

## PART 2. DISSONANT REVIVAL

### CHAPTER 7

#### ROMANTICISM

The resilience and ubiquity of just-war discourse during the past half century, taken together with frequent references to late-classical and medieval theologians in modern texts, might easily lead to the conclusion that the just-war approach to combat has been consistently prominent throughout the Christian era. Scrutiny of the performance history of Shakespeare's *Henry V* has suggested that seeming classic status may depend on revival. The current just-war vogue is more a case of resurrection than of survival. Throughout much of the world, even the Christian world, the just-war tradition was all but abandoned during a very long nineteenth century. James Turner Johnson, one of the foremost expositors of the tradition, readily concedes that 'it is one of the great losses of just war thinking ... that from the middle of the seventeenth century through the middle of the twentieth, creative religious efforts to think through the meaning and implications of this tradition have ranged from occasional to notably lacking.'<sup>1</sup> It was in exactly this period that the novel and the memoir emerged as leading genres of European and North American literature, gradually allowing a secular tradition of imaginative meditation on war and soldiering to develop

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<sup>1</sup> . James Turner Johnson, 'Just War, as it was and is' in *First Things: A Monthly Journal of Religion and Public Life* (1 Jan 2005).

That modern tradition is the subject of Part 3. Part 2, by contrast, attempts to understand a cultural anomaly. How did a fragment of neo-Thomistic thought come to be lodged in the gullet of late modernity? How coherent is it? There are two good reasons to examine explanations of the revival of the just-war tradition within the Church, its adaptation by international lawyers in the United States, and its return to general currency in public debate. To expose the weakness of claims of a continuous tradition is to open up the question of the relationship between contemporary just-war discourse and political theology. To establish and date a revival concentrates attention on political and intellectual conditions in those societies where it happened, and most of all in the United States of America and its allies since the 1940s. Why did they turn to the tradition when they did? What did it offer that other approaches did not?

Stephen Neff has distinguished four distinct periods in his recent general history of the law of war. Up to 1600 war was seen as an instrument of law enforcement within a natural law framework. A period of transition followed, in which the salience of natural law gradually diminished and war was transformed 'from a tool of God into a tool of men'. During the nineteenth century – the apogee of legal positivism – war came to be regarded as a normal part of international relations, no longer an instrument of justice. International law had by this time abandoned the central assumptions of the just-war tradition.

To Joachim von Elbe, on the eve of the Second World War, drawing on a century of scholarship in several languages, it seemed clear that 'the majority of writers during the nineteenth and at the beginning of the twentieth century ... rejected the

distinction between just and unjust wars, considering war as an act entirely within the uncontrolled sovereignty of the individual state.<sup>2</sup> A generation later, G. I. A. D. Draper described the second half of the nineteenth century as ‘the era of positivism, the high noon of state sovereignty, and [of] the virtual expulsion of the just war doctrine from the picture’.<sup>3</sup> A more recent author has claimed that, aside from the requirement of proper sovereign authority, ‘*jus ad bellum* ... remained dormant for more than 200 years [after 1648]’. It began to stir at the 1856 Congress of Paris, but not until the twentieth century did it regain ‘intellectual and institutional currency’.<sup>4</sup> For Neff, it was only in the last of his four periods, after 1918, that ‘a reversion to the medieval just-war outlook’ took place, ‘tentative and halting at first’.<sup>5</sup> Like Neff, O’Donovan dates the recovery to the twentieth century, and nails the essential point nicely when he declares that ‘[the just war] is not the “traditional” view of Christendom, if by “traditional” is meant “uninterrupted”’.<sup>6</sup>

Yet this periodization fails to reveal what was both a qualitative and a quantitative change in the tradition during the 1940s, and which has led some commentators to ignore the first phase of the revival altogether, notwithstanding substantial evidence of earlier interest among lawyers as well as ethicists. Writing in 2002, for example, Nicholas Rengger – too good a scholar long to stand by his initial concessions to the continuity of the tradition since the days of Augustine – dated its contemporary

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<sup>2</sup> . Joachim von Elbe, ‘The Evolution of the Concept of the Just War in International Law’ *The American Journal of International Law*, 33:4 (October 1939) 684.

<sup>3</sup> . G. I. A. D. Draper, review of James Turner Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts, 1200-1740*, in *The Yale Law Journal*, 86:2 (December 1976) 376.

<sup>4</sup> . Christopher R. Rossi (1998) *Broken Chain of Being: James Brown Scott and the Origins of Modern International Law* (The Hague &c: Kluwer Law International, 1998) 126.

<sup>5</sup> . Stephen C. Neff, *War and the law of Nations: A General History* (Cambridge: Cambridge University Press, 2005), pp.3-4 and p.177. (CHECK)

<sup>6</sup> . O’Donovan, *Just War Revisited*, p.viii.

flowering ('unequaled since the late seventeenth century') to the preceding forty years.<sup>7</sup>

This estimate is substantially supported by those writing in the 1960s. Lynn H. Miller wrote in 1964 of a recently concluded 'eclipse of nearly two centuries'.<sup>8</sup> Donald Wells, five years later, regarded the revival as a contemporary phenomenon, following 'two centuries of silence on the issue'.<sup>9</sup> Inis Claude, surveying the history of just-war discourse, came nearest to the truth when he dated a revived 'neo-just war doctrine' to the period between 1914 and 1960, but maintained that it was only after 1960 that something more closely resembling the medieval doctrine re-emerged.<sup>10</sup> One reason for this timing may have been that neo-Thomist views were more compatible with the prevailing positivist mentality in the social sciences than the more Augustinian variants of the tradition, associated with Christian realists such as Reinhold Niebuhr or Herbert Butterfield.

It therefore makes sense to deal with the revival in two phases, the first extending from 1815 to 1960 and the second dealing with the next fifty years. This chapter therefore deals with the nineteenth-century gestation of the revived tradition, while the next examines the work of international lawyers in the Americas and the beginnings of codification of a law of armed conflict based on the just war tradition around the turn of the twentieth century. Chapter 9 takes stock of the eclectic situation at mid-century out of which the modern version of the tradition was to

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<sup>7</sup> . Nicholas Rengger, 'The Just War Tradition in the Twenty-First Century' *International Affairs* 78:2, 353-63.

<sup>8</sup> . Lynn H. Miller, 'The Contemporary Significance of the Doctrine of Just War,' *World Politics*, 16: 2 (January 1964), 254.

<sup>9</sup> . Donald A. Wells, 'How Much Can "The Just War" Justify?' *The Journal of Philosophy*, 66: 23 (December 1969) 820.

<sup>10</sup> . Inis L. Claude, 'Just Wars: Doctrines and Institutions,' *Political Science Quarterly*, 95:1 (Spring 1980) 92.

emerge, fully-fledged and dominant, during the Cold War, while chapter 10 deals with three important variants — the first an official United States doctrine, the second the revived Thomistic doctrine within the Churches, and the third, a secular communitarian treatment. Part 2 concludes with an account of the triumph of those atrophic neo-Thomist formulae that have too long dominated public debate in the era of United States global preeminence followed by an outline of some of the more outstanding dissonances between the formula and its theological roots, which cast doubt on the coherence of the tradition in its current manifestation.

The first signs of a revival of the just-war tradition are to be found quite early in the nineteenth century, and may be regarded as a minor theme in European Romanticism. They are an aspect of the conservative and Catholic reaction against enlightenment and revolution that buttressed the dynastic restorations of 1815. Later in the century, this stream was swollen by a very different tributary. Liberal revulsion against the consequences of unbridled exercise of *raison d'état* had by then taken shape in a positivist approach to international law.

Three particularly vicious wars, bringing an end to the relatively peaceful yet misnamed 'liberal interlude' that had followed the restorations of 1815, sparked off this wave of concern. These were the Italian War of Unification (1859) between a Franco-Sardinian alliance and Austria, the War of the Triple Alliance (1864-1870) between Paraguay and three of its neighbours, Uruguay, Argentina and Brazil, and the American Civil War (1861-1865) between the Union and the Confederacy. The only major engagement of the first of these conflicts was the Battle of Solferino, but this was the largest concentration of forces since the Napoleonic Wars, with over

200,000 troops engaged, and it also witnessed a good deal of killing of prisoners by both sides. Its lasting significance, however, arose from the subsequent campaigning activities – culminating in the establishment of the International Red Cross and agreement on the Geneva Conventions – of a Swiss witness to the battle, Jean Henri Dunant.<sup>11</sup> The second was a uniquely bloody affair, for the nineteenth century, in which a very substantial proportion of the population of Paraguay died (estimates of the population and mortality vary widely).<sup>12</sup> Of the third it may be sufficient to note its scale (more than 200,000 killed or mortally wounded in battle) and to endorse Gertrude Stein’s rebuttal of repeated claims that the United States of America was a ‘new’ country. It was the oldest of countries, she declared, because by the manner of its civil war it had been the first to embark on modernity.<sup>13</sup>

Every academic field has its problem terms: words with complex and disputatious histories and multiple meanings that scholars would dispense with if only they could. For students of literature and culture ‘Romanticism’ is one such term. As early as the 1840s there was debate in the Hispanic world about whether it was a doctrine of pure reaction or a fusion of progressive and conservative elements.<sup>14</sup> Yet few would dissent from the view that its emphasis on history and tradition provided ideological underpinning for the restoration of monarchy and Church after a quarter-of-a-century of revolution and war. In this context, the neo-scholastic movement within the

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<sup>11</sup> . The story of the International Red Cross is well told in Michael Ignatieff in *Warrior’s Honor: Ethnic War and the Modern Conscience* (London: Chatto & Windus, 1998).

<sup>12</sup> . The Paraguayan War is notable for the revulsion it engendered in the Argentine liberal elite, leading, *inter alia*, to the anti-war activities and writings of Juan Bautista Alberdi (1810-1884), the foremost Argentine intellectual of his day and author of *El crimen de la guerra* (1872), translated into English as *The Crime of War* (London: J. M. Dent, 1913. Trans J. M. MacConnell). Doubt has been cast on traditional estimates of the number of Paraguayan casualties by Vera Blinn Reber in ‘The Demographics of Paraguay: A Reinterpretation of the Great War, 1864-70’ *Hispanic American Historical Review* 68:2 (May 1988) 289-319.

<sup>13</sup> . Gertrude Stein, *The Autobiography of Alice B. Toklas* [1933] (Penguin: Harmondsworth, 1966) 103.

<sup>14</sup> . Norberto Pinilla, *La polémica del romanticismo en 1842* (Buenos Aires: colección ‘Tiempo de América,’ Editorial Americalee, 1943).

Catholic Church may be judged Romantic, as may recovery of enthusiasm for Shakespeare's disorderly plays, so puzzling to eighteenth-century classical taste. And just as Sir Walter Scott or James Fennimore Cooper reached back into history to engage obliquely in discussion of topics that were too politically explosive to be met head on, so theologians now went back to Aquinas to resolve contemporary problems arising for Catholics from the ideas of philosophers as diverse as Kant, Hegel and the British empiricists, but to do so on their own terms. It was a vastly ambitious intellectual outflanking movement, wrong-footing Enlightenment and reform by deploying nostalgia and deference as cavalry screen for the advance of an unholy alliance of capitalist and autocratic foot-soldiers.

Evident by the 1850s, especially in Italy, the neo-scholastic movement was fed by new editions of the works of Aquinas published in Naples from 1845 onwards and rapidly spread to Spain, France and Germany in the third quarter of the century, its strength finally confirmed by the 1879 encyclical of Pope Leo XIII, *Aeterni Patris*.<sup>15</sup> All this led to a great deal of textual work and many translations of Aquinas into modern European languages. Less dominant after 1900 than before, even within the Catholic world, neo-Thomism continued to exert considerable political influence, above all through the writings of Jacques Maritain, which helped shape the mid-twentieth century Christian democratic movement in Europe and South America. Only in the 1960s, when faced with liberation theology and the rise of charismatic forms of worship, did the movement finally falter.<sup>16</sup>

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<sup>15</sup> . James A. Weisheipl, 'The Revival of Thomism: An Historical Survey' (<http://www.domcentral.org/study/revival.htm>).

<sup>16</sup> . The transition from 'New Christendom' and Christian democracy to liberation theology in Latin America is well told in the second chapter of Daniel M. Bell, Jr. *Liberation Theology after the End of History: The Refusal to Cease Suffering* (London and New York: Routledge, 2001). Also interesting are Peter Hebblethwaite

Romanticism serves as a general term for the change of sensibility, beginning in the late eighteenth century and gathering force during the first third of the nineteenth, that entranced the growing industrial middle classes of Europe and the Americas, and even Bengal. It confirmed yet also transformed scholarly interest in nations and their distinctive cultures and, more generally, in ancient or primordial sources of authority. It allowed the monarchs of Europe to hang on for a further century despite the French Revolution of 1789 and the Enlightenment that had heralded it. It brought Shakespeare and Aquinas back to prominence. It encouraged heightened individual self-consciousness. It hugely increased the popularity of the novel and of a relatively new sub-genre, the historical novel. Always ambivalent in its fusion of modernity and tradition, it fostered a quite unprecedented profusion of war stories spun from the texts of Shakespeare and Aquinas and of novelists such as Sir Walter Scott and James Fennimore Cooper. This profusion was unprecedented even when it rested on texts written long before. While participants attached value to tradition, they did so very largely because of their keen awareness and fear of modernity, and this coloured their readings. Selectivity and instrumentality haunt the revival of the just war, recounted in Part 2. It falls into the hands of people whose thought-worlds, whether legal or political, are quite different from those of the medieval theologians. Unease about the interaction of modernity and war is much more open in the modern tradition examined in Part 3.

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‘Liberation Theology and the Roman Catholic Church’ (179-198) and other essays in Christopher Rowland (ed.) *The Cambridge Companion to Liberation Theology* (Cambridge: Cambridge University Press, 1999).

## CHAPTER 8

### LAWYERS

*The almost mythic renown Vitoria's name has acquired in certain quarters over the last few decades is an interesting historical phenomenon in itself.*

Carl Schmitt, *The Nomos of the Earth*, p.115.

This chapter tells two stories that rapidly reach a confluence. They flow turbulently together through the second quarter of the twentieth century before debouching into the stream of American just-war doctrine during the Cold War. One is a continuation of the tale begun in the chapter 7, as the just-war tradition – rediscovered within the Catholic Church – is seized upon by secular minds in Protestant Europe and the United States. The other tells of the attempt to criminalize war or, more strictly, public aggression. The first is about ethics and the second about law. But the waters soon muddied, for the leading figures in the revival of just-war discourse outside the Church were lawyers, while the process of outlawing war, though often moralistic, was far from wholly altruistic.

It is easiest to begin with the legal restriction of war. For at least two centuries it had been generally accepted that European sovereigns had an absolute right to wage war against one another. Such argument as there was about the justice of war had been largely drained of moral or theological content, coming instead to rely entirely, as Schmitt put it, 'on the institutional and structural quality of political forms' as Schmitt put it. '[T]he right of war was based exclusively,' he continued, 'on the quality of the belligerent agents of *jus belli*, and this quality was based on the fact that equal

sovereigns pursued war against each other.<sup>17</sup> Once club membership had been approved, few questions were asked. Over time, this absolute right had gradually normalized, with war felt to be allowable because it was consistent with the reproduction of the states-system to which they all belonged, the *Respublica Christiana* or Commonwealth of Europe. By the end of the eighteenth century Edmund Burke was arguing that other European states had not merely a right but a duty to oppose France precisely because the revolution had upset the institutions of monarchy, church and balance of power on which the Europe-wide system rested.<sup>18</sup> Characteristically, Burke's conservative argument opened the door to the later criminalization of war by suggesting that the sovereign right to wage war had a proper purpose and therefore, by implication, was open to abuse.

A century later, at the end of the First World War, the victorious powers included in the Treaty of Versailles an Article (227) alleging that, by initiating hostilities in 1914 and violating the neutrality of Belgium and Luxembourg, the recently abdicated German Emperor, Wilhelm II, had committed 'a supreme offence against international morality and the sanctity of treaties'. The word crime appeared nowhere in this article, but the declared intention to bring him before a tribunal with judges empowered to determine what they might feel a suitable punishment strongly suggested that Wilhelm was being accused of a crime. Following German protests against Article 227, the Allies went on to make the position even less clear. The tribunal, they declared, was *not* to have 'a juridical character as regards its substance, but only its form'. The Emperor's alleged offence was against

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<sup>17</sup> . Schmitt, *Nomos*, 142-3. For a full account of the development of the law of war in this period see Stephen C. Neff, *War and the Law of Nations: A General History* (Cambridge: Cambridge University Press, 2005).

<sup>18</sup> . Jennifer M. Welsh, *Edmund Burke and International Relations* (Basingstoke: Macmillan, 1995); see also David P. Fidler and Jennifer M. Welsh (eds.) *Empire and Community: Edmund Burke's Writings and Speeches on International Relations* (Boulder CO: Westview Press, 1999).

‘international morality, the sanctity of treaties and essential rules of justice’.

Elsewhere in the same document, however, the Allies came right out and declared war to be ‘the greatest crime against humanity ... that any nation calling itself civilized, has ever consciously committed’.<sup>19</sup>

Straight away, we are in the no-man’s-land that lies between law and morality. Lawyers who might be thought modern positivists fell back, when faced with the momentous consequences of the war, on naturalistic appeals to custom, morality and ‘essential rules,’ for lack of the black-letter law and precedent they hankered after. The closet naturalism of some of the leading jurists of the day had been exposed, and this alone justifies discussion of ‘just war reborn’ after 1918. Yet those features regarded by Stephen Neff as leading inter-war anticipations of the just-war strategy embodied in the 1945 United Nations Charter were not derived from Catholic tradition in any obvious or direct way. Commitment to peace at this point seemed to have been much more concerned with avoidance of violence than achievement of justice. Forgotten was Augustine’s caustic comment on the *pax romana*: ‘Peace and War had a competition in cruelty; and Peace won the prize’.<sup>20</sup> Insistence on communal law-enforcement was not congruent with the political theology underlying Catholic understandings of proper authority. Finally, the emerging specification of circumstances justifying the use of force was far more restrictive than the just-war tradition. An unconditional right of self-defence, counterpart of the reduction of just cause solely to aggression, rendered legally

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<sup>19</sup> . F. L. Israel, *Major Peace Treaties of Modern History, 1648-1967* (New York: Chelsea House and McGraw-Hill, 1967) 1265; UNWCC, *History of the United Nations War Crimes Commission* (London: HMSO, 1948) 240. Both documents are quotes and discussed in L.C. Green, *The Contemporary Law of Armed Conflict* (Manchester University Press: Manchester and New York, 1993) 3-4.

<sup>20</sup> . Quoted by Jean Bethke Elshtain, *Augustine and the Limits of Politics* (Notre Dame IN: Notre Dame University Press, 1995) 105.

irrelevant the history of a dispute up to the point of first resort to force.<sup>21</sup> In so doing, it rendered hugely problematic the questions of compensation and punishment which, in the medieval system, had arisen from a substantive cause of war, such as the wrongful seizure of a city or territory, and not from the mere fact of having been the first to strike a blow.<sup>22</sup>

If there are grave objections to describing the legal developments of the post-1918 decade as a just-war revival it is nevertheless true that the instinct behind this identification is sound. Neff is quite right to declare that United States president, Woodrow Wilson, 'favoured a return to older just-war ways of thought'.<sup>23</sup> Behind this impulse, and preceding it, lay a resurgence of interest in the Scholastics, most of all in the United States of America. James Brown Scott, whose primary objective was to substitute arbitration for war, was a passionate advocate of the writings of Francisco de Vitoria and saw no contradiction between his own efforts to strangle war and the Scholastics' urge to regulate it.

