what guides our action is precisely what Aquinas means by intention. Without considering it we not only cannot make sense of many human actions, we also cannot account for heights and depths of good and evil in an action. To return to an earlier example, if the Vietnamese stopped the Cambodian genocide for selfish reasons, it was still good to stop it—but it would have been even better to do so for the right motives.

In Aquinas' account, then, we have a comprehensive way to deal with complex moral issues, one that covers the awkward, difficult cases, distinguishes acts done ignorantly and involuntarily from those not so done, and offers a full range of praise and blame for actions. It makes morality what is humanly possible. It avoids the problematic phrasing of much modern moral theorizing. It states, as we must feel, that the heart of moral evaluation is the answer to, "why did you do that?" In doing all this, it also avoids any implication that people should perhaps suffer harm for actions for which they bear no responsibility. It highlights morality's depth. It is, I suggest, a superior account.

CHAPTER V

MCMAHAN'S FAILED REDUCTIONISM

“We cannot...characterize behavior independently of intentions, and we cannot characterize intentions independently of the settings which make those intentions intelligible both to agents themselves and to others.”

—MacIntyre¹³³

Jeff McMahan is the author of the 2009 *Killing in War* and the author or editor of many more, as well as numerous articles, including one that I will especially consider below, “The Basis of Moral Liability to Defensive Killing” (2005). He has been the de facto leader of “revisionists” seeking to amend Michael Walzer’s legacy by putting the morality of war on a firm foundation of individual rights. *Killing in War* is a recent, impressive contribution to that effort. It contains a sustained attack on the “moral equality of combatants;” far-reaching discussions of the status of combatants on just and unjust sides in wars (with extensive consideration of their possible excuses); an elaboration of his notion, developed particularly in his 2005 essay, that there is a kind of responsibility for a forced choice that may arise when an agent has voluntarily engaged in an activity with a “foreseeable risk” of leading to harm to

¹³³ *After Virtue* (2007, p. 206).

innocents, a responsibility that can lead to liability to defensive action (and the application of that notion to war); and a consideration of whether this notion would open the floodgates to attacks on civilians (which he denies). It is a compilation of arguments made over a number of years into a single whole.

From the tradition's standpoint, many of McMahan's concerns about the morality of war are quite welcome. His overall concern about our societal carelessness about whether our wars are just is a vital one. Parts of that concern are expressed in his call for introspection by persons considering a military career and soldiers about to take part in a war, and in his emphasis on the fact that a decision to launch an unjust war creates a poisoned tree, none of whose fruits is likely to be good. One of the results of launching such a war will be the killing of soldiers who have done nothing that deserves death, something that is at the very least closely akin to murder. The notion of a "moral equality of soldiers" obscures this fact, and to the extent that it calls attention to this, McMahan's attack on the idea has been helpful. In addition, while I question many of his arguments below, it is encouraging from the tradition's standpoint that he continues to believe in just war theory and the possibility of just defensive wars at least.

Despite such significant points of agreement, McMahan's version of just war theory is strongly opposed to the position I have developed in this dissertation concerning defensive killing on both the individual level and the collective level (and, in effect, he reduces the latter to the former). Claiming to offer an account of a just war that respects individual rights, McMahan leaves us with an account of war that does not meet that criterion. McMahan believes in the morality of a defensive war, but has not shown, on his own premises, as I will argue below, that it "works."

My first section below aims to clarify the “moral equality of combatants” (MEC) from the tradition’s point of view. My next offers a critique of a key element in that book, what Seth Lazar calls “agent-responsibility,” through the five cases that illustrate that notion for McMahan. The idea of a kind of limited responsibility that can, in a forced choice situation (such as war), lead to liability to be killed is the heart of McMahan’s current attempt to put the morality of war on foundations that respect individual rights. I next consider Lazar’s stinging attack on McMahan’s account, “The Responsibility Dilemma for Killing in War: A Review Essay” (2010). McMahan responded to Lazar’s broadside in 2011. Because I think Lazar’s “internal” critique, which found an extended contradiction within McMahan’s work, was incisive and correct, I summarize it briefly and focus my own analysis on McMahan’s response. I then, in a final section, apply Russell Christopher’s elegant attack on objective theories of defense to McMahan’s theory.

5.1 The “Moral Equality of Combatants” (MEC)

I begin this look at McMahan’s work and the controversy over it by addressing an issue that is key to *Killing in War*, which is Walzer’s claim of the “moral equality of soldiers” (2000, p. 34: the phrase is in the header, not the text, but Walzer repeats the “moral equality” phrase elsewhere). Lazar calls *Killing in War* “a sustained assault on the linchpin of Walzerian just war theory, the moral equality of combatants (MEC)” (p. 181). It seems to me that McMahan is both right and wrong about the MEC. He is right in the sense that when we look at the issue from a thoroughly objective standpoint, we have to agree with him (and I think Walzer might as well). The soldier engaged in an unjust assault on another country who kills a soldier rightfully defending his homeland is *objectively* speaking close to a murderer. He may believe he is fighting in a just cause, he may accept propaganda from the government he has trusted (and if

many professors and pundits accepted the assurances of Colin Powell at the UN before the invasion of Iraq, can we blame soldiers?), he may have faced a variety of coercive and persuasive forces before embarking on the campaign and another variety afterwards. Yet in cases where the facts are clear, we have to say that this soldier killed an innocent man who did not deserve in any way to be killed. The conclusion follows logically from the idea that there are just and unjust wars (or, as McMahan carefully points out, just and unjust sides at times in wars). I think McMahan's point about the objective moral *inequality* of soldiers, in cases where one side is just and the other clearly unjust, can and should help remind us of the gravity of participating in an unjust war.

Yet I doubt that Walzer was ever making such an extravagant claim as that soldiers of an aggressive and of a (rightfully) defensive side are *objectively* moral equals, precisely as soldiers of their respective sides. Where Walzer's analysis is right, I think, can be seen in the following passage: "If we are to judge what goes on in the course of a battle, then, 'we must treat both combatants,' as Henry Sidgwick has written, 'on the assumption that each believes himself in the right'" (2000, p. 128). Given the exigencies of human nature, and the whole range of mitigating factors affecting ordinary soldiers that Lazar has eloquently described (pp. 194-201), I believe this is the only real way to avoid a harshly judgmental attitude about millions of men and women toward whom one is already likely to show a high degree of negative partiality—enemy soldiers. I would not want the soldiers of my own country to face, one by one, the kind of severe moral judgment that McMahan subjects them to in the pages of his book. McMahan's dissection of the MEC becomes, I think, too extensive, and it overvalues the objective against the subjective situation of soldiers.

But on the other hand, in the passage from Walzer quoted above, he immediately continues, in a non-ironic way, “And we must ask...without reference to the justice of their cause, how can soldiers fight justly?” (2000, p. 128). This, for the tradition, is simply too strong. How likely is it that the politicians who send soldiers into battle will botch the initial question of the justice of the war, yet insist on justice in the fighting of it? I believe Walzer too strictly divided the *ius ad bellum* from the *ius in bello*, and that his moral analysis suffered accordingly at important points. According to the tradition, the overall justice of a complex action, such as a war, must lie in the end that is sought, and if that is lacking, justice on the way to the end can only be sporadic, partial, and in fact opposed to the end for which the soldiers are actually fighting, and thus basically accidental. Still, that partial justice is better than flagrant injustice. (Of course this does not mean in any way that a just end guarantees just fighting, only that an unjust end strongly mitigates against it.)

Overall, I find the problems with McMahan’s treatment of the MEC are first, that his treatment of the subjective moral equality of soldiers is terribly slanted, as Lazar convincingly shows (2010, pp. 190-202). Second, while McMahan wants to keep the “legal equality of soldiers” for now (2009, pp. 108-109) his suggestions on how the MEC might be replaced, to the extent they are taken seriously as ideals and put into practice, would leave us in a worse place than we are now. We need McMahan’s reminder of the reality of something objectively close to murder on one side (as he points out, the tradition held this 500 years ago and more, 2009, p. 33 and p. 237, note 26), but in practice we must not let go of the aim of treating soldiers as persons not charged with deciding the overall justice of a war, but quite strongly charged with not killing the innocent, raping women, and the other crimes that soldiers on the objectively just and the objectively unjust sides are quite tempted to commit in the heat and the aftermath of battle.

5.2 The Tiny Risk of the Conscientious Driver

Before I turn to Lazar's elegant critique of the "Responsibility Account," which he calls "agent-responsibility," I want to draw my reader's attention to one of the foundational passages for that account, in *Killing in War*, "The Conscientious Driver" (2009, p. 165), and the surrounding cases. In a "forced choice" situation, McMahan holds, even a very tiny "responsibility" for an activity that led to the choice, based on a risk assumed in that activity, makes the person who took on the risk "liable to defensive action," which may be lethal force. The "Conscientious Driver" case is pivotal enough that it is useful to have it in full, followed immediately by McMahan's comments:

The Conscientious Driver A person who always keeps her car well-maintained and always drives carefully and alertly decides to drive to the cinema. On the way, a freak event that she could not have anticipated occurs that causes her car to veer out of control in the direction of a pedestrian. [end of case]

I will assume that on an objective account of permissibility, this conscientious driver is acting impermissibly. It is *impermissible to drive, or to continue to drive, when one will lose control of the car and threaten the life of an innocent person...* She does not intend to harm anyone and cannot foresee that she will harm anyone, but she knows that driving is an activity that has a very tiny risk of causing great harm—so tiny that the activity, considered as a *type* of activity, is entirely permissible. But she has had bad luck. Note that although her action is subjectively permissible, it is not subjectively justified. She has no positive moral reason to engage in the activity that she knows has a tiny risk of unintentionally killing an innocent bystander. (2009, p. 165, first emphasis added)

There are four other threats who bear less responsibility, in McMahan's account, for the death of an innocent person: *Resident*, who attempts to shoot someone in self-defense due to a mistaken but reasonable belief that he is a notorious murderer; *Technician*, who diverts a malfunctioning drone away from houses (which happen to be empty) and onto a bystander; *Ambulance Driver* (described above); and *Cell Phone Operator*. The last of these bears no responsibility according to McMahan ("these facts absolve him of all responsibility for the threat he poses," 2009, p. 166), despite the fact that his action leads to the death of an innocent person (his cell phone has been rigged to detonate a bomb when he presses "send," he presses send).¹³⁴ The other three are in the middle, sharing some "responsibility" for the deaths of innocents, although, as McMahan stresses, not one of them is blameworthy. As McMahan concludes concerning the Conscientious Driver on the following page, after repeating some of the reasoning above,

the risk she knew her act carried has now, improbably and through no fault of her own, been realized. Because she knew of the small risk...and because she nonetheless voluntarily chose to drive when there was no moral reason for her to do so—in short, because she knowingly imposed this risk for the sake of her own interests—she is morally liable to defensive action to prevent her from killing the innocent bystander (2009, p. 166).

On the foundation of such notions McMahan builds the theoretical edifice Lazar calls "agent-responsibility," which is McMahan's basis for the just side killing soldiers who are

¹³⁴ Ferzan, a legal scholar, asks, "Why isn't the cell phone operator also morally responsible [i.e. "agent-responsible," in Lazar's terminology] for the threat he poses, despite his ignorance? What McMahan owes us is a principled account of moral responsibility." In the footnote attached to this text, she cites Whitley R.P. Kaufman's summary of the problem: "to explain how one can lack culpability and yet have sufficient moral responsibility to be liable to be killed" (2012, p. 678 and footnote 35, internal citation omitted).

“Innocent Threats” (2009, 166) in a just war. Note the extreme importance for McMahan’s analysis of the objective evaluation of Conscientious Driver, whose act is “impermissible” due to something that “will” take place. (The other three cases of “responsibility” are much the same in this respect, although perhaps less obvious. I will return to this vital “objective” factor at the end of this chapter.) Of course, many moral theorists would agree that Driver is responsible for driving (a completely innocent, and, for the tradition, likely a praiseworthy choice—even driving to the cinema)¹³⁵ and at the same time deny absolutely that Driver bears any responsibility whatsoever for the “freak event.” It was completely outside her control. *Ex hypothesi* she is not the cause of the freak event itself, as the intervening mechanical failure both caused the car to go out of control and veer toward the pedestrian, and made her unable to change the course of the car.¹³⁶ The supposed risk she took by driving needs some serious consideration, as does the question whether assuming such risks leads to moral responsibility for such an outcome.

As one theorist quips, “in [the scenario] Threat from Projectile, Projectile [who has been picked up and hurled at you by a tornado] seems to meet McMahan’s conditions for being responsible for the threat to you: he moved to *Kansas*, not Oregon. Surely, he knew that there was some tiny risk of being hurled through the air by a tornado” (Doggett 2011, p. 231, note 19).¹³⁷ For a humorous assessment from the tradition’s point of view of this kind of occurrence, I suggest McInerney’s discussion of what might happen after he drives a golf ball. Near the end of the discussion, he notes, “My opponent would reasonably regard me as eccentric if I said that I

¹³⁵ For Aquinas, innocent pleasures at the right time are positive goods, see *S.t.* I, q.5 a.6. McMahan’s ascription of full liability to be killed to *Conscientious Driver* due to lack of a “positive moral reason” for driving is startling for the tradition, and feels frankly puritanical.

¹³⁶ I owe this point to David Mapel, in an unpublished paper entitled, “Agent Causation and Liability to Defensive Harm.”

¹³⁷ I choose to pass over in silence the defensive privilege that fact gave the Wicked Witch of the East when Dorothy’s house threatened to land on her in Oz.

would not drive just now because of a number of logically possible consequences of my doing so. A low-flying aircraft, say a stealth bomber, might be brought down by my Spalding 3. There are many reasons why I ought not to golf, perhaps, but this is scarcely one of them.” In his discussion of an outlandish scenario in which he drives the ball and a car then rolls onto the fairway and the driver is killed by the ball, McNerny writes, “I can say that the imprudent driver died because I drove my ball, but I am not the cause of his death in the same way that I am the cause of my ball’s going a certain distance” (1997, pp. 8-9).

But let us leave those questions aside for the moment and consider McMahan’s proposal. One problem for some readers might be that it is not immediately clear how something can be, subjectively, both “permissible” and “not justified.” If Driver is subjectively permitted to drive carefully, and has her own perfectly good innocent reasons for doing so (“as a *type* of activity, [it] is entirely permissible”) how can she not be subjectively justified? In the next sentence McMahan provides his answer: in order to be “subjectively justified,” one needs a “positive moral reason” to engage in any activity with a tiny risk. The next case, *Ambulance Driver*, is exactly the same as *Conscientious Driver* except that the driver is an ambulance driver and is doing her job of driving an ambulance to the hospital with a patient. “Ambulance driver,” McMahan says, “therefore has a subjective justification, and not merely a subjective permission, to act in a way that she knows has a tiny risk of causing great harm to an innocent bystander.”

Now we have a combination of a “tiny risk” and a lack of “subjective justification” which together make one “liable to defensive action.” To escape liability to defensive action when taking on even a tiny risk, one needs always to have a subjective justification, then? But that would be too fast: even *Ambulance Driver*, who *has* a subjective justification, is still liable to defensive action—just less liable than “Conscientious Driver. It is not enough to avoid innocent

pleasures (which are not “justified” when a risk is involved). To avoid liability entirely one must (if this is even possible) avoid all behavior that carries even a “tiny risk” of harm to others. Even in three of the four cases of persons less “responsible” than *Cell Phone Operator* for the deaths of innocents (2009, pp. 164-65), according to McMahan, “although all of these three agents are blameless, it is reasonable to suppose that all are nevertheless responsible for their choices and that this responsibility, however minimal, is a basis for liability to defensive action” (2009, 167). pp. 8-9).¹³⁸ (Although McMahan stresses repeatedly that differing degrees of responsibility lead to different degrees of liability, e.g. p. 175, it seems only fair to assume that when McMahan claims someone is liable to “defensive action,” he does not mean action that does not accomplish the aim of defense, and thus that he means that if necessary each of these “responsible” threats may be permissibly killed, through what is perhaps a very complex calculation, if that is the necessary defensive action, see e.g. p. 178.)

I want to focus here on the issue of risk. McMahan claims that in four of the five cases, the persons involved take risks or impose risks on others. Now, it is widely agreed, and the tradition agrees, that shooting someone (the case of *Resident*) involves a moral risk, a risk of doing the wrong thing. However, Ferzan argues against one interpretation of this risk: “I am not sure how mistaken self-defenders who honestly and reasonably believe they are being attacked are taking gambles and engaging in avoidably risky behavior. After all, they are likewise taking a gamble if they do not defend themselves, and they are gambling with their lives” (2012, p. 682,

¹³⁸ Ferzan objects from a legal standpoint: “A conscientious driver, or ambulance driver, who behaves reasonably but nevertheless harms another is not liable in any court of law. Not for even one dollar’s worth of damage... And indeed, although McMahan suggests that if tort law were governed solely by moral principles, it would look like his liability view, there is reason to doubt this. Although law is certainly not dispositive evidence of moral truths, it does seem to be telling that neither criminal law nor tort law draws the line that McMahan would have us draw.” (2012, pp. 677-78).

footnote 49). Still I leave *Resident* to one side, as I agree with McMahan to the extent that I agree that the risk is both important and high.¹³⁹

But in the other cases, I want to stress that McMahan's basis for moral liability is no longer the traditional criterion of conscious action, but *action that carries (even a 'very tiny') risk of indirectly eventuating in harm*, including actions that are innocent, good, and even necessary actions. *Conscientious Driver* no more "causes" the car to threaten the pedestrian than *Cell Phone Operator* "causes" the bomb to go off, if causality is understood in terms of conscious, knowing action—and moral responsibility is traditionally based on the latter kind of causality.¹⁴⁰ That means that the concept of "risk" bears a heavy burden in this theory. Yet for this pivotal ingredient in his theory, risk, McMahan specifies no level that triggers moral liability beyond the fact that it can be "very tiny." Yet *Cell Phone Operator* is immune: his risk must be below "very tiny."

We might begin by taking McMahan literally: clearly if something is possible *at all*, there is a "tiny risk" that it will occur. The only time we can be sure there is not even a tiny risk of something occurring is if it is completely impossible. But let me relax that standard slightly and suggest "inconceivable" instead, meaning "inconceivable within my understanding of how the universe works." In that case, of course, *Cell Phone Operator* runs a tiny risk, and is not relevantly different from *Conscientious Driver*. If McMahan can conceive of the rigging of the cell phone, so can its owner.

¹³⁹ Ferzan discusses McMahan's assertion that *Resident* is liable to be killed by the Twin (2012, pp. 676-77). She notes Otsuka's similar assertion regarding the "hologram gun": "actor is liable to defensive force when he sees a realistic hologram of a gun in your hand and aims to kill you defensively because he had rational control over the dangerous activity of using defensive force" (2012, p. 677, footnote 31). See also Lazar 2009 (p. 709, and pp. 724-25 for an insightful analysis and application to war situations).

¹⁴⁰ Traditionally, causality can also be traced to knowingly reckless or careless action, but clearly *Conscientious Driver* does not fit that bill.

McMahan might argue that this is unfair, since his standard is “very tiny,” but also “foreseeable.” McMahan states that *Cell Phone Operator* “does not choose to engage in an activity that has a foreseeable risk of causing serious harm” (2009, 166). But I argue (along with Ferzan) that “foreseeability” is highly ambiguous here. As Ferzan notes, first, is McMahan using the word in an objective or subjective way? Whose ability to foresee is implied?¹⁴¹ Second, if we simply take the word literally, it means “able to be foreseen as a possibility,” and we are back to my earlier suggestion that if anything is possible, there is a tiny risk that it will occur. But McMahan, rather idiosyncratically, seems to mean (if we read him charitably) not just “able to be foreseen as possible” (as the freak accident is possible), but in addition as more likely than my cell phone being rigged to set off a bomb—although how much more likely is not clear. Somewhere on the spectrum between the rigged cellphone (for McMahan, effectively zero risk) and the freak accident, and perhaps only at the freak accident, one crosses from “effectively zero” into “tiny risk” territory. But even the latter peg is counter-intuitive. Many a driver with decades of careful, sometimes fast, always accident-free driving, has never considered as even a possibility the accident McMahan specifies, I am quite sure. Why should I become liable if I fail

¹⁴¹ Ferzan writes, “Foreseeability will always be a matter of (1) the selection of the description of the harm and (2) the selection of the information available to the assessor. (All harms that occur are foreseen by the omniscient, even the cell phone.) It is true that driving seems risky (people die in car accidents) but it isn’t true that we would say that safe driving with a well-maintained vehicle is risky vis-à-vis a mechanical malfunction. That is, the question, “what if my well maintained brakes fail?” is not the sort of risk the Conscientious Driver foresees when he chooses to drive his car...Moreover, does McMahan require that the harm be foreseen by the actor? Would it matter if Fearless Fred never thinks that any harm can come from driving his car? ...what if Nervous Nellie reads the literature on self-defense and becomes convinced that we are in the midst of an epidemic whereby evil villains throw people down wells? Will her mere appearance in public now be a risk-imposing activity because she believes it is? Are we to determine whether the risk is foreseeable from the standpoint of the agent, a fully objective standpoint, or some place in between?” (2012, pp. 679-80). In his earlier paper, McMahan wrote, “There is, of course, a problem about how probable a threat or harm must be in order to count as foreseeable. I cannot address that problem here; for present purposes I will sidestep it by simply invoking the notion of a “risk-imposing activity...[etc.]” (2005, pp. 397). This seems inadequate.

to factor in to my moral calculations a ridiculous possibility that few people ever even imagine (the “freak event”), but be fully excused if I do not factor in a *really* ridiculous possibility (the cell phone rigging)? And how do we quantify the difference? I would simply argue that an enormous amount hangs on this difference, and it is radically underspecified in McMahan’s theory. Neither “a tiny risk” nor “a foreseeable risk” is a usable moral marker—there is no objective measurement of either one (it is like a distinction between “pale blue” and “very light blue”) which is already problematic for two points on a continuum that are meant to distinguish a point where responsibility applies from one where it does not. If I take a variety of low-risk situations to a variety of ordinary people (and risk experts) and ask them to quantify each as to whether it is “a tiny risk” or a “foreseeable risk,” I doubt that I will get any consistent pattern. Yet the whole difference between “responsibility” and “no responsibility” rests this distinction.

