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WAR AND THE DOUBTFUL SOLDIER

MICHAEL J. DAVIDSON*

INTRODUCTION

When one speaks about the morality or immorality of a military campaign, almost inevitably in the same breath the legality of that action is addressed. Opponents of military action frequently charge that the use of American forces would be immoral because it is illegal. Further, the test by which modern religious figures and ethicists measure the morality of military action—the just war theory—looks at the legal authority for waging the war,1 and parallels international legal restrictions on the proper conduct of armed warfare.2 To a large extent, the morality and legality of military conflict are two intertwined concepts. As Catholic Priest, Navy Chaplain, and later Cardinal, John J. O’Connor once posited: “[I]n our American tradition the just war (that is, the morally ‘right’ war) is the lawful war; the lawful war is the just war.”3

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1. RICHARD J. REGAN, JUST WAR PRINCIPLES AND CASES 84 (1996) (“Just war theory requires that those who make decisions to wage war should be constitutionally and legally authorized to do so . . . .”).

2. See OFFICE OF THE GENERAL ASSEMBLY AND PRESBYTERIAN PEACE MAKING PROGRAM PRESBYTERIAN CHURCH (U.S.A.), PRESBYTERIANS AND MILITARY SERVICE: QUESTIONS AND ANSWERS 7 (2002), http://www.pcusa.org/oga/publications/military-service.pdf (outlining that “[t]he traditional teaching of the church, which has been adopted by and incorporated in international law, includes criteria for deciding to go to war and rules for limiting the conduct of the war”) (on file with the Notre Dame Journal of Law, Ethics & Public Policy) [hereinafter PRESBYTERIANS AND MILITARY SERVICE]. The international law of armed conflict traces its roots, in part, to the just war doctrine. See YORUM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 61 (3d ed. 2001) (During the sixteenth and seventeenth centuries "the fathers of international law . . . imported into the new international legal system the well-established religious (Catholic) doctrine that only a just war is permissible.").

3. JOHN J. O’CONNOR, A CHAPLAIN LOOKS AT VIETNAM 11 (1968)
For those members of the American military tasked to fight it, the war’s characterization as just or unjust is particularly significant. America’s military is largely a religious one. Service members go into battle carrying holy books and religious symbols of their faith, and one of the few critical items of information listed on identification (dog) tags is the service member’s religion. The armed forces have their own Chaplain’s Corps, composed of representatives of numerous religions. Held in high esteem within the military, chaplains share many of the hardships associated with military life and accompany military units on deployments and into combat zones. Indeed, many chaplains have made the ultimate sacrifice while serving in the military; and chaplains have been the recipient of our nation’s highest award for valor, the Congressional Medal of Honor.

4. See Bill Broadway, Troops Find Faith in Things They Carry, WASH. POST, Mar. 29, 2003, at B1 ("Thousands of the U.S. soldiers in Iraq are carrying concrete symbols of their faith . . . ."); see also Nick Adde, There Are No Atheists in Foxholes, ARMY TIMES, Jan. 28, 1991, at 37, 38 (noting that Chaplains were purchasing camouflage Bibles for soldiers and Marines deployed to the Persian Gulf as part of Operation Desert Shield).

5. See Stephan Manning, Chaplains Help U.S. Military Accommodate Muslim Recruits, WASH. TIMES, Oct. 29, 2001, at B1 (pointing out that “more than 250 religious denominations are represented in the U.S. military”).


7. See Adde, supra note 4, at 37 (Navy Chaplain Williams Thomas Cummings, a Catholic priest, "was killed Dec. 15, 1944, when a torpedo from an American submarine sank the unmarked Japanese transport ship that carried him and other American prisoners of war."); see also Catholic Chaplains Killed in Wartime to Be Honored, DALLAS MORNING NEWS, May 20, 1989, at 41A ("Seventy priests were killed in World War II, six in Korea, and seven in Vietnam."); ROBERT L. GUSHWA, THE BEST AND THE WORST OF TIMES: THE UNITED STATES ARMY CHAPLAINCY 1920-1945, at 41, 141 (The U.S. Army Chaplaincy, vol. 4, 1977) (noting that twenty-three chaplains were killed in World War I while sixty-three were killed in action in World War II and an additional 273 wounded in action). During World War II, "[t]he Chaplain branch was third in combat deaths on a percentage basis, behind the Air Forces and the Infantry." See id. at 141.

8. Father Angelo Liteky earned the Medal of Honor during his first tour of duty in Vietnam. The chaplain was "credited with saving the lives of twenty wounded men at the repeated risk of his own, pulling them practically out of the teeth of an enemy machinegun nest." See LEWIS SORLEY, THUNDERBOLT: GENERAL CREIGHTON ABRAMS AND THE ARMY OF HIS TIMES 293 (1992). Liteky was wounded during his second tour in Vietnam and eventually left both the
The vast majority of service members describe themselves as practicing members of a religion, with over three-fourths of the armed forces declaring themselves to be Christians. When faced with the prospect of being sent in harm's way, those service members who practice a faith anchor to it and many who had not previously joined an organized religion do so, seeking the spiritual comfort that religious faith provides. The religious proclivity within the armed forces exists not only in the ranks, but also extends throughout the highest levels of the military. As an illustration, General Creighton Abrams, who eventually commanded the American effort in Vietnam and rose to become the Army's Chief of Staff, converted to Catholicism while assigned to Vietnam. Further, General George S. Patton, Jr., the profane and pugnacious World War II commander, was devoutly religious and reportedly read the Bible daily.

Beyond purely religious considerations, America's warriors want, and perhaps even need, to believe in the justness of their cause. Military commanders must bear the heavy burden of

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9. Most in Armed Forces Are Religious, WASH. POST, Apr. 6, 2003, at C11 ("Nearly half of Americans serving in the armed forces identify themselves as Protestant, and one-fourth as Roman Catholic . . . "). Of the approximately eighty percent of the armed forces who identified themselves with a particular religion, the Defense Department figures were as follows: "Protestant, 573,262; Catholic, 313,628; Muslim, 4,158; Jewish, 3,988; Buddhist, 2,519; Orthodox, 1,490; and Hindu, 437." Id. at 218-19 (noting how Army chaplain Charles Watters carried several wounded soldiers to safety, assisted the wounded, and administered last rites until killed in action).

