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A DRONE'S EYE VIEW: GLOBAL ANTI-TERRORISM AND THE EXISTENTIAL CRISIS OF JUST WAR THEORY

The Advent of Drone Warfare

The use of remotely piloted aircraft (UAV) to make lethal strikes in the current Global War on Terror (GWOT) has become as commonplace as it has controversial, even while aspects of it remain as clichéd as the American love for acronyms. From command and control centers largely in the United States, multiple drone strikes were launched in the first week of 2013, and all indicators suggest that this weaponry and its enabling technologies will become increasingly central to the American way of fighting current and anticipated wars.¹ The Obama administration claims to have decimated the leadership ranks of al Qaeda and related terrorist organizations through systematic targeting and drone-enabled strikes deep into Pakistan, Afghanistan, and increasingly the Yemen and the African Sahel. How many UAVs have been downed by resistance will remain unknown, but no pilots have been risked and no American lives have been lost.² Pilots of conventional fighter-bomber aircraft are also rarely lost, but the symbolic significance of lethal force exercised by UAVs across a vast geographical domain spanning most of half of Asia and Africa with pilots safely nestled into command and control centers scattered across the Midwestern United States is not lost on anyone. An arms race is well under way, and partly in response other nations are rapidly developing their own drone fleets to deter or to compete.³

¹ Spencer Ackerman, "Obama's New Year's Resolution: More Drone Strikes" *Wired.com* 01/03/13; Spencer Ackerman, "6 Strikes, 8 Days, 35 Dead: The U.S. Drone War in Pakistan is Back," *Wired.com* 01/13/13.

² Ackerman, "Not Even the White House Knows the Body Count," *Wired.com* Sept. 29, 2012.

³ Lev Grossman, "Game of Drones," *Time Magazine*. Vol. 181 No. 5 Feb. 11, 2013.

However, the technological and infrastructural advantage possessed by the United States will ensure its supremacy in the UAV wars for a considerable time to come. Clearly no military in world history has imagined or achieved that kind of ability, and the range of real and potential consequences are equally astounding and as singularly unique in the history of military strategies and capacities as are the technologies themselves. As ongoing accounts of ongoing cyberwarfare and covert espionage aptly indicate, the United States is hardly alone in its ability to wield the machinery of information technologies and a global computing infrastructure to its own ends. But it is alone for the foreseeable future in its demonstrated ability to coordinate all of that into a systematic program of targeted killing across a geographical domain considerably larger than the United States itself, with the theoretical possibility of reaching into any place at any time to kill any person deemed a security risk. Long-standing ambitions of American military planners to achieve full spectrum dominance on land, ocean, air, and the frontiers of space have been realized not by new aircraft carriers or armed space stations, but by the combination of a massive global information and communications structure combined with intelligent, flying machines sufficiently diminutive to be towed by a pickup truck.

As drones become the new centerpiece of counter-terrorism and counterinsurgency warfare, questions regarding their usage have escalated in recent months, particularly in terms of military strategy, political oversight, international relations, and the host of by moral considerations over the inherent scope and scale of the lethal violence that comes with any war. The current administration has purported to take such concerns with seriousness proportionate to what is at stake in a systematic program of targeted killing, now increasingly undertaken through these new technologies.⁴ It remains unclear exactly how that moral seriousness shapes or delimits the range of possibilities and the kinds of decisions that are made, since authorizing the killing of a particular person suspected of terrorism is not morally significant because of the *gravitas* of the authorization or who is unable to sleep at night, but because of the reasons for it and their moral intelligibility.

The most well-known exponent of that moral seriousness is John Brennan, former national security advisor to the Obama administration, who was entrusted for years by the President with oversight over the UAV program in the Yemen and Africa.⁵ These programs in their full scope have always been developed and deployed between the diverse armed services and what has become the frankly paramilitary nature of the Central Intelligence Agency. Oversight in Pakistan belonged to the CIA, while deployments in Afghanistan and Iraq fell to the Pentagon. Obama exercised immediate oversight only in the domains of the Yemen and the Sahel - and thus the difficulties of Obama's assertions that his own moral seriousness in orchestrating the drone program was in some meaningful way illustrative of

⁴ Ackerman, "Brennan / Government Goes Through 'Agony' Before Launching Drone Strikes," *Wired.com* Feb. 7, 2013.

⁵ Ackerman, "Hidden History / America's Secret Drone War in Africa," *Wired.com* Aug. 08, 2012.

the level of moral *gravitas* that accompanied the development and deployment of the new UAVs in any context. Obama's recent appointment of Brennan to the directorate of the CIA may have been the public occasion for venting the considerable controversies that do exist around the drone programs. But for Obama it provided the administration with the capacity to centralize the programs that did exist into a command structure that would actually control the paramilitary arm of the CIA, never otherwise subject to the Pentagon or the armed services, and to tie those forces together in a way that did at least provide for the potential level of moral scrutiny in the UAV programs that the President envisaged. The appointment was a candid move to place someone in a position of unprecedented power and influence over an incredibly sophisticated and powerful system of covert operations and targeted killings, who was also personally and visibly committed to a similar form of moral scrutiny over targeted killings, and who purportedly shared "the mind of the President" on such matters.⁶

Drone Warfare and Just War Theory

Brennan credits his ethical formation to his Catholicism and his education by the Jesuits at Georgetown University - and that brings into focus a particular kind of moral approach broadly recognizable to many as *just war theory*.⁷ The parameters and core commitments of just war theory have been around long enough and deployed consistently enough, to make explication unnecessary. Just war theory in different guises has been advocated by Catholics and Protestants alike for centuries, and forays into similar or comparable forms of thought in Jewish and Islamic contexts have also emerged. Volumes have streamed forth from academics, policy specialists, and pundits over the last few decades concerning just and unjust wars and the implications of those deliberations for American military deployments. Previous foreign policy "realists", typified by Henry Kissinger and the architects of the Vietnam War and the Cold War, were less enthralled by this kind of moral scrutiny. Just war theorists after World War II, and especially after Vietnam, have consistently portrayed McNamara, Kissinger, and assorted allies as champions of a potentially vicious *Realpolitik* in which reasons of state trumped moral deliberation and constraint. The old adage held that all is fair in love and war.⁸

Realism in foreign policy has been undoubtedly oversimplified by advocates of just war theory. But just war theory itself has been complicated by the use of modern weapons

⁶ Ackerman, "Exclusive / U.N.'s Drone Investigator Backs Brennan for Top CIA Job" *Wired.com* Feb. 7, 2013.

⁷ David A. Graham, "Meet John Brennan, Obama's Drone Czar and Nominee for CIA Director," *The Atlantic*, Jan. 2013; Conor Friedersdorf, "The Targeted-Killing Czar's Powerful Case Against the Drone War," *The Atlantic*, Oct. 2012; Ackerman, "White House Trades Targeted-Killing Memos for a New CIA Director," *Wired.com* Mar. 5, 2013.

⁸ Lawrence Masek, "All's Not Fair in War: How Kant's Just War Theory Refutes War Realism," *Public Affairs Quarterly*, Vol. 16, No. 2 (April 2002).

purportedly to save lives in intractable conflicts. The prevalence of obliteration bombing in Germany and Japan by the Allies during the Second World War, not to mention the decision to drop the newly-developed atomic bombs on the Japanese cities of Nagasaki and Hiroshima, brought to light the use of just war theory to challenge the propriety of certain kinds of actions on moral grounds in an otherwise justified war.⁹ But the potential for those new weapons was never recognized by presidents or military planners as an exceptional means of last resort, as the Truman administration frankly understood when it loaded B-52s with atomic bombs to face the standoff produced by the Soviet blockade of Berlin in June of 1948. The development of nuclear weapons by virtually all sides of the Cold War ended that monopoly over prospectively less costly ways to wage wars, and provided the most serious moral crisis for just war theorists since such discourse was invented. The failure of conventional weaponry in Vietnam also had a significant impact upon the moral framework of just war theory. The devastation wrought during that war provoked more moral objection and outrage than any American military campaign since the Philippines, and the heightened influence of just war theorists owes something to this fact.¹⁰

Brennan's fealty to Catholic approaches to just war theory troubles some critics, and religious metaphors have been circulated at least since a *Washington Post* exposé on the drone program described him as almost a "priest" given his moral *gravitas* and the seriousness with which he takes the just war tradition.¹¹ Just war theory became a staple of Roman Catholic social thought at least with the First Vatican Council, which canonized Thomas Aquinas as the exemplary theologian for the Church. Early *fin de siècle* neo-Thomism underwrote what became in 1944 John Ford's excoriation of obliteration bombing as a morally defensible tactic for fighting an otherwise just war - and that along with the advocacy of John Courtney Murray served more than any other single instance to cement the perception among just war advocates that the whole program was about moral restraint in a time of conflict. Consequent, as well as controversial, statements issued decades later by Catholic bishops in the United States argued that the use nuclear weapons was never morally permissible under any circumstances because of the very weapons used, and the apparent impossibility of using them discriminately.¹²

Something deeply disturbing to just war advocates, and indicative of the anti-nuclear positions taken, continued to circulate in the threat postures of "mutually assured

⁹ John Ford, "The Morality of Obliteration Bombing," *Theological Studies*, Vol 267 No. 2 (Sept. 1944)

¹⁰ Michael Walzer. *Just and Unjust Wars*. 4th ed. (New York: Basic Books: 2006).

¹¹ Karen DeYoung, "A CIA veteran transforms U.S. counterterrorism policy" *The Washington Post*, Oct 24, 2012.

¹² U.S. Bishops' Pastoral Letter, "The Challenge of Peace: God's Promise and Our Response," *Just War Theory*, ed. Jean Bethke Elshtain (New York: New York University Press, 1992).

destruction" contained in the theory of nuclear deterrence.¹³ The slip of the nuclear trigger was dangerously close and only circumstantially avoided during the Cuban missile crisis in 1962. Yet the annual national security reviews published by the United States continue to affirm the right to use nuclear weapons both as deterrence and defense - a point never lost upon the powers who have sought to develop a nuclear capacity as counter-deterrence to the United States or other nuclear powers. And so advocates of just war theory that rose to positions of prominence after Vietnam have nevertheless had to live with the persistent declaration of nuclear deterrence articulated by every presidential administration since the Soviet Union acquired its own weapons of mass destruction. Whatever just war advocacy Brennan brings to the moral perspective regarding drones finds its place in that complex and unsettled landscape of the last century, when entire cities have been leveled by astoundingly brutal military tactics, and the threat of using these tactics continues. The challenge of nuclear weapons exhibited the deep tensions and disagreements that often mark just war theory in any form.

To speak of just war theory now as *precariously situated in a state of existential crisis* is to peel away the layers of intelligibility that come with the oversimplified and reductive understandings most often advocated in contemporary contexts, something Brennan's own language often mirrors. Existential crises do imply that a particular approach to just war thinking has imploded in very real historical circumstances, and that the familiar ways of understanding the stakes of just war theory have been shaken. Most advocates would shun the description of just war theory as experiencing any form of crisis, especially considering its relative success in shaping public perception and military strategic doctrine.