In addition, the criterion strangely stigmatizes people doing innocent things (*Conscientious Driver*), things that we as a society just want people to do (*Technician*), and downright good things (*Ambulance Driver*).¹⁴² One criticism Ferzan offers of McMahan’s use of “risk,” is that distinguishing the responsible from the non-responsible on McMahan’s basis “might make more sense if we lived in a world in which we could choose not to impose risks, but we don’t” (2012, p. 680). Ferzan also argues that McMahan mixes objective and subjective factors in his evaluation. I will return in the last section of this paper to those objective factors. For now, my conclusion based on the argument thus far is that agent-responsibility is not a coherent notion.

5.3 Lazar’s Critique of McMahan

¹⁴² As Ferzan notes, each one does did “all that morality can fairly ask” of him or her (Ferzan, 2012, p. 682, footnote 49).

5.3.1 *The Double Standard of Liability*

I turn now to Lazar's elegant critique, which shows to me why McMahan's project, despite some strengths, is to a great extent dangerous, and certainly fails. I must radically simplify even Lazar's summary. He points to the following as key elements of McMahan's work: the right against being killed is nearly absolute. The criteria for being killed are the same in ordinary life as in war. "A person can become liable to be killed...when he is morally responsible for an objectively unjustified [lethal] threat to another person. Moral responsibility can be minimal or maximal." Minimal responsibility requires "voluntary choices that foreseeably contributed to the threat coming about," which requires responsible agency (2010, p. 183). "Minimal responsibility can be called *agent-responsibility*." Maximal responsibility adds the criteria of blame- or praise-worthiness, and if blameworthy, "is known as culpability." Moral responsibility does not require posing a threat, and conversely a person may pose a threat without being responsible for it (2010, p. 184). Posing a threat justifiably (i.e. as a soldier on the just side) does not make one liable to being killed, but one can be responsible for a threat that one does not actually pose.¹⁴³

Minimal moral responsibility is sufficient for liability to be killed. McMahan concedes...that this is *prima facie* disproportionate...He resolves this concern with an innovative take on proportionality in self-defense, arguing that liability comes in degrees, such that the more responsible B is for an unjustified threat, the more liable he is. Defensive harm should be 'narrowly proportionate' to his degree of responsibility. (2010, p. 185)

¹⁴³ McMahan states this clearly (2009, p. 157).

Narrow proportionality is illustrated with a scenario of defense against an attempted unarmed robbery of a precious vase, with four possible sub-scenarios, modes of defense that involve varying degrees of risk of harm to the defender and the would-be robber. These sub-scenarios illustrate principles of narrow proportionality, including collateral as well as intentional harms (2010, p. 185).¹⁴⁴ Greater force may be used against a more responsible threatener, and more risk must be assumed by the defender against a threatener or attacker who is less responsible. These principles are applied to war. The “targets of intentional killing” must be “liable to that fate,” and for those who suffer collateral harm the good achieved must be great enough to override their right not to be harmed (2010, p. 186). Finally, the combatants on the unjust side (“unjust combatants”)¹⁴⁵ “are responsible for unjustified micro- and macro-threats.” Just combatants may target them intentionally and may also “inflict some collateral deaths,” but combatants on the unjust side “enjoy neither of these permissions.” Only soldiers on the unjust side are liable to intentional attack, and only civilians on the unjust side are liable to be killed collaterally. Those on the unjust side “have no rights to kill at all: MEC is mistaken.” (2010, p. 187).

Here Lazar launches his critique, announcing two dangers to the possibility of fighting a just war that arise from two elements in McMahan’s schema. The first danger arises from the idea that it is morally permissible to kill only those who are liable to be killed through agent-

¹⁴⁴ Lazar cites p. 156 in *Killing in War*, but that page carries only a simplified version of “Vase,” without the word “vase,” and with “bottle” and “kick,” but not “tackle” or “grab.”

¹⁴⁵ I accept the need at times for shorthand terms, but this one violates Solzhenitsyn’s indispensable moral rule that the line between good and evil does not run between any human groups, but through all human hearts (Solzhenitsyn, 1985, p. 312). For this reason I use it when it is called for in discussions of McMahan’s work, but always in quotation marks in my own prose. I fully agree that one side may be just and one unjust in a war, but the phrase “unjust combatants” suggests that all the soldiers on the unjust side are unjust human beings. Endlessly repeated, the phrase eventually seems to prove the thing that is being argued. My point here is Orwell’s: “the slovenliness of our language makes it easier for us to have foolish thoughts” (Orwell, 1946).

responsibility. If this is the case, then if we are strict in determining the responsibility that leads to liability, then soldiers are unable to kill morally. On the battlefield, in fast-moving combat, there is no way for soldiers to acquire the relevant knowledge needed to assess liability of the individual soldiers they must target (2010, p. 187). This means that in practice, a just war is impossible. However, if this requirement is relaxed, we no longer have permissible killing. The “second danger is that by arguing that liability is grounded in responsibility for unjustified threats, not the fact that one poses the threat,” he makes non-combatants share in the responsibility for threats and thus liable to be killed, and so “McMahan opens the floodgates to total war.” The choices McMahan’s theory actually open up are either pacifism, or total war (2010, p. 188).

Lazar notes that McMahan’s earlier writings show that he is aware of these dangers, as his move away from his earlier belief that a soldier was required to be culpable in order to make him liable to be killed. His more recent position, which addresses that concern, is that, “agent-responsibility is sufficient for liability to be killed. Although his account of narrow proportionality militates against it, McMahan emphasizes that when the threat is sufficiently grave even a very slight asymmetry can be decisive (p. 169)” (2010, p. 188). With this shift, McMahan avoids the impossible requirement of determining who is actually culpable, since agent-responsibility should be much easier to discover.

Lazar continues: “Additionally, in a line pursued heavily in *Killing in War*, [McMahan] insists that an ‘overwhelming majority’ of unjust combatants are to some degree culpable, so just combatants are entitled to presume this is true of them all.” The footnote to the preceding sentence reads, “This second response, note, casts doubt on his conviction about the first: if agent-responsibility is sufficient for liability, then why care whether unjust combatants are

excused for fighting?” (2010, p. 188). Even if they are excused, they will be responsible by their prior choices for taking even tiny risks of bringing about a situation that may lead to the harming of innocents.

Lazar then announces his “internal” critique of McMahan’s account. While he disagrees with the notion that “agent-responsibility for a wrongful threat” is sufficient for liability, he does not argue that case (although agent-responsibility is the key factor he uses). The internal critique is that McMahan’s “responses to the total war and contingent pacifist objections contradict one another.” If “the liability bar,” the amount of responsibility required to be liable to be killed, is set low enough to allow the killing of “unjust combatants,” many of whom, he will claim, are only minimally responsible for the threats of which they are part, then vast numbers of civilians are also liable to be “intentionally killed” as they too are minimally responsible. The door is open to total war. If, to forestall this problem, the “liability bar” is set high enough to protect most civilians, it will then actually protect many “unjust combatants” as well, leaving “contingent pacifism” as the only moral option (2010, p. 189).

Another, very sharp version of the overall attack is that, just as Walzer’s account pays insufficient attention to individual rights, so in the end does McMahan’s. Lazar asserts that “[o]ne of McMahan’s key objections against Walzer is that, if our theory of killing in war is supposed to pay attention to individual rights, it should genuinely do so: we should not generalize about combatant liability, but attend to specifics.” Ironically, Lazar says, McMahan’s theory in *Killing in War*,

falls into this trap: all he does is halve the set over which we are generalizing. Instead of saying that all combatants may be treated the same, we say this of all unjust combatants.

This move is supposed to resolve the contingent pacifist objection—if we can make

sufficiently authoritative generalizations about unjust combatants' degree of responsibility, it may be possible to fight justly, despite the impossibility of knowing each adversary's degree of responsibility. I think this is inconsistent: if we want an account of killing in war that duly respects individual rights, we should not generalize at all. If this makes the theory impracticable, then we should perhaps reject the rights-based account of justified war. (2010, p. 190)

If Lazar is right, then how did McMahan construct an argument that made his case? Lazar charges McMahan with “apply[ing] a double standard to evaluating” the responsibilities of “unjust combatants” and non-combatants (2010, p. 203). Lazar continues,

At points in *Killing in War*, McMahan concedes that many non-combatants will be responsible for their country's war (e.g., p. 96), but where liability is concerned, he asserts the reverse (p. 225). Conversely, almost all unjust combatants are held not merely responsible, but even culpable. Their excuses are ruthlessly shredded, while non-combatants are not held to remotely the same standard. He dismisses the objection that combatants' causal contributions are small (pp.39ff.), but baldly asserts that non-combatants are not causally implicated (p. 225) (2010, p. 203-04).

If the reader has any doubts about Lazar's assertions above, I offer representative quotations from the first two citations above. On p. 96, McMahan states, “The civilian members of the society that sent them [i.e. soldiers] to war are in no position to abuse them for doing what the society demanded of them. Many of these civilians have been actively complicit in the waging of the war, and *most of them share some responsibility for it*” (emphasis added). On p. 225, McMahan writes, “*It is rare for any civilian to bear a significant degree of responsibility*

for an unjust war” (emphasis added). More quotations could be added: Lazar is being careful and fair here.

In support of his contention that the liability bar for combatants is very low indeed, Lazar goes on to cite McMahan’s strange assertion that, as Lazar accurately summarizes,

if [the leadership of] country A is secretly plotting against country B, and B, aware of this threat, can only avoid it by attacking now, the B-combatants are entitled to intentionally kill A-combatants who were non-culpably ignorant of their government’s unjust plan (pp. 183-84). If wholly blameless combatants who have not even contributed to a threat can be permissibly killed, why be so lenient on non-combatants who do contribute, and are often not wholly blameless? (2010, p. 204)

Lazar leaves out the details of McMahan’s reasoning behind this argument, which is that while the soldiers are not yet guilty of any immoral act, they voluntarily chose to join their country’s military and therefore would be committed in the near future to, and would likely participate in, an unjust war (McMahan 2009, p. 183). Lazar’s question here is clearly valid. (Ferzan finds McMahan’s assertion here “troubling”: 2012, pp. 687-88.)

Lazar then argues that many combatants are far less responsible than McMahan allows. Many do not pose micro-threats and make very small causal contributions to the micro-threats that are made by their military organizations. He goes on to argue against McMahan’s position concerning soldiers’ epistemic excuses, seeing them as far stronger than McMahan allows (2010, pp. 193-203). He critiques McMahan’s theory of “narrow proportionality” (2010, pp. 203-207), and McMahan’s argument from the general ineffectiveness of attacks on non-combatants (2010, pp. 207-09).

5.3.2 McMahan's Answer: a Non-Responsive Tweaking

McMahan's response (2011, pp. 546-559), concentrates on elaborating his ideas of liability, with a final brief response on the epistemic dilemma. The first three sections of the response are entitled, "Why most unjust combatants are liable to attack," "Why most unjust civilians are not liable to attack," and "The comparative dimension of liability." The fourth is entitled "The epistemic dimension."

McMahan insists that he rejects group liability. Early in the first section, McMahan states,

The Responsibility Account does *not* imply that all unjust combatants are liable. Liability depends on what a person does, not on a person's membership in some group. To suppose that a person can be liable simply by virtue of membership in a military organization is to embrace the idea of liability-by-association that enables a terrorist to believe that a person is liable to be killed by virtue of being, for example, an Israeli Jew (2011, p. 547-48).

The vehemence of the denial here, I suggest, is related to the fact that this is in fact just what McMahan is doing. He is justifying attacks on "unjust combatants" based on the group to which they belong. He doesn't insist on a one-by-one evaluation of liability, which would be impossible. His justifying scheme is all about two general evaluations, firstly of the group, "unjust combatants" and secondly of the group, "unjust non-combatants." The evaluation by groups is indicated in these first two section titles, noted above, and the following sentence, which precedes those titles: Some critics, McMahan writes, "argue that, in general, there is little

difference in the degree to which unjust civilians and unjust combatants are responsible for the threats their country poses” (2011, p. 547).

This response by McMahan both illustrates the problem Lazar points out and misrepresents his argument. While that last sentence in the paragraph above is aimed largely at Lazar, first, it illustrates the problem—McMahan is here implicitly offering an average evaluation for each of two groups, based on which his argument states that members of one group may be justly attacked, but not of the other. Second, McMahan here subtly *misrepresents Lazar’s argument*, which is not that the two groups do not differ on average, but that there is a great deal of overlap between them in terms of responsibility for the threat that is posed.

Lazar’s argument might be represented by a set of two Venn diagrams. In the first diagram there are two separate circles side by side, with the left-hand circle (somewhat higher on the page) representing all the combatants on the unjust side, and the bottom circle, the non-combatants on that side. Each circle is filled with hundreds of dots, red for combatants in the left-hand circle and blue for non-combatants in the right, representing the individuals involved. On the side, the y-axis represents the level of responsibility.

In the second diagram, the first circle is superimposed on the second, again on the same y-axis of responsibility. In this second diagram, the majority of the diagram consists of the area where the two circles overlap, with both red and blue are filling the overlapping middle. Many combatants are both low on the graph in responsibility, and also lower than many of the noncombatants. Conversely, many non-combatants are high on the graph in responsibility, and also higher than many of the combatants. Lazar’s most trenchant argument, in terms of this diagram, is that if you draw the “liability bar” line low enough on the graph so that all the combatants are liable enough to be attacked, i.e. congruent to the bottom of the combatant circle,

then millions of non-combatants are also liable enough to be attacked, a percentage that might be extremely high. If you draw it high enough for all the civilians to be exempt, then a large proportion of the combatants, perhaps even a majority, are also exempt.

McMahan's approach in his 2011 response evades the logic of Lazar's critique by consistently treating the two groups separately in his moral evaluation. In effect, he provides an average value for each circle in the Venn diagram, and argues that since the average responsibility value of the combatant group as a whole is higher, each member of that group may be presumed to be high in liability. He never considers the second diagram, in which both groups are presented together. If McMahan were serious about not making presumptions based on group identity, he would be forced to offer an analysis of the area of overlap on the diagram where thousands or millions of red and blue dots, the individuals, are intermingled—the analysis would be predicated not on which group each belonged to, but the actions of each, “what a person does,” as he wrote above.

As he assesses the liability of each group separately, McMahan seems to miss the force of Lazar's arguments. For example, his response to Lazar's point that many combatants do not kill is to argue that “even though only a certain proportion of unjust combatants who have combat roles end up killing someone, it is true of almost all of the others that they go armed into a war zone and *would* kill just combatants rather than allow themselves or their comrades to be killed. That their circumstances do not prompt them to kill is a matter of luck” (2011, p. 548). First, we simply do not know that it is true that they would kill (Lazar cites studies that assert that many, even, of the soldiers with weapons are unwilling to kill, so those without weapons might be presumed to be even less ready). McMahan's assertion seems weaker than Lazar's denial. Second, it is exactly what a terrorist, or a skeptical theorist, might say about a civilian: “they

would kill. It's a matter of luck that they don't." There is simply no rebuttal of Lazar's argument here.

Concerning Lazar's aircraft carrier example, McMahan again misses Lazar's point. He writes about troops in support roles that, "Lazar cites as an example [of such troops] the high proportion of the crew of an aircraft carrier who do not participate directly in combat." His response is, "[b]ut many of these intentionally make immediate and necessary contributions to the ability of the flight crews and others to fight. Without the support personnel, the planes could not fly, or get within range of their targets. Most soldiers in support roles...substantially increase the objective risk that innocent people will be killed. ..." (2011, p. 549). He fails to acknowledge that, as Lazar quite rightly insists, precisely the same can be said of most civilians during a modern total war. Like many of these responses by McMahan, it simply misses the main issue.

As in the case of support troops, McMahan discussion of voting misses the implications of his theory. In considering the question of voting as a possible issue of low responsibility, he writes that, "It is, in any case, doubtful that an individual civilian's vote makes a causal difference at all; for in virtually every case the outcome would have been exactly the same had that individual voted differently or not voted at all" (2011, p. 550). But this response ignores McMahan's own statement about the "Conscientious Driver" (2009, pp. 165-69). Here McMahan was establishing that a very tiny degree of responsibility can make one liable to be killed if a choice must be made: "she knows that driving is an activity that has a very tiny risk of causing great harm...as a *type* of activity, [it] is entirely permissible. But she has had bad luck" (2009, p. 165). (I believe McMahan's statement about voting confuses probability and causality: the probability that a single vote will change the outcome is incredibly tiny, but that does not at all mean that a single vote makes no causal difference—in the outcome of the vote, the total

garnered by the winning candidate is precisely the result of the “causal force” of all of the votes cast for her combined. After all, if each individual voter’s vote had *zero* causality, then the sum of millions of votes, each with zero causality, would be zero.)¹⁴⁶

Yet each voter who votes for a belligerent politician who later starts an unjust war is in the exact same position. His or her action too carries “a very tiny risk of causing great harm.” He or she too has made a tiny but real causal contribution to the unjust war. (If the Driver stayed home, the pedestrian would not have been endangered, and if each voter had not voted or voted differently, the belligerent politician would not have been elected.) Continuing the parallel, as a type of activity, voting is “entirely permissible,” but the voters who voted for the belligerent candidates have “had bad luck.” The reasoning is identical, yet McMahan does not appear to see this.

The payment of taxes is another quite similar issue. McMahan writes,

The proportion of an individual’s tax payment that is devoted to war is usually small. The financial contribution that most civilians make to a war is therefore comparatively small and inessential. It is also compelled. More importantly, tax payments serve a great many worthy aims and citizens are morally justified in making them. If, as I believe, moral justification for an act exempts a person from liability to defensive action on the basis of that act, then payment of taxes cannot be a ground of liability to attack in war. The contributions that a person makes to the economic strength of his or her state are also usually justified. (2011, p. 550.)

¹⁴⁶ I believe this is an example of one of Zeno’s paradoxes, that of the Grain of Millet. Zeno apparently argued that since a single grain of millet makes no sound when it falls, a bushel of millet must also make no sound. See Aristotle, *Physics* VII:5, 250a20.

But again, all these arguments excusing civilians can also be applied, with extremely slight variations, to serving in the military. The contribution is small compared to the whole war effort and also compelled, and in a hostile world service in one's country's military is, one can easily argue about many countries, one that "serves a great many worthy aims," and is "usually justified." The payment of taxes to a regime that launches an unjust war could surely be described in terms of McMahan's "tiny risk" of leading to "great harm" to innocent persons, as in the Conscientious Driver case.

When McMahan turns to the question of the effectiveness of killing noncombatants, he avoids a strong argument against his position and discusses a weaker one. He states, "If killing a person would be ineffective, that person cannot be liable to be killed, even if he has been a culpable supporter of the war. Yet the killing of unjust civilians might serve to end an unjust war by terrorist means – that is, by intimidating and coercing the survivors to capitulate" (2011, 550). McMahan continues, "...there is an a priori reason why [terrorism] is less effective than defensive killing, which is that it must operate not through its effects on its immediate victims, but indirectly through the wills of others." (2011, p. 551)

The problem with this analysis is McMahan has simply redefined the action so that it works for his argument. He has substituted the label "terrorism" for a description of the act (bombing civilians), and has ignored Lazar's stipulated purpose of the bombers (removing causal factors in the unjust effort) and replaced it by another (intimidating other civilians). Lazar's argument was that bombing a large number of civilians, many of whom are agent-responsible, could be a means of achieving the just cause of the "just combatants," and furthermore that such a bombing could be defended on McMahan's terms. Cases can easily be imagined where this is the only effective way to win a defensive war. In response McMahan wants to claim that such

killing would *really* be about influencing others, but that is not what Lazar described, which was the likely *effectiveness* of killing civilians who are, like many combatants, likely to be agent-responsible for supporting their country's war. McMahan simply leaves Lazar's argument unanswered here.

McMahan continues with a proportionality argument that also fails: "There is then a further reason why attacks even on those who are liable are likely to be impermissible, which is that those who are liable are generally intermingled with a much greater number of those who are not. Hence, a military attack that would kill the former would kill far more of the latter and would thus be likely to be disproportionate_w" (2011, p. 551). Yet this, again, ignores Lazar's point that in McMahan's theory a tiny responsibility can make one agent-responsible and liable to be killed if necessary. A huge proportion of civilians is in many cases liable in this sense. Since that is the case, McMahan's first point here is wrong. And since they are agent-responsible, and if saving the lives of combatants and non-combatants on the just side requires their deaths (along with the collateral deaths of some who are non-liable), then they may have to be sacrificed: killing them appears to be a permissible act given McMahan's prior definitions in *Killing in War*.