10. See Andrew Cawthorne, Battlefield Baptism, WASH. TIMES, Aug. 25, 2003, at A1, A12 ("For many of the 132,000 American soldiers occupying Iraq, religion is an important solace as they face loneliness, hardship and the possibility of losing their lives."); see also Jay Lindsay, Army Chaplains' Pack Provides First-Aid Kit for Soldiers' Souls, WASH. POST, Dec. 29, 2001, at B8 ("When you're fearing your mortality and bullets are flying, people get real religious," said a Protestant chaplain.); Adde, supra note 4, at 38 ("The bottom line is soldiers know they may die. They want to prepare for eternity, and chaplains can help . . . ."); GUSHWA, supra note 7, at 178 (World War II chaplains reported that "religious teachings that men already had embraced was a source of strength, and the time of peril made more dramatic their calling upon them."); Keeping The Faith, WASH. TIMES, Mar. 17, 2003, at A1 (Photo Insert) ("U.S. Marines of the First Marine Expeditionary Force attended Sunday church services yesterday at Camp Iwo Jima in Kuwait as war looms over the Persian Gulf region.").

11. SORLEY, supra note 8, at 298 (In 1970, Abrams left Vietnam to join his family in Thailand for the baptism.).

12. HARRY H. SEMMES, PORTRAIT OF PATTON 6-7 (1955).
sending their subordinates into hostile situations knowing that death, maiming, or other serious injury may result. Individual combatants, who struggle with and must overcome their natural moral aversion to killing another human being, seek justification for their actions.  

A belief in the justness of the military campaign sustains the soldiers' willingness to bear the heavy burdens and sacrifices associated with combat.

Further, as Vietnam so clearly illustrated, in a democratic society the national leadership must obtain and maintain public support for military actions, particularly prolonged ones, or risk eventual military defeat regardless of its achievements on the battlefield. As the former Army Chief of Staff, General Fred C. Weyand, posited: "[W]hen the American people lose their commitment it is futile to try to keep the Army committed. In the final analysis, the American Army is not so much an arm of the Executive Branch as it is an arm of the American people." Accordingly, for the American military, a belief in the justness of military action is critical.

Not surprisingly, large-scale domestic anti-war protests can undermine public support for a military campaign and concomitantly adversely affect the morale of America's fighting forces by causing soldiers to question the legitimacy of their participation or by interfering with their social support network at

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13. See Major Peter Kilner, Military Leader's Obligation to Justify Killing in War, MIL. REV., Mar.-Apr. 2002, at 24. Major Kilner posits that, in order to help soldiers deal with the moral repercussions of killing, military leaders have an obligation to morally justify such killings to their subordinates. Id.

14. See LTC (RET.) LAWRENCE P. CROCKER, ARMY OFFICER'S GUIDE 23 (46th ed. 1993) ("[E]xperienced military leaders know that officers and soldiers fight more courageously and sacrifice more willingly when they hold a deep conviction as to the worthwhileness and the justice of the cause for which they fight."); see also GEN. S.L.A. MARSHALL, MEN AGAINST FIRE 162 (1947) ("Those who respect history will deem it beyond argument that belief in a cause is the foundation of the aggressive will in battle.").


16. Id. at 11; see also MARSHALL, supra note 14, at 28 ("[A]ll military power is dependent on the civil will. It is the nation and not its army which makes war.").

17. See M.E. Sprengelmeyer, Protests Disturb Soldiers at Front, WASH. TIMES, Feb. 19, 2003, at A17 ("[S]ome say they take the anti-war protests personally, questioning the jobs they do and their boss, President Bush."); see also GUENTER LEWY, AMERICA IN VIETNAM 159 (1978) ("Disenchantment with the Vietnam war on the part of the media, 'peace' demonstrations and antiwar statements on the part of prominent public officials could not but create a climate of doubt and lack of sense of purpose which posed a severe challenge to dedication and discipline.").
Similarly, pronouncements by religious leaders challenging the justness of the cause may also have an adverse impact on those going into harm's way, both directly and indirectly. At no time in our history was the power of protest felt more acutely by the military than during the Vietnam War.

The controversy surrounding the invasion of Iraq by the United States and its allies generated debates about whether the invasion constituted a "just war." Major religious figures played a prominent, and very public, role in that debate. Religious opponents of the pending invasion, and subsequent military operations, appeared in television advertisements, participated in peace marches, passed resolutions, held public prayer vigils, and the like. Further, inadequate social support systems can lead to long-term psychological injuries in combat veterans. Id. at 277 ("Numerous psychological studies have found that the social support system—or lack thereof—upon returning from combat is a critical factor in the veteran's psychological health."); id. at 278 ("[A]n argument can be made that psychological casualties can be impacted by public disapproval.").

18. See Lt. Col. David Grossman, On Killing: The Psychological Cost of Learning to Kill in War and Society 277 (1996) (During Vietnam, antiwar sentiment contributed to soldiers' "psychological and social isolation from home and society . . . ."). Further, inadequate social support systems can lead to long-term psychological injuries in combat veterans. Id. at 277 ("Numerous psychological studies have found that the social support system—or lack thereof—upon returning from combat is a critical factor in the veteran's psychological health."); id. at 278 ("[A]n argument can be made that psychological casualties can be impacted by public disapproval.").

19. Frank Schaeffer, Stripped of Spiritual Comfort, WASH. POST, Apr. 6, 2003, at B7 (arguing that anti-war declarations by religious leaders deprive the parents of service members of "spiritual comfort").