Yet it remains the case, notwithstanding the arguments of some contemporary advocates, that whatever just war theory is today remains quite unlike what it has been before. Weapons technologies have advanced, and the shape of the conceptual ground upon which the morality of wars and the means of waging them has been theorized has shifted substantially since the first Romans first began to speak of the *iustum bellum* nearly a millennium before St. Augustine's own influential writings on the topic.¹⁴

Perhaps the real problem lies not in the weapons technologies themselves, or the shifting sand of what it means to subject them to moral scrutiny, but in the contradictory and chaotic history around motivations, strategies, and tactics that has sustained just war argumentation of one kind or another for three millennia. On the one hand, one finds a "tradition" and, on the other, a "theory." Just war advocates want to have it both ways and stand on the

¹³ The critique of deterrence has been most eloquently and adequately explicated by Oliver O'Donovan: Oliver O'Donovan, *Peace and Certainty: A Theological Essay on Deterrence* (Grand Rapids, MI: Eerdmans, 1996).

¹⁴ James Turner Johnson, "Just War, As It Was and Is," *First Things*, Jan. 1995; for the archaic Roman background, see Alan Watson, *International Law in Archaic Rome: War and Religion* (Baltimore: Johns Hopkins University Press, 1993).

strength of moral tradition, informed by religion, while at the same time pitching their tent with the heirs of Kant, who found tradition and religious authority to be the "self-imposed tutelage" of which enlightened modernity should emancipate itself.¹⁵ As if worried those foundations might prove insufficient, just war theorists also appeal to natural law and a tradition of commentary on the *ius naturale* and the *ius gentium*. Ultimately, the appeal to natural law or latent universal moral sensibilities of one kind or another is precisely what holds together the traditionally religious and the self-consciously modern formations of the just war phalanx; and it is perhaps the only thing that sustains just war theory in a multicultural and multi-religious world in which natural laws of some kind or another have been thought the chief adversary of cultural and moral relativism.¹⁶

Well-known advocates like George Weigel place the just war tradition in a moral and political advisory role, and his analysis draws from the weight of moral tradition (informed also by religion) and distinctly modern concepts of natural law. It is "a kind of ethical calculus, in which moral reasoning and rigorous empirical analysis are meant to work together, in order to provide guidance to public authorities on whom the responsibilities of decision-making fall."¹⁷ That moral theories are especially difficult to apply to concrete circumstances without crassly oversimplifying them is well acknowledged, but it is another thing to enquire after what Weigel's moral calculus combined with "rigorous empirical analysis" portends to do that is not already shaped by the same moral reasoning. Empirical analysis might inform the likelihood of success for a given military strategy or tactic, but it is difficult to construe such guidance alone as morally weighted in a context in which mission objectives are often formulated first and then passed down to the ethicist to see if they pass muster. What would empirical observations concerning carpet bombing in Vietnam look like if not ultimately a game of numbers as well as a certain cost-benefit analysis?

To his credit, that is not the kind of calculus Weigel pretends to advocate. But Weigel is not alone in describing just war theory in ways that are ultimately immune to historical and empirical critique. In that sense, and at the level of abstraction involved, the tradition begins to appear more and more as a kind of "conjectural history." Anglophone "state of nature" arguments run a similar course to Kant's later arguments on conjectural history, in that they illustrate or realize certain kinds of moral principles, but are hardly to be taken on historical or empirical grounds. John Rawls made it patently clear some years ago that the kind of moral legitimacy granted the modern state under social contract theory did not depend a whit upon whether Hobbes' "war of all against all" ever truly took place, or whether Rousseau's claim that civilization corrupted the natural tendencies of human beings

¹⁵ Immanuel Kant, "An Answer to the Question: What is Enlightenment?" *What is Enlightenment: Eighteenth Century Answers and Twentieth Century Questions*, ed. James Schmidt (Berkeley: University of California Press, 1996), 58-64

¹⁶ David Little, "Hugo Grotius and the Doctrine of the Just War," *Suche nach Frieden: Politische Ethik in der Frühen Neuzeit I*, ed. Verlag Kohlhammer (Barrsbüttel: Institut für Theologie und Frieden), 259-73.

¹⁷ George Weigel and Rowan Williams, "War and Statecraft," *First Things* (March 2004).

could ever be regarded as meaningful in an actual historical sense. Conjectural histories that underwrite social contract theories are rather demonstrations of the kind of moral reasoning that might be imagined to have preceded any collective ability to imagine something like a state of natural rights and “consent” towards the establishment of a polity to protect them. No amount of “rigorous empirical analysis” will be able to approach the principles by which such reason is conducted. Although it leaves Weigel's hopes for empirical and historical critique by the wayside, just war theory - as religion, nature, or pure practical reason would have it - ought to be further explored as a form of moral reasoning comparable to modern theories of subjectivity and rights.

The common perception is that military strategies enabled by the increased use of emergent technologies to extend the reach of American lethal force to an unprecedented reach indeed changes the moral grammar of war itself. The pertinent question is not simply whether the drone technologies are a morally defensible means of waging just wars. Familiarity with the criteria of the *ius ad bellum* and the *ius in bello* to the old framework of the *iustum bellum* can also breed excessively simplistic reactions and counter-reactions masquerading as serious moral criticism. The liveliness of the tradition itself is evidence enough that rote recital of criteria - and what Weigel justifiably calls “casuistic means-testing”- is inadequate to establish in any meaningful way what may be morally defensible in a just war. The difficulties that emerge from the use of these technologies in the current global war on terror are not reducible to “yes” or “no.” Rather they suggest all the more why the deeper terrain of the just war tradition needs to be combed once again in order to make sense of the challenges presented to the theory itself.

As Weigel elsewhere writes, “The just war tradition is best understood as a sustained and disciplined intellectual attempt to relate the morally legitimate use of proportionate and discriminate military force to morally worthy political ends.”¹⁸ Among the more difficult tasks that fall to advocates is figuring out exactly what it is about the new strategies and technologies realized in the UAV deployments and targeted assassinations that brings new moral considerations to the table. Just war theory is, according to Weigel, a form of *statecraft*, which otherwise sympathetic critics like Rowan Williams describe as “an aspect of political ethics, which concerns how to do right in the conduct of ordered community life.”¹⁹ The devil may always be in the details, but here it seems to have arrived early and made recognition of those conceptual foundations more difficult than alternatively would be the case. It is hardly clear what the tradition holds to be “morally legitimate” generally or in any given context, and it might be that Weigel’s formulation of the tradition threatens to collapse moral judgment to a service industry for a particular kind of modern politics. As Williams’ response to Weigel indicates, there remains an open question concerning whether the state has the genuine moral means for self-criticism that is not ultimately circular and self-referential.

¹⁸ Weigel and Williams, “War and Statecraft”.

¹⁹ Weigel and Williams, “War and Statecraft”.

Difficulties in Applying the Principles of Iustum Bellum

The age-old language of the *iustum bellum* is difficult to constrain on programmatic and institutional grounds, and even less amenable to the service of any particular state or political regime. In a good many historical instances, the advocate of moral accountability has stood against the state and the apparatus of its own self-justifications for war. In those ubiquitous examples, it becomes difficult to sustain that just war theory is a theory of statecraft. It is rarely acknowledged unwieldiness may prove surprising to Obama, Brennan, and contemporary advocates of the tradition alike, as it remains to be seen just how much of the tradition comes to the service of statecraft and how much more closely resembles prophetic critique.

How contemporary just war theory has come to be is the most significant single question that must be explored, especially if someone like John Brennan now oversees the UAV program in ways that purport to be derived from and indebted to that moral tradition. Given the contemporary prevalence of forms of just war theory that are inextricably tied to expectations about the perceived "burden of power" faced by the United States and its purportedly unique ability to combat things like terrorism, William's warning ought to be heeded regarding "the risk in claiming so unproblematic a right to define what counts as politics and so to dismiss certain sorts of political calculation in combating terrorism is that the threatened state (the U.S. in this instance) loses the power of self-criticism and becomes trapped in a self-referential morality which creates even deeper difficulties in the application of just war theory."²⁰

As many have rightly sensed, there is indeed a shift in moral syntax with the drone war, but no agreement has emerged on what has changed and what exactly it is that forces the old grammar to pause and take note. Some fear the lack of moral or political accountability that an increasingly covert means for waging wars poses. Others have suggested the argument that, like nuclear weapons, this kind of technology simply provides for the impossibility of a just drone war on any imaginable grounds - this time not because of the purported indiscriminate nature of the weapon itself, but from fear that human moral judgment will always suffer from the development of increasingly autonomous technologies. In this case, the UAVs are not autonomous, but remotely piloted aircraft. New technologies have often reduced the threshold for military action by rendering feasible what could have not been done before, or only with considerable difficulty. Others point to the elasticity of the just war tradition itself, and its long history of accommodating emerging technologies. They wonder if the UAV technologies will be any different once the novelty has worn off. Yet a persistent mistake of critics on either side of the moral permissibility argument concerns whether advanced technologies and new military hardware have any moral significance at all.

²⁰ Wiegel and Williams, "War and Statecraft".

Michael Walzer summed up an apparent consensus: “modern technology makes it possible to fight with greater discrimination now than in the past, if there is a political will to do so” - a point apparently not lost on Brennan. Military engineers and hardware manufacturers have often trumpeted the ability of new weaponry to be more accurate than before, and presented these new technologies as reducing the level of civilian casualties in modern warfare, but there are ample reasons to dispute the claim. Heightened accuracy enabled by modern technology is about feasibility, not enhanced moral discretion, and confusion of the two can be tremendously destructive.

In other words, equipping a sniper rifle with a new kind of laser-directed telescopic sighting system does not suddenly make for an ethical shooter. Neither does it allow the sniper to exercise moral discrimination any differently than would a soldier who is ordered to carry out a mission with a suppressed handgun at point blank range. Whether at ten meters or twelve hundred, the ethical judgment concerning whether to take the shot, and whether there is substantial risk of civilian casualties, is one and the same. Pilots who remotely fly the UAVs have to make similar decisions when pulling the trigger from three thousand miles away from the target. The distance at which one may now engage a target says nothing of moral relevance by itself, and no weapon enables discrimination in principle better than any other. With weapons technologies the same factors apply to Roman *gladii* or English longbows.

Contemporary confusion results from the predominantly aerial nature of modern wars and the long history of moral complaints about saturation bombing. An increased use of guided bombs and missile systems in more recent wars has muffled some of those complaints. But that has even created a context for just war advocates to say that moral criteria for waging wars were now satisfied in a way that they had not been before. The perception, however, is both simplistic and false. Choices are always made to accept some risk of civilian casualties in any kind of bombing mission. A decision made to accept greater or lesser risk of killing innocent bystanders may be a moral discretion, although many other kinds of considerations are doubtless involved as well - some of them simply strategic, as large numbers of civilians killed in military actions hardly bode well for “winning hearts and minds.” Yet, whether a weapon such as a smart bomb has accuracy to three meters, or accuracy to three hundred meters (as in the case of a conventional bomb), the *morally relevant* part of the decision to fire or to abort the mission involves the same considerations: knowing the capacity of the hardware, knowing how to use it, and judging whether or not it should be used in situations likely to produce “too many” casualties. There is a false public perception that more accurate weapons make that kind of decision any easier.