In McMahan's third section, "the comparative dimension of liability," he deploys arguments that seem to be additions to the arguments in *Killing in War*, but do not really work against Lazar's critique. For example: "But killing an individual civilian almost never operates in a defensive manner to diminish a threat posed by his state and its armed forces" (2011, p. 553). Surely it can and does, as comparison with soldiers easily shows. Killing an individual soldier may seem for the moment to do little "to diminish the threat posed by his state." His comrades and later his family may notice, but in the heat of the battle his killing may seem as low in

causality of any effect as an individual vote. Yet it at least reduces by some small amount the numbers and effectiveness of the armed, attacking group of which he is part. Often in war, as when air strikes or artillery cannot be brought to bear, killing individual soldiers one by one is the sole available way to stop a group of soldier, and the cumulative effect of such killings is what wins or loses battles (and those, cumulatively, often decide wars). Killing an individual civilian who is making small but real contributions to the war effort of the unjust side works in exactly the same way: it reduces the number of people contributing to the effort, and it reduces the effectiveness of their support of that effort. This becomes clearer in the aggregate: if an industrial city is producing ammunition and tanks and aircraft, and is full of agent-responsible people (as well as some others), then a carpet-bombing of such a city acts directly to reduce the enemy war effort. If new recruits must be trained to produce the weapons, and the work of others must be diverted to repairing damage, then these additional results have the same effect.

McMahan presumes rather than demonstrates that this is false, again avoiding Lazar's argument. He continues immediately, "Suppose, then, that the killing would have to operate in a terrorist manner, for example by intimidating and coercing someone else who would then forbear from killing the just civilian." McMahan argues that would be "*opportunistic harming*, and the constraint against that is arguably stronger than the constraint against causing the same degree of harm by action that is defensive" (2011, p. 553—I would argue that the former constraint is very strong indeed, while the latter, if the harm is proportionate, is not actually under a moral constraint at all). But *ex hypothesi*, the attacks on civilians that are under consideration are aimed at killing civilians who are contributing to the enemy's unjust war effort, thus decreasing that effort's effectiveness. As with his previous reversion to the idea of terrorism, McMahan's redefinition of the killing simply avoids the issue. Again, Lazar's point is not refuted.

To buttress his argument that his schema does not make noncombatants liable, McMahan now makes the claim that numbers matter in “wide” proportionality, so that each of “1,000 [fully] culpable threateners” is liable to be killed in self-defense (by a single threatened person, apparently), but in contrast, while “one minimally responsible threatener [who would otherwise kill me] would be liable to be killed, but if there were 1,000, it would not be the case that all would be liable to be killed” (2011, p. 553). He simply asserts this rather than argues it here, and then sets out to “explain” it. Out of a number of tentative proposals to explain this intuition, the firmest suggestion, revolves around a complex notion of the responsibility of a defender to share a “moral ‘remainder’” (2011, p. 554). The “moral remainder” notion is illustrated by an illustrative scenario of a threat by an agent-responsible person that “will cause me to be paralysed unless I cause him to be paralysed instead” (2011, p. 554). If I could divide the burden in my response, McMahan argues, leaving most of the physical cost on the threatener but taking on some of it, then because he is only agent-responsible, I should so divide it: “In that case, he may be liable only to be paralysed below the arms, and I must accept the loss of a finger.” But if such a division is not possible and I act so that the threatener is fully paralyzed rather than myself, “I seem to have a reason to provide the minimally responsible threatener partial compensation for his paralysis...” (2011, p. 554).

It seems to me that the first weakness of this account is illustrated by a set of scenarios that fail because when it comes to crucial details, they are not thin but downright skeletal. While I can imagine a car or an ambulance going out of control, a technician diverting a drone, and a cell phone rigged to send a signal that sets off a bomb, I simply cannot imagine a scenario outside of war in which 1,000 “minimally responsible threateners” will kill me unless, one by one, I kill them: the root scenarios suggest 1,000 cars or ambulances going out of control and so

forth. This cannot be right. In war, if McMahan is right that the numbers of minimally responsible threateners will be small, and they will be scattered among the more responsible, getting a thousand of them to attack a just combatant is incredibly unlikely. I regard “Paralysis” as a scenario with a crippling problem as an illustration, since I cannot even begin to imagine a paralysis threat story that enables me to calibrate the harm even to myself (here loss of a finger), let alone both to me *and* to another person (paralysis below the arms). The point of a scenario in this kind of argumentation is to present an at least vaguely plausible even if stylized story, which somehow might happen, and examine our intuitions about it—this appears to be a skeletal story that is missing all the key details, with a mere assertion that it embodies the desired intuition. When a scenario this strained is needed to illustrate an intuition, surely it indicates a problem in the moral theory involved.

The second weakness is a failure to give weight to the consideration that in war there is no question of a single victim, but thousands or millions. The thousands or millions of possible noncombatant victims should not be weighed against a single just victim on the other side, but against much of the population of the just side. Once that is done, we are back to a one-to-one correspondence, or something quite close. If one person may justly kill a minimally responsible threat, why may 1,000 people not kill 750 minimally responsible threats, or 1,500?

But in addition, *why* is there a need for partial compensation in terms of McMahan’s own theory? In “Conscientious Driver,” McMahan’s story that seems to anchor the “Responsibility Account,” the pedestrian is justified in killing the driver. If he is morally justified, why should he pay partial compensation? If he has done nothing morally wrong, what is the basis for a claim of compensation *against the pedestrian*? Since the victim in Paralysis has *no* liability to be paralyzed, and the other scenario actor has some liability, why is the victim to pay compensation

after defending himself, when he was not liable to any harm? This does not seem to be congruent with the notion of a forced choice—one or the other must suffer. Instead, it seems to be a denial of that notion: if one is made to suffer, the other must pay. But if there are no real forced choices, what is the theory of agent-responsibility about?

In war, this notion would have rather large consequences. Does the victorious just side, aggressively attacked by the unjust side without any real provocation, owe compensation based on the fact that some of the persons killed, wounded, orphaned, and widowed, including many of the soldiers, were only minimally responsible? Perhaps, because the just side has also suffered losses, there should be a tallying up of costs after the war, and if the unjust side has suffered more, only then is it owed the “minimal responsibility” compensation, but only for the surplus damage? (This would put a new post-bellum epistemic burden on just warfighting, to go with the pre- and in-bello burden.) This tweak to the theory looks more like a Ptolemaic epicycle than a piece of fine-tuning: it is an adjustment that calls the whole theory into question.¹⁴⁷

In summing up his section on comparative liability, McMahan returns to the dimension of effectiveness, stating,

Assuming further that most unjust civilians make a significantly lesser causal contribution to threats of wrongful harm faced by combatants and civilians on the just side, so that killing them is much less effective in defensive terms than killing unjust combatants, and assuming that unjust civilians also bear a lesser degree of responsibility for the threats posed by unjust combatants than those combatants themselves do, it is clear that what I have called the comparative dimension of liability has far greater

¹⁴⁷ My reference is to Kuhn’s paradigm case of paradigm change: from the Ptolemaic to the Copernican systems.

application in the case of unjust combatants than in the case of unjust civilians. (2011, p. 555)

But McMahan's assumptions here are implausible. Consider a case like the United Kingdom's during World War II. After a short period, attacks on Axis soldiers were very costly in terms of lives of British soldiers, especially since the Axis controlled and had fortified the continent. Soldiers were both dug in and well-provided with weapons and ammunition. It can easily be argued that bombing civilians, who might be somewhat less responsible than soldiers, but still "agent-responsible" (and thus liable to defensive force), was a far more effective way of achieving the just (and ultimately defensive) cause of an Allied victory than attacking the soldiers. Given the high risks to "just combatants" of attacking fighters on the other side, and the likely agent-responsibility of large numbers of civilians, why would British airmen (in this case) be asked to take on the added risks associated with only attacking soldiers?

And what of guerrilla warfare (which Lazar mentioned), where it is well known that many civilians help provide cover for a group that blends into the civilian population? If the guerrillas fight for the unjust side, then given that the civilians share in the responsibility for the guerrilla attacks, and that there is no effective way to separate the guerrillas from the population in which they shelter, would it not be more effective to attack them where they hide among the civilians than to try to do so somewhere else? As long as McMahan makes liability to be killed depend on agent-responsibility, then effectiveness considerations combined with comparative considerations cannot in practice give civilians the immunity that he wants to leave them with.

McMahan begins his address of "the epistemic dimension," a response to the criticism that "it is a condition of the Responsibility Account's plausibility that it imply that all unjust combatants are liable, for otherwise the difficulty of distinguishing between the liable and the

non-labile will make discriminate warfare impossible” (2011, p. 547), by changing his position on “appearing to threaten.” He now sees a hole in the reasoning in *Killing in War*. He posits that in a certain war, “roughly 95% of the unjust combatants are liable and the just combatants reasonably believe this,” making it acceptable in terms of Parfit’s “evidence relative” terminology for the “just combatants” to attack any of them. He notes that in the book he argued that an attack on one of the non-labile 5 percent might leave the attacker liable to lethal counter-force from the attacked soldier (2011, p. 555). This McMahan now rejects, arguing that the otherwise non-labile combatants on the unjust side are responsible for *appearing* to be threats, and this is sufficient to make them liable to be attacked, and thus to deprive them of moral permission to defend themselves in this situation. He buttresses this argument with the argument about a joker convincingly pretending to kill someone, who turns out unexpectedly to be armed and ready to defend himself. (2011, p. 555-56).

But as an illustration, the joker begs the question. It is ancient wisdom¹⁴⁸ that the joker is acting impermissibly, and everyone can see that, including any non-morally obtuse joker. What needs demonstrating is that the otherwise non-labile soldiers are, in morally relevant aspects, similar to the joker. But, *ex hypothesi*, they are not. McMahan has defined them as “otherwise non-labile.” It is simply never a permissible thing to put on an aggressive act and offer a realistic death threat to an innocent person, but it is often permissible to wear a uniform, bear arms, and follow the orders of one’s political leaders. “Appearing to be a threat” can easily be an important part of a reason for being liable to being killed in other moral accounts, but it seems inadequate in McMahan’s objective account without better backing.

¹⁴⁸ For just one example, see Proverbs 26: 18-19.

McMahan next notes that Lazar has cited but rejected as a possible liability-producing factor the idea that non-labile soldiers act as decoys, drawing enemy fire and, intentionally or not, “thus making a significant causal contribution to their side’s threat of wrongful harm” (2011, p. 556). But Lazar had rejected it because “the only reason they contribute to the threat, in this case, is because the just combatants shoot at them. This makes for an odd argument: we are permitted to kill you because we are going to kill you, when we could be killing someone who genuinely poses a threat. It is circular, and would mean that any noncombatants in the vicinity of the combatants we are targeting could count as contributing to the threat in the same way” (2010, pp. 191-92). McMahan offers no reason to reject this argument. At all events, if the liability bar is set here, it does seem to be an incredibly low level, and one that could, as Lazar notes, justify sweeping attacks on noncombatants.

McMahan then offers a long and very complex argument that killing “unjust combatants who are unthreatening” “is a matter of proportionality_w rather than discrimination.” I want to call attention to just a part of that argument. In it, a series of scenarios is offered in which “just combatants” are unable to distinguish civilians forced to wear military uniforms from combatants on a vital mission for the unjust side, a mission that, in each case, will win the war for them if they succeed. The stories culminate in scenario 3:

Finally, suppose again that it is known that of the 100 people [on the ground], one is a civilian *who has been forced to wear a uniform* and thus cannot be identified. But the just combatants are a helicopter crew who have no bomb but only a gun that fires bullets [apparently he means a non-automatic weapon]. They kill all 100, one by one. They know that one of their shots will kill an innocent person. But they do not necessarily

violate the constraint against intentionally killing an innocent person. *Again the same could be true even if the numbers were reversed ...* (2011, pp. 557-58, emphasis added)

This scenario actually illustrates Lazar's concerns. It is meant to address the epistemic dimension of killing non-liable combatants mixed in with liable combatants, with civilians used in place of non-liable combatants for illustrative purposes. The last sentence in the quotation above, however, states that "just combatants" could permissibly kill 99 civilians, all of whom had been forced to wear uniforms and who are apparently not liable at all, if that was what was needed to stop the one combatant who would otherwise win the war. If completely non-liable noncombatants can be killed at such a ratio to combatants to keep the unjust side from winning, this appears to vindicate, with a vengeance, Lazar's concerns about attacks on noncombatants in McMahan's theory.

Returning to McMahan's discussion of a 95 percent liable attacking army, what is most noteworthy in this part of the account is the blanket liability of an entire group: soldiers on the unjust side. Often such soldiers will be invaders, but sometimes they will be defenders of a guilty regime against a justified humanitarian intervention and thus defenders of their homelands. In McMahan's reckoning in this example, they are all, every single one of them, liable to be killed—the "liable" making up the massive percentage, while the others, in a way for which they are responsible, mimic liability in a way that...makes them liable. As McMahan writes,

A non-threatening unjust combatant is nevertheless an *apparent* threatener. And he is responsible for *appearing* to pose a threat of wrongful harm, for he has chosen to be present in a war zone with the visible markers of a person *committed* to attacking enemy combatants. He is therefore responsible for making it reasonable for the just combatant to

believe that, unless he attacks the unjust combatant first, the unjust combatant will threaten the lives of innocent people. (2011, p. 555-56, emphases in original)

The reader may recall McMahan's earlier denial quoted above: "The Responsibility Account does *not* imply that all unjust combatants are liable" (2011, p. 547). Yet now he has stated that, in an easily imagined case, 95 percent are liable, and the remaining 5 percent are also liable. Not a single combatant is left out. This appears to validate Lazar's criticism: in application, McMahan's theory is about enormous groups and the putative moral liability of all those in the group. Once you are part of the unjust group, your human right not to be killed is nugatory, and you may be killed on the presumption of liability based on your group membership. As Lazar complains, the set of those liable due to group membership has merely been halved: from all soldiers to all soldiers on the unjust side.

But there is a great deal of ambiguity built into each of McMahan's statements about proportions: presumably, but not explicitly, "95%...are liable" means liability ranging anywhere from the tiniest smidgen of agent-responsibility to fully culpable with no excuses. There is no way of telling, but it appears quite likely that being "agent-responsible" is driving the big percentage here. If that is the case, then surely huge numbers, millions in a large country, of non-combatants on the unjust side would also be making small but real contributions to the unjust war, or in other words would be just as liable as many of the soldiers. Here again the main issue Lazar has raised is left to one side, in this case through the ambiguity of the "liable" label and the pattern of dealing with combatants as one distinct group and non-combatants as another.

To wrap up this assessment of McMahan's defense against Lazar's onslaught, a few last points, beginning with "narrow proportionality." First, the combination of the epistemic conundrum and the nano-smidgen of responsibility situation is simply made worse by "narrow

proportionality,” as is illustrated in the “highly valued possession” scenario Lazar calls “vase” (2010, p. 185). You want to defend your possession from destruction but, McMahan informs us, “in fact someone earlier put a drug in [the threatener’s] drink without his being aware of it, and this, you realize, has weakened his control over his own action. He is partially, though perhaps not entirely, excused...”.¹⁴⁹ This is precisely the kind of knowledge that is almost never available on the individual level in real life. You cannot know it. But, significantly, such knowledge is still less likely to be available in wartime. Thus, practically speaking, we simply cannot apply McMahan’s principle. We rarely know anything morally significant at all about individuals fighting us other than that they are fighting us. As Lazar points out, we may know that a certain group of fighters are conscripts rather than dedicated special forces fighters, but when we are being shot at, we cannot choose to kick them in the shins and have our arms broken rather than kill them. Taking more risks in allowing or enticing them to surrender may lead not to minor harms but to the deaths of some of the soldiers on the just side, and “[d]eath is an indivisible harm” (2010, p. 206-07).¹⁵⁰ In his conclusion, he notes, casting grave doubt on the entire “narrow proportionality” claim’s applicability to war: “Just combatants cannot mete out harms in proportion to responsibility. War is not a distributive mechanism” (2010, p. 211).

Second, the emphasis in McMahan’s theory on the wide permissions to the just side and the lack of permissions to the unjust side could easily, as Lazar warns (2010, p. 188 and also pp. 207-210), lead leaders of all sides to believe that they (being the just side, as they will convince

¹⁴⁹ McMahan’s conclusion is that “you may have to settle for kicking him in the shin, despite the fact that this may be insufficient to prevent him from destroying your possession” (2009, p. 156). Norcross’s amusing remark seems to apply: “it’s OK to [kill] someone as long as it doesn’t do any good” (quoted in Doggett 2011, p. 231, note 25).

¹⁵⁰ Lazar notes in a footnote on this same page, “We should indeed use different tactics against these two forces, but this is simply the requirement of minimal force: if the conscripts might surrender, we should avoid a fight.”

themselves) actually have wide permissions to kill non-combatants if that is necessary to win the war. This is especially problematic in a theory that appears to assume that the over-all question of justice is so simple that every draftee should get the right answer if he digs a little. Many actions will appear to be necessary to leaders faced with a possible failed war or worse. If widely adopted in the world as it is now, it seems likely that McMahan's theory would make wars worse, on average, than they are now.

In conclusion, it appears to me that McMahan's counter-arguments end up for the most part either avoiding Lazar's criticisms or even reinforcing them, due to his consistent approach of considering the two groups, combatants and non-combatants, in isolation at each point of the argument, and apparently not noticing that arguments about individuals in one group apply to the other. He consistently compares groups as groups, never individuals in one group to similar individuals in the other. Another method of avoiding the force of Lazar's arguments involves implausible claims—e.g. killing an individual civilian doesn't perform any defensive work, or attacks on civilians would necessarily be aimed at influencing others rather than removing agents in the causal chain of responsibility for harms and deaths in the unjust war. Lazar's attack is compelling, and McMahan does not answer it.

5.4 McMahan's Objective Approach to Moral Evaluation

I would like to offer some further remarks on McMahan's fundamentally objective approach to moral evaluation. I begin by reminding the reader of the *Conscientious Driver* case discussed at the beginning of this chapter. Against McMahan's argument in this and three of the other cases discussed there, Resident, Technician, and Ambulance Driver, I will urge Russell Christopher's ingenious argument that a strongly objective approach in self-defense cases (which

McMahan exhibits here) leads to paradoxical results.¹⁵¹ (Note that McMahan is not primarily making an argument against subjective morality, of course. My point is that key facets of his arguments rest on an objective approach.)

McMahan's first words after introducing the *Conscientious Driver* scenario are, "I will assume that on an objective account of permissibility, this conscientious driver is acting impermissibly. It is *impermissible to drive, or to continue to drive, when one will lose control of the car and threaten the life of an innocent person...*" (2009, p. 165, emphasis added). Some, such as Ferzan, complain that the knowledge that makes a difference, that the car "will" go out of control, is available to no human being.¹⁵² Yet clearly, for some advocates of an objective approach, this concern cuts little ice: that is simply the way morality is, they say.

Christopher's critique of Thomson's objective approach,¹⁵³ especially as exemplified in her 1991 article discussed in chapter 4 above, applies to Conscientious Driver and the cases discussed around it, and may add, perhaps, an additional note of persuasion. Christopher notes that in self-defense cases using lethal force, the force must, "in some cases, be employed prior to the fruition of the threat to which it is a response" and this means that defining defense objectively faces a challenge (1998, p. 538). He notes that he is guided by Thomson's own use of the word "objective," and characterizes Thomson's "strongly objective" (1998, p. 543) approach thus: "Conduct is permissible, under an objective approach, based on what was, is or will be the

¹⁵¹ I am indebted to a footnote in one of Ferzan's articles (2012, p. 686, footnote 59) for a reference to Christopher's article.

¹⁵² To dramatize the problems, Ferzan has set up a case of *Involuntary Roulette*, in which Greta puts one bullet in a revolver, spins the chamber, and points the gun at Harry with evident malice. She complains, "Both Greta and Harry understand Greta's act in exactly the same way, and neither can predict whether Greta is an actual or apparent threat. How does it make sense for Greta's forfeiture of a right to turn on neither Harry's perception nor Greta's, but a fact that neither knows?" (2012, p. 693). If McMahan is not, perhaps, using a "forfeiture of rights" model, the effect is similar: becoming liable to be killed depends on an unknowable fact.

¹⁵³ Christopher calls the word objective "extraordinarily ambiguous" (1998, p. 537, footnote 3).

case, without regard to any mental state of the actor” (1998, p. 537, footnote 3). Christopher notes that Thomson rigorously excludes any subjective states of the actors in her account: “[For] Thomson, ...[t]he fault, intention or belief of an actor in using force is simply irrelevant for determining the permissibility of her conduct” (1998, p. 543). One of the ways Thomson excludes such factors is the story of Alfred, the would-be wife poisoner, discussed in chapter 4 above.

McMahan, by contrast with Thomson on this latter point, seems to continuously suggest consideration of a subjective point of view as a possibility, as part of what seems to be a diffident style. At the same time, it does seem clear that what is ultimately correct for him is always the objective account. Moral “justification” is the Holy Grail sought, and the word “justification,” used by McMahan alone and positively, always means “objective justification.” (Permissibility is treated the same: what *really* matters is objective permissibility.) Objective factors are often absolutely crucial for McMahan’s preferred accounts. There can be no doubt that McMahan offers such an account in Conscientious Driver. As he writes at an earlier point in *Killing in War*, concerning subjectively justified but objectively unjust combatants, “To act with merely subjective justification is to act in a way that is objectively wrong” (2009, p. 62). The moral, right act is the justified act, and whatever is not objectively justified falls short. Thus, when McMahan uses “strongly objective” language in this and the other three scenarios mentioned above, it seems clear that he is offering them in the same spirit as Thomson. If Christopher is right about Thomson’s account, he will be right about McMahan’s.