20. To the extent there may be limits on appropriate protests in a democratic society, some critics charge—rightfully so—that the boundaries of appropriate discourse were exceeded by various members of antiwar protest community. See Summers, supra note 15, at 26 (Anti-war protestors "too often raised [their voices] in support of our enemies," encouraged soldiers to disobey orders, and focused their "anti-war sentiment" on the Army itself; ") by attacking the executors of U.S. Vietnam policy rather than the makers of that policy, the protestors were striking at the very heart of our democratic system—the civilian control of the military.") (emphasis in original); see also Grossman, supra note 18, at 278 ("Often [emotionally vulnerable Vietnam] veterans were verbally abused and physically attacked or even spit upon.").

21. Alan Cooperman, Church Leaders Propose Anti War Plan, WASH. POST, Mar. 8, 2003, at A15 (The "ecumenical officer of the United Methodist Counsel of Bishops . . . previously appeared in television ads criticizing the administration's march toward war.").


23. Henry G. Brinton, Can Christians Back This War?, WASH. POST, Sept. 29, 2002, at B4 (The National Capital Presbytery, a regional body of the Presbyterian Church, "passed a resolution opposing military action against Iraq at this time. At a recent World Council of Churches central committee meeting, thirty-seven church leaders signed a statement urging restraint.").

and met with or sent messages to American and allied leaders.\textsuperscript{25} The Bush administration viewed the Vatican's skepticism seriously enough to send envoys to meet with Catholic officials, both before and after the invasion, to convince them that the war was just.\textsuperscript{26}

Interestingly, while a large number of religious leaders challenged the justness of the war, in contrast the majority of their congregations initially supported it.\textsuperscript{27} The most pronounced disagreements between the clergy and their congregations occurred "among Catholics and many 'mainline' Protestants . . ."\textsuperscript{28} In comparison, the smallest chasm between clergy and laity existed within the Southern Baptist Convention.\textsuperscript{29} Generally, both the leadership and laity of conservative evangelical and Pentecostal churches supported military action against Iraq.\textsuperscript{30} Further, even

\begin{footnotesize}
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\item \textsuperscript{25} Bill Sammon, \textit{Bush Discounts Pope's Anti-war Plea}, WASH. TIMES, Mar. 6, 2003, at A4 (reporting that President Bush met with the papal envoy, who presented the President with a letter from the Pope expressing moral concerns about attacking Iraq); Bill Broadway, \textit{Religious Leaders' Voices Rise on Iraq}, WASH. POST, Sept. 28, 2002, at B11 (noting that "[s]everal major U.S. religious organizations have written letters to the White House opposing the president's call for a preemptive strike against Iraq . . . [and that forty-nine] Catholic, Protestant and Orthodox Christian leaders" sent a letter to the President and members of his administration discouraging an attack on Iraq); \textit{see also} Caryle Murphy, \textit{Church Leaders to Voice War Opposition to Blair}, WASH. POST, Feb. 15, 2003, at B8 (reporting that a delegation of United States church leaders was to meet with the British Prime Minister to oppose the invasion of Iraq).
\item \textsuperscript{27} Robert S. McCain, \textit{Clerics, Laity Disagree}, WASH. TIMES, Apr. 1, 2003, at A2 ("Antivar rhetoric rings from many U.S. pulpits, but the people in the pews support President Bush's policy in Iraq."). Further, polls indicated that those Americans who regularly attended church were more likely to support military operations against Iraq than those Americans who did not attend religious services. Mark Tooley, \textit{Faith in Bush}, WASH. TIMES, Mar. 21, 2003, at A23.
\item \textsuperscript{28} McCain, \textit{supra} note 27, at A2 (The mainline Protestant denominations included Methodists, Episcopalians, and Lutherans.).
\item \textsuperscript{29} \textit{Id.}; \textit{see also} Rev. Glenn Moorman, \textit{Scripture Justifies 'A Season' for Both Just War and Peace}, WASH. TIMES, Mar. 31, 2003 (supporting the President).
\item \textsuperscript{30} \textit{See} Laurie Goodstein, \textit{Diverse Denominations Oppose the Call to Arms}, N.Y. TIMES, Mar. 6, 2003, at A12 ("There is support for a war among some leaders of large ministries, and of conservative evangelical and Pentecostal churches but little that is organized."); McCain, \textit{supra} note 27, at A2 (noting that seventy-seven percent of white evangelicals favored taking military action against Iraq); Broadway, \textit{supra} note 25, at B11 ("[T]he president also has received support from leaders of the fastest-growing segment of religion in the United States—evangelical Christianity.").
\end{enumerate}
\end{footnotesize}
some who questioned the justness of the initial invasion, nevertheless conceded that it was fought justly.\textsuperscript{31}

Two particularly unsettling events occurred during the latest Gulf War. First, the Bishop of the Roman Byzantine Catholic Church, reportedly issued a letter positing: "Any participation in and support of this war against the people of Iraq is objectively grave evil, a matter of mortal sin . . . ."\textsuperscript{32} Further, the letter declared that the military campaign did not meet the standards of a just war, that "any killing associated with it is unjustified and, in consequence, unequivocally murder," and concluded by forbidding direct participation in the war.\textsuperscript{33}

Second, in response, the Archbishop of the Archdiocese for the Military Services issued a letter to military Catholics assuring them that they could participate in the war.\textsuperscript{34} However, in a subsequent statement the Archdiocese posited that "the Magisterium (teaching authority) of the Church has the right and even duty in cases in which an unjust war is proposed or entered into to speak on the matter and if necessary, to obligate Catholics in conscience to object and refuse to participate."\textsuperscript{35} Notwithstanding the criticism of the war by several Catholic leaders, the Church had "stopped short of insisting upon a course of action for Catholics in the military."\textsuperscript{36} Such public pronouncements by religious leaders against the war, particularly those forbidding participation, raise the issue as to the proper role of religious

\textsuperscript{31}See Cheryl K. Chumley, War Seen As in Line with Christian View, Wash. Times, Apr. 15, 2003, at A13 ("Opponents of the military campaign, such as Rep. Jesse L. Jackson [junior] . . . said the administration's concerns for the lives of innocent Iraqis is a sign that the war has developed in line with Christian views of just engagement."); see also Tom Carter, Report Decries Use of Cluster Bombs, Wash. Times, Dec. 12, 2003, at A17 ("The Human Rights Watch report . . . does credit the U.S. military with extensive efforts to prevent civilian casualties.").