The Covenant of the League of Nations, which formed the first chapter of the Treaty of Versailles, provided a first step toward the outlawing of war by developing the Burkean principle of a shared interest in war in such a way as to apply not only to non-belligerents but also beyond Europe. The novel point was that war or the threat of war, whether or not it constituted a systemic risk, was now considered a matter for

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<sup>21</sup> . Neff, *War and the Law of Nations*, 279-284. Neff recognizes that the just war revival 'was not ... anything like an instantaneous process [and was] brought about in something of a piecemeal fashion' (287). Elsewhere, commenting on the declaration by Pius XI that the League of Nations was an expression of the thought of Thomas Aquinas, he concedes that 'it would be an error ... to suppose that the League Covenant really amounted to anything like a full reinstatement of the medieval just-war system' (292). My objection is to the too eager anticipation and association of tendencies that were merely convergent in the inter-war period and already deeply inconsistent with one another.

<sup>22</sup> . Neff, *War and the Law*, 293.

<sup>23</sup> . Neff, *War and the Law*, 287.

the League as a whole. Yet a succession of draft treaties, resolutions and declarations asserting that war was a crime, whether at the League, in the Conference of American States, or in the US Senate, made little headway during the first postwar decade. Even the Kellogg-Briand Pact of 1928, formally known as the General Treaty for the Renunciation of War, which condemned war, fell short of any outright description of it as a crime or any specification of sanctions to be applied to those who perpetrated it, aside from an ostrich-like refusal to accept its consequences. War, in Neff's words, was 'fenced in ... rather than tamed or put to death'.<sup>24</sup> Not until the 1940s would the United Nations, successor to the League, finally determine aggression to be a crime, effectively ruling out any but a defensive war while, perhaps unintentionally, sidelining all and any steps in an international dispute up to the first resort to force.<sup>25</sup>

These persistent and ultimately successful attempts to criminalize war had been given impetus by the First World War, but are properly to be viewed as the continuation of processes that had been gaining ground for half a century or more in response to a rising liberal conscience in the English-speaking and Protestant worlds and the neo-scholastic and neo-Thomist movements described in chapter seven.<sup>26</sup> The glaring inconsistency between these two movements cannot be ignored indefinitely, and will become apparent in the pages that follow. The liberals and the lawyers were out to eliminate war; the just-war tradition had always been concerned to justify and regulate it. To describe the move to criminalize aggression as 'a

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<sup>24</sup> . Neff, *War and the Law*, 293.

<sup>25</sup> . Green, *Law of Armed Conflict*, 4-8.

<sup>26</sup> . If not coined by him, the phrase 'Liberal Conscience' in this context has deservedly come to be associated with Michael Howard, whose 1977 Trevelyan Lectures were published under the title *War and the Liberal Conscience* (Oxford: Oxford University Press, 1977). It is consistent with his theme that Howard should have neglected the scholastics, starting his account with Erasmus and More; but one of my principal themes, namely the cultural hegemony of just war discourse in recent years, demands that the balance be redressed.

secular reinterpretation of the just and unjust war doctrine' is to stretch reinterpretation too far and betrays an anachronistic twenty-first century standpoint, reflecting a more fully accomplished confusion of law and ethics than existed in the early twentieth century. Up to a point the two camps could find common ground in the campaign to regulate war, though for many it appeared that the good was the enemy of the best.

One unintended consequence of neo-scholasticism had been that the thinkers and publicists who drove the campaign for peace through law, first in Europe and a little later in the United States, were to find the texts of Aquinas, Vitoria and other scholastics readily to hand in the closing decades of the nineteenth century. They in turn were to do much to make these works more readily available in vernacular European languages. A second consequence was that, by the last quarter of the twentieth century and thanks to the efforts of an earlier generation of United States lawyers, a Thomistic understanding of the just war deriving primarily from Francisco de Vitoria was to enjoy perhaps a more widespread currency and uniform acceptance in secular circles than had ever been achieved for it by the Catholic Church, though at considerable cost to its integrity. By the 1950s the German jurist, Carl Schmitt, while recognizing and deploring the ways in which Vitoria's writings had been bent to purposes other than or even antithetical to those of their author, felt bound to admit that 'few authors have had their arguments transplanted in such a way, and few names have become so famous as a result,' adding that 'the almost mythic renown Vitoria's name has acquired in certain quarters over the last few decades is an interesting historical phenomenon in itself.'<sup>27</sup> The just-war revival is

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<sup>27</sup> . Schmitt, *Nomos*, 115.

best seen as an intellectual eddy in the development of positive international law and great-power policy. More rhetorical than substantive at first, the eddy soon became a whirlpool.

This history has been traced in some detail by Martti Koskenniemi. In Europe, the practice of international law had been a narrow business conducted in a manner that largely supported the constitutional restorations of 1815. If taught at all, it had generally been regarded as an aspect of natural law. In the 1830s John Austin had famously maintained that law consisted essentially in the command of a sovereign. It followed that international law, for want of a supreme global sovereign, was not really law at all. For thoroughgoing legal positivists, following Austin, international law rested on the sovereignty of the states that were party to it and had no superior guarantee. It made as little sense to declare war illegal as to command an incoming tide to desist. It was only as the long European peace that had followed Napoleon's final defeat in 1815 faltered that liberals began to show interest in developing international law as a progressive political force. University chairs were established and the subject attained a separate and higher status in curricula. Spurred by the Battle of Solferino in 1859 and the catastrophe of the Franco-Prussian War (1870-1871), in which recently agreed conventions on the treatment of prisoners and the wounded had been flouted, prominent liberals established the *Institut de droit international* at Ghent, in 1873, as scientific society dedicated to articulation and affirmation, in law, of the conscience of the peoples of Europe.

It is easy to confuse this advocacy of an extension of positive international law with the philosophical position of legal positivism. It was consistent with a positivist

philosophy of law for states to reach agreements to limit the harm done by war and regulate its inception and conduct. But the European pioneers of international law went beyond this, mostly rejecting Austin's command theory and subscribing instead to a Romantic view of law, rooted in national consciousness and popular sovereignty. In natural-law terms they leaned toward the *jus gentium* – a kind of lowest common denominator of laws developed across a range of polities – as a source of law; in political terms they favoured regulation over sovereign discretion; in ideological terms they stood at the last moment in which liberalism and nationalism could be thought natural allies.<sup>28</sup> Mistrusting European sovereigns, many of whom were autocrats, they looked to formal agreements between states as the most practical expression of conscience and custom.

The development of international law in the Americas was in large measure independent of the European process, driven by distinctive encounters with warfare and shaped by the rise of the United States to great power status. For Americans, it had been the War of the States in the North (1861-5) and that of the Triple Alliance in the South (1864-70) that had acted as the initial spur, much as Solferino had in Europe. The Argentine jurist, Juan Bautista Alberdi had responded to the second of these catastrophes by arguing passionately for the criminalization of war, though the influence of his work in the Anglophone world was delayed and limited.<sup>29</sup> In 1863, two years into the nearly contemporaneous civil war in the United States, President Lincoln had issued General Order 100 to the Union armies, better known as the

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<sup>28</sup> . Marti Koskonniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge: Cambridge University Press, 2002).

<sup>29</sup> . Juan Bautista Alberdi, *The Crime of War* (London: Dent, 1913) was a translation of material written in Spanish by Alberdi during the War of the Triple Alliance (1864-70) and published in 1870. The most available modern edition is Juan Bautista Alberdi, *El Crimen de la Guerra* (Buenos Aires: Editorial Claridad S. A: 2009).

Lieber Code, in which Francis Lieber had attempted to codify the customary law of war.

Forty years later, a revival of interest in the ideas of Francisco de Vitoria began that was to have profound consequences began in the United States, largely on the initiative of James Brown Scott.<sup>30</sup> A practicing lawyer of considerable distinction, Scott was closely associated with and loyal to Elihu Root (1845-1937). Secretary of War under Theodore Roosevelt from 1899 to 1904, Secretary of State from 1905 to 1909, and Republican senator for New York from 1910-1915, Root was awarded the Nobel Peace Prize in 1912. Like Root, Scott had already been an active advocate of the extension of international law well before the outbreak of war in Europe in August 1914. From 1906 onwards he had been solicitor to successive secretaries of State. He had also served as the founding editor of *The American Journal of International Law* from 1907-1924. He had also been among the US delegates to the 1907 (second) Hague Conference on the law of armed conflict, which Root had done so much to promote.<sup>31</sup>

As early as 1906 Scott had conceived of a plan to publish new English editions of early texts in the series that came to be known as 'Classics of International Law'. This became a reality when the projected series was adopted by the Carnegie Endowment for International Peace, of which Root was president and Scott himself a

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<sup>30</sup> . Carl Schmitt, having seen only works on Vitoria written by Scott in his retirement, after 1930, attributed the Vitoria revival to the Belgian lawyer, Ernest Nys 'who broke the ground and paved the way for the Vitoria renaissance after World War I'. But there is ample evidence that Scott was already well aware of Vitoria before 1914. Schmitt, *Nomos*, 119 n.28.

<sup>31</sup> . The two most useful secondary works on Scott are Christopher R. Rossi, *Broken Chain of Being: James Brown Scott and the origins of Modern International Law* (The Hague: Kluwer, 1998) and Ralph Dingmann Nurnberger, 'James Brown Scott: Peace through Justice' (unpublished Ph. D. dissertation: Georgetown University, Washington 1975).

trustee, resulting in the publication, commencing in 1911, of many works not previously translated into English or available only in rare and imperfect translations.<sup>32</sup> (The same year saw the publication of the first volume of an English translation of the major work of Thomas Aquinas.<sup>33</sup>) One of the early volumes to appear in the Carnegie series brought together Vitoria's two works on war, *De Indis* and *De Belli Relectiones*, which Scott had first read in 1906.<sup>34</sup>

The Europeans, as we have seen, had appealed to collective conscience as the foundation for an extension of positive international law. For Scott, in rather the same spirit, the plan was to look to custom, and 'begin anew the development of international law in conformity with the past, instead of relying upon the right of each nation, according to the positive school, to determine, for itself, what is law and what is just'.<sup>35</sup> In short, Scott was a strong and consistent advocate of a naturalist approach to international law, though not of a strictly Catholic approach. Moreover, while he did not have time to devote himself wholeheartedly to establishing Vitoria as the founder of modern international law until the 1930s, following his retirement, he was already strongly influenced by the Spanish Dominican before 1914.<sup>36</sup>

Christopher Rossi, who remains sympathetic even when in disagreement with Scott, has reached past what he regards as a mistaken advocacy of Vitoria against Grotius and Hobbes to a deeper concern with the universality and systemic completeness of

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<sup>32</sup>. Frederic L. Kirgis, 'The Formative Years of the American Society of International Law' *American Journal of International Law* 90:4 (October 1996) 559-589; John M. Raymond and Barbara J. Frischholz, 'Lawyers Who Established International Law in the United States, 1776-1914' *American Journal of International Law* 76:4 (October 1982) 802-829; Rossi, *Broken Chain* (The Hague: Kluwer, 1998) 41.

<sup>33</sup>. Thomas Aquinas, *Summa theologiae* (literally translated by the fathers of the English Dominican Province), 1911-1935; 27 vols.

<sup>34</sup>. [Francisco de Vitoria] *De indis et de jure belli relectiones: being parts of Relectiones Theologicae XII*, Franciscus de Victoria; edited by Ernest Nys (Washington DC: Carnegie Institution of Washington, 1917. Classics of International Law, Vol.7). For the date of Scott's reading of Vitoria, see Rossi, *Broken Chain*, 7/8.

<sup>35</sup>. Scott's unpublished papers, 1929, quoted by Rossi, *Broken Chain*, 36.

<sup>36</sup>. Rossi, *Broken Chain*, 5. Schmitt, *Nomos*, 117-119, acknowledges the role of Scott while also criticizing him for 'instrumentalization of Vitoria's arguments'.

international law, which Scott shared with Vitoria.<sup>37</sup> Indeed Scott appears to have accepted the predominant Catholic view that the catastrophe of the Great War was a consequence of modern rejection of authority and tradition, making the interwar alliance between the Carnegie Endowment and the Vatican less strange than might at first appear.<sup>38</sup>

It has often been implied in text-books on International Relations that the notion of international law as a force for peace arose in response to the catastrophic destruction and loss of life occasioned by World War I and was the hobby horse of liberals or utopians, who saw in it an alternative to the use of military force.<sup>39</sup> But it must be apparent even from this brief account that attempts to mitigate or eliminate war antedated 1914 both in Europe and in the Americas.<sup>40</sup> Nor will the idealist tag stick, least of all in the United States. As staunchly conservative Republicans, Root and Scott were part of a politically realist movement to develop international law that was well under way before the outbreak of general war in Europe. Francis Boyle drew attention to this anomaly some years ago, arguing that the mainstream of legal thought in the United States at this time, firmly anchored in the Republican Party,

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<sup>37</sup>. Rossi, *Broken Chain*, 10.

<sup>38</sup>. The Carnegie Endowment spent \$200,000 between 1926 and 19349 training Vatican library personnel and cataloguing the Vatican collection; the Endowment also published the work of John Eppstein, a close associate of Scott, on *The Catholic Tradition of the Law of Nations*; Scott's eulogy was delivered by his Jesuit friend and colleague, Father Walsh. Rossi, *Broken Chain*, 24, 35. Note also the claim made by Pius XI in 1923 that 'the angelic doctor's teachings [were] the true foundation of the League of Nations'. Pius XI, *Studiorum Ducem*, 29 June 1923, in *The Papal Encyclicals in their Historical Context*, ed. Anne Freemantle (2<sup>nd</sup> edn, New York: New American Library, 1963) 224, quoted by Neff, *War and the Law*, 292 n.18. For all this Koskenniemi surely oversimplifies or generalizes too readily when he remarks (*The Gentle Civilizer of Nations*, 425) that 'American authors such as James Brown Scott (1866-1943) propagated the "Catholic conception of international law"'.  
<sup>39</sup>. This identification of international law with post-1918 liberalism owes much to E. H. Carr, one of whose rhetorical strategies was to characterise International Relations as a young discipline, arising out of the war, in order to denigrate utopianism as an infantile disorder and its fusion with realism as the fruit of maturity. Yet it remains evident even in some of the best general treatments of international relations. See, for example, Scott Burchill et al. *Theories of International Relations* (2<sup>nd</sup> ed. Basingstoke: Palgrave Macmillan, 2001) 46, or Martin Hollis and Steve Smith, *Explaining and Understanding International Relations* (Oxford: Clarendon, 1990) 17.

<sup>40</sup>. Casper Sylvest, *British Liberal Internationalism, 1880-1930: Making Progress?* (Manchester: Manchester University Press, 2009).

saw no inconsistency between the use of force and the advocacy of international law.<sup>41</sup> The two were complementary instruments of a rising power not yet able to rely on force alone, and had been since the closing years of the nineteenth century.<sup>42</sup> Finally, it is apparent that while lawyers on both sides of the Atlantic were becoming increasingly aware of the just-war tradition, and that their interest was more than antiquarian, the direct influence of just-war doctrine on the development of the law of war was negligible during the first half of the nineteenth century. Indeed, the tendency toward the criminalization of war ran directly counter to the just war tradition, which had always had as its purpose the reconciliation of war-fighting with seemingly pacifist injunctions in the Gospels.

So long as the development of international law and the revival of Catholic just-war thought are regarded as two distinct processes, it is reasonable to speak of eclecticism and, as chapter 9 will show, eclecticism was evident even among Christians up to middle of the twentieth century. The trouble starts when contradictory tendencies of thought get bundled up in a self-styled tradition, and for this James Brown Scott must bear some responsibility, though it was appropriation

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<sup>41</sup> . Hidemi Suganami and, before him, F. H. Hinsley, were well aware of the pre-1914 roots of what the former referred to as the pacifist-internationalist movement; but as this form of words suggests, Suganami, at least, was less inclined than Boyle to identify US advocacy of international law with political realism. Hidemi Suganami, 'The "Peace through Law" Approach: A Critical Examination of its Ideas' in Trevor Taylor (ed.) *Approaches and Theory in International Relations* (London and New York: Longman, 1978) 100-121. Also well aware of the pre-1914 origins of US concern with international law, but too inclined to identify it with the US peace movement, is Kirgis, 'Formative Years' 559. Suganami insisted on a tension 'between the adherent of the "peace through law" approach who think of politics as a function of law, and the so-called "realists" who think of law as a function of politics' (120). For Boyle, this was a false antithesis. See also F. H. Hinsley, *Power and the Pursuit of Peace: Theory and Practice in the History of Relations Between States* (Cambridge: Cambridge University Press, 1967), especially 127-143. Intriguingly, Hinsley notes (p.266/7) that 'it was not *simply* because of the predominance of lawyers in the government circles in the United States that the first attempt by government to go ... beyond the ad hoc arbitration of individual disputes and the signing of arbitration treaties between individual states ... was made in the Americas' (my emphasis). But he no more than hints at Boyle's notion of law as the realist tool of a revisionist power and is evasive about what the other reasons might have been.

<sup>42</sup>. Francis Anthony Boyle, *Foundations of World Order: The Legalist Approach to International Relations, 1898-1922* (Durham NC and London: Duke University Press, 1999), 16.

of the phrase 'just war' by the Eisenhower administration that did most damage. The mid-century eclecticism of chapter 9 metamorphosed into the formula of chapter 11, glossing over the internal contradictions arising from confused juxtaposition of the multiplicity of doctrines outlined in chapter 10 and the intellectual rootlessness exposed in chapter 11.

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## CHAPTER 9

### MID-CENTURY ECLECTICISM

By the 1940s, an improbable liaison of neo-scholasticism, liberalism, and nostalgic naturalism had outlawed aggression and helped establish a framework of positive law governing armed conflict, while going some way to set the terms of late-twentieth-century debate about the ethics of war. Yet the triumph of the standard late-twentieth-century view was by no means assured. Debate among jurists and political scientists was generally conducted in secular terms. Robert W. Tucker, whose lucid and penetrating essay is reviewed in chapter 10, treated American official doctrine at length — using the phrase ‘just war’ in his title, writing of non-combatants as ‘innocents,’ and discussing limited as against unlimited deterrence in the jargon of the day: all this without any mention of theology or reference to Thomist doctrine.<sup>43</sup>

Christian responses to both World Wars had been extremely varied, with the just-war tradition providing only one strand in the debate. Moreover there was a marked division within this strand between neo-Thomists and Augustinians, while many Christians were as much concerned with the moral predicaments that war created for individuals as with the larger questions of political ethics, concentrating their attention on pacifism, witness, pilgrimage, or passion.<sup>44</sup> These are some of the

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<sup>43</sup> . Robert W. Tucker, *The Just War: A Study in Contemporary American Doctrine* (Baltimore MD: Johns Hopkins Press, 1960) 70, 72 and throughout. Neither Aquinas nor Augustine merits a mention.

<sup>44</sup> . The responses of Evelyn Waugh and Gillo Pontecorvo, the first an English convert to Catholicism and novelist, the second a secular Italian Jew, partisan, and film director, were respectively to cast their fictions of war as pilgrimage and passion. See Evelyn Waugh, *Sword of Honour* (London: Chapman & Hall, 1952-62); on

themes explored by works in the modern literary tradition examined in Part 3 but marginalized by the just-war tradition in its state-centric modern manifestation.

