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Studies in the History of Ethics

Grotius and Contingent Pacifism

Larry May (Washington University, St. Louis)

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In general, there breathes from the pages of *De Jure Belli ac Pacis*, a disapproval amounting to hatred, of war.

Hersh Lauterpacht.¹

De Jure Belli ac Pacis reminded his audience that he was still an enthusiast for war around the globe.

Richard Tuck²

Grotius's great work, *De Jure Belli ac Pacis*, an 864-page work published in 1625, is still considered to be the single most important work in international legal theory.³ Grotius is the great modern defender of the Just War tradition, but he is also a kind of pacifist. This is an uneasy alliance within the same thinker. But such is the history of the Just War tradition, where its adherents maintained the same dual ideas: that war was evil, but that it could be, indeed must be, justifiable in certain cases. In this paper I will attempt to explain how Grotius reconciled the various elements of his political philosophy, and by building on his ideas I hope to provide the beginning of an account of a doctrine I will call "contingent pacifism."⁴ Contingent pacifism is opposed to war not on absolute grounds, but on contingent grounds, namely that war as we have known it has not been, and seemingly cannot be, waged in a way that is morally acceptable. As we will see, contingent pacifism makes *jus ad bellum* dependent on *jus in bello*.

The early Church Fathers, especially Tertullian,⁵ were pacifists, taking quite literally the pronouncements of Jesus that even if you have been directly attacked, you must turn the other cheek rather than fight back. This is the Western origin of the prohibition against engaging in war. The early Just War theorists already framed its ideas in serious debate with such pacifist ideas. Augustine argued strongly against such pacifist religious views,⁶ as did the seminal proponents of modern international law. Indeed, Grotius devoted 34 pages to showing that some wars could theoretically be justified despite the difficulty of reconciling war with what Jesus and the early Church Fathers had said.⁷ Contemporary Just War theorists seem to have lost sight of the fact that Just War theory was initially devised as a response to, though not a complete rejection of, pacifism. It is interesting to speculate why contemporary Just War theorists do not see their views as being as close to pacifism as did the early Just War theorists. One possible explanation is that contemporary Just War theorists largely define themselves in opposition to realists who deny that morality has any connection to war, not in opposition to pacifists who are few in number in the modern era. When Just War theory is understood as it was in its early years, contingent pacifism could be merely a variation of this doctrine, as we will see.

In this paper I will discuss Grotius's contribution to our understanding of the limits of the Just War doctrine, as well as Grotius's contribution to a somewhat different, although related, doctrine of contingent pacifism. In the first section, I will explicate Grotius's general view of what makes a war just. In the second section, I set out Grotius's reasons for supporting contingent pacifism, namely, that in most if not all wars it will not be justified to kill enemy soldiers or to risk the killing of noncombatants. In the third section, I step back from Grotius and try to develop a coherent modern position on contingent pacifism that is in keeping with Grotius's views. And in the final section, I discuss an objection to contingent pacifism .

Throughout I set the stage for a more elaborate exploration of a doctrine that has been largely disregarded in the literature about the morality of war.

I. Grotius on Just Wars

In Chapter Two of Book I, Grotius stakes out a rather common Just War position. He says:

In the first principles of nature there is nothing which is opposed to war; rather, all points are in its favor. The end and aim of war being the preservation of life and limb, and the keeping or acquiring of things useful to life, war is in perfect accord with those first principles of nature. If in order to achieve these ends it is necessary to use force, no inconsistency with the first principles of nature is involved, since nature has given to each animal strength sufficient for self-defense and self-assistance.⁸

From the beginning of the Just War tradition, self-defense or defense of the rights of others was seen as an obvious basis for justifying some wars. Early Just War theorists thought that defense of others was the most important of these claims, but by the beginning of the modern era, self-defense was seen to be the most obvious rationale for some wars, and Grotius seems to follow in this vein.