\textsuperscript{32}See Alan Cooperman, Prelate Reassures Catholic Soldiers, Wash. Post, Apr. 2, 2003, at A28. The Roman Byzantine Church consists of approximately 5,000 members and is part of the Roman Catholic Church, but follows various rites of the Eastern Orthodox Church. \textit{Id.}

\textsuperscript{33}\textit{Id.}

\textsuperscript{34}\textit{Id.} ("The archbishop responsible for Roman Catholics in the U.S. military has assured them that they can serve 'in good conscience' despite opposition to the war in Iraq from Pope John Paul II, his cardinals and many U.S. bishops.")


\textsuperscript{36}\textit{Id.}
leaders vis-à-vis their followers in the debate of a war’s justness and an individual’s ability to participate in it.

This Article will examine the considerations of the morally responsible professional soldier, Marine, sailor, and Coastguardsmen (generically referred to as “soldiers”) when called upon to participate in a military campaign. Because both the law and religion play a prominent role in this mental calculus, the Article will address both the legal and religiously-inspired moral constraints imposed on such a soldier when he or she either elects to fight, or refuses to fight, in a controversial military campaign. Finally, although the recent invasion of Iraq will be discussed because of the various issues it raises, this Article will not render any definitive judgments on the justness or legality of recent military operations in Iraq, but will merely use that campaign as one of many historical events to highlight certain points and issues.

I. ACCOMMODATING THE NEED TO FIGHT: THE DEVELOPMENT OF JUST WAR DOCTRINE

A. Historical Development

Early Christians were largely pacifists who did not participate in war.37 Indeed, there are few references to Christian soldiers during the first three centuries of the Church’s existence. The lack of references to Christian soldiers no doubt can be attributed in large part to the influence of Jesus’ message of nonviolence. However, many Christians also avoided military service because of various pagan rites common to the Roman Army.38 Further, during most of the Church’s early years the average Christian was not confronted with the thorny issue of serving

37. ALBERT C. WINN, AIN’T GONNA STUDY WAR NO MORE: BIBLICAL AMBIGUITY AND THE ABOLITION OF WAR 193 (1993) (“The church of the first three centuries . . . was a peaceful, nonviolent church, whose members by and large did not engage in warfare.”); see also TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 59 (1971) (“But in the Gospels there is much emphasis on nonresistance and forgiveness of enemies, and during the first three centuries after Christ there grew up among His followers a strong school of religious pacifism.”).

38. REGAN, supra note 1, at 5 n.2 (“The pagan rites associated with Roman military service were an additional and perhaps decisive reason why early Christians shunned such service.”); see also DARRELL COLE, WHEN GOD SAYS WAR IS RIGHT: THE CHRISTIAN’S PERSPECTIVE ON WHEN AND HOW TO FIGHT 8 (2002) (“These early believers were not, for the most part, opponents of warfare and military service per se, instead, they objected to military service mainly because of the role of pagan religious practices in the military.”).
both the State and God because the Roman Empire generally did not call upon Christians to fight in its wars.\textsuperscript{39}

Sometime after the mid-second century, some references to Christians serving in the army may be found, but they were the exception rather than the rule; and Christian leaders and writers of the time generally disapproved of military service.\textsuperscript{40} Christian writers objected to the taking of life in wartime and to the military requirement of performing various acts of idolatry.\textsuperscript{41} Some writers went so far as to completely condemn all military service, but the Church never adopted such a draconian position.\textsuperscript{42}

Although early Christians rarely served in the Roman armed forces, nothing in the New Testament indicates a condemnation of military service.\textsuperscript{43} In \textit{Luke}, Jesus speaks highly of a Roman Centurion's faith, telling "the crowd that followed him ... 'I tell you, not even in Israel have I found such faith.'"\textsuperscript{44} Peter converted Cornelius, "a Centurion of the Italian cohort," the first

\textsuperscript{39} See \textit{Winn}, \textit{supra} note 37, at 151 (Rome "did not draft Christians to fight in its wars."); see also \textit{Cole, supra} note 38, at 8 ("Roman authorities did not wish Christians in their ranks . . . ."); \textit{Arnold Toynbee, An Historian's Approach to Religion} 96 (1956) ("In practice, however, this potential occasion for conflict between the Roman Empire and the Christian Church caused little trouble, because in practice the post-Augustan Roman Army . . . was a professional force recruited by voluntary enlistment . . . .").

\textsuperscript{40} See, \textit{e.g.}, \textit{Winn, supra} note 37, at 194 ("Beginning around 178–180 there are allusions to Christians in the army . . . . Christian writers of this period were unanimous in condemning Christian participation in warfare."); \textit{Regan, supra} note 1, at 5 ("Fragmentary literary evidence from the second and third centuries of the Christian era indicates that Church leaders either disapproved or looked down on Christian's serving in the imperial Roman army . . . ."); \textit{Roland H. Bainton, 1 Christendom: A Short History of Christianity and Its Impact on Western Civilization} 60 (1966) ("The taking of life in war was unanimously condemned by all Christian writers of the period prior to Constantine, as far as such works are extant."); \textit{id.} at 61 ("[S]ome Christians did serve in the army, regardless of the injunctions of Church leaders. Yet . . . . Christian abstention from military service was . . . . notorious.").

\textsuperscript{41} See \textit{Bainton, supra} note 40, at 60 ("The taking of life in war was unanimously condemned by all Christian writers of the period prior to Constantine . . . ."); see also \textit{Taylor, supra} note 37, at 59 (noting that a strong sense of pacifism coupled with an abhorrence to acts of idolatry caused Church leaders to condemn military service).