Charles Raven, Regius Professor of Divinity at the University of Cambridge, devoted the greater part of his 1938 book, *War and the Christian*, to debating the merits of pacifism, which he himself had espoused in 1929. In the course of this discussion Raven made no reference to the just-war tradition, or to Augustine or Aquinas. This was consistent with his curt pronouncement that 'Rome's traditional ethics are almost wholly incapable of dealing with the modern world'.<sup>45</sup> It is hardly surprising that Gerald Vann, in a 1939 volume published by Burns, Oates & Washburn, 'publishers to the Holy See,' should demonstrate the influence of Aquinas more clearly. Two of the five chapters implicitly address the questions of *jus ad bellum* ('Just Initiation of War') and *jus in bello* ('Just waging of War'). But they are prefaced by a rather more Augustinian discussion of the difficulties, for each individual believer, of reconciling the Christian life with the demands of 'the predominantly pagan world of political organizations'. This is followed by an exposition of the basis of international society in natural law, out of which Vann derives the very possibility of law-governed use of force by one state against another, going on to champion this position against Romantic views of war as the unavoidable consequence of human nature or the sport of kings.<sup>46</sup>

Further evidence of the eclecticism and breadth of Anglophone Christians is to be found in the proceedings of a symposium, early in the Second World War, in which

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Pontecorvo see Charles A Jones, 'Dialect and Passion in Pontecorvo's The Battle of Algiers,' *Millennium* 35:2 (2007) 445-452.

<sup>45</sup> . Charles E. Raven, *War and the Christian* (Student Christian Movement Press: London, 1938) 178.

<sup>46</sup> . Gerald Vann, O.P. *Morality and War* (Burns, Oates & Washbourne Ltd: London, 1939).

Catholics (one at least from the United States) as well as Anglicans took part. For F. A. Cockin, in a clearly Augustinian account, the war was an expression of retributive justice. For Alex Vidler, editor of *Theology*, it raised, above all, the question of relations between church and state. Norman Pittinger, of the General Theological Seminary, New York, concerned himself chiefly with the place of prayer in wartime. H. H. Farmer advanced a sophisticated deontological argument for pacifism. Maurice Beckett, editor of *Christendom*, referred to the just-war tradition in passing, but was principally concerned with the question of whether reprisals can be justified. L. J. Collins rounded off the volume with an assessment of what might constitute a Christian peace. Of thirteen contributors only two made extensive reference to the Thomistic doctrine of the just war. Powel M. Dawley provided a classic statement of the Thomistic criteria, while Gerald Vann, author of *Morality and War*, writing here on 'The Teaching of the Church' turned to Aquinas only half way through the most profound and thoughtful essay in the collection, relegating out the standard Thomistic justification of a just war to a footnote.<sup>47</sup>

There are indications, in these designedly popular publications, as in the more scholarly journals of the lawyers and theologians, that neo-Thomist understandings of the war had gained ground during the first half of the twentieth century. But they remained closely identified with Rome and encountered a serious check during the 1930s. At that point Christian realism took its inspiration not from Aquinas but from Augustine, and was most closely associated with Reinhold Niebuhr (1892-1971) in the USA and Herbert Butterfield (1900-1979) in Britain.<sup>48</sup> The attenuated 'standard

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<sup>47</sup> . Ashley Sampson (ed.) *This War and Christian Ethics: A Symposium* (Oxford: Blackwell, 1940).

<sup>48</sup> . Of particular interest, because it was adapted from a 1990 doctoral thesis chapter and must have been revised before the full ramifications of 9/11 were evident, is Roger Epp, 'The ironies of Christian realism: The End of an Augustinian Tradition in International Politics' in Eric Patterson (ed.) *The Christian realists: Reassessing the*

formula' of the just war tradition that was to dominate the agenda from the 1980s could not so easily have triumphed in a community familiar with the thought-world of St. Augustine. Before Aquinas and Vitoria could be eviscerated the spirit of Augustine had first to be exorcised.

To step back from the mid-twentieth-century Atlantic world to the Romanized North Africa of Augustine's day is to enter another world. Born in 354, Augustine had converted from Manichaeism to Christianity in 386, just three years after its adoption as the state religion of the Roman Empire. By the time he died in 430 CE, the Empire was in disarray.<sup>49</sup> Half a century before, corrupt administration of the massive refugee camps on the Western banks of the Danube, aggravated by over-reliance on foreign recruits to the imperial army, had culminated in defeat of a Roman army and the death of the Eastern Emperor, Valens, at the Battle of Adrianople in 378.<sup>50</sup> The breach had been made. In 411 Rome was to be sacked by the Visigoths. Augustine's episcopal city of Hippo was still under imperial rule in the year of his death but was to fall to the Vandals the very next year.

Christians of Augustine's day asked why God would permit the Roman Empire to be defeated notwithstanding its official adoption of Christianity. Pagans claimed that the defeat stemmed precisely from the turn to Christianity and the consequent neglect of

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*Contributions of Niebuhr and His Contemporaries* (Lanham MA: University Press of America, 2003). Epp concluded with the thought that, in the 1980s, 'Niebuhrian remnants continued to exist on the periphery of American political debate.' The whole of Patterson's edited volume provides useful background on Christian realism, which is also extensively discussed in Eric Patterson (ed.) *Christianity and Power Politics Today: Christian Realism and Contemporary Political Dilemmas* (Basingstoke: Palgrave Macmillan, 2008). See also Charles A. Jones 'Christian Realism and the Foundations of the English School' *International Relations* 17:3 (September 2003) 371-387.

<sup>49</sup>, The best contemporary source is Ammianus Marcellinus, *The Later Roman Empire: A.D. 354-378* (Harmondsworth: Penguin 1986).

<sup>50</sup>. For a brief modern account see Alessandor Barbero, *The Day of the barbarians: The Battle that Led to the Fall of the Roman Empire* (London: Atlantic, 378).

Jupiter and renunciation of the deity of the emperor. Augustine reasoned that each and every civilization, past and present, pagan and Christian, was bound to suffer similar catastrophes, and argued that all history of the earthly or post-lapsarian world (the *civitas terrena*) was a process of human suffering which, in turn, was part of a divine providential vision by means of which redemption from original sin might finally be achieved. More recent and enthusiastic Augustinians have been less patient in the face of defeat and it is not difficult to trace a plausible argument supportive of a more aggressive Augustinianism.

The *civitas terrena* was inhabited by two kinds of people, the elect and the reprobate. Both were sinful, but the elect received from God what Augustine called efficacious grace, while the reprobate were motivated entirely by self-love or cupidity. While no one could avoid sin, some could *try* to avoid it. The elect, because of efficacious grace, were motivated by unselfish love and were therefore able to use their free will to choose the lesser of any two evils. They would be judged by God on the sincerity of this attempt, not its outcome. The terms for these two sorts of love – *cupiditas* and *caritas* or cupidity and charity — link nicely to the earlier Greek terms used in the Christian epistles – *eros* and *agape*.

Taken together with Augustine's radically deontological belief that the entire moral worth of action rests in intention, and not in outcomes, the distinction between reprobates and elect might lead to the following conclusion. Even defeat in war is a source of purification and strength to the elect; even victory will turn the reprobate to further sin by making them proud and arrogant. War – whatever its outcome – is an instrument of divine providence. But because Augustine believed that kings had

authority by divine right and also had a duty to obey God's will, he was willing to accept that a war declared by the Christian prince of a relatively uncorrupted state could be justified, regardless of the necessarily more or less corrupt nature of all earthly states. The truly good king would engage only in just wars fought with the intention of achieving a just peace. Men fighting with this intention can *will* peace while engaging in war. Moreover, if the intention is good, then no amount of incidental harm will outweigh it. Indeed, Augustine took the view that while violence in private affairs, even in self-defence, was not permissible, 'rulers and officials acting in the line of duty were able to kill without giving vent to hatred and other sinful passions'.<sup>51</sup> More than this, where war consisted in the punishment of aggressive or avaricious behaviour by other states, Christian princes had a *duty* to act by choosing this particular lesser evil.<sup>52</sup> This made the issue of proper authority crucial.

Although not willed by God and freely undertaken by men, war once begun becomes an instrument of Divine Providence. Fought 'with love (*caritas*) in one's heart', it might be conducted savagely and without regard for customary constraints. War was an evil which 'may be necessary in order to prevent worse evils'. Just war – 'a grim and horrible necessity' – would unavoidably bring harm to innocents.<sup>53</sup> Moreover, consistent with his view of kings as God's instruments, Augustine affirmed the obligations of soldiers to obey orders, even when in doubt about the justice of the cause, and even if told to act unjustly. It was this injunction that Shakespeare's John Bates echoed when he assured his comrades that their duty of obedience to the king, even if his cause were not just, exonerated them from any blame. Finally, war

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<sup>51</sup> . Frederick H. Russell, *The Just War in the Middle Ages* (Cambridge: Cambridge University Press, 1975) 18.

<sup>52</sup> . Herbert A. Deane, *The Political and Social Ideas of St. Augustine* (New York & London: Columbia University Press, 1963). 159.

<sup>53</sup> . Deane, *Ideas of St. Augustine*, 156-7.

need not be conducted merely to restore the *status quo ante bellum*.<sup>54</sup> Once an enemy had upset the moral order by refusing to provide redress – a far more serious matter than the original offence – it followed that war aims, and the use of force to achieve them, might extend beyond what was required to achieve restitution, encompassing punishment.

These implications of Augustine's treatment of war stand in marked contrast to later Christian just war doctrine, let alone the constraints of contemporary law of armed conflict. They pay scant regard to those arguments about proportionality, last resort, and the immunity of non-combatants which largely account for the appeal to modern secular liberals of Aquinas and Vitoria. They go far beyond the reactive war of self-defence that is now the only non-controversially legal form of war. The just war, fought by Augustine's elect king, may easily be thought a total war, in which the death of friend and enemy, combatant and non-combatant alike, is for their own good – encompassed by the will of God. The door is open to crusades and, by a parallel argument, to the persecution of heretics – a matter with which Augustine was closely concerned. 'Christ's teachings,' one commentator concludes, 'require us to maintain patience and good will toward men in our hearts even when we are correcting and punishing their misdeeds'.<sup>55</sup>

The principal temptations of Augustinian versions of the just war may be summed up as a tendency to over-dramatise the moment coupled with an idealistic identification of power with justice, too easily corrupted into a thoroughly un-Augustinian self-righteousness and arrogance. At the heart of the cruder kind of just-war revival has

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<sup>54</sup> . Frederick H. Russell, *The Just War in the Middle Ages* (Cambridge: Cambridge University Press, 1975), 19.

<sup>55</sup> . Deane, *Ideas of St. Augustine*, 164.

been the same seductive and illusory prospect of rock-solid moral justification for the employment of unrestrained and overwhelming lethal force by liberal democracies that infused early Cold War United States official doctrine.

Augustine's standpoint, within the ancient world yet in full sight of its end, had strong appeal for those twentieth-century Christian realists, who affected to discern analogous death throes of Western liberal civilization in the world crisis of the 1930s and 1940s. Augustine had lived in a world where the Roman Empire and its official religion, Christianity, seemed on the point of collapse. It is this apocalyptic notion of total war and civilizational crisis that provides the backdrop for both twentieth-century aftershocks of the Augustinian approach to just war: the first in the 1930s and 1940s, the second — a faint echo — since 9/11. Twentieth-century admirers of Augustine have felt theirs, similarly, to be an age of total moral confrontation between the Church and the secular totalitarian ideologies of fascism and communism or, latterly, between a Christian West and political Islam, in which there could be no peaceful coexistence. Some have gone further, condemning the entire Enlightenment project, expressed as much in the French as in the Russian revolution, as fundamentally misguided in its substitution of the worship of reason for faith in God.

Arnold Toynbee served as Director of the Royal Institute of International Affairs at Chatham House, in London's St. James's Square, from 1924 to 1954. There he wrote two major works, very widely read in their day. The first was an annual survey of world affairs; the second, *A Study of History*, construed all of world history as a

sequence of civilizations, not of states, nations or empires.<sup>56</sup> Toynbee was almost certainly the best-known British commentator on international relations in the United States by the 1940s and, though clinging to agnosticism, was clearly under the spell of Augustine.<sup>57</sup> Shortly after the collapse of France in June 1940, he expressed his sense of catastrophe in a letter to Columba Cary-Elwes, a Dominican monk.

The moral, even more than the military collapse of France means, I suppose, the end of an epoch – he wrote. – The national state is over, and we are now going to have a world state – established by Hitler if he smashes us this summer, or by the English-speaking peoples if we beat Hitler. The next chapter will perhaps be more interesting and fruitful: when the political waves have died down, religion will sail the seas again: AD 1940 = about 40 BC.<sup>58</sup>

Toynbee's contemporary, Herbert Butterfield, wrote in much the same vein a few years later, describing the commencement of the Cold War, as 'a serious collapse of civilization' and claiming that 'the Dark Ages [had] actually returned' in the shape of secular totalitarian ideologies spawned by war.<sup>59</sup>

The Augustinian tone of Arnold Toynbee's wartime letters reflects the peculiar isolation of Britain in 1940. Yet something of the same spirit was present in the extensive and widely read publications of Reinhold Niebuhr. As Niebuhr put it in the

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<sup>56</sup> . Royal Institute of International Affairs, *Survey of International Affairs* (London and New York: H. Millford, Oxford University Press, 1925-1977); Arnold J. Toynbee, *A Study of History* (London: Oxford University Press, H. Millford, 1934-1961). Toynbee was Director of Studies at the RIIA from 1924 to 1954. For detail see Christopher Brewin, 'Arnold Toynbee and Chatham House' in Andrea Bosco and Cornelia Navari (eds.) *Chatham House and British Foreign Policy, 1919-1945: the Royal Institute of International Affairs during the Inter-War Period* (London: Lothian Foundation, 1994), 137-161.

<sup>57</sup> . The ambiguities of Toynbee's religious position were nicely set out by Gerd Muller in his review of McNeill's biography: Toynbee, Muller felt sure, 'came to believe that there was a meaning to all history, and that this meaning could best be described as God's will'. Yet in spite of his long flirtation with Catholicism, he remained 'a member of the Church of England [and] turned out to be a greater agnostic than one had reason to expect in view of some of his earlier writings'. Jonathan Miller's felicitous description of himself as 'a pious agnostic' comes to mind. Gerd Muller, Review of William H. McNeill, *Arnold K. Toynbee: A Life* (New York and Oxford: Oxford University Press, 1989) in *History and Theory* 30:3 (October 1991) 381-384.

<sup>58</sup> . Arnold J. Toynbee, *An Historian's Conscience: the correspondence of Arnold J. Toynbee and Columba Cary-Elwes, Monk of Ampleforth*, edited by Christian B. Peper (Oxford: Oxford University Press, 1987).

<sup>59</sup> . Herbert Butterfield, 'Christianity and Human relationships' in Butterfield, *History and Human Relations* (London: Collins, 1951) 39.

title of one of his most influential books, Augustine opened the way to the co-existence of moral man and immoral society.<sup>60</sup> In particular, Niebuhr offered an Augustinian resolution of the problem of relativism that bedevilled secular realism by urging the Christian West to affirm its superiority to Communism, though with a spirit of charity that recognized its own ambivalence and imperfection. Herbert Deane, writing in 1963, now seems overly gloomy in his reading of Augustine, possibly concerned with the very real possibility that the United States administration of his day might resort to the use of nuclear weapons. Butterfield, by contrast, found in Augustine the resources for a more quietistic renunciation of the false righteousness of moralistic politics, and a trust that God and the Church must outlast tyranny. Yet if Deane's reading of Augustine *is* a distortion, it is a distortion that captures the apocalyptic tone already noted in Toynbee and present also in some strands of contemporary US thought.<sup>61</sup>

What became of Christian realism? Ngram viewer provides a rough measure of its decline through an experiment repeatable in seconds by anyone with internet access. This device provides data on the frequency of word-sets of up to five words within a corpus of 15 million scanned books and allows a distinction to be drawn between publications in American and British English. The phrase 'efficacious grace,' used as a marker for relatively technical discussion in the Augustinian tradition, peaked around the time of the First World War before rising to five times its 1900 frequency in American English around 1940. It fell quite rapidly thereafter to plateau

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<sup>60</sup> . E. H. Carr, *The Twenty Years' Crisis* (London: Macmillan, 1939), x.

<sup>61</sup> . On Toynbee, see Jones, 'Christian Realism', 376-7. For an example of what seems to a notably intemperate approach to the just war, see Alexander F.C. Webster and Darrell Cole, *The Virtue of War: Reclaiming the Classic Christian Traditions East and West* (Salisbury MA: Regina Orthodox Press, 2004).

at a level about 25% of the 1940 spike throughout the 1950s and '60s, experiencing a further though less dramatic decline after 1970 to about half the frequency recorded in the 1900s. British English shows a similar pattern, distinguished only by a belated Augustinian moment in the second half of the 1960s.

Christian realism has recently experienced a small resurgence, especially in the United States, part antiquarian and part committed. But its sudden decline in the 1960s has to be put down to a shift in United States Cold War ideological strategy, perhaps prompted less by intent than by a generational shift. The temper of the social sciences in the 1970s is nicely captured in reminiscences from Johannes Fabian and Fernando Henrique Cardoso. The former, a German social anthropologist, arrived at the University of Chicago in the early 1960s. There he found that 'Theory with a capital T was in high fashion, and the dream of elevating ethnography to "ethno-science" excited many minds.' Fabian survived the 'intellectual boot camp' to become a fully-fledged member of a profession that 'prided itself on having got rid of people, real living persons, and of otherness that makes us be ourselves... Theoretical progress [had been] bought,' he concludes, 'at the price of the progressive disembodiment of reason and knowledge.'<sup>62</sup> Around the same time young Brazilian sociologists were exploring the *favelas* dressed in white lab coats and carrying clip-boards.<sup>63</sup> At Harvard, B. F. Skinner's appointment as Professor of Psychology in 1958 ushered in the era of behaviourism, a far cry from the philosophical psychology of his Harvard predecessor William James or the

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<sup>62</sup> . Johannes Fabian, *Out of Our Minds: Reason and Madness in the Exploration of Central Africa* (Berkeley &c: University of California Press, 2000), xii.

<sup>63</sup> . Fernando Henrique Cardoso with Brian Winter, *The Accidental President of Brazil: A Memoir* (Cambridge MA: Public Affairs, 2006).

clinically based interpretative approach of Sigmund Freud. Meanwhile, the Correlates of War Project aspired to supersede international law as the primary instrument for the prevention of war by statistical analysis of antecedent events. 'Until war has been systematically described,' two of its leading advocates insisted, 'it cannot be adequately understood, and with such understanding comes the first meaningful possibility of controlling it, eliminating it, or finding less reprehensible substitutes for it.'<sup>64</sup> What is captured here is a process of secularization that is best thought of as a qualitative or stylistic change affecting the whole of society, including the faithful, rather than an un-churching or clear renunciation of belief.

These developments account for the onset of what Steve Smith was later to call 'the forty years' detour'.<sup>65</sup> In the Lilliputian world of academic International Relations the shift is sometimes characterized as a second 'great debate' within the nascent field.<sup>66</sup> Hedley Bull, an Australian-born member of the Cambridge-based British Committee on the Theory of International Politics who had recently left an academic post at the London School of Economics to work for the British Foreign Office, launched a diatribe against positivist approaches to international relations in World Politics. A strong rejoinder to 'The Case for a Classical Approach' came from Morton Kaplan, whose path-breaking *System and Process in International Politics* (1957)

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<sup>64</sup> . J. D. Singer and M. Small, *The Wages of War, 1816-1965: A Statistical Handbook* (New York: John Wiley) 4.

<sup>65</sup> . Steve Smith 'The Forty Years' Detour: The Resurgence of Normative Theory in International Relations' *Millennium* 21:3 (December 1992) 489-506.