A deeper problem emerges from concerns over whether the increased dependence upon smart weapons, whose range and effects may be better controlled, rather *increases* the human toll from what might have otherwise been the case. The sniper may very well take riskier shots precisely because his hardware is more capable of accuracy at that range than before,

and the moral rules allow him to risk them. In other words, if a soldier threw a grenade into crowd to target a person or group of persons, there would likely be moral repercussions, but no one is going to hold the sniper morally accountable if the bullet he fires from 1200 meters hits someone else. Yet if the sniper fires because he despises Muslims and suspects all of them to be terrorists, is that shot still ethically defensible? Unfortunately moral judgment is simply not commensurate with the risk involved in taking shots at such distances or using a combat knife to take out an enemy guard post.

Violence can often be self-regulating on the basis of simple reciprocity. The present day "war on terror" often suggests there is no bar to be lowered by the enemy, because religious extremists who are terrorists would already do anything imaginable to their own enemies. Forces fighting "terrorists" are obliged to be but one step less cruel than their enemies. But what happens when the rules now permit those actions that one may otherwise instinctively abhor? If the "ethical calculus" determines that some kinds of actions are in fact morally permissible, and that many of those actions may go quite beyond what many of those who fight the wars find intuitively acceptable, then it is impossible to escape the implication that the level of violence just got escalated. Accounts have circulated of former drone pilots who have been emotionally and morally devastated by actions that they took when pulling the trigger on a missile, even when the orders came from elsewhere, and otherwise the rules permitted it. The wealth of literature, novels, and films on war in the twentieth century is also replete with such examples. Can the advocate of just war theory who passes weapons technologies as "permissible" given the appearance of enhanced moral discernment escape some responsibility for that?

UAVs are but one example of the larger problem of what *ius in bello* criteria are supposed to accomplish. Advocates have long held that the just war tradition is about *limiting violence*. The theoretical and moral enterprise of restraining violence only works because, without the accountability built into just war theory, the realists take over, and all becomes fair in love and war. There is no specific evidence that wars inevitably descend into indiscriminate killing without the proper ethical guidance provided by rules of engagement. It is significant that the new technologies for targeted killing have the range that they do, and that they operate with a level of stealth. As critics have noted, drone deployments are simply easier than manned covert operations involving intelligence agencies or special forces, and hence the bar for considering whether a particular mission is undertaken is much lower than it might be otherwise. The program works because advocates like Weigel have argued that the mere existence of certain kinds of enemies is a justification for killing them. The part about "rigorous empirical analysis" appears to have fallen away.

Just war theorists do not get to populate the kill lists unless they are in a position like Brennan, which says something highly significant about moral traditions in modern contexts. They may advise, *but ultimately are powerless to decide*. For that reason, *just war theory has always been a theory of sovereignty*. Just war theory has ceased to be as visible these

days as such a theory, because it has become increasingly difficult to think about sovereignty in the age of democracy without the rule of kings or princes. But it nevertheless remains for just war theory to come to terms with what sovereignty has meant and might currently mean in the tradition. The most simple and straightforward response is that sovereignty consists in what determines the difference between killing and murder in a time of war. The weapon that does the killing does not matter at all, nor does its purported accuracy, or whatever other selective technologies it brings with it. The upshot is that the soldier who refuses to take a shot that the rules permit, for whatever moral reason he might bring to the table, may be court-martialed and prosecuted. In wars not so distant past, a soldier who decided that the war was no longer justified and refused to fight and left the military was a deserter in a time of war that could be court-martialed and executed. Whatever enthusiasm there may be for the accountability ostensibly provided by popular sovereignty and representative government, one should recall that those distinctions between legitimate and illegitimate killing have never been held to be private matters, or even ones in which whatever the person thought about the morality of the war or certain kinds of actions have been held to matter.

Hence absent any realized sovereignty except through the deep morass of representation, and absent any ability to formally determine the guilty and the innocent, who lives and who dies, the most that the just warrior on Weigel's advisory panel can do is to police the increasingly fine line between permissible and impermissible action, and conceive of it as guidance to decision-making powers. The reality of the matter is that just warriors are not warriors at all, but civilian advisors, and the military command structure has some investment in that difference. They cannot be tried before a military tribunal, nor subjected to military discipline. In other words, there is a considerable distance between the soldier who follows certain orders and the moralist who advises decision-makers, and the soldier who steps over that ever-shifting line between culpable and inculpable action can be charged with war crimes, the theorist who might have made it possible can at best be simply ignored. The point is not of course to prosecute incompetent just war theorists or other ethicists, but to put squarely on the table the uncomfortable fact that the level of risk undertaken by soldiers in actual combat and the civilian advisor in the Beltway think tanks is categorically dissimilar. Advisors have been able to say and suggest many things with very little risk concerning how it plays out where the war is actually fought - and perhaps the various attempts to ethically authorize torture have proved among the most evident examples. Some of the soldiers who did the work were prosecuted and sentenced, no one who argued in front of the decision-makers for its moral permissibility was held accountable.

How all of that is brought to bear on what happens in the blast zones is complicated and resistant to oversimplification of one kind or another, but what does emerge is somewhere in all of that remains a necessary distinction between the killing of innocent civilians and murder, between doing what one is authorized to do and that which one is not. That is

something that the just war tradition attempts to answer, but ultimately the criteria and language available are only able to say that a "legitimate authority" gets to decide the difference. Notably, neither the soldiers involved, victims, nor their families and relations are held to have sufficient moral standing to decide any significant aspect of this. Just war theory is unintelligible even at its most basic absent the recognition that sovereignty means that certain powers are authorized to do things and decide things that in a way that cannot be reduced to public reason or the discourse of the public sphere. Transformations have indeed occurred in the way that sovereignty has been theorized, and most especially in the contemporary understanding of what constitutes legitimacy. But it is nevertheless disingenuous for just war advocates or their critics to argue, as Weigel has done - and Williams conceded - that war is an essentially public enterprise. That public is not in any way authorized to determine guilt or innocence, or who lives and who dies. Admittedly, public pressure has been successful in persuading decision-makers to change and modify policies, or even reverse them. Such pressure - including that of religious leaders - has been effective in overturning practices of capital punishment in many states in the U.S., but it would be a mistake to construe successful public pressure in affecting policy as making the issue of legitimate force in a capital offense an essentially public enterprise. The public cannot arrest for murder any governor who authorizes state-sponsored execution, or any person who carries out the task, and that makes a very, very significant difference in cases such as these where there are matters of life and death at stake. To put it bluntly, modern democracies and representative government do not enable popular sovereignty to function as any other kind of sovereignty, and no popular vote is permitted to decide who lives and who dies, and who is guilty or innocent. Even when a jury proclaims a verdict, it can only *recommend* punishments appropriate to the crime (even the death penalty), only the magistrate can in fact authorize it. The difference between justifiable killing on the battlefield and murder in that same war zone is not something that there is any recognized public right to judge.

Perhaps it is on account of just war theorists' perception of themselves as the beleaguered moralists holding the ground against the encroachment of amoral realism that there is a considerable resistance to this kind of criticism. That resistance overwhelmingly suggests that what it takes to act as Weigel's advisory panel to persons with the power to make decisions is not only a sense of moral *gravitas*, but a weighed and meaningful sense of what that looks like in a time of war. This means at least minimal consensus on the theory itself, however that may be constituted historically, theologically, or philosophically. Were the power brokers to realize the depth of the unanswered and potentially unanswerable problems that continue to plague just war theory, there would be considerably less openness among political and military leaders toward the kind of moral advisory enterprise that just war theory claims to be. Decision-makers can have a noticeable lack of patience with perpetual conceptual navel-gazing, but an equal lack of patience with matters put before them that clearly have not been thought out. Among the most widespread criticisms of the theory from political and military circles is that it potentially renders any war or any kind of

military action impotent from the start, and that whatever guidance it purports to provide is simply lacking in realistic scrutiny. Just war advocates have hence been obliged to reassure others that they are not pacifists, and part of that requires a track record that demonstrates the ability of advocates to differentiate between meaningful moral guidance in the complex contexts of modern warfare and simply moralistic hand-wringing.

Subsequently, the seemingly Faustian bargain for the just warriors has been to trade what access to political and military decision makers has been gained for whatever may or may not be gained by internal criticism and scrutiny. Unfortunately, this has also come with a kind of implicit moral blackmail on at least two levels that has both illustrated and sustained that bargain: the first is the demand that one decides from the outset prior to critical investigation of any particular war among the available moral options: of a moral rejection of all wars (pacifism); a rejection of the applicability of moral norms to the chaos, mud, and blood of warfare of any kind (realism); or the position that morality does impinge upon the waging of wars and ought to hold accountable to principle reasons for which a war is waged and what is done in the waging of it (just war theory).

The second demand is that critics of the just war tradition are obliged to render a comparably comprehensive and coherent alternative to just war theory as the price of admission to moral critique of the tradition. However that image of the ethics panel writ large works out in any given context, it should be evident enough that this overly defensive retrenchment has done considerable damage to the moral intelligibility and credibility of the just war tradition itself. Just war theory does not hold the moral field alone, nor does it adequately absorb all of what moral reflection on violence in warfare has been or remains. There are also ample and very substantive worries about what constitutes the tradition, its purported coherence, and how that reflects on any particular war at all. As Williams argued in response to Weigel, and the kind of policy-oriented pragmatism that he has helped to shape, such an approach to just war theory “encourages a weakening of the freedom of moral theology to sustain the self-critical habit in a nation and its political classes. By sidestepping the subtleties of the analysis of violence in the traditional theory it ends by leaving the solitary nation-state battling terror or aggression morally exposed to an uncomfortable degree.”²¹ Weigel has been among the strongest advocates for a foreign policy approach that does prefer the “solitary nation-state battling terror” to anything substantially cooperative with its former European allies, and any kind of international bodies that have developed over the last half-century.

Although Weigel, Williams, and Walzer among others share discomfort with the kind of just war theory that resembles a moral checklist in proclaiming wars just or unjust, it is not evident that either of them have arrived at substantive means of rendering the just war advocate the ability to say much more than “yes” or “no” to the kinds of wars, means for

²¹ Weigel and Williams, “War and Statecraft”.

fighting them - and policies and technologies that enable them - that are shaped by the power brokers and those with decision-making capacity. It becomes important at this point to consider whether the tradition in its modern iteration is a deliberative tradition at all, or whether its theoretical and ethical energy is rather exhausted by becoming a determinative tradition that either authorizes and underwrites some such war or strategy as morally defensible or not. Considerable doubt may be raised about whether the reasons for justifying this or that war are genuinely public reasons, and whether the metaphor of the ethics panel for decision-making bodies in a time of war has rather created a class of specialists. The arguments of various just war advocates are certainly publicly available. But the reality of these modern wars is that the reasons for which they are fought are increasingly *not* publicly available. Quite often the unsatisfying argument is offered that this or that nation, group, or person simply constitutes a threat to national security interests.

Evidence for that threat increasingly comes from intelligence assets that are classified and only the purview of very few persons in intelligence, policy, and military circles. Providing moral guidance to that kind of war is a different matter from what is often presumed to be proper to the public sphere. In other words, the public is asked to support the war, and to trust those in power to have the right reasons and the right moral sensibilities to wage it accordingly. Transparent representation and accountability has admittedly been a fiction, especially in times of war. But the increased distance that is rightly perceived between the cadre that does all of the deliberating and decision-making and those who are asked to go along for the ride has become quite troublesome. And so it is right to demand of just war advocates whether their moral deliberations have privileged access to all the intelligence that goes into contemporary wars, or is what passes for deliberation as dependent upon the *New York Times* and other such outlets as the larger public appears to be? Most pressingly, is there anything of substance to actually *say* under these conditions other than "yes" or "no" or "avoid civilian casualties as much as possible?"