\textsuperscript{42} \textit{K. Honselmann, Pacifism, in 10 New Catholic Encyclopedia} 855 (1967) ("[O]nly Tertullian . . . and Lactantius . . . condemned military service outright. None of the accepted Fathers of the Church ever adopted this extreme position.").

\textsuperscript{43} \textit{Elizabeth Anscombe, War and Murder, in War, Morality and the Military Profession} 293 (Malham M. Wakin ed., 1979) ("[T]here is no suggestion in the New Testament that soldiering was regarded as incompatible with Christianity.").

\textsuperscript{44} \textit{Luke} 7:9.
Gentile to be converted. When soldiers sought guidance from John the Baptist, he merely replied: "Do not extort money from anyone by threats or false accusations, and be satisfied with your wages." Further, Paul accepted protection from the military on several occasions. Significantly, in none of these encounters with the Roman military were the soldiers criticized for serving, required to leave the Army, or told that their military service was incompatible with Christianity.

The first major turning point in the Christian Church's attitude toward military service is generally attributed to Emperor Constantine's Edict of Milan in 313 A.D., after which military service for Christians became both acceptable and more commonplace. Reportedly, in 312 A.D., as he was attempting to consolidate his empire, Constantine had a vision of a cross appearing above him bearing "the inscription 'By this sign, conquer.'" Constantine converted to Christianity, his armies

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46. Luke 3:14. Augustine opined that John responded in this manner because he knew that the soldiers' "actions in battle were not murderous, but authorized by law, and that the soldiers did not thus avenge themselves, but defend the public safety." St. Augustine, Contra Faustum, XXII, in The Political Writings of St. Augustine 164 (Henry Paolucci ed., 1962). However, in the King James version of the Bible, John also admonished the soldiers to "[d]o violence to no man." Luke 3:14 (King James). Other versions of the Bible do not contain this admonition. See, e.g., Luke 3:14 (New Revised Standard Version); Luke 3:14 (The New American Bible).
47. See Winn, supra note 37, at 152 ("He accepted military protection when the Jerusalem mob was trying to kill him ([Acts] 21:30-32), when the dissension in the Sanhedrin became violent (23:10), and when a band of sworn assassins planned to ambush him (23:12-35).")
48. See John J. Davis, Evangelical Ethics: Issues Facing the Church Today 236-37 (1985); see also Honselmann, supra note 42, at 855 ("Nor, to judge from [Jesus'] warm commendation of the faith of the centurion (Lk 3:14), did He regard the military profession as an impediment to discipleship."); id. ("So too St. Peter preached peace (1 Pt 3:8-11), but he baptized the centurion Cornelius without apparently requiring him to seek another profession ([Acts] 10:47."); Winn, supra note 37, at 152 ("Apparently no question was ever raised regarding a possible conflict between [Cornelius'] daily occupation and his profession as a Christian."); accord, St. Augustine, supra note 46, at 164-65.
49. Dennis Byler, Making Way & Making Peace, Why Some Christians Fight and Some Don't 9 (1989) (After Constantine's edict in 313 A.D., the church's "stance began to change" and "Christians began to serve actively in the military in obedience to the State."); Regan, supra note 1, at 5 ("The attitude of Christians seems to have changed with the Edict of Milan (313 A.D.) and the conversion of Constantine, and the practice of pacifism by Christians to have waned."); see also Winn, supra note 37, at 194 ("Constantine placed the cross on army standards and many Christians flocked into the army.").
50. Byler, supra note 49, at 18-19; Bainton, supra note 40, at 92.
fought under that standard and he attributed his military victory, in large part, to divine assistance from the Christian God.\textsuperscript{51}

However, Emperor Constantine’s motivations have been the subject of dispute and his attitude toward Christianity may have been motivated as much by political expediency as by religious piety. Certainly, Constantine viewed Christianity as a mechanism for unifying his empire.\textsuperscript{52} Although Christians made up only ten percent of the Roman Empire, the Church was considered to be one of the strongest organizations within the Empire, with churches in every province.\textsuperscript{53}

Skeptical commentators note that Constantine “continued to function as head of the Roman pagan religion.”\textsuperscript{54} Even after Constantine’s conversion to Christianity, paganism remained a powerful force and was the religion of choice for most of the Empire.\textsuperscript{55} As a prudent ruler, Constantine “had to maintain a studied ambiguity in religious policy . . . .”\textsuperscript{56} Further, skeptics point out that Constantine elected not to be baptized until 337 when he was near death; however, because baptism was viewed as washing away all sins, it was considered prudent during those times to wait until the death bed for baptism to take full advantage of the spiritual cleansing.\textsuperscript{57}

Regardless of Constantine’s true motivation, he did convert to Christianity, renounced any claim to being a deity, and publicly proclaimed himself a follower of the Christian faith.\textsuperscript{58} More importantly, he became a powerful patron for the Church. Consequently, the Christian Church’s stature rose within the Empire and legislation was enacted giving the Church previously unknown privileges and protections.\textsuperscript{59}

\textsuperscript{51} WINN, supra note 37, at 194; BAINTON, supra note 40, at 91–92.

\textsuperscript{52} WINN, supra note 37, at 194 (“Once in power he chose Christianity as the religion that would unify his empire . . . .”); BYLER, supra note 49, at 19 (“He needed a centralized religion to help unify the state, and thought Christianity would serve this purpose.”); BAINTON, supra note 40, at 94 (“Constantine certainly hoped that the Church would prove to be a politically integrating force.”).


\textsuperscript{54} BYLER, supra note 49, at 19.

\textsuperscript{55} BAINTON, supra note 40, at 94; DUDLEY, supra note 53, at 215.

\textsuperscript{56} DUDLEY, supra note 53, at 215; see also TOYNBEE, supra note 39, at 249 (noting that Constantine had adopted a “prudent policy of toleration for all faiths”).

