Assuming the Risk:
A critical analysis of a Soldier’s duty to prevent collateral damage

Part I: Introduction

Within the Just War tradition, considerable attention is afforded to the issue of how to fight justly once engaged in war. A central tenet of just fighting involves adhering to a principle of noncombatant immunity, which prohibits soldiers from taking direct aim at noncombatants in a military attack. Soldiers are thus commanded to cautiously discriminate between enemy threats and innocent civilians in order to minimize, or ideally eliminate, occasions of collateral damage. Yet, despite the caution that is employed by soldiers, destruction of non-military property and harms to innocent civilians appear to be inevitable and decisions regarding the lives of innocent civilians must often be weighed against military objectives. In such situations, one important line of thought relies on an appeal to the Doctrine of Double Effect (DDE), a moral doctrine that is used to draw a moral distinction between the intended effects and the unintended (but foreseen) effects of a voluntary action.

Certain just war theorists such as Walzer (1997, 2004), Christopher (1994), and Lee (2004), in an attempt to preserve the foreseeing/intending distinction while at the same time criticizing the traditional formulation of the DDE on the grounds that it is too permissive, have revised the DDE to encompass a “double intention.” Walzer goes so far as to claim that soldiers have a duty to assume certain risks in order to protect the lives of all innocent civilians (Walzer 1994: 152). I challenge this principle of risk by arguing that adhering to such a principle would require soldiers to neglect their strict duties and obligations required by their role as military professionals. I first discuss the soldiers’ strict duties of obedience to their superior leaders,
illustrating how assuming certain risks would require soldiers to challenge authority, thus undermining the command structure of the military. I then consider the obligations of commanding officers to provide for the safety and welfare of their subordinates and to achieve victory, both of which require commanders (and other leaders) to not put their soldiers in risky situations in order to save civilians. Next, I draw attention to the special duty soldiers have to not endanger or jeopardize the safety of their comrades by assuming certain risks. Lastly, in considering a soldier’s strict duty of courage and selflessness, I argue that soldiers have a duty to act courageously and selflessly only for friendly civilians (co-nationals). I thus maintain that the principle of risk is both an unjustified and impractical constraint on those soldiers fighting in the United States Armed Forces, yet, this does not entail that soldiers should not foster a positive intention to eliminate collateral damage.¹ In order to comply with the military necessity principle of jus in bello, soldiers are obligated to assume a positive intention to save civilian lives, yet, adherence to this principle does not require soldiers to assume additional risks.

**Part II: Collateral Damage**

Collateral Damage is defined by the U.S. Department of Defense as the “unintentional or incidental injury or damage to persons or objects that would not be lawful military targets in the circumstances ruling at the time. Such damage is not unlawful so long as it is not excessive in light of the overall military advantage anticipated from the attack.”² Collateral damage, then is always incidental or unintentional (although perhaps foreseen), which is the result of a legitimate military attack aimed against enemy forces or facilities.³ In the case of military operations, collateral damage generally refers to civilian property and non-combatant casualties or injuries. Thus, a given attack in wartime may involve two effects: (1) one which is the direct, intended, or primary effect (which would be considered to be the good effect—e.g. the destruction of an
enemy bomb making facility), and (2) a secondary effect which is unintended (but perhaps foreseeable) and is usually a bad effect, such as the death or harm of innocent civilians.

For the purpose of this paper, I will focus solely on collateral casualties a more restrictive notion than collateral damage (collateral damage pertains to both casualties and property). Collateral casualties, then, refers to the incidental killing or injury of noncombatants during a lawful military attack. Although the destruction of civilian property is not inconsequential, the debate, as it is framed by Walzer, Lee, and Christopher, gives mention only to civilian life and physical harm to civilians.⁴

**Part III: Jus in Bello and Collateral Damage**

Considerations for collateral casualties are addressed in the Just War tradition, an influential theory on the ethics of war and peace which employs a set of universal, moral rules of war that provide a moral framework for evaluating the justice of all aspects of war.⁵ The concern for collateral casualties is addressed in the principles fundamental to *jus in bello*, the Just War Doctrine that stipulates the use of force in armed combat, which pertains to military officers and soldiers who are responsible for the actual fighting.⁶ Rules of *jus in bello* include (but are not limited to): No means mala in se, Distinction/Discrimination, Proportionality, Military Necessity.

The targeting of civilians (wanton or not) is strictly forbidden by the *discrimination* rule of *jus in bello*, which is derived from the Laws of War, such as the Law of Armed Conflict, Rules of Engagement, and the Geneva Convention.⁷ Soldiers are expected to discriminate between legitimate targets, such as enemy combatants and military facilities, and civilians and civilian objects, such as hospitals and schools which are not legitimate military targets. This rule of *jus in bello* is employed with the intent that collateral damage be minimized, or, ideally, eliminated.
In order to understand the discrimination restraint of *jus in bello* consider the following scenarios:

1. There is an influential terrorist leader who is primarily responsible for planning, motivating, and executing a number of terrorist attacks. It is his leadership that encourages and inspires others to conduct acts of terrorism. It just so happens that we are able to locate the homes of his family and closest friends (who have no apparent involvement in conducting acts of terror). We begin, one by one, to bomb these homes, killing the residents, in order to encourage the terrorist leader to turn himself in. The terrorist, who loves and cares for his family and friends, turns himself in and, in the absence of his leadership, all acts of terrorism from this particular terrorist group come to an immediate halt.