Addressing Thomson’s account, Christopher goes on to note the application of the strongly objective approach to a number of self-defense cases in her 1991 article. In an early summary, he writes,

Similarly, the Innocent Aggressor and Innocent Threat have lost their right to life because they are ‘about to’ violate your right to life. Since you can only save your life by killing them and they have lost their right to life, self-defense force against them is permissible. You are not violating their right to life because they have already lost or forfeited it by being ‘about to’ violate your right to life (1998, p. 541).

When Thomson considers a counter-argument, the Aggressor’s claim that the victim Alice (who has an anti-tank gun) is “about to” kill him, and that is why he must kill her, “Thomson finds the Aggressor’s claim to be absurd because the Aggressor lost his right to life by driving the truck at Alice” (1998, p. 542). Just as in the poisoning or curing case, where no subjective factors mattered,

so also the lack of appearance, indication, or reasonable belief both that an actor is about to be killed and that self-defense by the actor is necessary does not prevent self-defense force from being permissible if the non-apparent attack was, in fact, about to occur and self-defense was, in fact, necessary...In assessing the permissibility of an actor’s conduct, the actor’s conduct is not viewed from the actor’s perspective, but from God’s or omniscient being’s eye view (an ideal observer), i.e. what actually occurred or what would have occurred. In determining which actor’s force in a physical conflict is permissible or justified in self-defense, the central issue is which party was, *in fact, the first to be about to use force* i.e., the first to violate another’s right to life. (1998, p. 544, emphasis added)

After this careful and elaborate setup, Christopher springs his trap. He notes that a threat does not have to actually kill before activating a defender’s right to kill, for it would then be too late to be of use (1998, p. 547). No, the threat has only to be “about to kill” to trigger the right.

Christopher then suggests a timeline in which “ten units of time” is arbitrarily set as the time between killing and being “about to kill”—the time has to be less than zero, in order for the victim to be able to act, and “about to” is not very specific, so “ten units” (whatever they are) seems fair (1998, p. 548). So if at T_0 the threat begins and the threatener is “about to kill,” the threatener loses or forfeits his right to life at that moment, and at T_{10} the victim will be killed, unless he acts. But he must act between T_0 and T_{10} if he is to save his life. If he acts at T_5 , Christopher asks when the victim was “about to kill” the threat. The answer is, at T minus 5, five units of time before the threat was “about to kill” the victim. But now it appears that the victim/defender was “about to kill” the threat before the threat was about to kill him (1998, pp. 548-49). Therefore, the victim/defender forfeited his right to life first, and it was impermissible to kill the threat. In fact, it was permissible for the threat to kill the victim, but sadly, the threat is now dead. The paradoxical conclusion holds whether the threat is innocent or culpable (1998, pp. 549-51).

Christopher takes on argument after argument against his thesis. In each case, he shows that discomfort with his conclusion rests on unacknowledged subjective input. He reminds the reader that in a strongly objective account we have, *ex hypothesi* (and quite explicitly for Thomson) left intentions and fault behind, and the “lack of appearance, indication, or reasonable belief” do not matter: what matters in such an account is “what will happen.” Christopher then considers various possible modifications to the theory, but all are ad hoc as modifications to an objective evaluation theory, and in addition yield paradoxical results. However, when he considers theories with at least some subjective elements, none yields a paradoxical result, offering evidence that the problem of the “about to kill” standard is precisely its objective character.

Christopher offers an important preliminary summary of his argument:

Central to our shared understanding of self-defense, I believe, is that the defender's force is a *response* to the threatened harm of the aggressor or threat. ...[A response], however, entails the defender having some mental state of perception, belief, knowledge, etc. in regard to the threat posed. In treating such states as irrelevant, an objective account obscures an essential aspect of self-defense—that it be a response. Whereas an at least partly agent-centered account affirmatively requires some mental state which ensures that the defender is responding, an objective approach treats the defender's force *as if* it was a response (1998, p. 566, emphases in original).

Applying Christopher's critique to McMahan, the "about to kill" standard is indeed what McMahan has claimed is behind justification and permissibility, although he generally simply uses the future tense. The Conscientious Driver has good beliefs and intentions, and has no evidence or indication at all that the freak accident "will occur." Yet, "it is *impermissible to drive, or to continue to drive, when one will lose control of the car and threaten the life of an innocent person,*" writes McMahan. According to McMahan, Conscientious Driver, Resident, Technician, and Ambulance Driver are all liable to be killed (if necessary) based on the objective evidence: they will kill (in an objectively wrong way) unless they are stopped.

Yet, anyone who kills them before they kill will be acting impermissibly. Applying Christopher's test, if the pedestrian successfully uses force against the Conscientious Driver, the pedestrian will actually be the first to use force, demonstrating that she was actually the first to be "about to use force," and thus that she forfeited or lost her right to life. The same would go for any of the victims of the "liable" threats in the other scenarios: if the victim struck first, we

would have to say the victim was the first to be about to use force, and thus the victim who lost her right to life. Thus, in each case, the defender would have acted impermissibly.

What if Christopher is wrong? Or what if he is right, but, perhaps, his painstakingly constructed case applies to Thomson's 1991 account, but not McMahan's? Even if this is true, which I doubt can be shown, can we not still say that McMahan's attempt to build a moral standard for action now based on what "will" happen in the near future is at the least disquieting? I suggest that is because the knowledge of what "will" occur is not human knowledge, but God's, or at least godlike, knowledge.¹⁵⁴ In each of the scenarios McMahan sets up here (2009, pp. 164-66), he carefully ensures that the decisive event is a freak accident, entirely outside of the possibility of human prediction that it *will* occur. McMahan, however, "knows" with complete certainty that it will occur. I think it is rather clear that McMahan *knows* the event will happen because he is the creator of the scenario and all its characters. As his creations, none of the characters *in* the scenario could possibly know the key, morally decisive factor, that event Y "will" occur.¹⁵⁵ (This is why such scenarios cannot be applied to the real world:¹⁵⁶ no one in the real world can ever know that an unpredictable freak accident *will* occur. Or, God knows, but he

¹⁵⁴ I note that I am not alone in using the language of divinity in this context. Ferzan speaks of an "omniscient" perspective four times in her 2012 article (on p. 680 twice, and once each on p. 681 and p. 691). Christopher writes, concerning Thomson's "strongly objective" viewpoint, that "[i]n assessing the permissibility of an actor's conduct, the actor's conduct is not viewed from the actor's perspective, but from God's or an omniscient being's eye view (an ideal observer)..." (1998, p. 544). If "omniscience" is taken literally, then both authors go too far in invoking the word: the "ideal observer" does not need all knowledge. However, by definition neither humans nor their best computers can predict with certainty (as the scenarios postulate) precisely when (or often even to the nearest year or decade), and where, an unpredictable event will occur until it gives some sign that it is about to occur. We might as well call the required ideal observer godlike, in knowledge at least.

¹⁵⁵ McMahan's control over the scenarios is like Hobbes' or Locke's account of the knowledge human beings have of the "political arrangements and institutions" they create (Shapiro 2003, p. 12, internal citation of Locke omitted). Shapiro calls it the "creationist" or "workmanship" theory of knowledge (2003, p. 11). The parallel seems rather strong.

¹⁵⁶ I urge the reader to try it, say with an ambulance driver. Tell her, "what if you are driving down the street to the hospital with a patient in your well-maintained ambulance, but unknown to you a freak accident is going to occur." Would the answer not be something like, "well, you say it's unknown to me, and it's a freak accident. What do you want me to do, stay home?"

does not make himself available for this kind of questioning.) McMahan has made himself godlike in terms of the scenario: the only possible holder of the key information. Then, McMahan announces a moral standard for the characters in the scenario, based on this knowledge that is absolutely unavailable to them: “it is impermissible to do X if Y will then occur.” This moral standard is then held up as a general standard for human action. If Christians were to teach that God judges humans in this way (as most Christian teaching in fact denies), it would be offered as evidence that the Christian God is unjust—but for McMahan, morality is in fact, at its deepest level, based on such considerations. This is surely problematic.¹⁵⁷

Christopher’s insight that our shared understanding about defense includes, essentially, a notion that it is a *response*, and we can only respond based on perceptions, should be combined with Ferzan’s strenuous insistence on what self-defense is. She is responding to McMahan’s scenario in which “A villain, fully intending to kill you, points his gun at you and slowly begins to squeeze the trigger. You and he both reasonably believe that the gun is loaded but in fact it is not. You have just enough time to kill him with your concealed derringer before he pulls the trigger” (2005, p. 390). After some discussion, McMahan remarks,

It would, after all, clearly be unjustified for you to kill him if you knew that his gun was unloaded, and *it is not clear how your lack of morally relevant knowledge can establish a justification where otherwise there would be none.* (This is one of the oddities of the

¹⁵⁷ Ferzan offers another critique of the future knowledge problem, a *reductio*. A fortune teller has told Vera that someday she will need to kill Ivan in self-defense, and so she has taken to carrying a ray-gun in case she is trapped at the bottom of a well. Ferzan writes, “If Vera has a right to kill Ivan because he will otherwise violate her right not to be killed, that fact is true, not just once Vera pushes Ivan down the well, but two days prior, and even twenty-five years prior. It appears that Thomson’s view [and McMahan’s!] would justify Vera killing Ivan at birth (or perhaps *in utero*)” (2012, p. 686, internal citation omitted). How is Ferzan wrong? The *objective* fact is that Ivan *will* violate her right not to be killed. How could the time interval make a difference in that fact? If we want to respond that no, Vera only acquires the right to kill once Ivan is “about to” kill her, then we must face Christopher’s devastating arguments on that score.

subjective account of justification: that it makes mistake of fact a ground of moral justification rather than excuse.)” (2005, p. 391, emphasis added).

Ferzan offers a sharply different perspective on the entire notion of self-defense:

This “morally relevant knowledge” problem arises because we believe that killing the aggressor is unnecessary. The defender has committed an unnecessary evil. Importantly, however, self-defense is not about committing the greater or lesser evil.¹⁵⁸ It is about giving the defender a right to act on the basis of the threat that she perceives. *In no instance of self-defense will the defender be able to be 100% certain that she must act to protect herself.* She must act preemptively. She must respond to risk. (2012, p. 691, italics in original)

Self-defense is a human action that must take place under the limitations to which we are all, always, subject. A moral standard that requires a self-defense decision that is in accord with divine rather than human knowledge is a cruel and, I suggest, unjust standard.

In conclusion, I offer a scenario:

Resident Two Murderer has, as we know from *Resident*, broken out of prison some time before his Twin (who has been traveling alone) approaches Resident’s house. Resident, fearing Twin, kills him. One minute later, and before anyone in town hears what happened between Resident and Twin, Murderer approaches a house on the other side of town and is killed by Resident Two.

¹⁵⁸ In places, Ferzan has argued that no restriction of reasonability is needed for a defender, e.g., “Finally, I claim that the subjective requirement is fully subjective: that the defender has the right to act so long as he believes there is any probability of attack, and that an inquiry into the reasonableness of the defender’s belief is not required” (2005, p. 715). I note that I disagree, as I can easily imagine attacks so low-risk that I think the intended victim should take on some risk himself rather than use lethal force.

The two scenes are (like the brothers) outwardly identical. The inner perceptions and motivations of the two residents are likewise identical. The difference, for an objective theorist, is between two “acts,” one fully “excused,” one fully “justified.” I want to use this comparison to ask the purpose of the description, “justified.” The word, with its heavy theological overtones,¹⁵⁹ is also clearly a powerful moral term for objective moral philosophers, especially McMahan. It is the seal of moral approval in his scenarios and descriptions: there is no higher term. Anyone is allowed, in moral terms, to do the permissible deed, yet the fully right act is that which is “justified.”

I imagine the word, and the associated phrase “excused but not justified,” would not and should not be used if the two killers go together to see a counselor with philosophical training to discuss the trauma of killing a human being, a trauma that is likely to be very heavy even for Resident Two. Surely a counselor or a priest should not say to Resident, “you are blameless—fully excused but not justified.” But this might only prove that the phrase is awkward when applied to someone dealing with the trauma of a mistake. The courts, as I noted earlier, seem to have no need of the phrase. “Not guilty” serves their turn.

The word and phrase also seem unneeded for the ordinary person, for whom “you didn’t do anything wrong, but through a tragic mistake, the outcome was bad” seems to suffice. The ordinary person might tell Resident Two, “you did the same thing as Resident in light of what you saw. It’s what anyone should do—it’s just that the man you killed was the actual murderer.” For Resident Two, there is surely some comfort in her trauma in the confirmation after the fact

¹⁵⁹ “Justification” is either a forensic declaration by God that one is acceptable through the sacrifice of Christ (for many historic Protestants), or a transformative action of God in which he both forgives the sinner and applies the sacrifice of Christ to make his followers holy and just (for Catholics). “Justification by faith alone” is commonly called the teaching “by which the Reformation stands or falls.” The word “righteous,” in older English a near synonym of “just,” has suffered a change of meaning in common usage, but the family of words centered on “just” still burns with sincere moral fervor.

that the one she killed was the murderer, but no higher approval in the form of the adjective “justified” is needed by her. The people of the town are not going to treat or speak of the two residents differently, except regarding the strange accident in the case of Resident. Resident should grieve over the dead man, but should not go through life reproaching herself, “I was not justified!” But again, this is suggestive but hardly dispositive.

Let us look at the actors and their actions. The inner lives of the actors throughout the incident is identical. Their background perceptions, what they see, their fear as the man approaches, their quick decision to act defensively, is identical. Insofar as we can separate act from actor, was the act different in the two cases? I suggest that, as actions, they have to be defined as identical not only from the perspectives of the actors, but from the perspective of any possible human observer. In order to be really certain which was the Murderer and which was the Twin, since they are identical, one would have had to be following one of them, but there is no mention of any companion in McMahan’s “Resident” scenario. I stipulated above that he was, like his brother, traveling alone. Therefore only a godlike observer arriving on the scene (with a rifle)¹⁶⁰ would know whether Resident or Resident Two was acting in objective self-defense.

¹⁶⁰ For many moral theorists, a great deal hangs on the question of whether an armed observer “who happens to know all the relevant facts” should shoot the mistaken defender or the about-to-be victim. (I think the scenario, already incredibly strained, becomes simply too ridiculous to bear any weight when an all fact-knowing observer is added, close enough to see who is involved, but far enough away that he cannot shout the truth or “stop”; unable to fire a warning shot but able to kill a participant in the conflict. But set that aside.) McMahan in 2011 (p. 556) says the joker, in a similar situation, should be shot by the justice-dispensing third-party intervener—but the joker is clearly subjectively in the wrong, or morally wrong as the tradition would agree, so the dilemma in Resident is missing. Mapel stresses this issue of third party intervention in an argument against Ferzan’s agent-relative reasoning: “Additionally, agent-relative views have trouble explaining most people’s intuitive judgments about the permissibility of intervention to save the victim of a mistaken attacker by third parties who know all the facts. Most people believe, for example, that if a policeman or even a private third party knows all the facts in Resident and has to choose whether to save the Resident or the Twin by using lethal force, the third party should intervene to save the Twin” (Mapel, in an unpublished paper entitled, “Agent Causation and Liability to Defensive Harm”). I am not at all sure “most people believe” this, although perhaps “most broadly Kantian scholars writing on this topic” believe it. From the tradition’s perspective both parties are morally guilt-free—how could I as a third party kill one of them? Either way an innocent person doing the right

From any possible *human* perspective except that of the Murderer or the Twin, then, the actions of Resident and Resident Two were identical, even if the outcome was tragic in one case, and merely traumatic in the other. The difference is not in the morality of the action, but in the goodness or badness, but *not* in a moral sense, of the outcomes. The difference in the outcomes is due to an accident, the strange accident that Resident's victim was not guilty, not to a different moral quality in the actor or action. We should not, then, offer a moral differentiation for the action, i.e. saying Resident One or her action is "excused," but Resident Two or her action is "justified." When we give moral praise to Resident Two and withhold it from Resident, we are describing their actions badly, because morality is about possible *human* actions, and human actions can only be undertaken on the basis of knowledge that is not impossible to have at the time.

thing, as all normal people would see it, will die, so killing a different one of them has no value. The tragedy would not be remedied by changing which innocent person dies. From the tradition's point of view, this intuition is mistaken, and cannot tell in favor of or against any account of self-defense. (From a practical point of view, an observer this well informed should strive mightily to make peace, not to kill one of these innocents to save the other.)

CHAPTER VI

RODIN'S RADICAL REJECTION OF A NATIONAL DEFENSE RIGHT

“Something has gone wrong here; we have ended up with a nonsensical conclusion...”

—David Rodin¹⁶¹

David Rodin, in a widely-read, much discussed, and taught account in his *War and Self-Defense* (2002), denies that there is a coherent explanation available of a nation's right to defend itself.¹⁶² In the previous chapter, I offered a critique, from the tradition's viewpoint,¹⁶³ of McMahan's reductionist account of such a right, claiming that his account failed. Rodin's attack is far more of a frontal assault on the tradition's position, and his project is thus a more serious concern from the tradition's point of view (as well as from that of many other versions of just war theory) than McMahan's. Rodin concludes his analysis with the assertion that defensive wars cannot be morally justified: “the conception of a moral right of national-defense cannot, in the final analysis, be substantiated” (p. 196).” He has provided a “repudiation” of “the right of national-defense...as a legitimate moral category” (p. 197). This claim is later repeated, more colorfully, in “The Myth of National Defense”: “The right of national self-defense is a myth, unsupported by coherent moral reasoning” (2014, p. 74). If a defensive war cannot be morally

¹⁶¹ Rodin, *War and Self-Defense*, (2002, p. 86).

¹⁶² For a brief look at Rodin's ambiguous exception for defense against genocidal regimes, see the “Genocide Exception” section below.

¹⁶³ As in previous chapters, when I say “the tradition” without further explication, I refer to the Aristotelian-Thomist tradition.

justified, then just war theory has indeed, as Rodin claims, “betrayed [its] promise” of providing “hope for the effective moral regulation of war” (2002, p. 189). These are sweeping claims that strike at the heart of the tradition’s perspective on just war, but also may recruit some readers away from any version of just war theory and to Rodin’s semi-pacifist stance on war. If defense of one’s country, the most obvious case of a just war for most people, is shown to be unsubstantiated by morality, the finer points of any version at all of just war theory become moot.

Thus in this chapter I attempt to cast serious doubt on Rodin’s attack on the right of, as he calls it in *War and Self-Defense*, “national-defense.” At a number of points, I supplement his arguments in that book with his arguments (which concede no ground at all) in his article “The Myth of National Defense” (2014). As part of his claim to refute the whole set of reasons offered to justify any nation’s having a right to defend itself, Rodin offers the alternative idea, attractive to some, that we should work toward at least a minimal world government that could treat the defense of what are now nations as a matter of law enforcement, and I critique this solution too, on Rodin’s own terms.

Rodin’s work is impressive in its subtlety, boldness, originality, erudition, and (for the most part) clarity, and must be taken into account by anyone offering a more positive justification for a nation’s right to defend itself. With its startling and sweeping overall conclusion, as well as its judgment that “Just War Theory has largely betrayed” its promise “to “combine moral principles with a pragmatic sense of political realism” (2002, p. 189), it has been a bombshell in the just war theory field, fully justifying the recent description, a “swingeing critique of the principle of national defence” (Fabre and Lazar, 2014, p. 3). Because a number of rebuttals have been offered, many with obvious merit, my critique will focus on Rodin’s claims

to logic and overall coherence, a number of which fail. These deserve to be taken as seriously as he clearly is when he puts them forward. The validity of his conclusions is only as good as the logic behind them. As with my discussion of McMahan, my criticisms are largely internal, appealing to the same standards Rodin acknowledges.

Rodin's account

War and Self-Defense begins with an intriguing and wide-ranging introduction that lays more cards on the table than some. As he explains his own work, he “undertake[s] two basic projects,” the first of which is an attempt “to provide a robust explanation of defensive rights in their most general form,” and the second, an attempt to “determine whether this explanation *can be used* to ground a right of national self-defense” (2002, p. 2, emphasis added). Part I, then, is “constructive and explanatory in mode,” while Part II “is probing, questioning, and ultimately skeptical” (2002, p. 3). It is clear immediately that the “most general form” of defensive rights can be found in “the right of personal self-defense,” a second description of the right he wants to explain in Part I of the book (2002, p. 3). The book moves on to a consideration of the contours and requirements of a personal right of self-defense in Part I. After a fascinating discussion, Rodin offers an account of a highly limited right of personal self-defense that depends on the culpability of the attacker, and is sharply restricted in terms of “imminence, necessity, and threat to life” (Tesón 2004, p. 91). Due to proportionality constraints, there is no right to use lethal force in defense of property (2002, pp. 43-46), and there are very strict limitations on the permissible use of lethal force against non-lethal threats, with only such exceptions allowed as “defense against enslavement, wrongful lifetime incarceration, or some similar grave infringement of liberty” (2002, p. 48). Rodin argues briefly that his proposed restrictions are valid “even in the absence of an effective legal system” (2002, p. 44), or in “a state of nature”

(2002, p. 45). Much of his argumentation for the personal right of self-defense is clearly “objective” in mode (2002, pp. 79-87, for example), but he does, in one paragraph at the tail end of Part I, address individual self-defense cases in which the culpability of the attacker is not clear (2002, p. 98), providing a suggested resolution.

