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# The Modern Secularization of Just War Theory and its Lessons for Contemporary Thought

Aviva Shiller

*The University of Western Ontario*

Supervisor

Dennis Klimchuk

*The University of Western Ontario*

Graduate Program in Philosophy

A thesis submitted in partial fulfillment of the requirements for the degree in Doctor of Philosophy

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The Modern Secularization of Just War Theory and its Lessons for Contemporary  
Thought

(Thesis format: Monograph)

by

Aviva Shiller

Graduate Program in Philosophy

A thesis submitted in partial fulfillment  
of the requirements for the degree of  
Doctor of Philosophy

The School of Graduate and Postdoctoral Studies  
The University of Western Ontario  
London, Ontario, Canada

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## Abstract

Just war theory is a family of views that has undergone many important changes throughout its development in the Western philosophical tradition. The following is an historical analysis of the transition from a religious to a secular conception of just war theory in the Early Modern period. My main argument is that the secularization of the theory led to the separation of *jus ad bellum* from *jus in bello*, a major change that had positive consequences on the theory and its application. One important consequence of this change was to place combatants on both sides of a conflict on an equal moral footing, applying the principles of *jus in bello* equally to all.

But the progress made since the theory's secularization is threatened to be reversed. Michael Walzer's "supreme emergency" exemption allows *jus in bello* to be sacrificed under certain extreme conditions, and Jeff McMahan promotes the view that just and unjust combatants do not have the same rights in war. Furthermore, a popular idea in the social sciences is that if the nations of the world all adopted a democratic mode of governance there would be few to no wars. This democratic peace theory, while not explicitly condoning the use of violence to achieve the result of a lasting peace, has had profound policy implications among democratic states. The United States, for example, has used the justification of spreading democracy abroad to promote its military ambitions for the last century. I put forward a number of arguments against these views and instead promote the adoption of a Kantian program for gradually moving towards a more peaceful international realm based on mutual trust and cooperation.

Religious justifications for going to war are no longer popular as a lasting peace was not achieved but rather contradicted by the massive violence caused by religious wars. If the religious justifications for going to war put forward in the Middle Ages were fallacious then I believe we should be skeptical of similar arguments put forward today in the name of political structure.

## Keywords

Just War Theory, *Jus ad Bellum*, *Jus in Bello*, St. Augustine, St. Thomas Aquinas, Grotius, Kant, Democratic Peace Theory, Michael Walzer, Jeff McMahan.

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## Introduction

The just war tradition begins with the question, ‘is it ever just to wage war’? Wars obviously have devastating consequences for adversaries in terms of lives lost, resources spent, and destruction of property, not to mention other externalities such as disease and population displacement. Given the huge material costs and the loss of human life, how then can war ever be the just way to resolve a dispute between adversaries? Just war theory is a family of views that exists in many different versions. However, what all versions of just war theory have in common is that they develop sets of ethical principles that apply in the context of war. As such, all versions of just war theory accept the basic idea that war is a sphere of human action to which principles of morality can and should be applied. Just war theory, then, is contrasted with and occupies a median position between two alternatives. On the one hand we have pacifism, which holds that wars are never justifiable and cannot be conducted morally. And on the other hand we have realism, which holds that war is a special situation that exists outside of morality. I will not take it upon myself to argue for the merits of just war theory against its pacifist and realist alternatives. I will take for granted that some version of just war theory is correct and argue for its adoption against other versions of just war theory.

Just war theorists generally divide the theoretical landscape into three parts. Although this has only been explicitly done in recent times these categories have their beginnings in the earliest versions of the theory. *Jus ad bellum*, or the justice of war, concerns the principles guiding the resort to war. Temporally this is the first part of just war theory as it concerns the principles related to the beginning of war. Some of the persistent principles of *jus ad bellum* include<sup>1</sup>:

- Just Cause: What purposes can war be waged for?
- Right Authority: Who has the right to declare war?
- Right Intention: Even if there is a just cause in play, is this the actual cause being fought for?

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<sup>1</sup> The following lists are my formulations of the principles of just war theory. For similar lists and an overview of these principles see: Nicolas Fotion, *War and Ethics: A New Just War Theory*, ed. James Garvey and Jeremy Stangroom, Think Now (New York: Continuum, 2007), 19-22; Brian Orend, *The Morality of War* (Toronto: Broadview Press, 2006), 62-65.

- Reasonable Hope of Success: Is fighting the war at all likely to meet with success?
- Last Resort: Are violent means the only ones possible to achieve the just cause? All other options must be exhausted before engaging in warfare.
- Macro Proportionality: Are the costs associated with waging the war proportionate to the just cause?

The second part of just war theory is *jus in bello*, or the justice in war. The principles guiding this second category include:

- Micro Proportionality: Are the costs of pursuing each military manoeuvre proportionate given the aim of the attack?
- Discrimination: Are the people and or installations under attack the proper objects of military operations?

The final part of just war theory is *jus post bellum*, or the justice after war. This is the area of just war theory that is currently undergoing the most development and that also has the least consensus. The following is a list of potential principles of *jus post bellum* as it has been developed by Larry May:<sup>2</sup>

- Retribution: How can we bring those who waged an unjust war to justice?
- Reconciliation: How do we ensure a lasting peace between former enemies?
- Rebuilding: Who is responsible for rebuilding after war has ended?
- Restitution: What if anything is due to those who had just cause for war?
- Reparations: What is owed to those against whom an unjust war was fought?
- Meta-Proportionality: How can we make sure that the application of the other principles of *jus post bellum* does not do more harm than good?<sup>3</sup>

The various principles of just war theory listed above have been around for centuries. Authors disagree as to how these questions, as I have described them, should be answered but not that these are the kinds of questions that any complete account of just war theory must seek to answer.

One persistent criticism levelled at just war theory is that the principles have been developed by potentially well-meaning jurists, politicians and academics, but that they do

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<sup>2</sup> Larry May, "Jus Post Bellum, Grotius, and Meionexia," in *Jus Post Bellum: Mapping the Normative Foundations*, ed. Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (Oxford: Oxford University Press, 2014), 16-18.

<sup>3</sup> Meta-Proportionality is my term for proportionality applied to *jus post bellum*.

not serve their intended purpose because realist considerations trump good intentions on the battlefield. In spite of the attractiveness of this sceptical position, numerous historical and contemporary accounts suggest that the laws of war that have been developed have had a profound effect on the types of wars that are waged and the ways in which they are fought. It is possible to see how the laws of war have changed over time, through their application on the battlefield. One period in which the historical record is particularly clear is during the early days of the United States of America. The US went to war frequently in its early days against a number of rival nations including France, Britain, Mexico, Spain, and Canada, not to mention native tribes across the continent. Because of the frequency of wars that the US was engaged in, there was continual discussion among politicians and military leaders regarding the proper application of the laws of war as they were handed down by European scholars and experiences. American leaders debated the merits of various positions regarding possible justifications for war and particular policies surrounding a number of issues from the treatment of prisoners of war to the rights of combatants and enemy non-combatants, which then directly influenced what happened on the ground. For example, on December 29, 1837 a British attack on an American ship carrying arms, supplies and men to a Canadian revolutionary faction seeking independence from Britain caused diplomatic outrage. Britain and America almost went to war over the incident, which would see the American ship the *Caroline* torched and set adrift to careen over Niagara Falls. In the aftermath of the attack the Secretary of State of the US, Daniel Webster complained that the British had led an unjustifiable attack on US soil. The standard to which the British were to be held in assessing the situation, according to Webster, was whether or not there was “necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.” The *Caroline* was not a military vessel, it was carrying supplies for a possible campaign against the British, but it was not even located in British controlled waters and could not have launched an attack against the British. Moreover, it was surprise-attacked at night without a declaration of war between Canada and Britain. Webster’s formulation of what came to be known as the *Caroline* dictum became the world’s standard as the test of

lawful self-defence ever since the end of World War II and was used at Nuremberg to conclude that the Nazi's had waged a war of aggression.<sup>4</sup>

The British attack on the *Caroline* raised a further puzzle regarding the laws of war that was even more controversial than the justification of the attack itself. During the attack, American passenger Amos Durfee was shot and killed. Afterwards the Americans sought to bring his killer to justice for what they viewed as murder. Several years after the attack a Canadian supporter of the British, Alexander McLeod, was charged with the murder of Durfee. McLeod's trial raised the long-standing question of whether soldiers at war were individually responsible for the actions that they took on behalf of their political communities. In other words, even if it was granted that the British had no right to attack the American vessel, there was still a separate question of whether it was right to charge McLeod with murder. At the time a British minister, Henry Fox, argued that: "making soldiers individually responsible for the consequences of military action authorized by their home states undid a century's progress in the laws of armed conflict."<sup>5</sup> He contended that, "[a]bsent immunity, a soldier facing criminal prosecution and a possible death sentence might be willing to fight to the bitter end."<sup>6</sup> In the end the Americans agreed with the British that allowing soldiers to be prosecuted for actions taken on behalf of their state would open the door to "impassioned and all-out war"<sup>7</sup> for personal protection as opposed to a more measured and rational war for a common national purpose. The debate regarding the rights of combatants in war continues today and has been around since the beginnings of just war theory but one standard answer has been to argue that there is a difference between murder and killing in war. The eventual release of McLeod is evidence that the seemingly un-influential debates about the laws of war have a direct effect on policy. These are not unimportant consequences; Britain and the US were making preparations to go to war against one another over the results of the

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<sup>4</sup> John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (New York: Free Press, 2012), 111-13.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid., 113.

<sup>7</sup> Ibid., 115.

McLeod trial, essentially over the proper interpretation and application of the laws of war developed by enlightenment thinkers.

One of the first major debates in the history of just war theory concerned exactly this issue of the difference between killing in war and murder. St. Augustine was worried that Christians could not become soldiers because they would be involved in murdering other people and would thereby compromise the eternal salvation of their souls by going against divine law. However, Augustine came out against the popular pacifist position of the early church and argued that we have a moral obligation to preserve our own lives against violent attack. His view went against the prominent Christian doctrine of “turn the other cheek”, which seemed to require that the practicing Christian allow harm to befall him even up to the point of loss of life so as not to commit a sin himself. His argument opened up the theoretical terrain to arguments for self-preservation and the defense of others who require assistance but he didn’t stop with arguments for self-defence. He also argued that violence could be undertaken as punishment to rectify wrongs already done. Augustine’s arguments were directed at a Christian audience who were largely concerned with whether or not waging wars and punishing wrongdoing could be done by earthly agents, or whether punishment was the sole job of God at the final judgment. In spite of the Christian orientation of his arguments, Augustine’s arguments were taken up again and again in the just war literature and modified to make sense of the conditions of new time periods and new problems.

This work seeks to trace the history of just war theory from its Christian beginning in Augustine through its most prominent defenders up until the present day. What I hope to show is that the theory has undergone important changes as the political landscape has changed. Some of these changes, especially the secularization of the theory that took place in the Modern period, have resulted in great shifts in its focus, which I believe have produced positive outcomes if we consider policies that aim to reduce political violence. What I hope to convince my readers of is that the move from a theory that focuses on *jus ad bellum* and that places a concern for these principles above those of a fully developed *jus in bello* runs the risk of working to corrupt the basic spirit of just war theory, which is to limit the destructiveness of warfare and to create the

conditions necessary for a lasting peace between nations. The version of just war theory that I favour does not depend on any particular political or religious ideology for its applicability. This will become clearer as my argument develops, but for now suffice it to say that there is a conceptual link between the subordination of *jus in bello* to *jus ad bellum* and the belief that a particular religion or governmental form has “got things right” and ought to use its positive influence to lead others towards more peaceful coexistence.

In the Modern period, Hugo Grotius and his followers elaborated a version of just war theory that sought to detach the Christian justifications for going to war from what would come to be known as the Natural Law theory which would root the right of nations to go to war in our common humanity and the derived rights that we all have to the defense of our own bodies against attack. With this shift in focus, the natural law theory allowed for the elaboration of a coherent body of law related to just conduct in war, or *jus in bello*, which had previously been secondary to questions about the justification of the war itself. In other words, for the Christian thinkers of the Middle Ages, the important question of just war theory was which side in a conflict was justified to wage war, and this question was answered by the side that had God’s blessing or God’s purpose. If your side had a God given purpose to wage a war against an enemy, in the way that the Hebrews had been given the right to go to war directly by God in the Old Testament, then short of committing otherwise sinful acts in the war, whatever means were necessary to win against an unjust adversary were allowable. In the Modern version of just war theory advanced by Grotius and others, having just cause to go to war is still an important consideration, however, just cause is not given by divine authority nor is it decided based on who won after the fact. What is most important after the war is over is not the question of who had justice on their side but whether the war was waged in a way that minimized damages and promoted a future peace between those who previously fought.

This shift in focus and what has come to be known as the separation of *jus ad bellum* from *jus in bello* (and *jus post bellum*) is extremely important from the point of view of international law and public policy making. If we think that what matters most is who has justice on their side in a war, then international law will reflect this value and

allow exceptions to be made for the sake of justice prevailing in the application of the laws of *jus in bello*. For example, regardless of whether a just war theorist holds that *jus ad bellum* and *jus in bello* should be separate or ordered hierarchically, most agree that intentionally targeting non-combatants, or civilians, in order to achieve a military goal is not allowed. This is the *jus in bello* principle of discrimination. However, those who think that what matters most is just cause and not adherence to the principles of *jus in bello* may be willing to allow the intentional harm of non-combatants in cases where it is the only way for the just combatants to avoid losing the war or suffering extreme losses.

One contemporary just war theorist who makes exactly this argument with respect to violating certain principles of *jus in bello* is Michael Walzer. In his famous 1977 book *Just and Unjust Wars*, Walzer argues for principles of *jus ad bellum* such as just cause and right intention alongside *jus in bello* principles of discrimination and proportionality. However, when he confronts the question of whether the principles of *jus in bello* can be violated in order to prioritize those of *jus ad bellum*, Walzer comes down on the side of *jus ad bellum*. The specific case Walzer has in mind when making this concession to *jus ad bellum* is the British use of terror bombing in World War II prior to 1941. After 1941, Walzer judges that other options were possible and so it became untenable to use terror bombing as a tactic.<sup>8</sup>

Walzer's position on this matter has been hotly debated and there are many independent reasons for thinking that the "Supreme Emergency Exemption" is not worth adopting in this case (which is the only incidence of the supreme emergency that Walzer condones). There are the practical concerns of its efficacy, some arguing that it was not worth adopting because it did not actually stall a Nazi victory. More important are the ethical reasons for contesting this strategy. On a "Grotian" interpretation, adopting a campaign of terror bombing is not only wrong because it violates that principles of *jus in bello*, it also undermines the possibility that current enemies will behave peacefully towards one another in the future. The principles of *jus in bello* serve a dual purpose for Grotius; first they accord with his conception of the natural law and are ultimately

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<sup>8</sup> For a full description of Walzer's example see: Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed. (New York: Basic Books, 1977), 255-63.

justified based on our interpersonal relationships. Moreover, they serve the secondary purpose of reinforcing the bonds of trust between people, even if they are currently fighting one another. Current enemies may be engaged in a battle over territory or natural resources but regardless of the justifiability of their actions as regards *jus ad bellum* they may still respect the principles of *jus in bello*, for example, by not targeting civilians or by respecting the rights of prisoners of war. Enemies who fail to respect these principles are likely to hold grudges owing to the mistreatment of their citizens and are less likely to come to a lasting peace, even if hostilities end temporarily. As Hobbes, Kant and others have pointed out, an end to present hostilities is not the same thing as peace. Conditions of peace exist when there is a reasonable hope that fighting will not happen in the future. This work seeks to contribute to the current debate regarding the correct version of just war theory and the interpretation of its various principles. Next I will summarize the content of the chapters that contribute to the particular version of just war theory that I believe holds the greatest hope of leading to a lasting peace.

## Chapter 1:

In the first chapter I lay out some of the popular versions of just war principles espoused by a number of Christian thinkers. I begin with and spend the most time on St Augustine's views, not only because his principles lay the groundwork for the Christian thinkers who followed him but because many survive in contemporary versions of just war theory. Other figures include Gratian, a 12<sup>th</sup> Century monk who canonized existing law and whose work, the *Decretum* inspired generations of Christian thinkers and framed legal debate in his time. His followers, the Decretists and Decretalists continue to elaborate the laws of war, working up to the views of St Thomas Aquinas and his circle who synthesized existing Christian thinking handed down from Augustine with the newly rediscovered Aristotelian texts popular in the 13<sup>th</sup> Century. James Turner Johnson argues that, by the end of this period, a kind of theological consensus had been reached with regards to warfare, a consensus that did not exist in earlier periods. Warfare was increasingly viewed as being a tool for the defense of the political community and a way to achieve the common goal of peace through the spread of Christianity. Just wars were those waged in defense of the Christian faith or to punish wrongdoing on the part of an

adversary, which was sometimes taken to include sins of idol worship or heresy. Augustine's concern, as we saw above, was with whether a good Christian could go to war and kill without sinning against God, in opposition to the popular pacifist view of many theologians at his time. By the end of the Middle Ages, the question driving just war thinking had been turned on its head. It was generally accepted that a Christian could fight in defense of his life or for territorial sovereignty. The question being asked in the 13<sup>th</sup> century was whether a Christian state could initiate offensive wars against potential enemies in order to convert the uncivilized to Christianity and thereby save their souls and move closer to the goal of achieving a lasting peace on earth. The question was answered in the affirmative, with the added bonus of eternal salvation for any soldiers carrying out the work of God on earth. Far from fearing eternal damnation for fighting in a war, even one of defense, by this time soldiers were being promised martyrdom if they participated in wars sanctioned by the Church.

## Chapter 2:

By 1625, when Dutch jurist Hugo Grotius first published his *On the Rights of War and Peace* the religious and political climate in Europe had undergone a profound transformation. Instead of the hegemony of Roman Catholicism as the one authorized religion, Europe and the rest of the Empire had splintered into independent Princedoms and countries. Improved naval capacities had allowed European settlers to travel to the Americas and to spread Western power to the far reaches of the globe. New opportunities for territorial conquest as well as interaction with a diversity of religious views and cultures previously unknown were now available. Grotius' writings marked a shift in thinking about international relations and the principles of just conduct in war. Instead of a theory focused on religious teachings and biblical interpretations, Grotius' theory started from the assumption that men are natural creatures endowed with the ability to rationally discover the principles of right action without requiring recourse to any specific holy texts. This was a radical shift because it meant that all people regardless of their religious faith were capable of discerning right from wrong. Grotius held that there were certain supererogatory divine laws that only Christians were held to

but that the basic underlying morality of all human beings was the same and based on what he called the “natural law”.

In this chapter I show how the derivation of the principles of right action in war and international relations from the principles of the natural law reversed the focus of just war theory from one most concerned with *jus ad bellum* to one that looked primarily to *jus in bello* and secondarily towards *jus post bellum*. In other words, while the previous religious thinkers were most concerned with who had a right to wage war and for what reasons, Grotius switched the emphasis of the theory to right conduct in war with a view towards establishing a peace between those currently fighting. Grotius’ lasting impact was to formulate rules of right conduct in human nature instead of religious teachings. On top of having an effect on international relations, this secularized perspective also changed how we think about sovereignty and political authority.

### Chapter 3:

In the centuries following Grotius, political thinkers moved from characterizing sovereignty in terms of group adherence and social cohesion and began to make the individual citizen the center of attention. In the new wave of thinking that ran up through the Enlightenment, thinkers focused on the need for citizens to consent to the political power being placed over them. With this new emphasis on individuals and their rational capacity for self-governance, the social contract tradition had to balance tensions arising from opposing the need for social controls with individual autonomy and freedoms. In many ways we are still living with these tensions today. Depending on the governmental structure of the countries we live in, we are under varying degrees of social control. Democracy is widely viewed by many theorists as the most legitimate governmental form because it takes seriously the rights of individual members of the political community to have a say in how they are governed. Democracies have also been relatively successful at maintaining peaceful relations between diverse and multicultural groups over significant periods of time. However, in the international sphere there are no democratic

institutions that are tasked with keeping the peace between the almost 200 nation-states currently in existence.

Even in the 1700's, Immanuel Kant was well aware of the failings of the state system, which was just in its infancy at the time, and he predicted many of the political problems that still plague international politics today. He argued that just war theorists, including Grotius, were "sorry comforters" because they did not address the systemic lack of coercive power that, he believed, rendered their principles ineffective in the real world. In this chapter I lay out Kant's program for perpetual peace and show how it attempts to transcend the limits of the use of force between nations. Kant believed that stronger nations could be predicted to use force in situations where this would be to their advantage and that the only way to escape this power dynamic would be to gradually move towards a system where the use of force would not be in the interests of the more powerful. While some of what Kant says regarding international relations would seem to place him firmly within the just war tradition, his later work on perpetual peace moves beyond the just war categories towards a theory of cosmopolitan cooperation and voluntary pacification between a widening league of nations.

## Chapter 4:

Kant's political works have gained renewed popularity in recent years and have inspired social scientists. One of the most noteworthy influences that Kant's political thought has had is on democratic peace theory. The basic idea behind democratic peace theory is that there is something special about democracies that makes them less likely to go to war against one another. This explains why no two democracies (or at most very few) have gone to war against one another in the past 200 years.<sup>9</sup> In his essay "Perpetual

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<sup>9</sup> See: John M. Owen, "How Liberalism Produces Democratic Peace," in *Debating the Democratic Peace*, ed. Michael E. Brown, Sean M. Lynn-Jones, and Steven E. Miller (Cambridge, Massachusetts: MIT press, 1994); Bruce Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World* (Princeton: Princeton University Press, 1993); Michael W. Doyle, "Kant, Liberal Legacies and Foreign Affairs," *Philosophy and Public Affairs* 12, no. 3 (1983); A. Cooper Drury and Dursun Peksen, "Sanctioning for Democracy," in *Democratic Peace in Theory and Practice*, ed. Steven W. Hook (Kent, Ohio: Kent State

Peace”, Kant predicted that spread of republicanism would lead to peaceful relations between nations.<sup>10</sup> This assertion has been adopted by democratic peace theorists in support of their theory. They equate Kant’s conception of republicanism with their preferred definition of democracy and then argue that he predicted the democratic peace. In this chapter I present democratic peace theory and argue that Kant’s position does not support it. I show how Kant’s vision of perpetual peace differs markedly from the vision of the democratic peace and why we should prefer a Kantian approach. Following this argument I also reject democratic peace theory on the basis that it is internally flawed, whether Kant would have hypothetically endorsed it or not. Democratic peace theory creates dangerous ideological grounds for going to war similar to those that the late Medieval Christian thinkers thought justified the resort to violence.

## Chapter 5:

Following the rejection of democratic peace theory as a viable political theory I turn to examining the similarities between the argument structures of democratic peace theory and the late Medieval versions of just war theory that placed a great deal of importance on the authority of religious leaders and religious causes for going to war. What I hope to show is that if we have good reasons for being sceptical of religious justifications for going to war, we should be equally sceptical of other ideological justifications that assume there will be an obvious way of judging who the just and unjust enemies will be in cases of armed conflict. This matters greatly for just war theory because if one side to a conflict can be obviously labeled the unjust opponent, because it fails to conform to a certain governmental form like democracy, then any actions undertaken by this unjust (authoritarian, totalitarian, fascist, communist...) opponent will by default count as unjust and vice versa for the just side. Moreover, if you are fighting a war with the explicit aim of spreading democracy and the human rights protections that

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University Press, 2010); Jörg Fisch, "When Will Kant's Perpetual Peace Be Definitive," *Journal of the History of International Law* 2 (2000).

<sup>10</sup> Immanuel Kant, *Practical Philosophy*, ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1996).

follow to non-democratic nations, then actions taken to this end will be considered just. Having adopted this ideological stance, there is a risk that the *jus in bello* restraints on legitimate actions in war will be disregarded or suspended whenever the aggressor judges that the native population will suffer less in the future than under present and otherwise unjustifiable attacks. In the end, the native population will benefit from having been released from the bonds of an unjust governmental form. Current losses will thereby be minimized in importance after the fact.

In this chapter I examine Michael Walzer's argument in favour of what he calls the *Supreme Emergency Exemption* and show how it fits the model of prioritizing one side in a conflict over another in order to judge the rightness of a given course of action in war.<sup>11</sup> Walzer's *Supreme Emergency Exemption* is not the only evidence in the just war literature of contemporary theorists promoting an ends-justify-the-means mode of reasoning. More recently, Jeff McMahan has argued that *jus ad bellum* concerns should trump *jus in bello* in the interest of protecting "just combatants" against "unjust combatants" who do not have the right to attack adversaries in armed conflict.<sup>12</sup> McMahan explicitly rejects Grotius' prioritization of *jus in bello* in favour of a just war theory that recognizes the differences between opposing sides to a conflict. He argues that we cannot claim that an unjust combatant ever acted justly in war. This is an unfortunate development for just war theory because it moves away from motivation of creating a lasting peace between current opponents and further legitimizes offensive actions aimed at punishing those viewed as unjust combatants for being on the wrong side in a conflict. Adopting this kind of a view has profound policy implications. For one, it justifies the increased development and stockpiling of weapons on the grounds that they may be needed one day against an unjust enemy. Additionally, if Michael Walzer's argument for the *Supreme Emergency Exemption* is combined with this view then not only is it rational to keep a stockpile of weapons, even those weapons which could never be used discriminately against an opponent, are now given a justification. Far from

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<sup>11</sup> Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*.

<sup>12</sup> Jeff McMahan, *Killing in War*, ed. Julian Savulescu, Uehiro Series in Practical Ethics (Oxford: Oxford University Press, 2009).

moving in the direction of a pacific union of republican states, as Kant argued for, this line of thinking makes it rational to abandon the goals of gradual disarmament and the development of strategies for peaceful deliberations between states.

What I hope to have shown is that just war theory has failed to learn the lessons provided by its rich history and that it is moving further and further away from transcending the problems that plague the state system as we know it.

# 1 Early Christian Conceptions of the Just War

Thinking about the nature of warfare and whether the resort to war can ever be considered just is not unique to the Christian tradition. However, Christian thinking about the just war is especially important from the perspective of contemporary Western philosophy because of its lasting influence on the terms of debate. The legacy that Christian thinking has left on just war thinking is mixed in with a number of other influences including the chivalric code, Roman law, as well as the ancient Greek tradition. Although many theorists speak as though there was a traditional just war theory that began with Augustine in the 5<sup>th</sup> century, James Turner Johnson makes a convincing argument that there was no “classic” just war theory until the 1500s. Before that the various streams of just war thinking were proposed by theorists of different stripes and there was no consensus as to the structure and content of a single theory. Johnson argues that by the end of the Middle Ages, around 1300, there was a real consensus that emerged among Christian thinkers, however, due to the amalgamation of inherited ideas that constituted this consensus, it already contained within it the seeds of its dissolution that would happen less than 200 year later. As Johnson argues:

A systematic just war theory came only some time later [than Augustine], beginning with Gratian’s *Decretum* in the middle of the twelfth century, maturing through the work of two generations of successors, the Decretists and the Decretalists, and taking theological form in the work of Thomas Aquinas and others in the latter part of the thirteenth century. Later in the Middle Ages, and particularly during the era of the Hundred Years War, this canonical and theological conception of just war was further elaborated by incorporation of ideas, customs, and practices from the chivalric code and the experience of war, from renewed attention to Roman law, especially the *jus gentium*, and from the developing experience of government.<sup>13</sup>

Although it is possible to read back the modern conception of a unified just war theory into earlier thinkers it would be wrong to attribute to any single thinker a comprehensive theory that is a coherent body of work on the question of the justice of and in war prior to the later Middle Ages.

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<sup>13</sup> James Turner Johnson, "Just War, as It Was and Is," *First Things* (2005): 14.

The first goal of this chapter is to trace the development of thinking about the problems relating to justice in war in the Christian tradition from St. Augustine up until the late Middle Ages with Aquinas and his followers. This historical picture will do a number of things. First, it will set up the terms of debate upon which questions of the ethics of war are based. Second, I hope to show that just war theory did not spring out of Augustine all neatly packaged and with all its problems already worked out. Just war theory has been evolving along with the societies and political structures that it developed alongside. Following the historical exposition what will be argued is that there was a profound shift that occurred in just war thinking between the late Middle Ages and the Early Modern period. In spite of the fact that the theorists writing about just war theory were still deeply religious themselves, a secularization of the theory took place which led to a shift in focus from the problems of legitimacy that occupied early Christian thinkers, to one about the means of fighting. What I will argue is that in order for a full account of the permissible means to be developed, the secularization of the theory had to happen first. This does not mean that earlier, what I will call “religious”, versions of the theory are totally unconcerned with the means used for pursuing just ends, but that these questions are subsumed under questions of legitimacy and authority in a way that is absent in the later secular versions of the theory. The argument of this chapter will proceed chronologically starting with Augustine’s elaboration of the just war then moving to his influence on later commentators such as Gratian and his followers and ending with Aquinas’ treatment through this inherited tradition of thought. Augustine’s contributions will receive the bulk of attention because he set up the terms of the debate for those who came after him. While the goal of this chapter is to set up the terms of debate to frame the differences between secular and religious versions of just war theory, it is important to note from the outset that these theories were interconnected through the entirety of the middle ages, which makes the task of teasing apart the various strands of thinking about just war a formidable task for any student of this period.

Frederick H. Russell has accomplished the difficult task of retracing the tradition of just war theory that emerged through the middle ages. He is quick to point out the difficulty of separating out the holy war from the just war in this period and states the following at the beginning of the introduction to *The Just War in the Middle Ages*:

In Christian thought two types of war have been seen as permissible, the holy war and the just war. The holy war is fought for the goals or ideals of the faith and is waged by divine authority or on the authority of some religious leader. [...] Content with the achievement of more concrete political objectives the just war stops short of countenancing the utter destruction of the adversary and tends to limit the incidence of violence by codes of right conduct, of non-combatant immunity and by other humanitarian restraints lacking in the holy war. In the holy war Christian participation is a positive duty, while in just wars participation is licit but restricted.<sup>14</sup>

This passage already points to some of the differences in the broad ways of thinking about the problems of justice in war. These two ways of thinking about just war were often held by the same authors depending on the nature of the war being fought. For example, the same author may countenance the use of violence against a foe for transgressions that would be allowable by the just war tradition and then at the same time see victory against this same enemy as proof that God had authorized the war. The following is an example of the principles of the just war set in a religious context where the religious and secular aspects are not kept perfectly separate:

Peace was the desirable condition, while resort to war must only be in case of necessity. Military prowess, itself a gift from God, and warfare were instrumentalities of peace; for this reason warriors must be pacific even in warfare, for their goal is to return their enemy by conquest to a state of peace.<sup>15</sup>

In this case, the permissibility of the war may be couched in the language of just war theory but the understanding that victory depends upon God's grace may shift the understanding of conditions of victory into a more religious conception. The religious justification for warfare may require restraint if facing an enemy, such as another Christian foe, but shift if the enemy is non-Christian, as was frequently the case for many Medieval thinkers. Through the following sections these tensions will be made more evident.

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<sup>14</sup> Frederick H. Russell, *The Just War in the Middle Ages*, ed. Walter Ullmann, vol. 8, Cambridge Studies in Medieval Life and Thought (Cambridge: Cambridge University Press, 1975), 2.

<sup>15</sup> *Ibid.*, 60.

## 1.1 Augustine on the Just War

Augustine is often thought of as the father of just war theory, but he makes no attempt to systematically talk about just war. Instead, we find a number of ideas related to just warfare throughout his works. In *City of God*, Augustine is careful to explain why the belief that the Roman Empire was able to expand and prosper due to worship of the correct Roman deities is false. He also states that it is the implicit observance of some of the virtues associated with proper worship of the Christian God that actually led to the prosperity of the Empire for as long as it lasted. If all people worshipped Christ as a collective body then there would be an everlasting peace, however this everlasting peace is not one that we can hope for in this fallen world. The best that we can hope for in this world is that those who hold power manage to maintain the peace against those who would disturb it. He is sceptical of a lasting peace or of the possibility of just wars more generally as is made clear by the following remark in Book XIX:

For though there have never been wanting, nor are yet wanting, hostile nations beyond the empire, against whom wars have been and are waged, yet, supposing there were no such nations, the very extent of the empire itself has produced wars of a more obnoxious description – social and civil wars – and with these the whole race has been agitated, either by the actual conflict or the fear of a renewed outbreak. If I attempted to give an adequate description of these manifold disasters, these stern and lasting necessities, though I am quite unequal to the task, what limit could I set? But, say they, the wise man will wage just wars. As if he would not all the rather lament the necessity of just wars, if he remembers that he is a man; for if they were not just he would not wage them, and would therefore be delivered from all wars. For it is the wrong-doing of the opposing party which compels the wise man to wage just wars; and this wrong-doing, even though it gave rise to no war, would still be matter of grief to man because it is man's wrong-doing. Let every one, then, who thinks with pain on all these great evils, so horrible, so ruthless, acknowledge that this is misery.<sup>16</sup>

Human relations are fraught with violence and the fear of violence, but these are not due to the failures of Christianity. Augustine was taken with the task of defending Christianity against its critics who blamed the new religion for the fall of Rome, which

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<sup>16</sup> Saint Augustine, *The City of God*, trans. Marcus Dods (New York: The Modern Library, 1993), XIX:7 p. 683.

occurred only three years before he began writing *The City of God*. According to Augustine, the sins of not obeying the principles of modesty and charity commanded by the true God are what led to the sack of Rome in 410 AD. On Augustine's account, not only is it wrong to blame Christianity for the fall of Rome, Christianity was the reason why the destruction that did occur was not as bad as it could have been. In the beginning of the very first chapter he reminds critics of Christianity that:

Many of them, indeed, being reclaimed from their ungodly error, have become sufficiently credible citizens of this city [of God]; but many are so inflamed with hatred against it, and are so ungrateful to its Redeemer for His signal benefits, as to forget that they would now be unable to utter a single word to its prejudice, had they not found in its sacred places, as they fled from the enemy's steel, that life in which they now boast themselves. Are not those very Romans, who were spared by the barbarians through their respect for Christ, become enemies to the name of Christ? The reliquaries of the martyrs and the churches of the apostles bear witness to this; for in the sack of the city they were open sanctuary for all who fled to them, whether Christian or Pagan. To their very threshold the bloodthirsty enemy raged; there his murderous fury owned a limit.<sup>17</sup>

In this work, Augustine lays out his metaphysical program in which he details the world order and how humans fit into God's plan for the universe. A noteworthy aspect of Augustine's metaphysical system is the separation between the rules that apply to the earthly and heavenly realms. In the earthly realm, things are necessarily imperfect and corrupted due to the fall from grace in the garden. However, in the heavenly realm there is peace and tranquility owing to the absence of sin. Because there can never be perfect tranquility in the earthly realm, it is incumbent upon Christians to conceptualize the morality of warfare. On the perfection of the eternal realm Augustine writes:

And thus we may say of peace, as we have said of eternal life, that it is the end of our good; and rather because the Psalmist says of the city of God, the subject of this laborious work, "Praise the Lord, O Jerusalem; praise thy God, O Zion: for He hath strengthened the bars of thy gates; He hath blessed thy children within thee; who hath made thy borders peace." For when the bars of her gates shall be strengthened, none shall go in or come out from her; consequently we ought to understand the

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<sup>17</sup> Ibid., I:1 p. 4.

peace of her borders as that final peace we are wishing to declare. For even the mystical name of the city itself, that is, *Jerusalem*, means, as I have already said, “Vision of Peace.” But as the word peace is employed in connection with things in this world in which certainly life eternal has no place, we have preferred to call the end or supreme good of this city life eternal rather than peace.<sup>18</sup>

Augustine is engaged with the problem of whether it is possible to fight a just war, in spite of his pessimism towards just war theories expressed above, and he engages the problem from the perspective of the actual material conditions that people are faced with living in the earthly realm. Of course if pacifism were possible in this realm that would be the morally preferable option, but since we live in a corrupt environment we have to make our moral judgments from this position. This concern with determining what morality requires given the inevitability of conflict persists in contemporary just war theory while today’s pacifists continue to put forward the view that all wars are necessarily unjust.

Augustine was concerned with whether wars could be fought by true Christians who were trying to live their lives in accordance with the teachings of Jesus and the Bible. War is a bloody affair in which soldiers are commissioned to kill their adversaries and it is not obvious that someone trying to live according to the precepts of Christianity could voluntarily engage in a pursuit in which he would be killing other people. However, in spite of the fact that the New Testament has a decidedly pacifist message at certain points, as is evidenced by the “turn the other cheek” doctrine as well as the often quoted “all they that take the sword shall perish with the sword,” (Matthew 26:52) there are also passages that condone violence under certain circumstances. The famous “turn the other cheek” passage states:

Ye have heard that it hath been said, an eye for an eye, and a tooth for a tooth: But I say unto you, that ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also. And if any man will sue thee at the law, and take away thy coat, let him have [thy] cloak also. And whosoever shall compel thee to go a mile, go with him twain.

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<sup>18</sup> Ibid., XIX:11 p. 686.

Give to him that asketh thee, and from him that would borrow of thee turn not thou away. (Matthew 5:38-42)<sup>19</sup>

At other points this seemingly stringent obligation of charity towards one's enemies is lifted. The Apostle Paul warns in Romans 13:4, "For [the ruler] is God's minister to you for good. But if you do evil, be afraid; for he does not bear the sword in vain. He is God's minister, an avenger to execute wrath on him that does evil." Augustine interprets these passages to mean that there is a general rule against shedding blood, but that in extreme circumstances this prohibition may be lifted without sinning. The circumstances that Augustine clearly has in mind as exceptions to the commandment "thou shalt not kill" are political and not personal ones. By this I mean that Augustine sees the cases of interpersonal relationships between individuals as being governed by a different set of laws than those of the political collectivity. As we will see later, Grotius and other natural law theorists derive the laws governing political bodies from those that apply in the interpersonal case. It is precisely because we know what is required of us in the individual case that we can discover the rules that apply to the larger political unit. Not only do Grotius and Augustine differ on what is required of the individual, they differ on how to move from the personal to the political in morality. For Augustine, when we are faced with a violent attacker in an individual case, we are required to give the attacker the benefit of the doubt and to face the attacker without succumbing to violence ourselves, even if this would result in our own death. Even in the case of rape, he forbids engaging in an evil act because the rapist is the one who will be judged for his misdeed. On this point Augustine states: "since purity is a virtue of the soul, and has for its companion virtue the fortitude which will rather endure *all* ills than consent to evil."<sup>20</sup> He interprets our duties towards one another as requiring strict adherence to the pacifist teaching to "turn the other cheek" because God will decide our fate. Grotius, we will see, is far more permissive with respect to individuals, arguing that we have a natural desire for self-protection that can be defended with violence in extreme situations, and that the rights of the political community to self-preservation are derivative of the individual right to self-

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<sup>19</sup> Biblical references are to the King James Version available in an online pdf version at: [www.bookbindery.ca/KJBIBLE.pdf](http://www.bookbindery.ca/KJBIBLE.pdf)

<sup>20</sup> Augustine, *The City of God*, I:18 p. 22. (My emphasis)

defence. On this view, there is no contradiction between the rights of individuals and collectivities that needs explaining away. Augustine explains away the apparent contradiction between the rules that apply to individuals and political groups in the following way.