2. A team of soldiers have been ordered to enter a civilian home in order to capture two influential, violent terrorist leaders. When the soldiers enter the home, the terrorists fire at the soldiers and as a result, the soldiers return fire. A child who was in the room is unintentionally shot dead in the midst of the firefight.

Although the death of the child in the second scenario is tragic, the soldiers did not take direct aim at the child, nor did they intend for the child to die. Yet, in the first scenario, the innocent civilians were directly targeted: the soldiers who bombed the home intended for the civilians to die. Thus we have a case of taking direct aim at and killing noncombatants (direct killing) and a case of accidental killings of noncombatants (indirect killing). As elucidated by Lackey, “in direct killing, death is the intended goal of an act, or an intended means to an intended goal; in indirect killing, death is a side effect caused by an act that has some other intended goal" (Lackey 1989: 66). Certain Just War Theorists maintains that although the deaths of civilians that occur as a consequence of military operations are regrettable, military members incur no moral blame for indirectly killing noncombatants, so long as the intended end was necessary for military success and the negative effects were proportional to the good effects obtained.\(^8\)

**Part IV: Applying the DDE to Collateral Casualties**

The principles of *jus in bello* are employed by the Doctrine of Double Effect (DDE), which, as it is used to critique wartime operations, is described as a way of reconciling the killing of
innocents with lawful wartime operations. In drawing a moral distinction between the intended effects of an action and the unintended, but perhaps foreseen, effects of an action, the DDE is characterized as a useful interpretation of the discrimination principle (Lee 2004: 234). According to the formulation of the DDE employed by Walzer in his book *Just and Unjust Wars*, the killing or injury of non-combatants is said to be justified or permissible so long as the four conditions of the DDE are met:

1. That act is good in itself or at least indifferent (the act is a legitimate act of war)— **No means mala in se**
2. The direct effect is morally acceptable or necessary (for example: the destruction of military supplies or the killing of enemy soldiers) – **Military necessity**
3. The intention of the actor is good: he aims only at the acceptable effect; the evil effect is not one of his ends, nor is it a means to his ends – **Discrimination**
4. The good effect is sufficiently good to compensate for allowing the evil effect— **Proportionality** (Walzer 2004:153)

Walzer criticizes the doctrine of double effect as it is applied to wartime operations, arguing that it is “darkly permissive”: it allows for a “blanket justification” for collateral casualties when, in some cases, the death and/or injuries could have easily been prevented (Walzer 2004: 153). In particular, he is troubled by the third condition, which fails to capture the full extent of a soldier’s moral obligations in war: the DDE merely instructs soldiers to have a “negative” intention in regards to collateral casualties, while failing to command soldiers to foster a positive intention to save lives or prevent injuries. That is, the standard formulation of the DDE directs soldiers to not intend the death or injury of non-combatants, yet this does not entail the further command of proactively preserving or protecting civilian lives. Just war theorist Steven Lee echoes Walzer’s concern as he writes: “the doctrine of double effect is too lenient [as it applies to military operations]; it does not capture the extent to which combatants should seek to avoid harming civilians. Not only should combatants not try to harm civilians; they should try not to harm them” (Lee 2004: 234).
In *Just and Unjust Wars*, Walzer provides an example to illustrate the failure of the DDE:

In a memoir of the First World War, Frank Richards recalls the bombing of dug-outs or cellars (which were frequently used as a hiding place by enemy German soldiers). Typically, soldiers would throw bombs into the cellars and look around the cellars for casualties after the bomb went off. However, Richards and his men were aware that civilians often times would hide in these cellars, so they would shout down into the cellar prior to throwing the bombs in the cellars. In one case, a woman and her family were saved by the verbal warnings of the soldiers. (Walzer 2004: 152).

None of the clauses of the DDE morally obliged Richards to issue a verbal warning prior to throwing the bombs in the cellars. Rather, the DDE would have permitted Richards to throw the bombs in the cellars without warning, thus justifying the death of non-combatants who may have been hiding in the cellars. This is because:

1. The act Richards engaged in (blowing up cellars) was a legitimate military act
2. The direct effect was good: the destruction of enemy hide-outs
3. The intention was good: Richards clearly intended the destruction of enemy hide-outs and not the civilian deaths; the civilian deaths would have served no purpose in obtaining victory
4. The good effect was sufficiently good in comparison to the evil effect: over a period of time, the proportions would have worked out favorably; the elimination of enemy hide-outs would outweigh the possible civilian deaths

According to Walzer, something is inherently wrong with this conclusion. That is, we should not be so quick to judge it morally acceptable to throw bombs into enemy hideouts before yelling out even if the success of the mission would be proportional to the lost civilian lives. This is because these soldiers could have prevented an additional harm—the loss of innocent civilian lives. Hence, he argues that Richards and his men acted as moral men *ought* to act by issuing a verbal warning before blowing up the cellars, even given the possible risks associated with shouting out (the German soldiers could have scrambled out of the cellar, firing as they came) (Walzer 2004: 154). Walzer ultimately concludes that “if saving civilian lives means risking soldier’s
lives, the risk must be accepted” (Walzer 2004: 156). Thus Walzer goes on to amend the third clause of the DDE in order to include a *positive intention* to protect the lives of noncombatants:

(3) the intention of the actor is good, that is, he aims narrowly at the acceptable effect; the evil effect is not one of his ends, nor is it a means to his ends, and, aware of the evil involved, he seeks to minimize it, accepting costs to himself (Walzer 2004: 155).