The Making of an Existential Crisis

The wars undertaken by the United States since 1990 have divided both the public and the community of just war theorists, most often with the result being rancor between those who supported the wars and those who did not, and there has also been increasing skepticism that just war theory was of any actual moral or political utility when the most visible advocates of the tradition remained at loggerheads over the most basic of just war questions: was it justified or not? But ultimately the same technology that makes such a globalized form of warfare possible happens to excel in binary processes, and indications are that the determinations of just war advocates that something is or is not justified are being increasingly harnessed by artificial intelligence and machine learning - as there is no qualitative difference between "yes" and "no" and ones and zeros.

Emerging technologies in data mining driven by machine learning are part and parcel of the marked turn towards the increasing deployment of UAVs in warfare. The amount of information processed by terrorist-hunting technologies such as Brennan's "disposition matrix" is exponentially greater than any human intelligence effort could realize. And it is not lost on many that machines do not share the same tendency to shape the outcome of intelligence enterprises by moral qualms and hesitancy, and even the appearance of objectivity that AI can generate can be considered very welcome in the complex business of intelligence and the population of kill lists.²² The task remaining for human beings appears to be increasingly relegated to oversight rather than direct action, and perhaps ultimately to moral hand-wringing in the public sphere when the decisions over life and death are made by those with access to artificial intelligence and the right databases. Demands for increased transparency as the resolution to that problem have also been often ill-considered, and in the context of the legislative bodies of the United States, too much of it begins to look like moral narcissism, as the death toll is markedly less of a concern than proper clearance from the right senators and legislators. Wars have never been waged with all of the information for public consumption. Transparency as a moral criteria can easily become a conceit of modern democracies, as whether a targeted assassination is approved by a public 51% or by those with security clearances does not even begin to touch on the pertinent moral issues.

These kinds of concerns and questions about the utility of the just war tradition in contemporary wars only begin to illustrate what it would look like to say that the tradition is in a contemporary state of existential crisis. That concerns its own conceptual structures, how it has received its traditions and how it has reshaped them for contemporary purposes, and how some of the more difficult realities of the mud and blood of warfare have been unaffected by the process of moral deliberation, or in worse cases the inherent violence in human warfare might be said to even increase when moral deliberation becomes a set of codified rules of engagement. Advocates across the disciplines may be surprised by the repeated claim that the tradition appears in shambles in its contemporary form, and that the history of just war thought presents anything but a clear set of criteria and clear set of principles for decision-makers in a time of war. Ethicists such as Stanley Hoffman argued forthrightly that just war theory "remains the only coherent doctrine" available regarding the constraint of violence in human warfare, and it has lasted "no less than a dozen centuries."²³ Whatever it is that has lasted for over a millennium simply does not lend itself to whatever Hoffman means by a "coherent doctrine," and it takes a considerable amount of effort to extract something of that sort from the past twelve centuries. That kind of just war theory accomplishes little of consequence in terms of theory or history.

²² Ackerman, You Can Order Hundreds of Drone Strikes and Still Be Called 'Wet Nurse' of Terrorism, *Wired.com* Jan. 7, 2013.

²³ Stanley Hoffmann, *Duties Beyond Borders* (Syracuse NY: Syracuse University Press, 1981), 47.

The purported coherence of a tradition shackled to the purported regularities of natural law simply ensures itself against irrelevance in a modern context. In order to ensure that moral restraint is upheld in ways that the cadre of “realists” would not ensure, contemporary advocates protect access to the appointment calendars of decision-makers by a presentation of the tradition as something nearly constant and consonant with Christian moral reflection since St. Augustine. They cite a view of natural law that is historically rooted, but also secularized and applicable to generally human moral reflection at least since Immanuel Kant’s famous “philosophical sketch” on perpetual peace in the late eighteenth century.²⁴ Few moral theories lay claim to such wide bases for their self-validation. At the same time, it would be quite inaccurate and misleading, however, to suggest a kind of instrumentality on the part of advocates that simply bolsters power and social influence. Just war theorists’ access to the halls of power is hardly reducible to self-interest or the maintenance of power regimes in and of themselves. The religious and moral seriousness of most advocates is not something that the present analysis disputes or questions. There is an admittedly vast difference between intellectual and theoretical engagement that is critical and what ends up looking like ideology critique. Hence reminders that just war theorists tend to be good people, genuinely invested in the reduction of the violence of modern warfare, are unnecessary. What ought to be subjected to critique are the particular configurations that just war theory has taken on in order to ensure access to decision-making bodies. Both its usefulness in bringing modern wars into moral relief and its purported universality and applicability regardless of language or culture are among those things.

Efforts to re-conceptualize just war theory for modern contexts, over the last several decades has scarcely nudged understanding of the basic principles and criteria one way or another. Those who argue for various forms of re-conceptualization tend to also present the historical aspects of the just war tradition as more or less stable and relatively given. The task of reconceptualization therefore becomes an attempt to make the tradition meaningful and germane to a contemporary world that is presumptively more complex than the past, and universally applicable to a multipolar and multicultural world by rooting it in something other than the Latin language and whatever it was that St. Augustine and St. Thomas had to say about it. Therefore the supposed underlying moral principles have been subjects of analysis and critique, as has been whatever is meant by “justice” in the modern world. The implicit yet deeply problematic consensus that renders pre-modern just war theory less problematic in nearly every way than modern just war theory survives in large part because there are no immediately available histories of just war discourse that display the associations, tensions, contradictions, and generally fractured nature of that ad-hoc assemblage understood as tradition.

²⁴ Immanuel Kant, *Perpetual Peace, and Other Essays on Politics, History, and Morals*, ed. Ted Humphry (Indianapolis IN: Hackett, 1983).

The apparent lack of agreement on some of the most basic of moral judgments evidenced in the contemporary context are also not unique. Historical instances abound to show how just war advocates found themselves on all sides of given wars, and quite at odds concerning just what the tradition was supposed to be about. Yet it would also be irresponsible to say that they were at odds precisely *because* they were unclear about what the tradition actually was. The intellectual historians have provided the generally accepted narrative sufficient to underwrite the modern approach to just war theory as criteria-centered moral judgment on wars and means of fighting them, even if some of those historians expressed considerable skepticism that modern presumptions to a “principle of nonmalfeasance” or a “presumption towards peace” aptly describe past approaches to just war theory at all.²⁵

Modern Borrowings from Roman Legal Theory

Historians such as Frederick Russell documented the transformation of just war theory from a Roman legal framework to a scholastic juridical theory, and others such as James Turner Johnson have explored the movement towards theories of international law by the early seventeenth century typified by the Dutch jurist Hugo Grotius.²⁶ Contemporary advocates have consistently identified the genesis of modern just war theory with the work of Grotius because it is there, they argue, that the religious traditions that have shaped just war theory are brought into the same discursive space as theories of natural law and the formation of the modern nation-state. As David Little puts it, “Grotius’ theory is *modern* partly because it is, to be sure, a *secular theory*.”²⁷

Why that kind of theory any longer requires the weight of sustaining a moral tradition at all is elusive, although Catholic skepticism about modern secularity may well be among the most evident reasons. Hence a good deal of the difficulty in sorting out just what the history of just war argument looks like results from that implicit enquiry. Yet Russell’s approach, which remains immensely helpful in sometimes surprising ways, raises as many difficulties as it purports to address. The remaining literature is less so. Historians such as James Turner Johnson have provided flatly characteristic “history of ideas” historiographies, typified by explication of a set of general principles, and a documentary approach to those

²⁵ Frederick Russell, "The Historical Perspective of the Bishops' Pastoral Letter: The View of One Medievalist," in *Peace in a Nuclear Age. The Bishops' Pastoral Letter in Perspective* (Washington DC: Catholic University of America Press, 1986), 86-97; the “principle of non-malfeasance” has been primarily a concept for medical ethics, for a just war application, see Richard B. Miller, *Interpretations of Conflict: Ethics, Pacifism, and the Just-War Tradition* (Chicago: University of Chicago Press, 1991).

²⁶ Frederick Russell, *The Just War in the Middle Ages*. (Cambridge: Cambridge University Press, 1975); James Turner Johnson, *Just War Tradition and the Restraint Of War: A Moral and Historical Inquiry* (Princeton, NJ: Princeton University Press, 1981); *The Quest for Peace: Three Moral Traditions in Western Cultural History* (Princeton NJ: Princeton University Press, 1987).

²⁷ Little, "Hugo Grotius and the Doctrine of the Just War," 259-273; Oliver O'Donovan, *The Desire of Nations: Rediscovering the Roots of Political Theology* (Cambridge: Cambridge University Press, 1999).

who wrote in such ways as to be thought to exemplify those principles.²⁸ Furthermore, no coherent analysis exists as to why the historical shape of the tradition matters at all to a moral theory self-identified as modern, secular, and legitimate on solidly rational grounds derived from an analysis of natural law. Perhaps that is also why the complexities of history so often thought to be subjects of arcane curiosity more than materials for moral enquiry - even Walzer's otherwise admirable work purports to be about a "moral theory" with "historical examples," and not a far cry from what has been presented by Johnson.

Yet the kind of challenge presented by this new kind of global war with new technologies is to be found quite profoundly in the old and arcane problem of grammar. Given the shape of the so-called "linguistic turn" in Anglo-American political theory that emerged with Quentin Skinner's approach to historiography and the history of political and moral thought, grammar ought to interest an intellectual historian a great deal. There is an operative presumption that the new landscape of emergent technologies and politics after the Cold War portends a shift in the moral grammar of war. It also suggests that there is an underlying shift in the conceptualization of just war theory, corresponding to the problem of what Skinner would describe as "speech acts." Words mean what they do when they are *used*. The problem of grammar emerges in the just war tradition when the Latin grammar without which just war theory is intelligible takes on relatively new and awkward shapes. In spite of vacuous various and repeated claims that just war theory exists - analogically or not - in virtually all cultures and languages where there are moral limits to warfare, the tradition as it has come to be perceived is inextricably tied to a particular history and a particular language.²⁹

Seventeenth century analyses of what may be held according to the regulatory laws of nature do not give anyone the old Latin *iustum bellum*, nor the accompanying grammatical inflections of the *ius ad bellum* and the *ius in bello*. The Latin *iustum bellum* may be rendered in the English language and most European languages as "just war" without excessive contortion, but the categories that distinguish two kinds of criteria contemporary advocates employ cannot. Hence contemporary texts and presentations almost always retain the Latin *ius ad bellum* and *ius in bello* even while describing the translated term *iustum bellum* as the "just war" - perhaps if for no other reason than that they are notoriously difficult to portray in quasi-elegant English. The difficulties of rendering the Latin inflections of *ius* otherwise intelligible are magnified when the two usages employed in these two categories are quite

²⁸ A notable contrast in the "history of ideas" tradition would be the theoretical work of Arthur Lovejoy. see Arthur Lovejoy, *The Great Chain of Being: A Study in the History of an Idea* (New York: Transaction Publishers, 2009); *The Revolt Against Dualism: An Inquiry Concerning The Existence Of Ideas* (Whitefish MT: Kessinger Publishing, 2006); *Essays in the History of Ideas* (Westport CT: Praeger, 1978.)