In apparent contradiction with his views on what is required of individuals he claims that there is still room for justifiable attacks by people on their enemies resulting in their deaths. There are two exceptional cases in which a person may kill another without violating “thou shalt not kill” and “turn the other cheek”; these are in the case of a general rule that permits the use of violence, or a temporary exception granted to one individual for a specific reason. After explaining how the commandment “thou shalt not kill” applies to the killing of men and not to the killing of plants or lower animals, Augustine explains these exceptions. He states:

However, there are some exceptions made by the divine authority to its own law, that men may not be put to death [for killing another]. These exceptions are of two kinds, being justified either by a general law, or by a special commission granted for a time to some individual. And in this latter case, he to whom authority is delegated, and who is but the sword in the hand of him who uses it, is not himself responsible for the death he deals. And, accordingly, they who have waged war in obedience to the divine command, or in conformity with His laws have represented in their persons the public justice or the wisdom of government, and in this capacity have put to death wicked men; such persons have by no means violated the commandment, "Thou shalt not kill."<sup>21</sup>

And he goes on to say:

With the exception, then, of these two classes of cases, which are justified either by a just law that applies generally, or by a special intimation from God Himself, the fountain of all justice, whoever kills a man, either himself or another, is implicated in the guilt of murder.<sup>22</sup>

So, if God commands a war through his earthly delegate in government those who carry out the war are not committing murder because they are merely the instruments that God

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<sup>21</sup> Ibid., I:21 p. 27.

<sup>22</sup> Ibid., I:21 p.27.

is using to punish those who may disobey his divine command. While it might seem strange to think of people as mere instruments doing God's work, this way of thinking about instruments is still prevalent today. For example, this type of thinking is especially prevalent in arguments about the morality of weapons.<sup>23</sup> If a man uses a gun to kill another, we do not say that it is the gun that is responsible for the death (aside from metaphorically) so too in the case of God waging a war, we cannot say that the individual soldiers he commissions are responsible for the deaths that occur in battle because they are merely instrumental from the perspective of God. There are, of course, relevant disanalogies between the case of the weapon and the soldier. For one, weapons cannot be held morally responsible because weapons are not moral agents at any time, even if they were specifically designed to kill or harm other human beings. When we say that a soldier is not a responsible moral agent we have to be careful of the nature of the claim we are making. For the physical weapon what we are saying is that it is a category mistake to attribute moral blame to this object. In the case of the soldier what we are saying is that there is a particular action for which the soldier is not morally blameworthy, not that soldiers are not the kinds of agents who can answer to charges of moral blame or praise. The notion, however, that a person can be released from moral blame or praise by the actions of another agent is a fairly uncontroversial one. In the individual case, if someone coerces me into some morally blameworthy action we usually hold the person who committed the act of coercion to account, not the one who was coerced. Of course, reality is much messier than hypothetical situations so it may be the case that both parties are in some way to blame for the situation at hand, but leaving complexity aside for the moment, coercion is usually a viable way of removing or mitigating blame in a moral or legal context.

The example that Augustine asks us to consider is different from one of coercion. It is different because it depends upon the supposition that the person who performs the

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<sup>23</sup> Michael Walzer has argued, for example, that it is not weapons but people who commit immoral actions and so there is no reason for prohibiting certain kinds of weapons on the grounds that they will be used immorally. What is important for Walzer is that the appropriate people be targeted with violence and not innocent civilians, consistent with the principle of noncombatant immunity outlined above. See: Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 275-76.

normally blameworthy action is not an authority on this matter and cannot understand the workings of the world from God's point of view. Therefore, whenever God (or God's chosen authority on earth) commands something you are required to obey because the types of judgments that you would normally apply to human action are not necessarily applicable in this case. It is an exception that requires the application of a totally different sphere of thought than we normally employ in our judgments of the world; it requires the application of faith and not reason. This is the core of the exception to the rule against killing. In our normal day-to-day relations we use reason and the dictates of morality to discover what we ought to do. This is why we can never kill another person, even if that person is attempting to take our own life. If this is what was meant to happen, then God is behind it and we cannot know what plans He has for us. It is better to die having refrained from sinning by spilling the blood of another. If, on the other hand, God commands you to fight in a war you must do so because there is something more important than what you can discover from your limited mortal perspective going on. But this in itself is not an answer to the question of why it is that soldiers can go to war and kill without sinning because it does not reveal God's purpose for waging war in the earthly realm. Next we will investigate Augustine's metaphysics in order to understand how God uses death as a way of punishing sinners.

That God can use violence as a punishment for sin is obvious to Augustine owing to the use of death as a punishment for original sin in the garden. However, in order to understand how death can be a punishment for sin without totally negating the act of creation (since death is the opposite of the act of creation) we must look at Augustine's understanding of the nature of life and death more carefully. Augustine distinguishes two types or instances of death that humans can undergo because of our fallen natures. In the garden prior to the fall man was not subject to the same laws as the rest of the natural world. The other animals would die and regenerate but man was immortal. As a punishment for the sin of eating from the tree of knowledge of good and evil man had reduced himself to the level of the beasts and would now die in the manner of the beasts. However, man was still distinguished from the beasts in that he had a soul. The second death of this soul could still be avoided if man lived free of sin and according to God's law. Augustine explains the two different kinds of death as follows:

For if we look at the matter a little more carefully, we shall see that even when a man dies faithfully and laudably for the truth's sake, it is still death he is avoiding. For he submits to some part of death, for the very purpose of avoiding the whole, and the second and eternal death over and above. He submits to the separation of soul and body, lest the soul be separated both from God and from the body, and so the whole first death be completed, and the second death receive him everlastingly. Wherefore death is indeed, as I said, good to none while it is being actually suffered, and while it is subduing the dying power; but it is meritoriously endured for the sake of retaining or winning what is good. And regarding what happens after death, it is no absurdity to say that death is good to the good, and evil to the evil. For the disembodied spirits of the just are at rest; but those of the wicked suffer punishment till their bodies rise again, - those of the just to life everlasting, and of the others to death eternal, which is called the second death.<sup>24</sup>

This section clarifies a familiar idea in the metaphysics of death. The death of the body is inevitable given flawed human nature but the death of the soul is something that can be avoided if you live the proper kind of life. For Plato for example, this meant gradually preparing the soul for its departure from the body in death, while for Augustine, it means living a life free of sin and/or repenting from the sins you have committed so as to be pardoned by God.<sup>25</sup> Augustine takes pains to argue against the Platonic idea that what we need to do in this life to achieve immortality is to properly detach the soul from the body but that is of little concern for us here.<sup>26</sup> Instead, what is still puzzling about Augustine's account is that earthly rulers would be in a position to punish those who sin against God. In order to answer to this worry we will need to examine Augustine's account of how wars could potentially be in the service of justice. By understanding how and why certain people can wage wars justifiably in the earthly realm we will be able to better understand the nature of Augustine's claim that "it is therefore with the desire for

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<sup>24</sup> Augustine, *The City of God*, XIII:8 p. 417.

<sup>25</sup> For the Platonic conception of preparing the soul for death see: Plato, *The Last Days of Socrates*, trans. Harold Tarrant and Hugh Tredennick (London: Penguin, 1993). Specifically the *Phaedo*.

peace that wars are waged, even by those who take pleasure in exercising their warlike nature in command and battle.”<sup>27</sup>

In order for a war to be just it is commonly held that there must be some political authority capable of declaring the war and taking responsibility for its consequences. Without a legitimate political authority in place wars would be indistinguishable from violent clashes between individuals. Wars cannot be the resort to violence by two individuals or groups because violence of this kind would always be sinful due to Augustine’s commitment to pacifism at the individual level.<sup>28</sup> Having a justifiable war means that it has to have some features that distinguish it from the unjustifiable resort to force that would be incompatible with the end of peace. The feature that Augustine distinguishes as essential in differentiating justifiable wars from other forms of violence is that justifiable wars are punishment for sin. How exactly this works depends on the metaphysical view sketched above. Because all men will face the first death as an inevitable consequence of original sin it is not particularly horrendous when any man dies. What is terrible is the second death of the eternal damnation of the soul. Therefore, if people can be redeemed through punishment in this life but it will result in their eternal salvation it is not a harm but a benefit to them, as was made clear in the passage quoted above. So those who seek to create peace on earth by making themselves the agents of God’s will are authorized in using violence because they use it not for their own ambition but in order to restore God’s place of authority in the world against sin. The following passage makes the distinction between justified and unjustified political authority, which then renders the use of force either justified or unjustified:

How much more powerfully do the laws of man’s nature move him to hold fellowship and maintain peace with all men so far as in him lies, since even wicked men wage war to maintain the peace of their own circle, and wish that, if possible, all men belonged to them, that all men and things might serve but one head, and might, either through love or fear, yield themselves to peace with him! It is thus that pride in its

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<sup>27</sup> Augustine, *The City of God*, XIX:12 p. 687.

<sup>28</sup> Although, as we will see Grotius reverses this line of reasoning and derives the rights of war and peace from what is and is not permissible to individuals.

perversity apes God. It abhors equality with other men under Him; but, instead of His rule, it seeks to impose a rule of its own upon its equals. It abhors, that is to say, the just peace of God, and loves its own unjust peace; but it cannot help loving peace of one kind or other. For there is no vice so clean contrary to nature that it obliterates even the faintest trace of nature.<sup>29</sup>

Faced with the fact that even the sinful seem to desire war for the sake of peace those who are justified in wielding political power and waging war must be those who have God's ends as their own. Augustine goes on as follows:

He, then, who prefers what is right to what is wrong, and what is well-ordered to what is perverted, sees that the peace of unjust men is not worthy to be called peace in comparison with the peace of the just.<sup>30</sup>

Even if a ruler manages to maintain peace for a time among his subjects, if he does not rule in accordance with God, he is the justifiable object of attack. It is better to face attack in this life and for those now subject to unjust (albeit peaceful) rule to be released and to fall under the rule of God's agent on earth than to remain ignorant of God's law. This leaves open the question of how some men come to have the authority to rule over others.

For many religious thinkers, God granted political authority to agents on earth. This is called the "divine right" view of political authority.<sup>31</sup> One famous version of the divine right view was put forward by Robert Filmer in the 17<sup>th</sup> Century. Filmer argued that present political authority was passed down through a hereditary line that could be traced back to the biblical Adam. Locke took the pains to argue against on this point as follows:

In his preface he [Filmer] tells us, That Adam being Monarch of the whole World, none of his Posterity had any right to possess any thing, but by his Grant or Permission, or by Succession from him: Here he

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<sup>29</sup> Augustine, *The City of God*, XIX:12 p. 688-98.

<sup>30</sup> Ibid., XIX:12 p.689.

<sup>31</sup> Jean Hampton, *Political Philosophy*, Dimensions of Philosophy (Boulder, Colorado: Westview Press, 1997), 7.

makes two ways of conveyance of any thing Adam stood possessed of, and those are Grant or Succession. Again he says All Kings either are, or are to be reputed, the next Heirs to those first Progenitors, who were at first the Natural Parents of the whole People. There cannot be any Multitude of Men whatsoever, but that in it, consider'd by itself, there is one Man amongst them, that in Nature hath a Right to be the King of all the rest, as being the next Heir to Adam. Here in these places Inheritance is the only way he allows of conveying Monarchical Power to Princes.<sup>32</sup>

Locke goes on to argue that by extending the range of possibilities for the derivation of monarchical authority from Adam, Filmer undoes his own argument “And he might have spared the trouble of speaking so much, as he does, up and down of Heirs and Inheritance, if to make any one *properly a King*, needs no more but *Governing by Supreme Power, and it matters not by what Means he came by it.*”<sup>33</sup> Augustine did not derive political authority directly from Adam in this way. Instead, he conceives of some forms of authority, such as that of men over women, as “natural”, while political authority comes about only because we live in an imperfect world. This conception of the origins of political authority in Augustine does not mesh with some of his later interpreters who tend to take a far more Aristotelian view of politics as a natural by-product of man’s social tendencies. This tendency to think of politics as a part of man’s fundamental nature is the backbone for theories of natural law that would reach their height in the 17<sup>th</sup> century. These ideas find a renaissance in Aquinas, with the rediscovery of Aristotle in the 13<sup>th</sup> century, so it is not surprising that he and his contemporaries viewed Augustine through the lens of Aristotle with a thoroughly Christian worldview. Disentangling the Augustinian view from his later interpreters will be informative in understanding the early Christian conception of political authority that underpins the justified resort to war. The 13<sup>th</sup> century fusion of Christian views of authority with a naturalised politics produces a view in which the most powerful rule by the grace of God for the benefit of those who are ruled without recourse to oppose mistreatment. Under both the earlier Augustinian view and the later secular natural law

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<sup>32</sup> John Locke, *Two Treatises of Government*, ed. Raymond Geuss and Quentin Skinner, Student ed., Cambridge Texts in the History of Political Thought (Cambridge: Cambridge University Press, 2009), 1: VIII p. 200. Locke dismantles Filmer’s argument for the authority of rulers based on hereditary kingship point by point and not only in this one way.

<sup>33</sup> Ibid.

view put forward by Grotius there is still an avenue open for political dissent because for Augustine power is not natural and can be abused, and for Grotius authority is natural but not underpinned by God's authority.

R. A. Markus interprets Augustine as having developed a conception of political authority that is at odds with his later 13<sup>th</sup> Century interpreters, such as Aquinas. According to Markus, Augustine conceives of political authority as a necessary evil in an earthly realm characterized by sin, while Aquinas, having been influenced by the then newly rediscovered works of Aristotle, saw political society as a natural by-product of man's nature. To elaborate, Augustine saw man's natural state as one in which no man was particularly well suited to ruling over others as all men are equals. Men naturally rule over women and the rest of the animals and the entire natural world, but since all men are created in the image of God there is no natural ground for one to rule over others. Augustine explains that men differ from the rest of the animals before the fall in that they were never meant to suffer the hardships of life and death and that in spite of their gregarious nature they were created out of one being, namely Adam:

For as to the other animals, He created some solitary, and naturally seeking lonely places, - as the eagles, kites, lions, wolves, and such like; others gregarious, which herd together, and prefer to live in company, - as pigeons, starlings, stags, and little fallow deer, and the like: but neither class did He cause to be propagated from individuals, but called into being several at once. Man, on the other hand, whose nature was to be a mean between the angelic and the bestial, He created in such sort that if he remained in subjection to His Creator as his rightful Lord, and piously kept His commandments, he should pass into the company of the angels, and obtain, without the intervention of death, a blessed and endless immortality; but if he offended the Lord his God by a proud and disobedient use of his free will, he should become subject to death, and live as the beasts do, - the slave of appetite, and doomed to eternal punishment after death.<sup>34</sup>

However, once fallen, it is a lust for power that makes some men aim to rule over others and there is a need for political authority because men are everywhere desirous of power. If some were not in a position to rule over others there would be war at all times. So,

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<sup>34</sup> Augustine, *The City of God*, XII:21 p. 405-06.

men in their natural, read unfallen, state do not require political leaders because they are inclined towards peace and do not sin. However, once fallen they are in need of powerful leaders capable of maintaining the social order upon which they depend. Since God does not simply abandon man once he is fallen He sees to it that there are such leaders capable of maintaining the social order. This is obvious through scripture, with God making many appearances and giving instruction to leaders from the initial covenants with Abraham, Isaac and Jacob, to Moses and until he eventually sends his own son Jesus to spread the word of His teachings. After the biblical period the Holy Spirit works through men to direct sovereigns in the ways of the Lord, albeit in ways that are not clear to us as mere mortals. As Augustine recounts, after a long explanation of why the Romans had such success even though they did not worship the one true God:

These things being so, we do not attribute the power of giving kingdoms and empires to any save to the true God, who gives happiness in the kingdom of heaven to the pious alone, but gives kingly power on earth both to the pious and the impious, as it may please Him, whose good pleasure is always just. For though we have said something about the principles which guide His administration, insofar as it has seemed to Him to explain it, nevertheless it is too much for us, and far surpasses our strength, to discuss the hidden things of men's hearts, and by clear examination to determine the merits of various kingdoms. He, therefore, who is the one true God, who never leaves the human race without just judgment and help, give a kingdom to the Romans when He would, and as great as He would, as He did also to the Assyrians, and even the Persians, by whom, as their own books testify, only two Gods are worshipped, the one good and the other evil – to say nothing concerning the Hebrew people, of whom I have already spoken as much as seemed necessary, who, as long as they were a kingdom, worshipped none save the true God.<sup>35</sup>

According to Augustine then, we cannot know God's purpose in giving some success in ruling and wars. There must be a divine purpose at work that places rulers in their positions and "thus also the durations of wars are determined by Him as He may see meet, according to His righteous will, and pleasure, and mercy."<sup>36</sup>

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<sup>35</sup> Ibid., V:21 p. 174-75.

<sup>36</sup> Ibid., V:22 p. 175.

The logic of the holy war from Augustine's perspective is top down. There is only one type of justification for shedding blood in this world, and that is for reasons related to the eternal realm of existence. In matters related to this world the moral law as it is laid out in the Bible and the teachings of Jesus apply without exception. Aquinas elaborates his theory of just war in this top down way as well but he talks explicitly about the duty of the sovereign in maintaining the peace of his political community.<sup>37</sup> We will see how this logic is completely reversed in the secular conception of the just war. To foreshadow what is to come: just war theory is formulated in terms of individual human rights and the rights of nations are an extension of the rights of individuals. For Augustine this does not hold. Instead, political leaders have rights that are completely inconsistent with those of individual citizens because they derive from a special relationship to God's authority. Only those leaders who have become good Christians have legitimate authority over their subjects because they use their power for the benefit of those being ruled.

Augustine's account of just cause for going to war depends on the authority of God. Based on this justification alone there is no reason to adopt any particular position relative to just conduct in war because knowing that the cause for going to war is a legitimate one does not tell you how you ought to fight for that just cause. It is consistent with no rules for conduct in war as well as a fully developed place for *jus in bello*. Augustine does lay out a preliminary account of just conduct in war, but one that is subordinate to and dependent upon his elaboration of *jus ad bellum*. In spite of the fact that wars are waged against sinners, and so we might imagine that no rules of correct action would be necessary to limit the destructiveness of wars waged against the wicked, Augustine cautions that only a minimal amount of violence be used against the enemy. Augustine's principle of proportionality is based on the virtue of charity. We must be charitable to our neighbours, even in times of war, because all people, regardless of their actions today, are the creation of God and have within them potential for virtuous action. Among the sinners it is possible that there are some who deserve to be spared. Augustine's own life experience as recounted in his *Confessions* is a case in point.

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<sup>37</sup> Johnson, "Just War, as It Was and Is," 17.

Augustine himself was brought back to the way of God after succumbing to sin earlier in life so there must be hope for everyone to make this positive change.<sup>38</sup> In the usual course of things sinners are punished at the final judgment and their actions in the temporal realm are left outside of Godly intervention. Augustine maintained that the time he was living in was sharply contrasted from the time of the Old Testament and even Jesus' time. The God of the Old Testament intervened directly in the affairs of men in order to change the course of history. The God of the New Testament sent his only Son to save humanity. Augustine's age was one in which God intervened not Himself, nor through his Son, but through the Holy Spirit. The Holy Spirit does not act on its own but through people who have taken up God's cause in their own lives. As John Mark Mattox explains:

Augustine [is] prepared to honour seership of the kind evidenced by Moses as a relic of the distant past – a phenomenon to be acknowledged as operative in ancient times, but not one operative in [his]. In [his]day, the sovereign acts as God's lieutenant on earth. That lieutenant may err in his judgment, but God's will concerning the war will be accomplished, either through the sovereign or in spite of the sovereign. Whatever the case, all subjects are expected to obey God's lieutenant in all matters that are not diametrically opposed to God's will; and even in the case that the sovereign's edicts oppose God's will, the subject assumes, at least here on earth, the full burden of responsibility for the consequences of disobedience.<sup>39</sup>

Individuals must live according to the laws set down in the Bible and try to get others to do the same. Because we are all responsible for our own salvation and the salvation of those around us we must try to bring those who have strayed from the path of God back onto it. Sometimes this may require people to use violence against those who sin against God. The goal that using violence is supposed to achieve is a lasting peace among those who follow in the true path of God. If everyone were truly living in the light of the one God, then there would be no wars or violence among neighbours. Because we have not

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<sup>38</sup> Augustine tells of his indulging in sins that he identifies as "sexual offenses" as well as theft and in spite of his sins is drawn to the path of God to become one of his most outspoken defenders. See Saint Augustine, *Confessions*, trans. Garry Wills (New York: Penguin Books, 2006), Book II p. 27-37.

<sup>39</sup> John Mark Mattox, *Saint Augustine and the Theory of Just War* (New York: Continuum International Publishing Group, 2006), 77.

yet reached salvation and we do not live in a perfect realm of peace as in the city of God, the goal of all those who are living in the temporal realm must be to bring this realm closer to the achievement of this ideal. Sometimes the only way to bring about this positive change is to use violence.

There is an unsettled inconsistency in the Augustinian account of the just war that will be an important focus for those following in his footsteps. Augustine requires that people live in strict accordance with the principles of pacifism in their personal lives but that they be ready to shed blood for the sake of punishing sinners in the world. Moreover, individual soldiers are not seen as carrying the moral guilt for the sin of shedding the blood of others, and punishment guides what ought to be done to enemy soldiers. Again, it is consistent with Augustine's theory that the enemy be punished because they are sinners, so there is nothing standing in the way of punishing them to the full extent of what is possible. However, Augustine asks soldiers to behave benevolently towards those they are attacking so that people are killed only in cases of extreme necessity. In this way Augustine maintains a distinction between the spheres of *jus ad bellum* and *jus in bello* that will be replicated in the modern just war theory. When discussing whether it is permissible for soldiers to fight wars in general his concern is with the reasons for going to war. However, when discussing the killing of any particular enemy, individual soldiers should temper retribution with charity in the hopes that those who are now enemies will be converted to the way of God. Hartigan remarks on the following passages from Augustine:

The Christian soldier should always be prepared to temper the "stern and lasting necessities" of war with mercy, as Theodosius had done when he spared the sons of his enemies. Augustine insists that necessity, not choice, should be the reason for killing an enemy: "Just as violence is meted out to him who rebels and resists, so mercy is due him who is defeated or captured, especially where no disturbance of peace is to be feared."<sup>40</sup> Hence, so long as the Christian kills without feelings of personal rancour or vengeance he not only does not violate God's law of charity but in reality obeys that law by participating in an

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<sup>40</sup> Saint Augustine, *Letters*, 3 vols., vol. 2, *The Works of Saint Augustine* (New York: New City Press of the Focolare, 2004), Epistle 189.

act of retributive justice, which in Augustine's moral philosophy is an aspect of charity.<sup>41</sup>

Focusing only on the sphere of *jus ad bellum* at present, there are two possibilities for understanding the characterization of moral viciousness that would constitute a just cause in Augustine. Sovereigns could go to war with the purpose of punishing sins against man. Or, the purpose of going to war could be to punish sins against God. These two possibilities are not mutually exclusive; it is possible for an action to be both a sin against man as well as one against God. For example, robbery is prohibited in the bible, and it is also obviously an affront to the person being stolen from. Not all sins are of this dual nature. For example, the sin of taking God's name in vain is not obviously related to a sin against man. If wars can be undertaken only for the purposes of punishing sins against man, these are usually easily identified and they do not require a particular religious authority or scriptural basis in order to understand the act of retaliation. If, on the other hand, wars can be waged for sins of idolatry and the like, which for Augustine they can, then the justification for going to war can take on a particular religious meaning. For Augustine and other Christian thinkers, wars to punish sinners were justifiable, and these sins included things that would be justifiable under non-religious versions of *jus ad bellum*, such as wars fought in self-defence against an aggressor. When they have the scriptural basis to back them up all wars can have a religious basis because the sins against man that would justify defensive resort to war have scriptural grounding, but they need not be religious in this way. As we will see, the modern just war theorists abandon the purely religious justifications that have no basis without scripture in favour of only those justifications that can find a basis in our common morality. As such, the salvation of the enemy's souls can no longer be a valid political objective.

To sum up Augustine's views relative to just war theory, the following is a list of the principles that Augustine puts forward with the associated modern terminology. On the *jus ad bellum*: wars had to be authorized by a sovereign authority in order to punish

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<sup>41</sup> Richard Shelly Hartigan, "Saint Augustine on War and Killing: The Problem of the Innocent," *Journal of the History of Ideas* 27, no. 2 (1966): 201.

sinner, whether the sins are those against God or against other men, and disputes should be resolved by means other than war wherever possible (right authority and last resort). Furthermore, the balance of the good effects of the war must outweigh the negative costs of going to war (proportionality 1). On the *jus in bello*: only the minimal amount of force necessary to achieve the objective in question ought to be used consistent with the virtue of charity (proportionality 2). Mercy should be shown to all captives and non-combatants (discrimination).<sup>42</sup> The reasons for allowing wars in the first place for Augustine, as we have seen, is because they serve some higher eternal purpose that is beyond the grasp of individuals. However, the limits on destruction may come as a surprise when the goal is eternal salvation and punishment of sin. The reason for having a *jus in bello* at all in Augustine's thought is not for the benefit of those who are being fought against (or at least not primarily so). The reason lies in the possible sins of those carrying out the war on the side of justice. Because wars have the potential to enliven sins in those carrying out God's wars, those doing this work must take pains to remain pious Christians while simultaneously killing others. The true Christian is held to the strict standards of pacifism in his personal life, as we saw earlier, and so as not to stray from the true path he must not glory in the deaths of those who he kills. The injunction to cause the least destruction possible is to stem the possible tide of sin in those fighting for God.<sup>43</sup> While there is a hint of the *jus in bello* to be elaborated by future theorists, it is always subsumed to questions of who has the authority to wage wars. As we will see later, the thrust of *jus in bello* for later theorists will come from its independence from questions of authority and just cause.

## 1.2 Gratian

Gratian was a 12<sup>th</sup> century canonist who undertook the task of consolidating and systematizing Christian canon law. This "Decretum" was such an influential text that it became the standard text of canon law for the Roman Catholic Church until the 20<sup>th</sup> century. As Russell explains: "Gratian's accomplishment lay not so much in the

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<sup>42</sup> Mattox, *Saint Augustine and the Theory of Just War*, 77-83.

<sup>43</sup> Hartigan, "Saint Augustine on War and Killing: The Problem of the Innocent," 198.

originality of his treatment as in his conscientious montage of texts bearing on problems of Christian morality and Church discipline.”<sup>44</sup> His texts were commented upon by the generations of scholars who came after him, notably by the students of the Decretum called “Decretists” and the commentators on the Decretists, the “Decretalists”.

Gratian, like Augustine before him, walks a fine line between just war theory and holy war. Gratian’s most succinct statement of the definition of just war theory is stated by Russell as follows: ‘A just war is waged by an authoritative edict to avenge injuries.’<sup>45</sup> Gratian followed Augustine in emphasizing legitimate authority as a main criterion for the just war and his major concern in this regard was to limit the resort to war to officials who would be able to curb the violent inner attitudes of private persons who might engage in warfare for reasons of vengeance. However, Gratian does not provide an adequate account of the conditions necessary to satisfy the principle of legitimate authority across a variety of cases. What is clear is that “Wars should only be undertaken on the command of God or some legitimate *imperium*.”<sup>46</sup> This statement does not make clear how the authority from God is supposed to manifest itself in the world or what other legitimate authorities look like but what is important about this statement on authority is that Gratian tacitly “extended divine authority to ecclesiastical authority.”<sup>47</sup> Because Augustine was sceptical of humanity’s ability to wage wars on God’s behalf, or for any profound positive changes to be achieved in the earthly realm, he did not extend this kind of authority to ecclesiastical officers. Russell maintains that for Gratian, however:

This extension meant that Christians, as God’s latter-day Chosen People directed on earth by the Church hierarchy, could legitimately wage war against its visible enemies; moreover, it transferred the still-inchoate notion of the just cause to the realm of defense of the faith against its enemies. Thus the just war became a licit and even laudable form of

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<sup>44</sup> Russell, *The Just War in the Middle Ages*, 8, 55.

<sup>45</sup> *Ibid.*, 64.

<sup>46</sup> *Ibid.*, 69.

<sup>47</sup> *Ibid.*, 73.

Christian aggression, and military service became not merely tolerable but even pleasing to God.<sup>48</sup>

What was particular about Gratian's treatment of religious reasons for going to war was that these were positive duties and not merely permissible wars which, in turn, meant that there were no barriers to what could be done to the enemies of the faith in pursuit of punishment. While Augustine had emphasized charity and benevolence towards one's enemies, Gratian emphasized the persecution of the enemies of the faith, in particular heretics but also, schismatics, idolaters and infidels. These enemies were guilty of injuries for which punishment could be exacted, although they must be punished not by the Church directly but by the secular authority acting at the behest of the Church.

Gratian's conception leaves room for two versions of theory attaching to two different kinds of wars. On the first conception he emphasises the avenging of injuries such as defense against an enemy attack while on the second conception he allows for the avenging of injuries against the Church by people who had not necessarily taken up arms against anyone, namely: idolaters, heretics, and other enemies of orthodox Christianity. At their base both conceptions rested on the same basic principles, authority and the avenging of injuries, but the interpretations afforded to these principles change depending on the enemy being faced.

Since there was widespread agreement on the judgement that wars could be fought to counter enemies of the Church at this historical juncture, Gratian's followers took to discussing more controversial topics, such as whether Church officials could themselves participate in warfare and particularly who had the right to authorize wars both religious and secular. Gratian's own opinion on the matter was that Church officials who held no regalia could themselves participate in wars but that only secular officials with authority over some jurisdiction could authorize wars. These wars could be demanded at the behest of religious leaders but the secular officials would be more or less bound to carry out the demands depending on the status of the religious official. These judgements were influential but the most lasting of his judgments on just war theory was

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<sup>48</sup> Ibid.

that authority held the central place of importance in deciding the justice of a war. Because he is unclear as to what authority amounts to in real terms his followers took to answering this question.

### 1.3 The Decretists and Decretalists

Because the Decretists and Decretalists were a diverse group of commentators this section can only hope to point to some trends that developed over the period of their writing. Like those who came before them they emphasized the need for proper authority in order to declare a war. However, in contrast with earlier thinkers they tended to move towards the identification of particular offices that were imbued with the proper authority to wage war. For example, Huggucio, one of the later Decretists, explicitly named princes as the authorities with the legitimacy to declare wars.<sup>49</sup> In addition, they required wars to be declared either by order or permission, adding a more formal institutional mechanism to the requirement of authority making it more transparent. While the office of a prince was not one that had a particular institutional pedigree to insure that all princes were created equal, the mere identification of an office with authority was a move towards later conceptions that would rest authority in the hands of heads of state in the modern state system. That this trend was emerging at this time of consolidation of power that would see the modern state system gradually emerge is not all that surprising. While there was a gradual shift towards the consolidation of political power throughout the Empire, this was accomplished with the help of the Church, and at many times the line between secular and religious authority was blurred. Because many princes also held religious offices as bishops, saying that princes were the ones who could legitimately declare wars was not a way of distinguishing secular and religious authority, as we might be tempted to read back. This conflation of authority posed a number of problems for Gratian's followers.

Johnson points to one particularly troublesome point regarding clerical participation in war. As we saw, Gratian maintained, following Augustine, that religious

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<sup>49</sup> James Turner Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton: Princeton University Press, 1981), 156.

authorities could not participate in wars as shedding blood ran contrary to the spirit of their offices. However, given the dual nature of many political offices Johnson remarks that the Decretists were forced to ask:

How could a bishop at one and the same time be able to authorize war and be defined as a non-combatant? Were men of the Church permitted to take up arms under any circumstances (say in a holy war against infidels or heretics), or were they prohibited from all bloodshed by the same definition that made them non-combatants?<sup>50</sup>

These questions were generally answered in an arbitrary way and with the continued insistence that religious leaders could not engage in warfare themselves, even if they themselves authored the war in their capacity as secular authorities.

One important outgrowth of the ban on clergy fighting, sometimes referred to as the Peace of God,<sup>51</sup> was that it separated out a whole category of people from the realm of fighting and thereby attempted to insulate them from the ravages of warfare. This was the beginning of thinking about what would later develop into a full-blown account of non-combatant immunity, which is one of the central notions of *jus in bello*. While not fully developed here, the inclusion of certain categories of people into those who should not be involved in fighting sets certain limits on what can justifiably be done once wars have started. Gratian included in the category of non-combatants: “clerics, monks, friars, other religious, pilgrims, travelers, merchants, and peasants cultivating the soil.”<sup>52</sup> Other categories of people traditionally exempted from wars by the Roman canonists and by the Chivalric code included: women, children and the elderly, and their lack of explicit inclusion in the later writings may be owing to their having been generally accepted and not in need of further treatment.

This attempt to limit the destructiveness of warfare through the inclusion of certain limits on who can be attacked was more or less useful in practice, as were other

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<sup>50</sup> Ibid., 157.

<sup>51</sup> Ibid., 127.

<sup>52</sup> Ibid.

attempts by Gratian and his followers to limit warfare to certain days of the year (by excluding Holy days). However, one main reason for the lack of adherence to these principles was that they applied only to Christian enemies. Once an enemy was an infidel or a heretic group no consideration of the status of the individuals being fought was made. Even the use of weapons, otherwise deemed illicit if used on Christian foes, was permissible in countering a non-Christian enemy. The difference of treatment between Christian and non-Christian enemies was a symptom of the dual nature of just war theory. On the one hand you had the Holy war, which had the positive goals of preserving the Christian faith against its enemies, and on the other the just war, which had limitations to the immediate goals of repelling and attacker or reclaiming what was wrongfully taken.<sup>53</sup> These just wars may have been possible against non-Christians, but it is more than likely that the just war categories applied to fights between rival Christian princes, while the Holy war principles applied to wars against non-Christians.<sup>54</sup> Holy wars authorized by God also had the added benefit that those fighting on behalf of their religious cause would be sure to gain salvation in the afterlife for their sacrifices in war. As Gratian notes in his *Decretals*, Canon 9, it was commonly held that:

Having relinquished all fright and terror, do combat with all your strength the enemies of the holy faith and the adversaries of all religions. For, if anyone of you dies, the Almighty knows that he dies for the truth of the faith, for the salvation of the country and the defense of the Christians, and he will therefore obtain celestial reward.<sup>55</sup>

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<sup>53</sup> In contemporary warfare a similar distinction is made between symmetric and asymmetric warfare. On the one hand, in a symmetric war against an enemy who is “playing by the rules” the principles of *jus in bello* are upheld. However, there are those who argue that in asymmetric war against an enemy deserving punishment it does not make sense to take on the risks of abiding by the principles of *jus in bello*. As David Luban recounts: “As for whether “our” soldiers should risk their lives to spare “their” civilians, to many people the answer is self-evidently “no,” because their civilians hate us and support the terrorists. Why risk your life for supporters of enemies who deserve punishment?” David Luban, “War as Punishment,” *Philosophy and Public Affairs* 39, no. 4 (2012): 302-03.

<sup>54</sup> It is interesting to note that the same considerations ancient Greek and Roman warfare, wherein certain principles of right conduct in war were respected against other Greek or Roman city-states but not against barbarian outsiders. See: Russell, *The Just War in the Middle Ages*, 8, 293.

<sup>55</sup> Gregory M. Reichberg, Henrik Syse, and Endre Begby, eds., *The Ethics of War: Classic and Contemporary Readings* (Malden, MA: Blackwell Publishing, 2006), 124.

Because the categories of holy war and just war were not completely distinct but overlapped the religious and secular reasons for going to war could be entertained at the same time with all of the arbitrariness in application that we are accustomed to in political discourse today. Nevertheless, in theory there was a marked difference between wars fought for the faith and those fought for less lofty goals. For example, when two Christian princes fought over territory they were at least held to certain standards such as observing holy days and not fighting during certain periods of the year, such as Lent.<sup>56</sup> Against other enemies, these considerations would not apply.

The Decretalists were left with the arbitrariness and inconsistencies of the earlier Decretists, such as Huggucio, and attempted to clarify the inconsistencies they inherited. Their main contribution was to assert that only the Pope could declare wars for the purpose of avenging injuries to the Church, while bishops could initiate wars if they held some secular office that would allow them to do so on grounds of self-defence or to avenge an injury.<sup>57</sup> In keeping with this idea that only the highest authority could legitimately declare a war, the Decretalists maintained that only those secular authorities with no superior could authorize and declare a war. Contra Augustine however, all people could act to defend themselves from a violent attack that was ongoing without a formal declaration being made, but this was not a just war, merely the resort to violence that every person (including clerics) had the right to when under direct attack. This distinction marks the difference between public and private forms of violence. Any person had the right to use violence in the private realm to defend herself against attack, but only publicly authorized violence was properly called a war. This is one of the first distinctions that we will see Grotius make with respect to warfare, as the distinction was not always so clearly marked in the historical literature.

To sum up the view that became dominant in the 13<sup>th</sup> century: Wars were defined as the public authorization of violence for the avenging of some injury. Two types of just cause were recognized; self-defence and the righting of wrongs fall on the just war side,

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<sup>56</sup> See Gratian's *Decretals* Canon 15 In: *ibid*.

<sup>57</sup> Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*, 162.

while defense of the Church against its enemies and the punishment of sin fall on the holy war side. Because of the two categories of just cause there were also two types of authority, the Pope for the holy war and the highest secular authority for the just war. The overview that I have just sketched of the theory of justice in war that developed from Augustine through to the Decretalists is the bringing together of a variety of authors who wrote about justice in war through their encounters with other moral and legal problems. As we turn to Aquinas we find a much more systematic attempt to deal with warfare than his predecessors, and although he does not add much to the theory that had not been stated in some form or another in the past, his approach has the benefit of clarity and coherence that earlier accounts were lacking.