Essentially, the demand is for a *double intention*: 1) that the good be aimed at, and 2) that the soldier mitigates the foreseeable evil as far as possible, that is, he intends to *not* harm civilians. Let us refer to this as the *principle of double intention*.10 From the principle of double intention, a second principle is derived by Walzer: the *principle of risk*, which requires soldiers to mitigate civilian harm or death even if it poses significant risks to themselves.11 So, although the principle of double intention (the positive effort to actively reduce the harm to noncombatants in military actions) may involve an *increased risk* to the soldiers fighting in the operation, Walzer maintains that “if saving civilian lives means risking soldier’s lives, the risks must be accepted” (Walzer 2004: 156).

**Part V: A Different Moral Standard for Military Soldiers**

The demand for a “double intention” seems to necessitate that the third clause of the DDE be amended *only* in its application to soldiers fighting in war. That is, an element of risk should be assumed *specifically* by soldiers, while it is perfectly acceptable for civilians to adhere to the original, risk-free formulation of the third principle of the DDE. This seems to presuppose the idea that military members are bound by a different moral standard than civilians. Such an idea can be traced to a consideration of “role morality”: the theory that special rights and obligations attach to certain social or professional roles that differ from the rights and obligations of ‘common morality’ that governs the behavior of people not inhabiting such roles (Luban 1988: ch 6-7). Being a soldier is such an example of occupying a “role” that entails special obligations
unique to the role of soldier, or as Hartle calls it, role-differentiated behavior (Hartle 1989: 5). As pointed out by Ficarrotta, this can mean one of two things: 1) there are unique moral obligations for soldiers that most other people do not have, or 2) soldiers have reason for being bound more strictly to the moral standards that apply to everyone else (Ficarrotta 2010: 2).

The uniqueness principle holds that soldiers have certain unique moral obligations based on the context of the situations they frequently encounter. Ordinary civilians are faced, on a daily basis, with certain moral choices concerning whether or not to break a promise or whether or not to tell a lie. Civilians thus may have certain obligations to keep promises or to tell the truth in certain occasions. Soldiers are faced with larger scale issues that involve mass suffering and harm, and they thus have unique obligations, such as the duty to not take direct aim at noncombatants. Since civilians do not fight in military operations, the obligation to “not take direct aim at civilians” does not apply to them under normal circumstances. However, the duty would apply to civilians if for some reason they found themselves in the midst of a combat operation. If a journalist covering a certain battle in a warzone finds herself in the midst of a firefight and returns fire in order to protect herself, she assumes the unique duty to not take direct aim at unarmed civilians.

The strictness principle maintains that because of the nature of their profession, soldiers are more strictly bound by certain general obligations that apply to civilians, such as exhibiting the virtues and behaviors of: honesty, courage, obedience, selflessness, loyalty, and discipline. For instance, civilians are obligated, to some extent, to obey laws, their bosses, and so forth, while soldiers assume a stricter, unwavering obligation of obedience: they must unquestioningly obey lawful orders from those who are in their chain-of-command. This is because the virtue of obedience (and loyalty, courage, selflessness, and so forth) is essential for a well-functioning
military. Thus, we can conclude that the role of the soldier imparts on soldiers the strict duty to foster military virtues such as selflessness, loyalty, courage, honesty, which are essential for military effectiveness.\textsuperscript{13}

The principle of risk seems to be derived from the strictness principle. Given the nature of the military profession, Walzer maintains that, since soldiers are, “after all, in the business of risking their lives,” they should foster, at a high level, character traits that enable them to put themselves at risk in order to save innocent lives such as personal courage, moral courage, integrity, and selflessness (Christopher 1994: 104). Soldiers should thus be held to a higher standard of courage, selflessness, and risk taking than civilians.

**Part VI: The Obligation to Follow Orders and Preserve the Safety of the Team**

In my analysis of the principle of risk, I will consider the strict obligations that are imparted on a soldier qua role of the soldier. In doing so, I will provide an account of the core military virtues that are essential for sustained and effective military operations, paying considerable attention to the military virtues of obedience, loyalty, duty, sacrifice, courage, and selflessness that are required at a higher, more complex level in every day military operations due to the role or nature of the soldier than in civilian life. I will then illustrate how the principle of risk requires soldiers: (1) to undermine the core virtues that are central to the role of soldier and the military profession, and (2) to go above and beyond what is required of the role of soldier.\textsuperscript{14}

**Disobeying Lawful Orders**

The command structure of the military limits the freedom of individuals to make their own decisions in tactical situations where risk or danger inevitably follows. That is, fundamental to military success is a rigid command structure and obedience to that structure. The commanding
officer makes all final tactical decisions, including decisions regarding target selection and how to respond to civilian presence on the battlefield, while subordinate soldiers are obligated to obey the commander’s decisions.

In any given mission, soldiers are provided with the commander’s intent, which stipulates the commander’s overall vision and general guidance as to how to accomplish the respective mission. In providing guidance that addresses the issue of civilian encounters, the commander will order soldiers to fight in one of two ways: 1) in such a way that requires soldiers to assume risk in order to save civilian lives, or 2) in such a way that requires soldiers to complete a mission with minimal risks to themselves which entails that soldiers avoid all unnecessary risks, including the risks involved in protecting civilians. Based upon the commander’s intent, platoon leaders, squad leaders, and team leaders, who are responsible for leading and conducting ground operations, develop battle plans which are rehearsed extensively before execution of the operation. During these rehearsals, soldiers are informed of the commander’s intent, which should stipulate the appropriate response to potential civilian encounters.