\textsuperscript{57} BAINTON, supra note 40, at 93.

\textsuperscript{58} \textit{ld.} at 93–94.

\textsuperscript{59} \textit{ld.; see also} WINN, supra note 37, at 194 (noting the new status “showered favors on the church”).
For the Church, with these new privileges came certain responsibilities to the State, including the inescapable involvement in decisions involving the application of military force. Christians were no longer social outcasts in a pagan society, but were now recognized members of a Christian empire. Indeed, by 380 A.D., Christianity became the Empire’s official religion. Christians soon held positions of power and authority in Roman government, and the Church became fully integrated into the Empire’s social and economic hierarchy.

However, beginning approximately 350 A.D., the Roman Empire began its final descent until the glory that was Rome was no more. In 367, Roman forces in Britain suffered defeat at the hands of a combined Irish, Pict, and Saxon assault; the Goths mauled a Roman army in 375; Vandals, Alans, and Suebi breached the Empire’s Rhine defenses in 406; and Rome itself was overrun by the Goths in 410. After the death of the Emperor Theodosius in 395, the Empire was divided between his two ineffectual sons into a western and eastern empire.

The collapsing Roman Empire served as the backdrop to the second major turning point for the Church’s attitude toward military service—Augustine’s just war theory. Born in 354 A.D. in what is now Algeria and appointed Bishop of Hippo in 395, Augustine began to write his seminal work, *City of God*, only three years after the Goth sack of Rome. Augustine was a realist who recognized that man was imperfect and that war and violence were societal norms, not exceptions to the norm. Peace on earth was a vanishing dream: “Swords never had been beaten into plowshares and never would.” Augustine believed that Christians should fight to defend the Empire now that it was a Chris-

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61. Id. at 40 (“The majority of senior people in power were soon at least nominal Christians . . . . Bishops everywhere became figures of importance in society.”).


63. See Dudley, supra note 53, at 206 (“From 350 onward the last phases of dissolution in the Western Empire set in with the renewal of large-scale barbarian attacks.”).

64. Id. at 206–19.

65. Id. at 219. From the death of Theodosius “until 476 the story in the West is one of utter feebleness and incessant crises . . . .” Id. at 206.

66. Id. at 236–37. Augustine’s *City of God* is believed to have “been prompted by the sack of Rome . . . .” Hastings, supra note 60, at 56.

67. Roland H. Bainton, *Christian Attitudes Toward War & Peace* 91 (1960) (“With the passing of the home of Christian perfection was coupled the vanishing of the dream of peace on earth.”).
tian one, and he also sought to address those pagan critics who charged that Christianity had undermined the martial spirit of the Roman Empire.

Further, as bishop, Augustine had his own barbarian problems to contend with. With Hippo threatened by invasion, the local Christian military commander, Boniface, decided to leave the military and become a monk. In order to convince Boniface to remain under arms and command the city’s defense, Augustine needed to formulate a reasoned argument permitting Christians to kill during wartime. This reasoned argument formed the basis of the modern-day just-war doctrine.

Augustine believed that the “real evils in war are love of violence, revengeful cruelty, fierce and implacable enmity, wild resistance, and the lust of power, and such like . . . .” Christians could undertake wars in response to these evils, and had a duty to come to the aid of others, although Augustine believed that the law of love limited Christians from killing others when acting purely in self-defense. However, Christian warriors had to be ordered to take up arms by a lawful authority and must pursue the war with the intent of restoring peace. Further, Christian

68. Winn, supra note 37, at 194.
69. Davis, supra note 48, at 234; see also St. Augustine, supra note 46, at xvii–xviii.
70. Byler, supra note 49, at 22–23; see also Bainton, supra note 40, at 128 (“When Boniface, the Roman general in Africa . . . wanted to become a monk, Augustine exclaimed, ‘For God’s sake not now! With the Vandals on the point of crossing the Straits of Gibraltar, the general must fight.’”). In 430, after being defeated by the Vandals, Boniface retreated to Hippo where he commanded the besieged city for fourteen months—during which Augustine died—until he was again defeated in battle. Leaving Hippo to the Vandals, Boniface departed for Italy. St. Augustine, supra note 46, at 276 n.1.
71. Byler, supra note 49, at 23.
72. St. Augustine, supra note 46, at 164; see Cole, supra note 38, at 23 (“[F]or [Augustine] the wrongness of war lay in the moral evil of disordered desire and twisted inward dispositions.”)
73. St. Augustine, supra note 46, at 164 (“[A]nd it is generally to punish these things, when force is required to inflict the punishment, that . . . good men undertake wars.”); Cole, supra note 38, at 24 (Augustine required rulers “to take vengeance on wrongdoers.”).
74. Regan, supra note 1, at 17 (noting the “duty to use force to aid others is incumbent on authorities as well as private persons, since ‘the injustice of the opposing side . . . lays on the wise man the duty of waging wars’”) (citing St. Augustine, City of God, bk. XIX, ch. 7); id. at 17 (Augustine believed that “the law of love prohibit[ed] Christians from killing or wounding others in their own defense . . . .”)
75. St. Augustine, supra note 46, at 164 (requiring “obedience to God or some lawful authority”).
76. Id. at 182 (“[W]ar is waged in order that peace may be obtained.”); see also Winn, supra note 37, at 195 (“Its intent should be to restore peace and
warriors were obligated to love their enemy, even in battle. Augustine's just war doctrine gave "Christian rulers . . . a moral theory on war that would reconcile their beliefs as Christians with their responsibilities as statesmen." In his thirteenth century work, Summa Theologica, Saint Thomas Aquinas refined Augustine's just war doctrine, introducing concepts of proportionality and discrimination, and permitting the use of lethal force in self-defense. Aquinas dictated three conditions for the just use of force: "(1) legitimate, that is, constitutional authority should make the war decision; (2) war should be waged for a just cause; (3) statesmen should resort to war with right intention." By the end of the seventeenth century, three additional requirements were added to the just war calculus: "(4) the evils of war, especially the loss of human life, should be proportionate to the injustice to be prevented or remedied by war; (5) peaceful means to prevent or remedy should be exhausted; (6) an otherwise just war should have a reasonable hope of success." Further, although Aquinas touched upon notions of just war conduct in his writings, theologians Vitoria and Suarez subsequently developed the jus in bello portion of the just war doctrine. Additionally, Luther, Calvin, and most leading Protestant reformers adopted the Catholic just war position. Significantly, Luther also viewed soldiering as an acceptable profession.

vindicate justice."); Cole, supra note 38, at 24 ("[P]eace is the ultimate goal of war . . . .").