<sup>66</sup> . In many standard accounts of the emergence of academic International Relations the first great debate is identified as a contest, between the two world wars, between an idealist or utopian group that flourished in the 1920s and a realist reaction, prompted by deteriorating international relations in the 1930s. Others regard this as at best a simplification, owing much to the masterly 1939 polemic of E. H. Carr, who sought to present his own views as a judicious compromise between the two alleged extremes. E. H Carr, *The Twenty Years' Crisis* (London: Macmillan, 1939); Charles A. Jones, *E. H. Carr and International Relations: A Duty to Lie* (Cambridge: Cambridge University Press, 1998).

had been among Bull's targets, and this was followed by a widely read and influential volume, edited by Klaus Knorr and James Rosenau, vindicating new approaches that had by already become something close to an orthodoxy in the United States.<sup>67</sup>

The adoption of methods originating in the natural sciences to the study of society was in large measure a generational shift, but its displacement of normative work was surely hastened by the exigencies of superpower rivalry. Within the space of a decade the basis of United States ideological confrontation with the Soviet Union had shifted from shared faith to technological supremacy. Under President Dwight D. Eisenhower, John Foster Dulles had aspired to lead a multi-faith crusade against Godless communism, but by his death in 1959 Soviet success in launching the first satellite to orbit earth, together with a series of tests of hydrogen bombs that was to culminate in the explosion of Tsar Bomba in 1961 had focused attention on science, technology and industry.

At first sight it may seem contradictory that this turn to science, albeit a narrowly positivist kind of science, should have coincided with a marked religious revival in the USA. But the revival took place within a liberal political framework in which religion was relegated to the private sphere, while individuals for the most part succeeded in suspending or deferring contradictions between their religious convictions and currently fashionable forms of rationality by analogous processes of compartmentalization. It may be that in a cultural climate such as this, the more

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<sup>67</sup> . Hedley Bull 'International Theory: The Case for a Classical Approach' *World Politics*, 18:3 (1966) 361-377; Morton A. Kaplan, 'The New Great Debate: Traditionalism vs. Science in International Relations' *World Politics*, 19:1 (1966) 1-20; Klaus Knorr and James Rosenau (eds.) *Contending Approaches to International Politics* (Princeton NJ: Princeton University Press, 1969).

rationalistic and systematic approach of Aquinas and his successors was felt by British and United States elites to be more consonant with the times than the rhetorical style and almost tragic vision of Augustine. Before long, the foot soldiers would be seeking those charismatic elements out of episcopalian Christianity in revivalist mass meetings and, later, in Pentecostal and other charismatic congregations.

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## CHAPTER 10

### AMERICAN DOCTRINES

Both the later triumph of neo-Thomist just-war discourse and the eclecticism of mid-twentieth-century Christian opinion on war need to be viewed within the context of a marked though uneven decline in churchgoing in Western Europe and the English-speaking world. In the United States, uniquely, this trend was to be sharply reversed during the first fifteen years after the war, facilitating public debate couched in Christian terms and the rise to public prominence of a more tightly focused, albeit eccentric, concept of the just war. Concurrent decline in religious affiliation and belief in the United Kingdom make the popularity of just-war discourse there more puzzling than in the USA, though the germ of an explanation may be found in the suggestion, from Mark Chaves, that religious *authority*, which might be claimed to have held up better than affiliation or attendance in Britain, should be regarded as the principal focus of secularization.<sup>68</sup> Religious affiliation in the USA had remained between 40 and 50 per cent throughout the first four decades of the twentieth century. But after United States entry into the Second World War an upward trend established itself, with affiliation rising to 55 % by 1950 and 69 % ten years later.<sup>69</sup> Today, the United States remains the only wealthy democracy in which a majority of the population believes in a divine creator.<sup>70</sup> By contrast, Britain has experienced a clear decline in

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<sup>68</sup> . Mark Chaves 'Secularization as Declining Religious Authority' *Social Forces* 72:3 (March 1994) 749-774.

<sup>69</sup> . Stephen J. Whitfield, *The Culture of the Cold War* (Baltimore and London: The Johns Hopkins Press, 1991) 83. I owe this reference to Lezlee Halper.

<sup>70</sup> . Gregory S. Paul 'Cross-National Correlations and Quantifiable Societal Health with Popular Religiosity and Secularism in the Prosperous Democracies' *Journal of Religion and Society* 7 (2005). The USA is also exceptional, among the wealthy democracies, for its high rates of homicide, sexually transmitted diseases, teenage pregnancy and per capita expenditure on healthcare.

church attendance, more or less in line with its European neighbours.<sup>71</sup> More general measures of religiosity may narrow the transatlantic gap somewhat, but tell a broadly similar story.<sup>72</sup> The evidence is mixed, but doubt has been cast on the claim, current in Britain in the 1990s, that those absent from church were 'unchurched' Christians, 'believing without belonging'.<sup>73</sup>

This exceptional characteristic of the United States clearly antedates the Cold War. It cannot readily be attributed to the World War, since similar revivals did not take place in other Christian belligerent countries. It was already under way when the Southern Baptist revivalist, Billy Graham, first attained national celebrity in 1949, backed by the Hearst press.<sup>74</sup> Nor did it follow from any political initiative in the United States. However it was encouraged, if not reinforced, by President Dwight D. Eisenhower. The new president's Christian commitment became evident to the nation at large on 21<sup>st</sup> January 1953, when he departed from his prepared remarks on being sworn into office to speak of his personal faith and recite a prayer of his own devising.<sup>75</sup> Distanced by military service from his family's commitment to the Jehovah's Witnesses, lax in worship during his military career by his own admission,

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<sup>71</sup> . Robin Gill, C. Kirk Hadaway and Penny Long Marler 'Is Religious Belief Declining in Britain?' *Journal for the Scientific Study of Religion* 37:3 (Sep. 1998) 514.

<sup>72</sup> . Loek Halman and Veerle Draulans 'How Secular Is Europe?' *British Journal of Sociology* 57:2 (2006) 263-88, chart variations across Europe, using 1999/2000 European Valued Study survey data, and generally support the view that levels of religious belief in Europe did not fall as much as the decline in church attendance would suggest. They attempt no systematic comparison with North America but accept that 'religious vitality in North American society' stands 'in marked contrast to the European situation' 267.

<sup>73</sup> . David Voas and Alasdair Crockett 'Religion in Britain: Neither Believing nor Belonging' *Sociology* 39:1 (2005) 11-28. Voas and Crockett argue that, in Britain, 'religious belief has declined at the same rate as religious affiliation and attendance, as is not even necessarily higher than belonging' 13. See also the same authors' 'Generations of Decline: Religious Change in 20<sup>th</sup> Century Britain' *Journal for the Scientific Study of Religion* 45:4 (2006) 567-584.

<sup>74</sup> . In 1956 Niebuhr wrote patronisingly of the revivalist, Billy Graham, whose meetings had by this time been attended by millions across the USA, that he was 'a personable, modest and appealing young man who has wedded considerable dramatic and demagogic gifts with a rather obscurantist version of the Christian faith,' and that his message was 'not completely irrelevant to the broader social issues of the day but ... approached irrelevance.' Quoted in Whitfield, *Culture of the Cold War*, 79.

<sup>75</sup> . Merlin Gustafson, 'The Religious Role of the President' *Midwest Journal of Political Science*, 14:4 (Nov. 1970) 709-710.

Eisenhower reaffirmed his Christian commitment just twelve days after taking office through baptism as a Presbyterian. It was he who added 'under God' to the pledge of allegiance in 1953 and three years later introduced the official national motto 'In God we trust' in place of the customary '*e pluribus unum*' that had figured on coins and banknotes since 1795.

Eisenhower's Christian faith need not be doubted. It was reflected in many of his appointments and the strong emphasis of his administration on the atheistic character of Communism. But while Billy Graham went the extra step, declaring that "if you would be a true patriot, then [you should] become a Christian," the Eisenhower administration took a more politic line that facilitated broad alliances, at home and abroad, of peoples of faith against 'godless Communism'.<sup>76</sup> This would lead, for example, to support for Buddhists in Tibet in the 1950s and may still have been an element in US backing of Afghan mujahedin against the Soviet Union during the final phase of the Cold War thirty years later.<sup>77</sup>

While the Catholic Church, too, was adamantly opposed to Communism, it was the populist and predominantly Protestant revival of Christianity in the United States, epitomized by Graham and publicly endorsed by government, that swept aside the latitudinarian elite eclecticism of the first half of the twentieth century and had, by the early 1960s, reformulated neo-Thomist and Christian realist strands of thought, both theological or lawyerly, into a hegemonic and righteous quasi-official version of just-war doctrine. The sense given to the phrase 'just war' during the first phase of the

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<sup>76</sup> . Whitfield, *Culture of the Cold War*, 81. There was also an element of the political in Eisenhower's confirmation of his faith. He told Billy Graham that he did not believe that the American people would follow a President who did not belong to a church. Whitfield, *Culture of the Cold War*, 88.

<sup>77</sup> . On Tibet, Lezlee Halper's PhD.

Cold War owed much to the recent changes in international law reviewed in chapter 8. It was quite remote both from the scholastic antecedents of the tradition and the form it was to take in debates about nuclear deterrence during the 1980s, but it cannot be ignored, since its ghost still haunts contemporary thought.

The German jurist, Carl Schmitt, had already detected the essence of the new United States position in his 1950 publication, *The Nomos of the Earth*.<sup>78</sup> Contrasting the contemporary international system with the European system that had preceded it, Schmitt observed that a significant change had taken place in the public meaning of just war, which he attributed to the administration of Woodrow Wilson. During the early modern period, Schmitt argued, Scholastic preoccupation with the substance of just cause had been hollowed out by emphasis on the moment of first resort to force and an amoral stress on the formal status of belligerents. A new view of sovereignty in early-modern Europe, most cogently expressed by the French jurist, Jean Bodin (1530-1596) had implied a shift in the meaning of the 'just' in 'just war' from the substantive question of the cause for which a war was to be fought to the merely formal characteristic of its being fought between 'equal sovereigns recognizing one another as equals and playing by the same rules'.<sup>79</sup> It has already been noted that a sovereign no longer needed to be a just belligerent in order to have just cause for war, but only to be one of a set of European sovereigns recognizing no right of jurisdiction regarding the moral substance of just cause beyond their own circle. In effect, the term 'just' came to mean little more than 'proper' or well-constituted, and it

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<sup>78</sup> . Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* ([1950] Telos Press: 2006)

<sup>79</sup> . Schmitt, *Nomos*, 153.

made perfect sense for two opposing states both to be regarded as ‘just enemies’.<sup>80</sup> The right to make war came to be regarded as inherent in state sovereignty, but the wars that ensued were ‘bracketed’ or regulated by the norms, laws and institutions of a European society of states.

It was the eclipse of this system of regulated warfare and its replacement by unregulated warfare in the twentieth century that Carl Schmitt outlined in the later sections of his treatise. Lawyers had responded in two ways when faced with an extension of international law beyond any coherent political community of the sort that Europe had formerly represented. One had been to substitute conventional international law for less formal European norms and customs, in an attempt to regulate warfare. The second was to seek to outlaw war altogether. The first option had been all but abandoned by mid-century, caught in a pincer movement between the 1930s pacifists who would not countenance anything short of the abolition of war, and those ‘hard and shrewd people, who did not ... believe that war had been “abolished” but who wanted to keep their hands free as the conduct of the next war’. In his passionate complaint against recent neglect of the laws of war, Kunz went on to note that proposals from the Committee of Jurists established by the 1922 Washington Conference had been ignored and the *Institut de Droit Internationale* had treated no problem in the law of war since 1920, while the Interparliamentary Union had resolved, in 1927, that no further attempt should be made to codify the laws of war and ‘even the teaching of the laws of war was opposed by many’ as somehow facilitating its occurrence. Admitting that there had been modest piecemeal

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<sup>80</sup> . Schmitt rightly recognises that this relativistic conclusion would have been rejected by early-modern theologians, but it was a consequence of the more formal view of the just war entailed by the rise of modern states and the concurrent weakening of Imperial and Papal authority, that this ‘relativistic and agnostic argument [should] develop over time and become increasingly important’ (Schmitt, *Nomos*, 154).

development of, for example, law governing prisoners of war, Kunz nevertheless concluded that the realities of war since the 1920s had raised innumerable legal questions on which the only guidance was state practice.<sup>81</sup>

This lacuna left space for pursuit of the second option, abolition, which in turn allowed the 'hard and shrewd' men to forge a uniquely American doctrine of just war that had very little to do with Catholic tradition, but would stand at the shoulder of formulaic neo-Thomism at the turn of the twenty-first century. The American doctrine – sketched in chapter 8 – was based in a total identification of aggression with first use of force. Circumstances leading up to any outbreak of hostilities, however provocative, were judged irrelevant.<sup>82</sup> Legally, war could now be waged only in defence of one's own or an allied state. This was problematic for two reasons. First of all it rendered illegal any morally justified pre-emptive or preventive use of force, leading to extensive resort to covert operations where no clear aggression licensed a public response.<sup>83</sup> Schmitt offers cogent arguments against identifying aggression with the initiation of hostilities, and in favour of removing the stress from initiation altogether, since it may be the morally justified party that fires first, while whoever fires first may, at other stages in the conflict, be on the defensive. He concluded that '[t]here is also a just aggressive war, as the traditional doctrine of just war always has maintained'.<sup>84</sup>

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<sup>81</sup> . Josef L. Kunz, 'The Chaotic State of the Laws of War and the Urgent Necessity for their Revision' *American Journal of International Law*, 45:1 (Jan. 1951), 39, 48-51.

<sup>82</sup> . Robert W. Tucker, *The Just War: A Study in Contemporary American Doctrine* (Baltimore MD: Johns Hopkins Press. 1960) 11.

<sup>83</sup> . Tucker, *Just War*, 14, quotes Dean Acheson, in a television interview, 10 October 1950: preventive war was 'throughly wicked thing ... immoral and wrong from every point of view'.

<sup>84</sup> . Schmitt, *Nomos*, 274-5. Tucker concurs, denying that force must necessarily 'be regarded as an instrument of injustice when resorted to aggressively {provided] such resort appears at the time ... the only effective reaction against a prior injustice'. Tucker, *Just War*, 33.

A second reason to deplore the outlawry of war was that it created a serious risk of unjustified self-righteousness in the 'defender,' now by definition the sole just party. This had been anticipated as early as 1940 by Elihu Root's biographer, Philip C. Jessup, who warned that '[n]ow, or in a few years time, a logical argument could be built to support a war of self-defense waged by the United States on the Yangtze or the Volga or the Congo'.<sup>85</sup> But it was not only geographical scope, but also intensity of violence, that was opened up by the seeming abolition of war, retrospectively exposing the realist kernel of the peace-through-law movement in the United States.

This was Schmitt's view. He observed that the 1924 Geneva Protocol for the Pacific Settlement of International disputes, unanimously adopted by all forty-seven members of the League of Nations (though renounced by Britain the following year), had been the initiative of a group of American private with James T. Shotwell at their head. Although the United States was not a member of the League and Shotwell lacked official status, the League Council had adopted the Shotwell report as an official League of Nations document in 1924 under the title 'Outlawry of Aggressive War'. In this, the state was identified as the only possible initiator of aggressive war. But although, for legal purposes, the perpetrator of aggressive war had now been identified, a lack of clarity remained about the precise definition of the offence and any related judicial processes or remedies.<sup>86</sup> Given new technologies of destruction, to have outlawed war without these legal clarifications effectively transformed it into a police action in which discrimination could too easily be pushed 'into the abyss'.<sup>87</sup>

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<sup>85</sup> . Philip C. Jessup, 'The Monroe Doctrine in 1940' *American Journal of International Law* 34:4 (October 1940) 704; quoted by Schmitt, *Nomos*, 285.

<sup>86</sup> . Schmitt, *Nomos*, 271ff.

<sup>87</sup> . Schmitt, *Nomos*, 321.

Though Schmitt's *Nomos* was published in 1950, it was not translated into English until 2003 and must therefore have had a restricted readership even in the USA, where many would, besides, have been shy of citing it because of the author's association with the Nazi regime.<sup>88</sup> Within the USA, the most succinct statement of the problems Schmitt had detected came from Robert W. Tucker, writing at the end of the 1950s. Because international law had by this time determined that the only legitimate ground for resort to force was to defend against aggression, it followed logically that whichever state initiated hostilities necessarily breached the law. But the determination of aggression hinged entirely on who struck the first blow, so the criminality of the aggressor gave the defender a moral position that licensed unrestrained use of force on pursuit of unconditional surrender. Put crudely, to be attacked made a state right, pretty much regardless of the events and offences that had taken place before the first blow was struck.

This much has already been established. What Tucker adds is a fine appreciation of United States political response to the new state of the law. From this it is evident that morality had dissolved into law in the official mind. Tucker catches Dean Acheson, speaking in a 1950 television interview, condemning war a 'thoroughly wicked thing ... immoral and wrong from every point of view'. But what appears confusion to anyone able to distinguish between legal, moral and religious sources of obligation, appears to have been something closer to fusion for those who established the American doctrine. Admitting no possibility of divergence between the requirements of state security and the moral law, it appeared to them that the

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<sup>88</sup> . Hans-Karl Pichler, 'The Godfathers of "Truth": Max Weber and Carl Schmitt in Hans Morgenthau's theory of power politics' *Review of International Studies*, 24 (1998) 185-200. See also William E. Scheuerman, *Carl Schmitt: the End of Law* (Lanham MD and Oxford: Rowan and Littlefield, 1999). Schmitt's isolation came to an end in the 1990s as he was taken up by writers on the European Left, notably Chantal Mouffe, who appreciated his critique of the Weimar regime. A spate of English translations followed.

United States was bound to respond to attack not solely by necessity but because of a higher obligation to defend the principle of resistance to aggression.<sup>89</sup> More than this, in the early days of the United Nations General Assembly, before the move to bloc voting, those who directed US foreign policy seem to have believed that this was a body that could be relied upon to legitimise their initiatives, since no wedge could be driven between American interests and universal right. 'Our conviction that the collective judgment of the Assembly may best reflect the moral law,' Tucker suggested with characteristically gentle irony, 'is no less sincere than our belief that the Assembly will only realise its true role when its judgments do not contradict American desires and interests'.<sup>90</sup>

Two corollaries spoke from this broad platform of certitude. The first was that few restraints need apply to a state combating aggression; the second that the objectives of the justified party in such a war need not be restricted to restoration of the *status quo ante* but may — perhaps should — extend to attainment of a moral peace through radical transformation of the international system or regime change.<sup>91</sup>

Such restraint as was to be seen in early United States Cold War policy, Tucker suggested, stemmed less from principled aversion to the use of force than from fear of retaliation following the development of atomic weapons and long-range delivery systems. Unconditional approval of defensive war had led the United States to fight

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<sup>89</sup> . Tucker, *Just War*, 20-1.

<sup>90</sup> . Tucker, *Just War*, 50. The assumption of harmony of interests evoked E. H. Carr's 1939 critique of the status quo powers (Britain, France and the United States), while the belief that democracies, while slow to anger, will fight unrestrainedly because their cause is just, is also recognised by Carr as a facet of Great power hypocrisy. See Charles A. Jones, *E. H. Carr and International Relations: A Duty to Lie* (Cambridge: Cambridge University Press, 1998).