Given this basic overview of military planning, let us reconsider Walzer’s example of Richards and the enemy hide-outs/cellars. Prior to execution of this mission, the soldiers would have rehearsed how they would go about blowing up the cellars. Furthermore, battle plans always take into account civilian considerations. So, during battle rehearsals, soldiers would have been informed of the dangers and risks of shouting out before blowing up the bunker and whether or not that risk should be assumed. If the commander demands for minimal risk to friendly forces, then this would entail that soldiers should not engage in extra risky actions, such as shouting out before blowing up the cellar. Thus, before executing the mission, Richards and
his men would have been instructed by their leader whether or not they should call out a warning order before throwing in the grenade.

Note that it would not have been unlawful for Richards’ leader to order the soldiers to refrain from shouting a warning before blowing up the cellar. It is not criminal or unlawful to order one’s troops to refrain from taking positive steps and risks to save enemy civilian lives. Rather, the Law of War, as illustrated in the Geneva and Hague Conventions, forbid only the direct killing of unarmed individuals, and furthermore, they permit soldiers to conduct missions that may put civilians at risk based on the principle of military necessity.15 In cases where collateral damage is “rendered absolutely necessary by military operations” or “offers a definite military advantage” the destruction of property and indirect killing of innocents is permitted, without the further requirement that a soldier assume a certain risk to reduce the damage.16 War crimes or unlawful acts of war are limited to direct uses of violence against noncombatants, such as "murder, the ill-treatment or deportation of civilian residents of an occupied territory to slave labor camps, the murder or ill-treatment of prisoners of war, the killing of prisoners, the wanton destruction of cities, towns and villages, and any devastation not justified by military necessity” (Solish 2010: 301-303). Note that negative actions, such as not taking a risk in order to save a civilian, are not war crimes.

The question then remains whether a soldier is justified in disobeying a lawful order in the name of morality. In the United States military, disobeying lawful orders can be prosecuted as a felony under the Uniform Code of Military Justice.17 That is, soldiers have a legal duty to obey the lawful orders of their superiors.18 Huntington takes this consideration of obeying lawful orders a step further, arguing that so long as an order is lawful, soldiers have a moral obligation to obey it. This is because:
For the [military] profession to perform its function, each level within it must be able to command the instantaneous and loyal obedience of subordinate levels. Without these relationships, military professionalism is impossible. Consequently, loyalty and obedience are the highest military virtues... When a military man receives a legal order from an authorized superior, he does not argue, he does not hesitate, he does not substitute his own views; he obeys instantly (Huntington 1986: 47-48)

Huntington’s central point is that one act of disobedience can upset the entire command structure of the military, which is dependent on an unwavering obedience to lawful orders. The success of the military is dependent on a rigid structure of command and leadership: obedience to orders is an integral part of soldier training and mission success, such as in combat situations where life or death depends on instant obedience. When individual soldiers challenge or undermine the decisions made by their higher command in combat, even for so-called “moral reasons,” disorder is inevitable. That is, if we allow one soldier to question or defy authority for what he or she believes to be moral reasons, we open the door to, and furthermore incite, the next soldier to defy authority for his own reasons, and so on. The end result would be an unmanageable, chaotic, and uncooperative military that invites soldiers to challenge authority, even in life or death situations.

Let us reconsider Walzer’s cellar example to illustrate this point. For argument’s sake, imagine that when Richards decided to issue a warning call to potential civilians, an enemy soldier who was in one of the nearby bunkers heard the warning call and immediately exited the bunker, firing his weapon all the way. Meanwhile, Richards’ team leader, who specifically instructed his team to exercise stealth in conducting the mission, was caught off guard by the noise Richards was making and instantly reacted by reprimanding him and as a result, he was unable to react quickly enough to the enemy soldier who fired directly at him.
This example illustrates the potential detrimental effects of individual decision making in a combat situation. Encouraging individual soldiers to take risks on their own, as the principle of risk requires, even for the sake of morality, undermines unit integrity and the authority of the leader: it upsets the tactical ambiance and arouses confusion, distraction, and disorder throughout the ranks. Rather than granting soldiers individual authority to deviate from tactical plans as they see fit, concern for civilians and the risks or costs associated with saving civilian lives should be addressed in the unit’s battle rehearsals prior to mission execution. If a soldier chooses to adhere to the principle of risk, and in doing so, disregards the commanding officer’s instruction, the whole command structure of the military, which is fundamental to mission success, would be undermined.

It may be objected that the character trait of unwavering obedience is not to be valorized, even in a military setting. If a soldier is conditioned to be unquestionably obedient to the military’s command structure, the soldier may fail to question authority when faced with an unlawful order. That is, a soldier may be either: (1) too afraid to challenge orders because of the emphasis on obedience in the military, and (2) unaware that the order is unlawful, and out of obedience, performs the unlawful action.

The U.S. field manual, *The Army*, FM 100-1, enumerates the values that are central to the profession which reinforce and promote the “professional Army ethic” and “strengthen the Army Ethic”: loyalty, duty, selflessness, service, integrity, courage, candor, competence, and commitment.” *Courage* can be identified as either physical or moral courage, moral courage being of significant importance to the issue at hand. Miller defines moral courage as: “the capacity to overcome the fear of shame and humiliation in order to admit one’s mistakes, to confess a wrong, to reject evil conformity, to denounce injustice, and to defy immoral or
imprudent orders” (Miller 2000: 254). Olsthoorn points to the few soldiers in Lt. Calley’s platoon who refused to participate in the My Lai massacre as paradigmatic examples of individuals who exemplified the trait of moral courage (Olsthoorn 2007: 275). Although the military seems to breed conformism, soldiers, in the face of unlawful actions must foster the trait of moral courage in order to refuse to obey unlawful orders. This is demanded by the role of the soldier, whose ultimate aim is to uphold the constitution, even when doing so requires that they challenge authority.