But there is a second consideration that also supports war, yet causes significant problems down the road for Grotius. On the very next page he says:

Right reason, moreover, and the nature of society, which must be studied in the second place and are of even greater importance, do not prohibit all use of force, but only that use of force which is in conflict with society, that is, which attempts to take away the rights of others.⁹

This looks like a simple restriction on which wars can be justified in self-defense, but much later in Grotius' book, it turns out to be of major importance. Indeed, I will argue that it is the consideration of the rights of others, along with humanitarian considerations developed by Grotius, that transform his otherwise conventional Just War views into a position that is quite close to pacifism, if not itself a nontraditional form of pacifism.

Grotius provides three statements that are meant to summarize his overall position in early passages from his book. He cites, approvingly, Galen's natural law comment that "man is an animal born for peace and war."¹⁰ And Grotius also provides a rational grounding when he says:

It is not, then, contrary to the nature of society to look out for oneself and advance one's own interests, provided the rights of others are not infringed; and consequently the use of force which does not violate the rights of others is not unjust.¹¹

And finally, Grotius claims that his "thesis is also proved by the general agreement of all nations, and especially among the wise."¹² Here the laws of nations join forces with the laws of nature and the precepts of right reason to confirm that some wars can be justified.

The structure of the early parts of Grotius' book is to develop each of these lines of argument by reference to the chief sources of justice: natural law, right reason, and international custom. It is in this way that Grotius seems to establish the justifiability of war on firmer grounds than previous theorists who only drew on one or another of these sources. And Grotius engages in overkill when he then also argues, at very great length, that the Gospels are also not inconsistent with the idea of war.¹³ He then summarizes this argument by saying: "Now it is in the love of innocent men that both capital punishment and just wars have their origin."¹⁴

However we should note that Grotius here turns from self-defense to defense of others as the best just cause for war.

So far, Grotius espouses a line quite consistent with standard Just War theory. But we should pause to note that just a few years earlier, the great Scholastic philosopher, Francisco Suarez had added to the Thomistic version of Just War theory a new element. Aquinas had listed the elements in a just war to be:

- a) the authority of the sovereign
- b) a just cause
- c) and a rightful intention.¹⁵

Suarez adds to this:

- d) a proper method¹⁶

Yet, this addition, as we will see, changes everything. There is good reason to think that Grotius followed Suarez in this respect.

The first major indication that Grotius is worried about how tactical concerns can undercut support for waging war comes when Grotius is already deeply immersed in *jus in bello* concerns. In Chapter Ten of Book III, Grotius surprises his readers by saying: “I must retrace my steps, and must deprive those who wage war of nearly all the privileges which I seemed to grant but did not grant them.” This all falls under the label of “With what meaning a sense of honor may be said to forbid what the law permits.”¹⁷ And while most of what Grotius takes back has to do with privileges concerning the tactics of those who wage war, it also appears that he wants to take back some of what he said about initiating or waging war at all.

This comes out most clearly when Grotius talks, as he does in the next chapter, Chapter 11 of Book III, about the right of killing.¹⁸ As it turns out, most forms of killing violate the rights

of others. Combining this point with the previously noted one, namely that war cannot be justly waged if it violates the rights of others, gets us a draconian proscription that most wars will be hard-pressed to meet. For if there are violations of rights in many, if not most, cases of war, then the situations where war might be justified shrink, perhaps to the vanishing point.

The point here is that Grotius denies that otherwise prohibited tactics are justifiable when one fights with a just cause. One might have thought that Grotius would not maintain this position, since he clearly does acknowledge that wars can be just. If a war can be just in that one side fights for a just cause and the other side fights unjustly, then it would seem to follow that any tactic that advances the side fighting for a just cause would itself be justifiable. In order to stop an unjust invasion, it seems odd to say that I cannot use tactics that seem to be the most efficacious. Yet it is curious that the discussion I will rehearse in the following paragraphs comes, in Grotius' book, under the label of what type of killing might be unjust even in a just war.