Part II applies these requirements to the putative self-defense right of a nation. He proposes international law as the main source of understanding of the “right of national defense” (2002, 104), but this leaves many questions about the subject, object, and end of the right (2002, pp. 122-27). He first considers “The reductive strategy” (2002, pp. 127-38), in which national-defense is seen “as simply the application, *en masse*, of the familiar right of individuals to protect themselves and others from unjust lethal attack” (2002, p. 127). This is found wanting (except in the case of the Jews of the Warsaw ghetto and similar cases, 2002, p. 139) for a variety of reasons, among which are a conundrum concerning the right of humanitarian intervention and “the argument from bloodless invasion” (2002, p. 130), which includes the use of “conditional threats” by invaders (2002, pp. 132-37). He next considers “the analogical strategy” in which states have a right of defense “analogous to the personal right of self-defense” (p. 141). This too, for a variety of reasons, Rodin finds wanting in chapter 7. Finally, he proposes that a law enforcement model provides a potential justification for “military action against an aggressive state” (2002, p. 163), but contends that the model would only work with a world-wide or universal (and Kant-inspired) state (2002, chapter 8). Rodin wraps up his account with some reflections on the difficulties in which this leaves people now who may be persuaded by his argument yet wish to follow the dictates of morality. When Rodin revisits the question in 2014, he offers no substantial revisions to his story, though he expands a few of his arguments and modifies the “genocide exception.”

Some responses to Rodin

One early review of *War and Self-Defense* seems to me to capture much of the response of many readers, including scholars. Adam Heal, after admiringly noting the impressive scholarship and the “clarity, focus, and verve” of Rodin’s writing, concludes that one reason we need not accept Rodin’s conclusions is his “failure to implement his own declared moral methodology” (2004, p. 195). Rodin claims that we must always respect strong “first-order intuitions,” but Heal sees little respect for them in Rodin’s conclusion, which throws out one of the most powerful intuitions of all in this area. “The existence of such a wide normative consensus on national defensive rights should lead us to reject a theory which can not sustain them, not to alter our firmly held moral outlook,” he avers (2004, p. 196).

Some scholars have responded with unmixed praise. Citing “the concerns voiced by the great antiwar critic Randolph Bourne *at the start of the last century* when he bemoaned the ‘neurotic fury about self-defense’ spawned by leaders to rationalize their offensive policies,” Cheyney Ryan says Rodin’s work is “everything such a book should be: a careful and learned exploration of the topic that resolves some long-standing issues while raising new questions and advancing new proposals for how to think about war...Rodin’s is just the sort of work we need to address this problem” (2004, pp. 69-70, emphasis in original, internal citations omitted).¹⁶⁴ By contrast, Whitley Kaufman, in his discussion of Rodin’s stance on individual self-defense against innocent attackers, stresses Rodin’s statement that “there may sometimes be situations in which there is a duty to abstain from self-defense, a duty in other words of martyrdom” (Rodin 2002, p. 67). There is no “general ‘duty of martyrdom’ (martyrdom is supererogatory at best),” Kaufman replies. He continues, “The very implausibility of such a conclusion leads Rodin to employ

¹⁶⁴ To be clear, I do not wish in any way to belittle or deny Ryan’s point that the word “defense” suffers vast abuse at the hands of many politicians.

desperate measures to attempt to wriggle out of it,” measures he goes on to describe as “ad hoc” as well as implausible (Kaufman 2004, p. 28). Kaufman makes no attempt to balance the harsh critique with any positive comments.

Most scholars have found something to praise along with something to criticize in Rodin’s account. In the same issue as Ryan’s commendation are articles by David Mapel, Jeff McMahan, and Fernando Tesón that reject his conclusion without dismissing the work entirely. As McMahan’s biggest concern is to defend against Rodin’s attack on the reductive approach, an approach I too reject, I will leave his critique to one side. Mapel notes, among other things, that Rodin simply goes “[a]gainst a consensus among philosophers and lawyers” when he claims that we may not kill innocent attackers (2004, p. 82). He offers Elizabeth Anscombe’s account of an “objectively unjust danger”¹⁶⁵ that justifies self-defense, clarifying that it differs from and is an improvement on Walzer’s position (2004, p. 83). While imminence of danger is required for lethal self-defense by individuals, soldiers of an unjustly attacking country “have a settled design on [defending soldiers’] lives” (2004, p. 84), so holding them to the individual standard is not reasonable. These are quite strong points, but another is even stronger:

Rodin also argues that neither territory, sovereignty, nor national identity is important enough to justify killing enemy attackers in *all cases* of aggression. While this is certainly true, international law must be designed to deal with the typical case, not the exception, and military threats of aggression are typically attempts to extort the surrender

¹⁶⁵ I agree with Mapel that this is a great improvement over both Walzer’s and Rodin’s account of the issue. I would note, however, that Anscombe is not being an “objective moralist” concerning self-defense here, in the sense I attack in chapter 4, as a full quotation helps show: “What is required, for the people attacked to be non-innocent in the relevant sense, is that they should themselves be engaged in an objectively unjust proceeding which the attacker has the right to make his concern; or—the commonest case—should be unjustly attacking him” (Anscombe 1961, p. 49). Even the “objectively unjust proceeding” should be taken as a proceeding that the attacker (in this case) reasonably believes to fit this description.

of very significant rights, and can be appealed only at serious risk and by setting dangerous precedent. International morality, on the other hand, permits more discriminating judgments about particular cases... (2004, p. 84, emphasis added).

This is an accusation of a false dilemma: Rodin in effect argues that either we say sovereignty grants an absolute right of national self-defense, as international law currently embodied in the United Nations Charter virtually does (and Rodin tendentiously chooses international law as the exemplary statement of the defensive right of states, 2002, chapter 5), or we must agree that the right does not exist. His exception, the bloodless invasion (2002, p. 130) shows on his account that the exceptionless right based on sovereignty is absurd. Mapel's point is the familiar one that many principles are not absolute, without thereby losing all meaning. "Return borrowed items when they are demanded" is a solid principle, but if the item is a shotgun and the lender is for the moment in a homicidal rage, the principle can be seen to have an exception (McInerny 1997, p. 57, adapting an example from Aquinas, who seems to have borrowed it ultimately from Plato). But this does not deny the principle, and a rule granting self-defense to a nation is not shown to be absurd by a narrow class of exceptions. In addition, Mapel makes the obvious and necessary point that morality can make finer distinctions than laws and charters, which must be more general.

Tesón makes a number of the same general points against Rodin's account in different forms. One thing he stresses more than Mapel is a point I make in my argument against reductionism in chapter 4, namely that the morality of individual self-defense with which we are familiar is heavily dependent on the existence of authorities: we can "call the police" (2004, p. 90). (I will say more about the inadequacy of Rodin's account of moral rules in the state of

nature below.) In addition, Tesón argues strongly that Rodin has ignored central features of liberal states:

Citizens defend not merely one another but also the just institutions that they have created together and under which they live. The government is simply their instrument. The justification of self-defense thus combines principles from political as well as moral philosophy. This account, I believe, is neither purely reductionist nor does it resort to the spooky communitarian views that Rodin rightly discards. The army of a justified state defends the citizens' lives and property threatened by the aggressor, but it also defends the liberal state itself, notably its institutions. It also defends its territory, morally understood as the locus for the exercise of liberal rights and the functioning of liberal institutions. (2004, p. 88)

This is another "false dilemma" argument, and Tesón is claiming that between the horns of the dilemma lies another way, the just liberal state, its institutions, and the property it defends on behalf of its people. He extends this argument by offering reasons for which even tyrants and dictators may defend their states (2004, p. 89), but the argument is somewhat weak. Against Tesón's point here, Rodin offers a counter:

...the argument risks committing us to an implausibly permissive view of humanitarian intervention. This is a particular problem for Tesón's account, in which the right of national defense is grounded in the presence of just (that is, liberal) institutions, and the right of humanitarian intervention is grounded in their absence. Many, if not the majority, of the world's states are illiberal, and we may be uncomfortable with the implication that all such states are potential objects of humanitarian intervention. Such a view is certainly a substantial deviation from the emerging consensus in international law that

humanitarian intervention is limited to cases of governmental abuse that “shock the conscience of mankind” (Rodin 2004, p. 94, internal citation omitted).

I believe this is one of Rodin’s better defenses in the set of responses in this article. One counter to Rodin would be to acknowledge that many liberal writers in fact make an effectively binary distinction between liberal and authoritarian states, but to note that some of the virtues of liberal states are shared by many non-liberal states. As Arendt writes, liberal theories often, overlook the differences in principle between the restriction of freedom in authoritarian regimes, the abolition of political freedom in tyrannies and dictatorships, and the total elimination of spontaneity itself, that is, of the most general and most elementary manifestation of human freedom, at which only totalitarian regimes aim...The liberal writer, concerned with history and the progress of human freedom...sees only differences in degree here, and ignores [the fact] that authoritarian government committed to the restriction of liberty, remains tied to the freedom it limits to the extent that it would lose its very substance if it abolished it altogether, that is, would change into tyranny. The same is true for the distinction between legitimate and illegitimate power on which all authoritarian government hinges. The liberal writer is apt to pay little attention to it... (2006, pp. 96-97)

Many a political scientist has illustrated Arendt’s point here by dividing the world into two kinds of states, democracies and authoritarianisms, coding examples of the first with a “one” and the second with a “zero.” But democracies in fact have flaws—they are not “just” *tout court*. In addition, the actual experience of life under an authoritarian regime¹⁶⁶ demonstrates Arendt’s point that many such states provide a great deal of protection for the dignity and security of their

¹⁶⁶ I have lived for a number of years in several of them, under their laws, even if as a foreigner.

citizens, and have considerably legitimacy as far as those citizens are concerned. Even tyrannies often do a great deal of good for their citizens through the simple provision of order. The negative factors of life in Iraq in early 2003 under Saddam Hussein were widely known. However, it was relatively stable, had a functioning economy, offered considerable religious freedom and tolerance for diversity (which was in fact rather high for the Arab world), and provided women considerable freedom to work and participate in public life, among other goods. There is no need, even with such a case, to create a binary distinction between democracies, which provide human rights, and other states, which can be assumed to be ripe for humanitarian intervention (which, as the Iraq experience, followed by the Libyan intervention and the support by various regimes for Syrian rebels, may do much to make life wretched for the “intervened” upon people).

If this point is granted, then Tesón’s point can be held but with a wider application: except for the very worst states, it is often the case that even a state with a relatively poor reputation in liberal democracies in fact embodies to some extent the desire of its citizens to have just institutions,¹⁶⁷ and to have a government that guards their patrimony of oil or land or fish or whatever other resources they have. Such a state is also usually governed by a regime with ties to its people of language, culture, tradition, and history. John Gray attacks versions of liberalism that ignore these points for missing a salient fact about human beings. For such liberals, “The subject matter of justice...must always be a matter of individual rights. It is obvious that this liberal position cannot address, save as an inconvenient datum of human psychology, the sense of injustice arising from belonging to an oppressed community that, in the shape of nationalism, is the strongest political force of our century” (1995, p. 5). For this kind of liberalism, he says, in

¹⁶⁷ Perhaps just not by liberal but by Islamic or other standards.

a remark that encapsulates the spirit of Rodin's "bloodless invasion" argument, "*It will not matter by whom we are governed*, so long as governments satisfy the common standards of justice and legitimacy" (1995, p. 4, emphasis added).¹⁶⁸

When the people of an authoritarian or even a tyrannical state are willing to fight to prevent resources being seized, or another, foreign regime with a different language, culture, traditions, and history from governing them (directly or through local clients), it may well be that their evaluation (that their government means a great deal to them) is close to Tesón's, minus the word "liberal." The thoughts and feelings of all these people may be wrong, but perhaps their perceptions matter in a way that Rodin's framework does not grasp. Note that Rodin's second example of a bloodless invasion is, "an aggressor may invade with such an overwhelming show of force that the victim state declines to resist..." (2002, p. 132). And, "international aggression need not pose an imminent threat *to any right* of sufficient magnitude to make proportionate the use of defensive lethal force" (2002, p. 133). Such "central" rights, Rodin claims in the footnote on the same page, "include rights against being killed, maimed, or enslaved." A complete takeover of one's country by a powerful aggressor with a completely different language, culture, and perhaps religion, for the purpose, perhaps, of diverting most of the wealth of the country into the coffers of the aggressor state, violates none of the "central rights" of one's people, according to Rodin, as long as it is not "genocidal." Tesón's response seems to have some force, even on behalf of many non-liberal states.

A road map of this chapter

¹⁶⁸ To be clear, Gray's attack does not spare critics of liberalism such as MacIntyre, Taylor, and Walzer (in *Spheres of Justice*, 1983). He appreciates such critics' "phenomenological approach to justice," which "turns us away from the hallucinatory perspectives of Kantian liberalism to the real world of human practices..." Nonetheless, he claims such critics often ignore the fact that "In our world—the only one we know—the shadow cast by community is enmity, and the boundaries of communities must often be settled by war" (1995, p. 7).

In this chapter, after offering some brief praise of Rodin and certain aspects of his project, I will offer my own critique, which focuses on the logic embodied in Rodin's arguments. In the end, his is not an appeal to the emotions of his readers (he notes they will be offended by his conclusions), or to authority of some kind (even the authority of a theory, which he renounces in his introduction). When Rodin makes the sweeping denunciations quoted in the first paragraph in this chapter, including the claim, "[t]he right of national self-defense is a myth, unsupported by coherent moral reasoning" (2014, p. 74), Rodin is appealing to shared standards of logic, reasoning, and coherence, whatever the assumptions on which he builds. When Rodin responds to his critics, he appeals to standards of logical coherence. If "coherent moral reasoning" condemns those who advocate a right of national defense by failing to support their thinking, then it is this standard Rodin must meet. I hold that he fails to do so on multiple levels.

Where Rodin is right

I begin with praise. Appealingly from the tradition's perspective, Rodin begins with a discussion of fundamental issues. He talks about how he will argue, and discusses the building blocks with which he plans to build his argument (2002, p. 3). He claims to build on the "common morality" that has developed within "western civilization" (2002, p. 7). He is "committed to the existence of objective moral norms (2002, p. xii). He even discusses the need for a "rigorous foundation" for "our moral outlook." This is frankly refreshing, and especially in comparison to works that launch into discussions where the first appeal is to what "most of us think." (It is of course frustrating that Rodin admits that "our moral outlook *does indeed require* a rigorous foundation," but instantly adds, "but it will not find one here," 2002, p. 8, emphasis added.) If I take back with my right hand some of the praise offered with my left, it is because, in my view, Rodin offers some striking deviations from the principles he proclaims.

I also share Rodin's unhappiness with certain forms of just war theory (and some international law now, and much international law in certain periods) that seem to endorse an absolute sovereignty of states (although I believe it is confusing for Rodin to call this simply "traditional just war theory" (e.g. 2004, p. 93—the description recurs five more times in this brief article). Not surprisingly, I endorse much of his critique of reductionism. I wholeheartedly endorse Rodin's view that "the primary role of moral evaluation is ... forward-looking assessment of how one ought to act" (2002, p. 11). It often looks as if some contemporary moral theorists pay little attention to this description, or perhaps disagree with it. And some of the praise offered by other recent critics is, I believe, well-merited. For example, I agree with Tesón's remark that "Rodin rightly discards" both "purely reductionist" and "spooky communitarian views" backing national self-defense (2004, p. 88). Nonetheless, as I discussed above, I think Rodin points to a weakness in Tesón's own liberal critique of Rodin's work. In sum, I for one have learned a great deal from Rodin, despite my very grave criticisms of his methods and conclusions, and I can endorse many of his concerns. I am grateful that his work has prompted so much reflection on these issues.

6.1 Logic and Coherence: Some Overall Questions

6.1.1 Overall: A Disjunctive Argument is Needed

Rodin's conclusion is categorical: He has provided a "repudiation" of "the right of national-defense...as a legitimate moral category" (2002, p. 197). Again, "[t]he right of national self-defense is a myth, unsupported by coherent moral reasoning" (2014, p. 74). In both forms, the argument claims to have ruled out all the possible exceptions. For such a conclusion to be valid, it needs to stand at the end of an argument that has defeated, or at least indicated the weakness of, all the plausible alternatives to his own view. Since his argument is cumulative,

each of the major parts faces this same requirement. This is clearly not the case. For example, Rodin offers no explanation of the ground of the existence of an individual *right* of self-defense, but simply assumes that it exists. There are other accounts of self-defense that may avoid some of Rodin's implausible conclusions that arise from his rights-based account (see Kaufman 2004, p. 28, for a discussion of these). One candidate (among many) is some branch of the tradition, but this is ignored. So are other candidates—leaving the sweeping conclusion unsubstantiated. A second example is Rodin's contention that there are two possibilities of aggressive war, lesser aggression or genocide. These two possibilities cover, I contend, very little of the territory (and the 2014 revision is still quite unclear). I am not claiming here that any one of Rodin's arguments is wrong, just that the sweeping conclusion is not validly supported.

6.1.2 *Contradicting the Western Tradition*

As Heal implies, Rodin's entire work is open to the kind of *reductio* argument he himself employs against Thomson, for his conclusion contradicts the tradition he claims to work within. At a crucial point in that argument, Rodin writes, "Something has gone wrong here; we have ended up with a nonsensical conclusion..." (2002, 86). If the conclusion is nonsensical, then the reasoning must be wrong. Rodin thus invites us to do the same to his entire work, as Heal does. This is an especially strong critique because Rodin claims to be operating in "the common morality of the West," yet his conclusion, that defense of one's nation is not morally justifiable, violates one of the most "old and...entrenched" (2002, p. 3) ideas in that common morality.¹⁶⁹

¹⁶⁹ Aquinas' seminal account (*S.t.* II-II, q.40 a.1) may be taken as an authoritative early example of the tradition's almost taken-for-granted approach to national defense. Although Aquinas provides a reason for the responsibility of the ruler of a state for a defensive war, he does not belabor the point, which hardly seems to have been doubted. This description could be duplicated, of course, with minor variations, over centuries of commentary and analysis, both in the Aristotelian/Thomist tradition and in later developments of the "common morality."

But that western tradition also demands foundations as well as coherence, and another question that may be posed is whether Rodin's method, which denies those foundations, is actually capable of achieving the kind of conclusion he claims to reach. He does not "derive...norms from" or "reduc[e] them to, one or another of the classic moral theories," nor does he "give [his] allegiance to any" of them. This is because "a moral explanation which has any hope of being true, will have to recognize...a plurality of sources of normativity." He cannot be a pure Kantian because, for example, it seems "unquestionably right to intentionally deceive a murderer who enquires where his would-be victim is hiding," but nor can he simply accept consequentialism, for it is "never...right to kill an innocent man in a hospital waiting room" to use his organs to save several others. But if Rodin cannot find a theory that reconciles his anti-Kantian and his anti-consequentialist insights here, why should we think him capable of reconciling all the different intuitions involved in the questions of individual and national self-defense? As Rodin admits, "the most fundamental goal of philosophy is consistent and coherent explanation" (2002, p. 9, the source of all quotations in this paragraph). We are left with Rodin's choice of one Kantian intuition here, and one consequentialist intuition there. Perhaps there are no coherent and consistent explanations of any moral question? But that would rather defeat the purpose of the book. Rodin's discussion of criteria for choosing between ethical systems does not help. They "will include, for instance, the richness and coherence of the system of norms, the extent to which it is capable of engaging in a useful way with characteristic human problems and the fineness and appropriateness of the distinctions it is capable of sustaining" (2002, p. 8). I say it does not help because where any reader has a different intuition from Rodin, it is a near certainty that that reader will disagree with Rodin on how well he has met these criteria.

There also appears to be a contradiction between a rigorous foundation being “required” and its being impossible to provide in this context. As Rodin approvingly quotes Kant, “ought implies can” (2002, p. x). Yet if there are no foundations, or none that are reliable, is the result not emotivism, at least in MacIntyre’s “broader sense” (2007, p. 26)? If the “common morality” of the western world has one strong feature of its methodology over centuries, it is an implicit requirement of logical consistency of some kind (Rodin 2002, p. 9), but a rejection of foundations implies a rejection of this requirement. Implicitly, it appears, Rodin rejects the requirement for logical internal consistency. At the same time, he claims that the results of his arguments are “findings” (2002, p. 99) and “conclusions” (2002, p. 197), words that belong to the world of rigorous argumentation from agreed premises. When at the end of Part I Rodin claims that his model “accounts for more of our pre-theoretical intuitions than its obvious rivals” (2002, p. 98) when another scholar disagrees, as many do, what is Rodin’s possible response within his own framework? That his distinctions are finer and more appropriate than theirs? (The problem is far less acute for writers with tentative conclusions throughout.)

Turning to structural issues, two aspects of Rodin’s argument call his claim to work within the common morality into question. First is his treatment of the two kinds of self-defense rights. While he borrows rather than attacks (or even examines the foundations of!) the belief within the common morality that personal self-defense is justified under narrow conditions, he treats that same common morality’s similar belief concerning national self-defense to an irresistible acid-bath of doubt. With flagrant inconsistency (from the standpoint of the common morality), Rodin implicitly adopts a modern or pre-modern approach to the value of the individual, assuming her significance and rights-holding status without question, but takes a kind of deconstructionist approach to the state and any attempts to establish its right to defend itself.

Second, the opposite outcomes of his inquiry, namely that an individual right of self-defense exists but a national right does not, seem to demand either an explanation in terms of the common morality or a frank admission that Rodin has left that common morality behind. Rodin might claim that his account in Chapter 7 of the flaws of the “analogical strategy” of demonstrating a nation right of self-defense is such an explanation. I believe his dismissal there of claims made on behalf of states is so sweeping, and leaves so little legitimacy for any government that has ever existed to this point, that it is hard to see how the account lies at all within the “common morality,” unless the latter designation is stretched so far it is more or less meaningless.