The value of competence requires that soldiers “develop and maintain the highest possible level of professional knowledge and skill” (Hartle 1989: 53). Soldiers are not only obligated to demonstrate competency of the Field Manuals that govern combat operations, yet, as noted by Hartle, they are furthermore required to know, understand, and “adhere to the laws of war and the regulations of their service in performing their professional functions (Hartle 1989: 53).” Soldiers must then be able to distinguish between lawful and unlawful orders by familiarizing themselves with the Law of War that governs the military profession. Ignorance, then, is not an excuse for blindly obeying unlawful orders. Thus, in addition to fostering the trait of obedience (to lawful orders), the role of soldier requires the virtue of moral courage in order to renounce unlawful orders and the virtue of competence which demands an understanding of the Laws of War and what actions violate such laws.

**Risk at the Command Level**

Since the commander makes the final tactical decisions regarding targeting selection and decisions regarding civilian encounters, the question remains whether commanders are obligated to impose risks on their soldiers for the sake of civilians. In order to answer this question, we
must first consider what the primary duties of a commander are. Furthermore, in order to determine an appropriate military ethic, like any other professional ethic, we must first determine the central goal of that profession (Mille 2004: 201). The central goal of the military profession is the security of the state, and the means of attaining a secure state is fighting and winning wars (Hartle 1989: 30). Thus commanders should embrace principles that enable them to achieve their defined purpose of accomplishing assigned missions and winning battles. If ordering soldiers to assume extra risks in any way threatens the mission, the commander is obligated to order subordinate soldiers to not assume such risks, regardless of the innocent lives that could potentially be saved.

Walzer provides an example that is useful for illustrating this point:

In Korea, American troops would automatically use tanks and call in for artillery fire and air support in order to return fire into the hillside when they were pinned down and fired upon by enemy troops. The tactic of the American military resulted in saving American soldiers’ lives, but civilians were indiscriminately killed. (Walzer 2004: 154-155).

Walzer finds this problematic and argues that the soldiers should have sent out a patrol to outflank the enemy rather than using tanks and artillery fire, despite the greater risks that would have been involved. Yet, the decision to attack on foot, which Walzer fails to acknowledge, would have been made by the commanding officer. Requiring soldiers to set out on foot to outflank the enemy would require the troops to leave their cover in order to advance to root out the enemy and they would be exposed and fired upon while unable to return fire (Cohen 1989: 28). Assuming such a risk compromises the whole mission, thus the commander, in order to fulfill his duty of ensuring military victory, should have made the decision to call in for artillery fire.20
Commanders not only are required by their role as military professionals to win battles, but they are also required to *command* subordinates. Commanding soldiers involves not only delegating and ordering soldiers to fight in certain battles, but it also comes with an incredible amount of responsibility over soldiers, their welfare, and their lives. That is, as leaders, commanders are responsible for providing for the safety and promoting the welfare of each and every soldier under their command. Furthermore, the responsibility commanders have for their subordinates takes precedence over any responsibility they might have to civilians. This line of thought is substantiated by Article 5947, Title 10, U.S. Code: “commanding officers and others in authority shall take all necessary and proper action…to promote and safeguard the morale, physical well-being, and general welfare of the officers and enlisted men under their command and charge.” Thus, the role of the commander requires that he first and foremost defend his country by winning battles, and secondly, that he preserve the safety of his soldiers by not subjecting them to non-mission essential risks.

**Duty to Fellow Comrades**

As a member of a team, soldiers have unique or special obligations to protect and safeguard the lives of their fellow comrades. This consideration is derived from the ethics of care, which maintains that morality involves particular relations with particular people, such as one’s friends or families. Virginia Held, a prominent figure in care ethics, writes that “the central focus of the ethics of care is on the compelling moral salience of attending to and meeting the needs of the particular others for whom we take responsibility” (Held 2006: 10). Most of us would agree that we have special, perhaps deeper, duties and obligations to our families and friends than we do to a stranger on the street. This thought can be extended to the military context, where we find teams of soldiers who form relationships or bonds with each other, which is often referred to as a
band of “brothers” or “sisters.” Because of the relationship that is formed through team-bonding, it seems uncontroversial to maintain that soldiers impart on themselves a deep obligation to their fellow comrades, especially when it comes to preserving their lives. This duty or obligation can be characterized as a form of loyalty, which Coleman characterizes as a “loyalty that service members tend to feel for each other, reflected in the desire to protect each other from harm and to defend each other from attack, whatever form that attack may take, and wherever that attack may be thought to be coming from” (Coleman 2009: 109).

This sort of loyalty is of considerable importance because soldiers operate under the faith that their fellow comrades will do whatever it takes to save one another, as is directed by the “no soldier left behind” motto. As Coleman points out, military personnel put themselves at risk in performing their duty in combat situations, expecting that their fellow comrades will demonstrate extreme, possibly unlimited, loyalty (Coleman 2009: 111).” If there were no special obligations of loyalty that require service members to promote the safety and welfare of each other, the military could not function as it does today: soldiers would live in a constant state of fear, anxiety, and uncertainty, questioning whether their teammates would make a decision that jeopardizes their lives.