Grotius's discussion of justifiable killing in war could be just a very straightforward discussion of what types of killing cannot be justified by those who fight without just cause, that is of the *jus in bello* restrictions that are in place even after *jus ad bellum* considerations have seemingly been decided. But since it turns out that Grotius places many restrictions on killing even in a just war, so that use of certain tactics can turn a just war into an unjust war, *jus in bello* considerations appear to place restrictions, at least at the limit, on what counts as a just war. And in this sense, Grotius may be following Suarez in thinking that if one is unable to wage a war with justified tactics then one is unjustified in waging the war at all.

II. Grotius on Justifiable Killing in War

In the first step down the road to what I will call contingent pacifism, Grotius says that “it is necessary that he who is killed shall himself have done wrong”¹⁹ Grotius also says that killing can be justified if there is no other way to save our own life or property, but this category is later dismissed, and the category of killing as punishment for wrong done seems to be the most important. And yet, according to Grotius, few soldiers have done anything personally wrong. Typically, soldiers simply follow orders, often out of a patriotic feeling. And even leaders act in ways they think will advance the interests of their states, thereby keeping to their primary obligations as rulers. So, for Grotius, it is hard to see why these soldiers, or leaders, would be thought to have done wrong.

In this discussion, Grotius refers his readers back to his earlier discussion of punishment. And there, he had said that punishment can only be justified if the one punished displays “a base or malicious nature.”²⁰ This requirement will make it very hard for many wars to be justified since while every war will have one side that is in the right and one side that is in the wrong, those who fight on the wrong side do not necessarily fight with base or malicious motives. Indeed, it will often be very hard indeed for soldiers to figure out whether their side is in the right or in the wrong. For punishment to be justified, the one punished must deserve to be punished, and no one deserves to be punished who is without malice or guilt.

Grotius makes it explicit that he will follow this line of reasoning when he says that “No man may rightly be killed because of his ill fortune, for example those who take sides under compulsion.”²¹ And in a very important passage, Grotius then also distinguishes between wrongs and faults. One cannot be rightly killed, in war or in capital punishment, for misfortune

or for fault, but only for having done wrong. Grotius defines fault and wrong by quoting Aristotle as follows:

“Now misfortunes are things which could not have been foreseen, and are not committed with evil intent; faults things which could have been foreseen, yet are not done with evil intent; wrongs things done purposely and with evil intent.”²²

This leads Grotius to draw a firm line between those “who are responsible for a war... [and] those who follow them.”²³

For Grotius, it is unjustifiable to kill a soldier who is merely following orders, especially if one is doing so out of a “sense of duty and righteous zeal.” These soldiers are not cruel or inhuman, and do not deserve to be killed. According to his earlier doctrine, Grotius could say that it would be a violation of their rights for people who are merely following orders to be killed, even in a just war. Indeed, the killing of these people in violation of their rights would seemingly make the war itself unjust. Remember that Grotius had declared that “the use of force which does not violate the rights of others is not unjust.”²⁴ So, when we find that the use of force in war does violate the rights of others, this would call into question the justness of the war.

Grotius also calls for the prevention of the death of the innocent during war. As he says, “no action should be attempted whereby innocent persons may be threatened with destruction.” Here the innocent are merely those who during war have not done wrong. But Grotius goes even further than this restatement of the principle of discrimination or distinction. He says that it is our duty “to spare those who are guilty for the sake of the innocent.” This means that the prohibition on not killing the innocent extends so far as not to kill even the guilty if doing so might jeopardize the innocent.

Grotius clearly indicates what he means by the innocent whose lives should not be taken even in a just war. “Children are always to be spared” as are old men. Women are to be spared “unless they have been guilty of an extremely serious offense.”²⁵ Grotius also follows other theorists in arguing that members of religious groups, those who are in arts or letters, farmers, merchants, and prisoners of war all should not be killed.²⁶ These individuals have not done wrong, at least in regard to the war, and cannot justifiably be killed. Such restrictions place quite severe limits on the waging of war. It is likely that all wars violate the rights of individuals, and it hence likely that most wars are unjust to begin with.