77. Regan, supra note 1, at 17 (Soldiers "should love the enemy they forcibly oppose."); Winn, supra note 37, at 195 ("Christians could and should love their enemies, even in the act of killing them in battle.").

78. Regan, supra note 1, at 17.

79. Winn, supra note 37, at 195.

80. Regan, supra note 1, at 17 (Aquinas "held that individuals may use proportionate force, even killing force, not only to defend others from harm but also to defend themselves.").

81. Id. at 17 (citing St. Thomas Aquinas, Summa Theologia, II-II, q. 40, art. 1).

82. Id. at 17-18. These additional conditions are attributed to the theologians Francisco de Victoria and Francisco Suarez. Id.

83. Id. at 18.

84. Davis, supra note 48, at 235; see Bainton, supra note 67, at 136 ("All of the Protestant state churches appropriated the just-war theory . . . .").

85. Bainton, supra note 67, at 139.
Currently, the Roman Catholic Church, as articulated by the U.S. Conference of Catholic Bishops, lists ten criteria for evaluating the justness of a war, of which seven criteria relate to the *jus ad bellum* determination and three to the *jus in bello* analysis. Unfortunately, no definitive interpretation of these criteria exists and they remain subject to differing interpretations. The *jus ad bellum* determination is made after considering the following criteria:

- **Just Cause:** force may be used only to correct a grave, public evil, i.e., aggression or massive violation of the basic rights of whole populations;
- **Comparative Justice:** while there may be rights and wrongs on all sides of a conflict, to override the presumption against the use of force the injustice suffered by one party must significantly outweigh that suffered by the other;
- **Legitimate Authority:** only duly constituted public authorities may use deadly force or wage war;
- **Right Intention:** force may be used only in a truly just cause and solely for that purpose;
- **Probability of Success:** arms may not be used in a futile cause or in a case where disproportionate measures are required to achieve success;
- **Proportionality:** the overall destruction expected from the use of force must be outweighed by the good to be achieved;
- **Last Resort:** force may be used only after all peaceful alternatives have been seriously tried and exhausted.

Many just war theorists require that all *jus ad bellum* components of the doctrine be satisfied before a war is deemed just.

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87. Id.

88. COLE, supra note 38, at 78 (“In general . . . when any one of these criteria cannot be met, Christians are forbidden to fight.”); see George Weigel, *Moral Clarity in a Time of War*, FIRST THINGS, Jan. 2003, at 23, available at http://firstthings.com/issues/ft0301/articles/weigel.html (on file with the Notre Dame Journal of Law, Ethics & Public Policy) (viewed as “a series of hurdles”); PRESTYRPIANS AND MILITARY SERVICE, supra note 2, at 7 (“To have a just war all of these criteria must be met.”); J. PHILLIP WOCAMAN, *CHRISTIAN PERSPECTIVES ON POLITICS* 348 (2000) (The just war tradition required that “each of these
Further, the modern interpretation of the just war doctrine reflects a conservative attitude toward the use of force, an attitude that includes a presumption against the use of military force.89

Although not universally embraced,90 the just war doctrine is still followed by the Roman Catholic and Eastern Orthodox Churches, most Protestant faiths, and various other Christian denominations.91 The doctrine provides a moral analytical

conditions had to be met before a Christian could consider a particular war justified.


89. Maryann C. Love, *Globalization, Ethics, and the War on Terrorism*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'y 65, 71 (2002) ("JWT begins with a presumption against the use of force, that is only overcome in rare, extreme circumstances."); Paul J. Griffiths, *Just War: An Exchange*, FIRST THINGS, Apr. 2002, at 31, available at http://www.firstthings.com/issues/f0204/articles/justwar.html (on file with the Notre Dame Journal of Law, Ethics & Public Policy) ("Convincing evidence" must be offered to rebut the presumption that the use of force is "illegitimate and unjust."); United States Catholic Conference, *Excerpt From The Harvest of Justice Is Sown in Peace* (Nov. 1993), at http://www.usccb.org/sdwp/international/justwar.htm (on file with the Notre Dame Journal of Law, Ethics & Public Policy) [hereinafter "Harvest of Justice"] ("The just-war tradition begins with a strong presumption against the use of force . . ."); PRESBYTERIANS AND MILITARY SERVICE, supra note 2, at 7 ("[J]ust war principles are a strong presumption against violence . . ."). But cf. Weigel, supra note 88, at 22 ("Those scholars, activists, and religious leaders who claim that the just war tradition 'begins' with a 'presumption against war' or a 'presumption against violence' are quite simply mistaken.") And, "[t]he classic tradition . . . begins with the presumption—better, the moral judgment—that rightfully constituted public authority is under a strict moral obligation to defend the security of those for whom it has assumed responsibility . . ."); Michael Novak, "Asymmetrical Warfare" & *Just War*, NAT'L REV. ONLINE, Feb. 10, 2003, at http://www.nationalreview.com/novak/novak021003.asp (on file with the Notre Dame Journal of Law, Ethics & Public Policy) (St. Augustine and St. Thomas Aquinas' view of the just war doctrine did not start with a presumption against violence, "but rather with a presumption that addresses first the duties of public authorities to charity and justice . . .").