Consider the following scenario:

Specialist (SPC) Engels, a mounted gunner, is part of convoy that must drive through a civilian part of town. When his vehicle passes through the local town, it is surrounded by a crowd of civilians. As he patrols the area, he spots a man with an EFP (energy formed projectile), whose body language suggests that he is about to launch it at her vehicle. If the EFP is successfully launched, SPC Engel’s whole vehicle will explode, killing not only himself, but the other soldiers in his vehicle. SPC Engels has a choice: (1) he can fire his primary weapon (which is already mounted). The primary weapon of a mounted vehicle is an M249, a light machine gun which fires indiscriminately and most certainly will kill innocent civilians in the area, but also will certainly take out the man with the EFP, or (2) he can take the extra time to switch to his secondary weapon, an M4, which is used for more accurate targeting, although the chances of taking out this man is unlikely,
given the fact that SPC Engels is in a moving vehicle, and furthermore, the man may launch the EFP before he has time to even switch to his alternate weapon.

SPC Engels can assume a risk by switching to his alternate weapon, yet at the same time, he increases the likelihood of his vehicle being blown to pieces along with himself and his teammates. In assuming such a risk, SPC Engels violates one of his core duty of loyalty as a soldier: to protect and promote the lives and safety of his comrades. If SPC Engel’s teammates cannot trust him to perform his military duty (in this case, to ensure the safety of his vehicle), then the foundation of trust, which is critical to military success, is undermined. Soldiers would constantly be on guard not only against enemy troops, but against their fellow comrades, fearing that a certain soldier might deviate from the rehearsed battle plan and engage in “risky behavior” in order to save civilians. SPC Engels cannot forget that he is a member of a team, and assuming a risk in order to save civilians endangers not only himself, but his fellow comrades who have placed their lives in his hands.

The virtue of loyalty confronts similar issues as the virtue of obedience. It may seem that “unlimited” loyalty to fellow comrades may compel soldiers to demonstrate loyalty in all situations, even to a soldier who has performed an unlawful act of war and requests another soldier to either help cover it up or keep quiet about the event, i.e. not blow the whistle. We can think of detainee abuse as a prime example. If a soldier refuses to keep quiet about the abuse, then he is accused of being disloyal. Coleman presents an interesting response to this problem, claiming that “given that the original act of misconduct is itself a form of disloyalty, [it is disloyal to the soldier’s oath of enlistment and to the aims and ideals of the military], it seems odd in such a case to accuse the second [soldier] of being disloyal; odd to even suggest that [his] loyalty could or should be requested or even demanded by someone who is demonstrating a lack of loyalty at the time” (Coleman 2009: 110). The military, then, seems to require a qualified
virtue of loyalty: loyalty to actions and persons who are loyal and moral themselves. Furthermore, one must have the moral courage to refuse loyalty even to one’s friends and comrades in situations that require them to compromise morality.

**Disparate Duties to Friendly and Enemy Citizens**

Unpredictable situations may arise that present soldiers with a decision to assume a certain risk in order to save civilians that: (1) is not addressed by their commander’s guidance, and (2) does not endanger their teammates. Consider the following scenario:

SGT Gibson is part of an Explosive Ordnance Disposal (EOD) team whose mission is to dismantle IEDs (improvised explosive devices). On one particular mission, SGT Gibson takes off by himself to dismantle an IED while the rest of his team stays a considerable distance back. While he is at the IED site, SGT Gibson sees three individuals running towards him: two men who are firing automatic weapons at him and one child who is dragged along by the men. Because SGT Gibson has a protective mask on, he is unable to use the only weapon on him: an M4 that requires careful targeting and sight picture alignment in order to successfully take out specific targets. SGT Gibson has a choice: he can throw a hand grenade at the group, which will take out all three individuals, or he could take off his protective mask and try to take out only the combatants by carefully targeting them with his M4, yet in doing so, he leaves himself vulnerable to the bullets that continue to fire in his direction.

I argue that even in such a scenario, the soldier remains under no obligation to assume an additional risk to save this child, so long as the child is a civilian from another nation (what I will refer to as an enemy civilian). Yet, I concede that soldiers do have a positive duty to protect citizens of their own nation because of their role as soldier, and they should thus put themselves at risk to do so if the situation presents itself.

Walzer promotes his *principle of risk* by advocating the view that “soldiers are in the business of risking their lives,” meaning that it is in the nature of the soldier to take risks and thus they should be prepared to risk their own lives and demonstrate personal courage in order to reduce risk to innocents when acting in their combat roles (Coleman 2009: 104). In this spirit, Lee maintains that “the structure of rights stands independently of political allegiance; it
establishes obligations that are owed, so to speak, to humanity itself and to particular human beings and not merely to one’s fellow citizens” (Lee 2007: 45). Christopher echoes both Walzer and Lee’s position, maintaining that the purpose of military forces is to “protect the civilian population” (Christopher 1994: 177).

What Walzer, Christopher, and Lee all argue is that the nature of the soldier is to risk his life in order to promote the lives of other human beings. It is then assumed that soldiers should foster a positive intention to equally protect all innocent lives that are involved in a respective battle. Soldiers thus are assumed to have equal obligations to both friendly civilians and enemy civilians. As Christopher writes: “a good rule of thumb might be that enemy civilians (innocents) should be subjected intentionally to no greater risk than to which one is willing to subject one’s own innocent population” (Christopher 1994: 104). Thus, respect for the human being is what imparts this duty to assume risk on the soldier, regardless of what nation the human being is from.