<sup>91</sup> . Tucker, *Just War*, 21-2, 30, 74. Tucker, to be clear, opposes both these extensions of the American doctrine: 64-5.

the Second World War ‘with almost utter lack of restraint’.<sup>92</sup> At the heart of the American doctrine lay a ruthlessness without which deterrence could never have succeeded. He quoted the grimly consequentialist claim of Harvard President James B. Conant (1893-1978) that ‘while liberty has repeatedly been gained by war, once won it can be protected only by adherence to those moral principles which were repudiated in its achievement’.<sup>93</sup> Anything goes. As for the aims of war, Lynn Miller, writing in the 1960s, noted how United States doctrine restricted resort to force but, once at war, felt wholly justified in adopting extreme measures in its longing ‘for infinite goals and ultimate achievements through war’.<sup>94</sup>

### *The Catholic Bishops*

It may have been with the official usage of the phrase ‘just war’ in mind in this early Cold-War period that G. I. A. D. Draper, responding to James Turner Johnson, condemned the classic medieval just war tradition *tout court* for its tendency to underwrite unrestrained violence by those convinced of the justice of their cause.<sup>95</sup>

The accusation is otherwise incongruous. In a revealing passage, Johnson himself – high priest of the ‘broad tradition’ view – distinguished between the just war tradition ‘broadly and properly conceived’ and a contrary position that tends ‘to justify any and all forms of war once the initial threshold has been crossed.’ He complained that ‘World War II – fought by nations that had signed the “agreement to outlaw war” –

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<sup>92</sup> . This quotation is from John Miller’s review (*Annals of the American Academy of Political and Social Science*, 336) of Robert Tucker, *The Just War: A Study in Contemporary American Doctrine*. One is reminded of the abrupt change of gear in Henry V from deliberation to militarism, once the bishops have established just cause. See above, chapter 5, at notes 5-7.

<sup>93</sup> . Tucker, *Just War*, 75, quoting an article by Conant in *The Atlantic Monthly*, Jan. 1949, 19-21.

<sup>94</sup> . Lynn H. Miller, ‘The Contemporary Significance of the Doctrine of Just War’ *World Politics* 16:2 (January 1964) 264-266.

<sup>95</sup> . G. I. A. D. Draper, Review of James Turner Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts, 1200-1740*, in *The Yale Law Journal*, 86:2 (December 1976), p.377.

was far more totalistic in character than the frequent “sovereigns’ wars” of the eighteenth century, or than the practice of limited warfare has been since 1945’.<sup>96</sup>

These opinions, expressed during the decade following American defeat in Vietnam, were anachronistic because that war, together with nuclear deterrence, gave rise to lively debate in the United States and Britain on ethical, as distinct from legal or pragmatic aspects of warfare. In public and academic debate, the just war was already becoming detached from official discourse and restored to something resembling its Thomist form. Leading this revival were leading Catholics and Michael Walzer, whose *Just and Unjust Wars* (1977) has probably been more widely read than any other single text on the ethics of war published in the past half century. These two aspects of the revival stand alongside official usage as an uneasy trinity, ill-assorted and quarrelsome parents to contemporary understandings of the phrase. The principal claim of this chapter is that Walzer, for all his humanity and reasonableness, is rather closer to the official American just-war doctrine of the early Cold War than might at first appear, and quite at odds with the official Roman Catholic position. Walzer has become so closely identified with the just-war tradition that the stark inconsistency of his position with Catholic doctrine on crucial issues has too often been passed over in silence. At the same time, the compromise that has seemed to reconcile Catholic and communitarian formulations of just-war doctrine, outlined in chapter 11, will subsequently be seen to be badly adrift from its theological moorings.

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<sup>96</sup> . James Turner Johnson reviewing Geoffrey Best, *Humanity in Warfare*, and other works in *Journal of Law and Religion* 2:2 (1984), 431-2.

The starting point for this exercise must be the ideas of St Thomas Aquinas (1225-1274) and Francisco de Vitoria (1480-1546) on war, so far glimpsed only in summary and at second-hand through Shakespeare's eyes. Almost mid-way between Augustine's day and our own, Thomas Aquinas (1225-1274) worked within a political environment quite different from that of Augustine, in which the power of the papacy and of the elected Holy Roman Emperors, mere simulacra of their ancient predecessors, were starting to feel the challenge of embryonic modern states, both in his native Italy and beyond the Alps, as the medieval European feudal system with its competing and overlapping jurisdictions began to crystalise into a system of territorially discrete sovereign polities.

Earlier discussion of Shakespeare's *Henry V* identified the standard division of Christian doctrine into *jus ad bellum* and *jus in bello*, the first concerned with the initiation of hostilities and the second with their conduct. The same discussion set out the standard concerns of just war thinkers: right intention, just cause, proper authority, last resort, proportionality and discrimination. Some of these concepts are traceable to fragments in the writings of Augustine, but it was Aquinas and his followers who gave them what was to become their conventional arrangement. The remainder of this chapter lays out the doctrine as systematized by Aquinas in a little more detail and contextualises it within late medieval thought before moving on to examine its role in Catholic thought about city bombing and nuclear deterrence. It concludes by pointing out the main inconsistencies between the three emergent uses of 'just war' in the United States during the later twentieth century: official, Catholic and communitarian,

Aquinas occupies a central position in Christian thought about warfare largely because of the status of his massive synopsis of Christian theology, the *Summa Theologiae*.<sup>97</sup> Such was his achievement that Aquinas was declared a saint by Pope John XXII in 1323 and before long came to be regarded as the equal of the four much earlier so-called Latin fathers of the Church – Ambrose, Augustine, Jerome and Gregory.

The orderly, rational and comprehensive character of Thomistic thought may be thought both a strength and a shortcoming.<sup>98</sup> Aquinas was primarily concerned to make explicit the criteria governing resort to and application of public force by codifying the unsystematic thoughts of his predecessors on the subject.<sup>99</sup> The matter of resort to force has come to be referred to customarily as *jus ad bellum*: the rules governing the right to go to war. These were three. The first was that war might be undertaken only by a proper authority. None other than a sovereign, subject to no temporal overlord, could be regarded as a proper authority; any lesser persons could and should take their dispute to a higher authority for resolution before resorting to arms. Second, there must be a just cause: war ought only to be fought in response to a wrong that could not be righted by other means, such as the seizure of territory or the usurpation of sovereign authority. Finally, war must be undertaken with right intention, which might be the restoration of peace or the punishment of wrongdoers but never the aggrandizement of the sovereign or the state.

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<sup>97</sup> . The most comprehensive edition is Thomas Aquinas, *Summa theologiae: Latin Text and English Translations* (London: Blackfriars, 1964-). Numerous abridgments and selections are available.

<sup>98</sup> . Gray, *Being and the Just War*, 127-138 provides a sensitive comparison between Aquinas and Augustine that illustrates this.

<sup>99</sup> . Paul Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral issues* (Eaglewood Cliffs, NJ: Prentice Hall, 1994) 52. For Aquinas, see William P. Baumgarth and Richard J. Regan, S.J. (eds.) *Saint Thomas Aquinas on Law, Morality, and Politics* (Indianapolis IN and London: Hackett Publishing Company and Avatar Books, 1988) 220-228.

As well as setting out rules governing resort to war, Aquinas offered two constraints on the conduct of hostilities. The first of these was a prohibition against killing 'innocents,' now generally interpreted to mean non-combatants. This required combatants to discriminate. The second was an injunction to use only as much force as was necessary. This final rule, concerning proportionality, may be thought relevant both to the initiation and the conduct of hostilities. Sovereigns were urged to consider the gravity of the cause before unleashing the unpredictable hazards of war, and it was in the discussion of *jus ad*, not *jus in*, that Aquinas forbade military operations 'which are inordinate and perilous and end in slaying and plundering'.<sup>100</sup> But he returned to the same theme again in his discussion of restraints on violence once war had begun, the implication clearly being that commanders in the field should use no more force than was needed to gain their tactical objectives, while sovereigns on the brink of war should weigh the risk of harm against the gravity of the *casus belli* rather than a possible beneficent outcome.

Aquinas qualified his treatment of just war through a discussion of the doctrine of double-effect, which substantially relaxes the rules of *jus in bello*. In his discussion of the right of self-defense, Aquinas argued that the foremost and legitimate intentions of a soldier under attack were to save his own life and contribute to the achievement of peace and the promotion of the general good. The death of an attacker was therefore an unintended and incidental consequence of combat, even though foreseeable. This echoes the Augustinian maxim: hate the sin; love the sinner. But what has proved repugnant to many modern commentators is the idea that the more

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<sup>100</sup> . Baumgarth and Regan, *Aquinas*, 222.

reprehensible of two outcomes – inexcusable to have intended – may be disregarded as unintended, even though foreseeable, provided it is subordinate to the other outcome.<sup>101</sup>

Important though this refinement and codification of Christian thought on war undoubtedly was, it is hard to escape the conclusion that it has been the general standing of St. Thomas as a supreme natural theologian that accounts for the prominence and influence of his views on war, which occupy only a very small part indeed of his published works. It is therefore all too easy to exaggerate the continuity and extent of his influence in this particular sphere.<sup>102</sup> With Vitoria and his contemporaries, writing in the sixteenth century, it was rather different. War occupied a prominent place in their thought. The rise of French power and the Reformation had brought a spate of wars within Christian Europe in which the Habsburg rulers of Austria and Spain were closely concerned. Meanwhile, Spanish adventurers were carving out an empire in America by force of arms. It was therefore natural that further elaboration of the Thomistic codification of Catholic doctrine on war should have been largely the work of Spanish theologians of the sixteenth century, including Vitoria himself, Juan Ginés de Sepúlveda (1494-1573), Bartolomé de Las Casas (1484-1566), and Francisco Suárez (1548-1617), all of whom were responding to current events.<sup>103</sup>

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<sup>101</sup> . Christopher, *Ethics*, 57; **other discussions of double-effect. Perhaps cross ref to (similar??) problem of conditionality (Finnis et al.)?**

<sup>102</sup> . What Aquinas wrote directly on warfare forms one short chapter in Baumgarth and Regan, *Aquinas*.

<sup>103</sup> . Bernice Hamilton, *Political Thought in Sixteenth-Century Spain* (Oxford: Clarendon, 1963); J. A. Fernández-Santamaria, *The State, War and Peace: Spanish Political Thought in the Renaissance, 1516-1559* (Cambridge: Cambridge University Press, 1977).

Between them, Vitoria and Suárez substantially refined the first rule of *jus ad bellum* by insisting that it was not the sovereign alone, but the sovereign in council, that constituted a proper authority with the right to declare war, and that war should be undertaken only as a last resort. As will become apparent in chapter 12, this represented a judicious compromise between rival regalist and popular views of sovereignty that fell short of settled agreement, as much in the sixteenth as in the fourteenth century.

Before going to war, the monarch should listen to arguments for and against war and exhaust diplomacy, offers of mediation and arbitration and lesser sanctions such as prohibitions of trade. Hence the lengthy opening of Shakespeare's *Henry V*.

Secondly, the rule of proportionality, as an element in the *jus ad bellum*, was strengthened by insistence that, except in self-defence, war should not be embarked upon without a reasonable prospect of victory. Without this, right intention was spurious. With perhaps a nod toward recent developments in the technology of warfare, Vitoria insisted that sovereigns were under an obligation to ensure that they did not do more harm than good by going to war. 'As, then, the evils inflicted in war are all of a severe and atrocious character – Vitoria insisted – it is not lawful, for slight wrongs, to pursue the authors of the wrongs with war.' Notable also is Vitoria's retention of war as not only a means of restitution and redress but also an instrument of punishment, provided this corresponded to 'the measure of the offence'.<sup>104</sup>

These developments certainly refined and strengthened the position of the Counter-Reformation Catholic Church on the use of public violence. Yet this should not

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<sup>104</sup> . Franciscus de Victoria, *De Indis et de Jure Belli Relectiones* (ed. Ernest Nys: Classics of International Law, general editor James Brown Scott, Washington, Carnegie Institute of Washington, 1917) 171.

obscure the fact that a late flowering of scholasticism was only one strand among many in sixteenth-century debate and practice, and perhaps the most backward-looking. This was also the century of Erasmus, Machiavelli and More. Besides, then as now, 'the remarks of university professors ... were rarely influential in the determination of foreign policy,' though to tell the story as though they were is a frequent ploy of the scholars.<sup>105</sup> Beyond the schoolroom, warriors had their own codes. Although he represents the thought of the scholastic philosopher-lawyers as the main thread of his narrative, Neff freely admits that their natural law framework was a 'top-down' approach and had about it 'the musty odour of the scholar's chamber'.<sup>106</sup> It may have had some effect upon behaviour, but was flanked by the *jus armorum* (or *jus militare*?) or law of arms, parts of it of Roman origin, which must frequently have been of close relevance to combatants, as it clearly was to Shakespeare's Llewellyn, since it governed matters relating to ransom, booty, truces, safe-conducts, exchanges of prisoners and military discipline. Reprisals, also, falling short of war, were also governed by customary law.<sup>107</sup>

While there certainly were patterns of thought within the Church in the late-medieval and early-modern European world that could be read as anticipating modern international law, it is hard to escape the conclusion that these were very limited in their impact on high politics, dealing for the most part with the affairs of specialized and restricted groups including diplomats, warriors of high birth, and merchants.

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<sup>105</sup> . Donald A. Wells, 'How Much Can "The Just War" Justify?' *The Journal of Philosophy*, 66: 23 (December 1969), p.821. Wells is referring to Vitoria. See also Peter Paret's review of James Turner Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts, 1200-1740* (Princeton NJ: Princeton University Press, 1975) in *The American Historical Review*, 82:1 (February 1977), 88-89, which takes Johnson to task for paying too much attention to doctrine as distinct from practice and ignoring *raison d'état* as a counterpoise to just war discourse before slighting the book as an 'exploration of some traditional remnants in contemporary American thought on the morality of war' (89).

<sup>106</sup> . Neff, *War and the Law of Nations*, 69.

<sup>107</sup> . Neff, *War and the Law of Nations*, 70-71.

They did not seriously impinge on the prerogatives of princes, who in some instances sub-contracted such matters – as for example through the chartering of trading companies, authorized to hold courts, apply sanctions, and wage war.<sup>108</sup> Besides, dissident voices such as those of Thomas More or Desiderius Erasmus were numerous by the early sixteenth century.<sup>109</sup> Erasmus, though accepting the Thomistic doctrine of just war in principle, saw practice in this sphere, as more broadly, as being so far out of line with doctrine as to require the total abandonment of warfare.<sup>110</sup> On the other hand, English Puritans, for all their theological variety, were drifting discernibly in the course of the sixteenth century from New Testament to Old and from just war to a more aggressive holy war rationale consistent with their self-identification as a chosen people.<sup>111</sup> That it should have been a neo-Thomist approach that came to denominate Anglo-Saxon Christian reflections on the ethics of war by the 1980s was a matter of extreme contingency and in no way reflected unanimity within society or even within an increasingly divided Christian church.

Decisive in this process were the writings of Paul Ramsey, whose opposition to the policy of nuclear deterrence was resolute and principled from the outset.<sup>112</sup> But the pastoral letter issued in May 1983 by the National Council of Catholic Bishops of the USA. moved discussion into a wider arena, while diluting the principles of just-war

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<sup>109</sup> . Did More really favour assassination or kidnapping of enemy leader? Did he feel treachery was to be preferred to combat? Source?

<sup>110</sup> . José A. Fernández, 'Erasmus on the Just War' *Journal of the History of Ideas*, 34:2 (April-June 1973) 226.

<sup>111</sup> . Timothy George, 'War and Peace in the Puritan Tradition,' *Church History*, 53:4 (December 1984) 494.

<sup>112</sup> . Paul Ramsey, *War and the Christian Conscience: how shall modern war be conducted justly?* (Durham NC: Duke University Press, 1961). For a taste of Ramsey's unequivocal clarity see page 269, where an analogy is drawn between Tourag prohibition of poisoning enemy wells and the need for nuclear disarmament: 'We are trying to fight the war *primarily* by poisoning wells, or trying to deter such a war by aiming at making it credible that we are going to poison wells. We shall soon all live in a great desert, whose wells are all poisoned, unless the people of the world are plainly told by their leaders that no political or human good can come from anything so essentially wrong (because so stupid) or anything so essentially irrational (because so immoral). Warfare is not feasible, deterrence is nor feasible, and what is more, politics is no longer feasible, unless this central war, with intrinsically unjust means, is abolished.'

doctrine. This influential and very public statement condemned the use of nuclear weapons, except as a deterrent designed to bring other nuclear-weapon states to the negotiating table and achieve agreement on multilateral nuclear disarmament. 'The Challenge of Peace' was far from a pure statement of Thomistic doctrine. It came very close to the lawyerly consensus of the day in its insistence that 'offensive war of any kind is not morally justifiable,' a position quite at odds with Catholic tradition if offensive war is read as the initiation of hostilities. This said, the pastoral letter made reference to the just-war tradition and to Thomistic concepts including proportionality, and for millions of Catholics in the USA and beyond it would reinforce the views of individual Catholics, such as Anthony Kenny or John Finnis, as they began to voice much the same message in a more authentically Thomist manner.<sup>113</sup>

#### *Walzer and the War Convention*

By the early 1980s appropriation of concept of the just war by US administrations was being publicly contested by the Catholic Church, though considerable ground was being conceded by the bishops to the very narrow view of legitimate grounds for war that had been established by positive international lawyers. Into this melee stepped Michael Walzer, whose *Just and Unjust Wars* is almost certainly the most widely read book on the ethics of war to have been published in the twentieth century. Walzer was very concerned to avoid writing a history of the evolution of the just-war tradition. He also decided not to try to ground his study explicitly in moral philosophy. His argument was that as a matter of fact, people do not consistently ground their arguments about war either in past writers on the subject or in orderly variants of moral philosophy. Few of us walk around trying to be consistent Kantians or utilitarians or virtue ethicists, and those who try to be good Christians spend little

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<sup>113</sup> . Kenny, Antony, *The Logic of Deterrence* (London: Firethorn Press, 1985).

time, for the most part, reconciling the very different tempers of Aquinas and Augustine or Christ and St Paul. What we do instead is act more or less deliberately and try to justify our actions, and this opens the door to an empirical study of justifications of resort to war and of behaviour in the course of hostilities.

To read Walzer's exploration of what he chooses to call the war convention, however, is very soon to encounter concepts such as double effect which are far from natural or universal. In short, a good deal of Catholic thought is smuggled in without close examination of its credentials but, far more significantly, deontological and consequentialist views jostle one another, as they do in daily thought, without the oversight of a referee able to send them back to their corners at the end of each round. In this way, Walzer appeared to be endorsing many just-war criteria while finally denying its basic principles through his treatment of military necessity and supreme emergency.

The key issue here is the weighing of probable consequences of actions for the political community against the implications of breaches of norms for the moral fabric of society and the characters of those who break the rules. Typical of classroom exercises that dramatise this dilemma is the issue of conditional nuclear deterrence. Assume first of all that the use of nuclear weapons would be wrong in any circumstances because of the scale and lack of discrimination of the damage they would inflict. The question then arises of whether to threaten to do wrong is permissible if the deterrent effect of the threat is the most effective way of ensuring that the weapons are never used. Most consequentialists accept the morality of the deterrent threat and many regard it as having played the leading part in the

avoidance of nuclear war during the long decades of US–Soviet rivalry that followed the Second World War. Against this view, Finnis, Grisez and Boyle argued that to threaten to do what could not be justified required a corruption of the entire chain of command. To be effective and credible, all concerned had to believe that, at a moment of supreme emergency, buttons would be pushed, missiles launched and bombs dropped. As wholly consistent Catholics, Finnis and his colleagues concentrated on intention and left consequences to God. The deliberate corruption without which the nuclear deterrent could not work was every bit as unacceptable as the actual use of nuclear weapons. Better red than damned.