²⁹ The broadest claim for the emergence of just war sensibilities in every culture, see Alex J. Bellamy. *Just Wars: From Cicero to Iraq* (Cambridge: Polity Press, 2006) 15-16; David Little's position is rather on "analogs" to the tradition - certainly more defensively, but Little presses the question against "cultural relativism" in reductive ways, see Little, "Hugo Grotius and the Doctrine of the Just War," 259-273 .

different from one another, and even more so from what constitutes a *ius naturale* or *ius gentium*. One remains almost obliged to revisit the long history of interpretation and argument concerning Latin political, religious, and political terminology that has preoccupied jurists, theologians, philosophers, and political theorists for centuries in order to make sense of the distinctions in *ius* that neither “right” nor “law” capture with anything approaching nuance. The distinctions function in English and European languages as well, a “law of nature” is different than a “law” enforced in a courtroom, and illustrative enough that not everything about *ius* can be held in forensic analogies.

Brennan’s approach to the drone deployments itself reflects a sense that something has changed in the grammar. At least implicitly, he shares in the sensibility among at least some contemporary advocates that have attempted to bring clarity to the matters at hand by arguing that the term “just war” ought really to be understood as “justified war.”³⁰ It remains indisputable that the overwhelming weight of just war theory does exactly that: it holds reasons for war and the means for fighting them to a moral scrutiny as to whether they are “justified” according to recognized criteria. Others have recommended a self-conscious shift from the *iustum bellum* to the “justified war”, but for otherwise incompatible reasons.³¹ In most cases, the vicious circularity in that grammatical shift is rarely noticed. Among those who have at least noticed that *ius*, *iusticia*, and *iustificatio* are conceptually related but not interchangeable terms, the suspicion remains that modern just war theory tends to avoid the much more difficult deliberations about what “justice” might mean in the modern world by focusing on criteria for “justification.” The addition of terms such as the *ius post bellum* add nothing, and do nothing to clarify the problem at hand of just what it is that is meant when these various adjectives and participles that qualify the Latin *ius*. Consequently Weigel and others insist on the “justified war,” but even Walzer recognizes that this is not what the old just war theory of the Augustinian type was about: “What can be said about this theory? To begin with, we must recognize that it had no intention of “justifying” war, but rather of limiting its frequency and ferocity by assigning extremely precise and severe conditions to be met before a war could be called ‘just.’”³² Walzer’s command of those conditions is no more Augustinian than the “justified war,” but an important distinction is nevertheless realized. A cursory historical look might suggest that such conditions were often enough neither precise nor severe.

Oliver O’Donovan also appears to recognize an unsustainable grammatical shift without quite saying so when he argues that just war theory is really not a “theory” at all, and perhaps not even a “tradition” in a meaningful sense of the term; it is what he terms “a proposal for doing justice in the theatre of war.”³³ As the resurgence of interest in theories

³⁰ Among others, see Richard Haas, “When is War Justifiable?” *Washington Post*, May 05, 2009.

³¹ George Hunzinger, “Torture is the Ticking Time Bomb: Why the Necessity Defense Fails” *Dialog: A Journal of Theology*, Vol. 47 No 3 (Fall 2008).

³² Michael Walzer, *Arguing About War* (Yale University Press, 2006), 86.

³³ Oliver O’Donovan, *The Just War Revisited*, (Cambridge: Cambridge University Press, 2003), 12.

of justice following the work of John Rawls aptly indicates, concepts of justice are both essential to the conceptualization of Enlightenment liberalism, and what is most often disputed when grappling with the problems of European colonialism and imperialism prior to and since the Enlightenment - not to mention European intellectual and moral traditions themselves, as the Burkean classical conservatives would rightly insist. In that sense the portrayal of just war theory as a kind of ethics panel for policy-makers reflects precisely what transpires when the question of justice is passed over for the sake of a consensus towards certain rules and criteria over which wars, strategies, and technologies are thought "justified." O'Donovan's argument implicitly points out that just war theorists fail to recognize that such a shift in the technical terminology of the Latin *iustum bellum* both embodies a more general tendency to avoid the most difficult moral and theoretical questions around justice as well as what it means to implement justice in the modern - and largely postcolonial - world. It suggests at the same time that justice is simply less realizable in terms of policy and warfare than is a "moral calculus" that helps policy makers remember to cause as few civilian casualties as possible.

But were emergent technologies given a more serious look in terms of the theoretical weight of the just war enterprise, understandings like that concerning whatever is meant by *iustum bellum* or the "justified" war (*iustificans bellum*) would be more profoundly shaken. At the very least, Johnson, whose historiography shapes a disproportionate amount of contemporary just war thought, would be forced to undertake serious revisions in the content and scope of his historical accounts when a significant amount of the tradition itself concerned matters of grammar, and the differences between *iustum bellum* and *iustificans bellum* that have been historically recognized and argued. Among the many difficulties is that ultimately there is no continuity of tradition sufficient to underwrite an approach that is self-consciously centered on the use of the *ius ad bellum* and *ius in bello* as criteria to conceptualize the categories of *iustificans bellum* as the means for moral restraint in human warfare. It should also not surprise anyone that no meaningful consensus exists regarding any particular war in that long history of deliberation over the *iustum bellum* that was not concocted *ex post facto*. The original just war theorists were also the original Latin speakers of the central Italian hills, and the Romans were condemned to perpetually dispute the legitimacy of their own wars, a fate shared by subsequent advocates from within a Roman juridical framework. Their plight illustrates not the irrelevance of just war theory to the actual warring and the shaping of wars, but that what may be a useful deliberative framework does not always give rise to a useful determinative framework..

For the Romans, the proclamation and waging of just wars was inscribed within a performative framework in which legitimacy was derived from dutifully performed religious rituals of the *iustum bellum*. Historians such as Johnson or Russell simply provide no insight into such difficulties when their historical accounts presume the coherence of modern just war criteria and what it means to elevate such criteria as means of determining whether any particular war meets the standards for justification. Russell, remained far more skeptical after extensive review of the vast landscape of medieval just war theory that

contemporary just war theory can be meaningfully derived from those sources at all. He self-consciously took into his work both the presumption of internal coherence that has been the self-identification of just war advocates, and the presumption that what underwrote the whole project was the development of a means for meaningful moral criteria to be the instrument in restraining violence in warfare. But from there his initial presumptions implode. His detailed and comprehensive account of the Roman juridical framework in which the *iustum bellum* became a part and how that was received by medieval jurists and decretalists rather suggested that the tradition as such had expended considerably more intellectual energy in the justification of various wars and technologies of the time than it did in the restraint of violence, but that the use of just war categories as themselves the means of restraining violence were hardly to be found in that historical record. That contemporary just war criteria allow for virtually all the technological and strategic challenges that were controversial for earlier moral analyses of warfare in the *ius in bello* also tends to drive a wedge in the sustainability of even minimal consensus regarding the intelligibility of the criteria: significant concern existed at various points in the past that, for example, the Christian admonition not to lie might also prohibit military strategies that are premised on deceit (ambush, false intelligence). No one sustains that claim any longer, but not for better moral reasons, notwithstanding Aquinas' own opinion warranting in some circumstances the deceit of one's enemies. Moralists have to learn to live with things in war that are morally questionable but which have come to be considered militarily necessary. Russell does not engage the problem of grammar and how the *iustum bellum* eventually emerged as the de facto *iustificans bellum*, but he nevertheless airs deep suspicions regarding the historical coherence of what modern just war advocates have held to be nearly constant over more than a dozen centuries.

Beneficial as that has been, Russell's work has otherwise provided the catalyst for another problem of perhaps greater weight - the conceptual distinction between wars that are deemed just and those that are waged for religious purposes. That distinction has been portrayed as nestled within the very self-definitions of just war theory. Without that distinction just war advocacy fears losing any claim to credibility in the modern world, even though its continued dependence upon religious concepts and forms of justification (buttressed or not by natural law and universalizable ethics) betrays the fact that it stands uncomfortably close for many to what is otherwise considered religious warfare. O'Donovan's proposal that just war is about the doing of justice in the theatre of war makes no mistake that it is not also about the sovereignty of God. And for that reason O'Donovan's moral framework is about eschatology rather than jurisprudence, and it may not bode well for the ethics panelists.

Just War Theory Rests on the Theoretization of Religion

The primary fault line in contemporary just war argumentation lie neither in weapons technologies nor whatever constitutes the chain of command that uses them. Nor is it

necessarily the scale of violence in and of itself that is purportedly restrained. The argument that needs to be sustained is that just war theory and the modern way of war stands or falls on advocates' reductive and inadequate theorization of religion in the modern world, and of the rapidly expanding global stage upon which these wars are being waged. The difficulties faced by the tradition in sorting out whether it is a theory of justification or a proposal to do justice both stems from and deeply informs that perpetual problem of religion. The lack of a robust theory of justice in modern just war theory appears symptomatic enough of the difficulties encountered in sustaining any theory of justice in the global and rapidly globalizing world. It is because of that reductive and inadequate understanding that the war against terror is so often seen as a religious war, in spite of whatever reassurances to the contrary are perpetually offered. The perception nevertheless remains that some religions play nicely with modernity and some do not - and that "extremist" religions by definition do not. For his other highly intelligent and beneficial contributions to Christian political theology, there is something both very recognizable and yet deeply amiss in Jürgen Moltmann's assertion in 2001 that,

The 'war' that has come over us . . . is the terrorist reaction of a radical wing of Islamic fundamentalism. These groups are reacting against the conditions that the Modern World imposes on all of us in order for different religious communities to live a peaceful life in a common society. . . . The modern world is an open world . . . but it can offer peace between religious communities only under the . . . conditions mentioned . . . This is because these were the conditions for overcoming the religious wars in Europe in the seventeenth century. They gave birth to the modern world then, and they are essential for the peace and the modernization of the world today.³⁴

This also has a great deal to do with why reassurances to Muslims that this is not a religious war so often fail to resonate with their experiences. It is modernity that dictates to Muslims what aspects of the Islamic tradition are now permissible: a set of conditions purportedly based upon what it took to stop Christians from killing each other in seemingly interminable religious wars. The fact that the Europeans who purportedly made peace at Westphalia went through two and a half more centuries of wrenching revolutions, insurgencies, and catastrophic wars, and that this occurred quite in spite of their substantial secularization, is not lost on Muslims, or on those who are Islamic radicals. There are many deaf ears to that kind of analysis and presentation of religions in the modern world, and Muslims are not unique in purporting to live out a religious life that is about submission to God, and whatever falls to the modern state is a distant second. Nor does the *actual* history of the West in the last few centuries suggest that this is but the occasion for more violence. Those fault lines reveal that contemporary just war theory, for all its appeal to a tradition of two

³⁴ Jürgen Moltmann, "Hope in a Time of Arrogance and Terror" *Strike Terror No More: Theology, Ethics, and the New War* (St. Louis: Chalice Press, 2002), 185-6.

millennia, is unintelligible absent the modern nation-state, accompanied by a frankly mythological interpretation of the Treaty of Westphalia in 1648 and its consequent understanding of the concept of sovereignty.