The view that soldiers have an equal positive obligation to protect all innocents is rejected by Fleury, who draws a distinction between two sorts of civilians and the disparate duties owed to these individuals by soldiers: (1) enemy civilians—civilians from the state or country they are at war with and (2) friendly civilians—civilians from their own nation:

A distinction should be made between one’s own innocents and the innocent citizens of an enemy nation in terms of the moral duty not to intentionally harm non-combatants. Certainly, soldiers do not have the same positive duty to protect innocents among the enemy population, as they have to protect their own population, although they have an obligation not to harm innocents intentionally regardless of their nationality (Fleury 1998).

To be clear, Fleury rightly points out that soldiers have an equal moral and legal obligation to refrain from directly harming or attacking both enemy and friendly civilians. That is, regardless
of one’s nationality, one has a certain moral standing that should be respected due to his or her status as a human being. Yet, soldiers have an additional duty or obligation to friendly civilians: a further positive obligation that may require them to themselves at risk in order to save citizens from their own nation.

Fleury thus acknowledges that there is indeed an element of courage, or selflessness that soldiers are expected to demonstrate in combat, yet this courage or selflessness need only be demonstrated in order to protect their country and co-nationals. This thought stems from an appeal to what Hurka calls agent-relative national partiality (Hurka 1997: 139-157). Such a view is an extension of moral particularism: the view that morality involves particular relations with particular people and, furthermore, one owes special obligations to those one forms a relationship with, such as friends, family, and, in this case, nation. As Hurka points out, “the relations among citizens of a nation are not as close as between parents and children, and the partiality they justify is not as strong. But common sense still calls for some partiality toward fellow citizens” (Hurka 2005: 60). This attitude of partiality to one’s co-nationals, if justified, could invoke on soldiers a positive duty to protect civilians from their own country.

Hurka maintains that this moderate form of nationalism, partiality to co-nationals, (as opposed to full blooded nationalism, an impersonal partiality which concerns impersonal goals such as the survival and flourishing of one’s nation) is justified so long as there is a special tie that warrants agent-relative national partiality. The two components of the special ties Hurka points to are: (1) a nation having good qualities (like an individual can have good qualities), and (2) co-nationals can have a shared-history-of-the-right-kind of doing good together or suffering evil or oppression together. So, American soldiers can be said to be justified in endorsing a form of nationalism, since: (1) the United States has good qualities, such as freedom, equality, and so
forth, and these qualities define both America and her citizens, and (2) Americans have a shared-history-of-the-right-kind: Americans have bonded together to overcome a number of tragedies, such as the terrorist attacks of 9/11.

This attitude of agent-relative national partiality is supported by the motto of the United States Military Academy: duty-honor-country (Sorley 1986: 141). Hartle points out that the country is the object to which the performance of duty and the maintenance of honor are devoted (Hartle 1989, 49). Service to the nation or country, then, is the goal of the military profession: soldiers engage in battle and wars in order to promote their country: both the qualities or traits of the nation (freedom and democracy) and the actual constituents of the state with whom they have a shared history. Since enemy combatants are not members of the state soldiers are obligated to protect, it seems reasonable to maintain that soldiers do not have a unique obligation to positively protect these individuals.

This idea that soldiers have a unique obligation to co-nationals can be observed in the Soldier’s Creed, which embodies the core duties and obligations fundamental to the role of the American soldier: "I am a warrior and a member of a team”; “I serve the people of the United States”; “I will never leave a fallen comrade.”23 In these phrases, the Soldier’s Creed specifically gives mention to a soldier’s obligation to defend America and the people of the United States. Nowhere, in this creed do we see a requirement to “never leave an enemy civilian behind” or to “sacrifice oneself in the name of a civilian from another nation.” Thus it seems plausible to conclude that soldiers indeed have a strict obligation to foster and cultivate a character trait of immense courage or selflessness, yet only in order to protect their country and their co-nationals.

As Cohen points out, there are limits to what we can expect soldiers to endure and that "the law of war implies that soldiers are not obligated to raise their already high risks to even
higher levels in order to lower further the risk to innocents in combat zones. The rights of innocents are ‘defeasible’ when honoring those rights would push the soldiers’ risks beyond what it is reasonable to expect any group to endure (Cohen 1989, 33).” Thus soldiers should not be obligated to rise their already high stakes to assume an additional strict duty to act courageously for enemy civilians: civilians they have no relationship or shared history with.

**A Double Intention without Risk**

Although I have argued against the principle of risk, which beseeches soldiers to put themselves at risk in order to save civilian lives, I, by no means, intend to discount the seriousness of collateral damage and how imperative it is, as moralists and just fighters, to minimize the harmful effects of war on innocent civilians—friendly or enemy. Yet, I argue that we can promote a positive double intention to prevent collateral casualties without requiring the soldier to assume an element of risk. This is because reducing the risk to civilians does not always mean greater risk to soldiers or the mission.

As we recall, Walzer’s initial concern regarding the DDE is that it is “too lenient” and that it fails to require soldiers to foster a positive intention to save lives. Yet, what he fails to acknowledge is that the doctrine of *jus in bello* requires soldiers to conduct their mission with the least amount of suffering possible. Consider the principle of *military necessity*: all war actions should be “necessary to compel the submission of the enemy with the least possible expenditure of life, and money.” In requiring that war actions be conducted with the “least possible expenditure of life,” the principle of military necessity calls for a *positive intention*. That is, beyond requiring soldiers to not take direct aim at civilians, as the principle of discrimination requires, the principle of *military necessity* requires that soldiers take positive steps to eliminate preventable bad effects, such as the loss of civilian lives.
Perhaps, then, the confusion is not with the third principle of the DDE as it applies to *jus in bello*, but with the second principle of the DDE, which Walzer identifies as: *the direct effect is morally acceptable or necessary*. In promoting the principle of double intention, while remaining true to the principles of *jus in bello*, I propose that the second principle of the DDE be amended to reflect what exactly is demanded by the rule of *military necessity*: to restrain **all unnecessary or preventable force**, injury, or death in any military action. Thus, the revised 2\(^\text{nd}\) principle of the DDE should read: *The direct effect is morally acceptable or necessary (for example: the destruction of military supplies or the killing of enemy soldiers), while the bad effect (the harming or killing of civilians) is reduced as far as possible.*