To argue against this position requires two steps. The first is to place probable consequences ahead of intention in the process of deliberation. The second is to consider the question: consequences for whom? Because the deterrent threat was intended to prevent any use of nuclear weapons against any target, and because it was widely believed that a nuclear war might trigger severe climate change, it was easy to believe that the beneficiary was humankind in general. This universal character of its intended benefit made it easier for the US bishops and other Catholics to accept the deterrent use of nuclear weapons as an interim measure to bring all parties to the negotiating table. Similar arguments were used to justify the actual use of atomic bombs against Hiroshima and Nagasaki in 1945. By shortening the war, it was argued, more lives were saved than lost, and these included Japanese lives as well American, civilians as well as combatants.

Consequentialist arguments get a little more difficult when the benefits are less evenly distributed, as this poses questions about the relative moral value of

combatants and non-combatants and of members of opposing political communities. Britain has twice destroyed the fleet of a neutral or allied power in order to avoid its capture and use by an enemy, at Oran in 1940 and Copenhagen in 1807. As organized French resistance to invading German forces collapsed in June 1940, British Prime Minister Winston Churchill mistrusted assurances from the French Navy that they would sail their navy to Britain or the USA in the event that Germany were to break the terms of the 24<sup>th</sup> June armistice, which left the navy in French hands. With French reinforcements on the way to Oran, the final British ultimatum required the French fleet to set sail forthwith. When they refused, the British attacked killing more than 1,000 French sailors and soldiers and sinking three capital ships.

The Copenhagen incident, in September 1807, was also triggered by the probability of a fleet falling into enemy hands. As a neutral state, Denmark was vulnerable to French invasion. Britain offered an alliance, but the Danes refused. Instead, the British attacked with land and naval forces. Rather than fight their way through the city, with probable losses, the British contented themselves with defeating Danish ground forces outside the city and then launched a naval bombardment, killing more than 2,000 civilians, in order to force a surrender. They then made off with what was left of the Danish fleet.

The first incident is shocking because the French had so recently been allies of the British; the second, because Denmark was a neutral state and so many of the victims were civilians. In each case, breaches of custom and prevailing norms were clear. In both cases the justification must depend on some blend of three considerations. The first is strategic. Continued and effective resistance against the

enemy would, in each case, have been materially damaged by a fleet falling into enemy hands. The second involves a claim of superiority. The British believed, on both occasions, in their moral superiority over the opposing power. Both Napoleonic France and Nazi Germany espoused political values at odds with those of the British and each posed a fundamental threat to the basic principles of the European commonwealth of states or international society. The third justification is existential. Regardless of its relative moral value, so this argument goes, a state may break the rules of the war convention when its survival is in question.

These questions of military necessity and supreme national emergency are addressed head on by Walzer and are the points on which he most clearly diverges from the just-war tradition. In his discussion of military necessity, Walzer takes hard cases, in each of which there is a strong element of anticipation. Pointing out that 'necessity' is too strong a term for what is, in essence, a weighing of risks, he examines the Laconia order, the 1914 German invasion of Belgium, and the British provocation that resulted in the 1940 German invasion of Norway.

The 1956 British film, *The Battle of the River Plate*, offers an idealised view of naval warfare in which the commander of the German pocket battleship, Admiral Graf Spee, scrupulously avoids the deaths of non-combatants. Raiding in the Atlantic from the outbreak of war in September 1939, he accepts the surrender of the crew of each merchantman he encounters before sinking it. Later, the captain of one of these vessels becomes, in effect, his confidant, as the stricken German vessel limps into Montevideo in December 1939. The fellowship of all mariners and meticulous adherence to international law, even in times of war, are stressed in what may be

seen as an oblique criticism of the very different temper of submarine warfare later in the war. In 1942, Admiral Doenitz ordered German submarine commanders not to assist the crews of ships they had attacked. The argument was simple enough. Submarines were vulnerable to attack on the surface and could not afford to linger when enemy warships, alerted by their victim, might be approaching. Besides, they had no space for prisoners. It is not very different from one of the justifications for King Henry V's killing of the French prisoners. If indeed, the French were renewing their attack, the troops required to guard prisoners could not be spared. It is an argument that will be encountered again in chapter 16, where the central point at issue in the trial of three Australian soldiers, charged with killing prisoners, is whether there had been an equivalent to the Laconia order, licensing them to kill Boer prisoners when operating in hostile territory. This is all about weighing risks.

With the 1914 invasion of Belgium and the 1940 Norwegian case, something closer to necessity is in play, but Walzer points out that in each, justifications included claims of moral superiority and that in neither case would defeat have been imminent or probable had neutrality been respected. With Copenhagen and Oran, the scales were more evenly balanced. Britain was isolated in the face of a strong European coalition. At this point military necessity merges into supreme emergency, which is a rather different argument, where the risk of defeat is plain and imminent, and the weight of justification moves on to the relative values of the belligerent states and the value of independent statehood itself.

Here, Walzer discusses British city bombing and the decision to use atomic weapons against Japan. After the fall of France, Britain was unable to engage with German

and Italian forces except in the North African theatre for more than three years. Churchill rapidly reached the conclusion that 'bombers alone provide the means of victory'. Such was the inaccuracy of bombing at the time that attacks on military targets were bound to cause extensive civilian casualties and could not be relied upon to achieve their objectives. These practical considerations combined with the hope that city bombing might damage German morale and cheer the British public with the thought their government was not idle, as they themselves suffered repeated raids. The second case is one of supposed necessity, not supreme emergency. Japan had effectively lost the war. The USA was not under threat. Here Walzer argues that there was no necessity, because the Americans could have chosen to avoid the huge loss of life entailed by an invasion of the main islands of Japan. There was no external compulsion for them to do this. A negotiated settlement was possible. The only necessity came from their own policy objectives.

The conclusion of Walzer's extensive discussion of military necessity and supreme emergency is that 'utilitarian calculation can force us to violate the rules of law only when we are face-to-face not merely with defeat but with a defeat likely to bring disaster to a political community'. It is a characteristically humane conclusion in which many would concur. However it is not consistent with the Thomistic just-war tradition. Dismissing so many historical appeals to necessity and supreme emergency for what they have been – hypocrisy and self-deception – leaves the ultimate case, where the threat really is imminent, unexamined and without historical illustration. Yet there is little doubt from his treatment of the Nazi regime that Walzer resists moral relativism. He is persuaded that some polities have relatively superior values, that they ought to prevail against their enemies and may, *in extremis*, do

wrong in order to survive. If, of course, political autonomy in and of itself is valued, then the war convention evaporates entirely at moments of supreme emergency.

By contrast, the Augustinian tradition has consistently subordinated the earthly city (the state) to the city of God and insisted on right intention and conduct, leaving the outcome to God. Meanwhile, the Thomistic strand of Catholic thought has paid close attention to the state as the space within which it may be possible to live the good life, but has been resistant to the idea of a moral hierarchy of polities. Indeed, Vitoria expressly ruled out their paganism as a justification for Spanish conquest of the indigenous polities of the Americas, arguing for the legal equivalence of orderly polities, regardless of their internal constitution and values. In sum, the subtle discussion of examples that fail to meet the criteria for abandoning the war convention should not blind anyone to the fact that Walzer leaves the door wide open to a no-holds-barred struggle in very exceptional circumstances, while the Catholic Church does not.

The purpose of this discussion has not been to reach a view about the rival merits of these two positions. That is a matter for theologians and political theorists. For the historian, the conclusion is a rather different one. It is that by the 1980s, as the boom in just-war talk and publications really took off, four discernable variants were current in the English-speaking world. The law of armed conflict was just that: positive international law, not morality. But through the antiquarian activities and occasional naturalist lapses of the lawyers, it ran close enough to the three traditions of more strictly moral debate to cause confusion. These three – reviewed in this chapter – were the official view espoused by policy-makers during the early decades of the

Cold War, the neo-Thomistic view promulgated by senior churchmen as tensions heightened once again in the 1980s following a period of détente in the 1970s, and the secular, mildly communitarian view offered by Michael Walzer. What is odd, from the perspective of cultural history, is that none of them – not even the official view of the Church – wholly anticipated the formulaic yet infinitely flexible version of just-war doctrine that was about to emerge.

7,189 / 8,740

## CHAPTER 11

### FROM TRADITION TO FORMULA

‘[James Brown] Scott ...sees in the modern turn to a discriminatory concept of war a return to the Christian theological doctrine of just war. But modern tendencies do not resurrect Christian doctrines. Rather, they are ideological phenomena attending the industrial-technical development of modern means of destruction’. Carl Schmitt — *Nomos of the Earth*, 321.

It is customary in the literature on the just war to distinguish between tradition and doctrine. The tradition is broad and encompasses a range of views, not all of them mutually compatible. Doctrine is a distillation of the traditional wisdom into rules and principles of practical guidance. Some have tried to make a virtue of the process of aggregation that was progressively to incorporate official, Catholic and communitarian views into a single tradition from the 1980s. Tradition has always been very much about spinning a yarn, in which strength derives from the multiplicity of overlapping filaments and not from any one alone. Some of the best writers on the subject have rightly been concerned to preserve a casuistic approach to the use of force and differentiate themselves from those who regard justification as little more than the completion of a routine checklist. They have found value in the idea of a broad tradition as distinct from a doctrine – still less a *theory* – of just war. For Charles Guthrie and Michael Quinlan, respectively Chief of British Defence Staff (1997-2001) and Permanent secretary at the British Ministry of Defence (1988-92), the tradition was ‘a living and evolving body of thought and enriched by tradition as understanding widens under the impact of changing circumstances, the challenge of

debate, and collective learning from varied new experience.<sup>114</sup> Michael Howard applauded James Turner Johnson for studying the just war as tradition, not theory, and for including in the tradition the chivalric and professional ethics of soldiers, ‘the utilitarian tradition of the eighteenth century’ and ‘limited-war concepts of our own time.’<sup>115</sup> Reviewing a later work by Johnson, Richard Harries, soon to serve as Bishop of Oxford, wrote of his relief at finding an author who regarded the just war as ‘not so much ... doctrine as [a] tradition,’ and a tradition ‘to which lawyers and soldiers have contributed as much as theologians.’<sup>116</sup> Johnson himself applauded three quite disparate authors for their contributions to the just war tradition even though – by his own admission – only one used the term while another positively flinched from it.<sup>117</sup> Oliver O’Donovan rightly bristles at the term ‘just-war theory,’ offering two reasons for avoiding the term theory. ‘It is not, in the first place, a falsifiable theory at all, but a proposal of practical reason; and it is not, in the second place, about “just wars”, but about how we may enact just judgment even in the theatre of war’.<sup>118</sup>

There are undoubted advantages in this inclusive approach. It might at first sight be thought consonant with the pragmatist tendency of this book. After all, a tradition is rather like plywood. It is less brittle and more easily shaped than any single plank of wood; consequently it can more easily be bent into required shapes and can

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<sup>114</sup> . Charles Guthrie and Michael Quinlan, *Just War—The Just War Tradition: Ethics in Modern Warfare* (London: Bloomsbury, 2007) 8.

<sup>115</sup> . Michael Howard, reviewing James Turner Johnson, *Just War and the Restraint of War: A Moral and Historical Inquiry* (Princeton NJ: Princeton University Press, 1981), in *International Affairs*, 58:2 (Spring 1982), 329.

<sup>116</sup> . Richard Harries reviewing James Turner Johnson, *Can Modern War Be Just?* (New Haven CO and London: Yale University Press, 1984) in *International Affairs*, 61:2 (Spring, 1985), 297.

<sup>117</sup> . James Turner Johnson, Review of Geoffrey Best, *Humanity in Warfare* (New York: Columbia University Press, 1980); Stanley Hoffman, *Duties Beyond Borders* (Syracuse NY: Syracuse University Press, 1981); William V. O’Brien, *The Conduct of Just and Limited War* (New York: Praeger, 1981), in *Journal of Law and Religion*, 2:2 (1984) 429-435.

<sup>118</sup> . Oliver O’Donovan, *The Just War Revisited* (Cambridge: Cambridge University Press, 2003) 6/7.

withstand the failure of one or more of its components without giving way completely. Yet it may too readily come to bear much the same relationship to sound timber as does a sandwich to a proper meal. Prolonged reliance on convenience food will ultimately weaken the constitution.

The first problem in accepting the view of just war discourse as a broad tradition is therefore that it is almost bound to require the conflation of a range of very different views that are not merely varied but rely on mutually inconsistent claims. The marked difference in styles of expression and thought between Augustine and Aquinas have already been remarked upon, as also dissonances between the views of the Scholastics, those of the twentieth-century lawyers and policy-makers who enshrined them in public policy, and the leading secular exponent of the tradition.

The foremost contemporary exponents of the broad version of the just war tradition were already being taken to task for the first of these tendencies quite early on in their careers. Timothy George noted the concern of James Turner Johnson to retain English Puritans within the just-war tradition despite their evident drift toward holy war or crusade. He also criticized Michael Walzer for understating the extent of disagreement on these issues.<sup>119</sup> A second problem is that flexibility and conflation can too easily slip into vagueness and evasion, and thence once more to confusion. Criticize any aspect of what you suppose to be the tenets of a tradition or an ideology, and its devotees will promptly find some exponent who is innocent of that

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<sup>119</sup> . Timothy George 'War and Peace in the Puritan Tradition,' *Church History* 53:4 (December 1984), 493 n.5. Although writing in the 1980s, George is referring here to early works of Johnson and Walzer, dated 1975 and 1965 respectively (James Turner Johnson, *Ideology, Reason and the Limitation of War: Religious and Secular Concepts, 1200-1700* (Princeton: Princeton University Press, 1975); Michael Walzer, *The Revolution of the Saints: A Study in the Origins of Radical Politics* (Cambridge MA: Harvard University Press, 1965).

particular charge. Traditions are like punch bags; they absorb criticism until the critics tire. Like ideologies and literatures, they elude falsification.

The broad and inconsistent range of opinions held by users of the phrase, coupled with the profusion of mutually inconsistent late-medieval views on warfare to be touched upon in chapter 12, make adoption of the ideas of Aquinas and Vitoria, at the heart of contemporary just-war debate a cultural anomaly of the first order. This was in some degree accounted for in chapter 8 but, as chapter 10 made clear, the triumph of Vitoria was far from having been achieved by mid-century among jurists, in the Christian churches or within society at large. Equally, those who populated the nascent academic discipline of International Relations were very often either pacifists or realists, shy of a normative approach felt to condone war by the first group and regarded as irrelevant by many in the second.

Worse was to come in the 1960s, when admiration for the methods of the natural sciences led to an almost total eclipse of normative and Christian approaches to International Relations, once more confining just war discourse to the admittedly spacious worlds of the Catholic Church and the quality press.<sup>120</sup> But this second eclipse was brief and partial, for the later 1970s and 1980s saw a general resurgence of interest in the ethics and law of war. For a time, this resurgence consisted in parallel lines of inquiry, Christian and secular; but by the 1990s the Thomistic tradition had reached even the positivist fastnesses of academic International Relations and appeared to have subsumed Walzer's communitarian approach.

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<sup>120</sup> . Catholic Bishops, Ramsay???

Crude empirical support for this impressionistic account of the just-war revival, its timing, and even its tone can be gleaned from *Ngram Viewer*. The phrase ‘just war’ hardly registers before the mid-1920s. Falling away again after 1930, it perks up intermittently between 1935 and 1965, rising thereafter —though only in the United States — to a ‘Vietnam’ peak around 1968. After this, however, it never falls far, experiencing rapid and significant rises in frequency during the nuclear debates of the early 1980s and once again following 9/11. By the start of the twenty-first century its relative frequency was consistently exceeding mid-twentieth-century levels tenfold and rising steeply.

The prominence of discussion in Thomist terms is attested to by an irregular, but rising frequency of the term ‘double-effect’. But while this more than doubled in American English between 1940 and 2010, it came nowhere near to matching the more than five-fold rise in the frequency of ‘just war’ during the same period, suggesting a steady infusion of references to just war in non-technical or secular writings.

One of the remarkable things about the recent revival of interest in the ethics of war has been the extent to which so many participants, whether Christian or not, have accepted as their starting point the agenda set by Vitoria and his contemporaries almost five hundred years before. In doing so they have fostered a spurious sense of continuity and a false perception of the strength and coherence of the tradition in late-medieval and early modern Europe. It is hardly a surprise to find contemporary Catholic thinkers slipping easily into a discussion framed in Thomistic terms. Antony

Kenny felt no need for lengthy historical or doctrinal preliminaries in an account of the application of just-war thinking to nuclear deterrence that took the prohibition against killing of innocents for granted.<sup>121</sup> John Finnis and his co-authors devoted close attention to the distinctively neo-scholastic question of whether it was allowable to threaten that which it would certainly be wrong to perform. In one of the most conscientious and closely-argued treatments of nuclear deterrence they concluded that maintenance of such a deterrent was bound to corrupt the whole chain of command and could not therefore be justified.<sup>122</sup> Better Red than damned! James Turner Johnson, assessing the continuing relevance of the just war tradition, paid due homage to the Bible, medieval codes of chivalry and other sources when making the case for its continuity and development, but his thematic statement a few pages later might have been written by Vitoria and it was against this template that current international law was to be measured.<sup>123</sup> More recently, it comes as no surprise that the proceedings of a 2004 seminar organized by the Belgian Army Catholic Chaplaincy's centre for Theology and Military Ethics should have been devoted to the extension or adaptation of the tradition to encompass terrorism and asymmetric warfare or that — in Britain — Charles Guthrie and Michael Quinlan — the first a senior British military officer and the second a senior civil servant in and a practicing Catholic — should have devoted the greater part of their short book to two chapters on *jus ad bellum* and *jus in bello* which together cover just cause, sufficient and proportionate cause, right intention, right authority, reasonable prospect of success, last resort, discrimination and proportionality.<sup>124</sup>

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<sup>121</sup> . Antony Kenny, *The Logic of Deterrence* (London: Firethorn Press, 1985).

<sup>122</sup> . J. M. Finnis, Joseph M. Boyle and Germain Grisez (1987) *Nuclear Deterrence, Morality and Realism* (Oxford: Clarendon Press, 1987).

<sup>123</sup> . Johnson, *Morality and Contemporary Warfare*, 22-30.

<sup>124</sup> . W. Smit (ed.) *Just War and Terrorism: The End of the Just War Concept?* (Leuven and Dudley MA: Peeters, 2005). Guthrie and Quinlan, *Just War*.

More curious than this consistency within the Church is the extent to which non-Catholics have felt bound to refer to the just war tradition and follow its agenda, and in doing so to reinforce something very close to the version reached by the mid-sixteenth century. Sydney Bailey, a Quaker who had served six years in the Friends' Ambulance Unit in Burma during Second World War, unhesitatingly adopted the Catholic narrative, running through Augustine and Aquinas to Vitoria, as preface to his consideration of the evolving law of armed conflict in two book-length studies. In doing so he reduced the tradition to seven summary points which are neither more nor less than a distillation of Vitoria: legitimate authority, just cause, right intention, reasonable prospect of victory, last resort, immunity of innocents, and proportionality.<sup>125</sup> A more recent pacifist, Diana Francis, got it down to five bullet-points: 'legitimate authority ... just cause ... exhaustion of all other options ...proportionality ... [and] discrimination between combatants and civilians'.<sup>126</sup>

Professional moral philosophers and political theorists have followed much the same path. Donald Wells, writing in 1969, organized discussion of what he regarded as a recently revived tradition around an agenda closely reflecting Vitoria's formulation: duly constituted authority, proportionality, just cause, reasonable prospect of victory, last resort, right intention, and morally acceptable means.<sup>127</sup> A. J. Coates, in 1997, structured his ostensibly secular study of the ethics of war around an initial comparison of four 'images of war'—realism, militarism, pacifism, and the just war.