But the crucial piece of the puzzle, that moves Grotius toward a form of pacifism, comes when he says that it is not legitimate to argue “that by a sort of fiction the enemy may be conceived as forming a single body.”²⁷ Instead, we must consider whether any given soldier has “done wrong” before he or she may be killed. If this requirement were legitimate, then virtually all wars would seem to be unjustified, since it would be almost impossible to determine whether all those soldiers, on the battlefield for instance, have done wrong and hence could be justifiably killed. At this stage of Grotius’ argument, it appears to me and to other commentators, such as Hersh Lauterpacht quoted at the beginning of this paper, that Grotius moves very close to a form of pacifism. This is not an absolute principled pacifism, where he is opposed to all violence, for instance. But it is a “contingent pacifism” in that just war is nearly impossible because nearly all war involves killing those who are innocent, that is those who have not personally done wrong in war.

Grotius sometimes seems to modify his claims in ways that run contrary to my interpretation of him as a contingent pacifism. But he also returns to his main theme, often in the same paragraph, as when he says:

Against these precepts of justice and the law of nature frequently exceptions are offered, which are by no means just; as for example, if retaliation is required if there is need of inspiring terror, if too determined a resistance has been offered. Yet he who recalls what has previously been said for putting to death will easily perceive that such exceptions do not afford just grounds for execution.²⁸

Retaliation, he tells us here, can only be justified “against those who have done wrong.”²⁹ And in non-retaliatory cases, we similarly can only justifiably kill those who have done wrong, and yet any military unit will have a mixture of those who are innocent and those who are not.

But as the other quotation at the beginning of this essay, from Richard Tuck, indicates, some scholars have seen Grotius as only too ready to justify a whole assortment of wars. So we must consider the possibility that Grotius did not fully understand the implications of the extended discussion we have just seen in Book III, Chapter 11, of De Jure Belli ac Pacis. My view is that Grotius was at best a “contingent pacifist” of the sort who does not fully realize that his views have committed him to the condemnation of virtually all wars, even as he is otherwise disposed to think that they could be justified. Indeed, contingent pacifists must keep open the possibility that wars in the future, or even today, could be waged in such a way that they could be just, in case weapons become so precise that they can be targeted and intelligence becomes so good that we can pick out the guilty from the innocent soldiers, even as they recognized that such wars are not currently possible.

III. The Idea of Contingent Pacifism

The view that I call contingent pacifism, which I derive from Grotius’ remarks, can be initially summarized as follows:

Rarely, if ever, is it morally permissible to kill the innocent

All wars involve killing, or the risk of killing, the innocent.

Rarely, if ever, are wars morally justified.

This simple argument admits that it may be possible for some wars to be morally justified. Since there have been few if any wars in the past that were justified, and since there is no reason to think that the future will not resemble the past, this view comes very close to being, if it isn't already, a form of pacifism.

One could argue that contingent pacifism only calls for looking at wars on a case by case basis to see whether there is unjustified killing of the innocent, and this is consistent with what Just War theorists have often argued over the centuries. In response I would have to agree – contingent pacifism is consistent with some forms of Just War theory. This is why Grotius could be both a Just War theorist and yet also a supporter of contingent pacifism. The two quotations at the beginning of my essay, one pointing out that Grotius disapproved even hated war and the other that Grotius was an enthusiast for war could be reasonable interpretations of Grotius' texts. In theory, Grotius is a defender of war, but in practice he finds wars to be subject to strong disapproval.

To get an initial idea of what is involved in contingent pacifism, consider a parallel idea concerning the justifiability of capital punishment. Today many theorists and politicians are not opposed to all cases of capital punishment, indeed the hypothetical case of the child-molester who also kills his victims is often mentioned as a case in which capital punishment is regarded as justified even by those who have serious principled reservations about capital punishment. But when it comes to actual cases, the problem is that trial procedures do not guarantee accurate verdicts even in capital trials. Indeed, the chances that an innocent person, or at least the wrong person, will be convicted or that the jury will fail to see significant mitigating factors, or

overstress aggravating factors, are so great as to undermine any warrant for thinking that capital punishment will be used only for guilty persons. Even though one might recognize the moral justifiability of capital punishment for some types of case in theory, one can become a contingent opponent of capital punishment, or as it might be called, a contingent abolitionist. Capital punishment should not be employed if it is likely that defendants will be executed who do not deserve to be. A similar position could be taken on the justifiability of war, resulting in what I have been calling “contingent pacifism.”