The *historical* narrative is demonstrably false on historiographical grounds, and hence what emerges from Moltmann's redaction is the stock form of what can only be called the conjectural history of modernity when it comes to modern religions. It is also the conjectural history that contemporary just war theorists have made their own. As conjectural histories do, they narrate a state of affairs which renders intelligible what it means for someone to imagine the grounds for things like the legitimacy of the modern state. The modern state is the locus of modern sovereignty, and the only way that this is actually intelligible at all is to imagine that previous conceptions of sovereignty rooted in religion resulted in the interminable internecine violence to which the modern state was the answer. Conjectural histories, like state of nature arguments, do not have to be historically true accounts to function in the cognitive forms in which they do. As Rawls indicated, they make a particular kind of world or state of affairs *imaginable*, only Rawls also suggests that having imagined giving consent to this state of affairs is also what makes the state actually legitimate on the basis of having been granted consent. Moltmann's narrative functions in precisely that way. There is simply no other basis available for the otherwise astonishing claim that "modern Islam (or Islam in modern societies) has agreed to live by these conditions and has given up the Shariah and the Jihad." The historian might otherwise want to see the paperwork and where the signatures went down, understanding as the historian might that the collapse of the Ottoman Empire and the British and French colonial projects shaped the landscape of modern Islam, social contract theory did not.

Historical deficiencies and legions of counterexamples aside, just war theory does not purport to adequately describe all wars or the reasons for which they are fought, nor is it an exhaustive compilation of just and unjust instances, nor a list of approved technologies. It rarely aspires to historical or theoretical invulnerability; it may be challenged and stretched by new technologies when it is not immediately clear how they may impact moral reasoning. But what it does purport to be is a means of limiting the violence inherent in warfare by a kind of reflective moral procedure that subjects both the causes for which the war is fought and the means of fighting it to the kind of moral scrutiny that it understands itself to model. Historians such as Johnson or Russell simply provide no insight into such difficulties when their historical accounts presume the coherence of modern just war criteria and what it means to elevate such criteria as means of determining whether any particular war meets the standards for justification.

The problem of conjectural histories is complex, and cannot be adequately addressed here. Kant's own work obviously adds much to the categories of conjectural histories for the purposes of envisaging a certain construction of morality.

Yet that problem will always remain pertinent to just war theory, as the ways in which the modern iteration of the tradition has taken up Hugo Grotius' writings seems to demands of it, and ultimately of the place of modern warfare within it. As David Little's explication of Grotius illustrates, the primary aspect of his writings that have made him "modern" stem from his statement that all of those things regarding just and unjust wars would be true even if "there were no God, or that human affairs were of no concern to him."³⁵ Like Hobbes, Grotius had a considerable investment in classical rhetorical theory, but however else his statement is to be weighed, it was nevertheless *speculative*.³⁶ Grotius did not *know* what it was like to *not believe in God*, or his care for his human creation. The rhetorical technique employed would have been recognizable to any number of his contemporaries.

Thus even for Grotius himself such a litmus test for modern secularity is not historically tenable. Only the modern political and moral theorist may have a more intimate understanding of what it is like not to believe in God, but that may not be shared by a considerable number of religious people in the world, for whom moral theories that obtain whether there is a God of any kind at all will remaining perplexing at best. Theologians from various parts of the world have often suggested that the European preoccupation with atheism, unbelief, and religious skepticism does not carry the same weight in other places - perhaps there the problem is less skepticism than it is frank idolatry. What *kind* of God one believes in also matters and it has never been good enough simply to affirm that one exists or to deny it.³⁷

Whether just war theory can afford an analog of social contract theory to sustain itself in the increasingly globalized world of increasingly global religions is another matter. Conjectural histories have been deeply formative ways of thinking for people in all kinds of contexts for a long time, but there is always some deeply disturbing danger that lurks when people appear unable to sustain the distinction between that kind of political and moral thought-experiment (as Rawls called it) and the considerably more chaotic history that has transpired. Hobbes' account of the state of nature has informed political forms of association and of civil society in multiple contexts for quite some time, but one would be foolish in trying to locate just when and where someone woke up and decided that life was

³⁵ Little, "Hugo Grotius and the Doctrine of the Just War," p 259-27; Hugo Grotius, *Prolegomena to the Law of War and Peace*, trans. Francis W. Kelsey (New York: Liberal Arts Press, 1957), 10.

³⁶ For analysis of Grotius with less insistence upon the secular bent of Grotius' rhetorical statement in his *Prolegomena*, and as exemplary of the "linguistic turn" in Anglo-American political philosophy and intellectual history, see Richard Tuck. *The Rights of War and Peace: Political Thought And the International Order from Grotius To Kant*. (Cambridge: Cambridge University Press, 1999).

³⁷ Moltmann was very sympathetic to this argument as it came through Ernst Bloch. Ernst Bloch, *The Principle of Hope*, 3 vol., trans. Neville Plaice (Cambridge: MIT Press, 1995); *Atheism in Christianity: The Religion of the Exodus and the Kingdom*, trans. J.T. Schwann (New York: Verso, 2009).

short, nasty, and brutish in a world where each is his or her own sovereign, and figured out a polity that would protect their lives by surrendering their sovereignty save their right to self-defense to a collective or representative sovereign who would hold the monopoly over legitimate violence in ways that the former sovereign could not. It is a way of *thinking*, it is not *what happened* - it is a way of theorizing the net political result of what happened, but in already sharply constrained ways. For just war advocates who also present quasi-historical narratives, there may be some benefit in advocates like Elshtain having to admit that the narrative form in which she presents the tradition is blatantly counterfactual.. And adopting Moltmann's "Westphalian" social contract theory of religions in the modern world as *wie es eigentlich gewesen* would be catastrophically foolish.

The utility of that conjectural history to sustain whatever it means to be religious in the modern world is appearing increasingly frail. As has been suggested, the contemporary state of just war theory owes much to the old problem of grammar, and the diagnosis of existential crisis comes most soberly from the results of that problem, and the difficulties about religion, military hardware, and the death toll of modern wars fall out from there. Whether it is a theory of moral restraint or an exercise in moral justification thought to result in moral restraint seems the most pertinent question in the contemporary conversation. The problem is not new, and historians and theorists have pointed it out before. What has not been broadly recognized is the extent to which this impasse over what just war theory is and what it purports to do reveals the grammatical confusion at the core of the contemporary enterprise.

The Dubious Augustinian Ancestry of Just War Theory

It is also here that one encounters the disingenuousness of the claim that just war theory emerges from wherever moral restraint to the endemic violence of human warfare has emerged, and of someone like tapping into the long history of just war theory. It has been argued persistently that analogs are to be found in other traditions and that this enabled the broader claims of just war theory as universalizable moral theory to be realized quite in spite of its obvious indebtedness to the Latin language. Attempts to render a form of just war theory into that broad of a moral anthropology has led more than a few just war theorists into proposing that some kind of basic moral principles must underwrite the whole program - hence if it does have an identifiable Hellenistic heritage, it is because the Greeks and the Romans bequeathed their terminology, but it was simply one development of general moral principles into a codified tradition of enquiry and interpretation. Otherwise, as is the case with Elshtain, the genesis of just war argumentation is most often credited to Augustine, even though historians like Russell, who have provided most of the historical insight available into the early medieval reception of just war discourse, understand readily enough that Augustine was engaging a long and complex line of discursive practices that were very much alive from well before the Roman imperial era.

Augustine in fact invented nothing of it, nor did he “define” it, as even he was obligated to the Latin language, and could not have afforded that kind of universalist anthropology and actually have had an audience of competent Latin speakers whom he would persistently seek to engage. The consequences of having attempted to breed Augustinian just war theory from some kind of universalizable genetics have been enormous - or universalizable just war theory out of Augustinian genetics that has been among the most conceptually significant problems in the long history of the just war tradition. That becomes apparent as well when modern iterations of just war theory - already subjected to the abstracting forces of universalization, and already shaped by archetypically modern characterizations of religion and politics and the shape of civil society - become more or less the lenses available for reading the *City of God* and others from the huge corpus of the Bishop that refer to problems pertinent to the just war.

Overcoming the grammatical morass of contemporary just war theory would suggest that something in the legacy of the way that Augustine has been received has gone very wrong. He was hardly the first to write about the old Latin *iustum bellum*, and not even the first Christian to take on the subject. Historians such as Johnson suggest Ambrose - but nothing significant has come of that identification except to say that Ambrose and Augustine were both participants in the large discourse of just and unjust wars. But it is from Augustine that ideas and concepts have been wrested, and which have become a *locus principis* for what the just war tradition has been held to be about, and in such a way that the modern tradition remains in important ways simply unintelligible without the *City of God*. The difficulty presented to the contemporary person who wishes to understand what the tradition has been is not that Augustine's ideas and concepts cannot be made relevant to contemporary contexts and contemporary wars, but that they have not been well understood for so long that it is difficult to know what to make of them.

What would emerge from a reading of Augustine that was not about theorizing modern criteria and principles of non-malificence would wander over a considerably different moral and intellectual terrain. Classicists and scholars of late antiquity such as Robert Markus and Peter Brown have repeatedly cautioned against lifting some kind of theorized just war doctrine out of Augustine, but the difficulties encountered there have not prevented contemporary theorists from finding in Augustine the resources for a return to theorizing contemporary ethics by the demands of charity in an otherwise fallen world, and whatever it is that Augustine was thought to have said about the necessity of good government to restrain the human impulse towards sin and self-aggrandizement.³⁸

³⁸ On Augustine, see Robert A. Markus. *Saeculum: History and Society in the Theology of St. Augustine* (Cambridge: Cambridge University Press, 1988); Peter Brown. *Power and Persuasion in Late Antiquity: Towards a Christian Empire* (Madison WI: University of Wisconsin Press, 1992); “Political Society” *Augustine: A Collection of Critical Essays.*, ed. Robert A. Markus (New York: Doubleday, 1972); Henri Irène Marrou, *Saint Augustin et la fin de la culture antique* (Paris, 1938). For modern recuperations of Augustine in a just war context, see Paul Ramsey, *The Just War* (New York: Charles Scribner's Sons,

As Markus has argued for quite some time, Augustine was neither Roman acolyte nor dismissive critic. He wrote deeply penetrating and ruthlessly excoriating critical exposés of the histories and practices of Roman civil religion and civil society, and - it should be noted - of the Roman attachment to the *iustum bellum* as evidence of their cultural and military success, and of the dutiful care that they displayed for observance of their religious duties toward the gods. Roman *pietas* demanded that fidelity, and expected from it success in ventures ranging from government to the arts and to the arts or war. Hence their wars were often described as *iustum bellum et pietas*. Whether the gods were responsible for Roman military victories, and whether their successes were evidence of their *pietas*, actually mattered to Romans for nearly a millennium before Augustine, and yet it is a point that has scarcely been explicated in the nearly two millennia since the *City of God* was written to snare in polemical tangles all that had gone into Roman civil religion and its dutiful devotion to the gods. One scarcely knows where to begin responding to contemporary just war theory that finds in Augustine the materials for the contemporary approaches that have been advocated.