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<sup>125</sup> . Sydney D. Bailey, *Prohibition and Restraints in War* (London: Oxford University Press for the Royal Institute of International Affairs, 1972); Sydney D. Bailey, *War and Conscience in the Nuclear Age* (Basingstoke: Macmillan, 1987).

<sup>126</sup> . Francis, *Rethinking War and Peace*, 87/88.

<sup>127</sup> . Donald A. Wells, 'How Much Can "The Just War" Justify?' *The Journal of Philosophy*, 66: 23 (December 1969) 819-829.

He soon concluded, however, that the last of these was ‘the only one to uphold the moral limitations of war clearly and consistently’, and the greater part of the book consisted of a sequence of chapters on legitimate authority, just cause, proportionality and the recourse to war, last resort, proportionality and the conduct of war, non-combatant immunity, and peacemaking.<sup>128</sup> Around the same time a generally secular treatment of the ethics of war by Richard Norman devoted two of its six chapters to a discussion of issues central to the Catholic tradition, killing in self-defense and killing the innocent. He prefaced this with a three-page summary of the just war tradition which repeated the scarcely varying seven-point litany: ‘just cause ... right intention ... legitimate authority ... formal declaration ... reasonable hope of success ... last resort ... [and] proportionality’.<sup>129</sup> As recently as 2007, Nicholas Fotion set out to offer ‘a new theory of the just war,’ warily declaring his intention to leave aside the grounding of the just-war theory in moral philosophy. Nevertheless he opted to accept the neo-Thomist agenda of just cause, last resort, proportionality, likelihood of success, right intention and legitimate authority in *jus ad*, and proportionality and discrimination in *jus in*, as though this could be done without implicit acceptance of the moral philosophy of the Catholic Church.<sup>130</sup> More modestly, David Rodin introduced a collection of essays on ethics and war that very same year with the admission that ‘most writers continue to locate themselves within some variant of the just war tradition’, though ‘the basic assumptions and constructs of this approach were being tested, challenged and reformulated’.<sup>131</sup> Especially odd, given her profound knowledge of Augustine, is the lapse of Jean Bethke Elshtain,

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<sup>128</sup> . A. J. Coates, *The Ethics of War* (Manchester: Manchester University Press, 1997).

<sup>129</sup> . Richard Norman, *Ethics, Killing and War* (Cambridge: Cambridge University Press, 1995), p.118.

<sup>130</sup> . Nicholas Fotion, *War and Ethics: A New Just War Theory* (London: Continuum, 2007).

<sup>131</sup> . David Rodin (ed.) *War, Torture and Terrorism: Ethics and War in the 21<sup>st</sup> Century* (Oxford: Blackwell, 2007) 1.

after some opening Augustinian gestures, into a recital of the standard Thomist formula, employed as checklist to justify the so-called war on terror.<sup>132</sup>

Two recent anthologies on the subject exhibit a similar pattern, privileging the Thomistic version even while considering rival approaches to the ethics of war. Reichberg and his co-editors identify the just war tradition at the outset as something with which ‘most readers will be familiar’ and emphasize its breadth, as ‘a living tradition in constant development’ as justification for their decision to offer only a representative sampling of rival realist and pacifist views.<sup>133</sup> Kinsella and Carr take a similar line, dividing their collection of readings into four parts, the first of which compares the just war tradition to other approaches before abandoning these, like so many stages of a launch vehicle, to concentrate on ‘Resort to War (*Jus ad Bellum*)’ and ‘Conduct of War (*Jus in Bello*)’ in parts two and three, finally casting the net a little wider to cover retrospective legal judgment of war crimes in a fourth part, entitled ‘War Crimes and Judgment (*Jus Post Bellum*)’.<sup>134</sup> In one of the most thoughtful recent surveys of the evolution of moral deliberation on warfare, Alex Bellamy seems at first to have woken from the general Thomistic trance. His just war tradition is much broader, encompassing approaches such as chivalric custom, crusading, positive international law and *raison d’état* that many would consider merely adjacent to, if not actually at odds with just war thinking.<sup>135</sup> This allows him to distinguish three streams of thought or ‘sub-traditions’— realism, legal positivism and

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<sup>132</sup> . Jean Bethke Elshtain, *Just War against Terror: The Burden of American Power in a Violent World* (New York: Basic Books, 2003), 54-70. See also Jean Bethke Elshtain, *Augustine and the Limits of Politics* (Notre Dame IN; University of Notre Dame Press, 1995).

<sup>133</sup> . Gregory M. Reichberg, Henrik Syse and Endre Begby (eds.) *The Ethics of War: Classic and Contemporary Readings* (Oxford &c: Blackwell, 2006), pp.ix-x.

<sup>134</sup> . David Kinsella and Craig L. Carr (eds.) *The Morality of War: a Reader* (Boulder CO and London: Lynne Rienner, 2007).

<sup>135</sup> . Bellamy, *Just Wars*.

legal naturalism – which together constitute contemporary just-war thinking. Yet this awakening from Thomistic contemplation suddenly collapses into a standard recitation of Vitoria’s version at the midpoint of the book, as Bellamy turns his attention from history to contemporary problems.<sup>136</sup>

Given this hegemony of Aquinas and Vitoria in the scholarly literature it was only to be expected that reference to the just war tradition in non-specialist works would have become almost entirely formulaic by the turn of the century. It is worth quoting at length one final and typically eviscerated summary of the tradition and its contemporary significance. It is from a recent book by John Leech and figures there as no more than a sub-plot. ‘St Thomas Aquinas gave previously pacifist Christians a moral justification for participating in war with the concept of the “just war”,’ we learn. ‘Suitably amended, this has become the basis of relevant international law.’ Leech continues:

In the end, we are therefore likely to apply the test of the just war to confirm our decision to act. The six traditional tests are widely quoted before every campaign. In effect, they are:

- just cause;
- proper authority;
- right intention;
- discrimination between combatants and non-combatants;
- proportionate response; and, significantly,
- minimum force.

‘It seems clear to us,’ Leech concludes, ‘that any offence against [these tests] is an offence against humanity and in turn legitimizes punitive as well as preventive action.’<sup>137</sup>

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<sup>136</sup> . Bellamy, *Just Wars*, 121-128. Table 1 (127) nicely illustrates my objection. The left-hand column lists rules (right intention, just cause, etc.) Each of the three remaining columns characterises the stock response expected of a realist, a legal positivist and a legal naturalist, but the agenda is Vitoria’s.

<sup>137</sup> . John Leech, *Asymmetries of Conflict: War without Death* (London: Frank Cass, 2002). It is extraordinary to see even those who know better fall into a trance-like state and reel off the Vitorian check list when cued by the phrase ‘just war’. Thus Neta C. Crawford, on one and the same page, provides the standard seven-point list

By its flexibility, subtlety, breadth and humanity, Western debate on the ethics of war laudably aspires to generate mature expressions of public reason. Yet the reality is that in its transit from seminary and university to council chamber and command centre wisdom has too readily been condensed into bullet points and these, in their turn, have too readily been transformed into ideological friendly fire, sending alternative approaches scurrying for cover.

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before warning the reader that it is *not* a check-list, that it is not law, that the doctrine consists at best in a set of principles requiring casuistic application following a process of informed deliberation, etc. See Neta C. Crawford, 'Just War Theory and the U.S. Counterterror War,' *Perspectives on Politics*, 1:1 (March 2003), 5-25.

## CHAPTER 12

### THEOLOGICAL CONTEXT

Thus far, those ancient, medieval and early-modern Christian views about warfare that have been most commonly referred to in recent discussions of the just war have been surveyed without delving deep into the theological foundations on which they stand. It is now time to step down into the crypt. There are those who have claimed that the most important question facing advocates of just war doctrine is whether it can be extended to cover irregular warfare and post-war reconstruction.<sup>138</sup> Yet the question of whether the structure can stay upright at all when its original underpinnings are removed is far more urgent than any extension or reform. Is it possible for the just war tradition to retain its ethical content when secularized and absorbed into international law, as Jean Bethke Elshtain has suggested, or is Philip Gray right to claim that '[t]he challenge of St. Augustine's thought [is] whether the just war can be coherently sound without the metaphysical/theological system upon which it was based' and that without its underlying theological assumptions the tradition loses coherence.<sup>139</sup> Carl Schmitt, writing soon after the Second World War, was confident of his answer. 'If today some formulas of the doctrine of just war, rooted in the institutional order of the medieval *respublica Christiana*, are utilized in modern and global formulas,' he wrote, 'this does not signify a return to, but rather a

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<sup>138</sup> . Fotion, etc. The irony of these recent interventions is that the doctrine is relatively permissive, especially regarding just cause; many of the constraints attributed to the tradition arise instead from twentieth-century international law.

<sup>139</sup> . Jean Bethke Elshtain, *Just War against Terror: The Burden of American Power in a Violent World* (New York: Basic Books) 53; Gray, *Being*, 116, 3, 123 and passim.

fundamental transformation of concepts of enemy war, concrete order, and justice presupposed in medieval doctrine'.<sup>140</sup>

The first section of this chapter explores the rootedness of Augustinian thought about war in a holistic ontology, a remorselessly deontological moral philosophy and a providential historiography. The second section examines the thought of Aquinas on proper authority in the context of his treatment of natural law, perfect political community and kingly prudence. Analysis of the close relationship between reason and will in the treatment of kingly decision-making by Aquinas, and their subsequent separation, leads to consideration, in a third section, of the steady substitution of positive law for deliberation-in-council and sovereign discretion that took place during the century following the death of Aquinas. The purpose of these discussions is not antiquarian. It is to convey a sense of the political theology within which the contemporary just war formula originated and of the difficulty of detaching a formulaic doctrine from its theological base. It is far from clear that the total disregard for consequences or the concept of proper authority at the heart of Catholic doctrine have wide contemporary appeal.

A subordinate argument, couched in the argot of academic International Relations, is that Augustine and Aquinas are both, in their different ways, realists. Augustine falls into this camp because of his emphasis on sin and contingency in a fallen world, which provides a near analogue to customary modern realist emphasis on the ineradicability of conflict, though with the vital difference of possible redemption through grace. Aquinas might also to be placed in the realist camp by virtue of the

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<sup>140</sup> . Schmitt, *Nomos*, 131. See also 122/3:. These are matters that will be dealt with more extensively in chapters 13 and 15.

resolutely statist character of his political theology. These are not in themselves criticisms, but reminders, at this mid-point in the argument, of the gulf between an ethics of war which is properly part of political theory and a professional military ethics more concerned with personal development and conduct.

### *Augustine*

One of the most passionate recent advocates of the indissoluble connection of doctrine and theology has been Phillip Gray. Gray's claim is that erosion of the link between the two has rendered the just-war doctrine meaningless, 'tending to reinforce *Realpolitik* goals or pacifistic inaction'.<sup>141</sup> At the heart of his argument lies St. Augustine's concept of the Inexpressible: 'an experiential understanding of the wholeness of Being'.<sup>142</sup> Capital 'I' 'Inexpressible' is (almost) inexpressible precisely because it is rooted in religious experience, able therefore to be conveyed, if at all, not by systematic exposition but only by rhetorical conjuring.<sup>143</sup> For those who are resistant to the very idea of religious experience, the nearest approximation might be to think of a latent awareness, fleetingly looming into consciousness, of the wholeness of God and His creation, and of the inter-relatedness of all things. The majesty, omnipotence and perfection of God are beyond description. God is in all creation, and this presence would be lessened by a complete representation that would necessarily have to stand to one side of that creation, and is therefore not to

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<sup>141</sup> . Phillip W. Gray, *Being in the Just War* (Saarbrücken: Verlag Dr. Müller, 2007) 7. My remarks about Erasmus, More and Machiavelli at the conclusion of chapter 13 suggest that just such a fragmentation was taking place in the early modern period.

<sup>142</sup> . Gray, *Being*, 9.

<sup>143</sup> . Commenting on the difference in style between Augustine and Aquinas, Gray concedes (or boasts?) that the former 'tends more in the direction of the poetic'. Robert L. Holmes echoes this when he remarks that while explicit discussion of war in Augustine is scattered and fleeting, the war metaphor is pervasive. Robert L. Holmes, 'St. Augustine and the Just War Theory' in Gareth B. Matthews (ed.) *The Augustinian Tradition* (Berkeley CA: University of California Press, 1999) 323/4. This is consistent with the general stylistic observation that Augustine relies on rhetoric more than Aquinas, while Aquinas leans toward syllogistic reasoning and systematic taxonomy.

be had or looked for. (Think of the hoary question in logic of whether the set of all possible sets is a member of itself.)

This emphasis on wholeness (perfection) stemmed from one of the major controversies of Augustine's day, and one which was central to his own life. Before his conversion to Christianity, Augustine had been a Manichee.<sup>144</sup> Manichaeism rested on a dualistic cosmology in which spiritual good and material evil struggled for supremacy. Evil, just as much as good, was a substantial and active force, entailing a tendency to disorder in an essentially corrupt world.<sup>145</sup> Against this, Augustine argued that God, the creator, was a sovereign without rival, and that evil was no more than a falling away from God and therefore from existence. 'Instead of the conflict of the two principles [good and evil], there remains only the unity of the one principle, the one truly real entity, God.' It followed that since all that existed was good, existence itself was good 'and the more fully existent something is, the more good it is'. Only as the ideal of existence and immutability could God be the creator of the world.<sup>146</sup>

The next step in this argument arises from exploration of the *manner* in which all things are related to one another. When introducing Augustine's ideas about war in chapter 9, stress was laid on *caritas*, or non-carnal love. But love for Augustine was not merely a relation between the three elements of the Christian Trinity (God the

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<sup>144</sup> . Samuel N. C. Lieu, *Manichaeism in the Later Roman Empire and Medieval China* (Manchester: Manchester University Press, 1985).

<sup>145</sup> . Established circa 240 CE, Manichaeism was regarded by the early Christian church as a heresy but is more properly to be seen as a religion in its own right. Though its founder, Mani (c. 216-276 CE) declared himself an apostle of Jesus Christ, the eclectic faith that he established drew on elements of Buddhism, Taoism, and Persian religions as well as Christianity, enduring, in parts of China, until the twelfth century.

<sup>146</sup> . Gray, *Being*, 58.

Father, God the Son and God the Holy Ghost); it was ‘the very substance of God’.<sup>147</sup> But as the principle of inter-relatedness of all things, love becomes closely aligned or associated with order, which in turn may be thought of, when extended in time, as Providence.<sup>148</sup>

This sense of order-as-Providence, still evident in English in the usage of ‘ordained’ to indicate a foreseeable and inevitable event, is crucial to a complete understanding of Augustine’s disregard for the outcome and consequences of war. This in turn, and somewhat counter-intuitively, provides rationales both for resort to force and for restraint in combat. In resorting to force, princes have the example of God Himself, ‘willing to use a strong arm to bring his elect to the faith, [which] while coercive ... is a great love, as it brings eternal salvation’.

Outcomes matter much less once it is accepted that both ‘success and failure have their place in the great Divine plan,’ and understanding of this promotes temperance, since it ‘prevents the just from seeing the current situation as “world-historic,” or as some unique turning point where moral restrictions become moot’.<sup>149</sup> Thus the melodramatic quasi-Augustinianism of the mere fellow-traveler, Arnold Toynbee, noted in chapter 9, contrasts with the calmer views of the believer, Herbert Butterfield, bespeaking a modern mind unable to grasp the full implications of abandoning consequentialism.

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<sup>147</sup> . O’Donovan emphasises the persistent lodging of the discussion of just war within the treatment of charity from Augustine to Suarez. Oliver O’Donovan, *The Just War Revisited* (Cambridge: Cambridge University Press, 2003) 9.

<sup>148</sup> . Holmes, ‘Augustine and the Just War’ 324. ‘Augustine understands [war] in terms of a divine order and ... seeks war’s legitimation in the relationship between God and humankind.’

<sup>149</sup> . Gray, *Being*, 65, 108.

## *Aquinas*

Rejection of consequentialism persists in Thomist thought, most cogently presented in the context of modern just-war debate by John Finnis and his colleagues, when advocating unilateral nuclear disarmament in the 1980s. But it has been his codification of Christian thought about war and his realist casting of this as primarily a political issue, centering on proper authority, that has constituted the novel and lasting contribution of Aquinas to the tradition.

The unique status of Aquinas within the Church, boosted by the foundational role ascribed to Thomist thought by early-twentieth century United States advocates of international law on war, have combined more recently to bolster doubtful claims about the continuity and comprehensiveness of the just war tradition. Specifically, they have concealed the range of political theology in the century that followed the death of Aquinas in 1274, drawing attention away from the central position occupied by proper authority in his treatment of the just war and the lack of consensus within Christendom on this vital point both then and since. In a Europe where feudalism and its imperial canopy were receding to reveal sovereign states, Aquinas had somehow to resolve the issues of political community and authority in a manner consistent with order and virtue on the one hand, and Papal and Imperial authority on the other. Within the Roman Empire, and with a theology that attached central importance to Providence, supreme temporal authority had not been the problem that it came to be for Aquinas, in a late-feudal political environment of overlapping and competing jurisdictions.

Gray is right to detect the beginning of an epochal change here, since the strong role Aquinas ascribed to kings, as individuals, in decisions such as the declaration of war, was to prompt related debates pitting kingship and discretion on the one hand against popular sovereignty and the rule of law on the other.<sup>150</sup> As will become apparent, if contemporary debate had been grounded in a revival of Marsilius of Padua rather than Aquinas it would have had a very different tone; and if this was a problem for Aquinas, how much more so for secular authorities today. As James Turner Johnson has observed, '[i]f God is not the motive force for transforming the world (as Augustine thought), then a contemporary secular entity such as the United Nations, NATO, or even the United States acting alone must take God's place as the motive force in history; this is a tall order indeed.'<sup>151</sup>

Aquinas retains unique authority for many Christians. Others have felt that he inclines too far toward reason and away from faith. Philip Gray, for example, sees the Thomist systematization of Christian thought about war as a retrograde process, 'making the just war doctrine a purely temporal formula.' It is here,' he complains, 'that we see the first steps toward the decline of the doctrine as a living tradition and its start as a legalistic formula'. This is harsh. Just-war doctrine remained embedded in political theology for Aquinas, as Gray himself slightly grudgingly concedes on occasion.<sup>152</sup> For those who are not Christians, the question arises with regard to Aquinas, as with Augustine, of the extent to which his thought about war relies upon a broader world view and theology and can flourish without them. It is not easy to see how the just-war doctrine of Aquinas can be detached from views on natural law,

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<sup>150</sup> . Gray, *Being*, 124.

<sup>151</sup> . James Turner Johnson, p.17 top (but of which work???)

<sup>152</sup> . For example, Gray, *Being*, 127.

speculative psychology and politics that are indissolubly bound up with Christian faith.

A first step must be to settle the place of war and the state within the broad framework of natural law. God had created a world with certain regularities and with a purpose or final cause. Natural law did not consist in divine commands, but arose from the way in which, once created, the world and its purpose, by their natures, offered an independent standard of justice in the world. Even God could be regarded as bound by natural law, since having willed the original act of creation it would be contradictory for Him to will anything inconsistent with it, and God could not be conceived of as willing a contradiction.