## 1.4 Aquinas on the Just War

Aquinas is by far the best known of the Christian thinker to take up the question of the justice of warfare, but there were a number of other sources that weighed heavily in these debates in the centuries following his writing. In order to get a firm grip on the classic doctrine as it was in the 1500s it will be important to understand Aquinas' role in synthesizing the centuries of debate that had been ongoing in the Catholic Church since the time of Augustine. One major difference between Aquinas and those who came before him was that he had been heavily influenced by the newly rediscovered works of Aristotle in his treatment of ethics. Owing largely to this fact, Aquinas reinterpreted the classical doctrines of ethics as they had been handed down from the Church fathers in light of a highly systematized natural philosophy. Aquinas was far more systematic in his writing about just war and explicitly mentions three necessary conditions that must maintain in order for a war to be just; as Johnson summarizes, these are the still central conditions of: "sovereign authority, just cause, and right intention".<sup>58</sup>

On the topic of sovereign authority, Aquinas makes clear that whatever rights an individual may have to use violence in his own life disappear as soon as there is a sovereign who has jurisdiction over that individual. The influence of the newly

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<sup>58</sup> "Just War, as It Was and Is," 16.

rediscovered works of Aristotle is clearly evident in the naturalization of political machinery. Aquinas was unique in that he:

Fused the Aristotelian political theory to the traditional Augustinian outlook of his predecessors. His comprehensive treatment incorporated such Aristotelian tenets as the naturalness of political authority, the teleology of communal life, and the superiority of the common good over the good of the individual.<sup>59</sup>

While for Augustine we saw that political authority was a necessary evil in the fallen world, for Aristotle political authority was a natural by product of man's sociable nature combined with his desire to live in peace with his neighbours.<sup>60</sup> It is the duty of the sovereign to make sure that the political order is a realm of peace and the sovereign is the only one who is legitimated in using force against anyone once he is given power. This monopoly over the use of force extends both to internal as well as external threats of violence.

Aquinas elaborates on the three principles necessary for a war to be just as follows in section 40 of the *Summa Theologiae*:

1. First, the authority of the prince by whose command war is to be waged. For it does not pertain to a private person to declare war, because he can prosecute his right at the tribunal of his superior; similarly, it does not pertain to a private person to summon the people together, which must be done in time of war. Rather, since the care of the commonwealth is entrusted to princes, it pertains to them to protect the commonwealth of the city or kingdom or province subject to them...
2. Second, a just cause is required: that is, those against whom war is to be waged must deserve to have war waged against them because of some wrongdoing. Hence Augustine says in the book *Quaestiones in heptateuchum*: 'A just war is customarily defined as one which avenges injuries, as when a nation or state deserves to be punished because it has neglected either to put right the wrongs done by its people or to restore what it has unjustly seized.'

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<sup>59</sup> Russell, *The Just War in the Middle Ages*, 8, 258.

<sup>60</sup> See Richard McKeon, ed. *The Basic Works of Aristotle* (New York: The Modern Library, 2001), Politics Book I chapters 1 and 2 p. 1127-29. "When several villages are united in a single complete community, large enough to be nearly or quite self-sufficing, the state comes into existence, originating in the bare needs of life, and continuing in existence for the sake of the good life. And therefore, if the earlier forms of society are natural, so is the state, for it is the end of them, and the nature of things is its end. ...Hence it is evident that the state is a creation of nature, and that man is by nature a political animal."

3. Third, it is required that those who wage war should have a righteous intent: that is, they should intend either to promote a good cause or avert an evil. Hence Augustine says: 'Among true worshippers of God, those wars which are waged not out of greed or cruelty, but with the object of securing peace by coercing the wicked and helping the good, are regarded as peaceful.'<sup>61</sup>

All three principles: Right authority, just cause and right intention, had already been expressed in the centuries of literature on the just war. Where Aquinas departs from his predecessors is in providing a comprehensive doctrine in which all of the explanations for the principles espoused fit into a wider political framework. For example, while there was always an emphasis on right authority from Augustine onward, Aquinas is the first to explicitly state the reason for deferring to sovereign authority in the case of war. His explanation rests on an understanding of the political community as being a natural way of meeting the interests of people. However, as opposed to Aristotle's understanding of the interests of men, Aquinas clearly has two sets of interests in mind. Aristotle argues for development of the virtues in the service of living the good life, whereas for Aquinas the virtues are in the service both of this life but more importantly for the eternal salvation of the soul. Frederick Copleston explains these "two ends" as follows:

St. Thomas distinguishes two ends, a supernatural end, the consideration of which he assigns to the theologian, and a natural end, the consideration of which he assigns to the philosopher. [...] This distinction is of great importance and it has its repercussion both in morals, where it is the foundation of the distinction between the natural and the supernatural virtues, and in politics, where it is the foundation of the distinction between the ends of the Church and the state and determines the relations which should exist between the two societies; but it is not a distinction between two ends which correspond to two mutually exclusive orders, the one supernatural, the other that of 'pure nature': it is a distinction between two orders of knowledge and activity in the same concrete human being.<sup>62</sup>

Here we see the interrelation of the just war and the holy war in a new way. The natural goal of the political community are subsumed to its supernatural goals, thereby making it

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<sup>61</sup> R. W. Dyson, ed. *St Thomas Aquinas Political Writings*, Cambridge Texts in the History of Political Thought (Cambridge: Cambridge University Press, 2002), 240-41.

<sup>62</sup> Paul E. Sigmund, ed. *St. Thomas Aquinas on Politics and Ethics* (New York: Norton, 1988), 132.

imperative that they be sacrificed to the more important goal, just as the individual can sometimes be sacrificed for the goals of the community. To make this more concrete, the goal of the lasting peace and justice is of such a great importance that other intermediary duties, such as the duty not to kill can be waived if the goal is important enough. Russell reminds us that “Aquinas held that one can do harm to enemies to avoid greater evils or to support greater goods such as justice, and in the *Summa contra Gentiles* he viewed punishment of wickedness as a divinely authorized means of restoring moral order and concord.”<sup>63</sup> This is where just cause and right intention surface in the service of punishing sin. The sins may be natural ones, such as the sin of having engaged in a campaign of territorial expansion, but they may be supernatural, as in the failure to worship the one true God. When sins are committed those who have committed them may be coerced into being saved, “even against their own wishes.”<sup>64</sup>

The principle of just cause is lifted directly out of Augustine and, again according to Johnson, has two possibilities: “recovery of that which has been wrongly taken, and punishment of evil.”<sup>65</sup> Johnson points out that the most often cited just cause, self-defence, is not listed in these possibilities but that given the logic of Aquinas’ account this could easily fall under the “punishment of evil”. That self-defence could fall under punishing evil is not surprising because self-defence would be in the service of some attack, which would automatically count as a violation of the law of God, as was mentioned above. That “recovery of that which has been wrongly taken” was listed as a separate reason though raises the question of why this particular kind of evil should be singled out. Theft is already covered in the Ten Commandments and so it is obviously an evil that would fall under those things fit for punishment. Why then do Augustine and Aquinas following him list “recovery of that which is wrongly taken” as a separate just cause? One possible answer is that in the context of war the things being recovered may

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<sup>63</sup> Russell, *The Just War in the Middle Ages*, 8, 260-61.

<sup>64</sup> *Ibid.*, 260.

<sup>65</sup> Johnson, "Just War, as It Was and Is," 17. Rendered by Dyson as follows: “A just war is customarily defined as one which avenges injuries, as when a nation or state deserves to be punished because it has neglected either to put right the wrongs done by its people or to restore what it has unjustly seized.” Dyson, *St Thomas Aquinas Political Writings*, 240-41.

not be material things that are normally stolen. In civil matters, property in the form of land is not the kind of thing that is easily lost to theft. However, in international relations, often the cause being fought for is land that is under dispute. Aquinas may be making room for the reclaiming of land that was lost in previous battles so long as those fighting can show that they have a legitimate claim to the land. If punishing evil were the only legitimate cause for going to war, then it might be restricted to ongoing evils that need to be taken care of, as in the case of immediate self-defence. If on the other hand, “recovery of that which is wrongly taken” is a different kind of condition, then it may allow for the righting of wrongs that were committed in the past and that would no longer fall under the heading of evils to be punished.<sup>66</sup>

The requirement of right intention for Aquinas is not merely the reinforcing of the just cause. It contains both a positive and a negative requirement. The negative requirement rules out what is actually wrong in war as described by Augustine in the *Contra Faustum*:

What is evil in war? It is not the deaths of some who will soon die anyway. The desire for harming, the cruelty of avenging, an unruly and implacable animosity, the rage of rebellion, the lust of domination and the like—these are the things which are to be blamed in war.<sup>67</sup>

On the positive side, the principle of right intention requires that, as Augustine puts it: “We do not seek peace in order to be at war, but we go to war that we may have peace.”<sup>68</sup> Beyond having a cause that meets the requirements of punishing evil or restoring what was wrongly taken, the ultimate goal must not be merely to right the wrong of the particular moment but to achieve a lasting peace. What this means then is that if this is not believed to be a possible or likely result of the present struggle, then the war is not permitted even if there is a just cause that is being pursued for its own sake. It is within

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<sup>66</sup> If self-defence falls under or is equivalent to the punishment of evil, then it would be restricted to present cases and would not allow for wars to be waged (or more precisely, for violence to be used) to right past wrongs.

<sup>67</sup> Johnson, “Just War, as It Was and Is,” 17-18. In Saint Augustine, *Reply to Faustus the Manichaeon*, ed. R. Stothert, vol. 4, Nicene and Post-Nicene Fathers (Grand Rapids, MI: Eerdsman, 1974), 22:74.

<sup>68</sup> Johnson, “Just War, as It Was and Is,” 18. In Augustine, *Letters*, 2, Epistle 189.

this definition of right intention that the structure of a *jus in bello* lies hidden. It is obscured by the religious thinkers we have considered because, as we have seen, they are committed to the view that the lasting peace among nations is something that cannot be achieved by fallen humans and more specifically because the deaths of those who would be the subjects of the rules of *jus in bello* do not hold the same value that they do with the now popular “human rights” standards for all persons.

*Jus in bello* today requires that wars be fought with a view towards minimizing destruction and one way that it does this is by looking forward to the end of the war and considering the position that people will be in once the fighting has stopped. If the true goal of every war in the present is a lasting peace in the future, then any actions undertaken today must aim at achieving this peace in the future. It is not by some miracle that the future will be a peaceful one. The future will be a negotiation between people who are presently at war. In order to meet the requirement of right intention, those fighting in the war of today must make it their goal to see their opponents as their friends tomorrow. Those who die today will not be involved in the eventual discussions that will lead to the lasting peace but their families and descendants will be and what takes place today on the battlefield will have a lasting effect on the prospects for making the future peace possible. There are two possibilities that open up once the goal of war is a lasting peace. The first is that wars ought to be fought with as little destruction and bloodshed as possible, and this approach is exemplified in the duels between princes or single battles that were used to decide the fates of nations. Von Clausewitz begins his famous *On War*, stating that “War is nothing but a duel on an extensive scale”,<sup>69</sup> so the single duel would be the most restrained form of war. Walzer echoes this idea when discussing the nature of consent in war, saying:

Some wars are not hell, and it will be best to begin with them. The first and most obvious example is the competitive struggle of aristocratic young men, a tournament on a larger scale and with no presiding officer in the stands. Examples can be found in Africa, ancient Greece, Japan, and feudal Europe.<sup>70</sup>

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<sup>69</sup> Carl Von Clausewitz, *On War*, trans. Colonel J. J. Graham (New York: Barnes and Noble, 2004), 3.

<sup>70</sup> Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 25.

On the other end of the spectrum is the possibility of so completely destroying opposition that there is no one left to negotiate with. If the enemy is completely wiped out and his territory taken over there will be no future wars with that particular enemy. In other words, having a lasting peace as the end that is being aimed at is uninformative as a guide to action.

Without a clear guide as to what is permissible and impermissible in wars, relying only on the end goal as a guide to behaviour in a particular instance is unhelpful at best. What will be argued in the next chapter is that having a clear and specific understanding of the limits of the permissible in warfare is essential to actually achieving the end of a more peaceful international political order. Grotius achieves this through a twofold process of, first, rejecting the religious justifications for war, which as we have seen, means basing the reasons for going to war on the idea that the violence inflicted is carried out by God in order to punish sin. Second, he lays out a detailed account of what is permissible for soldiers fighting in a war, which is essential to limiting destructiveness but is inconceivable if your system relies on the idea that soldiers fighting on God's side will be rewarded while those who fight against God will be punished. In other words, the Grotius' ability to elaborate a fully developed *jus in bello* depended on removing religiously motivated wars from just war theory.

## 2 Grotius and the Modern Secularization of Just War Theory

Hugo Grotius (1583-1645) was a prominent Dutch jurist whose works were extremely influential and popular during his lifetime. For two centuries after his death his political writings were considered essential reading for any scholar. That Grotius is not currently considered to be required reading is an artefact of the popularity of other streams of thought but his works have recently made a resurgence in the areas of international relations and political theory, due to their lasting application to today's political situation. This chapter will examine Grotius' thinking on international politics and war and hopefully it will become clear why his writings are still pertinent nearly 400 years after his writing. The present chapter aims to show how Grotius articulated his theory of *The Rights of War and Peace* through the elaboration of a political and moral philosophy based on our natural rights as human beings. I hope to compare and contrast Grotius with the theorists of political rights who came before him, with an emphasis on the role of the individual in politics. Specifically, I hope to show how his conception of the individual as a bearer of rights, from which the rights of political groups are derived, changed the focus of just war theory from one in which the principles of *jus ad bellum* have primacy and the principles of *jus in bello* are secondary concerns, to one in which the two spheres are held separately and without hierarchical ranking.

In spite of the fact that the state of the international political arena was completely different at the time that Grotius was writing *On the Rights of War and Peace*, his work has had a lasting impression on political thought for a number of reasons. First, Grotius was one of the first thinkers to conceptualize the rights of political leaders and their subjects through the lens of a social contract that arises for the benefit of the ruled. Prior to Grotius, Medieval thinkers relied on the idea that rulers were ordained by God in some way and that they must rule for the benefit of the people, but the people themselves are not in a position to judge what is best for them. Grotius conceived of political authority as a relationship that is based in the relationships that people have prior to the establishment of political rule. Everyone is in a position to understand the nature of justice and the rights afforded to citizens through the exercise of reason. This was to

become a hugely popular way of understanding moral and political relationships between people, owing to the increasing importance of individual participation in the political process with the ongoing democratization of politics in Europe and beyond.

The social movements underway in Europe that would shape the 17<sup>th</sup> century and define the terms of debate in international relations for the centuries to come were directly related to the wars that were fought on the basis of religious disagreement. The violent clashes over religious belief that came with the protestant reformation and subsequent wars for religion dramatically altered the political landscape. Notably, the extremely destructive Thirty Years War, which was the longest continuous war in European history (1618-1648), ended with the Peace of Westphalia and instituted what we now take for granted as a political order based on the idea of territorial sovereignty. Grotius was writing *On the Rights of War and Peace* in the middle of this political upheaval and was concerned with the ideas that could ground the wars for religion that were ravaging Europe. It is perhaps unsurprising then that Grotius would be against wars waged for the purposes of spreading a preferred version of religious doctrine, especially when the history of such wars was so bloody and it was becoming increasingly difficult to justify the resort to wars on the basis of some future benefits that they would provide society. The Thirty Years War in particular was so devastating, resulting in the annihilation of approximately half the population of what is now Germany through the combined effects of battles, food shortages and disease spread by the movement of troops, that the idea that the later effects of the war would positively outweigh the costs of fighting were almost impossible to motivate to a population of citizens.

One way to capture the difference between the Grotian position and other versions of just war theory that we have looked at is to compare the connections between *jus ad bellum* and *jus in bello*. The Christian literature that we have looked at until now contained the beginnings of a *jus in bello* but one that was second to and dependent on the principles of *jus ad bellum*. Take for example Augustine's idea that people who are being fought against must be treated charitably. As we saw in section 1.1, the ideal of charity is important because the people being fought against have souls that have the potential of being saved if only they adopt the correct Christian beliefs and practices so

they matter for their own sake. But, and more importantly perhaps, the ideal of charity is to be pursued by a just conquering force because the soldiers doing the fighting are concerned about their own salvation. Soldiers fighting for a just cause are not committing murder according to Augustine and his followers because they have just cause. However, there are still ways in which the just soldier can be condemned for his actions if, for example, they are done for his own personal gain or are excessive with regards to the amount of force used. The principles of this proto *jus in bello* are secondary to the principles of *jus ad bellum* espoused by the medieval thinkers because, for one thing, just cause determines whether the principles of *jus in bello* apply to your side in the conflict. Those who do not have God on their side have no claim to just cause so they are engaged in condemnable acts of murder and not legitimate killings of people who deserve to be punished. And second, the more important the cause the better the likelihood that concerns for enemy populations will be subsumed under the desire to achieve military objectives with the least amount of harm to your own side. Christian soldiers were not supposed to engage in acts of plunder when conquering enemy territory because they were not supposed to gain personally from engaging in a war effort. However, concerns for the lives of the conquered for their own sake were not really considered so long as the enemies were sinners. Wars then were seen as divine punishment for the sin of not believing in the true God and following the moral code set forth by Him.<sup>71</sup>

Grotius altered the logic of his medieval predecessors by placing *jus ad bellum* on an equal footing with *jus in bello*. In doing so he maintains that the two spheres of just war theory are to be judged independently. This position takes seriously the possibility that both sides to a conflict may have a claim to just cause, which in turn means that each side cannot simply claim that winning the war necessitates violating the otherwise binding rules of *jus in bello*. Grotius elaborates his just war theory in the larger context of a political system that makes individual people the primary units of concern. Before moving to a discussion of his just war principles I will provide an account of his broader political system.

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<sup>71</sup> Russell, *The Just War in the Middle Ages*, 8, 16-17; Augustine, *The City of God*, XIX:15,16 p. 693-95.

## 2.1 Grotius on Rights

For Grotius, the rights of states derive from the rights of the individuals that comprise them. States are simply the aggregation of individuals who have all tacitly or explicitly given their consent to be ruled by the governing body in question. This formulation is not new for contemporary theorists familiar with the contractarian tradition. However, from the point of view of the seventeenth century, the idea that individuals have certain fundamental rights, and that these rights constrain what the state may or may not do was a significant departure from a world-view in which state and religion were inextricably linked. For centuries prior, the Middle Ages were characterized by political arrangements in which a state's religion and its government were one and the same thing. The authority of the state did not come from the individual subjects that made it up but rather, from the religious authorization of the person in charge (usually a prince or king). Grotius' what we might call "bottom-up" view of rights can be contrasted with the religious "top-down" model. So in order to explain what rights a state has we must first pass through an examination of the rights of the individual. Let us now turn to the question of what grounds an individual's rights for Grotius.

Although Grotius does not completely eliminate the role of God in his account of rights, this role is significantly minimized so as to pave the way for his successors to proceed towards a system completely devoid of any reliance on the authority of some supernatural being. For Grotius, God is conceived of as the author of the laws of nature, to which human beings are subject but this God is not thought of as intervening in the affairs of humans, at least not in the time after scripture. For example, in laying out his genealogy of law from human nature to natural law and civil law, Grotius says that the basic elements of human nature come from the "Author of Nature."<sup>72</sup> (Proleg, §16) Despite having God as the foundation of his account of human nature in the limited sense that God created people with certain characteristics, Grotius asserts in the prolegomena to his *On the Rights of War and Peace*, that "what we have said [regarding the natural law]

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<sup>72</sup> Hugo Grotius, *On the Rights of War and Peace*, trans. William Whewell (Cambridge: Cambridge University Press, 1853), xxvii.

would still have great weight, even if we were to grant, what we cannot grant without wickedness, that there is no God, or that he bestows no regard on human affairs.”<sup>73</sup> (Proleg, §11) In other words, everything that Grotius says about human nature could be said without reference to God.

Grotius maintains that human nature rests on two fundamental things, the desire to promote our interests (which is common to men and other animals) combined with a desire to live in society with others. Man is contrasted with the other animals in this desire to live in society, which is desirable because of its ability to provide a life of tranquility. As Grotius puts it:

For man is an animal indeed, but an animal of an excellent kind, differing much more from all other tribes of animals than they differ from one another, which appears by the evidence of many action peculiar to the human species. And among these properties which are peculiar to man, is a desire for society, that is, a desire for a life spent in common with fellow men, and not merely spent somehow, but spent tranquilly, and in a manner corresponding to the character of his intellect.<sup>74</sup> (Proleg, §6)

This basic desire to live in society coupled with both our innate predispositions for compassion, and a capacity to use reason and to be guided by general principles in our decision-making is the “source of natural law”<sup>75</sup> according to Grotius. (Proleg, §8) This conception of human nature gets us a few basic principles of justice that exist even before we agree to set up institutions for our mutual governance. The basic notion of justice pre social contract is: “to leave to another what is his, [and] to give him what we owe.”<sup>76</sup> (Proleg, §10) So, even before there is any government capable of enforcing our rights legally we would have the moral duty to respect other people’s bodily integrity, their right to use the things necessary to maintain their bodies, so called “universal use,” and those things that fall directly out of these rights. Grotius’ view lies in contrast with the

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<sup>73</sup> Ibid., xxvi.

<sup>74</sup> Ibid., xxv.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid., xxvi.

later Hobbesian idea that there is no such thing as justice or injustice until there is an authority in place to enforce these standards of behaviour. As Hobbes makes clear in *Leviathan* XIII:

To this war of every man against every man, this also is consequent; that nothing can be unjust. The notions of rights and wrong, justice and injustice have there no place. Where there is no common power, there is no law: where no law, no injustice.<sup>77</sup>

And following in XIV:

And because the condition of man, is a condition of war of every one against every one; in which case every one is governed by his own reason; and there is nothing he can make use of, that may not be a help unto him, in preserving his life against his enemies; it followeth, that in such a condition, every man has a right to every thing; even to one another's body.<sup>78</sup>

In contrast, for Grotius, because we all share a common human nature, which contains within it both reason and compassion, we all have basic rights to bodily integrity and universal use even before there is any way for violators of others' rights to be punished. For Grotius morality is the foundation of law and morality exists prior to any social contract in the state of nature. For Hobbes there is no morality or law prior to the social contract. On Grotius' view then we would have a duty to obey the moral law<sup>79</sup> not because moral laws were ordered by God at Mount Sinai, or because violators will be punished but because they fall out of our common human nature.

The authority of the laws that we enter into in civil society stems from our mutual agreement that there ought to be some authority capable of adjudicating between parties who are subject to the principles of justice derived from the natural law. In other words, we tacitly agree to follow the laws of the society that we live in because society provides a mechanism capable of punishing those who would violate our rights under the natural

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<sup>77</sup> Thomas Hobbes, *Leviathan*, ed. C. B. Macpherson (London: Penguin Books, 1985), 188.

<sup>78</sup> *Ibid.*, 189-90.

<sup>79</sup> Going against these moral laws would be against the desire to live peacefully in society because violating them displays a lack of regard for other people as equal moral agents.

law. Without this authority we may have a right to bodily integrity and universal use, but the only thing stopping someone else from violating that right would be each person's ability to defend herself from potential violators. Because we all desire to live in peaceful society, and to improve our conditions beyond what is possible in the state of nature, we must be assumed to have agreed to put someone or some group in a position to punish those who violate the conditions for living in this stable and peaceful society.<sup>80</sup>

As such, Grotius maintains that:

Civil Rights were derived from this source, mutual compact. For those who had joined any community, or put themselves in subjection to any man or men, those either expressly promised, or from the nature of the case must have been understood to promise tacitly, that they would conform to that which either the majority of the community, or those to whom the power was assigned, should determine.<sup>81</sup> (Proleg, §15)

This way of understanding where the authority of political bodies comes from has been extremely influential. Charles Taylor, for one, puts this idea in the following way:

The underlying idea of moral order stresses the rights and obligations that we have as individuals in regard to each other, even prior to or outside of the political bond. Political obligations are seen as an extension or application of these more fundamental moral ties. Political authority itself is legitimate only because it was consented to by individuals (the original contract), and this contract creates binding obligations in virtue of the pre-existing principle that promises ought to be kept.<sup>82</sup>

In moving to the international context the same considerations apply, except that there is nobody capable of governing above the level of the state.

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<sup>80</sup> It might be tempting at this point to read a Hobbesian view into Grotius' account of the basis for political community. However, Grotius' account, unlike the later Hobbesian one is not based on mutual fear. Instead, Grotius asserts that it is possible for humans to live together without civil society so long as one of two conditions is met. Either "if men had remained in great simplicity" or "had lived in great mutual good will". That these conditions are practical possibilities is evidenced by his reference to native Americans who he says: "have lived for many generations in that state without inconvenience". (II.2.1.1) Grotius then goes on to give an historical account of the development of property and he reasons as to what earlier peoples must have compacted so as to generate the authority of political institutions.

<sup>81</sup> Grotius, *On the Rights of War and Peace*, xxvii.

<sup>82</sup> Charles Taylor, *A Secular Age* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2007).

The genealogy of international law stems from the aggregation of different communities who should all recognize the utility of working together for the sake of maintaining peace. So, just as individuals living in civil society must have come to a tacit agreement to uphold the laws of their society for mutual benefit, communities must be thought to have consented to an international legal order capable of maintaining peaceful relations between political groups. Even though there is no authority with jurisdiction capable of punishing offenders at the international level, Grotius believes that peoples will be driven to respect the conditions for their mutual thriving and not fall prey to the present utility of violating the law to the detriment of future peaceful relations. In other words, Grotius believes that political groups will recognize that going to war for the purpose of aggrandizement actually compromises the conditions that are necessary for future flourishing, and so we will be driven by our nature to avoid conflict.

For as a citizen who violates the Civil Law for the sake of present utility, destroys that institution in which the perpetual utility of himself and his posterity is bound up; so too a people which violates the Laws of Nature and Nations, beats down the bulwark of its own tranquility for future time. And even if no utility were to arise from the observation of Law, it would be a point, not of folly, but of wisdom, to which we feel ourselves drawn by nature.<sup>83</sup> (Proleg, §18)

So, the basis for any discussion of just war theory with an aim towards creating a framework of laws in the international realm is generated out of the account of natural law based in a particular view of human nature; one in which we strive to meet our particularly human needs by living together in society, which contains within it both our basic animal functions as well as our social needs.

## 2.2 Individual and Collective Rights in War

“War” for Grotius is defined as “the state of persons contending by force”<sup>84</sup> (I.1.2.1) and so what he refers to as “public” and “private” wars are both included under

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<sup>83</sup> Grotius, *On the Rights of War and Peace*, xxviii.

<sup>84</sup> *Ibid.*, 2.

this definition, even though he recognizes that what we normally mean by war is public war only. Whether or not there is such a thing as a just war depends on a conception of rights, as “Right is a moral Quality by which a person is competent to have or to do a certain thing justly.”<sup>85</sup> (I.1.4) So, in deciding whether there is a case of just war what we ought to look for first is whether there are cases of private war that are just, and then see whether a case can be made by analogy to public wars.

In trying to decide whether war can ever be just we must first look to the natural law. According to the natural law, “the first business of each is to preserve himself in the state of nature; the next to retain what is according to nature, and to reject what is contrary to it.”<sup>86</sup> (I.2.1.1) Grotius maintains that we have certain rights that are presupposed in the kinds of creatures that we are. Because we are human, we have the right to preserve our lives and we also have to live in society with others. Setting up a society with its laws is the best way to satisfy these goals in a stable manner.

In society the authority put in charge upholds certain rights to property. Originally however, all things were held in common granting people a certain limited right to those things in his own possession. On this point Grotius asserts:

God gave the human race generally a right to the things of a lower nature, at the creation, and again, after the deluge. Every thing was common and undivided, as if all had one patrimony. Hence each man might take for his use what he would, and consume what he could. Such a universal use was then a right, as property is now. What each one had taken, another could not take from him by force without wrong.<sup>87</sup> (II.2.2.1)

With the institution of civil society a more robust set of rights to property are granted. For example, with civil society infants may inherit property, even though they would not be able to do so by the laws of nature alone, because only rational beings can claim a right to property in the state of nature. (II.3.6) Because rational beings have a right to what he calls “universal use” in the state of nature, in that state “there is nothing which is

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<sup>85</sup> Ibid.

<sup>86</sup> Ibid., 9.

<sup>87</sup> Ibid., 69.

repugnant to war, indeed all things rather favour it, for the end of war, the preservation of life and limb, and the retention or acquisition of things useful to life, agrees entirely with that principle.”<sup>88</sup> By human nature then, if someone challenges my ability to live (tries to kill me) or the material conditions of my life (tries to steal what I have acquired) I have a right to defend myself against this attack, as Grotius makes clear in the following passage:

If the body be menaced by present force with danger of life not otherwise evitable, war is lawful, even to the slaying of the aggressor, as we have before said, in proving some private war to be lawful. And this right of defense arises from the natural right of self-protection, not from the injustice of fault of another who makes the danger. And therefore this right of self-protection is not taken away, even if the aggressor be blameless; if, for instance, he be a soldier acting *bona fide*, or if he take me for another than I am, or if he be insane or a sleepwalker, such as we read of: it is sufficient that I am not bound to suffer what he attempts to inflict; just as if a wild beast were to attack me.<sup>89</sup> (II.1.3)

Grotius is sympathetic to the Attic law that says: “if a man commits robbery by night, and if anyone kills him, it is justifiable homicide.” (I.3.2.2) The significance of the condition that the robbery is committed at night and not in the day is twofold. First, “by night” signifies that you cannot easily know the intent of the burglar in order to be in a position to judge whether there is actually a threat to your life. And the second signification is that it will be extremely hard to identify a thief in the night at some further time to be able to reclaim your goods. (II.1.12.2)

What is important in Grotius’ account of the conditions that justify a resort to war is that he immediately moves to qualify all justifications of using violence to fend off an attacker, putting forward the basic principles of a *jus in bello* immediately following this argument from self-preservation. Grotius warns that while I may justly kill the aggressor in order to save myself, I may not kill a third party who is innocent to achieve the same

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<sup>88</sup> Ibid., 10.

<sup>89</sup> Ibid., 62.

result.<sup>90</sup> This may seem puzzling, as Grotius does not base the right to use force on the assailant's guilt, so why make the distinction between first and third parties if in both cases an innocent is to be killed? While Grotius does not consider this puzzle, one possible response is that my moral responsibility for causing harm rests on what I can reasonably be expected to know about a given situation. If I believe that someone intends to take my life, I am justified in using violence to fend off the attacker, even if, upon further reflection, the person who was "attacking" me was not actually intending to take my life. However, I know, all things being equal, that the bystander has no intention of harming me and so cannot be sacrificed to save my life. In the first case, so long as I could not have known better at the time I am excused from having made a (terrible) mistake. In killing the bystander to save myself I have no such excuse. In other words, my right to self-defence extends only insofar as this is the only way to avert an attacker, and this attack is either already underway or imminent. If, on the other hand, I have recourse to any other method to repel a potential attack, I must make use of whatever other means are possible. So, on our thief in the night example, the night is important because it limits our recourse to the judicial process, whereas a thief who is easily recognizable could be stopped and brought to trial. On these point Grotius tells us that:

Present danger is here [for the purposes of self-defence] required, and imminent in a point of time. I confess that if the aggressor be taking up weapons, and in such a way that he manifestly does so with the intent to kill, the deed may be anticipated; for in moral things, as in natural, there is no point without a certain latitude: but they are in great error who allow any fear [however slight] as a right of killing for prevention.<sup>91</sup> (II.1.5.1)

And, furthermore:

If any one direct against us violence not present; as if he make a conspiracy, or lay an ambush, or put poison in our way, or assail us with

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<sup>90</sup> On this view it would be justifiable to kill an aggressor even if the aggressor was innocent in self-defence because the act of aggression is what legitimates my resort to violence and not the guilt of the perpetrator. As he makes clear at II.1.3: "And therefore the right of self-protection is not taken away, even if the aggressor be blameless; if, for instance, he be a soldier acting *bona fide*, or if he take me for another than I am, or if he be insane or a sleepwalker, such as we read of: it is sufficient that I am not bound to suffer what he attempts to inflict; just as if a wild beast were to attack me."

<sup>91</sup> Grotius, *On the Rights of War and Peace*, 63.

a false accusation, false testimony, or iniquitous judgment; I deny that he may be lawfully slain, if either the danger may be otherwise avoided, or it be not certain that it cannot be otherwise avoided. For delay allows recourse to many remedies and many chances; as we say, between the cup and the lip.<sup>92</sup> (II.1.5.2)

So in the first few sections on the causes of war Grotius lays out many of the fundamental principles of a modern just war theory. Namely, the *jus ad bellum* principles of moral equality of combatants, and the just cause of self-defence, as well as the two fundamental principles of *jus in bello*: discrimination between legitimate targets and proportionality in the means used to repel an attacker.

What is especially important, for our argument, is that individual “private” wars do not depend on a religious authority for their justification. Instead, they depend on a naturalistic account of what all humans, independent of religious affiliation, must be thought to need to live their lives. In the state of nature there is a right to war, but this does not necessarily show that this right carries over into civil society once the power to punish wrongdoers has been put into the hands of political leaders.

The story continues that men did not remain in the simple state of nature and so came to develop agriculture,<sup>93</sup> which necessitated the division of the land into parcels appropriate for this purpose, as well as trades and professions useful for the production of goods made from the resources extracted from the land. So, things became the property of some to the exclusion of others through an agreement that it was better to have property than to continue to live the simple life that did not necessitate it. Grotius tells us that:

By a certain pact, either express, as by division, or tacit, as by occupation. For as soon as community was given up, and while division was not instituted, it

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<sup>92</sup> Ibid.

<sup>93</sup> The development of agriculture may be a necessary condition for the establishment of property and then the state, but it is certainly not a sufficient condition, as Benoît Dubreuil makes clear in his: Benoît Dubreuil, *Human Evolution and the Origins of Hierarchies: The State of Nature* (Cambridge: Cambridge University Press, 2010), 194-95.

must be supposed to have been a matter of agreement among all, that what each had occupied he should have as his own.<sup>94</sup> (II.2.2.5)

Many rights follow from the right to property, including the right to exclude others from hunting on your land but as with self-defence against an attacker the right to property is limited in cases of necessity. Grotius remarks that a person who is in great peril may use the property of another to keep himself alive (as a sailor using a dock that is not his own during a storm) and that people may not be denied harmless use of property (as when they pass over your land or drink water from a stream running through your property).<sup>95</sup> (II.2.12) The right to use another's property in self-defence is a special case of the right to self-defence and as with the case of defense against an attacker it too extends to the international realm of warfare. Grotius maintains that an army may occupy the land of a neutral third party in a case of extreme necessity so long as it pays damages for any loss that occurs as a result. So:

Hence we may collect how he who carries on a righteous war may lawfully seize a place situate in a land which is not at war, namely, if there be a danger, not imaginary, but certain, that the enemy will seize that place and thence do irreparable damage and next, on condition that nothing be taken which is not necessary for this purpose of caution.<sup>96</sup> (II.2.10)

This passage introduces a requirement of proportionality as well as discrimination in the particular actions undertaken by troops acting on the ground. Because property rights are contingent on their usefulness for preserving life and improving the conditions of that life, property rights may be overridden in cases where it would not make sense to preserve that property at the expense of life. Proportionality provides the guiding line for determining which violations of property rights are allowable once the condition of necessity is in place. And since in this example the people whose property rights are being violated are not parties to the war they must be thought of as immune from violent attack. The structure of the scenario is such that once you have a situation of necessity this does not

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<sup>94</sup> Grotius, *On the Rights of War and Peace*, 70.

<sup>95</sup> *Ibid.*, 73-74.

<sup>96</sup> *Ibid.*, 73.

create a rights-free-zone. Instead it creates a zone in which specific sets of principles apply that would not normally apply. Proportionality in this context is a *jus in bello* principle because it constrains the actions of soldiers and commanders once they are already in the situation of war. Discrimination says that we treat people differently depending on their status within the war. The third party citizens in this example are the ones who are to benefit from their territory being taken over by a righteous ally, so they are not the proper targets of attack, even if it would be more expedient to attack them to secure the position.

A second *jus ad bellum* principle that is implicit in the discussion of property right in war is right intention. Right intention requires that for an action to be just it must not only be done in external compliance with the requirements of just cause, it must also be done with the intention of actually achieving the permissible end in question and not for some other self-interested aim. Hence, the emphasis on he who carries out a “righteous” war, for in the following sentences it is clear that the seizure of the land must be for the protection of the inhabitants and not for some other secondary goal such as territorial expansion. Reading on, we learn that the land may be occupied but that it must remain in the control of the original owners for all purposes external to the war effort.<sup>97</sup> (II.2.10) That Grotius makes reference here to those carrying out a righteous war may be interpreted so as to make the conditions of *jus in bello* only applicable to those fighting on the side of justice, or those with just cause in the war. However, given that Grotius goes on to state that what it means to be righteous in this example is to seek to preserve the lives of third parties it need not be interpreted in this way.<sup>98</sup> (II.2.10) A more consistent reading would be to say that it is possible to behave righteously in war regardless of whether just cause in the war can be attributed to the party. So, an unjust enemy, meaning one without just cause to go to war, may nevertheless conform to the *jus in bello* requirement to do as little damage as possible to property once at war. This reading concords with the way Grotius argues for the division between the various spheres of law. I will have more to say about this later in this chapter, but for now what is important is

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<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

that the principles of *jus ad bellum* seem to mirror Civil Laws, while the *jus in bello* principles mirror the Natural Law. That is not to say that the principles themselves are natural or civil laws themselves, merely, that the principles of the *jus in bello* seem to hold whether or not the *jus ad bellum* principles are met. As such it may be helpful to think of them as being prior to the *jus ad bellum* principles in line with Grotius' historical metaphor regarding the natural condition of man in the state of nature.