Biography and lengthy exegesis belong elsewhere, but salient points regarding what Augustine actually engaged in terms of just war discourse are suggestive enough of where the fault lines are to be found between the late-antique Latinist and the contemporary ethicist or moral theorist. Augustine gained his fame within the Latin rhetorical schools, and as a consequence his writings portray with repeated consistency how he viewed the place of rhetoric in the formation of concepts as much as in the formation of persons. That understanding of rhetoric as a means of subject formation (in both senses) has a quite long history before Augustine, and even the more recent theorists such as Quintilian had continued to bring new ways of parsing old problems back to the table.³⁹ Quintilian also gained his fame for refusing to allow that concepts of beauty, truth, or justice were the sole provenance of the philosophers, when it was language itself that owned any conceptualization of such things (they had to be spoken about in words) - and rhetoricians were notably the masters of language.⁴⁰

As a master of language, and celebrated Roman orator before he returned to north Africa and took up offices in the Church, the immediate point to be made is that Augustine could not have conflated the sensibility behind the *iustum bellum* with the *iustificans bellum*, especially when the consequence would be to lose any useful means for parsing the Latin *ius* without vicious circularity. Hence it does matter immensely that he wrote in the Latin

1968); "The Just War According to St. Augustine," *Just War Theory* ed. Jean Bethke Elshtain. (New York: New York University Press, 1992), 8-22.

³⁹ Quintilian. *Instituto oratoria*. Loeb Classical Library (Cambridge: Harvard University Press, 1920).

⁴⁰ Quintilian. *Instituto oratoria*, Book II; Charles Trinkaus, "The Question of 'Truth' in Renaissance Anthropology and Rhetoric" *Renaissance Eloquence: Studies in the Theory and Practice of Renaissance Rhetoric*, ed J. Murphy (Berkeley: University of California Press, 1983); Samuel Ijsseling, *Rhetoric and Philosophy in Conflict: A Historical Survey*. The Hague: Martin Nijhoff, 1976).

language, and that language has grammatical rules, and knowledge of them and mastery over their creative capacities fed an overwhelming ambition among many Romans to master the arts of oratory - not simply to be acolytes reciting stories before the Roman games of gladiators and slaves, but because the mastery of language was the best means available for the formation of moral persons, and hence persons who wished to fulfill their lives in public service to the *respublica*. "Republican virtue" is obviously not a seventeenth century innovation in the history of political and moral thought.

Augustine was one of those, and never ceased to be even after his conversion to Christianity and his gradual distance from his tutelage under the Roman schools of moral formation. Modern philosophy can displace most of what it had meant to be schooled in the Latin language, and to be formed by a kind of moral grammar internal to its functioning, although the legacy of the Renaissance humanities underwrote perceptions of classical education through out most of the last two centuries, of which something survives in what is otherwise the rapidly disappearing milieu of the liberal arts education. In spite of that, the overwhelming bulk of the reception of Augustine in modern political and ethical theory has not required anyone to learn about Latin rhetoric much at all, and hence "Augustinian" ways of thinking in political philosophy and theology have almost taken on the shape of a modern calculus who knows very little about Newton or Leibniz. Read *as* a masterful form of epideictic rhetoric, the *City of God* operates on recognizable principles of the Latin *encomium*: praise and blame.⁴¹ That was the form of moral reasoning inculcated by the rhetorical theorists who looked to history as a compendium of *exempla* according to which one stood in relationship to any given moral context: *historia magistra vitae*. How one followed (*imitatio*) the exemplarity of a given figure stood in relationship to the right functioning of praise (those things which were worthy of emulation) and blame (those which were not).

Aspiring military strategists learned the same way - praise and blame of Caesar's own account of the Gallic wars provided the *locus princeps*, as "what would Caesar do" was never an awkward question or occasion for a bumper sticker. There were formal expectations for the *encomium*, and for how praise and blame were the substantive parts of what it meant to learn from the great exemplars of the past, and what it meant to be a moral and virtuous person (even when the exemplar was anything but a moral or virtuous person, the lessons were drawn the same way). Therefore, with that kind of emphasis upon linguistic mastery and the moral formation provided by the rhetorical schools, a person unable to speak in a manner adequate to the seriousness and *gravitas* that the subject demanded was never a man tolerated in the halls of the Senate, the courts, or in any public office.⁴²

⁴¹ Particular attention to the proemium, Augustine *The City of God*. (New York: Pelican Classics, 1972).

⁴² George Kennedy, *Quintillian*, (New York: Twayne Publishers, 1969).

Augustine wrote as interlocutor to Roman just war theory, but he made no attempt to rescue Roman just war theory from the wreckage of Rome after 410 AD. Instead he blamed the catastrophe on the Romans themselves for failing to realize their own moral and religious aspirations. However, at the same time he did not invent another just war theory to take its place. Augustine's engagement differed in a very substantive ways from those whose works and moral histories he most admired: Cicero, Seneca, Varro, Quintilian, Plutarch. Yet in other ways his imitation of what they had demonstrated to be moral history is evident throughout the work, as is his indebtedness to them. The most substantive difference was now that he came to accept that the one who the Romans had subjected a couple of centuries before to the capital punishment reserved for insurgents and instigators of violence, Jesus of Nazareth, was the God of Israel and all the nations who became flesh and walked among human beings. Having been crucified by a Roman procurator, God had raised him from the dead, and thereby demonstrated to all that *only he was sovereign*, and that the powers to determine the guilty and innocent, to preside over matters of life and death, belonged to him alone. Thus the contest that Augustine waged with his Roman interlocutors in the *City of God* has everything to do with sovereignty, and in many ways that *was* the only theme of the book - where the Romans got it, how they understood it, and how it ought to be understood in an *orbis terrarum* where God staged a triumph over his enemies, and put Roman pretensions to decide matters of guilt and innocence, and life over death, to open shame.⁴³ Hence the last enemy to overcome would be death itself.

For all the contemporary criticism aimed at the Emperor Constantine, who oversaw some of the most substantive transformations in Christianity and its place in the Roman political and religious world, the fact that he also came to accept a Nicene Creed laying responsibility for the crucifixion of Jesus squarely on a Roman procurator who acted with *imperium* over Jerusalem, is something not to be lightly passed over. Augustine followed suit. Read as a massive conflict staged between two competing political theologies of which sovereignty was the most important element, it is evident that Augustine subjected to withering and excoriating critique the *iustum bellum* of Romans, precisely because he understood the extent to which the claim to have fought only just wars was at the core of Roman conceptions of civil religion and of civil society. That critique did not suggest that he had simply come up with a better theory of just and unjust wars, it quite passionately charged the Romans with having catastrophically failed to understand the one that they had. The forensic analogs to the *iustum bellum* were mostly developed in civil jurisprudence (and heavily weighed by Cicero), but the part that Augustine most cared to disrupt was the close and inseparable link that the Romans had between their just wars and the providential care of their gods (heavily weighed by Varro).

Unlike *any* contemporary advocate of just war theory, Augustine thought that Roman military defeats were proof enough that the gods were *not* with them, and that their wars

⁴³ Colossians 2:15.

were not as *iustum et pietas* as their religious conceptions and dutifully performed religious observances portrayed. One will search in vain in Augustine's excoriation of Roman just wars for a portable principle that survives the collapse of the Roman Empire as a meaningful religious and political entity. It took a considerable amount of time for later commentators to systematize a number of statements from Augustine's texts that would gradually become *loci* for the ongoing attempts to grapple with the moral and legal problem of war. The project of a later commentator like Gratian is evident in the title of his massive work: "the concord of the discord of the canons." The massive undertaking was to wrest from the appearance of chaos and discord all that had been said about a particular topic some kind of resolution that would bring them together in a kind of conceptual harmony. The difference between what Augustine wrote, and what emerged as principal *loci* in a larger architectonic of deliberation over the inheritance of Roman juridical, remains of utmost importance to how it is that Augustine has been understood.

In addition, Augustine did not permit himself to depart from what it meant to speak aptly (*dicere apte*) of the *iustum bellum*, and he responds accordingly: *Iusta autem bella ea definiri solent, quae ulciscuntur iniurias.*⁴⁴ Historians and ethicists alike have seen in that oft-quoted phrase that a just war is only determined by avenging injuries or punishing wrong-doers, a definition that can be traced to Augustine. But what should have been seen is Augustine's proper description of what the Romans had *always* meant by the *iustum bellum*. Augustine does not develop a theory of the just war in the *City of God*, nor does he elaborate principles for determining what would be or not be a possible just war. But contrary to Russell's speculations, does he rely upon Aristotle's ethics for a sense of what justice ought to look like - he never read that Aristotle, as it was not in circulation in any Latin translation, some had been preserved by Arabic commentators writing with Islamic interpretations, but a good bit of it was rediscovered in manuscript form only few hundred years later just prior to Thomas Aquinas.

Augustine quite obviously read Plato and the neo-Platonists, but his conceptualization of justice regarding just wars was not from the Greek philosophers, as he was very much aware of the particular history of the *iustum bellum* in Latin, and his engagement with that history occupies most of the *City of God*. Notwithstanding his other immensely valuable contributions, Russell leaves the modern reader with a demonstrably inadequate and even misleading concept of justice to underwrite the just war, and he ultimately fails to connect Augustine's reflections to the long discursive history of the *iustum bellum* that preceded him by nearly a millennium. Modern classicists have approached the Roman historians with considerable skepticism regarding their portrayal of persons and events, but that makes for a very poor framework for understanding what Augustine thought of them and how his excoriation of Roman moral history functioned in his own texts.

⁴⁴ Augustine. "Quaestionum in Heptateucum libri VII" *Patrologia Latina*, Edited by J. Migne 1855.

Some contemporary just war advocates, notably Elshtain, have located Augustine's "just war framework" in the nineteenth book of the *City of God*, in a passage probably more often quoted in the just war literature than any other of Augustine. But to put that book in perspective requires knowing something about the framework of Latin rhetoric and the very specific and identifiable ways that Augustine used it. Succinctly stated, that passage about the "wise man" who only wages "just wars" and laments that he has to wage them at all but for the "injustice" of others who "compel" him to do it, is hardly an Augustinian theory of the just war, it is an *encomium* - constructed on the practices of praise and blame proper to that genre - and ultimately a eulogy to the man who bequeathed the *iustum bellum* to the Latin language - Numa Pompilius, the Sabine who was appointed the second king of Rome following the death of Romulus. Latin historians and moralists from Livy to Plutarch, and Greek émigrés such as Dionysius of Halicarnassus, had long eulogized Numa as the "wise man" who "preferred peace" and who only fought "just wars" when compelled to do so by the "injustices" of others. Augustine's language had identifiable precedents, and all of those point toward Numa.

Augustine engages Numa and the tradition of the *iustum bellum* quite critically in the third book. But what Augustine develops throughout the fourth book is an argument that the one true God had been the one to give to the Romans dominion, and allowed them to extend their empire while thinking that they were waging just wars. Yet it was because God, in essence, manipulated their love for glory and honor into accomplishing quite other purposes than the Romans had in mind, and that this was in large part what the providential care of God - rather than Jupiter - looked like. God was the one who extracted good from evil, and made things work in some fashion according to his promises for redemption of all of creation - something the Romans clearly never had any plans of accomplishing themselves. Markus and others are quite correct in saying that Augustine was no Roman acolyte who praised their empire, even when he found it working rather in the interests of God rather than the *respublica populusque Romanum*. And they are correct in their skepticism about Augustine having a portable just war there ready for the taking by modern ethicists and moral theorists. But it remains that Augustine held that God had given imperium to the Romans when he willed and to the extent that he willed. He only differed from more enthusiastic supports of the Roman legacy in saying that all of that was the work of the one true God, who triumphed over Rome and her pantheon by raising the crucified Jesus from the dead.