Natural law was known to humankind from three sources: self-evident principles (of which the most commonly cited is that we should do unto others as we would be done by), the considered views of expert jurists, and the *jus gentium* or 'law of peoples'. The quasi-deductive process of practical reason from self-evident principles was often set out as analogue of the strict deductive process of theoretic reason in the natural sciences. However the few self-evident principles that there were did not readily interpret themselves and the development of natural law by jurists, however expert, had a certain artificiality about it. In consequence, a great deal rested on the *jus gentium* or prevailing custom. The *jus gentium* was less a prototype of modern international law (*jus inter gentes*) than a statement of the laws common to, though independently developed by, all (or nearly all) peoples. Similarity of law among different peoples was seen as evidence of its consonance with human

nature. Its authority lay 'in the fact that no matter how many diverse peoples and kingdoms the human race may be divided into, it always has a certain unity, not merely as a species but even a sort of political and moral unity ...'.<sup>153</sup>

Much of the business of jurisprudence in this tradition had to do with the movement from the second to the third degree of natural law and with the distinction between what was ordained by natural law and what was merely consistent with it. Broad principles applied in general terms (the second degree) had finally to be applied in specific cases (third degree). This was not the kind of law reserved to courts and jurists, though they had their part to play. All people, especially those in authority, were responsible for the exercise of practical reason, by which natural law was applied in particular circumstances.

Many institutions, including property and, controversially, slavery, while not derivable from the self-evident principles of natural law, were regarded as consistent with it. The state was not required by natural law, but was consistent with it because its purpose was to allow individuals to live the good life by providing security and justice.<sup>154</sup> Similarly, the decision to go to war could be consistent with natural law. Evil in itself, war might be consistent with natural law provided it was an exercise of kingly prudence and therefore able to be regarded as subject to regulation. Earlier chapters have already made clear that authorization by a proper authority was

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<sup>153</sup> . Suárez, *De Legibus*, bk.ii, ch.xix, par.9, quoted by Bernice Hamilton, *Political Thought in Sixteenth-Century Spain* (Oxford: Clarendon Press, 1963) 108.

<sup>154</sup> . J. A. Fernandez-Santamaria, *The State, war and Peace: Spanish Political Thought in the Renaissance, 1516-1559* (Cambridge: Cambridge university Press, 1977) 67, summarizing Vitoria.

among the conditions to be fulfilled if this consistency were to be upheld, but the concept of proper authority was enmeshed in ideas about political community, kingship, prudence and command which, like the concept of war itself, were set within the larger scheme of natural law and would come under sustained attack in the fourteenth century.

These ideas are so foreign to all but a handful of minds today that they need some explication. Prudence in particular, now almost synonymous with expediency or calculation, had a very different sense for Aquinas. Many secular people in the modern world have tended toward legal positivism, a position in direct conflict with the legal naturalism of Aquinas and his contemporaries, and of Catholics to this day. Chapter 8 recalled that nineteenth-century adherents of the more extreme variants of legal positivism had regarded law as being neither more nor less than the command of a generally accepted authority, backed by sanctions.<sup>155</sup> If this position is accepted, then law may prevail within political communities, provided they are not tyrannies, but cannot regulate relations between sovereign polities, since by definition they acknowledge no superior authority. There is also a domestic problem. A ruler who sets aside his own law or applies it inconsistently may be judged a tyrant. If the command of a sovereign is regarded as nothing more than an act of will, then by

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<sup>155</sup> . The distinction between legal naturalists and legal positivists is succinctly drawn in the first two chapters of J. W. Harris, *Legal Philosophies* (London: Butterworth, 1997). Thomas Hobbes is often cited as among the earliest advocates of the positivist or command theory of law. 'Where there is no common Power, there is no law: where no law, no Injustice...' (*Leviathan* (Oxford: Clarendon Press, 1909) 98. However, Hobbes makes clear his belief in natural law and obligations deriving from it. His objection is to use of the term law to denote a system of rights and obligations lacking sanctions. There is some equivocation on this point. Thus 'The Lawes of Nature are Immutable and Eternall' (121), but, on the next page, 'These dictates of Reason, men used to call by the name of Lawes; but improperly: for they are but Conclusions or Theoremes concerning what conduceth to the conservation and defence of themselves; whereas Law, properly is the word of him, that by right hath command over others' (122). Note the circularity of 'him that *by right* hath command'.

what authority may one or more of the commands of any legitimate sovereign be found unjust?

A strongly positivist position might be to say that this cannot be helped: law is an instrument of domination and to speak of unjust law is empty talk. But this conflicts with a widespread human commitment to some supposedly intuitive principles of justice. Sanctions explain why people obey the law, but not why they so often feel obliged to do so. For every Jeremy Bentham, roundly declaring natural rights to be ‘nonsense on stilts,’ there has been a Thomas Paine, affirming universal principles superior to any single political authority. ‘All the great laws of society are laws of nature,’ Paine declared. ‘They are followed and obeyed because it is in the interest of the parties so to do, and not on account of any formal laws their governments may impose or interpose.’<sup>156</sup>

The medieval natural law tradition offered answers to both problems, but the coherence of the answers depended on belief that the world was the creation of God. Reciprocal interest might have been a sufficient explanation of social order for Paine, but not for Aquinas.<sup>157</sup> Rather, ‘to have the quality of law in what is ... commanded,’ Aquinas affirmed, ‘the will [of the prince] must be ruled by some reason... The maxim [that] the prince’s will has the force of law,’ he continued, ‘has to be understood with that proviso, otherwise his will would make for lawlessness rather than law.’ In short, the solution Aquinas offers to the dilemma faced by legal

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<sup>156</sup> . Thomas Paine, *The Rights of Man* (Pelican, 1969) 187.

<sup>157</sup> . Even Paine accepted that the force of law derived from something more than reciprocal interest, seeming on occasion to acknowledge the value of a communal commitment to order over justice. ‘I have always held it an opinion (making it also my practice) — he wrote —that it is better to obey a bad law, making use at the same time of every argument to show its errors and procure its repeal, than forcibly to violate it; because the precedent of breaking a bad law might weaken the force, and lead to a discretionary violation, of those which are good’. Paine, *Rights*, 178.

positivists is that reason provides the means by which the commands of sovereigns are to be judged and the necessary condition of their proper formulation. Since later secularizers of the natural law tradition were also to rely on these concepts of will and reason, very differently understood, the attempt to recapture the medieval understanding of natural law, and of the place of war within its frame, must examine the relationship between will and reason, as Aquinas conceived of it, before turning to the peculiar moral position and obligations of the sovereign.

The reader already holds the key to the first of these two chambers: 'the will must be ruled by some reason'. To appreciate fully what Aquinas meant by this psychological claim it is necessary to step back and consider the basis of his belief in natural law. God had created all things. This creation had purpose, being directed by Divine Providence toward its redemptive end. The nature of inanimate things directed them toward this end in a predetermined manner. The consistent responses of gold or water to their environments were set by their nature, and the inanimate world was therefore generally reliable and predictable, and its investigation a relatively unproblematic pursuit. But because humans, following the Fall, had intelligence and free will, they were at liberty to act as they would, and might not always act in accord with their true nature. To take just one example, Aquinas argued that individuals could not live the good life except in relatively self-sufficient and orderly political communities. It followed that behaviour that was bound to subvert such communities, such as theft, offended against natural law.

Following Aristotle, Aquinas dealt with this distinction between humankind and the remainder of God's creation by drawing a distinction between theoretic and practical

reason. Following his Christian predecessors, he regarded even the human world as intelligible to reason because it had been created by God. In this scheme, theoretic reason is concerned with what is; it 'contemplates the simply ultimate'.<sup>158</sup> Its method is deduction from self-evident first principles, such as the law of non-contradiction; its outcome is reliable scientific knowledge. Practical reason, while analogous to theoretic reason, is very different. It, too, proceeds from 'naturally evident principles' by a process of rational deliberation that resembles deduction though it is not identical to it.<sup>159</sup> Complementing the rather general self-evident principles of natural law — analogues of the first principles of theoretic reason — stand the *ends* of the virtues, practical reason being driven by final causes and, above all, by 'the common end of mankind'.<sup>160</sup> Practical reason therefore resembles an art (and so is practical) because it is concerned with what is to be done for the achievement of an end, the good life. This end, in turn, is constituted by the ends or final causes of the individual virtues. Prudence is the business of arranging conduct in such a way as to achieve these ends in a world of contingency and uncertainty and thereby conform to the redemptive direction of Divine Providence.<sup>161</sup> For Aquinas, it was 'at once a virtue of mind and a virtue of character ... [standing] first among the moral virtues, which in practice it binds together'.<sup>162</sup>

In place of the sure conclusions yielded by the deductive exercise of theoretic reason, practical reason offered a number of possible paths to any single chain of reasoning. Its judgments might be formed by quasi-deductive deliberation about a

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<sup>158</sup> . St Thomas Aquinas, *Summa Theologiae* (London and New York: Eyre & Spottiswood and McGraw Hill, 1974) vol.36, 7.

<sup>159</sup> . Aquinas, *Summa*, 36, 23.

<sup>160</sup> . Aquinas, *Summa*, 36, 7 and 23.

<sup>161</sup> . Loc. Cit.

<sup>162</sup> . Thomas Gilby, writing in the introduction to St Thomas Aquinas, *Summa Theologiae* (London and New York: Eyre and Spottiswood, 1974) xiv.

specific case, by reference to some more or less general law or custom (the *jus gentium* or law of peoples – plural), or else by reliance on acknowledged experts. One way or another, individuals reasoning in good faith might fail to agree. This was because practical reason dealt with human affairs, which were radically contingent because of the Fall. It was sin that made for uncertainty in moral reasoning, resulting in the resistance of moral life to reduction through ordinances or written laws. It was sin that gave rise to the need for prudence, consisting in the reconciliation of basic principles of natural law with the contingencies of human life, in the determination of one's own conduct, in the judgment of specific cases, and in the framing of legislation.

The exercise of practical reason consisted in the prudential application of general principles to particular cases through deliberation and judgment, resulting finally in command. Aquinas argued emphatically that prudence resided in human reason, not the will. It had to do with comparison and judgment – learning from the past and anticipating the future, as in Titian's celebrated allegory – and it was capable of progressive refinement through rational deliberation.<sup>163</sup> However Aquinas immediately qualified this by adding that 'the value of prudence consists not in merely thinking about a matter, but also in applying itself to do something ... [and] given failure here, then this above all conflicts with prudence'.<sup>164</sup> The passage of time was also a feature of other late medieval treatments of prudence. For Pierre

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<sup>163</sup> . Erwin Panofsky and Fritz Saxl 'A Late-Antique Religious Symbol in Works by Holbein and Titian', *Burlington Magazine*, XLIX (1926) 177-181, reprinted as 'Titian's "Allegory of Prudence": A Postscript' in Panofsky's *Meaning in the Visual Arts* (London: Penguin, 1970) 181-205.

<sup>164</sup> . *Ibid.* 7.

Bersuire (1290-1362) it consisted in 'the memory of the past, the ordering of the present, [and] the contemplation of the future'.<sup>165</sup>

It was not possible for the individual to live the good life except in a community. The state was a perfect or complete community because it was autarkic. It followed that the common good of the political community was higher than that of the individual or the family because it was a necessary condition for achieving them.<sup>166</sup> Political prudence was therefore to be exercised by all citizens, 'because each man, proportionately to his reasonableness, has a share in government through his freely reasoned decision'.<sup>167</sup> Kingly prudence, or statecraft, by contrast, was to be exercised only by sovereigns. Since the perfect (complete) form of rulership was realized in the king, so 'the prudence which befits a king ... is of a special and most complete kind'.

The vital point that distinguishes Thomistic analysis from that of the secularisers of early-modern Europe is the insistence that command is an act of reason, not of will. Law may be a command of the prince for both Aquinas and Hobbes, but for Hobbes that command is willful while for Aquinas it is reasonable: the final episode in an exercise of prudence. To sum up, command consists in taking counsel, forming a judgment, and executing that judgment through a command: the very process laid out by Shakespeare in *Henry V*, Act 1 Scene 2. And while the final command might appear to be an act of will, Aquinas divides it into two parts. 'Setting in motion as

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<sup>165</sup> . I owe this reference to a blogger with the pseudonym of Miglior Acque. We have already seen that Shakespeare's King Henry V could not truly exercise prudence or achieve lasting dominion in France because his father had usurped the crown.

<sup>166</sup> . Aquinas, *Summa*, vol.36, p.35.

<sup>167</sup> . *Ibid.* 39.

such is an act of will,' he concedes, '[b]ut command implies a motioning *together with a kind of ordinance*. That is why it is an act of reason...'<sup>168</sup>

Like Augustine, though for different reasons, Aquinas had high expectations of what we would now term the 'competent authority' responsible for decisions about the use of public force. He well knew that princes might err. Statesmanlike prudence might befit a king, but there was no guarantee that he would possess it. It was not something inborn or natural, as Aquinas believed moral sense (*synderis*) to be. It could not be, for it concerned the relation between general principles and particular circumstances. Accordingly, prudence was to be 'discovered through experience and instruction'.<sup>169</sup> And it was this provision, above all, that opened the door, admitting counsel and custom – the expert jurists and the *jus gentium* – as the support of princely deliberation and the legitimating endorsement of princely command when voiced as positive law.<sup>170</sup>

The Thomist view of command as rational action has been dealt with at length because it is so very distant from the modern view in which, predominantly, command has been thought of as arbitrary and, for that reason, in need of constraint by law. This view persists, but in the Catholic tradition command is less a matter of constitutions (whether republican or monarchical) than of the personal responsibility of heads of government or state. In retrospect, it is apparent that many powerful policy-makers in the United States and Britain had already decided, months or years

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<sup>168</sup> . Aquinas, *Summa*, vol.36, 29-33. My emphasis.

<sup>169</sup> . Ibid. 49.

<sup>170</sup> . This point was later emphasized by Vitoria, as Paul Christopher notes (*Ethics* 60) and is echoed in the first act of Shakespeare's *Henry V*, as we have seen.

before, that it would be right to remove Saddam Hussein from power. They knew that it was not enough to be right about this. An attack had also to be legal. Many of those who disagreed with their moral judgment placed their faith in law as a restraint on the arbitrary exercise of power by their masters. Finally, the politicians were able to persuade one another of the legality of their intended action.<sup>171</sup> The implication of any wholehearted acceptance of the Thomist view of kingly prudence would have been to remove even such restraint as the law currently provides, restoring a much more extensive power to heads of state than exists in any democracy, and clothing that power in the mantle of reason. The realist tendency in Aquinas consists not solely in his distinction between private riot and public warfare but in his preference for princely responsibility over legal regulation. This is quite at odds with the temper of the liberal state, with its insistence on the rule of law and the separation of powers.

### *After Aquinas*

Taking Aquinas off the peg, for present use, places extraordinary moral responsibility on the shoulders of heads of government. In some degree, the recent rise in prosecutions of former leaders for war crimes and crimes against humanity has suggested a willingness to acknowledge this. Yet an awareness of the perils of this political theology in the century after his death — of which intransigency is not the least — led some of the successors of Aquinas to modify his position on sovereignty, with consequences that go some way to solving the problem through increased reliance on law, while exposing the strangeness and anachronism of current enthusiasm for the Thomistic concept of proper authority. This final section of the

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<sup>171</sup> . For an exceptionally lucid legal analysis see Marc Weller, *Iraq and the Use of Force in International Law* (Oxford: Oxford University Press, 2010).

chapter traces the transition through brief consideration the views of Marsilius of Padua (1275-1342) and his near contemporaries on the balance between kingly prudence and positive law.<sup>172</sup>

Marsilius dissented from Aquinas on a number of issues that bear on the ethics of war. His broad intent was to reduce the effective scope of deliberation and discretion by extending that of prior ordinance and regulation. The political objective was to enhance popular authority over that of monarchs, but in the process the moral qualities of individuals came to matter less. The process of enactment of the popular will in legislation was largely mechanical, so that the question of whether prudence was natural or acquired through experience and good counsel fell by the wayside. Government was beginning to be thought of as more mechanistic and bureaucratic, concerned with the prevention of order as an end in itself rather than the pursuit of order as a means to the good life.

Marsilius conceded that the perfect ruler must have prudence in order to judge adequately in cases 'where the act itself or its manner is not determined by law'.<sup>173</sup> But any similarity to Aquinas is superficial. St Thomas had expected the greater part of public business to be settled by prince in council and was content with the exercise of discretion over a large area of uncertainty. Marsilius looked to minimize this. He followed Aquinas in distinguishing three phases of prudence: deliberation, judgment and command. But all three were now removed from the council chamber of the prince to a more public arena. First came deliberation by prudent experts;

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<sup>172</sup> . I have relied quite heavily here on a paper I wrote many years ago which, from the outset, is studded with extraordinary typographical errors that I might have been able to correct had proofs been sent to me. Charles Jones, 'Prudence: reply to Garver', *Social Epistemology*, 1:4 (1987) 311-320.

<sup>173</sup> . Marsilius of Padua, *The Defender of Peace* (Translated and with an introduction by Alan Gewirth. New York: Harper & Row, 1967) 56.

next, judgement, as citizens, sitting in council, chose from among the proposals put before them by the experts. Last came command, as the citizens voted on executive measures or ordinances giving expression to the law.<sup>174</sup>

In so far as some business of state defied codification, it remained a matter for the exercise of princely prudence. William of Ockham, mounting a rearguard action against the substitution of legislation for prudent command, rationalized this by identifying a third mode of natural law, *jus naturalis ex suppositione*, consisting in 'rational responses to non-rational and contingent circumstances' in which the prince still had a privileged role.<sup>175</sup> The trouble was that as the tide of regulation rose, the island of princely discretion became ever smaller, consisting more and more in decisions on contentious and complex matters, such as the declaration of war, which could not but appear arbitrary and even immoral. Having first eroded the moral authority of the prince, the authors of the new prudence then conceded it in the most vital of circumstances. Prudence began to acquire its modern association with expediency, secrecy, and arbitrariness – a total perversion of original practice and meaning. If the prince was to be so hedged about and constrained by the magic of written law that there was scarcely room left for traditional statecraft, this could only be because he was not to be trusted. Yet if not to be trusted in routine matters, how can the prince be trusted in the great, the exceptional, the ultimate matters of state? The prince was reduced from an ideal role as guardian of the possibility of the good life to efficient cause of civil order. All this savours of a radical fear of uncertainty: the uncertainty necessarily involved in the exercise of practical reason, in reliance on

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<sup>174</sup> . Alan Gewirth, *Marsilius of Padua and Mediaeval Political Philosophy* (New York: Columbia University Press, 1951) 168-70.

<sup>175</sup> . Arthur Stephen McGrade, *The Political Thought of William of Ockham: personal and institutional principles* (Cambridge: Cambridge University Press, 1974) 177.

custom, in the contingency of events, in the play of competing jurisdictions, and in the variable character of princes. Shorn of the more popular aspects of Marsilian republicanism, the whole strategy may be seen to have acquired the beginnings of secularism and civil autonomy only by submitting to absolutism and amorality.

The purpose of this excursion into the fourteenth century has been to show that the view of proper authority taken by Aquinas was very far from being uncontested in the century following his death. His model of sovereign decision making is not easily transferred to the twenty-first century and already appeared inadequate to his near contemporaries. No better justice is done to Aquinas by privileging him and his followers than is done to Augustine by ignoring the unity of his thought. Formulaic just-war doctrine today depends on a form of intellectual cryogenics by which elements of past thought, wrenched from the texts and the politics from which they arose, are defrosted and assembled into an intellectual monster worthy of Victor Frankenstein. Walzer's instinct, that it was best to start afresh, was sound but impossible. His work is haunted by the whispering of ghosts denied audience. A better route, latent in his work, consists in the acceptance of past principles governing the ethics of war as moral hypotheses, entirely cut away from their ground, lacking privilege, and open to the test of experience. In such a view of war they may be conjoined with the more phenomenological military ethics implicit in modern texts, examined in Part 3, to provide a pragmatic synthesis of the political and the personal aspects of warfare.