The structural difference between the individual and collective cases makes a difference to the content of the right, but not the basis for the right. So, if individuals have a right to self-preservation, then political communities must have a similar right to defend their members against unjust attack, even if they may have further obligations, such as declaring war, that individuals do not have. In fact, in the case of a political community, it would appear that the requirement that they defend their members is even stronger than in the individual case of self-defence. The reason for this is as follows. In the case of an individual being unjustly attacked, that person may willingly give up his life, however, in a case of a guardian who has agreed to take care of a charge, the act of defence of the other is no longer optional, or merely allowed, it is required by the terms of the contract.<sup>99</sup> In like manner, the state is responsible for the tranquility of the lives of its citizens and would be acting unjustly if it were to ignore its duty to protect them in the event of an attack. This is the limit of the state's duty to protect its citizens, as just war requires that the act of aggression be resorted to only in the case of an attack already underway or imminent. In addition, the *jus ad bellum* requirement that we must have a reasonable chance of success when entering any war fits into the broader requirement that states are required to take into account when considering going to war. All of the principles of *jus ad bellum* are derived from the collective nature of public wars combined with their natural law justifications. As we saw above, an individual may choose to sacrifice himself, or to fight an aggressor even if he has no chance of succeeding in fending off attack. However, in the collective case, it is incumbent upon leaders to take into consideration the lives that will be lost in a vain war effort. If there is

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<sup>99</sup> Grotius does not make this kind of distinction and would probably not have thought that you could actually will your own death. However, this point shows how it might be morally consistent to be a pacifist in the individual realm but not in the political one.

no chance of success, then some cases may require surrender on the basis of a utility calculus. Fighting to the last man may appear to be the right thing to do, but it may simply be folly or pride that leads to the adoption of this position and not defence of human life, which lies at the heart of just war theory.

A third principle of *jus ad bellum* can be derived from Grotius' discussion of property rights, namely, "reasonable hope of success". In the example above of occupation of a foreign third party to a conflict, this right of necessity would surely not hold if there were no reasonable hope of the protecting forces succeeding in fending off the imminent attack. In other words, there is a *jus ad bellum* requirement of proportionality that comes prior to specific calculations of utility once a battle is underway. Since the recovery of property is supposed to mend a previous injustice that resulted from its being wrongly taken, engaging in an effort that is likely to fail even before it is begun does nothing to right the wrong, it simply causes more damage on top of the wrong already committed of stealing the property.

That Grotius entertains the idea that both parties in a war could be acting from a just cause is unique for the time of his writing. While he does not explicitly endorse the view that this is possible the mere identification of this as a possibility is telling of his commitment to judging parties to a war or dispute on the actions that they take in trying to resolve their dispute.<sup>100</sup> (II.16.13.2) The focus of his writing is clearly on the details of what it means to act justly and according to law and not on the abstract conditions that render one's cause just. Readers of Book II will notice the discrepancy in the time and energy directed to questions of the background conditions necessary for justice to obtain compared to the detailed account of lawful action in acquisition, contract, exchange, inheritance, etc. Whether initial conditions were just with respect to first acquisition of property is not really important. What is important is that there are conditions under which it could have been just and now we are held to acting morally in the situation that we find ourselves in.

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<sup>100</sup> Grotius entertains the possibility of a war being just on both sides at Grotius, *On the Rights of War and Peace*, 196.

The final just cause of war that Grotius identifies is the right to punish wrongdoing. In line with his arguments for the other just causes, self-defence and retrieval of property, punishing wrongdoing is understood in terms of righting particular wrongs that cannot be stopped except by the resort to violence. However, the right to punish wrongdoing differs from the rights to self-defence and retrieval of property because, as he points out, either a) the wrongs that are being punished have already been committed and the punishment does not serve the purpose of securing peace in the future and/or b) the party carrying out the punishment is not the one that is being harmed. The category of punishing wrongdoing is explicitly contrasted with revenge and Grotius takes great pains to argue against those who would justify the resort to war on the grounds of vengeance. At Book II: XX, Grotius compares punishing a wrongful act already committed in order to prevent future misdeeds and deterrence of others who may be tempted into engaging in similar criminal acts.<sup>101</sup> Grotius condemns revenge on the grounds that it belongs to a past and more imperfect time. Grotius maintains that those who seek to exact revenge against their enemies do not take seriously that God is the ultimate judge of the actions of men on earth and that it is not within the rights of men to punish those who have transgressed against the law in the past. If we have reason to believe that the one who did wrong may harm again in the near future he may be detained in order that this wrong be avoided but if there are any signs of repentance then the former enemy must be given the benefit of doubt. As Grotius argues:

But what are we to say of revenge, as it respects, not the past, but protection for the future? Here also Christ enjoins us to forgive, if he who has injured us shews any signs of penitence; [see the passages,] in which he speaks of a plenary remission of injury, which may restore the offender to his former place in our good will, whence it appears that nothing is to be required of him in the way of punishment. And even if signs of such penitence be wanting, we are not to take it too severely, as the precept, of giving our coat also, shews. ... But if such forbearance bring great peril, we are to be content with such precaution as shall do the least harm to the offender.<sup>102</sup> (II.20.10.6-7)

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<sup>101</sup> For more on Grotius' account of punishment in war see: Benjamin Straumann, "The Right to Punish as a Just Cause of War in Hugo Grotius' Natural Law," *Studies in the History of Ethics* 2 (2006).

<sup>102</sup> Grotius, *On the Rights of War and Peace*, 229-30.

The case of punishment of wrongdoing does not seem to occupy a central role in Grotius' program of just war theory, yet it serves to point out an important difference between himself and his predecessors, as well as to emphasize proportionality in dealing with threats once again. While the authors that Grotius quotes in this section allowed for vengeance to play a role in justifying the resort to war Grotius takes pains to argue against this historical residue from a certain type of reading of Biblical texts. He emphasizes that while other commentators may have pointed to instances of justified vengeance in the Old Testament, we must see ourselves as living in a time where the Divine Law demands more of us than what was asked of previous generations before the reign of Christ. More on this Divine Law category later in the chapter.

Punishment of wrongdoing still has a place in Grotius' just war theory, but it is one that is greatly reduced to what we might think of today as extreme breaches of human rights. It is important to note here that Grotius maintains a right to go to war in order to punish wrongdoing and also that he is cognizant that allowing this just cause of war opens his theory up to potential misinterpretation leading to the use of just war theory to further self-serving ends. The type of wrongdoing that Grotius has in mind as punishable by war is what he calls a "sin against nature".<sup>103</sup> (II.20.40.4) Sins against nature are distinguished from sins against God and punishments cannot be inflicted against other nations for violations of the civil laws that are not instituted in that territory but that apply in yours. Sins against nature can only be punished if they are so grave that there is no doubt as to their injustice. In Grotius' words: "war undertaken on the ground of punishment, must be very suspected, except the crimes are very atrocious and very manifest."<sup>104</sup> (II.20.43.3) They are very atrocious and very manifest when there is no doubt that they are violations of the law of nature. As we have seen, the law of nature applies even in the state of nature before we enter the civil condition and we gain the formal right to property. When a people is being so clearly abused that even their natural rights are being violated it is an insult to the humanity of those being violated to do nothing to help them. Grotius cites Seneca and agrees with his assertion that "*though he does not do any harm to my country,*

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<sup>103</sup> Ibid., 242.

<sup>104</sup> Ibid., 243.

yet such depravity cuts him off [from the tie of humanity]:”<sup>105</sup> (II.20.40.3) and so they should be punished with war. The examples of sins against nature that Grotius believes to merit punishment by outsiders include: tyranny, killing strangers, cannibalism and piracy.<sup>106</sup> (II.20.40.3)

Grotius’ inclusion of punishment as a just cause reintroduces the ideologically driven wars back into his program, albeit with a reduced emphasis compared with the justifications from self-defence and retrieval of property. Whether or not we find Grotius’ argument as to why these punitive wars are justifiable persuasive there is still something to be said for the fact that Grotius at least attempts to make the basis for punitive wars universal. Compared with the religious thinkers who came before him, all people, not only Christians, can and must recognize the human rights abuses that are punishable by war. However, the inclusion of punishment as a just cause is not without its problems. Richard Tuck, for example, argues that Grotius’ list of atrocities that can be punished with warfare neatly justified wars by Europeans against indigenous peoples around the world in order to annex territory.<sup>107</sup> We can, perhaps, differentiate between the theory as Grotius presents it and the use the theory was put to, but we may have further theoretical reasons for disagreeing with this part of his *jus ad bellum*. Grotius presents a list of abuses and historical incidents of peoples responsible for carrying out atrocities that he thinks others were justified in punishing. We may disagree in principle with the categories of abuses that he thinks justify punishment, with the historical examples that contribute evidence towards his categories, or more importantly, we may take issue with the entire idea that others can punish abuses to which they themselves are not subject. Kant, as we will see in later chapters, takes issue with the idea that outsiders have a right to punish people who are not part of your political community unless they have failed to maintain what he calls the “civil condition”. He might, therefore, agree with Grotius that tyrannical rulers who abuse their subjects can be attacked for the benefit

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<sup>105</sup> Ibid., 242.

<sup>106</sup> Ibid.

<sup>107</sup> Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), 103.

of creating the conditions necessary for rule of law to be maintained, but even this minimal goal is best achieved internally than with the help of outsiders. Kant, like Tuck, was worried that the principles of just war theory as they were presented by Grotius and others, were liable to be used as a smokescreen for territorial expansion and other abuses by powerful nations. We will return to this tension between the principles of just war theory and abuses of the theory in later chapters. For our present purposes I will present Grotius' principles in the most charitable way possible, ignoring for now whether they are likely to be abused.

To summarize, the principles of just war theory that Grotius develops are as follows and they can be divided into two broad categories:

*Jus ad bellum:*

1. Just Cause:
  - a. Self-Defense
  - b. Retrieval of Property
  - c. Punishment of Wrongdoing
2. Right Intention
3. Reasonable Hope of Success
4. Proportionality

*Jus in bello:*

1. Proportionality
2. Discrimination

What I hope to show in the next section is that Grotius' important contribution to just war theory was that he made *jus in bello* independent of *jus ad bellum* in a way that would have profound implications for the future of just war theory and the kinds of policies that would be developed to counter the destructiveness of war.

## 2.3 Grotius on the Independence of *jus in bello*

In making *jus ad bellum* independent of *jus in bello*, James Turner Johnson argues, Grotius and his contemporaries achieved two very important results for just war

theory. First, *jus ad bellum* could now admit the possible moral equality between two sides in a conflict. Since one side is no longer authorized to engage in warfare by God, because this is not the way that God intervenes in the world, it is theoretically possible for both sides in a conflict to be acting justly, or for both to be acting unjustly (with the potential that one side is in the right and the other in the wrong still remaining). For example, two nations could go to war over a territory that belongs to neither side. In this case, both sides are acting with the purpose of aggrandizement and are acting unjustly. On the other hand, the possibility remains that one nation attacks another and the latter act in self-defence justly. However, when one side claims to be acting on the command of God, there is no theoretical space for the other side to be acting justly in self-defence, or for both sides to be in the wrong. Johnson notes that Augustine's statement that "that kind of war is undoubtedly just which God himself ordains" and God would never ordain a war for his behalf on both sides of the same conflict was often cited by religious thinkers in the Middle Ages.<sup>108</sup>

The second result of secularizing just war theory is a significant strengthening of *jus in bello* (the rights in war). Turner points out that the moral equality of combatants on both sides of a struggle leads to the recognition that strong rules of engagement need to be put forward to protect the innocent from attack. The two principles of *jus in bello* that gain their full expression in Grotius' writings are discrimination and proportionality. Discrimination, as we saw in the introduction, says that there are certain permissible and impermissible targets in war while proportionality aims to mitigate the amount of violence permitted even against legitimate targets. As Thomas Hurka explains, "there is controversy about exactly who these [legitimate targets] are, but the traditional view is that deadly force may be directed only at combatants, including soldiers and munitions factory workers, but not at non-combatants."<sup>109</sup> So, for example, targeting civilian

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<sup>108</sup> James Turner Johnson, *Ideology, Reason, and the Limitations of War: Religious and Secular Concepts 1200-1740* (Princeton: Princeton University Press, 1975), 53. It should be noted that this statement was taken out of context by later writers who fail to acknowledge that some fault had to be present to justify the war for Augustine.

<sup>109</sup> Thomas Hurka, "Proportionality in the Morality of War," *Philosophy and Public Affairs* 33, no. 1 (2005): 36.

populations is not permissible, but even if you are targeting a legitimate military target, like a munitions factory, there are things that are banned by the further condition of proportionality. This condition would, for example, allow the targeted bombing of a vital munitions factory even if that will unavoidably kill a few civilians, but forbids killing thousands of civilians as a side effect of achieving some trivial military goal.<sup>110</sup>

If you are fighting a war on God's behalf in order to punish non-believers, then reasons for considering the moral value of the enemy and to obey rules of engagement meant to spare lives on the side of the adversary may be diminished in order to guarantee a future lasting peace. If on the other hand, the enemy's citizens are being fought against because of some act of aggression perpetrated against you, there are reasons to consider the non-military populations of that state to be outside the sphere of possible targets. They have equal moral standing and have not sacrificed their right not to be targeted with violence as those who bear arms have. The *raison d'être* of just war theory, from at least Augustine on, was to establish a lasting peace between those who are now in conflict, and so it becomes important to have an appreciation for rules of engagement in order to promote peace in the future. How exactly this result is achieved is of central importance to which practical solutions get advanced. As we saw in chapter 1, for Augustine and Aquinas the future lasting peace is achieved by bringing those who are outside the grace of God into the fold. For Augustine in particular, this world is one of violence and sin, whereas the world as governed by the one true God is one of peace and tranquility. This is the central distinction between the two cities in *City of God*. So, even though it is impossible for the fallen world to be completely redeemed until the second coming, it is incumbent upon the followers of Christ to attempt to bring about the conditions necessary for the lasting peace to occur. In order to do this, people must strive to live their lives according to the teachings of Christ. But, as we saw, there is a potential disagreement between this goal and the goal of punishing sinners in the world. To get around this problem Augustine admits the possibility that God uses people to punish others in this world. What this allows for in the abstract is the potential for the ends to justify the means in just war thinking. In other words, when evaluating the morality of war, what

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<sup>110</sup> Ibid., 37.

we care about is the end result. Do we have a situation in which sinners were punished? Did the good guys win? The alternative approach that is present in Grotius and his followers reverses this logic. Instead of looking at the totality of results after the war is over, what we have to evaluate is whether or not the actions that are being planned are in line with morality and this morality is measured according to standards of shared human rights.

Grotius answers the question, ‘what is permissible in war?’ with a detailed account of the principles of *jus in bello*. (III.11) He concludes that even for those with a just cause restraint must be used against one’s enemies. The familiar principles of discrimination between combatants and non-combatants as well as proportionality are expressed.<sup>111</sup> In addition to right conduct in war Grotius ties the duties of *jus in bello* to the requirements of *jus post bellum*, or the justice in the termination of wars.<sup>112</sup> Grotius maintains that it is much easier to acquire a foreign government by force than it is to properly rule over newly conquered people. Following Plutarch, he asserts that “ordering a great government is a greater work than acquiring it.”<sup>113</sup> (III.15.7.1) For this reason measures must be taken to ensure a smooth transition between the conditions of war and peace. Grotius judges that the best way to ensure a lasting peace is to respect the principles of *jus in bello* when conducting a war and to always keep in mind that the goal of the current war is a lasting future peace. He urges even those conducting a just war to use clemency against their enemies especially in the termination of wars. Grotius cites several authors on this point, Hermocratus: “The glorious thing is, not to conquer, but to use victory clemently,” Tacitus: “Those endings of war are to be admired which are brought about by granting pardon,” and Cesar: Be this a new way of conquering; to

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<sup>111</sup> Grotius, *On the Rights of War and Peace*, 371-78.

<sup>112</sup> For excellent volumes on the current state of scholarship relating to *jus post bellum* see: Carsten Stahn and Jann K. Kleffner, eds., *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (The Hague, The Netherlands: T.M.C. Asser Press, 2008). Carsten Stahn, Jennifer S. Easterday, and Jens Iverson, eds., *Jus Post Bellum: Mapping the Normative Foundations* (Oxford: Oxford University Press, 2014).

<sup>113</sup> Grotius, *On the Rights of War and Peace*, 394.

protect ourselves with mercy and liberality.”<sup>114</sup> (III.15.12.2) The liberality that Grotius recommends is specifically, to leave the people to rule themselves whenever possible and to allow them to continue to practice their religions freely.

The emphasis that Grotius places on conducting war justly through the elaboration of the principles of *jus in bello* marks a contrast with earlier ways of thinking. As Johnson remarks:

It is the work of Grotius and his successors, then, to provide after the holocaust of a hundred years of religious war that shattered the unity of Europe a new basis for conceiving that unity, along with a new basis in custom and mutual self-interest for mitigating the harshness of war.<sup>115</sup>

This new basis for understanding just war was in the rejection of the crusade on God’s behalf as a possibly just war, and this new synthesized just war theory, which took into account different traditions of thinking about just war, would come to have significance for all peoples, whether Christian or not, in how they would engage in warfare in the field.

## 2.4 Just War and Holy War Contrasted

Just war, as we have seen Grotius argue, is based on a right to self-defence, the defence of others and punishing transgressions against human rights. Holy war, as it was developed by the authors we saw in chapter 2, is justified on grounds of punishing transgressions against divine law or doing God’s bidding. Both the holy war and the just war are motivated by the possibility of a future lasting peace between people in the future of this temporal realm. However, from the standpoint of religion there is a further purpose beyond a temporal peace, the purpose of fighting against idolaters is to make them recognize the error of their ways so that they will adopt the true religion and be saved at the final judgement. The intermediary goal of a peaceful temporal realm may

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<sup>114</sup> Ibid., 396.

<sup>115</sup> Johnson, *Ideology, Reason, and the Limitations of War: Religious and Secular Concepts 1200-1740*, 64.

also be aimed at, meaning, that it is consistent with the religious approach to strive for peaceful relations between peoples now, but the ultimate goal is always in the spiritual realm. Because peace in the temporal realm is consistent with the religious approach it should not be surprising that there is overlap between religious and just war principles. All holy wars are necessarily just from the standpoint of religious thinkers but not all just wars are holy wars, providing room for overlap between justifications advocated by proponents of holy war and just war. For example, in the Middle Ages, the following list of 11 causes for which one may justifiably go to war was common, according to Johnson:<sup>116</sup>

1. If a province blasphemes God by the cult of idols;
2. If it departs from the worship of God;
3. If it ceases to be faithful to its temporal lord;
4. If it rebels against its sovereign;
5. If it defends evildoers;
6. If it is guilty of an injury to a prince or his legate.
7. A prince may make war to free himself from an unjust tribute;
8. In order to deliver a friendly or allied nation from its enemies;
9. To recover the freedom of its subjects;
10. To recover the integrity of his kingdom.
11. A war against one who aids an enemy may also be declared a strong duty.<sup>117</sup>

The above list shows that even religious thinkers allowed for the legitimacy of some wars fought for reasons that go beyond religious justification. Out of these 11, those pertaining to the rights of princes, or secular authority, are those that are associated with the modern conception of the just war, specifically those dealing with defence of subjects and allies, while the first two are clearly religious in nature. The third condition is not grounds for going to war on a secular conception, as independent temporal lords are not seen as responsible for actions undertaken in other independent territories. However, this

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<sup>116</sup> This list is actually attributed to Hostiensis (ca. 1200-1271), but Hostiensis apparently ascribes this position to several (8) other authors and it is said to scarcely differ from Thomas' list of justifiable causes. Ibid.

<sup>117</sup> Ibid., 50.

justification does make sense on the religious view that temporal authorities are granted their status by God. So, if a community ceases to be faithful to its (true?) temporal lord, then they must be seen to be rebelling against God as the authority legitimating the temporal leader.

Johnson argues in his *Just War Tradition and the Restraint of War*, that the abandonment of the religious justifications for going to war led to different emphases in just war thinking as compared to holy war thinking. While secular just war theory from Grotius onward emphasized limiting the destructiveness of war through the development of a robust *jus in bello*, religious thinkers were much more concerned with who had the authority to authorize wars and whether Christians could go to war without sinning against God. Johnson's observation of the historical trend that occurred in the Middle Ages among religious thinkers is not one based on necessity. Instead, it could have been the case that religious thinkers would have been drawn to develop a robust *jus in bello* taking off from Augustine's emphasis on the charity that we owe our adversaries as good Christians. However, what happened in practice was that religious thinkers coming after Thomas Aquinas emphasised the moral inequality of the two sides in a religious conflict. In the case of two sides in a conflict where the rules of engagement are only thought to be applicable to one side in the conflict, it becomes very difficult to gain any traction against the enemy. If the Christian side of a religious conflict being fought for the true religion is held to a higher moral standard than the idolatrous enemy, it would be very difficult to fight against the immoral enemy. Since the non-Christian group has already proven their disregard for the moral law by shunning the true religion, how could they be trusted to follow any of the rules of engagement? With the secular just war, all combatants on either side of a conflict are held to the same moral standards based on their common human nature. In other words, the moral standard that you are held to does not depend on your religious belief, but instead on your social and rational nature. On the religious basis for morality, non-Christians would not be trustworthy moral agents and so any rules of engagement that sought to limit what is permissible in war, once the war has already begun, would hold sway with only those who are held to the moral law. It is not surprising then that a religious framework that emphasises the moral inequality of

enemies was not the one to develop a robust *jus in bello* with the aim of limiting the destructiveness of wars once they are underway.

Once the moral equality of combatants is a central feature of just war thinking it is possible to envision a *jus in bello* that binds all parties to a conflict equally. In contemporary just war thinking there has been a renewed trend of emphasising the moral inequality of combatants and challenging of the traditional separations between *jus ad bellum* and *jus in bello*. For example, authors like Jeff McMahan have recently argued that only those who are fighting on the side of justice have a legitimate right to self-defence and that those who are on the aggressor side cannot legitimately target even the army on the other side.<sup>118</sup> This position does not entail that each individual of either side of a conflict is not a moral agent of equal standing, what it does mean is that these individuals will be judged differently for having done the same action; namely, targeting the other side's military service people and munitions installations. If I am on the side of justice and I kill enemy combatants I will not face punishment at the end of the war, if I happen to be on the unjust side then this same action will be judged unjust and I will face consequences for having performed that attack. The traditional account of *jus in bello* does not typically judge these cases differently. Instead writers like Grotius and more contemporary thinkers like Walzer and Hurka (along with many others), make a distinction between discriminate and indiscriminate uses of violence, so that the opposing army's soldiers constitute a legitimate target, while civilians on either side are considered off limits.<sup>119</sup> Just how far these categories extend has fuelled countless debates, for example, whether munitions factory workers are legitimate targets is questioned. But the basic idea that the soldiers on either side of a conflict are legitimate targets has remained a popular position.<sup>120</sup> What I would suggest tentatively here is that challenging the moral

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<sup>118</sup> McMahan, *Killing in War*.

<sup>119</sup> Hurka, "Proportionality in the Morality of War." And Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. See also: Orend, *The Morality of War*; Igor Primoratz, ed. *Civilian Immunity in War* (Oxford: Oxford University Press, 2007); Fotion, *War and Ethics: A New Just War Theory*.

<sup>120</sup> There were of course challenges to the moral equality of combatants. For example, Vattel and following him, a number of American jurists held American Indian populations to different standards than those who upheld the European standards of conduct in war. Indian "savages" could be attacked

equality of combatants so that one side of a conflict is held to a different standard than the other does nothing to promote the rationale of just war theory, which we have already said, is to limit the resort to and destructiveness of wars through the application of its principles. Although saying that one side in a conflict is not legitimated in attacking the adversary may seem to limit the destructiveness of wars, there is little practical reason to think that this will ever happen. What is most likely is that parties on the 'just' side of the conflict will be allowed to fight, while those on the 'unjust' side are doomed to either be killed or tried as criminals under international laws against war crimes. Given the difficulty of figuring out whether wars are just in the first place, leaving the decision to individual soldiers who face severe disciplinary measures in the case that they refuse to carry out their orders seems to lay the responsibility for the war in the wrong hands. Maintaining the moral equality of combatants allows for a *jus in bello* in which both sides are held to the same standards and it also places the blame for the resort to war in the right hands, in the hands of the politicians who authorized the war in the first place. On this view, consistent with Grotius' just war theory but not the holy war theory, individual soldiers are responsible for the actions that they undertake to perform freely, while the political leaders are responsible for injustice if they authorize injustice.<sup>121</sup>

Some would argue that Grotius does not have the tools necessary to allow for the true moral equality of combatants, given that his account does rest on a conception of morality that is ultimately based in religion. Numerous passages seem to suggest that Christians are held to the standards to the divine law, while others are merely held to the standards of natural law. If this is the case, then perhaps the case for the moral equality of combatants with differing religious affiliations has been overstated in this section. The following section will aim to give an account of divine law that is entirely consistent with the moral equality of combatants (and all people) because it is rooted in the natural law and not distinct from it.

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indiscriminately because of their failure to uphold the rules of war. Contrary to the Grotian position, Americans were not required to obey the rules of *jus in bello* if their adversaries failed to do so. See, Witt, *Lincoln's Code: The Laws of War in American History*.

<sup>121</sup> For further accounts of the moral equality of combatants see: Jeff Montrose, "Unjust War and a Soldier's Moral Dilemma," *Journal of Military Ethics* 12, no. 4 (2013).

## 2.5 Natural and Divine Law

In putting forward his vision of the natural law, many scholars have argued that Grotius departed from religious thinkers who based morality on divine revelation and instead rooted morality in a secular conception of human nature. However, the story that Grotius tells is a bit more complicated and nuanced than this account allows for. For example, in reading *On the Rights of War and Peace*, it is immediately obvious that Grotius takes scripture seriously and thinks that scripture is an important moral guide, so to say that his is a theory divorced from religion would be a stretch. The story that Grotius tells us about human nature and the basis for morality is one that can be told without reference to God, but only up to a point. Eventually the basis for human morality still lies with God, as the creator and maintainer of human nature. This point is emphasized by Richard Vetterli and Gary Bryner, who argue that Grotius' secularity has been overstated in the literature.<sup>122</sup> They try to show how, in spite of the fact that the natural law does not need reference to God to get off the ground, in the end, Grotius is a profoundly religious thinker whose views are entirely consistent with the Christian God. This is no doubt right, however, the way that Grotius goes about laying the foundations for the natural law is still in sharp opposition to the way that religious thinkers previously laid the basis for morality. Instead of having a God-centered approach in which the moral laws enumerated in scripture are followed for fear of eternal damnation, the moral law follows from consideration of the nature of the beings to whom morality applies. It may be the case that God is the supreme author of this law, but it does not follow from that fact that only some of humanity who are believers are held to the standards of the moral law. In the traditional religious interpretation of the foundation of morality it makes perfect sense to be wary of those who have not accepted the Christian God as saviour, as they cannot be trusted to have the requisite fear of damnation in their hearts that is thought to be necessary to stimulate conformity with the moral law. However, on Grotius' view, the element of belief in God has been removed as a necessary condition for conformity to the moral law. For Grotius, all humans are subject to the moral law, whether they believe in God or not and they will hold themselves to the standards of the

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<sup>122</sup> Richard Vetterli and Gary Bryner, "Hugo Grotius and the Natural Law: A Reinterpretation," *The Political Science Reviewer* 22, no. 1 (1993).

law because they realize it is to their mutual benefit and not because they fear punishment at the final judgement. There is no reason to fear that non-Christians will thwart the moral law, as its basis is located in our common human nature and not in faith. The divine law that is given in scripture is entirely consistent with the natural law in Grotius' system, so there is no need to fear that non-Christians will not be held to similar moral standards to Christians.<sup>123</sup> On this reading of the grounds of morality it makes sense to call Grotius a religious man, but to contrast his belief in revelation from the theoretical underpinnings of his theory of morality and law. They might be seen as two routes towards the same conclusions regarding morality, but they have importantly different foundations. The divine law may be more demanding on Christians but what does this mean for morality? As we have seen, morality remains the same irrespective of how people come to it. All people are required to obey the moral law based on their shared human nature. If Christians are supposed to be more charitable because of what is written in scripture, this means that they have further positive duties towards their neighbours; it does not undo the negative obligations that others are required to follow. In other words, if I believe in the revelation then I may have reason for going beyond the strict requirements of natural law, but this does not minimize what I can expect from others. So, for example, the natural law may forbid that I steal from my neighbour but this does not require that I provide for him in a time of need. The divine law, however, may prescribe charity towards my neighbour, which is a positive duty beyond the mere negative requirement that I not harm him.

Grotius shares much of the structure of just war theory with earlier religious thinkers, however, his particular take on the perennial issues of justification, authority, and just means refocuses these ideas to account for a newfound scepticism regarding the claims for the truth of one religion over another. If people no longer believed that they were justified in going to war over religious matters then there would be, from Grotius'

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<sup>123</sup> David Little also argues that Grotius' view of religion is "Janus faced" and that while he preached toleration in the international sphere he preferred authoritarian tactics of guaranteeing religious uniformity within states. However, given Grotius' genealogy of law explained above this would be surprising. It may be the case that Grotius advocated that if religious uniformity previously existed and was stable that introducing religious toleration at this point would be unwise for practical reasons, but that his theoretical commitment to toleration still holds. David Little, "Religion - Catalyst or Impediment to International Law? The Case of Hugo Grotius," *Proceedings of the Annual Meeting (American Society of International Law)* 87 (1993).

standpoint, a huge reduction in the number and gravity of wars. Unfortunately, we have found novel reasons to go to war that do not encompass a religious element and removing religious justifications from the possible list of just wars has not ended warfare. Where Grotius aimed to limit the possible reasons for going to war and the proper means of engaging in it so as to curb its destructiveness, future theorists would focus on the means required to eliminate war from international relations.

The next chapter focuses on Immanuel Kant's program for lasting world peace as it is laid out in his 1795 essay "Perpetual Peace". Although Kant was a critic of just war theory and its proponents, including Grotius, his thinking is consistent with the spirit of just war theory in that it aims to reduce the incidence of war so that a perpetual peace would remain.



### 3 Kant's Perpetual Peace

In the first two chapters I have outlined a number of theories that aim to establish the necessary and sufficient conditions for achieving a lasting peace between nations. What all the authors we have looked at thus far have agreed on is that international relations can be improved by the elaboration of a set of rules that will bind the various actors in the international realm. What they have disagreed on is to whom the various rules of engagement apply (who has the authority to go to war) and what can be legitimately done to win a just war (the rules of engagement). In this chapter I will examine Kant's vision for a lasting peace between societies. Kant differs from the theorists that came before him in that he does not think that the elaboration of a set of rules will do anything to change the nature of international relations. Instead of coming up with a list of rules for who can wage wars justly and how, he sets out to show how the entire international realm would have to be altered to achieve the ideal of perpetual peace. Ultimately, Kant believes that the power dynamics of states competing against one another would have to be replaced by a system of mutual cooperation in order for wars to become less frequent. While the principles elaborated by the just war theorists are nice in theory, Kant ultimately thinks that these theorists are merely "sorry comforters" because their principles cannot apply to the world that we find ourselves in.

Kant has been interpreted by many contemporary scholars as correctly predicting the democratic peace and they read his *Perpetual Peace* as support for democratic peace theory.<sup>124</sup> The democratic peace refers to the empirical fact that no (or almost no) democracies have gone to war against one another in the last 200 years. The democratic peace thesis states that the fact of this lasting peace between democracies can be best attributed to some feature or set of features inherent to democratic norms and or institutions. If the theory is correct, then it follows that if all nations were run democratically there would be few to no wars. Many authors, such as Bruce Russett and Michael Doyle, begin their defense of democratic peace theory by referring to Kant as the "father" of their favoured theory. What I want to argue is that a careful reading of Kant

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<sup>124</sup> See: Doyle, "Kant, Liberal Legacies and Foreign Affairs."; Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World*; Owen, "How Liberalism Produces Democratic Peace."

reveals that he would not have endorsed the theory as it is specified in most of the contemporary literature. My argument will proceed as followed: First, I will begin by laying out Kant's own theory of how we are to achieve a lasting peace among nations. Second, I will turn to Kant's larger political theory to show how his program for perpetual peace is the logical endpoint of his vision of a just society. Third, I will argue that Kant's political philosophy contains within it a version of just war theory that places him firmly outside the realm of either realism or pacifism and that commits him to a principled view of what is allowed in international relations. Finally, in chapter 4, I will be in position to present democratic peace theory and to argue that Kant himself would not condone this theory.

Whether or not Kant would endorse democratic peace theory, as its proponents suggest, is an interesting topic from the point of view of Kant scholarship. However, regardless of Kant's position, democratic peace theory is significant in its own right because of its public policy implications. Our democratic politicians frequently make use of the rhetoric of "spreading democracy abroad" and they justify their authority to do so on the grounds that this will produce a more peaceful world in the future. For example, at his inaugural address in 2005, President George W. Bush made the following statement:

We have seen our vulnerability, and we have seen its deepest source. For as long as whole regions of the world simmer in resentment and tyranny -- prone to ideologies that feed hatred and excuse murder -- violence will gather, and multiply in destructive power, and cross the most defended borders, and raise a mortal threat. ...We are led, by events and common sense, to one conclusion: The survival of liberty in our land increasingly depends on the success of liberty in other lands. The best hope for peace in our world is the expansion of freedom in all the world.<sup>125</sup>

While democratic peace theorists like Russett and Doyle do not necessarily condone the use of violence to achieve perpetual peace, the resort to war to produce a future lasting peace is consistent with the internal logic of the theory. Because of this I believe that we do best to avoid this kind of argument. In addition, if it is found to be a defective

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<sup>125</sup> "Bush Pledges to Spread Democracy," *CNN Politics* (January 20, 2005), [http://articles.cnn.com/2005-01-20/politics/bush.speech\\_1\\_ideologies-that-feed-hatred-bush-pledges-human-freedom/3?\\_s=PM:ALLPOLITICS](http://articles.cnn.com/2005-01-20/politics/bush.speech_1_ideologies-that-feed-hatred-bush-pledges-human-freedom/3?_s=PM:ALLPOLITICS).

explanation, and there are alternative ways of promoting a lasting peace between nations, then we should prefer these ways to the defective theory. I hope to show that Kant's *Perpetual Peace* provides this alternative and is preferable to democratic peace theory.

## 3.1 Kant's Perpetual Peace Explained

### 3.1.1 Six Preliminary Articles

In arguing for the principles that are required for a perpetual peace to be maintained, Kant maintained that there are six "preliminary articles" that must first be achieved by nations. These six articles must be achieved first because they lay the groundwork for possible mutual trust in the future. In other words, it is impossible for Kant to imagine a perpetual peace without these initial conditions being met. The six preliminary articles (PA), as follows, are all obviously directly linked to the business of war and it is not difficult to see why Kant thought that moving towards achieving these intermediate goals would be in line with the further goal of a lasting peace among nations.

PA1. 'No treaty of peace shall be held to be such if it is made with a secret reservation of material for a future war.'<sup>126</sup>

In the terminology of just war theory this amounts to the *jus post bellum* idea that any peace treaty entered into must be entered into on good faith and without plans for a future war. It is also connected, theoretically, to the *jus in bello* requirement that wars must be waged with the goal of a future peace in mind. This means that you must view your enemy of today as a future ally tomorrow, so as to not do anything in the present that might hamper future peaceful relations. There are many possible examples of actions that can be taken by armies that would constitute a breach of this guiding principle. One such example would be the mistreatment of prisoners of war. Although they are enemy combatants and have lost their right not to be attacked when on the battlefield, once

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<sup>126</sup> Immanuel Kant, *Toward Perpetual Peace*, ed. Mary J. Gregor, The Cambridge Edition of the Works of Immanuel Kant (Cambridge: Cambridge University Press, 1996

), 8:343.

captured, they are no longer in a position to do damage and must not be treated as such. Mistreatment of these prisoners may threaten the future peaceful relations between states who discover this mistreatment only after the fighting is over. Kant expresses this idea, stating that “a conclusion of peace nullifies all existing reasons for a future war, even if these are not yet known to the contracting parties, and no matter how acutely and carefully they may later piece together out of old documents.”<sup>127</sup>

PA 2. ‘No independently existing state (whether small or large) shall be acquired by another state through inheritance, exchange, purchase or donation.’<sup>128</sup>

Kant bases this injunction on the moral character of the state as a collectively willed institution granted its moral status by the original contract. By acquiring another nation as though it was a possession and not a moral entity capable of self-determination you treat the collectivity as a means to your selfish ends instead of as an end in itself. Even without the Kantian formulation it is easy to see why this is an important step towards the goal of perpetual peace. If independent states can continue to be acquired by others there will be no end to wars. This still leaves open the question of whether there are any non-independent states and, if these exist, how and whether these can be acquired. However, assuming that we live in a world of already existing independent nations, that they cannot be acquired as possessions is already an important step forward for perpetual peace.

PA 3. ‘Standing armies shall in time be abolished altogether.’<sup>129</sup>

Having an army is rightly seen as a threat to other nations so the best way to show your own commitment to perpetual peace is to gradually diminish and eventually abolish your standing army. While Kant could probably not have envisioned the technological developments in weapons that have occurred since his writing, his condemnation of

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<sup>127</sup> Immanuel Kant and Hans Siegbert Reiss, *Kant : Political Writings*, 2nd, enl. ed., Cambridge Texts in the History of Political Thought (Cambridge [England] ; New York: Cambridge University Press, 1991), 93-94.

<sup>128</sup> Kant, *PP*, 8:344.

<sup>129</sup> *Ibid.*, 8:345.

standing armies would likely extend to the financing of weapons technologies and their stockpiling. In discussing standing armies Kant says:

They spur on the states to outdo one another in the number of armed men, which knows no limit; and inasmuch as peace, by the cost related to it, finally becomes even more oppressive than a short war, a standing army is itself the cause of an offensive war, waged by a state in order to be relieved of this burden.<sup>130</sup>

While in his time the number of soldiers was the definitive element in wars and the challenge of feeding, outfitting and transporting these soldiers was the most costly expenditure, today the soldiers themselves are becoming less important while the weapons they have access to largely determine the wars they are likely to engage in. Regardless of what tools are being financed Kant's point still holds true; being prepared for war makes you more likely to engage in wars of aggression.