Taking serious the principle of military necessity requires leaders to consider alternate courses of action when developing plans for particular missions: courses of action that have disparate levels of risk to civilians, soldiers, and so forth. That is, in the war gaming phase of planning operations, leaders should assess not only the quickest or easiest way to complete a mission, but rather, leaders should strive to develop a course of action that minimizes both: (1) risk to the soldier, and (2) civilian casualties (both friendly and enemy civilians). Consider this final example:

The location of a terrorist leader is disclosed to the opposing force: he hides out in a local school. He is known to be extremely fearful of enemy troops and will certainly fire his weapon in order to prevent his capture. The commander of the unit ordered to capture the terrorist devises a plan to enter the school during the day in order to complete the mission.

The decision to enter the school during the day clearly violates the principle of military necessity because (1) the terrorist, in instigating a firefight, would endanger the lives of the children, and (2) the soldiers could have conducted the mission when school was not in session,
such as during the night, reducing or perhaps eliminating the number of collateral casualties. Thus, in the planning phase, the commander should have considered more than this one course of action: he should have considered courses of action that would procure the least amount of harm while still accomplishing the mission, such as conducting the mission during the night.

**Conclusion**

I have thus illustrated why the traditional doctrine of the double effect still applies to soldiers who fight in war despite the challenges waged by Walzer, Lee, and Christopher. As it currently stands, the collateral damage estimation methodology is employed at the command level—the commander provides detailed instruction concerning how to respond to civilians (friendly and enemy) on the battlefield in his commander’s intent. In order to fulfill his role as commander, his intent will reflect his primary duties to safeguard his subordinates and to win battles. I have argued that making an individual decision to assume risk in a tactical situation not only undermines the military’s command structure, but it also endangers one’s fellow comrades, and it is to these comrades whom the greater obligation to protect is owed. I have furthermore illustrated that the role of the soldier does indeed require that a soldier embrace a strict duty and obligation to act courageously and selflessly, yet the scope of such a duty is limited. That is, soldiers are only required to act courageously and selflessly to those they have a shared history and relationship with: the constituents of their own country.

Although Walzer wrongly argues that an individual soldier is obligated to assume certain risks in order to protect *all* innocents, he brings up a significant point that can be applied to higher military leadership and implemented in the strategic planning phases: military commanders and leaders should always *proactively* seek to develop plans that minimizes bad
effects when doing so does not endanger the lives of their subordinates or compromise the mission. That is, the military should not stop short at performing “good” actions that have unintended evil consequences that are outweighed by the success of the operation; rather, the military should relentlessly focus on minimizing collateral casualties. Yet, as I have illustrated, this consideration is already implied by the principle of *military necessity*. 
1 I specifically focus on the American military, due to the fact that the argument I propose may not apply to all militaries, as other militaries influence different virtues, which my account fundamentally relies on.


4 Walzer refers to the responsibility to prevent “civilian casualties,” Christopher refers to “protecting civilian population, and Lee specifically focuses on issues of protecting “humanity itself and particular human beings.”


6 The scope of this paper is limited to considerations of jus in bello, the principles of fighting justly once engaged in war. That is, I will bracket the issues concerning jus ad bellum (the justice of resorting to war in the first place) or jus post bellum (the justice of peace agreements and termination phase of the war), assuming that soldiers are morally obligated to adhere to the principles of jus in bello regardless of whether the war is just or unjust.


10 In his article “Double Effect, Double Intention, and Asymmetric Warfare,” Steven Lee refers to this idea as the “double intention.”

11 This discussion can be found in both Michael Walzer’s Just and Unjust Wars (155) and more recent book Arguing About War (17).
To be clear, soldiers are, at the very least, obligated to follow the same moral rules as everyone else, yet because of their role, they may have additional moral duties and obligations.

This is not to say that soldiers are more strictly bound by all virtues. In fact, the role of the soldier may require him to be less-altruistic, less-compassionate, less-sympathetic, and so forth.


Lawful orders is key here. This rules out the “obligation” of soldiers to partake in morally heinous actions such as torturing or raping another human being.

This is not to say that soldiers should be unquestioningly obedient: soldiers are encouraged to challenge unlawful orders, such as those that violate the Laws of War.

I will, at times, refer to the soldier or commander as “he” due to the current Direct Combat Exclusion Law (DCEL) which prohibits females from serving in infantry units below the brigade level and combat Military Occupational Specialties. Although I recognize that females may engage in combat, many of the scenarios I describe are that of an infantry unit below the brigade level. If the DCEL were to be overturned, these arguments would apply to female soldiers as well.

This thought is not unique to ethics of care: Kantians have argued this as well as rule-utilitarians.

The question of what duties soldiers owe to allied civilians remains open. For the purpose of this paper, I will not take up this issue. Yet, one could argue that the obligation to ones co-nationals is greater than that of allied civilians, since soldiers do not have a shared history with allied civilians.

The Soldier’s Creed is the standard that all United States Army personnel are encouraged to live by. It is taught at basic training and recited at all training events, ceremonies, and so forth.
References