6.1.3 The Method of Argumentation

Rodin’s method of argumentation leaves, at many points, much to be desired from the standpoint of widely accepted norms of logic. He often appears to ignore possible explanations others might offer to support a thesis. However, he proposes a conundrum designed to demonstrate his point, and then claims that he has thrown the thesis into doubt. Some pages later that doubt has turned, in Rodin’s prose, into refutation. I offer an extended analysis of one of his arguments in section 6.5. Here I offer a shorter example.

One of Rodin’s arguments against the reductive strategy is “the argument from humanitarian intervention” (2002, p. 130). “Common sense tells us that humanitarian intervention is a very different creature to national-defense,” he writes. Indeed, on the surface they are very different entities. Yet, what if the point of both rights (neither of which is absolute) is the defense of innocent human beings, with the one an application of that right for an emergency situation and the other to be applied in more typical situations? But this sort of thinking does not seem to come up for Rodin. Instead, he offers the following logical conundrum

(I apologize for the convoluted and extended nature of this passage, but it is a representative sample, and I see no way to summarize it):

...if national defense were a right whose end is defending the lives of individual citizens, then not only would national defense and humanitarian intervention share an underlying moral structure, but the latter right could be derived from the former [this is a clear non-sequitur: when things share an underlying moral structure, they may derive, as in the example I will offer below of a family, from a third thing] by this simple argument: If the citizens of state A are threatened by aggressive actions of state B, then state A has the right to engage in a defensive war against B in order to protect its (A's) citizens. Similarly any third party, state C, has the right to engage in war against B (and hence intervene in that state without the approval of its authorities) with the end of protecting the citizens of A. But now it would seem that humanitarian intervention is simply the application of this general principle with respect to third party intervention on the assumption that states A and B are the same state. [This makes no sense that I can see. No assumption that A and B are the same state is required. The attack on B is only allowed if it is proportional, and if it is aimed at and has some hope of achieving relief for the citizens of A, presumably by forcing the soldiers of B to retreat from A.] To put the point another way, if a particular military action of state C is justified by the fact that it defends the endangered lives of the citizens of A, then it should make no difference to the morality of C's action whether the citizens of A are threatened by their own state or a third party.

But, of course, such a result flies in the face of common sense as well as the law and the moral theory of self-defense. ... (2002, pp. 130-31)

An analogy that springs immediately to mind against Rodin's initial claim here is the normal family, against which there is a "right of intervention" in extreme cases (even passers-by may intervene on the children's behalf in extreme cases, say public torture of a child, even against the family), but belonging to which is a normal "right to be free of interference" (in normal cases the authorities in the family, the parents, have the right to reject outside advice and interference). In both cases, the underlying good is that of the children. If there is a right of intervention in extreme cases, does that prove that normal families have no value, or that parents have no right, in general, to raise their children without constant interference from strangers? If there is a right to be free of non-family interference, does that mean any action may be undertaken against children without anyone having a right to interfere? If we say the two rights are grounded in the same thing, the welfare of the children, does that mean that the right of interference in extreme cases should be derivable from the right of the parents not to be interfered with normally as they raise their children? Surely not.

Let us again consider, "it should make no difference to the morality of C's action whether the citizens of A are threatened by their own state or a third party." Because we would have chaos if states were constantly intervening in the affairs of other states, the right of humanitarian intervention is only considered to be triggered in extreme cases. But the right of interference in a war between two states is also not to be used without weighty reasons. Given the proper reasons, C's action can be moral in either case, but the two cases of intervention differ, even though the underlying moral ground, the rights of A's citizens to live, is the same. Rodin's argument appears to rely on the ruling out of any nuanced approach.

I offer one more, rather different, example of flawed methodology. A strange but important line of argument in *War and Self-Defense* is the notion that "when moral concepts are

systematically prone to abuse, it is a symptom of their fatigue and failure. What it shows is that morality has failed to take proper cognizance of politics and its astonishing capacity to subvert, abuse, and manipulate moral categories” (2002, p. 196). Is there any moral concept that is not “systematically prone to abuse?” Surely the Ten Commandments and the concept of the “brotherhood of man” are abused daily! It is no argument at all against just war theory that concepts within it, or the theory itself, are misapplied by foolish, careless, or calculating moralists and politicians: *abusus non tollit usum*.

6.2 Individual Rights

6.2.1 Ambiguity on Individual Rights vs. “General Rights”

There is a fundamental ambiguity to Rodin’s entire project, which is worth addressing briefly. Rodin claims to be testing a hypothesis. The result is this: “The model of defensive rights, derived in Part I, which generates a valid justification for interpersonal self-defense, fails to do so for national-defense” (2002, p. 197). What was he attempting? As Rodin announced in his introduction, “...I will undertake two basic projects. The first is to provide a robust explanation of defensive rights in their most general form” (2002, p. 2). He also asks, “can we understand both self-defense and national-defense as legitimate aspects of a single more general phenomenon of legitimate defensive rights?” (2002, p. 3). These three statements together seem to say that in Part I Rodin discovered what defensive rights were in abstraction and then created a model of those rights. Next, in an experiment, as it were, he applied that model first to interpersonal self-defense situations and then to international ones, testing it in the two situations.

But this is not what he does. In fact, all the discovery of “self-defense rights in general” takes place through asking questions about interpersonal, individual morality, as the most

cursory reading of Part I reveals. For example, Part I begins: “Self-defense is referred to as a right. Why? What kind of right is it?” (2002, p. 17). Rodin immediately adopts a model based on Hohfeldian interpersonal rights, and sticks with it throughout Part I.

There is no deeper model “X” which is applied at the individual level and the interstate level. Rather, the interpersonal right of self-defense is explored and specified, it is assumed to be the general right, and this interpersonal right is applied to the interstate situation. There simply is no “model of defensive rights, derived in Part I, which generates a valid justification for interpersonal self-defense...” In fact there is only a tautology here: the model of individual defensive rights generates justification for individual defensive rights. This matters because if Rodin were able to validly claim to have discovered the “objective moral norms” (2002, p. xii) that are independent of and foundational to interpersonal rights and that govern both those rights and putative interstate rights, he would have a project with greater *prima facie* validity. There is nothing particularly wrong with the way Rodin actually proceeds, but it is simply not what Rodin describes in these pivotal phrases.

6.2.2 Assuming Individual Rights—Assuming No National Right

Rodin treats the question of the individual right of self-defense sharply differently from the question of a possible national rights, assuming that the one exists and needs to be explained and that the other must prove its existence, as I noted briefly above in the context of Rodin’s claim to work within the “common morality.” Individual rights that lead to a self-defense justification are assumed to exist, as Rodin explains in his introduction (any analysis of them will be “constructive and explanatory”), but national rights of self-defense are required to prove their existence in the face of a withering (“probing, questioning, and ultimately sceptical”) scrutiny (2002, p. 3). In the main text, the individual right is introduced thus: “Self-defense is referred to

as a right. Why? What kind of right is it?” (2002, p. 17). The only question asked here concerning the right is how to define it. Yet in Part II we are introduced to national defense as a “purported right,” and the question is, “to what extent can national-defense be seen as a valid instance of the broader class of defensive rights which we have charted in Part I?” (2002, p. 103). The two sets of rights are put on a playing field with a very steep slope toward one end.

This is not just an implicit rejection of the common morality but an obviously uneven method of proceeding. The claim that individual rights exist is controversial, and there is no clear explanation from Rodin as to why he is assuming them without at least indicating why. Given that most people also assume that a national right of self-defense exists, just like an individual right, why not expose both sets of rights to “probing, questioning” mode (2002, p. 3) of Part II? Or conversely, why not assume that states have Hohfeldian rights against each other, claim rights and liberties and so on (2002, pp. 17-26)? Given that both sets of rights are sometimes questioned, it would seem to be a matter of intellectual rigor and fairness to address both sets of questions, or at least to indicate why this is not done.

6.2.3 The Right's Hidden Source in the Legal Order

Since, as I have argued, Rodin's actual project is to call putative national right of self-defense before the bar of the individual right, it matters greatly how the individual right is derived. In Chapter 4, in sections 4.3.2 and 4.3.3, I discussed the problem of discovering general “standards of justice” that will apply in the “state of nature” that is, as we have generally believed since Hobbes, the international arena. If we go by our intuitions, I claimed there, the problem is that those are inescapably shaped by the myriad unremembered forces of our upbringing in a state mid-way between an individual state of nature and an international one: the

“well-established legal order,” in Rodin’s phrase (2002, p. 44) with its authorities and guardians, preventing and deterring some wrongs and punishing others.

Rodin has considered this claim, that our perceptions concerning the use of force are shaped by the government in the background, in his account of excluding property rights and certain liberty rights from those rights that can be defended by lethal force. I believe that account gives a strong indication of how well he is able in his self-defense account to define an individual right of self-defense as should be described *in a state of nature*: for any restrictions in the individual right will be used by Rodin in his description of the individual right will be stringently applied to states, which as Tesón notes, cannot “call the police.”

Rodin’s state of nature account begins by noting this fairly common counter-argument: “this thought [“the exclusion of property from rightful defence with lethal force”] cannot identify a basic principle of justice, because the distinction is only plausible within a well-established legal order.” But his response is negative: “I want to reject this claim, and maintain that the principle of proportionality that I have outlined would be valid even in the absence of an effective legal system” (2002, p. 44), or, as he notes on the next page, in “a state of nature.” He goes on to consider crimes against property in such a state (2002, p. 45-48). (It should be noted that Rodin makes an exception for “property on which one’s life directly depends...one’s last food, or a vital piece of one’s life-support machinery,” 2002, p. 44. Throughout Rodin’s account, he continuously addresses crimes in a one-off manner, as in “one’s last food” just above: there is never a consideration of the possibility that the crimes will be committed repeatedly, as they are in actual states of nature (or, very similarly, in states of justice deprivation such as those in war zones).

The heart of Rodin's most extensive discussion of why lethal force cannot be used in defense of property is as follows: "First, even in a state of nature, there is a possibility of redress and compensation for attacks on property... For instance, a victim of theft in a state of nature might be able to re-appropriate his property, by sneaking into the thief's house late at night" (2002, p. 45). Now, note that I am "sneaking into the thief's house late at night," so presumably he is stronger than I am, or else better armed. Whether he originally robbed me at knife- or sword-point or not, he is assumed in terms of the scenario itself to be violent when provoked, or I would either not have allowed my property to be taken, or I would swagger into his house in the daytime and take it back.

But this "sneak in at night and take it back" suggestion is unworkable on Rodin's own terms on a number of levels. First, it is hopelessly impractical. As Hobbes points out, people are armed in a state of nature, and they lock their valuables in chests, and take other measures to protect their property, such as keeping dogs and servants (or living with fellow thieves). If the item is valuable and small it will be hidden or locked away, and if it is valuable and large (half the harvest, but not "my last food") it will be too large to sneak out with quietly. Second, this violates Rodin's own proportionality principle: the thief or robber, if awakened, will be likely to respond with violence if he awakens and finds someone in his house before the re-appropriation is complete—or even afterwards. According to Rodin, however, if I provoke a violent person I assume a share of the responsibility for the violence that results. Although it is a discounted responsibility, on the other side of the scale is my duty of care, in this case for myself. If I die in the ensuing fight, I will share in the responsibility for my death, and if I kill him, that will be the (disproportionate and impermissible) infliction of death in response to theft (2014, pp. 83-84).

In the third place, the thief's reputation for violence is a contingent threat directed against those who might like to recover lesser interests. As Rodin claims, "when a direct threat to a lesser interest is accompanied by a contingent threat to a vital interest, this provides a moral reason not to defend the lesser interest" (or in this case, attempt to recover it in a way likely to end in a fight). As he explains, this is because "the permissibility of engaging in defensive action is in part determined by the foreseeable consequences that the defensive action will produce" (2014, p. 82). (And "recovery" action is surely under the same rules as "defensive action.") Finally, this bizarre hope of sneaking into a thief's house is going to need to be repeated many, many times in a world in which victims will never use force to secure their property. Any victim's property is almost sure to be unrecoverable on Rodin's terms, unless (even more absurdly) we posit a state of nature populated exclusively by non-violent thieves, and even then, the continuous effort to re-appropriate one's property (since there is no reason to assume thefts will be one-off) will end up taking as much energy as somehow gaining a living in the first place—which means gaining a living will be impossible.

The hope of reconstructing destroyed property, in another of Rodin's brief discussions of another difference between defense of property and defense of life, is at least as futile. "But it is not simply the possibility of redress that differentiates attacks on property from attacks on persons, it is also the possibility of reconstruction. A house destroyed by marauders may be rebuilt better than it was before, and a lost fortune can be reconstructed." An attack on property is "a different kind of injury" from an attack that "kills, mutilates, or disfigures." Rodin notes that "the chances for effective reconstruction of property are diminished in a state of nature; however, this does not refute the claim that there exists a morally significant distinction in kind between the two harms, for that distinction is based on *the possibility* itself" (2002, p. 45,

emphasis added). This “possibility of reconstruction” is not just diminished but is clearly otiose when bandits are rife in a region in the state of nature (and they tend to be rife just where no one is able or willing to resist them). This is especially the case when they can return at any time for a second helping—to burn down your rebuilt house, or take away your reconstructed fortune, knowing that you will not resist. Rodin is surely right that there is a difference in kind between the two harms, just as there is a difference in kind between beating someone unconscious and killing him. What he has not shown is that a world in a state of nature where decent people did not resist robbery until their “last food” is reached would be a livable world.

Rodin goes on to compare the defense of life to the defense of “rare paintings and musical instruments,” but then shifts dismissively to discussing the defense of a pair of sunglasses (2002, p. 46). Finishing the discussion of the defense of property he goes on to loss of limb and rape, and concludes that these are indeed morally defensible with lethal force if necessary. (I assume the state of nature proviso continues, since this would strengthen rather than weaken his argument, which, as he notes, admits in Part II of the book the existence of a state of nature: 2002, p. 45.) The final question in the section concerns the loss of liberty. Rodin does permit the use of lethal force in defense of liberty, but only in cases of, “defense against enslavement, wrongful lifetime incarceration, or some similarly grave infringement” (2002, p. 48, emphasis added).

What might a victim do with this last permission? Is lethal force is only warranted, say, when the kidnapper proclaims that your incarceration will be for life? (Is a year’s incarceration really a thing far different from a single rape or loss of limb?) Or, do we need good evidence that the kidnapper is of the “lifetime incarceration” kind, or an enslaver of innocents, since no one gives out business cards with “slave-dealer” to prospective victims? If we must simply rely on

our good judgment, then there is no way to tell the difference between someone trying to enslave me for a week, a month, a year, or life—until I am completely in his power, when I might discover the fact.¹⁷⁰ So may I resist any kidnappers based on that truth? If so, what is the point of the stipulation of the “lifetime” restriction, since relying on my judgment will allow me to use lethal force against anyone who seems to have serious designs on my liberty for whatever purpose or period? And, since kidnappers often rape their victims, perhaps the whole discussion on Rodin’s part is unnecessary?

Rodin’s later “home invasion” analogy to “lesser aggression” actually works against his thesis, but also illustrates again the weakness of his appeals to morality in a state of nature. This later analogy involves a home invasion by an armed villain exercising a presumably “defensive”¹⁷¹ “conditional threat” (2014, p. 84): “He makes it clear that he will not use violence unless resistance is met.” Built into the home invasion are these features: “He lives in your house, eats your food, and makes you and your family do all the work... There is no end in sight.” It is odd that Rodin does not note that the villain (a) has effectively enslaved the family, and (b) has no intention of ever giving them their freedom, and thus has effectively kidnapped them for life. Although he states that “it would not be right to resist,” this is for the sake of the children, with the implication that it is better they grow up and live out their lives as slaves than face the risk of death. The apparent contradiction with the slavery and “life-long incarceration” exceptions granted earlier seems strong to me. And, if an adult is allowed to risk harm to save himself from lifetime slavery, why not for the sake of children who will spend even longer as

¹⁷⁰ As Locke pointed out long ago in the Second Treatise (2005, p. 279–80). It seems particularly apposite here.

¹⁷¹ I use Seth Lazar’s term here (Lazar 2014, 26), since Rodin quotes Lazar’s account with approval, but without endorsing it as a description. The adjective is not apt for a threat except when the threat is in the service of rightful defense. Offering to steal something and then offering a “defense” against the rightful owner’s response is an abuse of the term “defense.”

slaves? The only way Rodin's prescription of non-resistance here might make sense is if (though he neglected to mention it) he expects the police to arrive at some point—he has not explicitly identified this particular parable as a state of nature story. Yet this would, of course, destroy the point of the metaphor, which is to stand for a “lesser aggression” internationally, where no police force exists.

The evidence appears to be quite strong that the intuitions to which Rodin appeals are thoroughly shaped by life “within a well-established legal order” (2002, p. 44). There is no evidence in Rodin's work to indicate successfully that the rules appropriate *in* such an order could maintain a viable, and non-enslaved, life *outside of* such an order—yet, to repeat, slavery is one of Rodin's justifications for resistance. Because the second part of his book is built on conclusions from the first (very much including his state of nature argument), as Rodin himself notes numerous times, his unconvincing arguments about a state of nature form an important part of his argument for the impermissibility of national defense.

Applying these concerns briefly to Rodin's account of self-defense, I note Tesón's summary of Rodin's requirements of “imminence, necessity, and threat to life” in order for lethal self-defense to be permissible. While these are certainly valid requirements in a governed community, will they not have exceptions in a state of nature? In such a state, once someone strong and violent has made quite clear a settled design on your life, must you wait day after day for him to ambush you—or, lacking any other hope of long-term survival, may you not kill in response to a serious and real standing threat? In a state where retreating leads to being chased away from the means of survival, is there a duty to retreat? In a state where the police will never come, must a kidnapping attempt backed by unknown plans be met with non-violent resistance? I think it is clear that Rodin completely fails to offer a credible account of individual rights in a

state of nature. However, if he truly took the potential ugliness of a state of nature seriously on the individual level, it would make his arguments against the permissibility of the defense of a nation-state (except for “genocide,” see the relevant subsection in section 6.3) untenable.

6.3 The State and the World State

In this section I want to look at some logical inconsistencies in Rodin’s account concerning the state and its role in the world. As I noted in section 6.2, Rodin assumes an individual right of self-defense, but then assumes that states have no such right, and in effect requires them to prove that they do. But there is another element here: as shown in the same section, much of Rodin’s analysis of a state of nature actually makes no sense unless there is a state in the background enforcing domestic order. It is Rodin’s hidden assumptions about the domestic rights of the state, and their contradiction with the lack of external rights of the state, that I want to question here.

6.3.1 Assumption: States Permitted to Use Force Domestically

Among many contradictions, surely it is still another to assume that the state must prove its right to use force internationally, but at the same time grant without question that it has the right to use force, including lethal force, domestically (as Rodin does and I will show below). In light of the former assumption, how does the latter make sense? Shouldn’t the domestic rights of the state to use force, including lethal force, be subjected to the same “withering, probing analysis” applied to its putative international rights? Is there some overarching and obvious right of the state to provide order domestically, using force against domestic enemies of order, that excludes any right to use force against external enemies? I am aware of no such clarity in any theory which Rodin has endorsed.

In chapter 4 I discussed the fact that Rodin implicitly accepts the role of the state in locking up the dangerously insane. Let us look more closely at that activity. Locking up a dangerously insane person is often an act of force, and is almost always backed by lethal force. But it is not the end of the use of force. What if the dangerously insane person escapes? Would a policeman be authorized to kill the insane escapee if she resisted re-arrest and tried effectually to kill him, say with a large knife or a 5-foot section of two-by-four? (If recapturing the dangerously insane is justified, it involves the use of force by police, who presumably would not agree to do the job if lethal force were out of the question in extreme situations.) If so, on what grounds? If a private citizen defensively killed the escapee, he would be saving his own life through a self-defense killing, as well as sparing the community from further killings, whereas allowing the escapee to kill him would lead to his own death and, likely enough, the deaths of others. A policeman in the same situation would be performing just the same service for himself and the community. How can the moral burden on the individual, to let his life be taken, be so much greater than the moral burden on society, which is allowed (domestically) to ride roughshod over the “broadly Kantian” requirements of morality? The inconsistency here is grave. And if state’s forces of order may kill the non-culpable insane person at home in order to protect innocent citizens from harm, how can Rodin insist that invading enemy soldiers may only be permissibly killed if they are culpable (2002, pp. 163-64)? This is a flagrant double standard: on what basis can Rodin hold the state, in war, to the same moral standards he claims to have discovered for individuals, yet allow the state in everyday life to violate those same standards?

But leaving the insane aside, what of the more general point of the authorized use of lethal force by officers of the state? First, police officers simply make no attempt to determine if someone is either culpable or responsible for his or her behavior: they react to the behavior, and

if the person involved escalates, the officer escalates in response (as Tesón among others notes, 2004, p. 90).¹⁷² In addition the police, the persons charged with the use of deadly force by the state to protect citizens domestically, leave questions of justification and excuse, culpability and responsibility, entirely to the courts.

Take armed robbery as an example: it does not seem to be a very serious crime in Rodin's view, as it is a mere crime against one's property, and Rodin argues strongly against the permissibility (for citizens) of using (or threatening) lethal force to defend property (2002, p. 44-46; 2014, p. 82). Yet, first, the long prison sentences handed out for armed robbery suggest that societies take the crime far more seriously than Rodin does. Second, defense of property by an individual is disproportionate, he argues, because the robber's escalation of violence if an individual wants to defend his property must be built into his proportionality calculation (2014, p. 81-85). But although Rodin imposes this requirement on private individuals and on states acting internationally, he ignores the fact that in the domestic affairs of every well-functioning state, police officers ignore Rodin's requirement, issuing orders without regard to possible escalation by presumed criminals. Confronted by an armed private citizen issuing threats to fellow citizens (or shooting at them!), the police simply aim their own weapons at the person and command him to lay down the weapon.¹⁷³ If the citizen escalates the use of force, the police respond, and no society (no liberal society, even) holds it against them—in fact, they are commended for it if they do it well and bravely.