Contingent pacifists, by analogy, do not have absolute principled objections to war, indeed they forthrightly acknowledge that in theory wars can be justifiably waged, especially in cases of self-defense and defense of others. But contingent pacifists follow Francisco Suarez in thinking that wars can only be justifiably initiated and waged if it is clearly foreseeable that justifiable tactics can be employed. And contingent pacifists follow Grotius in understanding that justifiable tactics are those that do not violate any rights. Wars cannot justifiably be initiated or waged if it is likely that doing so will result in serious violations of the rights of the innocent. Thus the objections to war are contingent rather than absolute; but the contingencies may be such that one becomes a de facto pacifist.

Today several leading theorists have argued, somewhat plausibly, that we should revisit the idea that *jus ad bellum* and *jus in bello* should be kept separate from one another.³⁰ Contrary to several thousand years of theorizing within the Just War tradition, these theorists argue that different rules concerning the morality of tactics should be in place based on whether one is on the side that wages a just war as opposed to the side that wages an unjust war. Indeed, some have argued that there should be few if any restrictions on those who fight on the side that wages a just war, and that very strict restraints should apply to those who fight on the side that wages an

unjust war. I do not here want to go into the merits of this new doctrine, except to say that I disagree strongly with it. My point in bringing it up is that contingent pacifists will offer another kind of argument for revisiting the separateness of *jus ad bellum* and *jus in bello*, and hence will also be swimming against several thousand years of Just War theorizing, although with a few important exceptions we have already noted.

Contingent pacifism does not call for, indeed does not countenance, the weakening of *jus in bello* rules of war based on *jus ad bellum* considerations. But contingent pacifism does call for the strengthening of *jus ad bellum* rules of war in light of *jus in bello* considerations. Specifically, following Suarez, contingent pacifism adds a significant condition to the requirements for the initiating and waging of a Just War, namely that “the method of its conduct must be proper.”³¹ The problem is that we will not be able to meet this condition in advance of fighting the war unless that requirement is reformulated, as I have suggested, to be something like “it must be likely that the conduct of the war will be proper.” But once formulated in this way, the new requirement folds *jus in bello* considerations into the requirements for *jus ad bellum*, and disrupts the separateness of these branches of the Just War doctrine.

To take another tack, one could insist that the separation of *jus ad bellum* and *jus in bello* be maintained, and yet still reach the same conclusion I have been defending. Suppose one maintained that the justness of initiating or waging war (*jus ad bellum*) is independent of the tactics or means used in so doing (*jus in bello*). One could still agree that any military tactic that was quite likely to kill innocent people was unjustified. However, war itself is not thereby rendered unjustified. But if it turns out that because of the restrictions on tactics, there are no justified tactics left, then war would be rendered so restricted tactically as not to be fightable morally. By this I mean that if people who want to fight a just war cannot find any morally

permissible tactics then there really aren't any morally justifiable wars that they are morally permitted to fight. To say that the war is just but there are no morally permissible tactics to use in that war is equivalent to saying that wars cannot be permissibly fought. This form of contingent pacifism would hold that while war can be morally justified in theory, the fighting of war is not and is unlikely to be morally justified. This amounts to the same thing as saying that most if not all wars are morally impermissible.

Some contemporary authors have seemed to see the Grotian point that I have been developing. Jenny Teichman for instance says the following:

If all the soldiers on the morally right side are thereby innocent, then to kill them is murder and on a par with killing children (say). Those on the morally wrong side who cannot know that their rulers are engaged in an unjust war are also innocent, and to kill *them* is murder and on a par with killing helpless old peasants, or priests, or nuns. Rulers, who after due consultation and after taking counsel from wise men come to believe sincerely, albeit wrongly, that their cause for war is a just cause, are also innocent; to kill them, if one could get hold of them, would be murder. But who then *may* be killed in a just war justly fought? Only those few rulers who have either failed to take proper consultation (negligence) or know themselves that their cause is not just (guilty mind).