PA 4. 'No national debt shall be contracted with regard to the external affairs of a state.'<sup>131</sup>

Kant immediately recognized how the creation of international credit systems had the potential to completely change warfare. While he saw how taking loans for the purposes of achieving food security in years of famine could be useful, he warns against incurring debt for the sake of growing military powers. He warned "the ingenious invention of a commercial people in this century – is a dangerous power of money, namely a treasury for carrying on war that exceeds the treasury of all other states taken together".<sup>132</sup> The dangers of allowing the military to expand were reviewed in the preceding article; however, Kant adds one important point: "This facility in making war, combined with the inclination of those in power to do so, which seems to be implanted in human nature, is therefore a great hindrance to perpetual peace."<sup>133</sup> The importance of this statement

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<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

cannot be minimized. If it is a natural tendency of humans, especially those in power, to be warlike, then what are the hopes of achieving a perpetual peace through a voluntary association of nations? In order to achieve anything close to perpetual peace given that we start out with a tendency to be warlike we must put in place the preconditions necessary for these tendencies to be minimized. The list of preliminary articles that Kant mentions is not necessarily a complete one, but one that covers at least the basic steps that need to be taken to minimize our pre-existing warlike inclinations, which then in turn allows us to provide a positive structure for keeping peaceful relations in check moving forward into the future.

PA 5. ‘No state shall forcibly interfere in the constitution and government of another state.’<sup>134</sup>

The only exception to the article above is in cases of civil war. In the case of an ongoing civil war the “rightful condition”, Kant’s term for a society in which the basic demands of justice are being met, has already been reduced to one of anarchy and so technically an ally interacting on behalf of one side in the conflict is not interfering with the constitution or government of another state. In all other cases, a state, in securing the peace of its citizens is achieving its primary goal and cannot be interfered with by an outside force not having the authority to regulate the internal affairs of one another. Once civil war has been initiated from within it is allowable for an outside force to side with one of the parties in the already ongoing conflict, just as it is acceptable for a force to defend an ally in an already declared war. Once the state of peace has already been abandoned a new set of rules apply that did not when the peace was still being maintained.

PA 6. ‘No state at war with another shall allow such acts of hostility as would have to make mutual trust impossible during a future peace; acts of this kind are employing *assassins or poisoners, breach of surrender, incitement to treason* within the enemy state, and so forth.’<sup>135</sup>

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<sup>134</sup> Ibid., 8:346.

<sup>135</sup> Ibid.

Article 6 differs from the first 5 in that it discusses actions taken in the state of war as opposed to how to avoid entering this state in the first place. PA 6 acknowledges that wars will continue to exist but that they must be undertaken so as to preserve the possibility of entering into a peaceful condition once more. If all trust in the enemy is lost and all means of achieving the annihilation of the enemy are allowed, then wars will become what Kant terms “wars of extermination” or what we might call “total wars”. Kant was unaware of the potential that nuclear weapons and other weapons of mass destruction hold to turn contemporary warfare into total war, yet in 1795 he was already concerned with this possibility. PA 6 is of particular importance because it holds that some element of trust must be maintained between those currently engaged in fighting. Without this minimal condition of trust no conception of *jus in bello* can even get off the ground.

Taken together the preliminary articles that Kant lays out are the conditions under which a lasting peace could be constructed among nations who have a natural inclination to go to war against one another owing to their competing interests. The preliminary articles may not comprise a complete list of all the things to be established between sovereign states, but it is an attempt to spell out practical guidelines for achieving the basic goals of just war theory, or what I am calling the “basic spirit” of just war theory as elucidated by Grotius and others. This basic spirit is that we should be working together in the international arena to limit the resort to war, *jus ad bellum*, as well as the destructiveness of those wars that do occur, *jus in bello*. While Kant, as we have seen before, is explicitly sceptical of Grotius and others’ attempts to lay out laws of war and peace, Kant’s basic impetus is the same as the just war theorists he seems to ridicule. What Kant adds to just war theory, while he might have abhorred being lumped together with his predecessors, is an insistence on the mutual trust that must obtain between sovereign nations if any hope of perpetual peace in the future is going to obtain. He is sceptical of the ability of just war theory, as laid out by the likes of Grotius and others, to have a positive effect on international relations because they do not take into account that sovereign nations have no reason to abide by the laws laid out by these “important

men”.<sup>136</sup> In order to be in a position to trust the other, all nations must be moral, to some minimal degree, which means that they are working towards achieving the moral goals of their individual members. While the preliminary articles aim at the steps that nations have to take to make themselves less likely to go to war with their neighbours, the following definitive articles (DA) point to the relations between these sovereign nations. John Bourke explains the functioning of the preliminary articles as follows:

The burden of these conditions [PA's], if we take them all together, is clear. The only way of approximating gradually towards a state of permanent peace is by seeing to it that, each time a war is fought, the period following it shall be less and less a merely negative period, a mere cessation of hostilities, an interval between one war and another, and more and more a positive period in which constructive attempts are made to establish peace on a firmer and more lasting basis. Let, therefore, such wars as from time to time unhappily will still occur be conducted honourably and not in such a way as will further wreck confidence and respect; let the peace treaty which concludes each be, not vindictive merely, but open, generous, and constructive; and above all let each succeeding period of peace be one of serious and unceasing effort on all sides towards lessening the causes of further outbreaks.<sup>137</sup>

The definitive articles make a further claim on nations, because they require that nations enter into a lawful state with one another. In other words, they must leave the state of nature at the international level.

### 3.1.2 Three Definitive Articles

If the preliminary articles were all achieved this would be a step in the direction of perpetual peace. However, in order for perpetual peace to be guaranteed nations must enter into a lawful state with one another. As Kant states:

A condition of peace among men living near one another is not a state of nature, which is much rather a condition of war, that is, it involves the constant threat of an outbreak of hostilities even if this does not always occur. A condition of peace must therefore be *established*; for suspension of hostilities is not yet assurance of peace, and unless such assurance is afforded one neighbour by another (as can happen only in a *lawful*

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<sup>136</sup> Ibid., 8:355.

<sup>137</sup> John Bourke, "Kant's Doctrine of "Perpetual Peace"," *Philosophy* 17, no. 68 (1942): 330.

condition), the former, who has called upon the latter for it, can treat him as an enemy.<sup>138</sup>

Kant is clear that the state of peace between nations must be “established” and talks about the terms of the formal agreement in terms of two neighbours giving one another a guarantee. However, the guarantee that two nations give one another is not akin to the kind of guarantee that is made between two individual neighbours. In the case of individual neighbours, they are bound to enter into civil society and to accept the laws that the society they are members of has instituted. Then, when they are faced with problems they can take their respective complaints to the proper authority in question to settle their disputes. In the case of neighbouring nations, they must enter into a formal agreement with one another but this is an agreement that is voluntary and that can be backed out of if it no longer meets the needs of its individual members. Kant conceives of many voluntary associations in the same terms as the international arena. A marriage, for example, takes the same form; it is a formal agreement between parties who come together for their mutual benefit, but they can back out of said agreement at a later time if and when it no longer suits their purposes. Arthur Ripstein makes this point in the following way, stating:

Kant does not deny that the people might come to recognize each other’s claims to property or under contracts without an omnilateral authorization. He characterizes these as “societies compatible with rights (e.g., conjugal, paternal, domestic societies in general, as well as many others); but no law.”<sup>139</sup>

Members of such societies might well, in fact, accept rules and dispute-resolution procedures governing their interactions, but whether they accept them or not depends on the matter of their choices, that is, on the particular ends they happen to have. Such associations are purely voluntary arrangements from which any member might withdraw unilaterally if his or her particular ends were to change. The members themselves might not see things this way, and might think they are morally bound to recognize each other’s

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<sup>138</sup> Kant, *PP*, 8:349.

<sup>139</sup> Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, Massachusetts: Harvard University Press, 2009), 157.

claims, think it prudent to do so, or fear sanctions if they do not comply. None of these possibilities is sufficient to give either the rules or the procedures genuine authority, because there is no general entitlement to compel the members to accept them. Such societies are like the international order as Kant conceives it: each state has a right to withdraw from any alliance if it perceives that it is endangered by getting drawn into disputes between other members.<sup>140</sup>

Because the international agreements that nations enter into are voluntary they cannot be forced either to enter into an agreement, even for their own benefit, or to remain in it. It may be rational to enter into an agreement with other like-minded nations but this depends entirely on the terms of the agreement and on the likelihood that others will comply with it. Kant believes that the likelihood that nations will agree to enter into and obey the rulings of a league of nations is greatly improved if they are all internally set up in a way that is consistent with the rule of law; that they are all in a rightful condition themselves. For this reason he believes that the chances of achieving perpetual peace are improved if the first of his definitive articles is realized, namely that:

DA 1. ‘The civil constitution in every state shall be republican’<sup>141</sup>

By ‘republican’, Kant means that individuals within the state are free and equal before the law and are represented in the government in place that upholds this law. In *Perpetual Peace* Kant defines the republican constitution as follows:

A constitution established, first on principles of the *freedom* of the members of a society (as individuals), second on principles of the *dependence* of all upon a single common legislation (as subjects), and third on the law of their *equality (as citizens of a state)* – the sole constitution that issues from the idea of the original contract, on which all rightful legislation of a people must be based – is a *republican* constitution.<sup>142</sup>

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<sup>140</sup> Ibid.

<sup>141</sup> Kant, *PP*, 8:349.

<sup>142</sup> Ibid., 8:350.

While the above is a definition of the condition of the citizen under a republican constitution it does not tell us anything about the nature of the government that these citizens are placed under. Kant is clearer on this point in *Public Right*, where he outlines his basic theory of political authority and the institutional framework that grants this authority its legitimacy. The government has authority over the people because they could have consented to the establishment of the laws of the state. Without the state all people are in a condition of lawlessness where no one's rights are capable of being secured. As such, we have a duty to enter into civil society and to respect the decrees of the government. However, this does not mean that a government, no matter the content or procedural mechanism by which its laws are instituted, has legitimacy. In order to be a legitimate bearer of coercive power a government must respect the basic definition of republican constitution quoted above. A government, for Kant, does this when it has separate offices for the three branches of government necessary for maintaining public order. These are: the legislative, executive and judicial branches of government. On this point Kant states the following:

There are thus three distinct authorities (*potestas legislativa, executorial, iudiciaria*) by which a state (*civitas*) has its autonomy, that is, by which it forms and preserves itself in accordance with laws of freedom. – A state's *well-being* consists in their being united (*salus rei publicae suprema lex est*). But the well-being of a state must not be understood as the *welfare* of its citizens and their *happiness*; for happiness can perhaps come to them more easily and as they would like it to in a state of nature (as Rousseau asserts) or even under a despotic government. By the well-being of a state is understood, instead, that condition in which its constitution conforms most fully to principles of right; it is that condition which reason, *by a categorical imperative*, makes it obligatory for us to strive after.<sup>143</sup>

Just before this point he explains the dangers of having these three offices with any combination of one being subordinate to any other. Since the people are all themselves the government through a system of representation, all must be equally subject to the laws and lawmakers with no conflict of interest arising when it comes time to judge on individual cases. If any of the offices of the government are subordinate to any other then we can be in three precarious positions. In order to avoid the various

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<sup>143</sup> *Practical Philosophy*, 6:318.

problems associated with the lack of separation of powers each branch must act independently and be subject to the power of the others. Kant makes this point by stating that:

The will of the *legislator (legislatoris)* with regard to what is externally mine or yours is *irreproachable (irreprehensibel)*; that the executive power of the *supreme ruler (summi rectoris)* is *irresistible*; and that the verdict of the highest judge (*supreme iudicis*) is *irreversible* (cannot be appealed).<sup>144</sup>

Now that we have outlined what it means for a constitution to be republican from the point of view of the citizen as well as the institutions of the state, it remains to be seen why it is that Kant thinks that this type of constitution is necessary for states to enter into a relationship of peace understood as more than the elimination of hostilities. In Kant's words:

Now, in addition to the purity of its origin – its having arisen from the pure source of the concept of right – the republican constitution does offer the prospect of the result wished for, namely perpetual peace; the ground of this is as follows. When the consent of the citizens of a state is required in order to decide whether there shall be war or not (and it cannot be otherwise in this constitution), nothing is more natural than that they will be very hesitant to begin such a bad game, since they would have to decide to take upon themselves all the hardships of war (such as themselves doing the fighting and paying the costs of the war from their own belongings, painfully making good the devastation it leaves behind, and finally – to make the cup of troubles overflow – a burden of debt that embitters peace itself, and that can never be paid off because of new wars always impending);<sup>145</sup>

As we will see later, this is one of the arguments made with respect to democracies in support of the democratic peace thesis.

DA 2. 'The right of nations shall be based on a *federalism* of free states',<sup>146</sup>

By this Kant means that the states in the world stand in relation to one another as individuals in the state of nature but that they must come together voluntarily in order to

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<sup>144</sup> Ibid., 6:316.

<sup>145</sup> *PP*, 8:350.

<sup>146</sup> Ibid., 8:354.

prevent one another from engaging in hostilities. The only peoples that can be expected to voluntarily associate under this kind of federation are those states that recognize that they are better off giving up some of their liberties, i.e. the liberty to go to war, in order to reap the benefits of group membership, which lies in the potential for perpetual peace. According to Kant:

Just as we now regard with profound contempt, as barbarous, crude, and brutishly degrading to humanity, the attachment of savages to their lawless freedom, by which they would rather struggle unceasingly than subject themselves to a lawful coercion to be instituted by themselves, thus preferring a mad freedom to a rational freedom, so, one would think, civilized peoples (each united into a state) must hasten to leave such a depraved condition, the sooner the better; but instead each *state* puts its majesty (for the majesty of a people is an absurd expression) just in its not being subject to any external lawful coercion at all,<sup>147</sup>

Kant uses the parallel to the individual in the state of nature in order to motivate this claim that it would be foolish for states to remain in the state of nature. However, it appears, at least on the surface, that there is an obvious disanalogy between the case of the individual and the state when it comes to the manner of enforcing the condition of lawfulness. In the individual's situation, once a person has exited the state of nature and has joined civil society there is a coercive body in place that is charged with upholding the law in the case of disagreements between people. In the case of states, they enter into a condition of lawfulness not by placing some higher authority over them, as the creation of some world state, or international court would do. They simply agree, without the threat of a coercive mechanism, to try to resolve their disagreements by some means other than fighting. Kant is clear in stating that:

This league does not look to acquiring any power of a state but only to preserving and securing the *freedom* of a state itself and of other states in league with it, but without there being any need for them to subject themselves to public laws and coercion under them (as men in a state of nature must do).<sup>148</sup>

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<sup>147</sup> Ibid.

<sup>148</sup> Ibid., 8:356.

It may be that confederation is still in the best interest of states, owing to the brutality of warfare. But it is at least plausible to imagine a situation in which the costs that one nation would face in engaging in warfare with a much weaker opponent would be worth the risk of going to war. In this case, a further incentive would have to be used to convince this state from refraining from the act of aggression that would appear to be in the interest of the state. Given that Kant is clear that he does not want the federation to have the kind of coercive power that would impose a burden on the otherwise beneficial action, he has to provide some alternative reason for thinking that states will voluntarily curb their natural tendency to go to war against weaker nations. The reason that Kant insists upon is the fact that we can trust that the other nations in the federation all abide by the moral law, meaning the categorical imperative. So, since no nation that is morally run can will that others take up arms against her, then she must also refrain from warfare. The test of whether the other nation is trustworthy in this sense would seem to be that it has organized itself into a republican government, because this is the only institutional form that is reasonable and so in accordance with the autonomy of the individuals who make it up. Perpetual peace then relies on some nucleus of republican states that all agree to enter into a federation with one another that will eventually expand to encompass all political groupings across the globe.

DA 3. ‘Cosmopolitan right shall be limited to conditions of universal *hospitality*,<sup>149</sup>

What this means is that people must be granted right of free passage in all the territories of the world without fear of facing a hostile native population. This was very important to Kant in an era of increasing travel and trade between formerly isolated populations. Kant saw this free movement of people and goods as a necessary condition for a lasting peace owing to the violation of individual rights that he witnessed when foreigners travelled to states with laws different from their home land. Only with the protection of the “public rights of human beings” in all corners of the world could there be hope for a

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<sup>149</sup> Ibid., 8:357.

universal peace in which these rights are not violated and so put all of humanity at risk of continued fighting.<sup>150</sup>

The final definitive article, like the second, seems to rest on the first, or on the requirement that all states be republican, because it requires that all states treat their subjects morally, which is only possible under a republican government. If Kant is right that the only legitimate constitution is republican and that only if all states are republican do we have a hope of achieving perpetual peace, then does it follow from this that states that are already republican have the right to coerce non-republican states into becoming republican and joining the federation of free states that he envisions? The next section will examine whether Kant is in fact committed to this view.

## 3.2 Kant's Larger Political Commitments

### 3.2.1 Kant on Freedom and Coercion

In the last section we already encountered a tension in Kant's theory that deserves extra attention. On the one hand, freedom is central to his account of moral personhood and on the other hand freedom is dependent on there being some coercive agent capable of enforcing the conditions of freedom. Kant defines freedom in a discussion on innate right in the introduction to the *Doctrine of Right*, stating:

*Freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.<sup>151</sup>

Freedom is a relational concept because it does not make sense to talk of a person as being free if there are no other people whose wills she cannot be subject to. So, the hermit living alone in the woods does not have "freedom" in the sense of freedom from the coercive actions of another. It may seem that living in a society with laws and rules is less free than living without them in the state of nature where one is "free" to do anything

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<sup>150</sup> Ibid., 8:360.

<sup>151</sup> *Practical Philosophy*, 6:237.

without fear of being punished. However, this kind of freedom is no real freedom at all because in this condition I am always potentially the victim of the arbitrary will of another person. Moreover, I have no recourse to defend my right not to be coerced in this way. The solution to this problem is to set up a coercive institution that can secure the freedom of its various members.

The state is set up as a mechanism to deal with the problem of a lack of freedom in the state of nature. For this reason the state is authorized to use coercion in order to combat the failures of the state of nature. The particular laws that are instituted by the state in order to guarantee the freedom of its individual members are only justifiable if they could have been consented to under conditions of equality for all. This characterization of the original contract in Kant is not a foundational account of how we came to be living in society together. Instead it explains what the limits on coercive power must be in order to justify the limits of what can be legally instituted by the state. What we really want then is to live in a condition where we are under the protection of just laws, or what Kant would term a condition of “right”. Freedom is the gauge by which we determine whether or not the condition of right obtains and not what we are actually aiming for. Kant explains this point in “On the Common Saying: That May be Correct in Theory, but is of no Use in Practice”. At 8:289 in the context of an argument against the Hobbesian conception of the state of nature, Kant remarks that:

The concept of an external right as such proceeds entirely from the concept of *freedom* in the external relation of people to one another and has nothing at all to do with the end that all of them naturally have (their aim of happiness) and with the prescribing of means for attaining it.<sup>152</sup>

The state does not obtain its right to coerce owing to any improvement in the happiness of its subjects; it obtains the right to coerce owing to the condition in which the subjects of a political group find themselves. Right, then, is defined as follows:

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<sup>152</sup> *On the Common Saying: That May Be Correct in Theory, but It Is of No Use in Practice*, ed. Mary J. Gregor, The Cambridge Edition of the Works of Immanuel Kant (Cambridge: Cambridge University Press, 1996), 8:289.

*Right* is the limitation of the freedom of each to the condition of its harmony with the freedom of everyone insofar as this is possible in accordance with a universal law; and *public right* is the sum of *external laws* which make such a thoroughgoing harmony possible.<sup>153</sup>

Freedom then does not consist in not being subject to laws, but in only being subject to those laws that create a condition of right in society. All other laws, ones that do not respect the autonomy of subjects, meaning their ability to decide their ends for themselves, are not legitimate laws. So, for Kant, the original contract is what tells us whether the laws that are in place live up to the condition of public right. Kant puts this point in the following way, stating that the:

[original contract] is instead *only an idea* of reason, which, however, has its undoubted practical reality, namely to bind every legislator to give his laws in such a way that they *could* have arisen from the united will of a whole people and to regard each subject, insofar as he wants to be a citizen, as if he has joined in voting for such a will.<sup>154</sup>

So, in spite of the apparent contradiction between freedom and coercion in Kant, there appears to be a sense in which a conception of freedom without coercion is meaningless. If we want to be able to live in society together then there must be some institution capable of guaranteeing that the laws that apply to us as moral individuals are enforceable. While the law, for Kant, is a natural thing, in the sense that we all have access to the law as moral beings, there is only such a thing as law, as opposed to morality, if it is instituted in such a way that it is enforceable. As Mulholland writes: “for Kant knowing the law is insufficient to produce the rule of law.”<sup>155</sup> We will come back to this point later but for now I want to turn to Kant’s conception of the state of nature and what condition states find themselves in in the international realm.

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<sup>153</sup> Ibid., 8:290.

<sup>154</sup> Ibid., 8:297.

<sup>155</sup> Leslie A. Mulholland, "Kant on War and International Justice," *Kant-Studien* 78, no. 1 (1987): 26.

### 3.2.2 The Original Contract and International Law

The state of nature for Kant is not necessarily a state in which people are living miserable lives. In fact, Kant's solution to the state of nature, namely civil society or a rightful condition, is not one that claims to improve the living conditions of the people in it. Instead, the civil condition is a permanent solution to the coordination problems that tend to arise between people living in close proximity to one another, which is achieved by placing a superior power over individuals in order to guarantee their safety. It is possible for people to temporarily resolve these problems for themselves without entering into a rightful condition. However, the civil condition guarantees that the individual rights that people have will be enforced by the law. Kant defines a rightful condition as follows:

A rightful condition is that relation of human beings among one another that contains the conditions under which alone everyone is able to *enjoy* his rights and the formal condition under which this is possible in accordance with the idea of a will giving laws for everyone is called public justice. ... A condition that is not rightful, that is a condition in which there is no distributive justice, is called a state of nature (*status naturalis*). What is opposed to a state of nature is not (as Achenwall thinks) a condition that is *social* and that could be called an artificial condition (*status artificialis*), but rather the *civil* condition (*status civilis*), that of a society subject to distributive justice. For in the state of nature, too, there can be societies compatible with rights (e.g., paternal, domestic societies in general, as well as many others); but no law, "You ought to enter this condition holds a priori for these societies, whereas it can be said of a *rightful* condition that all human beings who could (even involuntarily) come into relations of rights with one another *ought* to enter this condition."<sup>156</sup>

Because the rightful condition is one in which individuals place a sovereign capable of enforcing the law over them there is a minimal threshold that needs to be met in order to count as living in the civil condition. Not every instantiation of a civil condition will do a great job of securing the rights of its citizens consistent with the rights of every other citizen but so long as it is better than it would have been in the state of nature citizens have a duty to obey the sovereign.<sup>157</sup>

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<sup>156</sup> Kant, *Practical Philosophy*, 6:306.

<sup>157</sup> So Kant says that there is no right to revolution or sedition "even if the organ of the sovereign, the *ruler*, proceeds contrary to law, for example if he goes against the law of equality in assigning the burdens

Kant, as we saw earlier in this chapter, believes that the constitutional form best capable of instituting the laws in a way that is legitimate is a republican government. The republican government is an institutionalization of the public will of the people such that the laws that uphold the freedom of the people are maintained. In this system there is a system of representation ensuring that the government is held accountable to the will of its citizens. Moreover, even in the case where the government is deficient and the will of the citizens is not represented or only partially represented there is the possibility of reforming the system from the inside so that it better conforms to the ideal of the rule of law. For this reason, Kant believes that people living in the state of nature (without the possibility of the law being enforced) can be coerced into joining into civil society. To reiterate this important point, individuals cannot rationally remain in the state of nature, even if their physical condition may in actual fact be better than once they enter the civil condition. The potential threat of being subject to the arbitrary coercive force of another renders this decision untenable. We must enter the civil condition then because failing to do so is not a rational response to the problem of political coordination. The downside to this is that members of a society in which the laws can be enforced, even if the laws themselves are deficient, must remain in society regardless of its faults. Its faults must then be reformed from the inside, there being no situation in which it is preferable, i.e. rational, to leave the civil condition. On this point Kant is clear that there is:

No right to *sedition*, still less to *rebellion* and least of all is there a right against the head of a state as an individual person (the monarch), *to attack his person* or even his life on the pretext that he has abused his authority.<sup>158</sup>

Moreover,

A change in a (defective) constitution, which may certainly be necessary at times, can therefore be carried out only through *reform* by the sovereign itself, but not by the people, and therefore not be *revolution*; and when such

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of the state in matters of taxation, recruiting and so forth, subjects may indeed oppose this injustice by *complaints (gravamina)* but not by resistance.” He goes on to say that “a people cannot offer any resistance to the legislative head of a state which would be consistent with right, since a rightful condition is possible only by submission to its general legislative will. *Ibid.*, 6:319-20.

<sup>158</sup> *Ibid.*, 6:320.

a change takes place this reform can affect only the *executive authority*, not the legislative.<sup>159</sup>

Given that it is always preferable to be living in a civil condition as compared to the state of nature, and that people can be coerced into the civil condition and cannot leave it by force once they have entered into it, what does this tell us about the rights of independent nations each living in a civil condition with respect to one another?

In *Public Right* 6:343 Kant tells us that states, like individuals in the state of nature, are in a constant state of war with respect to one another.<sup>160</sup> Surprisingly, however, unlike individuals in the state of nature who have a duty to enter into a rightful condition by placing a coercive body in charge of enforcing the law, nations must not place a sovereign authority over themselves but must come into a voluntary association. This association will provide the structure that is necessary to establish a lasting peace between nations and so it is something that states must work towards creating. Kant believes that states that have a republican constitution are likely to be willing to enter into this mutual association with other republican nations because they will contain within themselves the elements necessary to establish a mutual trust. The following section aims to examine the rights that nations have with respect to one another and how they can hope to exit the state of nature, which is the state of war, without creating a coercive power capable of binding them all.

### 3.2.3 Kant on the Just War

Kant asserts that states have three different kinds of rights with respect to one another as follows:

The rights of states consist, therefore, partly of their right *to go to war*, partly of their right *in war*, and partly of their right to constrain each other to leave

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<sup>159</sup> Ibid., 6:321-22.

<sup>160</sup> Ibid.

this condition of war and so form a constitution that will establish lasting peace, that is, its right *after* war.<sup>161</sup>

The just war theory terminology that would map on to these rights are *jus ad bellum*, *jus in bello* and *jus post bellum*, corresponding to the limitations on the right to wage war, how the wars ought to be fought and the steps necessary to establish a lasting peace through these first two categories. While Kant clearly utilizes these categories he emphasizes that there is no constraint on *jus ad bellum* and *jus in bello* that can be applied by nations unless there is some coercive force necessary to enforce the rules. For this reason he says that there can be no just war theory, or at least no just war theory in the form proposed by Grotius and others, because there can be no mechanism of this kind in the international realm.<sup>162</sup> The best that we can hope for is a provisional agreement between nations to stop engaging in warfare and the better the internal setup of the nations making the agreement the better the chances of it holding in the long run.

The following is a list of the elements of the right of nations as put forward by Kant in *Public Right*:

1. States, in external relation to one another, are (like lawless savages) by nature in a nonrightful condition.
2. This nonrightful condition is a condition of war even if it is not a condition of actual war or hostilities.
3. A league of nations (social contract) is necessary not to meddle in internal dissention but to protect against attacks from without.
4. This alliance must not involve a sovereign authority but only an association.<sup>163</sup>

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<sup>161</sup> Ibid., 6:343.

<sup>162</sup> Of course this does not mean that we could not feasibly institute a world government but that it would be irrational to do so.

<sup>163</sup> Kant, *Practical Philosophy*, 6:344.

While individuals form themselves into associations with one another in a non-voluntary way and can be coerced into joining political association, groups of individuals who have already taken this first necessary step are not forced to enter into association with other groups but they are compelled to do so by moral reason.<sup>164</sup> What feature of political groups explains the difference between individuals and groups? Remember that for Grotius the rights of nations were completely derivative of the rights of individuals and there were some differences in application of the law owing to the conditions that larger groups of individuals find themselves in but their laws were based on the same basic principles. Here Kant departs from this way of thinking and seems committed to the view that the laws that apply to individuals are not directly transferrable to groups.

Kant's assertion that Grotius and other just war theorists are sorry comforters is revealing on this point. What is wrong with Grotius' position, on a Kantian reading, is that there is no sovereign with the authority necessary to punish political units that violate the laws of nations. If such a sovereign existed then it would have absolute power, as there would be no other group capable of judging whether the sovereign was behaving correctly. The problem with a world government is that the risk of creating an absolute tyranny is too great. This leads Kant to conclude that the only way to achieve perpetual peace, which is the "entire final end of the doctrine of right within the limits of mere reason",<sup>165</sup> is to improve the internal workings of each sovereign state so that they will voluntarily agree to associate with one another in achieving the goal of perpetual peace. Since peace is in all of their interests there is no need to place a sovereign who is above the law over the federation of nations.

With this solution to the problem of perpetual peace in mind there is one obvious problem that confronts the possibility of achieving this reality. Notably, even if it is reasonable to try to achieve the end of perpetual peace by agreeing to a voluntary association, this voluntary association places each independent member in an international prisoners dilemma. It may be better for me if everyone else agrees to the

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<sup>164</sup> Ibid., 6:352.

<sup>165</sup> Ibid., 6:355.

rules of the association such that no one goes to war against me, but if I manage to ensure that others are complying without obeying the rules of the game myself, then I am in a position to greatly increase my influence. Since, as we saw, the preliminary articles require all nations to gradually disarm themselves it would be in every nation's interest to appear to be disarming while actually keeping secret a supply of weapons in case they are ever in a position to use them. More problematic even, is that Kant limits the possibility of states that are in the league of nations to influence others that have not already agreed to the voluntary association. Kant is explicit on the point that nations must "gradually work their way out of barbarism of their own accord if only one does not intentionally contrive to keep them in it."<sup>166</sup> If this is the case, then the more committed to the goal of perpetual peace a nation is, the more likely they are to be defenceless against enemies who have not agreed to the terms of peace. It is for these reasons that Kant maintained that in practice "*perpetual peace*, the ultimate goal of the whole right of nations, is indeed an unachievable idea",<sup>167</sup> one that he thought could only be approximated.

Although Kant is committed to the idea that states must not interfere with the internal affairs of other states, when they pose a threat to another they are liable to attack. While Kant maintains that there is a limit to the force that can be used against an unjust attacker (it must be proportionate to the threat being countered) he does not say explicitly what counts as a threat.

There are no limits to the rights of a state against an *unjust enemy* (no limits with respect to quantity or degree, though there are limits with respect to quality); that is to say, an injured state may not use *any* means *whatever* but may use those means that are allowable to any degree that it is able to, in order to maintain what belongs to it.<sup>168</sup>

On one interpretation it would be possible to view Kant's limited discussion of *jus in bello* as though it were not even being discussed in terms of already instigated hostilities. This is not an entirely ridiculous way to read Kant given what he said regarding the

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<sup>166</sup> Ibid., 8:41.

<sup>167</sup> Ibid., 6:350.

<sup>168</sup> Ibid., 6:349.

condition that states find themselves in in the international realm. Because the state of nature is a state in which there is always the threat of war, there is no need for actual hostilities to be underway in order for a state to feel threatened. Especially in the case where some states have agreed to terms of peace based on their mutual acceptance of republicanism they would be rational to feel threatened by other states that have not accepted these terms. Since they are already technically “at war” with these other states and since they cannot be trusted not to harm others in the future it is in the best interests of more powerful states to try to disarm other noncompliant states into entering the league of nations. This is allowed for in the case of individuals in the state of nature who can be coerced into entering the civil condition, so it is not altogether inconsistent to read Kant in this way.

However, since the ideals of republicanism as well as that of the perpetual peace are unachievable in practice, it may be that any state no matter its constitution is already in a civil condition that is sufficiently good to protect it from the external influence of others. On this interpretation, exiting the state of nature is what is most important for individuals. Afterwards any improvements that can be made towards reaching republicanism and then perpetual peace are improvements to the civil condition so that deficiencies are not sufficiently threatening to authorize the use of coercive power against less developed countries. I believe that this reading of Kant is more in keeping with the spirit of his thinking as it is laid out in *Cosmopolitan Right*. Here he states that “morally practical reason pronounces in us the irresistible *veto*: *there is to be no war.*”<sup>169</sup> Howard Williams agrees with this reading of Kant, he argues that Kant was one of the first thinkers to dispute the idea that just war theory would temper hostile relations between states. Kant does place greater limits on the justifiable resort to war than the authors we have seen so far, but to go so far as to say that Kant does not have a just war theory would be, I think, to misunderstand the subtlety of Kant’s political program. At its heart, Kant’s program for perpetual peace is pacifist in spirit. What I mean by this is that it condemns the use of violence to achieve political goals. However, Kant cannot be a true pacifist because he also maintains that states have to protect the rights of citizens and so

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<sup>169</sup> Ibid., 6:354.

they must maintain the right to defend these citizens from attack. In the next section I will argue for a Kantian version of just war theory.

### 3.3 Kant's Just War Theory

In spite of the fact that Kant scholarship has traditionally been in agreement that Kant is not a just war theorist, more recently, attempts have been made to show that Kant is committed to principles of just war theory.<sup>170</sup> Brian Orend has made a convincing argument that Kant cannot be seen as either a realist or a pacifist and that his writings on war are consistent with a just war program. However, I would like to challenge the idea that there is such a sharp division between these categories and that instead there is room for significant overlap between realism, and just war theory. As Paskins has argued, contemporary versions of just war theory, like the one put forward in Walzer's *Just and Unjust Wars*, "exaggerates the tensions between realism and the just war."<sup>171</sup> In other words, there is a possible realist reading of just war theory that does a better job of integrating Kant's political writings. The traditional realist position in international relations is often expressed by the phrase "all's fair in love and war." On this interpretation, nations will do what is in their best interests and they cannot be expected to obey laws. Even when they do appear to be acting in accordance with so-called laws this is only because they happen to accord with their interest for the time being. As soon as the laws no longer suit them, nations will violate the laws. On the popular realist reading of Kant, just war theorists are "sorry comforters" because they outline laws of warfare that will be violated as soon as it is in the interest of states to do so. What I maintain is if Kant is a realist, then he is not a traditional realist but the kind of realist who can accept that certain principles of just war theory are applicable to states that have agreed to cooperate in a league of nations.

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<sup>170</sup> The alternative to being a just war theorist is to be either a realist or a pacifist. Kant has traditionally been placed in the realist camp, which I aim to show is an oversimplification of his position.

<sup>171</sup> Barrie Paskins, "Realism and the Just War," *Journal of Military Ethics* 6, no. 2 (2007): 117.

Kant moves along the boundaries of realism and just war theory, recognizing that states will do what is best from the point of view of their self-interest, but hoping that rationality will guide states to recognize that cooperation is to their mutual advantage.

Apart from a few overtly hostile references to just war theorists such as Vattel and Grotius that we have seen, Kant is committed to the view that states are moral agents and that we can hold them to moral standards. The criticism of the just war theorists is that they do not recognize that the laws that they propose will be violated whenever it is in the interest of nations to do so. Kant's solution to this problem is to suggest that states must focus on their own internal make-up so that when they interact in the international realm it is in their best interest to cooperate peacefully with others. Because he recognizes that pursuing perpetual peace is a utopian ideal that will not ever be fully met he must allow for realist calculations of what is in the best interests of states. The hope is that the calculation will work to favour peace but this may not always be the case.

In spite of the fact that he takes realist considerations seriously, Kant cannot be a realist. That is because he is clearly committed to the view that there can be moral improvements in the international realm and that these improvements will come about through gradual improvements to the individual governments that make up the international realm. While Kant does believe that international relations at the time of his writing are best explained through the lens of realism, he also thinks that we can and must move beyond realism to a global rightful condition. A global rightful condition is one in which the freedom of each state to act is compatible with the freedom of every other state to do the same. This extension of the universal principle of right to the international realm acts as a guide to the morality of actions done at this communal level. If it were impossible to create a rightful condition at the international level, says Kant, then this would undermine the possibility of morality at all the other levels. What Kant says at the beginning of the section on "Public Right" in the *Doctrine of Right* is particularly revealing on this point:

The sum of the laws which need to be promulgated generally in order to bring about a rightful condition is *public right*. – *Public right is therefore a system of laws for a people, that is, a multitude of human beings, or for a*

*multitude of peoples, which, because they affect one another, need a rightful condition under a will uniting them, a constitution (constitution, so that they may enjoy what is laid down as right. – This condition of the individuals within a people in relation to one another is called a civil condition (status civilis), and the whole of individuals in a rightful condition, in relation to its members is called a state (civitas). ... Hence under the general concept of public right we are led to think not only of the right of a state but also of a right of nations (ius gentium). Since the earth's surface is not unlimited but closed, the concepts of the right of a state and of a right of nations lead inevitably to the idea of a right for a state of nations (ius gentium) or cosmopolitan right (ius cosmopolitanum). So if the principle of outer freedom limited by law is lacking in any one of these three possible forms of rightful condition, the framework of all the others is unavoidably undermined and must finally collapse.*<sup>172</sup>

In order for the idea of international law to make any sense this must necessarily be the kind of place where the concept of law makes sense. If there were no way for laws to apply to and between nations, then there could be no cosmopolitan right. The challenge for Kant, as was mentioned above, is to explain how it is possible to move from a situation of anarchy in the international realm to a law-governed situation.

From this passage it is pretty clear that Kant thinks that we can and must rationally move beyond the state of nature in international relations. What is still unclear is whether he is committed to the pacifist view that all wars are necessarily unjustifiable on any moral grounds. On this point it is obvious that Kant does not subscribe to pacifism. In the *Doctrine of Right* he asserts that:

The right of states consist, therefore, partly of their right *to go to war*, partly of their right *in war*, and partly in their right to constrain each other to leave this condition of war and so form a constitution that will establish lasting peace, this is, its right *after war*.<sup>173</sup>

This commitment to the categories of *jus ad bellum*, *jus in bello* and *jus post bellum* in and of itself shows that Kant is not a believer in pacifism, which holds that all acts of political violence are necessarily morally wrong, even if they are undertaken in self-defence. It is clear from the use of the above-mentioned categories of thinking about the

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<sup>172</sup> Kant, *Practical Philosophy*, 6:311.

<sup>173</sup> *Ibid.*, 6:343.

ethics of war that Kant believes that there are conditions under which wars can be waged justly.