If Augustine had a sense of what *iustum bellum* to uphold, it was that the Romans had catastrophically failed in their own, even when there were otherwise admirable things to say about them and the empire that they created. But it was nevertheless only God who could truly proclaim a just war. As the archaic Latin *ius* suggested the providential administration of Jupiter in which peace reigned and not war, Augustine held the historical mirror to the face of the empire and asked what peace they were talking about, when Numa's successors immediately returned to the old ways of war. Only God could bring peace, as only God could bring justice. In other words, extracting from Augustine a just war that is not about

God or the Christian faith is impossible, as it is also impossible to derive from the Roman *iustum bellum* a secularity that is not ultimately about the providence of the gods and the dutiful performance of religious obligation to underwrite the success of their wars. It would be difficult to imagine a modern just war theory that made those arguments, and still tried to sustain a conceptual opposition between secular and religious wars. The "wise man" of Augustine's nineteenth book was the founder of Roman religion in its most enduring and far-reaching form, and only those wars authorized by the gods were those just wars that he would fight. He called that "peace."

A substantially more plausible grammar for the just war (also consonant with Augustine's usage) would suggest that the *iustum bellum* describes what it means when "bellum" and "iustum" are simultaneously realized in action and in a state of affairs. There is nothing terribly arcane in that grammar, and it comes quite close to what O'Donovan has suggested: "to do justice in the theatre of war." To be more precise, however, it would be to *realize justice by waging war, and to realize (the meaning) of war as to realize justice.*⁴⁵ In other words, an *iustum bellum* obtains when a *iustum bellum* is fought. There are no *criteria* in Augustine or his Latin predecessors for deciding whether a war is justified; there are rather *substantial expectations* of what would be *apparent* should the war be *iustum bellum*. The absence of those expectations would obviously occasion doubt as to the status of the *iustum bellum*, but holding that there are identifiable attributes to the *iustum bellum* is a considerably different conceptual enterprise than holding criteria to determine whether a war is *iustificans bellum*. The attributes expected of the *iustum bellum* were also delineated by their own attributes, and the process continues until a substantial picture develops of what one ought to see when a genuine *iustum bellum* is realized. There is no other way out of complete grammatical and conceptual circularity. Neither is there a way out of *ius* as having something fundamental to do with the proper functioning of the cosmos under the providential care of Jupiter - the gods always matter.

Consequently, what must be drawn from the larger context of the third and fourth and nineteenth books of the *City of God* is the realization that Augustine treats Numa's *iustum bellum* analogously to the way he treats the ideology of the Roman *respublica*, as articulated by Cicero in his famous "Scipio's dream". There could be no genuine "*res*" *publica*, Augustine argued, absent the knowledge of God and his rightful rule and reign over creation - as the *res* that Roman republicanism held as common to its citizens was embodied in political and religious mores, institutions, and conceptions regarding their proper function in Roman civil and religious life. It would not be inappropriate to describe all of those things as part of the Roman social contract. Proper performance of religious duties (*pietas*) was not a private matter at all, it was essential to the virtue of the citizen. And so if

⁴⁵ *Iusticia* and *ius* are *not* grammatically interchangeable, as terms such as the *ius ad bellum* and *ius in bello* demonstrate. However there is simply no adequate way of rendering *ius* in this context, and "justice" is arguably the most appropriate in spite of its limitations.

the resurrection of Jesus and his "triumph" nullifies the Roman traditions of religious duty to the gods, a different scheme of "res" had to be put in place, as no genuine republic could be based on a lie.

If that portrayal yet bears some resemblance to Locke's social contract, and even his refusal to extend religious toleration to atheists and Catholics, there are reasons for that - as Augustine explicitly recognized, there were matters of *fides* and *bona fides* to be established before there was any sort of *res* to hold in common. In Locke's case it was a Protestant community loyal to their sovereign in conflict with a transnational religious community that owed obligations to the Papacy, and those who could not hold either aspect of that *fides* in common were not part of that commonwealth. And so the Ciceronian social contract was declared null and void by Augustine because all of those things which were part of that *fides* prior to whatever might be held in common were now destabilized by the God who demonstrated his sovereignty over Roman affairs by the resurrection of Jesus from the dead. Hence at the end of the day perhaps Augustine has but *one* just war criteria: how did those wars in which the Roman *iustum bellum* became flesh now appear when the sovereignty of the one true God was revealed - who became a human being as Jesus, and who was crucified by the Romans as in instigator of *iniuria*, and who God raised from the dead as "subjecting to ridicule" the "powers and principalities" of Roman sovereignty?

Without Augustinian just war theory of one form or another, one is left with arguments from the *ius naturale* and *ius gentium*. In other words, one is left where contemporary just war theory now finds itself: a tradition and a theory and yet not quite either one of them; in a position overwhelmingly defensive of its tradition, suspicious of other means for theorizing the moral restraint of wars, awkwardly universalistic in its claims to be the embodiment of all means of theorizing such restraint in wars, and at the same time *impotent to confront what has become the primary challenge of the contemporary era, which is the war against terror associated with forms of religion that do not play well with modernity*. As an index of the rationality, or irrationality, of current religious and political structures, Augustine is of no significant use. Contemporary theorists may not easily identify with an Augustine so conceived as among the most eloquent and defiant apologists for the sovereignty of God in the Christian tradition. But to those who claim that the modern world has dispensed with that understanding of the rule and reign of God as sovereign over creation, a response has been fomenting in the Islamic world for a long time, as it has never ceased fomenting in Christianity or various other religious traditions. Popular sovereignty may be a poor substitute for the sovereignty of God, and just war theory abandons the framework of divine sovereignty at its peril if in fact a way forward with modern wars - inextricably religious, inextricably about sovereignty - is to be ultimately found.

The Failure of the Theory of Iustum Bellum in the Context of Global Drone Warfare

Swirling in the circularity of the *iustificans bellum*, increasingly aided by developments in artificial intelligence and information technology, whoever is curious as to what just war theory is all about looks in vain for what *ius* is meant to do when it qualifies war in the first place, or for how it functions in the grammar of the *ius ad bellum* and *ius in bello* at all. Just war proponents have held positions in every major military academy, dominated think tanks and policy circles, and written as pundits on whether this or that war has met the appropriate criteria upheld by the tradition for more than a couple of decades. As a result, the moral framework has yielded unanticipated success in the public sphere. Yet it is one thing to weigh the causes and means for waging wars in the framework of just war theory, and another to be in the business of justifying wars, strategies, tactics, and new technologies. One may entertain informed suspicions, but evaluation of the huge outpouring of just war argumentation appearing in the last three or four decades might help decide the question of whether the enterprise has been fundamentally about the justification of wars, or about whatever it means to constrain violence by subjection of such things to moral scrutiny - ironically, a task for which data mining technologies might prove immensely helpful.

Something is amiss when a moral tradition that understands itself to have been formed by an appeal to moral restraint in the declaring and waging of wars now finds itself in becoming an ethics panel writ large for politicians, policy makers, military strategists, and makers of military hardware. In reality, it seems to be about experts advancing a strategic objective as far as is possible before the just warriors intervene and stop them just short of crossing the line dividing morally permissible from morally culpable action. The boundary is sufficiently flexible to permit the ethics panelists to empower the soldier to approach that line more closely than might have otherwise been the case. Consequently, the circle of legitimate means for fighting a war just got enlarged, and the fighting of it just got escalated. The argument for restraint only works when a proposed very real, concrete action is contrasted with an imagined outcome weighed out as an inevitability.

The upshot is that just warriors now find themselves more than ever in the business of establishing the outer moral limit of wars and means for waging them by imagining the boundaries for an imaginary war. Conceptual claims about what technology can and cannot do have not only been shallow and ill-conceived, they enable the next round of technology to scale up the range of possibilities for fighting wars dangerously close to crossing the moral border markers. Smart bombs are no more an innovation fostering moral discrimination any more than rifled barrels for firearms did in the century before the last. The question hardly needs to be raised whether more people have died from rifles and modern propellants than black powder muskets.

The concentration of lethal power, along with new and transformative technologies for wielding it, in the hands of an intelligence-based regime appears to be not simply the brute necessity of waging a war on terror at the behest of humanitarian intervention, nor simply the extension of the analogy of self-defense to preposterous lengths. It is the formation of a

new approach to foreign policy underwritten by a new way of fighting a potentially perpetual war against threats to the interests of the United States in which the use of covert and secretive lethal force is the new preferred means for sustaining it. Ironically, if just war theory has always been a theory of sovereignty, and its immediate history has been underwritten by notions of the sovereign nation-state, then it also becomes apparent that the new case for *perpetual war for the sake of perpetual peace* is much closer than realized to a frankly postmodern project predicated on the collapse of sovereignty invested in the modern nation state. Clandestine drone wars wreak havoc upon the legacy of Westphalia. They have ceased to be remotely related to Kant's prescriptions for perpetual peace upon which just warriors have relied for over two centuries.

A war without borders against persons with no national identity is not a modern war. It is a consequence of the failure of modern wars to deal with the problems that have haunted the modern project, and those are about religion more than national or ethnic identities. The drone program, according to Obama and his subordinates, is here to stay, and the technologies that have enabled it are likewise set to transform the American way of war into something that war has never before been. The reach of technologically enabled covert operations is now theoretically infinite when abstracted from the constraints of having intelligence or special operations forces on the ground. The range of targets is theoretically endless and how they are singled out and on what basis they are targeted will only a select few be privy to. New data and computational capacities may mean that no one really knows those bases at all. Hence the response to the perceived infinity of evil presenting as terrorism is the infinite reach of lethal force, and an infinite war posture to sustain it.

The dilemma associated with contemporary wars, which frame religion in the modern world as collared and leashed by the demands of secularity and modernity, is that for a good many people of faith *the notion of God's sovereignty ultimately implies that only God is worth killing for*. It is not evident that such a view furthers violence more than whatever is enabled by the natural right to self-defense and its legal analogs - especially in a time of war. At the very least it would prohibit the now accepted and legally justified practice of killing over theft or threats to private property, and it might make exclusive national control over global resources untenable. It may be that in wars in defense of national interests everything that has drawn geographical borders around the concept of sovereignty have proven to be the *impultrix violentia* of contemporary warfare in ways that belie the modern presumption to have solved endemic religious violence through politics. There is good historical evidence for the suspicion that religions may be better prepared to form wise men who love peace than the modern state.

The suspicion itself cannot be contained in a context presumed to have been secularized long ago. It instead indicates that religion in the modern globalized world will find means of negotiation with the demands of all kinds of societies in all kinds of places other than those that enforce privatization of religious sensibilities and commitments, which is

precisely the modern project. To the extent just war theory cannot freely concede that “religious extremism” - the conflict between global and globalizing religions and the shape of the nation-state - is in essence the primary moral and political problem it addresses, it betrays its own profound existential crisis, and ceases to become relevant any longer in today's world. *That world is now shaped by perpetual wars against infinite targets in infinite places with the hubris of infinite power relentlessly driven by the technological imagination.* It is no longer difficult to imagine a future in which critics of a previous generation's investment in the “archaic” theory of just and unjust wars are merely proclaiming the obvious.

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