But a war with so few protagonists is not a war at all.³²

Here we can see another version of contingent pacifism. War is not immoral, for it could be based on self-defense or defense of others. But so few people can be killed in such a war that war is nonetheless all but extinguished from the moral universe, or at least war is rendered immoral in the forms of war we have known and are foreseeable in the future.

Writing before the beginning of the Just War tradition, Seneca said that it is odd that “actions forbidden of private citizens are committed in the name of the state.” Governments try hard “to restrain murders and the killing of individuals” and yet “wars and the crime of slaughtering nations [are] full of glory.”³³ Today, the Bush doctrine calls for the use of war, unapologetically, as an instrument of foreign policy. But such a stance is clearly at odds with the abhorrence of war that Just War theorists, and many other theorists not in the Just War tradition, have shown toward war.³⁴ But more than reiterating the abhorrence with war, contingent pacifists argue that war may turn out not to be justifiable even in those cases that seem to be paradigmatic ones where we might think it to be justified despite its abhorrence, namely in cases of self-defense or defense of others. Such a view gives rise to a major objection against contingent pacifists that we will next consider.

IV. An Objection to Contingent Pacifism

One of the chief objections to contingent pacifism can be explained by reference to a non-war example. Imagine that someone points a gun at you. As far as you can tell, your life will be extinguished in the next few minutes unless you shoot and kill this person. Yet, as far as you can tell, your attacker may be innocent and not responsible for his actions. If the attacker is innocent, it seems unjustified to kill him. But if you do not kill him, you in effect sacrifice your own life, another innocent life and importantly your own life. It seems to be an odd result of contingent pacifism if we are blocked from trying to save our lives. If it makes sense to say that we can kill someone who might be innocent in the personal case, why does it not make sense in

the case of war? And if killing the innocent can indeed be justified, then contingent pacifism makes far less sense than before.

There are several things to say about this objection. First, while it is true that Just War theory has often relied on just such an example to get its foot in the door against pacifism, it is not at all clear that the personal case is sufficiently analogous to war to be helpful. Notice that in the example the possibly innocent attacker is poised to attack and hence clearly jeopardizing your life. There are circumstances where enemy armies are also poised to attack and may be seen as jeopardizing lives or even the “life” of the state. But things are normally much more complicated in the multi-person case than in the personal case.

The main complication is that the individual soldier is not normally in the position of being attacked outside of the context of war. Many soldiers volunteer to be put in harm’s way, or choose to act in ways that has that risk as one clear option. If the soldier had not placed himself on the battlefield, or its equivalent, the soldier would not now be in need of defending himself against an enemy soldier. In a sense, the soldier is complicit in his current predicament in ways that are rarely true in the personal case. Similar problems result from attacks directed against a state. One might be able to say that the state is the entity that is likely to be killed if self-defensive violence is not directed at members of an attacking army. But except in rare cases, states are not completely innocent, either on the defending or attacking side. For these reasons the personal case and the war case are not parallel. And even in situations where it seems that utilitarian considerations would weigh heavily in favor of self-defensive violence, the individual soldier is often better off not engaging in such violence for the sake of his or her honor.³⁵

As I indicated above, Grotius cautions against taking a collectivist position on such issues. Here is the key quotation from Grotius again: “It is not sufficient that by a sort of fiction the enemy may be conceived as forming a single body.”³⁶ If we are launched into the discussion of who can justifiably be killed, we must look at the wrongness of the actions, or the innocence of the persons, one by one. To do otherwise is to engage in a pernicious form of guilt by association, that is, to hold one person guilty for what the other members of the group are doing. And it is certainly not to take into consideration the key ingredient in responsibility for both Aristotle and Grotius, namely whether or not the soldier or leader has a guilty state of mind that warrants punishment in the form of wartime violence.