The conditions under which a state may justly wage war include self-defence, and the defence of foreign populations against the abuse of their rights. These conditions existed, as we have seen in previous chapters, under the various versions of just war theory to come before Kant. However, under the Kantian commitment to the principle of universal right these just war categories are more limited than the previous versions of just war theory that we have seen. For example, the state's right to self-defence under the Grotian interpretation was grounded in each individual's right to self-defence in the state of nature. This individual right was then transferred to the state, which, being in an international state of nature retains this right. On a Kantian reading the state of nature is not one in which individuals have the proper right to self-defence, in a way they cannot be thought of as having rights proper at all. For Kant, we only have our rights provisionally in the state of nature and the freedom that we have in the state of nature is not really freedom at all. We give up the "wild" freedom of the state of nature for the real freedom to pursue our life projects unhindered by the arbitrary will of another person. As such we give up the right to punish those who abuse us to a coercive power in the civil condition. However, nations are not similarly in a position to punish aggressors in the international realm. Violations of the laws of nations can be rectified if they are ongoing and directed at external others. Contrary to individual in the civil condition who may be punished for their violations of the law, so as to maintain order in society; nations do not retain the right to punish aggressors but simply to repel them and restore the conditions prior to the aggression. In cases of aggression that is directed inwardly towards a state's own population, external others are not only not required to intervene they are restricted from doing so unless the civil condition breaks down to the point that it is non-existent and the territory in question has returned to the state of nature. For the present I simply wanted to point out that Kant's version of just war theory is restricted compared to Grotius and other social contract theorists because it eliminates punishment as a possible just cause and defence of others is restricted to returning others, at their behest, to a civil condition.

To summarize Kant's just war theory, *jus ad bellum* still contains the principle of just cause, but instead of self-defence, defence of allies and punishment of wrongdoing, we are left with only self-defence. Right intention becomes redundant in the case of aggression already being committed against your own population and really only served a role in limiting the resort to force for the protection of others. This is because there is no need to prove right intention in the case of self-defence. The state has a duty to protect its own citizens, which it is required to carry out precisely because we presume that the state represents the best intentions of its citizens. The principle of last resort is also presumed by the justification of self-defence. Since violence is more costly an option in the case that you are being attacked than convincing your attacker to withdraw, when violence is used in self-defence it is as a last resort. *Jus ad bellum* proportionality remains, limiting what can be undertaken in self-defence to the reestablishment of the conditions that were in place before the current act of aggression took place. In other words, you cannot benefit from having been attacked by taking over territory that was formerly not your own. And reasonable hope of success, the idea that aggression should not be met with aggression simply for the sake of maintaining honour if there is no likely hope that by engaging in self-defence you will be in a better condition than by surrendering.

The *jus in bello* principles of proportionality and discrimination remain at the core of the Kantian idea that all people should be treated as ends in themselves and not mere means to an end. Moreover, proper respect for these principles, as in Grotius, is the foundation for coming to a lasting resolution of current hostilities.

Most important for Kant, the principles of a proper *jus post bellum* are enumerated in the articles for perpetual peace that we have seen. Kant waffles in his commitment to a set of principles governing rights after a war has been terminated. On the one hand he seems to say that victory in war does not confer any rights upon the victor to the detriment of the vanquished party's ability to self-government. But he also seems to say that once a war against an obviously unjust aggressor is over that state "can be made to accept a new constitution of a nature that is unlikely to encourage their

warlike inclinations.”<sup>174</sup> So, it would seem that in spite of his commitment to allowing independent states to govern themselves internally as they see fit, once they have shown themselves to be unjust in their actions towards others it may become legitimate for an outside party to intervene in changing the constitution. Usually it appears that states must reform themselves from the inside out. Kant is explicit in “Cosmopolitan Right” that it is not justifiable to take over the territory of another on the argument that things will be better for the people there afterwards. In other words, there is no justifiable way to “civilize savages”, and Kant counters arguments to this effect saying:

Someone may reply that such scruples about using force in the beginning, in order to establish a lawful condition, might well mean that the whole earth would still be in a lawless condition; but this consideration can no more annul that condition of right than can the pretext of revolutionaries within a state, that when constitutions are bad it is up to the people to reshape them by force and to be unjust once and for all so that afterwards they can establish justice all the more securely and make it flourish.<sup>175</sup>

There appears to be a difference between the example of the nation being forced to adopt a new constitution after conquest and one being forced without previous aggression to be subdued by a foreign power. Kant has in mind the taking over of territories native to the indigenous populations of America in the latter case, which he thinks is unjustifiable on the grounds of “civilization”. The former case seems to be one in which a nation has been overtly hostile to another and has engaged in a war of aggression. These people, and only under certain circumstances may be forced to adopt a more just constitution, but there is a sense in which they are already returned to the state of nature internally and so it does not violate their actualized rights, since they cannot be said to have any. As Waltz commenting on Kant warns:

Peace is the noblest cause of war. If the conditions of peace are lacking, then the country with a capability of creating them may be tempted to do so, whether or not by force. The end is noble, but as a matter of *right*, Kant insists, no state can intervene in the internal arrangements of another. As a

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<sup>174</sup> Ibid., 6:349.

<sup>175</sup> Ibid., 6:353.

matter of *fact*, one may notice that intervention, even for worthy ends, often brings more harm than good.<sup>176</sup>

Kant is one of the first theorists to explicitly endorse the category of rights after war *jus post bellum* and to link it to how wars are fought. His overall vision for just war theory is that all the principles tend towards the goal of perpetual peace. In order to get closer to this ideal we have to be willing to work on the internal workings of our own states in order to make our national situation come closer to that of justice. In addition to this internal work, we have to be willing to forego our rights to go to war in favour of securing the global rightful condition. We do this by entering into a league of nations and agreeing with others to resolve our disputes in non-violent ways. Kant insists again and again that this must be done in a gradual way so as not to undo whatever gains in matters of rights have been made in the past, so it is most consistent with his program for perpetual peace that there be no coercive body capable of forcing compliance with international laws. So:

The attempt to realize this idea should not be made by way of revolution, by a leap, that is, by violent overthrow of an already existing defective constitution (for there would be an intervening moment in which any rightful condition would be annihilated). But if it is attempted and carried out by gradual reform in accordance with firm principles, it can lead to continual approximation to the highest political good, perpetual peace.<sup>177</sup>

Given that what we as moral agents must try to do is to exit the state of nature in the international realm it makes sense to adopt the program that Kant spells out for perpetual peace in his 6 preliminary articles and 3 definitive articles. The problem of other states complying with the laws is always going to remain, so Kant's assertion that:

What is incumbent upon us as a duty is rather to act in conformity with the idea of that end [perpetual peace], even if there is not the slightest theoretical likelihood that it can be realized, as long as its impossibility cannot be demonstrated either.<sup>178</sup>

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<sup>176</sup> Kenneth N. Waltz, "Structural Realism after the Cold War," *International Security* 25, no. 1 (2000): 13.

<sup>177</sup> Kant, *Practical Philosophy*, 6:355.

<sup>178</sup> *Ibid.*, 6:354.

There have, of course been numerous critiques of Kant's position with regards to the possibility of establishing a lasting peace through a voluntary federation. For one, Thomas Carson has argued that a consistent Kantian position requires him to argue for the creation of a world state with the power to coerce others and not merely a voluntary association without a coercive body. Carson suggests that Kant is in fact committed to this view and that his arguments in support of a world federation are based on the belief that world powers will not in practice agree to give up their sovereignty in order to join the world state. This may be the case, however, Carson maintains that without the coercive power to enforce disarmament and to punish violations of international law the federation of nations will do little to achieve the goal of perpetual peace.<sup>179</sup> In response to the supposed "fact" that democracies will not go to war with one another, Carson considers this the result of happy coincidence and does not believe that the spread of democracy will in any way guarantee a lasting peace.<sup>180</sup> I will turn to arguments in favour of the "democratic peace thesis" in the next chapter and hope to show, ultimately, that Kant cannot be thought to support the thesis that democracies will not go to war against one another.

I believe that Kant's development of a theory of international relations in *Perpetual Peace* and elsewhere in his mature writings is particularly successful because it navigates the line between realism and idealism. He is not committed to the view that international relations are destined to remain violent and bloody, nor does he minimize the great efforts that must be undertaken by nations, both individually and collectively, in order to improve the international situation. Kant's position perhaps in political philosophy is perhaps not the most optimistic but not entirely defeatist either. Kant asks us to act in such a way that our actions are consistent with bringing about the goal of perpetual peace, even if the likelihood of this occurring is negligible. What is somewhat surprising, given Kant's scepticism, is that it appears that international relations have developed in a way that is consistent with the Kantian program, since his death many of

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<sup>179</sup> Thomas L. Carson, "Perpetual Peace: What Kant Should Have Said," *Social Theory and Practice* 14, no. 2 (1988).

<sup>180</sup> *Ibid.*, 180-81.

the states of the world have voluntarily agreed to come together for their mutual benefit in both the League of Nations and now the United Nations. The result of these associations has obviously not been to eliminate warfare between nations (or even between members of the associations), yet there remains the hope that with the greater expansion of the articles of *Perpetual Peace*, that more peaceful relations are possible. In the next chapter I will examine the arguments in favour of “the democratic peace” (sometimes called the “Kantian peace”, or the “liberal peace”). What I hope to show is that in spite of the theory’s reliance on Kant as inspiration, Kant himself could not be a supporter of the democratic peace thesis owing to the political program that was outlined in this chapter.

## 4 Democratic Peace Theory

Democratic peace theory begins from the empirical data that there have been no wars between democratic countries since the beginning of the modern state system. From this data set theorists conclude that there must be something about the nature of democratic institutions or culture that produces this surprising result. Bruce Russett summarizes the elements of democratic peace theory as follows in his influential 1993 book *Grasping the Democratic Peace*:

In the modern international system, democracies have almost never fought each other. This statement represents a complex phenomenon: (a) Democracies rarely fight each other (an empirical statement) because (b) they have other means of resolving conflicts between them and therefore do not fight each other (a prudential statement), and (c) they believe that democracies should not fight each other (a normative statement about principles of right behaviour), which reinforces the empirical statement. By this reasoning, the more democracies there are in the world, the fewer potential adversaries we and other democracies will have and the wider the zone of peace.<sup>181</sup>

Democratic peace theorists almost always make reference to Kant as having predicted why the prudential and normative sections above serve to promote the empirical data that has been observed. For example Sean Lynn-Jones writes: “Two centuries ago, the German philosopher Immanuel Kant *predicted* that republican states would enjoy a “perpetual peace” with other republics.”<sup>182</sup> [emphasis added] Russett remarks that: “The vision of a peace among democratically governed states has long been invoked as part of a larger structure of institutions and practices to promote peace among nation-states,” and then implies that Kant was the father of this line of thinking, saying: “Immanuel Kant spoke of perpetual peace based partially upon states sharing “republican constitutions.”<sup>183</sup> And Doyle explains that: “Immanuel Kant offers the best guidance” for the democratic peace. “‘Perpetual Peace,’ written in 1795, predicts the ever-widening

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<sup>181</sup> Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World*, 4.

<sup>182</sup> Michael E. Brown, Sean M. Lynn-Jones, and Steven E. Miller, eds., *Debating the Democratic Peace: An International Security Reader* (Cambridge, Massachusetts: The MIT Press, 1996), ix.

<sup>183</sup> Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World*, 4.

pacification of the liberal pacific union, explains that pacification, and at the same time suggests why liberal states are not pacific in their relations with non-liberal states.”<sup>184</sup>

While many authors offer Kant up as a defender of the democratic peace theory what I will suggest is that a careful reading of Kant shows that his claims are not consistent with those of the democratic peace. What is perhaps most surprising about this attribution is that Kant had absolutely no access to any empirical findings to support his idea that the internal structure of a state’s government would have an effect on how it interacts with other states. At the time that Kant wrote *Perpetual Peace* (1795), there were in total only three states that could roughly be defined as democratic: the Swiss Cantons, the French Republic (1790-1795) and the United States (1776 and following). Even within this short list, not all the Swiss Cantons were democratic, and the United States was only so north of the Mason-Dixon line until 1865.<sup>185</sup> Moreover, even in the small areas of rule of law these states did not have universal suffrage until long after Kant was writing.

The central claims of the democratic peace theory are, as we have seen above, that the empirical evidence that democracies have not gone to war against one another in the last 200 years is best explained by an inherent democratic feature of their governance, and that, if more countries were democratic there would be fewer wars ultimately resulting in a fully democratic peace if all states adopted democratic governance at the internal level. The theory does two things: first it provides an explanation for an observed pattern in international relations; and second it tells us how to act in the future in order to achieve the goal of a lasting peace among nations.

## 4.1 The Structural Argument

Broadly speaking there are two “explanatory” versions of the democratic peace thesis. The first is based on an excerpt taken directly out of Kant’s *Perpetual Peace* and in which he makes the following claims:

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<sup>184</sup> Doyle, "Kant, Liberal Legacies and Foreign Affairs," 225.

<sup>185</sup> Ibid., 209.

Republics must get the consent of their citizens before embarking on a war and these citizens will be hesitant to condone going to war because:

- a) They will have to bear the costs of the war themselves in lives lost and resources spent on carrying it out.
- b) They will have to pay for reconstruction after the war is over.
- c) They will have to pay back the debt accrued in fighting.<sup>186</sup>

Because of all of these factors it is believed that republics (which are taken by democratic peace theorists to be consistent with democracies) and their citizens will only agree to go to war in extreme circumstances where it cannot be avoided. This is not an unreasonable claim; however, it is not consistent with the empirical data supporting the democratic peace for the following reason. If republics are more peaceful because they have to get actual consent from their citizens then it would stand to reason that they would be more peaceful in general and not just more peaceful towards other similarly governed nations. There is no reference to the internal governmental structure of the opposing state and it is not clear why this would make any difference to the willingness of citizens to pay the costs of going to war. What would be expected from this list of reasons why republics would be less willing to go to war is that they would be more peaceful towards all states regardless of governmental form, yet this is not the result that has been observed. In reality, republics (or democracies) are less likely to go to war amongst one another, but no less likely to go to war tout-court.<sup>187</sup>

Kant's first definitive article for perpetual peace begins with the idea that the consent of the governed is necessary in a republic and that this is the reason why these

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<sup>186</sup> The passage in question is quoted above.

<sup>187</sup> David E. Spiro, "The Insignificance of the Liberal Peace," *International Security* 19, no. 2 (1994): 52; Christopher Layne, "Kant or Cant: The Myth of the Democratic Peace," *ibid.*: 12. For a further attempt to explain the democratic peace data in terms of the internal structure of governments see: T. Clifton Morgan and Sally Howard Campbell, "Domestic Structure, Decisional Constraints, and War: So Why Kant Democracies Fight?"

, " *Journal of Conflict Resolution* 35, no. 2 (1991). In the end Morgan and Campbell suggest that the cultural thesis is a more plausible explanation than the structural argument.

states will be less war prone. Consent plays an important role in the social contract tradition and there are many types of consent, actual, tacit, hypothetical, which play different roles depending on the job that consent is supposed to do in the theory. Consent for Kant does not play the role of legitimating the government's actions. What consent does for Kant is justify the government's exclusive use of coercion to control the actions of its citizens. Moreover, it is not the actual consent of the citizens that does this. Instead, citizens of the state must have consented to the government's authority to coercively enforce the law because living in a lawless condition, even a temporarily peaceful lawless condition is worse than living under even a corrupt government.

It is tempting, based on the way the explanation of the first definitive article is phrased, to interpret Kant's reliance on consent to mean actual consent of all people.<sup>188</sup> However, what I would like to suggest is that it would be inconsistent with what he says about representation to maintain that he thinks that actual consent to waging war would be necessary to justify it. In fact, he asserts precisely that the actual consent of the people is not required in order for the representatives to decide to engage in a war. In a note in *Theory and Practice* he gives the example of a tax levied for a war effort:

If, e.g., a war tax were imposed proportionately on all subjects, they could not, because they found it oppressive, say that it is unjust because in their opinion the war may be unnecessary; for they are not entitled to appraise this but instead, because it is still always *possible* that the war is unavoidable and the tax indispensable, the tax must hold in a subject's judgment as in conformity with right. But if, during such a war, certain landowners were burdened with levies while others of the same rank were exempted, it is easily seen that a whole people could not agree to a law of this kind, and it is authorized at least to make representations against it, since it cannot take this unequal distribution of burdens to be just.<sup>189</sup>

The test for whether legislation is in accordance with right is not whether the people do consent to it, but whether they could consent to it. All people do not decide on the law and its justice and they must abide by the decisions of the legislators even if it goes against their own judgment. Reading the above passage in *Perpetual Peace* as though

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<sup>188</sup> And it may even seem counter-intuitive to read this passage with possible consent in mind.

<sup>189</sup> Kant, *TP*, 8:298 n.

Kant required all people to vote on whether a war is just or not goes against what he says in the rest of his political philosophy. Notably, Kant maintains the need for representative government in which not all but only some decide for all, and in which the laws put forward by the legislature are legitimate regardless of whether the people consent to the laws or not, because it is better to live in the civil condition and to gradually reform its institutions and laws than to live in the state of nature where there can be no laws to begin with. It is true that Kant does endorse voting as a decision procedure and that some people may be in a position to vote on whether a war will happen or not. In this case, representatives, who should have the interests of all citizens and cobeneficiaries at heart, may have to vote on whether to engage in warfare but the procedural mechanism is not what makes the resort to war less likely. What if the war would benefit those who were in a position to vote and not their representatives? What makes the resort to war less likely is that representatives in this ideal situation are duty bound to respect the rights of those they represent. If they fail in this duty, citizens must work to gradually reform the laws such that their rights are respected. The government in this case would suffer from a lack of legitimacy but the decision to go to war would still be justified. On Kant's view of representation, it is likely that not very many people would actually get the chance to decide on whether the state goes to war or not.

Kant holds that a situation in which all decide is necessarily despotism because a majority will always get to decide against a dissenting minority. In order to solve the problem of who gets to decide for all Kant says that the people must be represented by officials whose mandate is to ensure that their rights as autonomous individuals are maintained. According to Kant, the best government is one with the most representation, meaning that there are a very small number of representatives (and possibly only one person) representing the interests of all. Kant makes this point clear in the explanation of the first definitive article for perpetual peace as follows:

It can therefore be said that the smaller the number of persons exercising the power of a state (the number of rulers) and the greater their representation, so much the more does its constitution accord with the possibility of republicanism, and the constitution can hope by gradual reforms finally to raise itself to this. On this basis it is already harder in an aristocracy than in

a monarchy to achieve this sole constitution that is perfectly rightful, but in a democracy it is impossible except by violent revolution.<sup>190</sup>

The representative is given the mandate to use her best judgment to rule over the people and is constrained in the types of laws that she can make by whether or not it respects the freedom of the citizens. My freedom as a citizen is guaranteed when my rights are secured by a government capable of enforcing them against others and the rights that are guaranteed are those that apply equally to all citizens. Those placed in the position of ruling over others must ask themselves in legislating and executing the laws whether they are consistent with the freedom of each of the citizens. So the type of consent that Kant must be talking about in the passage above is not whether the citizens actually consent to the war, which they may or may not do, but whether they could possibly consent and have that consent be consistent with their right to freedom. In the case of war, if an outside force threatens the security of the nation, this undermines the government's ability to carry out its functions, which was the condition for leaving the state of nature, so it is impossible for the citizens to not consent to defending themselves against attack. If, on the other hand, the rulers wage war for their own benefit, or for the benefit of some small group but not for all, then the people could not have consented to taking on the burdens of fighting that Kant lists.<sup>191</sup>

The burdens of fighting an aggressive war are the same whether the adversary is a republic or any other form of government, so it should make no difference to the citizens of a republic whether their adversary is a republic or not. Republics that near the ideal will fight fewer wars, according to Kant, because the leaders are asking themselves whether or not their citizens could consent to the actions taken on their behalf all the time. They do not fight fewer wars against other similar government types.

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<sup>190</sup> *PP*, 8:353.

<sup>191</sup> It is important to recall that what we have been concerned with here is Kant's ideal theory of republicanism. Voting in the ideal world may be unnecessary because we could reach a consensus through reason. However, in the real world voting plays an important role both as a procedural mechanism and as a symbol of the consent of the governed.

One reason why we might think that republics would not fight wars against other republics but that they would fight against non-republics is because the citizens would not consent to fighting against those they see as reasonable and capable of engaging in trustworthy negotiations. This brings us to the cultural argument. This version of DPT holds that there is something about the shared culture of democracy that makes democracies trust one another more than other forms of government. For this reason they manage to settle their disputes in ways that avoid warfare, through negotiation and bargaining, which is how all democratic decisions are made. The next section will take up this version of DPT to show why, even though Kant advocated that nations should build their strategies for negotiation and building trust, he did not think that this trust was built on the type of government that a state had, but on the concrete steps taken to improve their relationships.

## 4.2 The Norms and Culture Argument

Bruce Russett, probably the most prominent advocate of the cultural thesis, explains why the culture of democracy works to constrain violence against other democracies:

The basic norm of democratic theory is that disputes can be resolved without force through democratic political processes that in some balance ensure both majority rule and minority rights. A norm of equality operates both as voting equality and certain egalitarian rights to human dignity. Democratic government rests on the consent of the governed, but justice demands that consent not be abused. Resort to organized lethal violence, or the threat of it, is considered illegitimate, and unnecessary to secure one's "legitimate" rights.<sup>192</sup>

What this means is that democratic decisions are made through a process that involves discussion and compromise. When two democracies have a dispute at the international level, they each know that the other is experienced with dealing with negotiation and compromise and so they are more likely to engage in these types of diplomatic actions than to come to blows with others who are like them. Sebastien Rosato explains the

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<sup>192</sup> Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World*, 31.

“normative logic”, meaning the way that the cultural norms of society function to constrain the actions of democratic citizens and their leaders, as follows:

Proponents of the normative logic argue that one important effect of democracy is to socialize political elites to act on the basis of democratic norms whenever possible. In essence, these norms mandate nonviolent conflict resolution and negotiation in a spirit of live-and-let-live. Because democratic leaders are committed to these norms they try, as far as possible, to adopt them in the international arena. This in turn means that democracies both trust and respect one another when a conflict of interest arises between them. Sentiments of respect derive from a conviction that the other state adheres to the same norms and is therefore just and worthy of accommodation. Trust derives from the expectation that the other party to the dispute is also inclined to respect a fellow democracy and will be proscribed normatively from resorting to force. Together these two causal mechanisms – *norm externalization* and mutual *trust and respect* – make up the normative logic and explain why democracies rarely fight one another.<sup>193</sup>

The mutual trust and respect that democracies are expected to show one another are supposed to override their desire to pursue their self-interest through violent means. Kant thinks that we can override the effects of self-interest in the state of nature that characterizes the international realm, so it is initially tempting to think that he would endorse a version of the cultural argument, even if he did not explicitly discuss this possibility. However, because the cultural argument is supposed to work because a country is a democracy, and not because of any specific formal treaties or agreements that it has made ahead of the peace, there are two possible Kantian responses. The first option would be to say that it is a coincidence that no democracies have fought one another.<sup>194</sup> The second would be to say that it is because they have engaged in the formal peace-building exercises that Kant suggested in the six preliminary articles. Since it is clearly the case that our modern democracies fail to satisfy the preliminary articles, even minimally, there is little reason to think that Kant would endorse this view.

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<sup>193</sup> Sebastian Rosato, "The Flawed Logic of Democratic Peace Theory," *The American Political Science Review* 97, no. 4 (2003): 586.

<sup>194</sup> See Spiro, "The Insignificance of the Liberal Peace." For a criticism of the democratic peace showing that it is statistically insignificant and predicted by random chance.

In contrast with democratic peace theorists, Kant does give us a list of the things that republics would have to do in their own internal domestic cases to make them less likely to go to war, however, like the democratic peace theorists these seem to be things that would make them less likely to fight at all and not merely with other republics. As we saw above, the preliminary articles (PA's) 1-6 provide some guidance as to what states ought to do in order to decrease their reliance on violence as the only means of adjudicating disputes at the international level. Kant's approach is internal looking as opposed to external; he cares much more about how each state runs its own affairs as opposed to what others are doing. Because of this his theory provides an account of how we can all move independently towards the conditions that will make perpetual peace possible. The likelihood that a state will choose to act in accordance with the PA's is significantly improved if it has adopted a republican constitution as its mode of governance. And there is a greater likelihood that a number of states that have adopted republican governments will respect one another and agree to disarm and abide by the other PA's due to this mutual trust. The structural and cultural arguments for DPT have two different thresholds to meet when assessing the empirical data. The cultural argument requires more than a simple risk-assessment to determine whether it is preferable to go to war or not. Because the cultural argument holds that democratic nations will have mutual respect and trust due to their shared values we would expect not only that they will not actively engage in hostilities with one another but also, that they will not threaten to use force. If we accept the data that no democracies have gone to war in the last 200 years, we must still take into consideration the posturing and threats of war between democracies as potentially damaging to the cultural thesis.

Christopher Layne describes cases in which democracies have engaged in violent posturing towards one another. In these so-called "near misses" wars between two democracies almost happened. Layne discusses four "near misses" in order to show that a better predictor of whether two countries will go to war with one another is power interests and not governmental structure. The four examples of near misses that Layne details are clear instances in which the predictions that democratic peace theory would be expected to make are all violated. If the norms of the democratic peace guided relations

between democracies then we would expect democratic norms to be the things that led to the “near misses” in question, as Layne explains:

Democratic peace theory, if valid, should account powerfully for the fact that serious crises between democratic states ended in near misses rather than in war. If democratic norms and culture explain the democratic peace, in a near-war crisis, certain indicators of the democratic peace theory should be in evidence: First, public opinion should be strongly pacific. Public opinion is important not because it is an institutional constraint, but because it is an indirect measure of mutual respect that democracies are said to have for each other. Second, policymaking elites should refrain from making military threats against other democracies and should refrain from making preparations to carry out threats. Democratic peace theorists waffle on this point by suggesting that the absence of war between democracies is more important than the absence of threats. But this sets the threshold of proof too low. Because the crux of the theory is that democracies externalize their internal norms of peaceful dispute resolution, then especially in a crisis, one should not see democracies threatening other democracies. And if threats are made, they should be a last-resort option rather than an early one. Third, democracies should bend over backwards to accommodate each other in a crisis. Ultimata, unbending hard lines, and big-stick diplomacy are the stuff of *Realpolitik*, not the democratic peace.<sup>195</sup>

Layne documents four near misses where democracies almost came to blows: “(1) the United States and Great Britain in 1861 (“the Trent affair”); (2) the United States and Great Britain in 1895-96 (the Venezuela crisis); (3) France and Great Britain in 1898 (the Fashoda crisis); and (4) France and Germany in 1923 (the Ruhr crisis).”<sup>196</sup> In all four of these cases the democracies in question failed to live up to the expectations of the democratic peace. They engaged in big-stick diplomacy, their populations and government bodies supported going to war, and Layne concludes that the best explanation for why they did not go to war in the end was not because of some mutual respect for other democratic people, but because of realist concerns. Instead of being concerned with using non-violent conflict resolution whenever possible, the states in question backed off from engaging in warfare because it was deemed to be too costly. In other words, if the realist predictions are right, then the internal governmental form of a state has nothing to

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<sup>195</sup> Christopher Layne, “Kant or Cant: The Myth of the Democratic Peace,” *ibid.*: 13-14.

<sup>196</sup> *Ibid.*, 14.

do with whether it will go to war against an opponent. Instead it makes sense to look at other indicators, such as relative military power. On this count, Kant was right to insist that the gradual demilitarization of states is key to ensuring peaceful relations between them. However, he was acutely aware of the risks of being the only one disarming. In order for it to be rational to disarm others must be doing the same. However, in spite of the fact that many scholars claim that mutual republicanism is the key to ensuring that the conditions listed in the PA's be realizable, I would like to suggest that Kant could not have held this view because he did not think of the actual world as divided into republics and non-republics.

Some commentators of Kant's *Perpetual Peace* suggest that the preliminary articles and definitive articles are like the preliminary and definitive articles of a real existing peace treaty.<sup>197</sup> The preliminary articles in these documents typically listed the initial terms of the agreement to lay down arms, resulting in the end to hostilities, while the definitive articles were usually drafted later and set out the conditions under which the two parties would agree not to fight again in the future. Without the definitive articles then, even if active hostilities had broken off, the threat of war would always be present and so the two parties could not be said to be at peace, at least not on a Kantian definition of peace. In order for a real peace to be instituted the parties would have to formally agree to definitive articles of peace. While it might be tempting to read Kant's *Perpetual Peace* in this temporal way there are some problems with this interpretation. The preliminary articles for perpetual peace need not all obtain in order for countries not to be at war with one another. In other words, it is possible for countries to be coexisting without an outbreak of war even if they have not moved towards removing the likely causes of war between them. It is of course more plausible that they would remain at peace for a longer period of time if these conditions obtained. Moreover, the definitive articles do not necessarily come "after" the preliminary articles in the sense that they are solidifying the preliminary articles. If anything, the empirical data that serves to justify the democratic peace thesis today shows that it is possible to have the definitive articles without the preliminary articles being fulfilled.

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<sup>197</sup> Fisch, "When Will Kant's Perpetual Peace Be Definitive," 5.

The current global system has vastly more capable militaries than any Kant could have fathomed at his time, and democratic nations are at the forefront of military armament. The definitive articles taken together seem to suggest that the only form of government compatible with perpetual peace is republican and that only republican governments will enter the federation of free states and be engaged in “universal hospitality”. However, this reading requires that we be able to carefully distinguish republican from non-republican forms of government. Republicanism for Kant tells us only how the state makes use of its power, and Kant divides governmental forms into two types based on how they make use of power. Kant defines “republicanism”, as “the political principle of separation of the executive power (the government) from the legislative power” and “despotism” is “that of the high-handed management of the state by the laws the regent has himself given, inasmuch as he handles the public will as his private will.”<sup>198</sup> The transition between despotism and republicanism is something that Kant says can happen “by gradual reform”<sup>199</sup> so there is the possibility of a state being in transition from despotism to republicanism. The consequences of this on DA 1 is that all states being republican may not require them all to have achieved perfection on this score. It may be enough for them to tend towards republicanism but not to have gotten there perfectly. If this is the case, then one would expect many imperfect republics to be joining in the voluntary league of nations and that they would do this because it is rational to do so and not because they share some overarching culture with the other nations doing likewise. The transition from the state of nature to the civil condition does not pretend to require that the inhabitants of an area share a common culture and that this is the basis for their coming together. They institute the rightful civil condition on the basis that it is rational to do so that each may guarantee his right not to be interfered with. Nations are in a similar situation, and they will agree to enter into voluntary association because it is rational, not because they hold the others with whom they negotiate in high esteem. If there were some cultural norms keeping people from going to war against one another we would be living in a better world than the one we live in, one in which the chances of

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<sup>198</sup> Kant, *Practical Philosophy*, 8:352.

<sup>199</sup> *Ibid.*, 8:353.

achieving perpetual peace would be greatly increased. We do not, however, live in this world and so people do not all want to cooperate and it is because of this refusal to cooperate that we live under the “constant danger of war breaking out.”<sup>200</sup>

Kant says that we have the duty to try to achieve the conditions that would be favourable for achieving perpetual peace, but this does not mean that he thought that this was a realizable condition given the nature of the world in which we happen to find ourselves. We may today be living in slightly better circumstances for the achieving of perpetual peace because some nations have come together and agreed not to fight against one another in the future. But this fact alone cannot justify the optimism of the democratic peace theorists to predict that democratic nations will not fight one another in the future. In fact, the very thing that Kant thought was most indicative of the desire to maintain peaceful relations in the future, the entering into of the league of nations, is not even mentioned as a factor in support of the democratic peace thesis. Whether or not a democracy has entered into the league of nations does nothing to the prediction that it will not fight another democracy. If the democratic peace theorists allowed this to play a role then they would have to predict that all nations entering these international organizations were less likely to go to war against one another, which is clearly not the case. The United Nations, for example, comprises many nations that are not democratic and the theory does not want to conclude that these nations are less likely to fight one another.

### 4.3 Why Kant is not a Democratic Peace Theorist

Because of the structure of Kant’s program for perpetual peace and the way in which it is tied to his larger political and legal philosophies he held a much more robust account than democratic peace theorists of how to go about creating a more stable world order. Democratic peace theorists hold that there is something about democracies that makes them less likely to fight but when pushed to state what this feature is their answers point to either institutions, which one would expect to make them more peaceful generally, or to the less well defined “norms and culture”. Even with a more robust account of how to achieve perpetual peace Kant does not authorize politicians in more

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<sup>200</sup> Ibid., 328.

perfected versions of republicanism to influence the internal workings of other states, even if this would predictably make the achievement of perpetual peace more likely. It would go against the autonomy of these groups, which is at the base what Kant is concerned with, and so it would be contrary to the goals of politics to impose upon another political unit a better form of government. Whatever form of government is in place it is a departure from the state of nature and so a civil condition that is to some degree rightful and capable of securing the rights of its citizens. To interfere in this process would be to place yourself in the position of judge where there cannot be a higher authority. Perhaps in the case of a total breakdown back to the state of nature Kant would authorize that force could be used to promote the return to a rightful condition but he is not clear on this point.

As a final point of comparison between Kant and the democratic peace theorists, consider the difference between their respective condemnations of spreading republicanism or democracy by force. Whereas Kant's condemnation is a logical one, it would go against the logic of the perpetual peace as well as of political sovereignty more generally, democratic peace theory tends logically towards the conversion of non-democracies and democratization by force is contested on practical grounds. Russett, for example, does not condone the use of violence to spread democracy to those countries that are not yet democratic. However, this is not for some principled reasons but because it "probably would not work". To elaborate Russett's view, he recognizes that "a misunderstanding of [democratic peace theory] could encourage war making against authoritarian regimes, and efforts to overturn them"<sup>201</sup> but that we should not interpret him as promoting this kind of action. This is a far cry from Kant's principled condemnation of the use of violence outside of self-defence. Although the democratic peace may seem consistent with Kant's argument for perpetual peace what I hope to have shown is that Kant's positive program is far more robust than that of the democratic peace. Most importantly, Kant's perpetual peace is based on the gradual adoption of articles that are clearly linked to fewer hostilities, disarmament, limits on legitimate takeover of sovereign territories, etc. and he is against the use of force to achieve

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<sup>201</sup> Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World*, 135.

supposed future benefits. In terms of approach and conclusions Kant's position is compatible with a full-fledged just war theory. Because defensive wars must be legitimate for Kant, he also has to elaborate a *jus in bello* detailing what is allowed in the case that a country finds itself in the situation of defending itself against outside aggression. While Kant does not mention any explicit rule of *jus in bello* proportionality in conducting military operations he does, as Brian Orend argues, mention a principle of discrimination that must obtain between combatants and non-combatants.<sup>202</sup> Moreover, it is clear that Kant deplores the use of "intrinsically heinous means" which would either make the citizens performing the heinous acts unfit to be citizens or would threaten the goal of perpetual peace. Democratic peace theorists have generally been reluctant to elaborate on the prescriptive side of their theory apart from a general hostility to the idea of spreading democracy by force. However, since the theory purports to be both an explanation of the data and to provide guidance on issues of public policy, this failure to provide an account of what is wrong with spreading democracy by force, not just practically but also theoretically, is necessary. I believe that I have shown that Kant's political theory is inconsistent with democratic peace theory and that he provides an alternate account of how to promote a lasting peace between nations.

#### 4.4 The Democratic Peace in Theory

While Kant may have been at odds with the thinking behind the democratic peace at a theoretical level, after the apparent 200 years of successful non-intervention by democratic states with respect to one another, are there independent empirical reasons for taking seriously the idea that the spread of democracy, through whatever means, will lead eventually to a more peaceful international order? This section will examine the arguments for and against the democratic peace thesis both from the point of view of its fit with the empirical data as well as its coherence as a theoretical model.

Democratic peace theorists are quick to point out that "the finding that democracies do not fight other democracies" is "a law-like cornerstone of knowledge about

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<sup>202</sup> Brian Orend, "Kant's Just War Theory," *Journal of the History of Philosophy* 37, no. 2 (1999): 349.

international politics”<sup>203</sup> but as Rasler and Thompson remark, “findings are one thing, explanations of this ‘law’ represent something else entirely.”<sup>204</sup> With democratic peace theory, or the explanations offered for why it is the case that democracies tend not to fight against one another, there are as many explanations as there are theorists. Many criticisms of democratic peace theory focus on whether the data set that generates the claim that no (or almost no) democracies have gone to war with one another is reliable or on whether it is statistically significant, or both. One popular method of argument against the democratic peace data has been to challenge the assertion that no democracies have gone to war against one another. For example, David E. Spiro has claimed that the data used to confirm the democratic peace hypothesis depends on omitting certain conflicts from consideration as well as minimising the significance of these so called exceptions. Some of the examples used to counter the claim that no democracies have fought one another are: the American Civil War, which is explained away owing to the fact that this was a civil war and not interstate violence by some, or by others because the confederacy had not had time to properly elect its officials. The Second Philippine War of 1899 between the US and the Philippines is likewise not counted, owing to the fact that the Philippines did not hold elections before losing the war to the US. The Second World War doesn’t count as a war between democracies on two counts. First because Hitler had suspended the constitution rendering Nazi Germany no longer democratic when the war was initiated,<sup>205</sup> and also the Finns bound with the Axis powers in 1944 to avoid surrendering to the USSR, but the decision to join the Axis was repealed at the next election cycle.<sup>206</sup> These various exceptions and others are minimized or not counted on the grounds that they do not correspond to the correct definition of democracy, or because the effects of democracy could not yet expected to be pacifying. Different authors use

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<sup>203</sup> Karen Rasler and William R. Thompson, *Puzzles of the Democratic Peace: Theory, Geopolitics, and the Transformation of World Politics* (Palgrave Macmillan, 2005), 3.

<sup>204</sup> Ibid.

<sup>205</sup> Spiro is quick to point out: “I do not mean to imply that Nazi Germany should be coded as democratic, but it is disturbing that this regime came about as a result of a democratic election. What is the utility of a theory predicting the absence of wars between democracies if a democratically elected leader can legally suspend the constitution, quickly change the regime to a fascist one, and then initiate a global war?” “Spiro

<sup>206</sup> Spiro, “The Insignificance of the Liberal Peace,” 212-13.

different data sets to get the result that there have been no, or virtually no, wars between democracies and in spite of the disagreement with respect to the definition of democracy given primacy or the list of who should count under the definition as democratic there is still widespread agreement on the result that there have been no wars between democracies and that if there are “borderline cases” as Russett and Moaz allow, then they are not significant and the pacifying effects of democratization remain in place. This may well be the case but Spiro points to at least one reason to be sceptical. If different theorists have different definitions of democracy and then they choose the data set that best matches their preferred definition. Without widespread agreement among scholars then we are getting the individual subjective judgments of a number of theorists not some consensus that can be verified easily by third parties to get the so called immutable fact of the democratic peace. Moreover, even if the fact of the democratic peace were self-evident, Spiro point to a further reason to be critical of the statistic that no democracies have gone to war.