¹⁷² "Consider the intruder on my property who simply trespasses to occupy, say, the shed in my backyard. He is not threatening me or my family, so, let us concede, I may not use deadly force against him. Yet surely I can call the police to evict him from my property. *If he resists he will be dragged out by force, and if he uses violence he may even be killed.* Now consider the international example..."

¹⁷³ In the extensive attention to a spate of recent (2015-2016) cases of police officers shooting black male U.S. citizens, the outrage is almost always focused on the background fact of the alleged lack of impending harm to the officer. No mainstream account complains at all about any case while admitting that the citizen showed strong evidence of being about to harm the officer.

Let us sum up a few of the domestic activities of the state which Rodin accepts without any cavil. It can protect your property, with the threat and use of lethal force, from an angry and violent robber (insane or not, culpable or not), although you may not. (Rodin assumes a “well-established legal order,” and the police in such an ordered society respond to lethal violence with lethal violence, if necessary. Rodin nowhere condemns this domestic function of the state.) It can kill an innocent deadly threat (insane or not, culpable or not), and you may not. In sum, its officers may violate “the ordinary rules of interpersonal morality” as Rodin interprets them to keep its citizens safe from criminals in their midst—whether it knows if they are culpable or not, whether they are violating vital interests, or not—yet it may not do so to protect its citizens from invasion and loss of their national patrimony and independence and right to vote. This is a startling contradiction. Even if unintentionally, Rodin appears to be hiding behind the skirts of the state, allowing it to do in its internal actions what is, according to his argument, gravely immoral, but (a) not acknowledging this, (b) forbidding private citizens to perform the same actions even to save their own lives, and (c) forbidding the state to perform the same kind of action externally.

6.3.2 The Genocide Exception

Despite Rodin’s sweeping conclusions about the impermissibility of national self-defense, there is an exception in the fine print, so to speak: the genocide exception. However, it seems to include stark contradictions. It is first introduced at the end of chapter 6, as an exception to his refutation of “the reductive strategy.” Rodin writes,

I should stress that it is not the case that military action can never be justified purely in terms of individual defensive rights. The actions of those who forcefully resist genocidal aggression can quite properly be understood in terms of rights of personal self-defense,

even when that resistance is organized and collective in form. Thus when the Jews of the Warsaw ghetto fought against the assault of the German army, they were quite literally fighting for their lives...it is possible to understand their actions as justified wholly within the conceptual scheme of individual rights. (2002, pp. 139-40)

This exception, as stated here, does not do much. By the time the Jews of the Warsaw ghetto were fighting for their lives, they, as a barely-armed band, faced an organized and well-equipped army with overwhelming military superiority—they had almost no chance of success. It is noteworthy that Rodin does not grant the *country of Poland* the right to defend itself in 1939. He implies rather strongly that Poland had no such right. (After discussing the “bloodless invasion” scenario, Rodin had earlier suggested Finland had no such right, discussing Stalin’s demands on Finland in 1939 as what certainly appears to be an example of an attempted “bloodless invasion” that should have been submitted to, 2002, p. 136.) In the context of his gloomy conclusion, Rodin writes, “suppose one accepts that there is no way to understand the fighting of defensive wars as morally justified” (the very thesis he advances throughout Part II). He continues,

many will find the conclusion that one may not fight against an international aggressor [again, the thesis he has been advancing consistently] morally unacceptable. This conviction may stem from a consequentialist concern for the costs of not resisting aggression, *which may be appallingly high especially if the aggressive regime is as repugnant as Nazi Germany or Stalinist Russia.* (2002, p. 198, emphasis added)

Here is Rodin’s opportunity to reassure us that he certainly does not mean there is no permissible resistance to such regimes as these! But he offers no such assurance, and it is quite clear that against these regimes too, “national-defense” is not permitted. We are left, putting

these two stories together, with the clear conclusion that unless an entire nation is threatened with genocide, it may not permissibly defend itself. This is not much of an exception!

It is true that Rodin, in his 2014 article, widens the earlier exception (without saying he is doing so). There he defines “what we might call ‘genocidal aggression’” as “aggression that threatens the vital interests of all, or a significant portion, of a group of people” (2014, p. 80). This is contrasted with “what we might call ‘political aggression,’” which “is primarily directed towards obtaining a political or material advantage for the attackers” (2014, p. 81). He continues, “[a]lthough genocidal aggression sadly does occur, it is clear that political aggression is by far the most important form of aggression when it comes to rights of national self-defence” (2014, p. 81). Some find this passage reasonably clear. The one thing I can be sure of after reading it is that the vast majority of international aggressions in history did not qualify for the exception.

Would the exception even justify Poland’s resistance, as a state, to the Nazis in 1939? As Mark Mazower point out, as late as 1940 the Nazi regime was considering the “Madagascar Plan,” “by which Europe’s Jewish population were to be shipped to the island” rather than exterminated (1998, p. 159). As he writes a few pages later, quoting Christopher Browning, “the goal of the Final Solution at this stage remained ‘the expulsion of the Jews to the furthest extremity of the German sphere of influence.’ What transformed Nazi policy towards the Jews was the invasion of the Soviet Union, and the consequent radicalization of the war” (1998, p. 167). Mazower points out that in general, “the war did not merely expand the geographical reach of Nazi racial policies, it also radicalized and complicated them. War was the great catalyst” (1998, p. 159). In 1939, none of this was crystal clear. The Nazi plans for genocide had not even been formulated. At any rate, the line between “genocidal aggression” and “political aggression”

does not seem to be a bright one, and the burden of showing that they qualify for the exception seems to lie, in Rodin's telling, with would-be defenders.

6.3.3 *The Universal State*

In 2004, Tesón proposed an amusing yet cogent *reductio* response, involving aliens, to Rodin's suggestion of a universal state to enforce the defense of "nations:"

Moreover, Rodin's suggestion that a liberal world government would eliminate the problems associated with self-defense because it would provide law enforcement is mistaken: there would still remain the issue of planetary self-defense. Rodin would have to say that we do not have self-defense against invaders from another world, should we encounter them, because of the problems of lack of proportionality that he mentions.

Furthermore, Rodin is committed to the view that unless the invaders intend to wipe us out (in which case our defensive action would be identical to individual self-defense), we would not have a right to use deadly force. If they just wanted to conquer us, abolish our democratic institutions, and establish an autocratic yet not genocidal government, according to Rodin we would not have a right to resist. Whatever the proper justification of our resistance may be, this conclusion is surely wrong (2004, pp. 90-91).¹⁷⁴

I agree with Tesón that Rodin's "solution" raises more questions than it answers. First, just why should the proposed universal state be immune from the "probing, questioning" approach to all actually existing states, as it clearly is in Rodin's account? Such a universal state, however large, would in fact be (absent divine intervention or a startling leap in human evolution) essentially another, very large state, despite its possible benefits of "impartiality and consensual submission" (2002, p. 176), something many existing states also claim to achieve.

¹⁷⁴ In the spirit of this appeal to an alien invasion, I would also like to point out that Rodin's culpability requirement means no one has the right to defend herself against zombies, who are almost certainly innocent attackers.

Yet as a state it is not subject to any of the “probing, questioning, and ultimately sceptical [sic]” treatment (2002, p. 3) that is used to discredit the rights of existing states to defend themselves.

This new proposed state needs some minimal imaginative consideration beyond the benefits Rodin believes it would bring. Would it truly have no biases that might lead it to interfere unjustly, on the wrong side of a conflict? If it would be protected from such biases, how? What if an organized attempt to secede from it took place, with the consent of the majority of those in the seceding area? Such an eventuality would be almost guaranteed to occur with time. People and institutions change with the years. The universal state could not continue to be universal and exercise its universalist legal authority of “law enforcement” defense for the rest of the planet without first crushing the rebellion. If it did not do so, it would simply be a very big state, without any moral right to intervene—for it would no longer be “universal.” It would have to make war on that seceding portion of the planet—a civil war aimed at crushing a rebellion, the acceptance of which is something Rodin sees as a travesty of morality at the heart of the analogical strategy in traditional just war theory (2002, p. 157 and p. 194)—only this would be rebellion-crushing on a global scale.

In the section, “The myth of discrete communities” (2002, pp. 158-62), Rodin grounds one of his major objections to the analogical defense of the rights of states to defend themselves in the multiple levels of communities below the level of the state: “It is difficult to see why such groups should be denied an analogous right to defend their integrity with force” (2002, p. 160). What about lower levels, such as traditional states, under a universal state? It seems Rodin, rather than solving the issue of civil war with his proposal, has simply moved it to a larger scale.

And since *ex hypothesi* the majority of the people in the seceding area would have withdrawn their consent (which is also a highly likely outcome in at least some cases), the claim

that the now not-quite universal state would practice “law enforcement” would now rest purely on the remaining purported benefit, its supposed impartiality. Yet what state or international body has not given at least somewhat greater weight to the interests of powerful groups within it? What reason do we have to believe the universal state could ever achieve impartiality? The doubts that should be arrayed against Rodin’s claims for the universal state’s war-making rights are surely every bit as strong as the doubts Rodin casts on existing states, as soon as we consider his solution in the same framework in which he considers existing states, the world as we know it (as Gray puts it, “our world—the only one we know”).

If it is objected that the universal state might, without any extraordinary change in the reality we know today, achieve at least some degree of impartiality and global consent, and that some is better than none, this objection undermines Rodin’s claims against the rights of existing states—why should not they too be seen as having managed this feat, and if so, why is so little value attached to that achievement? If a second objection is advanced, that at least we would be rid of the endless wars between states, what of the likelihood that the universal state would be engaged in endless bloody suppression of secessions and rebellions, or that in order to prevent these it would engage in endless severe repression? What argument convincingly suggests that the latter scenario is less probable than the current level of warfare in the world.

6.4 Objective Morality and the Culpability Requirement

In chapter 4 I addressed both the issue of an “objective” approach to morality generally and Rodin’s culpability requirement (for threats to be permissibly killed) specifically. Nonetheless, there is a specific and vital issue concerning the combination of these factors that must be addressed here, which is Rodin’s belated attempt to deal with the real world situation of a victim of an attack. After several chapters of asserting a justification-based (rather than excuse-

based) account of self-defense, which requires that the “facts” be in the victim’s favor in order for him to act morally (see 2002, pp. 28-98), Rodin finally addresses, *for the first and only time*, the epistemic quandary of the victim. He does this in a single short paragraph on page 98, the penultimate page of Part I. But this brief paragraph proposes a solution that does massive damage to the rest of the argument of the book. In fact, the application on the international scale of Rodin’s proposed solution on the individual level appears to invalidate his entire argument—a disquieting result. Yet it is not a paragraph that could be simply cut, say, from a future edition of the book, for *it is the sole place in the individual model (which is then assumed for the state model) where Rodin translates his objective moral theorizing into guidance for someone in the real world*.

Rodin, laudably, claims early on that “of course the primary role of moral evaluation is not backward-looking judgement of past action, but forward-looking assessment of how one ought to act” (2002, p. 11). But this is a problem for an objective account due to the epistemic dilemma: forward-looking moral assessment can only be performed based on what is believed to be true. As multiple self-defense scenarios quite rightly insist, on occasion what we think is true turns out not to be. Thus, Rodin’s explication of the “central case” of self-defense, coupled with a “self-defense as justification” model of the individual right (in which justification is obviously an objective rather than a subjective requirement, and in which “the aggressor is fully culpable in making the attack,” 2002, p. 29) cries out for translation into the real world, where agents have no guarantee that what they perceive is the case.

Real human beings rarely have access to the facts about the culpability or non-culpability of an attacker, much less his degree of culpability. Culpability is by its nature an inner fact, not visible or empirically measurable, even if evidence of it exists. It depends on other inner facts,

such as responsibility and ability to freely choose. Its very existence is denied by some, deterministic, philosophical schools. When courts try to determine culpability retrospectively, they sometimes spend days or weeks wrestling with the issue, and this is with access to a multitude of facts that are usually not available to the victim.

Even if the victim had time to weigh possible culpability, consider the following cases. Implicitly, Rodin asks the prospective victim to distinguish among the following, some of which include a permission for the prospective victim to kill, and similar cases where by implication permission to kill is denied. As a planned or imminent victim, you are permitted to kill: “a malicious 9 year old...shooting at me” (2002, p. 93), but presumably not non-malicious 9-year olds, and not much younger either way. You are clearly permitted to kill sociopaths (2002, p. 95). You may (“sometimes”) permissibly use lethal defensive force against the mentally ill the cause of whose cause insanity is internal “to [their] mental and psychological world,” but not those where the cause is external (“we may not use defensive force in the first kind of case”) (2002, p. 95). You may permissibly kill attacking drunks (and presumably drug-users of other kinds) if they have the *mens rea* for the attack on you, and if their intoxication is voluntary, but not if they lack the *mens rea* for the attack, or if the intoxication is involuntary (2002, p. 93). You may permissibly kill (by implication) those attacking persons who are avoidably mistaken about you—but, Rodin explicitly states, not those unavoidably mistaken (2002, p. 97). It must be remembered that the epistemic burden in the model of individual self-defense will also rest on the shoulders of soldiers who wish to fight hostile soldiers crossing the border into their country (2002, pp. 163-64).

In the last three pages of Part I, Rodin notes that “it does seem hard justice to hold a person guilty for striking against a dangerous automaton or an unavoidably mistaken aggressor

to save his life,” and asks if there is some way to deal with this concern. Here at last Rodin considers a suggestion that the defender might be excused rather than justified in killing an innocent threat or an innocent attacker, but initially fends off this proposal: while “this is a helpful suggestion...[Thomson] unfortunately does not indicate how she thinks the excuse in this case can be accounted for” (2002, p. 97). Rodin considers “Hobbesian considerations about the extreme forces operating on a person face to face with the void,” but rejects this as a possible excuse for the defender, because, he insists, the model of self-defense he has set out is a justification model, and there is a “deep tension” “between justification and excuse.” In addition, “the notion of self-defense as a right is premised on the assumption of responsibility and hence the possibility of abstention even in the face of death” (2002, pp. 97-98). He then offers his final brief paragraph on excuses. I offer it in full because it is the only place in the individual model where the epistemic difficulty facing the victim is, briefly, acknowledged, and a solution proposed:

A better explanation of how it could be excusable to kill a dangerous automaton or mistaken aggressor is that of reasonable mistake. When faced with dangerous and threatening individuals it is reasonable to assume that the attack is malicious unless one has very good evidence to the contrary. A reasonable mistake in many of these cases will serve to make the use of lethal force excusable (though not justified). None the less, there will inevitably be cases in which the victim has unequivocal knowledge that the aggressor is innocent in one of the ways I have specified, and the conclusion we are driven to accept is that in these circumstances the victim may not kill to save himself. (2002, p. 98)

Here then is the solution to the epistemic dilemma of the victim of which I have made such heavy weather. It is a sweeping rule that takes care of doubts: unless the victim is privy to “very good evidence” of non-culpability, when “faced with dangerous and threatening individuals,” assume a culpable attack (the word “malicious” is surely used as a synonym for “culpable” here at the very end of Part I, which identifies culpability as the key criterion for allowing the inflicting of lethal defensive harm). This suggestion feels like an abrupt afterthought after all the careful distinguishing of various excuses of attackers, but perhaps it solves the problem of access to knowledge by the victim. The proposed solution will have to be questioned on Rodin’s own terms.

First, note how this suggestion works: the defender kills an apparently culpable attacker. If the attacker turns out to be culpable, then according to everything Rodin has written up to this point, the use of lethal force was justified, there was a moral relation between attacker and defender, and the defender discovers that he has treated the attacker “as a subject.” If, on the other hand, the attacker turns out to be nonculpable, no problem: the defender is excused. One way or another, there is no moral blame for the defender. The same act works on the completely different principles (which are in “deep tension”) of justification and excuse. In the one case, you will have treated the other as a subject; in the other, you will be responsible for “a regrettable action that one is none the less excused for performing” (2002, p. 28).

But, given this suggestion, what was the point of the taxonomy of attackers’ excuses? If the rule is “assume the culpability of the attacker,” why did we agonize over all the possible categories and sub-categories of attackers’ excuses? Every single kind of attacker considered up to this point will appear “dangerous and threatening.” Only in the rarest of instances will a prospective victim have “very good evidence” of an attacker’s non-culpability. Even if the

attacker appears to be insane because he is wearing a hospital gown and foaming at the mouth, the target of the attack does not know if the attacker's insanity has internal causes, leading to culpability in Rodin's account, or external causes, leading to a verdict of "nonculpable." All doubts are resolved in favor of the defender in this suggestion. Unless the defender actually knows the attacker and his medical history, he need not worry about any of these nice questions: he can permissibly assume culpability and kill the attacker, knowing that he, the defender, is either justified or excused. The vast majority of the previous discussion has been unnecessary as a guide to action. The only discussion necessary would be of the very rare cases when culpability would be known to a high degree of certainty. All others are covered by this suggestion.

However, this calls into question major parts of the rest of the argument. Why did Rodin present a "central case" of self-defense, which included the culpability of the attacker and the moral relationship between the two? Why did he carefully discuss the question of whether self-defense is a justification, or an excuse? In terms of this suggestion, it almost never matters in practice. He approvingly quotes Eric D'Arcy as saying "The effect of an excusing circumstance is to put the wrongful act *ex causa*, outside the court of moral verdict at all." Rodin goes on to comment, "For this reason there is little intercourse between the system of Hohfeldian relations and the idea of an excuse" (2002, p. 28). More strikingly, a single page before this suggestion, Rodin writes,

Yet self-defense is grounded in the existence of a level of normative responsibility on the part of the aggressor for the threat he poses to the defender. Where this is not present, as in the case of physical compulsion, involuntary intoxication, or unavoidable mistake, self-defense is impermissible. The *level of responsibility required* is delineated by a

principle of respect for persons which is Kantian in spirit and which *cuts through the class of excused actions* (2002, p. 97, emphasis added).

Yet according to this sole suggested solution to the defender's epistemic dilemma, in almost every case of sudden attack there is an intimate interplay between justification and excuse—the same act can rely on one or the other, depending on unknown circumstances. As a defender you may rely on plausible appearance and kill the attacker, and find out later (or never) whether you are justified or excused. Either way, your own act is permitted by morality.

But then, this suggestion requires an asterisk beside “culpability” even in the central case of self-defense (2002, p. 29), as well as in the entire discussion of the requirement of a moral relationship to the attacker as a subject being necessary to self-defense (2002, pp. 88-89). Rodin should write, wherever he mentions the culpability requirement, “but culpability may be assumed unless the defender has very good evidence to the contrary.” But that would entirely change Rodin's argument.

In fact, the rule also destroys the very beginning of Rodin's discussion of culpability. In the case of the original “Innocent Aggressor” and “Innocent Threat” (2002, pp. 79-81), this suggested solution would allow me to simply assume that anyone suddenly attacking me in an elevator or hurtling toward me through the air is culpable, absent “very good reasons to the contrary.” Yet this is wrong, according to Rodin, precisely because we must treat these sudden attackers, everything about whom except that they are likely to kill us is unknown to us, “as moral subjects.” Even if I know the colleague who “suddenly goes berserk” (2002, p. 80), I am incredibly unlikely to know the exculpating reason, which leads us straight back to the assumption of malice/culpability and permission to kill. The falling fat man would be the same: he is suddenly hurtling through the air toward me down a well—how am I to know what put him

in that position? Perhaps he is malicious yet careless of his life, a thrill-seeker who wants to kill in a risky way, and pretends to scream in terror as he does so. I have no evidence of his non-culpability, certainly not “very clear evidence,” so this suggested rule allows me to vaporize him with a clear conscience.

Yet all of the foregoing issues are minor cavils compared to a sixth and most vital point, which is that Rodin appears to forget this suggestion completely when he comes to national defense—but the suggestion, applied there (an application that must be legitimate if Rodin’s overall structure makes any sense at all), destroys a major part of his rebuttal of a right of national defense. Near the end of Part II, he states,

...in Part I, we learned that if one is to be justified in harming a person in defense, then it must be the case that the object of the defensive force has forfeited or fails to possess a right against being harmed. I argued that an aggressor can only forfeit or fail to possess rights against being harmed if there is an appropriate normative connection between him as a subject and the threat posed—the object of defensive force must bear some level of normative (as opposed to merely causal) responsibility for the threat posed. (2002, pp. 163-64)

Rodin goes on to state, “But the question is this: how can a forfeiture of sovereign rights on the part of a state explain the forfeiture on the part of its soldiers of their right to life? There is a gap in the moral explanation between a right to act against an aggressive state, and the right to act against the persons who are its soldiery—a ‘conceptual lacuna between the two levels of war’” (2002, p. 164).

But this ignores the massive hole he left in the argument for excused killings. If Rodin is right that it is morally acceptable at the individual level, then this is how we may certainly treat

invading soldiers. They are clearly “dangerous and threatening.” Following the rule, each politician and soldier could say of any invading soldier that he has “forfeit[ed] or fail[s] to possess rights against being harmed,” due to the fair assumption of malice/culpability, just like the attacker in Rodin’s excuse suggestion. For, “it is reasonable to assume that the attack is malicious unless one has very good evidence to the contrary.” This suggested rule seems to wash away Rodin’s argument against killing invading soldiers. Rodin himself has very helpfully filled the “conceptual lacuna between the two levels of war.”