The analogy also fails because the innocent soldiers who are likely to be killed during war are not the ones who are threatening the lives of those who are most likely to kill them. The soldiers who do not fire a shot, and have no desire to do so, are not innocent threats, at least not in any direct sense, against the lives of the soldiers who fight for a just cause and who would take their lives, or risk doing so, if war is allowed. It seems to be especially pernicious to kill people who do not have bad, and may have good, intentions.

But in any event, contingent pacifists do not necessarily dispute the justifiability of war on grounds of self-defense, or, even better, on grounds of defense of others. Indeed, contingent pacifists have no absolute principled way to rule out such wars and are often critical of normal pacifism for ruling out such wars as unjustifiable in all cases. Contingent pacifists are not pacifists in the normal sense in that they do not rule out the justifiability of every type of war. Instead, contingent pacifists consult the context in each case to see if there are justifiable ways to wage the war in question. They become a kind of pacifist in that since they do not know in advance whether a proposed war will be able to be conducted rightly, they rarely if ever think a

proposed war is justified. In war where there is so much violence, the benefit of the doubt must always go to restraint. As Grotius said: “war is of the utmost importance, seeing that in consequence of war a great many sufferings usually fall upon even innocent persons. Therefore in the midst of divergent opinions we must lean toward peace.”³⁷

Again, consider the case of capital punishment. The contingent abolitionist about capital punishment does not say that all cases of capital punishment are morally unjustified. Indeed, there may be cases, at least in theory, in which the evidence is simply unassailable that this defendant, who is about to be executed, is the one who committed an especially egregious murder. What drives the contingent abolitionist to a position similar to those who on absolute principled grounds oppose all capital punishment is a belief that there are few if any cases that lack a significant risk that an innocent defendant will be falsely convicted and then executed. The contingent abolitionist however remains open to the possibility that some cases of capital punishment are justified. The contingent abolitionist even hopes that some actual executions are justified, such as when the person convicted and executed is truly guilty. The contingent abolitionist allows that capital punishment can be legitimate, and worries only that innocent persons might mistakenly be convicted of capital crimes.

In a similar vein, the contingent pacifist, like the traditional Just War theorist, believes that some wars are, at least in theory, morally justified, especially wars waged for self-defense or defense of others. The contingent pacifist is given pause by such wars as those waged against Nazi Germany’s aggression, at least initially thinking that such wars are surely justified, if any wars are. Indeed, the contingent pacifist believes that the world would be a better place if such wars were fought, assuming that tactics could be devised that did not risk the killing of the innocent. Such wars could do considerable good, if only the risks of killing the innocent were

not so high. So, the justification for war based on a need for self-defense, first mounted by those like Augustine against the early Church fathers who were pacifists, is something that contingent pacifists take very seriously.

Like Grotius, I am of two minds about the morality of war, wanting to support, at least in theory, certain wars, but also disapproving of wars, at least the way they are typically waged. Contingent pacifism does not rule out in advance the moral justifiability of any war, that is, in advance of examining the specific context and circumstances of a given war. Hence, the view I have defended here appears to be not really a form of “pacifism” at all, at least as that term has been traditionally understood. But insofar as contingent pacifism might indeed lead to no wars being justified, it might still be called a form of pacifism, although nontraditional.³⁸ The contingent pacifist is a nonstandard kind of pacifist, just as the contingent abolitionist is a nonstandard kind of opponent of capital punishment. That a view is nonstandard is, of course, not a mark against it. I hope that I have been able to convey some of the history and moral plausibility of contingent pacifism in this paper.³⁹

¹ Hersh Lauterpacht, “The Grotian Tradition in International Law,” *British Year Book of International Law*, vol. 23, 1946, p. 47.

² Richard Tuck, The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant, Oxford: Oxford University Press, 1999, p. 95.

³ Hugo Grotius, De Jure Belli ac Pacis (On the Law of War and Peace) (1625), translated by Francis W. Kelsey, Oxford: Clarendon Press, 1925.

⁴ As far as I am aware, Jeff McMahan first coined this term, but employed it in another context. See Jeff McMahan and Robert McKim, “The Just War and the Gulf War,” *Canadian Journal of Philosophy*, vol. 23, 1993, pp. 501-541.