While the assertion that no democracies have ever gone to war against one another is compelling, it may not be of any real statistical significance, given the number of democracies that have historically existed in combination with the likelihood of their coming to blows.<sup>207</sup> Wars are relatively rare occurrences overall, with wars being far more likely to occur between countries that are in close proximity to one another. Certainly one part of the explanation for why no two democracies have historically gone to war is that many of the world’s democracies are located so far from one another that the chances of their fighting a war against one another are minimal or nonexistent (think of the chances of Australia and Canada fighting, for example). So, you do not need to claim that democratic norms or institutions have any role to play in an explanation of the fact that democracies have not fought one another; random chance predicts the same result without the complication of having to account for some feature of democracy that must be doing some work. That is not to say that random chance is the best possible explanation, but merely to show that the democratic peace hypothesis is not better suited than realism to explaining why it is that certain countries go to war against one another

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<sup>207</sup> Ibid., 203.

and not others. We have seen some other reasons above why we might prefer a realist explanation to the democratic peace in the cases of near misses argued for by Layne.

## 4.5 The Democratic Peace in Practice

Even if it turns out that the democratic peace thesis is the best explanation for why it is that democracies do not fight one another, there are further theoretical reasons put forward in the literature as to why this is a dangerous idea from the point of view of its applicability in guiding policy decisions. In the hands of politicians democratic peace theory has been used to justify foreign intervention on the preventive grounds of “making the world safe for democracy”. The attempts at spreading democracy by force that have been tried in recent decades have been far from successful. However, even if there were overwhelming successes, like the transformations of Germany and Japan after the Second World War, there are independent reasons for rejecting the spread of democracy by force.<sup>208</sup>

R. William Ayres has suggested that apart from the feasibility of promoting democracy by force abroad, it is contrary to democracy at home to promote it in this way. Ayres examines the democratic norms and institutions that are present in the American context and how they developed historically, he then goes on to examine the implications of fighting wars in order to promote democracy on these same institutions and values at home. What he argues is that given the nature of American democracy, it is contrary to the values of freedom and pursuit of the common good to violently promote these goals abroad. For Ayres the fundamental goals of democracy are to have a government strong enough to provide for the common good of all its citizens while at the same time placing limits on the power of government such that it does not go against the freedom of each citizen to decide how to live their own lives. In Ayres’ words: The “challenge of the ‘first wave’ of democracy was to design a government strong enough to provide for the common good (defense against enemies, ordered society, etc.) while not giving it power

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<sup>208</sup> For an interesting account of the reasons for the success of democratization by force after WWII and the failures of more recent attempts see: Cora Sol Goldstein, "Just War Theory and Democratization by Force: Two Incompatible Agendas," *Military Review* 92, no. 5 (2012).

to undermine the freedom of its citizens.”<sup>209</sup> There is an obvious tension between these two goals and it is not clear that the American case marks a successful attempt to deal with this tension, but these are the values that animated the founding fathers and continue to be at issue in American politics today.

Ayres goes on to elaborate three reasons why promoting democracy abroad by force undermines democracy at home: 1. The threat and burden of a strong standing army 2. The weakening of the separation of powers and 3. Stifling honest debate. As Ayres puts it:

Forceful democratization efforts thus require the United States government to undergo at least three institutional transformations contrary to basic principles of American democracy. First, the government must bring in significant tax revenues to support a standing army, which poses a double threat (fiscal and coercive) to citizens’ liberty. Second, power and decision-making authority must be concentrated in the executive branch, in violation of the separation of powers. And third, the government must find means other than reason (i.e., passion or false information) to persuade citizens to support positions they would not otherwise find in their interest.<sup>210</sup>

On the first point Ayres notes that the US requires a strong professional armed forces with an army, navy and air force in order to carry out wars far from home. Having this strong military force is a threat for two reasons: a. the military could be used against citizens at home (coercive threat) and b. the taxes required to finance the military put an economic burden on the population restricting their freedom (fiscal threat). The second and third threats to the ideals of democracy are related in that they rest on the assumption that wars are generally unpopular with citizens, regardless of their justifications. Because it is unlikely that the population will support a war effort for the purpose of spreading democracy (at least before it has been declared) the ability to declare a war has been moved from the congress, which is directly responsible to the population, to the president. When the president can unilaterally declare a war without the support of congress and the people more generally we are not in the situation being described by

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<sup>209</sup> R. William Ayres, "Competing Values in U.S. Democratization Policy," in *Democratic Peace in Theory and Practice*, ed. Steven W. Hook (Kent, Ohio: Kent State University Press, 2010), 146.

<sup>210</sup> *Ibid.*, 155.

democratic peace theory, in which the population has the ability to even indirectly influence the resort to war. Instead the institutions of democracy that are supposed to guarantee that the population is being represented look a lot more like the structure of monarchy or authoritarian regimes in which one can decide the fate of the many. Regarding the third point, Ayres notes that the government must find some way to motivate the population to support the war effort once a war has been declared. In the case of the wars that have been waged by the US at least since the end of WWII the strategy adopted has been to frame the lack of democracy in a foreign state as a threat to security at home. In some cases, (the war in Iraq provides a striking example) the causes for going to war were falsified in order to galvanize support for the war effort at home. Democratic governance rests on the assumption that the people will come to the best possible decision regarding what is in their interests given access to correct information. If information is being falsified in order to produce results desired by those in power, then the basic value of free discourse leading to rational decision-making has been undermined. From a Kantian perspective the United States fails to meet many of the ideals that would lead republics to have peaceful relations with their neighbours. Practically speaking the spread of democracy by force has not led to a more peaceful world, and it seems to move nations further from the conditions that would lead to a lasting peace. In the following paragraphs I will show why democracy promotion by outside influences is not likely to meet with success regardless of whether democratization was achieved using lethal force or not.

Andrea Kathryn Talentino presents a convincing argument as to why we should not put our hopes for a lasting peace in the democratization of nations that are currently undemocratic.<sup>211</sup> Her scepticism with regards to democratic peace theory applies to the prescriptive element of the theory, which states that we should actively promote the adoption of democracy as a mode of government in currently undemocratic nations in order to secure a lasting peace. It may well be the case that current democracies are unlikely to go to war with one another owing to factors pointed out by democratic peace theorists. However, those democracies that exist today developed at a particular

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<sup>211</sup> Andrea Kathryn Talentino, "The Forgotten Element of Democratization," *ibid.*

historical time and those that are adopting democracy today are not in the same position as those earlier democracies. Talentino's paper tracks the failures of new democracies to develop robust and stable institutions that effectively achieve the ideals of safeguarding human rights against abuse. She attributes this failure to a lack of citizen participation in the functioning of the government. To summarize, while the new leaders in countries like Afghanistan, Bosnia, Iraq and Haiti may have been elected in apparently contested elections, which satisfies the most basic requirements of democracy, citizens are not often involved in the process of governing day to day. This is a serious flaw in building a transition from other forms of government to democracy because, as Talentino notes: "From the point of view of democratic theory, citizen involvement in political life is a necessary means of inculcating the values that support democratic behaviour. Participation leads to the broadening and deepening of democratic principles, which ultimately strengthens democracy through habituation."<sup>212</sup> In stark contrast with what would be required to develop strong democracies abroad, international actors engage in nation building by dealing almost exclusively with political elites. Talentino remarks that this top-down exercise in nation building "becomes manifest in a sense of imposition, a belief that international actors are forcing changes that are not reflective of or sensitive to local interests."<sup>213</sup> In the end the imposed government "is not viewed as being of or for the people."<sup>214</sup> The citizens may have formally consented to the power being placed over them but this is not enough to guarantee the legitimacy of the government. The standard for legitimacy depends upon the government as being viewed as actually serving the interests of the citizens.

As we saw in the last chapter, for Kant, this continued test of legitimacy is far more important than the initial acceptance of the procedure that brought the government into power. Citizens may not have had much of a choice at the initial time that the government came to power but it can still pass the test of guaranteeing the safety and

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<sup>212</sup> Ibid., 167-68.

<sup>213</sup> Ibid., 170.

<sup>214</sup> Ibid.

wellbeing of the citizens. Citizen participation and an ability to freely express political dissent are necessary for creating a strong democracy that is likely to have the attributes necessary for democratic peace theory to yield significant results. Recent trends in nation building that disenfranchise the citizenry are unlikely to produce the desired results of pacifying international relations. Citizens in these new democracies often do not feel that the government represents them. Instead, they see the government as exploitative, the opposite of what one would expect from a government elected by the people and accountable to them.

For example, Talentino recounts the results of a survey of the citizens of the Democratic Republic of the Congo (DRC). In the survey, citizens of the DRC were asked the following question: “If the state was a person how would you interact with him?” and the most frequent response to the question was “kill him”.<sup>215</sup> In Afghanistan, introducing democratic voting procedure for selecting the government had the perverse effect of further strengthening radical organizations. In the Afghani case “[l]arge, established, ethnic parties with the capacity to mobilize across a single issue did well, while newer groups that pursued a more complex platform were at a disadvantage.”<sup>216</sup> Similar problems were felt in Bosnia where “the problem with elections has been their tendency to enshrine ethnic or sectarian divisions within the political system.”<sup>217</sup> While nation builders were pushing the need for elections “the compressed time frame did not allow moderate groups to develop or establish agendas and so rewarded the existing, ethnically centered, hard-line parties.”<sup>218</sup> Far from contributing to the peaceful world order that democratic peace theorists hope for, external intervention in nation building seems to have the effect of relating democracy with violence and instability. Kant warned that sovereign nations have to progress towards the ideal of republicanism on their own and cannot be forced to adopt republicanism by force. Perhaps his advice on

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<sup>215</sup> Ibid., 171-72.

<sup>216</sup> Ibid., 173.

<sup>217</sup> Ibid.

<sup>218</sup> Ibid.

this point should be heeded and we should be less quick to point to democratization as a panacea for problems of interstate violence.

The perverse effects of trying to promote democracy abroad in order to secure peace at home are felt not only when states promote these ends by force. A preferred method of trying to promote regime change is through economic sanctions. Instead of engaging in all out war with a state that may be viewed as posing a threat to democracy, economic sanctions are put in place, often with the explicit goal of promoting human rights abroad. What A. Cooper Drury and Dursun Peksen have argued is that economic sanctions placed on a country, even when those sanctions are explicitly tied to promoting democracy and human rights, have a tendency to reduce the rights and subsequent opportunities for a grassroots democratic transition to take place. As with the more forceful promotion of democracy through warfare and regime change, economic sanctions tend to strengthen those already in power by giving them an external enemy to combat. Those in power pass the burden of the economic sanctions to citizens and claim a need to reduce rights and freedoms in order to counter these economic attacks. While those applying economic sanctions may have the best interests of the citizens in mind when trying to promote democracy through this tool, Drury and Peksen conclude that:

The desire of decision makers to spread democracy as a means of spreading peace in the world is problematic when sanctions are involved. Although economic coercion is one of the most commonly used policy tools for democracy promotion, as we have demonstrated, it is counterproductive. If sanctions undermine democracy, they also inhibit the spread of the democratic peace.<sup>219</sup>

Taken together with Talentino's findings, even if democracy is not being promoted through warfare, in practice the act of spreading democracy abroad through top-down interactions with local governments is counter-productive in promoting the democratic peace.

What I hope to have shown in this chapter is that we have multiple reasons to be sceptical of democratic peace theory. At the level of the theory's data analysis, there are

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<sup>219</sup> A. Cooper Drury and Dursun Peksen, "Sanctioning for Democracy," *ibid.*, 197.

reasons to prefer a realist explanation for the observed peace between democracies. If the fact of the democratic peace is maintained it does not provide a firm guide for foreign policy because attempts at spreading democracy, by force or otherwise, have proven to be unsuccessful. If we were truly interested in achieving a lasting peace between nations then we would do better to adopt a version of just war theory informed by a Kantian perspective that attempts to transcend the realist paradigm in international relations. In the next chapter I will elucidate the version of just war theory that I believe holds the greatest chance of meeting the task of a more peaceful global order.

## 5 In Support of a Modern Conception of Just War Theory

This concluding chapter has two goals. First, I will draw together an argument for non-intervention that finds its support in the Modern conception of just war theory. This approach begins with Grotius and finds its full expression in Kant. My emphasis will be on two aspects of what I am calling Modern just war theory; the separation of *jus ad bellum* from *jus in bello* and the focus on the individual as the locus of the right to go to war in defense of civil rights. This Modern conception, I will suggest, lies in stark contrast with the earlier Classical conception of just war theory, which locates the right to go to war in the authority of kings and princes to rule over their subjects and, following from this, makes concerns of *jus ad bellum* such as right authority and intention the central focus of the theory. On this conception concerns of fighting justly are subordinate to the concern of having the proper authority to go to war. Depending on the type of enemy that you are facing and the nature of the cause for which you are fighting, the limits on what is permissible will change accordingly. Contrast this with the Modern view, which holds the principles of *jus in bello* constant regardless of the threat being faced.

In the second half of the chapter, I will address contemporary challenges to the Modern conception that undermine the separateness of *jus ad bellum* from *jus in bello*. Specifically, I will examine Michael Walzer's argument for the supreme emergency exemption, which allows extraordinary measures that would otherwise be impermissible according to the rules of *jus in bello* to be used in times of great peril. Finally, I will present Jeff McMahan's position on just war theory presented in his 2009 book *Killing in War*. In this book and related papers, McMahan argues against what he labels the "traditional" and what I have been calling the "Modern" position of just war theory, which maintains that there is moral equality between combatants. In arguing against the moral equality of combatants, McMahan undermines the foundation of *jus in bello*, which requires that combatants on both sides of a conflict be able to satisfy the rules of engagement regardless of the ultimate justice of their cause. There are a number of reasons why this moral equality of combatants is normally understood to be a necessary element of just war theory. For one, there is a great deal of uncertainty in politics and it

is often very difficult to tell whether the cause for which a country is fighting is in fact just until after the fact. To complicate matters, sometimes neither side to a conflict has a just cause at all. It is in the interest of all parties to fight in a way that causes the least amount of damage regardless of the justness of the cause being fought for. Secondly, even if you believe one side to be unjust and the other just, soldiers cannot be held accountable for actions that they took on the orders of their superiors. If this were the case, and unjust combatants risked being tried and convicted of murder once the war is over, they will be much more likely to fight to the death and not accept conditions of surrender. Contrary to this traditional view, McMahan suggests that combatants fighting on the side of justice can satisfy the demands of *jus in bello*, while those who do not fight for a just cause cannot (except for under some unusual circumstances).

Ultimately, what I hope to have shown through these and preceding arguments, is that best hope for achieving a lasting peace between nations is through policies of non-intervention and the gradual negotiation of a balance of power through the establishment of effective international organizations committed to peace building and disarmament. Kant's vision of a world without war may in fact be unrealizable, as he himself was well aware. However, his program for moving towards this goal remains inspirational and applicable in our current context. In arguing against ideological intervention in the affairs of sovereign nations throughout this work a major puzzle remains. There may be justifiable ideological reasons for intervening in the affairs of other nations in the case of the blatant disregard for and abuses of human rights. In these cases, does it then become possible to use warfare to actually save people from their persecutors? I believe that looking to Kant again is suggestive of an answer. In the case of the blatant disregard for human rights and a breakdown of the basic protections of the state, people in these situations are already living in a state of nature. In the case that they ask for help from the international community to fight in what amounts to a civil war against their former rulers, then this is a justifiable use of force where you are going to war on behalf of an ally already in the throes of war. Absent these conditions, there is no general right to intervene for humanitarian causes absent a breakdown in the civil condition and a request for aid.

## 5.1 The Modern Turn in Just War Theory

In preceding chapters I discussed the different views of just war theory that were developed from the time of St Augustine in the 4<sup>th</sup> century through to Kant's critique of the just war concept in the 18<sup>th</sup> century. While I hope that it is already clear that a profound shift in thinking occurred with Grotius' *On the Rights of War and Peace* I would like to turn now to a previously unexplored result of Grotius' rethinking of international relations. Grotius, as I explained in chapter 2, turned the logic of just war theory on its head, moving from a top down model of authority to a top up model. Where the classical model of just war theory gave kings, princes, and religious leaders the right to declare war in order to pursue their interests against hostile neighbours and their own subjects, Grotius' theory gives individuals the rights to defend themselves and then extends this right to political leaders. If normal conditions apply and one state attacks another, war is declared by the head of state who has been charged with the task of defending the interests of his constituents. If, however, the civil condition is not instituted for some reason, individual citizens may have no choice but to defend themselves and their interests, in other words, they must declare war on behalf of their nation. This is precisely what Grotius argued for in defending the actions of his cousin, Heemskerck whose ships attacked a Portuguese vessel as it was anchored in a Singapore harbour. The details of the attack are such that under the codes of conduct for warfare of the day, Heemskerck did not have the proper authority nor the proper conditions for declaring war and seizing the spoils of the Portuguese vessel. Scott Shapiro and Oona Hathaway argue in a forthcoming book that Heemskerck would have been considered a pirate under the international law of the day and as such he would have been considered an enemy of all people. Moreover, the prizes he captured would have been considered the rightful property of the Portuguese. This is:

Because pirates did not have the legal power to go to war, they were not legally permitted to kill or take property. If they did, they could be prosecuted for murder and theft. Indeed, a pirate was considered an "enemy of all mankind" (*hostis humani generis*) and could be punished severely not only by their victims, but by anyone in the world.<sup>220</sup>

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<sup>220</sup> Scott J. Shapiro and Oona Hathaway, "The Law of the World," (2013), 19.

In order to legitimize the attack that Heemskerck carried out against the Portuguese ship, Grotius argued that Heemskerck was acting as a soldier in a just war owing to previous transgressions of the Portuguese and that because his cause was just the prize gained in the war rightfully belonged to the victor.<sup>221</sup>

However, it was far from clear that Heemskerck's cause was actually just. The Portuguese had not attacked him, so he was not acting in self-defence. Instead, what Grotius argued was that the Portuguese were responsible for atrocities against the local population as well as against the Dutch, who were simply trying to engage in peaceful trade. Grotius frames the attack against the Portuguese as an attack against their inhumanity. He talks of the "savagery" of the Portuguese as well as their:

fierce insistence that so vast a portion of the world...should be dedicated exclusively to promoting the wealth, not to say the luxury, of a single people, while lying in great part neglected and useless, although this same territory would suffice to keep many nations engaged in commerce and supplied with sustenance?<sup>222</sup>

Grotius describes the savagery of the Portuguese by reporting that:

...the Portuguese are regarded in those regions not as merchants but as foreign robbers, destructive of human liberty and aflame no less with avarice than with lust for dominion, so that no one associates with them any more than is absolutely unavoidable. For when they first came to that part of the world, they established colonies and strongholds, and then (the natives having been insufficiently perceptive as to the ultimate objective of these enterprises), they reduced all nearby territories to a state of slavery. Presently, by participating in the civil wars of the East Indians, wars to a great extent instigated by the Portuguese themselves, the latter acquired a share in the victories; whereupon they turned the power that had been increased through these wiles against the very persons by whose aid they had been rendered victorious.<sup>223</sup>

Furthermore, Grotius reports that the Portuguese engaged in:

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<sup>221</sup> Ibid., 21-22.

<sup>222</sup> Hugo Grotius, *Commentary on the Law of Prize and Booty*, ed. Martine Julia van Ittersum, Natural Law and Enlightenment Classics (Indianapolis: Liberty Fund, 2006), 258-59.

<sup>223</sup> Ibid., 259.

Unparalleled treachery, the mangling of women and children belonging to the households of native potentates, the disturbance of [East Indian] kingdoms through the poisonous activities of the Portuguese and abominable cruelty displayed toward both subject and allied peoples.<sup>224</sup>

By characterizing the Portuguese as having engaged in “abominable cruelty”, Grotius is able to make the case that Heemskerck’s attack of the Portuguese ship was a just war in defense of the human rights of the native populations and the rights of the Dutch, among other nations, to engage in free trade. Grotius’ modern conception of individual rights was central to both the right of the soldier to declare war on behalf of his nation, as well as the cause for which his war was fought.

Making the individual central to his account of just war theory opened the way for Grotius to focus on the principles of *jus in bello*. If individuals are now able, to be the judges of whether or not they can engage in warfare then the moral burden of fighting justly also falls to these same individuals. That is not to say that soldiers commissioned to fight in wars will always be the judges of the justness of the war, in conventional situations where two nations are at war the declaration of war would still normally come from the head of state. However, as the Heemskerck example shows, sometimes soldiers will have to make decisions regarding *jus ad bellum* categories like just cause, and they are certainly the correct agents to be making judgments regarding *jus in bello*, which is more properly theirs to monitor from their positions on the ground.

We tend, nowadays, to think of wars in extremely negative terms owing to the huge stakes involved and the efficiency of advanced weaponry. However, warfare in the past, and especially naval warfare, was far more limited in scope and aim than warfare today. That is not to say that it could not be extremely costly and bloody. There were wars in Europe that ravaged whole segments of the continent, like the Thirty Years War, and brought with them death due to military action and the spread of diseases that would kill huge segments of the population. However, the general pace of warfare and the reasons for engaging in it were sometimes less far-reaching than the goals of something like the 30 or 100 years wars. Disputes arising between differing national interests over

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<sup>224</sup> Ibid., 259-60.

small pieces of disputed territory or access to seaways beneficial for trade were routinely fought without escalating into total wars for domination over populations necessitating regime change. We no longer live in the kind of world that Grotius lived in. Notions of territorial sovereignty and the standards that need to be met for a war to be considered just have made limited forms of warfare extremely rare. The signing of the Kellogg-Briand Pact by many of the world's nations in 1928 changed the political landscape such that only wars for defensive purposes and defense of allies were considered just. The parties to the pact agreed to the following articles:

#### ARTICLE I

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.

#### ARTICLE II

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.<sup>225</sup>

The countries in question adopted these articles, yet they failed miserably at creating conditions for a lasting peace between one another. However, what this pact did manage to achieve was a change in the discourse and legal status of the violent use of arms between nations. While a modern conception of just war theory would have allowed for disputes between nations to be resolved by armed force if no other methods were proving viable, since the beginning of the 20<sup>th</sup> century anything other than self-defence has been deemed illegitimate and worthy of punishment at war tribunals following acts of aggression. This has made politicians frame the wars they intend to engage in in terms of self-defence. Public support for wars has also dwindled unless a reasonable case can be made that they are necessary for self-defence. Kant, no doubt would have seen this transition in a positive light. In the next section I turn to where Kant and Grotius would

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<sup>225</sup> Kellogg-Briand Pact 1928

have agreed on matters of international relations and examine an alternative to Kant's program for perpetual peace, namely a realist balance of power situation with a global hegemonic power, and finally link this to the democratic peace literature in an attempt to show how the democratic peace is in fact shaped by realist considerations.

## 5.2 Kant, Hegemonic World Power and the Democratic Peace Revisited.

While Kant may have characterized Grotius and other just war theorists as “sorry comforters” and apologists for war they are in basic agreement regarding the state of the international political community. States have special rights that individuals do not have because there is no international body capable of adjudicating disputes that arise between them. In the individual case, we are all parties to the social contract and must refrain from seeking damages personally. Instead, we bring our disputes to courts and they act to remedy conflicts between individuals. The system is not perfect and interpersonal conflict still exists in well-organized societies. However, political communities now have fairly effective ways of dealing with violence between individuals through police and the court systems. The greatest threats to individual security under social contract theory is that the government will lose control of the apparatus of social coercion and that society will become anarchic, or that the government will become so despotic as to threaten the lives of its own citizens. While wars between countries cost citizens in terms of resources and their lives, civil wars and violent political regimes destroy the very fabric of society and the rights that guarantee the protection of person and property.

Grotius and Kant disagree on one fundamental point. For Grotius, nations have a right to go to war afforded to them by the natural right of individuals to seek reparation for damages done. For Kant, trying to talk about rights in war is not possible because wars occur in a situation where rights cannot hold because there is no rightful condition to speak of. Kant makes this clear in *Metaphysics of Morals* § 61 as follows:

Since a state of nature among nations, like a state of nature among individual human beings, is a condition that one ought to leave in order to enter a lawful condition, before this happens and rights of nations, and anything external that is mine or yours which states can acquire or retain by war are merely *provisional*. Only in a universal *association of states* (analogous to that by which a people becomes a state) can rights come to hold *conclusively* and a true *condition of peace* come about.<sup>226</sup>

Since war itself is an unlawful condition, there may be little use in discussing the provisional rights that hold in this state, yet Kant does remark upon some of the things that are impermissible in war because they are incommensurate with the goal of exiting the state of nature among nations and creating a lasting peace. For example:

Means of defense that are not permitted include: using its own subjects as spies; using them or even foreigners as assassins or poisoners (among whom so-called snipers, who lie in wait to ambush individuals, might well be classed); or using them merely for spreading false reports – in a word, using such underhanded means as would destroy the trust requisite to establishing a lasting peace in the future.<sup>227</sup>

This focus on the possibility of peace in the future, or a just war theory focused on *jus post bellum*, is one of the conditions that separates the ideological justifications for war from the limited political perspective. That is not to say that proponents of the ideological reasons for going to war are not seeking peace, but they are not necessarily seeking peace between nations, but rather the supplanting of these nations or a change of regime that will alter the characters of the nations not merely their current political aims. For example, the very same conflict can be described in very different terms and this characterization will have an effect on the ability of a nation to rally troops to the cause and what types of military actions are possible. The ongoing war in Iraq is a case in point. It was, at the beginning of the conflict, promoted as a war against a violent dictator thought to have weapons of mass destruction. Once it became clear that there were no such weapons the focus shifted to liberating the people of Iraq from their unjust oppressors. The war is most plausibly viewed as one for the control of natural resources, however, this kind of justification for aggression being extremely

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<sup>226</sup> Kant, *Practical Philosophy*, 6:350.

<sup>227</sup> *Ibid.*, 6:347.

unpopular in motivating troops to join in a war where they face great personal risks, it is not surprising that the United States did not employ this strategy in justifying the war. Not to mention that the United States has signed a number of international treaties, which limit the kinds of justifications for war to self-defence and defense of others.

The logical structures of the two types of defenses of war are very different. The “just war logic” has the following structure:

P1: Individual nations have a right to go to war against one another in order to secure their rights.

P2: The rights of nations to go to war are derived from the rights of individuals in the state of nature such as: the rights to protect their person and property, the protection of allies and the right to retrieve stolen property.

P3: Even if you have a just cause for going to war, wars must be waged with the least amount of violent force necessary to achieving the objective in question. Moreover, innocent civilians may not be attacked in order to achieve military objectives, as they are not responsible for the fighting.

Therefore: All actions in war must be undertaken with the goal of securing a future peace between current enemies.

The “ideological logic” is as follows:

P1: Nations have a duty to protect their citizens against external threats.

P2: External threats include actively hostile nations as well as those who will likely pose a threat in the future.

P3: Those who are likely to pose a threat in the future are those who already pose a threat to their own populations by enforcing the wrong values (either through religion, culture, or institutionally, etc.)

P4: Because they already hamper their own populations' ability to prosper, it is permissible to effect regime change or usurp power from illegitimate rulers.

Therefore: Wars are just when they are defensive or serve the immediate goal of liberating an oppressed population and the secondary goal of achieving a lasting peace which will be possible because these possible enemies will now have the correct religious, or moral or institutional set up and will not attack us in the future.

The "ideological" logic above is ideological in the sense that it rests on a particular conception of the good, be it couched in religion, culture, governmental form or some other "right" way of doing things. To put this in Rawlsian terms, those who promote their particular version of the good over all others have a "thick" conception of the good. In contrast with the thick conception of the good is a "thin" version, which Rawls defines as those goods that every rational agent must desire in order to fulfill his or her particular version of the good life. In other words, whatever other things I may desire, I must have the things covered in the thin conception of the good for my life to count as good.<sup>228</sup>

Because the goals at stake with ideological warfare are so high, an "ends justify the means" approach is often taken. It is not surprising, then that the principles of *jus in bello* are not the focus of this approach. If the only way of achieving peace is to harm civilians, or use disproportionate means, then these will likely be justifiable on the grounds that what is at stake is the end of all wars. There is no driver for restraint when the stakes are set this high. Moreover, the citizens who might be targeted in order to win the war and bring about the lasting peace are already under threat from their own governments. We saw the same kind of arguments running in the case of the religious crusader. If your goal is to convert the idolatrous to the true religion that will bring their souls eternal salvation, then the death of a few now is justified on the grounds that many more will be saved in the future, and for all eternity. To intervene on behalf of a downtrodden populace is to have their best interests at heart. The big picture justifies putting aside the normal rules of conduct on behalf of a greater purpose. This is not

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<sup>228</sup> John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999), 350-55.

merely a theoretical point. Politicians have often argued for interventionist policies on the grounds that the current violence will be lead to greater peace at a future time. As Kenneth Waltz notes, Woodrow Wilson talked about World War I in exactly these kinds of terms. As Waltz wrote:

Woodrow Wilson, [...] was quite capable of speaking as though motivated primarily by concern for the safety of the state he led. ... "Is the present war," Wilson once asked, "a struggle for a just and secure peace, or only for a new balance of power?" More frequently as the First World War progressed he sounded the call to a war of "the Present against the Past," of "right against wrong," a war to bring an end to the baleful power of autocracies and to establish freedom and justice for the people of the world.<sup>229</sup>

Waltz goes on to note that wars that are fought with the lofty goal of establishing a lasting peace are better thought of as crusades than as traditional wars. He paraphrases Collingwood, an English philosopher-historian, who urges that:

It may then be incumbent upon the peace-states to clean up the whole world, to turn wars from the object of the narrowly defined safety of the state into crusades to establish the conditions under which all states can coexist in perpetual peace.<sup>230</sup>

However, the historical record is full of seemingly well-meaning pleas for intervention on the basis that a lasting peace will ensue. So far the one constant in international relations has been warfare and all the attempts to intervene in the internal affairs of other nations have not led to a more peaceful world.

Grotius, like Kant, was convinced of the need for restraint in war based on the same principle of needing to preserve the possibility of a future peace between current enemies. However, unlike Kant, he fails to provide a coherent model upon which a lasting peace can be built so as to escape the state of nature on a more permanent basis. There are, of course, many possible ways that a lasting peace could be constructed. One possibility that has proven to be fairly effective is to increase the territory of a hegemonic

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<sup>229</sup> Kenneth N. Waltz, *Man, the State and War: A Theoretical Analysis* (New York: Columbia University Press, 2001), 110.

<sup>230</sup> *Ibid.*, 111.

superpower that manages to maintain control over its local population. The *Pax Romana*, or Roman peace lasted just over 200 hundred years, during which time there were no civil wars over the entire legal jurisdiction of the Roman Empire. The Empire at this time covered an impressive area spanning most of Western and Southern Europe, the North African coast, up around to modern day Turkey. There were wars with foreign powers at the edges of the Empire but there was a conspicuous lack of civil wars. The lack of civil unrest is largely attributable to the consolidation of power in the hands of the emperor, which was achieved under Augustus. Prior to Augustus' consolidation of power into the hands of the Emperor, annually elected magistrates had power over their individual territories. As Paul Burton explains:

This changed with Augustus who, in addition to gathering most of the constitutional powers of the annually elected Roman magistrates, as well as the Roman senate and people under his personal control, began to exercise a monopoly on the *imperator* title for himself and members of his immediate family, and indeed perhaps as early as 40 B.C. even transformed the title into an element of his personal name—*Imperator Gaius Caesar*. Augustus' innovation gives some idea of the revolutionary shift in the balance of power in the Roman *domestic*, rather than the external imperial order. Under Emperor Augustus, domestic control shifted from the traditional “senate and people of Rome,” *senatus populusque Romanus* (abbreviated to *SPQR*, still visible on sewer covers and buses in the modern city of Rome) to a single individual.<sup>231</sup>

In addition to consolidating power into his own hands, Augustus also attempted to make the borders of the Empire better defined and this led to the era of relative peace that followed this large-scale political change. With an increased concentration of power focused on keeping control of the civil population, there were fewer overall wars at the borders and virtually no civil wars for just over 200 years.

Contrast this situation with the current era of peace being experienced between democratic nations. Democracy has become more and more popular as a mode of governance; meanwhile, there have also been two world wars implicating many of these same democracies. Since the end of World War II, the United States has become the

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<sup>231</sup> Paul Burton, "Pax Romana/Pax Americana: Perceptions of Rome in American Political Culture, 2000-2010," *International Journal of the Classical Tradition* 18, no. 1 (2011): 72.

world's military leader and has gone to war with countless other nations often with the explicit "civilizing mission" of spreading and making the world safe for democracy. As Ali Parchami explains, the United States sees itself as having a "special mission to restructure the international order."<sup>232</sup> Just as there was a pacifying effect of living within the bounds of the Roman Empire, and later of being under the control of the British, there is a pacifying effect of being under the influence of American power. While in the case of Rome and Britain the territorial control was more obvious, America today yields power not through territorial annexation and direct control, but utilizes "soft" tactics of economic pressure and, when this is not possible, "hard" techniques usually by placing leaders more favourable to American control in power. In foreign policy, American hawks tend to promote these tactics with the rhetoric that America is an "exceptional nation" that has taken on a burden of "benign imperium" in order to secure the world against potential threats to the global peace.<sup>233</sup>

One way of understanding the so-called *Pax Americana* is through the lens of the theory of hegemonic stability. "According to the theory," as Parchami relates, "the US, as hegemon, set out to promote a liberal international order based upon free trade and integrated world markets. By presiding over the system, it provided other international actors with incentives and security guarantees in favour of liberalization, while punishing 'free-riders' through positive and negative sanction (i.e. persuasion and coercion)."<sup>234</sup> When a global hegemon decides the term of the debate to suit her needs there is a great risk involved in not complying with her wishes. Moreover, once the system is in place, seeking to disrupt it in any way seems to be inviting warfare and instability, thereby reinforcing the hegemon's self-justification that she holds power benignly in the interests of all. Putting this into the language of the democratic peace, if there is a lasting observable peace between democracies, then we should be doing whatever is in our power to promote the conditions that allow for this peace to continue, even if the peace

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<sup>232</sup> Ali Parchami, *Hegemonic Peace and Empire: The Pax Romana, Britannica, and Americana*, ed. Jeremy Black, War, History and Politics (New York: Routledge, 2009), 167.

<sup>233</sup> *Ibid.*, 176.

<sup>234</sup> *Ibid.*, 183.

comes at a cost and benefits some more than others, and even if the explanation for why democracy correlates with peace is insufficient at the present time.

With the view of providing a more comprehensive account of the democratic peace phenomenon, one that allows a place for realist considerations of power politics, Karen Rasler and William R. Thompson look at various explanations for the democratic peace that do not rely exclusively on the pacifying effect of democratic institutions and/or culture. I believe that their account is helpful because it does not merely dismiss the data that proves that a democratic peace does exist, while at the same time making room for the possibility that “democracy” is not doing all the heavy lifting for the theory alone. While they agree that democratic norms and culture may tell part of the story they offer a comprehensive view of the multiple geopolitical reasons why we are currently in a period of peace between democracies.

Rasler and Thompson argue that: “The influence of democratic regime type is only one of a number of factors encouraging less conflict in contemporary world politics.” And that: “The emergence and survival of democracies, and any consequences thereof, is embedded within a larger context of structures and processes that share responsibility for subsequent reductions in conflict behaviour.”<sup>235</sup> In this light they suggest a number of complementary factors that may influence the democratic peace thesis. The first is the “reversed causal arrow hypothesis”, which asks us to consider whether the effect of democracy on peace building runs exactly backwards to the way suggested by the democratic peace. It may well be the case that democracy and peace are causally connected, but peaceful periods may be the times under which democracy has a chance to flourish and not the other way around. This hypothesis is sometimes called the “reversed causal arrow hypothesis”.<sup>236</sup> In support of this reversed causal arrow hypothesis, Rasler and Thompson make the following claims:

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<sup>235</sup> Rasler and Thompson, *Puzzles of the Democratic Peace: Theory, Geopolitics, and the Transformation of World Politics*, 27.

<sup>236</sup> *Ibid.*, 37.

1. “The greater is the perceived external threat, the more likely is a state to develop and maintain high levels of domestic power concentration.”
2. “The greater is the level of domestic power concentration, the less likely a state is to democratize.”
3. “Controlling for external threat and domestic resource concentration, the greater the level of democratization, the more likely it is that a state’s foreign conflict behaviour will be constrained, especially with other democratic states.”<sup>237</sup>

So, among other things, if you have hostile neighbours who threaten you, you are less likely to adopt a democratic form of government in the first place. States in this kind of situation tend towards more autocracy and less democracy. Not only do states under fear of an external threat concentrate their power, regardless of regime type, they tend to concentrate their power even more when an actual threat is ongoing. Many democracies have in place extraordinary measures that temporarily suspend the normal workings of the government in order to deal with situations like warfare and huge natural disasters. This temporary suspension of democracy is seen to be legitimate because the external threat is a greater cause of concern for the continuation of the nation, regardless of regime type. Democracies are cumbersome in their decision making procedures, and as Kant made clear, it is a far worse thing to lose the basic functioning of the government, regardless of regime type, than to temporarily suspend some functions of government that go beyond the basic function of maintaining the rule of law. So, if a threat can be made to seem like it challenges the continued survival of the domestic government, then almost anything is permitted in defense of such an important cause.