In the first half of my argument against this suggested solution, I have claimed that it would blow major holes in significant places in the rest of Rodin’s argument. But beyond this claim, there are other problems with this suggested solution to the epistemic dilemma, both generally and in Rodin’s terms. First, the defender’s excuse is said to be a “reasonable mistake.” But this suggestion is dependent on a subtle word shift, from “culpability” to “malice.” The former has done all the work in Rodin’s analysis to this point, and the words represent different concepts. Does “mistake” work with culpability rather than malice? I contend it does not. A mistake about culpability is not even possible in the milliseconds available in a sudden attack. There is not enough information available to the victim to allow him to form a rational description of the attacker’s mental state, nor is there enough time available even if he had the information. Rodin insists, quite rightly, that there are culpable and non-culpable attackers, but these are often indistinguishable to the naked eye. Every one of these attackers will appear “malicious” in a sudden attack. The judgment “malicious” may or may not be a mistake, but the mistaken judgment “culpable” is not even possible given the time and information available. It is simply, therefore, not possible to make a “mistake” about culpability, as even a judgment of any kind on the subject is impossible to a defender in the time available.

Next, Rodin is offering a moral theory, and it is worth repeating once more that “the primary role of moral evaluation is ... forward-looking assessment of how one ought to act” (2002, p. 11). Rodin’s readers, if they are morally serious, are being challenged to ask themselves, “What should I do if suddenly attacked by an assailant whose culpability is unclear?” Rodin is advising the reader to plan beforehand, in effect, to “assume the attacker’s culpability, and you will be excused if you are mistaken.” Does this work in terms of Rodin’s own theory developed up to this point?

It still fails, in Rodin’s terms, because it is a wager on a moral outcome, which includes a plan to take advantage of a likely excuse if the wager fails.¹⁷⁵ Consider the consequences of a “failed” wager—of discovering you had killed a non-culpable person, something Rodin has insisted again and again that you “may not” do, because it is “impermissible.” It is not treating your attacker as a moral subject. It is something you should die before doing, as Rodin’s theory makes very clear. Your killing of the human being in front of you was deliberate. But how could you forgive yourself, knowing that you had violated the rules of morality on a wager, playing Russian roulette with your conscience? There is a significant number of morally non-culpable attackers in the world (Rodin has listed many), but you decided to run a real risk of grave immorality. You would have to ask yourself, “Could I have done better?” And the answer would come: certainly. You could have planned to act in accord with the dictates of morality, to do nothing impermissible, and thus not to treat anyone as culpable unless you had strong reasons, beyond simple evidence of hostility, to believe an attacker was culpable. And as Rodin himself

¹⁷⁵ McMahan at one point made a suggestion, according to Lazar (2010, p. 202), that one could kill a group of soldiers but with the intention of killing only the ones liable to be killed, such that non-labile soldiers would be collateral damage, their deaths “unintended.” Lazar attacks “such a malleable account of intention,” and states that this “proposed solution would conflict with McMahan’s other views... the proposal would build A’s mistake into the description of his intention, by asserting that he intends to kill B only if B is in fact liable.” Can Rodin’s view be understood except as a suggestion that one build a possible mistake into an intention?

argued a mere paragraph earlier, there is a “deep tension” “between justification and excuse,” and “the notion of self-defense as a right is premised on the assumption of responsibility and hence the possibility of abstention even in the face of death” (2002, pp. 97-98). Killing people with no good reason to know they are culpable, but a mere assumption that they are, hardly seems like an assumption of responsibility. If knowledge of non-culpability leads to a moral duty not to defend myself, how can I kill on a wager of culpability?

Rodin’s model of morally permissible self-defense is a justification model, not an excuse model, and that is the case both at the individual and state levels. It requires that the attacker be culpable, and that fact requires that the defender be reasonably certain about that culpability. The only prospective moral rule consistent with Rodin’s principles would be this: “If I am suddenly attacked, I am morally permitted to defend myself if the attack is by someone I know with reasonable certainty is sufficiently culpable; otherwise not.” It would be objectively impermissible to defend myself (even with a backup plan of being excused) if I were to kill a non-culpable person. I cannot morally plan on being excused, but can only plan on taking morally justifiable action—surely the whole point of the book. Morally, then, on Rodin’s principles outside this paragraph, unless I know the attacker is culpable, I can only let myself be killed (and note, *this is the assumption Rodin implicitly applies in cases of enemy soldiers attacking one’s country*, 2002, pp. 163-64).

Rodin shows an awareness of the moral weakness of planned excuses earlier in the text: “For example, if a person studies the rulings of the courts on the excuse of necessity...and tailors his actions to fall within these limits, then this will not guarantee an acquittal. Indeed, it may impair the chances of acquittal, for the agent’s premeditated reliance on the excuse of necessity undermines his claim to have acted out of the overwhelming compulsion of the circumstances”

(2002, p. 31). Similarly, “planning to make a reasonable mistake” in the case of a sudden attack should call down a harsh moral judgment.

To summarize: Rodin’s sole translation of his objective moral theory into the real world fails to meet his own moral standards. Not only that, if applied to his own examples offered as he develops his defensive model on the individual level, it would yield opposite results to those he insists victims of attacks must follow. If applied at the international level (and a key premise of the book is that the model of defensive rights developed in Part I should be applied to international relations in Part II), it leaves Rodin’s anti-national defense case in tatters.

6.5 Rodin’s Attack on the “Analogical Strategy”: an Illustration

In chapter 7, “War and the Common Life,” Rodin claims to refute “the analogical strategy.” (I note that I am not defending that strategy.)¹⁷⁶ He examines three options to see if they provide “interpretations of the common life as a potential end of national-defense.” The first interpretation he examines is “to seek an understanding of the value of the common life in an account of state legitimacy. The second would be to see the common life as the embodiment of a particular cultural and historical heritage. The third...sees the common life as the arena of collective self-determination and autonomy” (2002, p. 142). These three options for understanding “the common life” form the core of Rodin’s understanding of the “analogical strategy” (2002, p. 141) for discovering the reasons behind a state’s right of self-defense. Here I will examine the logical structure of Rodin’s treatment of the first of the three options. I do this for illustrative purposes, as I believe this one section shows a typical logical weakness of Rodin’s method of argumentation. Rodin rejects each of the three options, each of which is a link in the

¹⁷⁶ The tradition claims not that a right of national defense may be constructed by observing the analogy between individuals and states, but that the legitimate and core function of the state is to defend the common good of its citizens, both domestically and abroad, by force when necessary (and proportionate). Thus my point in this section is not an implicit defense of an analogous strategy, but an illustration of questionable logic in action.

chain through which he rejects the entire possibility of a right of national defense. To the extent that this link, option one, is weak, so is the disjunctive argument Rodin needs to employ.

In the following, I offer quick summaries of the individual arguments Rodin uses in a short discussion (2002, pp. 145-49, just over four pages). At times I use direct quotations. I have left out no substantive argument in this four-page section. I then offer a response to each. I put *Rodin's arguments* in italics to keep the separation of the arguments clear.

Hobbes will provide the account of state legitimacy. "The Hobbesian social contract is especially germane to our purposes, because it provides an extremely minimal treatment of the legitimation of the state" (2002, p. 145).

Response: On the contrary, Hobbes is perhaps the weakest possible example here, and to defeat the notion that we might find "an understanding of the value of the common life in an account of state legitimacy," Rodin needs the strongest possible example. The possible antidote to an excessive liberal individualism (embodied in the reductive strategy already discussed) is the proto-liberal who gets liberalism started by reducing society to a collection of individuals and proceeding from that point? This appears to be a rather clear example of special pleading. If we can go as far back in history here as Hobbes, why not use someone like Aquinas, or if a more modern example is needed, Maritain? Such examples would provide real alternatives to Rodin's point of view, which he could then try to refute.

According to Hobbes, the state provides order, a vital foundational good. But using the Hobbesian account has "two difficulties." First, it has a "curious, almost paradoxical incompleteness" (2002, p. 145). Although it solves the "state of nature" problem within a given state, its "by-product...is the creation of a state of nature at the level of sovereign states" (2002, pp. 145-46). But then if Hobbes is correct in his reasoning about the need to escape from the

state of nature, this suggests the need to form “a universal or global political association...not marred by the state of nature on any level.” But the right of national self-defense “stands opposed to a universal political association in a very basic way” (2002, p. 146).

The second difficulty is that, “international aggression does not typically seek to destroy political life as such, reducing the vanquished state, as it were, to a state of nature.” Conquered people will still be in a state. Hence Hobbes provides no convincing reason for resisting such aggression. Tribes on the periphery of the Roman Empire, for example, had no good Hobbesian reason to resist absorption into the empire (2002, p. 147).

Response: Rodin’s observations here are, I believe, very true, but they flow nicely from choosing Hobbes as his “foil.” Had he chosen a real opponent to attack, these objections Rodin offers might not be available.

But perhaps the problem is that “the Hobbesian account is simply too minimal and therefore too permissive (2002, p. 148).

Response: No, it is simply not a germane example. A Hobbesian state has legitimacy in one dimension: the naked consent of its people to “being governed,” due to fear of violent death, uncolored by any notions of inherent justice, or cultural and historical fit. Typically, anyone who cares about “legitimacy,” including liberals, denies that a purely Hobbesian state would have any legitimacy at all—unless, somehow, everyone involved actually gave his or her unforced consent to Leviathan, a counterfactual that has never been observed and seems unlikely ever to be achieved.

Maybe only some states are legitimate, those that have “achiev[ed]...a more substantive set of political goods” (e.g., perhaps, liberal democratic states). But this has two problems: first, why do even these legitimate states have defensive rights against other legitimate states? (2002,

p. 148). If we define legitimacy to exclude states that aggress, this is “intolerably ad hoc,” and also “fails to explain how even consistently aggressive states may have defensive rights if they are the victim of unjustified aggression” (2002, p. 148).

Response: “Legitimacy” here seems to be on the one hand a category with a relationship to morality because it rests on providing “a more substantive set of political goods,” but on the other hand, these “legitimate” states are presumed to be willing to (unjustly) set upon other states. But there is nothing in Rodin’s argument to rule out the possibility that a state that internally provides these goods is willing to oppress another state. Let us suppose two of these legitimate states willing to oppress foreigners. If State A sets on State B, then quite possibly the people of B do not wish to be oppressed, for its own government is legitimate to the people of B, but the government of State A is not. So, on any theory that lays a foundation for defensive rights that goes beyond collective defense of the bare lives of the citizens, State B has defensive rights against an attack by State A. There is no need for Rodin’s interlocutor to define legitimacy as he suggests.

As for his last suggestion above, it seems irrelevant. In Rodin’s theory, such states have no defensive rights, but perhaps in another theory they do—in some qualified way. And it should be remembered that the coherence of such a theory is meant to be what Rodin is *arguing against* here, not assuming away. Asking “how could X possibly work?” is not an argument unless it involves some flagrant contradiction.

But let us dig in a bit: what is a “consistently aggressive state?” Does the U.S. or Britain or France or Israel qualify? Perhaps one or more does qualify, as each has “begun” wars in recent decades. Saddam Hussein’s regime aggressively started a war with Iran, but it had complaints against Iran, and limited aims, and that war ended. It aggressively started a war with Kuwait, but

it had complaints against Kuwait (Israel had complaints against Lebanon, the U.S. had complaints against Iraq, the UK had complaints against Argentina), and that war ended with Iraq submitting to a massive set of sanctions. Did it lose its future right to defend itself despite allowing multiple inspections and undergoing severe sanctions? If so, did it regain its right under new management after the U.S. invasion of 2003? What I am driving at here is that there seems to be a rather simplistic assumption on Rodin's part that anyone committed to the existence, in general, of defensive rights of states is also committed to the view that "consistently aggressive states" lose these rights—but such a loss cannot be permanent, and the specification of how they are lost is not so obvious as to constitute a clear problem.

The second problem with the view that "only a subset of the world's states" are legitimate, is that it "would not meet our precondition for an interpretation of the common life: that it support an understanding of national-defense which maps closely to the consensus view on the laws of war," and those laws admit all sovereign states to have a right of self-defense, not just those that have particular qualities (2002, p. 148).

Response: This is special pleading, since perhaps a moral theory that provides a reason for national self-defense will go against international law. It is tendentiousness to claim the international law is the best expression of international morality—Rodin himself flatly rejects this notion in his conclusion, so he cannot consistently insist that his opponents accept it. But even if we were to grant the existence of this second "problem," all Rodin's argument does here is refute an argument that (a) may perhaps be held by some extreme liberals, but is also (b) one that many proponents of a minimal legitimacy would reject out of hand, including many liberals. Note, for an eminent example, that John Rawls in "The Law of Peoples" explicitly rejects it (1993, pp. 37-38, 44, etc.).

But now we have come to the end of Rodin's dismissal of option one, "to seek an understanding of the value of the common life in an account of state legitimacy." How did Rodin reject it? By attacking a straw man, the need, as he summarizes it, "simply to defend order" (2002, p. 149). If there are no good accounts of the possible legitimacy of an actual state, and Hobbes is the best account available, then Rodin has disposed of this possibility with gusto. But this is clearly not the case. The argument in this section, one of just three that comprise his attack on the "analogical strategy," is clearly not an example of "coherent moral reasoning." It leaves wide open the possibility that there is a real way to find "an understanding of the value of the common life [at least in part] in an account of state legitimacy."

Conclusion

Rodin's firm and universal conclusions about defensive rights and war, couched in the language of logic and a "common morality" of Western civilization, stand in inherent need of a rigorous and coherently logical approach that he did not provide. Although many of his individual observations and concerns and some of his individual arguments have merit, his overall conclusions may be safely discarded, as they do not spring from the kind of consistent, coherent argument his own foundations require. Scholars and statesmen interested in a just war theory that endorses self- and other-defense of many (not just liberal) states, in many situations, should not, because of Rodin's attack, give up hope.

CHAPTER VII
BACKWARD MUTTERS OF DISSEVERING POWER¹⁷⁷

“A probable argument is one that may be found compelling by one individual, but not another because of the different antecedent background beliefs that each brings to his or her evaluation of that argument. It is these background beliefs—what Newman called ‘that large outfit of existing thoughts, principles, likings, desires, and hopes which make me what I am’ ...—that make us find a particular probable argument compelling or not...But which then are the arguments that direct us toward the truth?”

—Alasdair MacIntyre¹⁷⁸

I began this dissertation with the puzzle that a great deal of current just war theorizing cannot, or cannot with clarity and internal consistency, offer a positive account of what seems to be the simplest of external moral questions for a nation-state, defending itself against an attack by another state. Michael Walzer wrote in 2002, perhaps ironically, of “The Triumph of Just War Theory.” If it cannot justify the paradigm case of just war, a defense against external invasion, then we need instead to speak of “the failure of just war theory,” as Rodin did in that same year. Many have offered rebuttals of Rodin’s attack, including certainly McMahan’s attempt in 2009 to show that a reductionist approach is still viable, but others have certainly found it convincing.

¹⁷⁷ Milton, Comus: “What, have you let the false enchanter scape? / O ye mistook, ye should have snatched his wand / And bound him fast; without his rod reversed, / And backward mutters of dissevering power, / We cannot free the lady that sits here / In stony fetters...” In Abrams *et al* (Eds.), Vol. 1, 1974, p. 1333.

¹⁷⁸ MacIntyre, *God, Philosophy, Universities* (2011, p. 150).

If current just war theory is a failure, then one alternative is to elaborate a new moral theory that will cover the “exceptional” circumstances of war. Lazar is one of those who find Rodin’s anti-reductionist arguments convincing, but is not ready for Rodin’s “semi-pacifism.” Some of those responding to the call have offered alternate, non-reductionist explanations for national defense in *The Morality of Defensive War* (2014).

Perhaps just war theory has failed and we must start over—but that is not the only possibility. If a theory produces unsettling results, it might be that over time it has drifted away from its roots in some way, and those roots still have life in them. This was MacIntyre’s claim about modern ethical reasoning generally in *After Virtue*, in a work which echoed and developed Anscombe’s similar claim in 1958 in “Modern Moral Philosophy.”

The fall from Eden, in the Western world’s background stories, is matched on the political level by the collapse of Rome, and we often look ahead to a possible new apocalypse and its aftermath: science fiction is full of such stories. MacIntyre’s *After Virtue* begins with a parable derived from such a post-apocalyptic science fiction tale, *A Cantic for Liebowitz*, but in his telling it is ethics rather than science that has been shakily reconstructed from the old fragments in the aftermath of the catastrophe, which is an intellectual revolution rather than a nuclear exchange. Just war theory is one of MacIntyre’s brief examples of an area of ethics that uses the old vocabulary, but wrenched from its original context so that the terms no longer function as they once did.

Understandably, those who are deeply committed to liberal individualism, or the Enlightenment legacy, seem likely to look with disfavor on any attempt to claim and show that their bliss-producing dawn was rather, at least in part, a forest fire on the horizon; or to change metaphors, that the decisive point of inflection was a wrong turn on the road. To sound even

more inimical, we in the tradition see liberalism as a heresy—but I offer this observation to clarify, not to offend. The word heresy comes from the Greek *hairesis*, a form of the verb “to choose.” The label was not directed against freedom to choose: in the early church’s view the root of the problem, for most heretics, was not “picking the wrong idea,” but a choosing and overemphasis of one factor that, in itself, was good. After that overemphasis, a life-giving balance could only be lost.

The human individual is of transcendent value: I want to emphasize that note as I conclude. The tradition does not share what Tésón called “spooky communitarian views.” Rather than an expendable cell in the political body, deriving her life and her value from the state, the individual, in our view, is actually far higher than the state. As Maritain puts it,

The State is not the supreme incarnation of the Idea, as Hegel believed; the State is not a kind of collective superman; the state is but an agency entitled to use power and coercion, and made up of experts or specialists in public order and welfare, an instrument in the service of man. Putting man at the service of that instrument is political perversion...man is by no means for the State. The State is for man. (1951, p. 13)

As I claimed in chapter 2, the tradition claims to be the originator of and to be able to explain one of the best features of liberalism, its stress on the equal dignity of human individuals. (This note is often sounded but rarely explained in contemporary liberalism, and seems to show some serious erosion at the margins.) And as liberalism was for a very long time, and especially in the United States, closely intertwined with Christianity, the tradition (to the extent that Christian ideas about nature and the human individual overlap, as they often do) can even claim some of the credit for the achievements of liberal democracy. To the extent that liberals have sounded the note of the value of the human individual, the tradition can only agree.

The tradition's quarrel with liberalism is not based on concern that the individual is overvalued by liberalism. The concern, rather, is with that "choosing" alluded to above: in this world, putting the individual outside of the community, as if he were a kind of self-subsistent thing like an atom that could be studied in isolation and then his qualities and those of others understood, the interaction either created or explained—the state of nature story—is the equal and opposite error. Similarly, for the tradition, the liberal emphasis on freedom takes a very good thing but tends to consider it as if could stand on its own, whereas for the tradition freedom without truth, including the truth of human nature, cannot achieve the human good. And we do claim that there are some givens for individuals, some parts of our identity, and some guidelines and even duties that we must follow to be fulfilled, that we discover rather than choose—even if, given the imperfections of everything in this world, we can have an ongoing discussion about the details. Some of those givens will come from our communities, sometimes as embodied in the states governing them. (There seem to be few liberal voices raised on behalf of these latter notions.)

It is in this slightly qualified but nonetheless highly pro-individual spirit that I hope this dissertation will be taken. I have tried to present a positive case for the Aristotelian-Thomist account of the value of existence, of human nature and, based on that, of the justice of self-defense in extreme (and generally tragic) situations. But more prosaically, I have noted that while property is far from an absolute, it does have value and is defended by force by all states we know of. I have argued that individuals too may offer a proportionate and forceful defense of property, not against the starving, but against those who would rob them of significant property, and that the escalation of force, if it occurs, is not to be blamed on those who justly use force in defense of what is rightly theirs. On behalf of the defense of political communities by

governments, I then argued that the state (in some form) is necessary for full human flourishing. I added that the most vital function of the state is to provide a framework for the human flourishing of the individuals in it, and that part of how it does so is to protect their lives and property from external (as well as internal) aggression.

Against both McMahan and Rodin I argued that our task in the rather tragic circumstance of being attacked is not to ascertain the degree of culpability of attackers, but to defend ourselves with an eye to what is needed for defense, not punishment. I argued that for both, and sometimes among other scholars doing this work, the individual rights that are posited are subject to limitations that seem too often to be derived from life in a well-governed state with a functioning legal system, whereas truly careful consideration of the problems of a real state of nature might indicate fewer or different limitations, affecting the validity of their effort at reductionism. I argued at length that the objective point of view of moral evaluation has a tendency to lead ethicists astray, and does not adequately portray actions as the human acts we must undertake in our lives.

Finally, I offered a critique of McMahan's reductionist project of defending war on the basis of liability grounded in "agent-responsibility," with a special view to the inadequacy of his responses to Lazar's critique. I followed this with a set of criticisms of Rodin's work, concluding that he did not meet his own standards of logic and consistency, leaving the possibility wide open that his negative conclusion about national defense is false.

If I have demonstrated for a reader that the tradition, the progenitor of just war theory, has a coherent vision of the world and human beings, I will be highly pleased. If instead I have only shown that it has significant resources with which to address the quandaries that have arisen in some versions of current just war theory, I will still be satisfied. Perhaps I have only cast

doubt on McMahan's and Rodin's conclusions, leaving open for some readers the possibility that other and better avenues for the demonstration that nations may generally defend themselves against unjust attacks are still open. If that is the case, I will have to be content with sowing that much doubt.

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