⁵ Tertullian, “The Soldier’s Chaplet,” (c. 210), Chs. 11 and 12, in Disciplinary, Moral and Ascetical Works, translated by Rudolph Arbersmann, Sister Emily Joseph Daly, and Edwin Quain, NY: Fathers of the Church, Inc., 1959, pp. 255-260.

⁶ Augustine, The City of God, (c. 420), translated by Henry Bettenson, NY: Penguin Books, 1984, Book XIX, Chapters. 1, 7 and 12, pp. 843, 861-862, and 866-867.

⁷ Grotius, De Jure Belli ac Pacis, Book I, Chapter 2.

⁸ Grotius, De Jure Belli Ac Pacis, p. 52.

⁹ *Ibid.*, p. 53.

¹⁰ *Ibid.*

¹¹ *Ibid.*, p. 54.

¹² *Ibid.*, p. 55.

¹³ *Ibid.*, pp. 57-85.

¹⁴ *Ibid.*, p. 75.

¹⁵ Thomas Aquinas, Summa Theologica, Pt. II-II, Qu. 40, Art. 1, trans. by Fathers of the English Dominican Province, London: Burns, Oates and Washburn, 1936.

¹⁶ Francisco Suarez, “On War,” in Selections from Three Works, (Disputation XIII, De Triplici Virtute Theologica: Charitate), (c. 1610), translated by Gwladys L. Williams, Ammi Brown, and John Waldron, Oxford: Clarendon Press, 1944, p. 805.

¹⁷ Grotius, De Jure Belli ac Pacis, p. 716.

¹⁸ *Ibid.*, p. 722.

¹⁹ *Ibid.*, p. 723.

²⁰ *Ibid.*, p. 488.

²¹ *Ibid.*, p. 723.

²² *Ibid.*, p. 727, quoting Aristotle’s Rhetoric, I, xiii.

²³ *Ibid.*, p. 729.

²⁴ *Ibid.*, p. 54.

²⁵ *Ibid.*, p. 734.

²⁶ *Ibid.*, pp. 736-737.

²⁷ *Ibid.*, p. 741.

²⁸ *Ibid.*, p. 740.

²⁹ *Ibid.*, p. 741.

³⁰ See Jeff McMahan, “The Ethics of Killing in War,” *Ethics*, vol. 114, Summer 2004, pp. 693-733; and Lionel MacPherson, “Innocence and Responsibility in War,” *Canadian Journal of Philosophy*, 2005.

³¹ Suarez, "On War," p. 805.

³² Jenny Teichman, Pacifism and the Just War, Oxford: Basil Blackwell, Ltd., 1986, p. 64.

³³ Seneca, Letters, xcvi, [xcv 30], quoted in Grotius, De Jure Belli ac Pacis, p. 170.

³⁴ See Chris Hedges, War is a Force that Gives us Meaning, NY: Anchor Books, 2002.

³⁵ See my essay, "Collective Responsibility, Honor, and War Crimes," *Journal of Social Philosophy*, Fall 2005.

³⁶ Grotius, De Jure Belli ac Pacis, p. 741.

³⁷ *Ibid.*, p. 560.

³⁸ There is some reason to think that Erasmus might also have held the view that I here attribute to Grotius. See Sissela Bok's essay, "Early Advocates of Lasting World Peace: Utopians or Realists?" in Ethics and International Affairs: A Reader, second edition, edited by Joel H. Rosenthal, Washington DC: Georgetown University Press, 1999, pp. 124-147. Bok writes that "Even on the strictest strategic grounds of national self-interest, Erasmus insists, a truly realistic look at the costs of war should dissuade a prince from just about all recourse to arms." p. 130.

³⁹ This paper is cut from the third volume of my trilogy on the normative foundations of international criminal law. The first two books are: Crimes Against Humanity: A Normative Account (Cambridge UP 2005) and "War Crimes and Just Wars" (forthcoming). The third volume is tentatively titled "Crimes Against Peace and Waging Aggressive War."