If the democratic peace is in fact a reality, but the causal arrow is reversed, as is suggested by Rasler and Thompson, then clearly the goal of spreading democracy abroad is helped by doing some of the things suggested by Kant in *Perpetual Peace*, including, when possible, reducing military preparations and not posing a threat to others. This goal has been partially achieved by, among others, the European Union, which has a number

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<sup>237</sup> Ibid., 44.

of member states that no longer maintain standing armies and have significantly reduced investment in military spending. However, the history of European warfare is certainly not to be emulated in terms of a strategy for peace building. European nations across the continent have fought in almost every conceivable combination over the course of recorded history and have engaged in some of the bloodiest wars of all time in the twentieth century. Both World Wars were far from runaway victories for democracies and Rasler and Thompson point out that the fate of the democratic peace would have been very different had the other side won. The spread of autocracy and fascism was definitely a live possibility prior to the end of World War II. Since America replaced the old European powers as world hegemon and democratic watchdog they have gone to war almost continuously, but each time with non-democracies. The main question that has remained unchanged for just war theorists since the end of the Middle Ages is how to achieve peace between current enemies. Our enemies in the West used to be characterized by their adherence to the wrong religion, but today the enemy is usually characterized by regime type, although the old prejudices against “bad religions” seem to be returning since September 11<sup>th</sup>.

So far we have looked at one way of securing a zone of peace, by overpowering or eliminating enemies, annexing their territory and assimilating their native population. In doing so you no longer have a hostile external threat, although you may have created lasting tensions between minorities within your home population.<sup>238</sup> A second possibility lies in negotiating terms of peace with enemies so as to solve future disputes by non-violent means. Groups more likely to adopt the first strategy are those who can easily overpower their potential enemies and who have enemies that they view as untrustworthy. On the flip side, the second strategy of negotiation is more probable the more the two sides view one another as similar and sharing in values so that the terms of the agreement are more likely to be respected in the future. In other words, where profound disagreements for various ideological reasons exist and victory will not be very costly, nations are very likely to view warfare as a legitimate option.

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<sup>238</sup> Technically speaking this solution does not create peace between current enemies since one of the sides involved in the dispute is no longer around. It does, however, eliminate the state of war.

As we have seen in previous chapters, the view of what was considered just in war underwent significant changes throughout the Middle Ages. Rome especially saw itself as the rightful ruler of the world and at various points in the history of the Empire sought to use the first technique of territorial annexation and population control to achieve peace. Richard Tuck outlines some of the different ways of expressing this ideological view of the superiority of Rome over its enemies. As Tuck notes; “Paul Vayne has pointed out that it was this willingness to attack any potential danger which made Rome see itself as destined to be mistress of the entire *orbis terrarum* – any independent state was in principle a danger.”<sup>239</sup> Furthermore, even if claims of the Emperor of Rome being lord over the whole world were merely hyperbolic, the claim that the Pope was prince over the whole world was not a fact that could be verified empirically. The Christian position at the time held that the Pope was given jurisdiction over the world directly for God and that he delegated the secular rule of the world to the Emperor. The Emperor had the divine right to rule over the whole world, but he did not actually achieve this objective, even if claims to the contrary were sometimes made.<sup>240</sup> Given this worldview there were two different kinds of threats to the Empire and these different kinds of enemies were not created equally. First, there were enemies who were fought that had to be completely overcome and rivals who merely had to be subdued and brought back into line with Roman ambitions. If you are fighting for the survival of the Empire and not merely over who gets to control a small portion of land then different means will be available to you. As Cicero recounted:

So with the Celtiberians and the Cimbrians we fought as with deadly enemies, not to determine which should be supreme, but which should survive; but with the Latines, Sabines, Samnites, Carthaginians, and Pyrrhus we fought for supremacy.<sup>241</sup>

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<sup>239</sup> Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*, 20.

<sup>240</sup> *Ibid.*, 58-59.

<sup>241</sup> *Ibid.*, 20-21.

And Cicero reasons that the rights we have as individuals to defend ourselves against violent attack apply equally to the political community as a whole. As he famously argued:

There is a law not of the statute-book, but of nature, ... that should our lives have fallen into any snare, into the violence and the weapons of robbers or foes, every method of winning a way to safety would be morally justifiable. When arms speak, the laws are silent; they bid none to await their word, since he who chooses to await it must pay an undeserved penalty ere he can exact a deserved one.<sup>242</sup>

It would seem from the two passages above that any means necessary may be used to counter a threat on your life but that the means employed will depend on the end. For political communities, if there is a threat to the continued existence of the group, or for survival, then anything goes. If, on the other hand, the battle is for supremacy, then restraint is merited.

This was not an unpopular idea in the Middle Ages and into the Modern period, nor has it fallen out of favour today. Vitoria, for example argued that sins against nature could be punished by anyone, even if those being harmed did not ask for help. It is necessary to defend people against sins like cannibalism not only for their own benefit but also to ensure that these injustices will not continue to happen in the future. Towards that end, if the only way to ensure an end to the sins against nature is to set up a Christian prince over the inhabitants, then this is required.<sup>243</sup> Following in this tradition, Locke argues in the *Second Treatise* that it is necessary to punish transgressions of the law of nature in the state of nature, of which the international realm is but one instantiation. On this necessity to punish transgressions of the law of nature in the state of nature he is clear:

And that all Men may be restrained from invading others Rights, and from doing hurt to one another, and the Law of Nature be observed, which willeth the Peace and *Preservation of all Mankind*, the *Execution* of the Law of Nature is in that State, put into every Mans hands, whereby every one has a

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<sup>242</sup> Ibid., 21.

<sup>243</sup> Ibid., 74.

right to punish the transgressors of that Law to such a Degree, as may hinder its violation.<sup>244</sup>

The final phrase "...to such a degree, as may hinder its violation" allows the punisher a great deal of leeway in what would, outside of the state of nature be unavailable to him. Although it may not go quite as far as saying that "whatever means necessary" can be employed against transgressions of the law of nature, the vagueness of this final phrase leaves room for this interpretation. In support of the view that Locke would have endorsed all out unrestrained war against those with whom no social contract is possible we have only to look a few sections further in the Second Treatise. Locke characterizes warfare as a fight against wild beasts, against which no restraint is required.

And one may destroy a Man who makes War upon him, or has discovered an Enmity to his being, for the same reason that he may kill a *Wolf* or a *Lyon*; because such Men are not under the ties of the Common Law of Reason, have no other Rule, but that of Force and Violence, and so may be treated as Beasts of Prey, those dangerous and noxious Creatures, that will be sure to destroy him, whenever he falls into their power.<sup>245</sup>

Equating our enemies with beasts of prey in this analogy implies that anything can be done in the service of overcoming the enemy and does not leave much room for a discussion of the principles of *jus in bello*, specifically of proportionality. There is a relevant disanalogy between the cases of killing a wild animal and killing another human being in a war. In the case of the wild animal, Locke is suggesting in the passage above, that we have a right to kill the wild animal because of the threat that he poses to my personal security. We know full well, says Locke, that the wild animal will take any chance to harm me in the future, so any action I take against it now is justified. With men in a war this is not necessarily the case. I may be involved in a dispute with party *x* today, but our dispute may be settled and we may return to a condition of (at least temporary) peace.<sup>246</sup> With the wild animals in Locke's analogy we can have no future

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<sup>244</sup> Locke, *Two Treatises of Government*, §7.

<sup>245</sup> *Ibid.*, §16.

<sup>246</sup> This must be the case for Locke, even in the international realm with no superior capable of enforcing laws, otherwise there would be no difference between the "State of Nature" and the "State of War", which Locke clearly wants to maintain as is evidenced in §19: And here we have a plain difference between the

peace. Lions and wolves are not potential parties to the social contract. Locke's choice of these two animals is very telling. While it is easy to forget living in industrialized cities, which are relatively free of wild animals and certainly of large carnivores, Locke's contemporaries would have been far more sensitive to the image of the lion or the wolf threatening human settlements. Even up into the 1930's in the United States, wolves were hunted mercilessly and were driven out of the country because of the threat they posed to livestock. The same was done in throughout Europe, where only a handful of wolf populations survive today, and lions continue to be hunted whenever they near human settlements. Characterizing the enemy in terms of the most demonized and feared carnivores on the planet literally dehumanizes them and makes it seem as though it is impossible to negotiate and set up conditions of peace in the future.

### 5.3 Walzer's Supreme Emergency

Jumping forward to the 20<sup>th</sup> Century, references to idolatrous barbarians and characterizing your enemy as a wild animal has become less fashionable. However, the background assumption that there are some enemies who are not trustworthy and to whom the regular rules of conduct do not apply remain. Take Michael Walzer's now famous depiction of Nazi Germany during World War II, upon which he bases his argument for the supreme emergency exemption.<sup>247</sup> Like authors before him, he makes a distinction between different kinds of enemies that we may face in war, those who seek our total destruction and those who seek some concrete goal, such as a piece of territory. The two cases, according to Walzer, require different sets of rules. Although he is quick to caution that we not assume that every enemy is out for our total annihilation and that we should be careful not to abandon the rules of *jus in bello*, Walzer in the end argues that sometimes the suspension of the regular rules of conduct is necessary. Walzer asks:

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State of Nature, and the State of War, which however some Men here confounded, are as far distant, as a State of Peace, Good Will, Mutual Assistance, and Preservation, and a State of Enmity, Malice, Violence, and Mutual Destruction are from one another. *Ibid.*, §19.

<sup>247</sup> Walzer's is not the only version of just war theory that contains an exemption of this kind. See for example: John Rawls, "Fifty Years after Hiroshima," in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, Massachusetts: Harvard University Press, 1999). In which he argues for what he terms the "crisis exemption".

What is it that defeat entails? Is it some minor territorial adjustment, a loss of face (for the leaders), the payment of heavy indemnities, political reconstruction of this or that sort, the surrender of national independence, the exile or murder of millions of people? In such cases, one's back is always to the wall, but the dangers one confronts take very different forms, and the different forms make a difference.

If we are to adopt or defend the adoption of extreme measures, the danger must be of an unusual and horrifying kind. Such descriptions, I suppose, are common enough in time of war. One's enemies are often thought to be – at least they are often said to be – unusual and horrifying. Soldiers are encouraged to fight fiercely if they believe they are fighting for the survival of their country and their families, that freedom, justice, civilization itself are at risk. But this sort of thing is only sometimes plausible to the detached observer, and one suspects that its propagandistic character is also understood by many of the participants. War is not always a struggle over ultimate values, where the victory of one side would be a human disaster for the other. It is necessary to be sceptical about such matters, to cultivate a wary disbelief of wartime rhetoric, and then to search for some touchstone against which arguments about extremity might be judged. We need to make a map of human crises and to mark off the regions of desperation and disaster. These and only these constitute the realm of necessity, truly understood. Once again, I am going to use the experience of World War II in Europe to suggest at least the rough contours of the map. For Nazism lies at the outer limits of exigency, at a point where we are likely to find ourselves united in fear and abhorrence.<sup>248</sup>

He follows with a description of Nazism:

Nazism was an ultimate threat to everything decent in our lives, an ideology and a practice of domination so murderous, so degrading even to those who might survive, that the consequences of its final victory were literally beyond calculation, immeasurably awful. We see it – and I don't use the phrase lightly – as evil objectified in the world, and in a form so potent and apparent that there could never have been anything to do but fight against it. I obviously cannot offer an account of Nazism in these pages. But such an account is hardly necessary. It is enough to point to the historical experience of Nazi rule. Here was a threat to human values so radical that its imminence would surely constitute a supreme emergency; and this example can help us understand why lesser threats might not do so.<sup>249</sup>

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<sup>248</sup> Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 252-53.

<sup>249</sup> *Ibid.*, 253.

While Walzer makes a number of warnings that we should not be quick to judge something as a supreme emergency, nevertheless, his theory does allow for the characterization of the enemy in terms that resemble those of his predecessors. Against “evil objectified in the world”, not only is it necessary to fight, but also the limits on what is otherwise justifiable are raised and any means of combatting the threat are permissible. Walzer himself grants that there has only been one instance in which the supreme emergency has been present and the regular laws of war were justifiably suspended. However, his admission that there is even such a thing as a supreme emergency has more profound implications for his just war theory.<sup>250</sup> Walzer’s position with regards to the supreme emergency is importantly linked with his stance on weapons prohibitions. According to Walzer, weapons are unjust only in their use in disproportionate and indiscriminate ways; there are no grounds for banning weapons themselves. We can only condemn those who use weapons in an unjust manner. So:

...the strategist suggested (rightly) that the crucial distinction in the theory and practice of war was not between prohibited and acceptable weapons but between prohibited and acceptable targets.<sup>251</sup>

It is informative to contrast Walzer’s position on weapons with Kant’s, which was outlined above. Kant argues that we must move towards a situation of disarmaments, decreasing our investment in the weapons of war and condemning the use of prohibited means of warfare such as poison. Walzer, on the other hand reserves the possibility that we may require stockpiles of weapons, even if these weapons would otherwise be unable to be used discriminately or proportionately and although he does not make the link directly, this is likely because he believes that we should reserve ourselves the possibility of fighting a threat like that posed by Nazism again in the future.

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<sup>250</sup> Many authors have argued against Walzer’s supreme emergency. See for example: C. A. J. Coady, “Terrorism, Morality, and Supreme Emergency,” *Ethics* 114, no. 4 Symposium on Terrorism, War, and Justice (2004); David Duquette, “From Rights to Realism: Incoherence in Walzer’s Conception of *Jus in Bello*,” in *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory*, ed. Steven P. Lee, Amintaphil: The Philosophical Foundations of Law and Justice (Dordrecht, The Netherlands: Springer, 2007); Christopher Toner, “Just War and the Supreme Emergency Exemption,” *The Philosophical Quarterly* 55, no. 221 (2005).

<sup>251</sup> Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 276.

Walzer's stance in general with regards to just war theory as a whole is fairly conventional. He repeats arguments familiar from the very beginnings of the Western tradition such as an emphasis on the *jus ad bellum* principles of just cause and right intention and this is coupled with a robust defense of the traditional *jus in bello* categories of proportionality and discrimination. Moreover, his account does not prioritize one category over the other but generally argues for the moral equality of combatants, which translates into an argument for the possibility that both sides in a war fight justly or unjustly regardless of their satisfaction of the tenets of *jus ad bellum*. The moral equality of combatants is a central concern for Walzer, and he bases his argument on the possibility of epistemic uncertainty that military personnel are likely to have with regards to the war effort. Regarding soldiers in general he states:

For soldiers, as I have already argued, are not responsible for the overall justice of the wars they fight; their responsibility is limited by the range of their own activity and authority. Within that range, however, it is real enough, and it frequently comes into question. "There wasn't a single soldier," says an Israeli officer who fought in the Six Day War, "who didn't at some stage have to decide, to choose, to make a moral decision ... quick and modern though [the war] was, the soldier was not turned into a mere technician. He had to make decisions that were of real significance." And when faced with decisions of that sort, soldiers have clear obligations. They are bound to apply the criteria of usefulness and proportionality until they come up against the basic rights of the people they are threatening to kill or injure, and then they are bound not to kill or injure them. But judgments about usefulness and proportionality are very difficult for soldiers in the field.<sup>252</sup>

Moreover, they are offered two sorts of defenses, one owing to the mistakes that are likely in the heat of battle and the second because of the chain of command and the obedience required of soldiers. In addition:

The defense of superior orders breaks down into two more specific arguments: the claim of ignorance and the claim of duress. These two are standard legal and moral claims, and they seem to function in war very much as they do in domestic society.

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<sup>252</sup> Ibid., 304.

What this means is that soldiers, very often, are not acting of their own accord. Moreover, they cannot, from their vantage point, know whether the actions they are being instructed to perform are just or not. On this point Walzer maintains:

Ignorance is the common lot of the soldier, and it makes an easy defense, especially when calculations of usefulness and proportionality are called for. The soldier can plausibly say that he does not know and cannot know whether the campaign in which he is engaged is really required for the sake of victory, or whether it has been designed so as to hold unintended civilian deaths within acceptable limits. From his narrow and confined vantage point, even direct violations of human rights – as in the conduct of a siege, for example, or in the strategy of an anti-guerrilla campaign – may be unseen and unseeable. Nor is he bound to seek out information; the moral life of a combat soldier is not a research assignment. We might say that he stands to his campaign as to his wars: he is not responsible for their overall justice.

The epistemic uncertainty that is granted to the soldier is important because it shows a humility with regards to our general capacity to judge *jus ad bellum* claims more generally and allows that warfare is not strictly a good guys vs. bad guys affair where we can easily be certain that our side is acting justly. The greater the demonization of the opposing side, the more likely we are to flout the rules of engagement in the supposed interest of self-preservation. A demonization of the opponent coupled with the claim that a lasting peace will be achieved if they are defeated and the regime responsible replaced has been a tactic used for centuries to get otherwise unwilling citizens to participate in wars of aggression. I would not like to suggest that the actions taken by the Nazis were not atrocious, or to minimize the evil nature of Hitler's program for world domination. However, it is important to note, I think, that even in the case of Nazi Germany once the war was over the Nazi threat that justified abandoning the rules of *jus in bello* immediately disappeared even though the very same people who carried out the atrocities in question were still alive and running the country. In 1954 Waltz remarked:

We fought against Germany in the Second World War because as a whole it followed the lead of Hitler and not because so many people in the United States felt a personal enmity for the people of Germany. The fact that we opposed not individuals but states made possible a rapid realignment of states following the war, which is now spectacularly demonstrated by the

cooperation of the United States with the leaders and people of states that were a short time ago our mortal enemies.<sup>253</sup>

One of the very important reasons for having and abiding by the rules of *jus in bello* is precisely because we are not waging wars against individuals but against states. The people, no matter whether they support the war effort or not, are not the proper targets of attack, and once the war is over they will be the people who we will have to get along with to maintain peace in the future. Demonizing the population and then attacking them on the basis of this characterization undermines our own humanity. Attacking people indiscriminately and disproportionately is no guarantee that the war effort will be successful or less costly to those choosing these methods, think of the Vietnam War, for example. And in addition, these tactics actually undermine the morality of those who claim to hold the moral high-ground.

In the case of Nazi Germany the case may be too fresh in our minds and too personal for many to accept that the Nazis and the German people who supported them deserved any kind of consideration based on the rules of *jus in bello*. However, lack of restraint and a foregoing of these very same principles have been urged by politicians against many groups throughout history. One such demonization of the adversary occurred in the Americas with the conquest of Native populations. These groups were brutalized and not offered the same protections as Europeans or other peoples because they were considered to be savages and underserving of legal protections. As John Fabian Witt recounts:

A century after Grotius, however, jurists began to carve out hard-and-fast exceptions for Indians who did not follow the European laws of war. “When we are at war with a savage nation,” Vattel wrote, “who observe no rules, and never give quarter, we may punish them in the persons of any of their people.” American jurists took Vattel a step further. Vattel’s approach treated Indians on the basis of their alleged conduct, not on the basis of their status. But the early American literature excluded Indians from the protections of the laws of war on the basis of their race and religion.<sup>254</sup>

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<sup>253</sup> Waltz, *Man, the State and War: A Theoretical Analysis*, 180.

<sup>254</sup> Witt, *Lincoln's Code: The Laws of War in American History*, 92-93.

Demonizing the opponent based on race or religion and not based on actions was an even greater threat to the native populations because they were targets of indiscriminate attack regardless of whether they violated the European laws of war or not. Witt, citing Kent, continues:

Kent's *Commentaries* explained that "the Christian nations of Europe, and their descendants on this side of the Atlantic" had "established a law of nations peculiar to themselves," one rooted in "the brighter light, more certain truths, and the more definite sanction, which Christianity has communicated."<sup>255</sup>

A century after Grotius had sought to eliminate religion from the laws of war and peace Christianity was still being promoted as a prerequisite for being afforded the protection of the laws of *jus in bello*. Unfortunately, not much has changed, although today's preferred ideology is democracy and not Christianity.

#### 5.4 McMahan on the Separation of *jus ad bellum* from *jus in bello*

Jeff McMahan criticizes just war theory on the grounds that it separates the categories of *jus ad bellum* from *jus in bello*. While I have been arguing throughout this work that the separation has been a positive development for just war theory, allowing for a more robust account of *jus in bello* to be developed and placing the blame for the violence of warfare on the agents actually responsible for the violence, McMahan is highly critical of this stance. In this section I will present McMahan's argument against the separation of *jus ad bellum* and *jus in bello* and I will argue that this position does not take seriously the epistemic uncertainty related to both our ability as observers to properly judge just cause in the moment, and the epistemic condition of soldiers fighting in wars.<sup>256</sup>

In order to best understand McMahan's argument against the separation it will be important to begin from his starting point regarding just war theory as a whole. To begin, McMahan provides his readers with a definition of just cause. For McMahan:

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<sup>255</sup> Ibid., 93.

<sup>256</sup> See also: Jeff McMahan, "On the Moral Authority of Combatants," *Journal of Political Philosophy* 14, no. 4 (2006).

Just cause is an aim that satisfies two conditions: (1) that it may permissibly be pursued by means of war, and (2) that the reason why this is so is at least in part that those against whom the war is fought have made themselves morally *liable* to military attack.<sup>257</sup>

From this definition of just cause McMahan is already anticipating the argument against the moral equality of combatants. Directly following on this definition McMahan makes a contrast between just and unjust combatants as follows:

With this notion as background, we can now distinguish between “just combatants,” who fight in a just war, and “unjust combatants,” who fight in a war that lacks a just cause.<sup>258</sup>

The goal of marking a difference between just and unjust combatants is to be able to then argue that they do not have equal moral standing with regards to one another, something that traditional versions of just war theory at least since the Modern turn have held. On the traditional view there is an important difference between civilians, or non-combatants and combatants, and this has to do with their training, ability and positioning to do harm to combatants on the opposing side. Normally, it is said of combatants that they have “lost their right not to be attacked” but that the general population has not put itself into such a position merely by having a war fought on their territory or on their behalf.

McMahan, in opposition to the moral equality of combatants, states:

I will argue against the moral equality of combatants by arguing against the view that unjust combatants act permissibly when they fight within the constraints of the traditional rules of *jus in bello*. I will argue, indeed, that with few exceptions, they cannot satisfy the constraints of *jus in bello*, even in principle, when those constraints are properly understood.<sup>259</sup>

According to McMahan, unjust combatants cannot properly satisfy the demands of *jus in bello*, discrimination and proportionality, because there is no just cause for which their actions could count as proportional and also because the just combatant has not lost his

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<sup>257</sup> *Killing in War*, 5.

<sup>258</sup> *Ibid.*

<sup>259</sup> *Ibid.*, 6.

right not to be attacked by the unjust combatant. While this view seems intuitively plausible in the abstract the greatest threat to this view is that whether or not your side has a just cause both sides will act as though they do have just cause. In this scenario, from a subjective standpoint each side has a just cause and there will be certain military campaigns that will serve to move each side towards their goals. These goals can be met either with a respect for the rules of *jus in bello*, taking care to use only the force necessary to achieve objectives and targeting only enemy soldiers, or they can be achieved in whatever way minimizes costs to your own side. The aim of *jus in bello* is to limit the destructiveness of war, which is already a non-ideal scenario in which other methods of resolving disputes have failed. *Jus in bello* also has the further aim of limiting destructiveness to increase the chances that current enemies will be able to resolve future disputes peacefully and not continuously resort to violence in the future. McMahan is of the opinion that being subjectively convinced of the justness of your side in a war is not enough to make the actions of the unjust side morally equivalent to the actions taken on behalf of the just side.

McMahan's argument takes into consideration a variety of possibilities related to the epistemic conditions of the soldiers fighting in war. He considers the possibility that soldiers are not well placed to judge the justness of the war they are fighting in, as well as the fact that soldiers are institutionally imbedded in such a way that their personal judgments regarding *jus ad bellum* claims are actively discouraged in order to maintain the military's efficiency. On the first point, McMahan is sympathetic to the idea that soldiers may not be ideally placed to judge the justness of war. However, in the end he argues that this would have to be the case in every situation of war in order for the moral equality of combatants to hold. He maintains that there are cases in which soldiers can objectively tell that they are on the unjust side and that they have no grounds for attacking the opposing forces. The first thing to say about this position is that it rests on a particular epistemological position regarding objective and subjective knowledge that McMahan does nothing to support. I am not suggesting that McMahan's book on just war theory is the right place for a lengthy discussion of epistemology and a defense of the objectivity of knowledge claims. However, it is important to note that his position rests on the assumption that individual agents are capable of holding objectively true opinions

regarding the outside world.<sup>260</sup> If this assumption is put into question this threatens his view on the moral equality of combatants. If we only ever hold subjective opinions regarding the moral/legal status of the wars we are engaged in, and on top of this there are persuasive media campaigns aiming at convincing citizens and soldiers on both sides of the conflict into believing that their side has justice on its side, then this puts a significant strain on the idea that anyone can ever be entirely sure that his position regarding the justness of war is objectively true. Moreover, if I subjectively believe very strongly that the war my country is engaging in is unjust it is possible for me to refuse to fight for this particular cause. The penalties that soldiers face for refusing to fight will depend of course on the laws of each nation, however, it is at least possible in principle for soldiers to refuse to fight in a war they believe to be unjust. If instead of McMahan's objectively unjust war we can only have relative certainty of our position, this still leaves room for a consensus to develop among people and for support for the war to be undermined. Under the traditional principles of just war theory, those who believe themselves to be fighting in an unjust war have the opportunity to not fight and they are not bearing the moral blame for declaring the war or issuing commands, for which they are not properly responsible. "Unjust combatants" are judged based on the moral decisions that they are actually responsible for, those of *jus in bello*, and not for those that do not stem from their personal choices, those of *jus ad bellum*.

There are certain practical consequences of adopting McMahan's view regarding the asymmetrical status of combatants in war that are important for my argument. For one, if soldiers are indeed not afforded the same moral status in war, then it becomes, at least in principle, permissible for just combatants to use means that would otherwise be impermissible in order to expedite victory against the enemy. In the current legal context, both parties to a war are concerned with the repercussions of their actions against opposing forces and tend to frame their actions relative to the principles of *jus in bello*. If, however, we remove the assumption of the moral equality of combatants from the

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<sup>260</sup> I do not intend here to take any position regarding the possibility of holding objectively true beliefs about the external world. I simply wish to point out that McMahan's position rests on the assumption that this is possible, even in the complex realm of international politics where powerful interests are known to manipulate information for their benefit.

picture and instead frame the enemy as consisting of unjust combatants (which both sides are likely to do), then we will likely increase the violence of warfare, not decrease it. McMahan is aware of this point and suggests specifically that in the case of asymmetry, which he suggests is the correct moral characterization of combatants in war, that additional rights should be granted to just combatants as opposed to the unjust. As he states:

I believe that there could *in principle* be circumstances in which it would be morally permissible for people with a just cause to act in ways now prohibited by law. It could, for example, be permissible for just combatants intentionally to harm certain civilians or prisoners of war; it could be permissible for them to disguise themselves as civilians to facilitate an attack on unjust combatants participating in an unjust occupation. I concede that such acts could rarely be permissible in practice, if only because they would provoke reprisals against the innocent; but what could make them permissible in principle is that those who would be their intended targets would have made themselves liable to attack by virtue of responsibility for a wrong that could be prevented or corrected only by attacking them in a proportionate manner.<sup>261</sup>

There are consequentialist reasons for thinking that adopting the asymmetrical model of combatant rights in war is a bad idea and McMahan is the first to recognize these, as he states:

A neutral law that permitted all combatants to attack civilians in certain specified conditions, or to harm or kill prisoners, or to disguise themselves as civilians, would be exploited by the unjust and inevitably abused by the just, leading to greater violence, and in particular to more and worse violations of the rights of the innocent, than a law that prohibits these forms of action to all.<sup>262</sup>

And he continues:

At present, in other words, when all who fight claim to be just combatants, and most sincerely believe what they claim, and when their belief cannot be authoritatively controverted, we must deny them all permission to act in

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<sup>261</sup> McMahan, *Killing in War*, 108-09.

<sup>262</sup> *Ibid.*, 109.

certain ways that on occasion might be morally permitted to actual just combatants, or even morally required of them.<sup>263</sup>

So prudentially, at least in the current system, it would be unwise to adopt the asymmetrical view, according to McMahan himself. However, we do not have to look very far into military actions to discover the asymmetrical position at work in the world. Take the way that terrorist groups and other non-military groups are treated differently from military enemies.

Terrorism poses a problem for just war theory because it deals with interstate violence but terrorist actors often fail to meet the standards normally required of combatants. For example, terrorists and other non-military actors often carry out their actions in secrecy, without exposing themselves to the dangers of full-blown military conflict. By using civilians as cover, they intentionally disregard the convention derived from the just war principle of discrimination that requires soldiers to identify themselves with appropriate insignia to distinguish themselves from the general population.<sup>264</sup> They do not necessarily represent the interests of any one national group, and so their actions do not get authority from the channels normally permitted by just war theory. And they use attacks on civilian populations as a means to their ends, which is explicitly prohibited by *jus in bello*. These are just a few of the ways that terrorism breaks down the categories of just war theory and places itself outside the purview of the traditional rules. In a way, terrorists are the ultimate “unjust combatants” on McMahan’s model because they not only fail to meet *jus ad bellum* criteria but they also, and most importantly, deliberately go against the rules of *jus in bello*. Surely, if the reasons for precaution set out above are already not being met; if the enemy is one that refuses to adopt the rules of

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<sup>263</sup> Ibid.

<sup>264</sup> If we are required to distinguish between combatants and non-combatants when engaging in military attacks, then soldiers must wear uniforms or display other signals that they are not civilians. Prior to the 20<sup>th</sup> Century it was common for armies to wear colorful uniforms much like sports teams so that they would not kill their own men in close combat situations. As opposing sides have moved further and further away from one another with new technologies, the risk of inadvertently killing a member of your own side has been reduced drastically. Today soldiers tend to wear uniforms designed to camouflage them from the enemy but they continue to identify themselves in ways that distinguish soldiers from civilians. These norms are obviously flouted by terrorists and guerrillas who intentionally use civilians as cover in order to achieve their objectives.

*jus in bello* as binding for himself, then there is no longer a reason for soldiers defending themselves and their citizens to be held to the standards of *jus in bello*. This stance regarding terrorists, that they are not afforded the same protections as even unjust combatants, is already present in our current international relations.

This way of distinguishing terrorists, as our enemies who carry out unjust attacks without proper authorization, without distinguishing themselves from the general population, etc. is an agent-focused way of defining terrorists. It focuses on who carried out the attacks and builds in the injustice of the attack to definition of the enemy. As Stephen Nathanson points out in his book *Terrorism and the Ethics of War*, we should be concerned with the moral quality of the actions carried out and not with defining certain people or groups as terrorists. As he remarks:

The idea that we should define “terrorism” by who does it leads to absurd results. If we define a “terrorist act” as *an act carried out by terrorists*, an obvious problem is that this definition does not tell us how to identify someone as a terrorist. But even if we could independently identify some people as terrorists, we would still need criteria for identifying terrorist acts because most of the things that terrorists do are not terrorist actions. They wake up in the morning, eat breakfast, drive cars, make phone calls, etc. Even if we add that terrorist actions must be violent, not every violent act by members of a terrorist group is terrorism. If members of a terrorist group are attacked by a rival terrorist group and kill their attackers in self-defence, these self-defensive killings would not be terrorist acts.<sup>265</sup>

Instead of defining terrorists based on who did the action, or in terms of agents, Nathanson suggests an act-focused approach that uses the quality of the action in question to determine whether it was a terrorist action or not. According to Nathanson terrorist acts:

1. are acts of serious, deliberate violence or credible threats of such acts;
2. are committed in order to promote a political or social agenda;
3. generally target limited numbers of people but aim to influence a larger group and/or the leaders who make decisions for the group;
4. intentionally kill or injure innocent people or pose a threat of serious harm to them.<sup>266</sup>

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<sup>265</sup> Stephen Nathanson, *Terrorism and the Ethics of War* (Cambridge: Cambridge University Press, 2010), 14-15.

<sup>266</sup> *Ibid.*, 24.

Based on this definition, there are terrorist acts and the people responsible for carrying these out at any given moment. They are not limited to our enemies and are not defined by belonging to a particular group. In fact, governments of all kinds can, and have, committed terrorist acts. Walzer's famous account of the British carpet-bombing of German cities in World War II clearly fits the definition, as do many other examples of acts done by state actors. Clearly then, there are instances where "terrorists" are clearly identifiable and usually adhere to the rules of *jus in bello*, which would undermine the credibility of treating so called "terrorists" differently from other combatants in war, who should be afforded the protections offered by the moral equality of combatants, regardless of their failures to uphold *jus in bello*.

In the above critiques of Walzer and McMahan, I hope to have shown that making the principles of *jus in bello* subordinate to those of *jus ad bellum*, or removing the separateness of the categories, leads to worse and not better results for just war theory. In fact, this separation and the neutral definitions that the principles of just war theory are based upon allow the theory to maintain its view towards improving the conditions necessary for a future peace. As I have mentioned above, the logic of just war theory seeks to limit the resort to war and the destructiveness of war in the hopes that current enemies will one day resolve their disputes in non-violent ways. The introduction of ideological justifications for suspending or altering the rules of *jus in bello* into the theory, such as the supreme emergency exemption, McMahan's just and unjust combatants, or different rules for dealing with "terrorist threats" creates various conditions in which wars are fought not by soldiers who have certain rights afforded them, but good guys and bad guys, us vs. them, true believers and idolaters, etc. This way of thinking risks making the goals of winning the war more important than any temporally limited geo-political goal. The only way for "us" to be safe in a world made unsafe by "them" is to counter and eliminate the threat once and for all. "They" are not to be trusted and whatever violence committed now on behalf of our goals will be justified by the peace that we will have in the future.<sup>267</sup> The ends justify the means

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<sup>267</sup> That is not to say that there is nothing that can be done about threats to national security in the current context. Just war theory permits wars for the sake of self-defense and eliminating threats from terrorist groups may well fall under the scope of what is permitted. In this case though, terrorists will have to be

however unjustifiable they would be under “normal” circumstances. If we are sceptical of the crusaders’ justification that violence now is justified to bring about a lasting peace, then we should be equally sceptical of those who would seek to protect us today through the use of violence and the undermining of the rules of war. The lasting peace may never be achieved, as Kant reminded us, however, gradual progress may be made if we remain vigilant against ideological attempts to undermine the applicability of the rules of just war theory.

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judged as enemy combatants and afforded the rights of other soldiers in war. If they cannot for some reason be placed in this category, for example, because they do not identify themselves as soldiers, then an alternative is to judge that they are not like enemy combatants but more like criminals. If they are criminals, then they are to be apprehended and tried according to the laws of the country that they have attacked. In the case of the US this means that they are afforded certain rights not to be held without charges being brought against them, to be tried by a jury, etc. So-called terrorists are in a grey zone where they are not afforded the rights of either the combatant group or the criminal.

## Conclusion

Just war theory is referred to as a theory, which is misleading, as it implies that it is made up of a stable set of principles that are agreed upon by various theorists across time. However, as I hope I have made clear in the preceding chapters, just war theory is less like a scientific theory that has set rules and principles and more like a family of views with a shared history that has undergone important changes over time. Just war theorists are often lumped together because of the views they do not hold (realism and pacifism) rather than because they all agree on one set of principles. That having been said, there are certain categories of principles, as we have seen, (*jus ad bellum* and *jus in bello*) that have been treated by all just war theorists in the Western tradition since its beginnings. The most important shift in just war thinking, I have argued, happened in the Early Modern period, when religious justifications for going to war were largely abandoned, and a full account of *jus in bello* separate from *jus ad bellum* was elucidated.

The importance of this shift cannot be overstated. For one, removing religious justifications for going to war from *jus ad bellum* was a first necessary step towards recognizing the shared humanity of participants on both sides of a military conflict. When it is accepted that your enemy has rights that are owed respect, it becomes imperative to develop a full *jus in bello* that will effectively guide military commanders and soldiers in their on the ground decisions. Once we have a fully developed *jus in bello* there are a number of obvious benefits. For one, responsibility is properly attributed to the agents responsible for the different spheres of just war theory. Political leaders who decide whether their co-citizens will go to war on behalf of the state or sub-state group are held responsible for respecting *jus ad bellum*, while military commanders and individual soldiers are held responsible for the decisions they make in considering the principles of *jus in bello*. A separate account of *jus in bello* also leads theorists to consider including new provisions in *jus in bello*. For example, if the principles of *jus in bello* hold regardless of the kind of threat being faced, then it is clear that certain kinds of weapons that cannot meet the requirements of discrimination and proportionality because of their inherent destructiveness should be prohibited. Considering the ethical status of weapons has never been more important than it is in today's age of technological innovation. The ways that wars are being waged today were unthinkable a few short

decades ago and the ethical implications of these changes are still largely unknown. I believe that it is important for ethicists to become involved in debates surrounding weapons and their possible ethical use, rather than deferring to the idea that they are not inherently harmful in their development and stockpiling and that we have to wait to see how they are used to determine their ethical status.

In addition to these important consequences of separating *jus in bello* from *jus ad bellum* a final benefit of this shift in just war thinking was to open up just war theory toward the further elaboration of a *jus post bellum*, which is essential for thinking through how to establish a lasting peace between current enemies. Treating your opponent as a bearer of rights also respects them as the responsible moral agents with whom we will have to get along once present hostilities have ended. I have not had the chance here to elaborate a full account of *jus post bellum* but, in line with my support of a Kantian program for thinking about how we will eventually move towards a more peaceful world order, I believe that it is essential that a comprehensive *jus post bellum* be developed. At the time I am writing a number of theorists are working on this exact task and are leading a new revolution in just war theory, hopefully one that will be as transformative as the development of a full *jus in bello* was in the Early Modern period.

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## Curriculum Vitae

**Name:** Aviva Shiller

**Post-secondary Education and Degrees:** McGill University  
Montréal, Québec, Canada  
2003-2007 B.A.

Université de Montréal  
Montréal, Québec, Canada  
2007-2009 M.A.

The University of Western Ontario  
London, Ontario, Canada  
2009-2015 Ph.D.

**Honours and Awards:** Province of Ontario Graduate Scholarship  
2013-2014

**Related Work Experience:** Teaching Assistant  
Université de Montréal  
2008-2009

Research Assistant  
Université de Montréal  
2007-2009

Teaching Assistant  
The University of Western Ontario  
2009-2011

Course Instructor  
The University of Western Ontario  
2011

Research Assistant  
The University of Western Ontario  
2013

**Publications:**

Shiller, Aviva. "Why Kant is Not a Democratic Peace Theorist" In Andreas Føllesdal and Reidar Maliks Eds. *Kantian Theory and Human Rights*. Routledge. 2014.

Shiller, Aviva. "Husserl and Sedimentation: The Evolution of his Theory of Time-Consciousness" In *Philosophic Fragments*, McGill University Undergraduate Journal of Philosophy, 2007.