90. See, e.g., WINN, supra note 37, at 195 ("The bankruptcy of just war is evident. It has seldom prevented wars, because 'Christian' nations always reason that their cause is just."); see R.A. McCormick, *Morality of War*, in 14 NEW CATHOLIC ENCYCLOPEDIA 806 (1967) ("The Catholic moral teaching on warfare has been attacked not as erroneous but simply as irrelevant.").

91. DAVIS, supra note 48, at 234 ("The just-war position represents the dominant majority within Christianity, including the Roman Catholic, Eastern Orthodox, and Protestant expressions of faith."); see Presbyterian Church (U.S.A.), *Being a C.O. in a Time of War*, available at http://www.pcusa.org/wash-
framework for discussing and evaluating the initiation and conduct of military campaigns.\textsuperscript{92} Further, it serves as the prism by which public conscience and popular opinion are formed.\textsuperscript{93} From a more practical perspective, political leaders will endeavor to characterize military campaigns as being just, if for no other reason than to gain and maintain popular support, both domestically and abroad. Further, as noted in the introduction, military leaders will want to characterize the decision to go to war and the subsequent conduct of hostilities, as legally and morally justifiable in order to maintain national will and the morale of the armed forces. Responsible soldiers will desire to meet the just war criteria simply because it is the right thing to do.

C. Recent Developments

As the United States prepared to invade Iraq, a number of issues arose which implicated the just war doctrine. Chief among these issues was the legitimacy of a war that was not in direct response to a military attack. In the case of Operation Iraqi Free-
dom, the United States partially justified the invasion of Iraq under the controversial doctrine of preventive war. Additionally, the decision to go to war without the support of much of the international community, and in particular without the sanction of the United Nations Security Council, generated considerable discussion as to the role of the United Nations in the just war calculus.

1. The Proactive Wars

Just war theorists have generally recognized the legitimacy of fighting in a defensive war against an unwarranted attack. Catholic Catechism 2309 also recognizes as legitimate the defensive use of military force. Similarly, the right of self defense, codified in Article 51 of the United Nations Charter, is a recognized legal right of long-standing in international law.

However, there are certain proactive wars that have proved more difficult to reconcile with both international law and the modern notion of a just war. This is largely because the just war theory anticipates the exhaustion of peaceful avenues for conflict resolution. Similarly, international law, as exemplified by provisions of the United Nations Charter, encourages the peaceful resolution of international disputes. For example, Article 2(3) requires all members to “settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” Further, Article 33(1) provides: “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and

94. COLE, supra note 38, at 79 (“[S]elf-defense against an aggressor” is a just cause.); REGAN, supra note 1, at 48 (“Nations have a prima facie just cause to defend their territory and citizens against armed attack.”); Jean B. Elshtain, The Third Annual Grotius Lecture: Just War and Humanitarian Intervention, 17 Am. U. INT’L L. REV. 1, 7 (2001) (“The primary just cause in an era of nations and states is a nation’s response to direct aggression.”).


97. See CATECHISM, supra note 95, at 556 (“[G]overnments cannot be denied the right of lawful self-defense, once all peace efforts have failed.”) (quoting CATECHISM No. 2308); cf. REGAN, supra note 1, at 49 (“[J]ustice requires that nations be willing to negotiate or arbitrate genuine territorial disputes . . . .”); Elshtain, supra note 94, at 5 (“[A] war must be the last resort . . . .”).
security, shall first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their choice." However, despite the preference for peaceful resolution of international conflicts, a nation need not wait until it is attacked before it may legitimately take military action.

One form of proactive warfare is the preemptive strike (or war), whose legitimacy is based on the right of anticipatory self-defense. Pursuant to this legal theory, "a state may respond to an imminent threat of force before that force is actually exerted." Anticipatory self-defense was recognized as a legitimate right of states prior to the adoption of the U.N. Charter, and is recognized by current customary international law and permitted by Article 51 of the U.N. Charter. Many just war theorists also recognize the legitimacy of a preemptive strike under appropriate circumstances. However, the requirement "that the threat be imminent" is key to the invocation of this theory as a justification for the use of force. Further, at least one just war theorist requires as a condition precedent to a justifiable preemptive attack that the attacking nation possess "moral certitude about the hostile intentions of the putative would-be aggressor nation ...." The 1967 Israeli attack on its Arab neighbors that initiated the Six-Day War serves as a frequently cited example of a preemptive attack that was both legal and just. In mid-May,

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98. Condron, supra note 96, at 129; see also Stephen Murdoch, Preemptive War: Is It Legal?, WASH. LAW., Jan. 2003, at 26 ("The element of imminent threat exists in preemption, which is considered a legitimate use of force in international law ... ").

99. Condron, supra note 96, at 129-31; see Alex Wagner, U.N. Charter Offers No Justification for War On Iraq, LEGAL TIMES, Aug. 25, 2003, at 53 ("Certainly, the U.N. Charter permits what is commonly known as preemptive war—a situation where one state, fearing an imminent attack, acts first.").

100. See, e.g., REGAN, supra note 1, at 51 ("A nation need not wait until it is attacked to have just cause to use military force against a would-be aggressor; it is as much an act of self defense to initiate hostilities to prevent imminent attack as it is to respond to hostilities already initiated by an aggressor.").

101. Condron, supra note 96, at 131; cf. REGAN, supra note 1, at 5.

102. REGAN, supra note 1, at 52.

103. Murdoch, supra note 98, at 24 ("[M]any international law experts ... believe that article 51 [of the U.N. Charter] should not render illegal Israel's 1967 attack on Egypt, Jordan, and Syria at the outset of the Six-Day War."); see also Joseph S. Nye, Before War, WASH. POST, Mar. 14, 2003, at A27 ("Preemption in the face of imminent attack—such as Israel faced in 1967—is widely regarded as acceptable self-defense ...."); Robert F. Turner, Military Action Against Iraq Is Justified, NAVAL WAR C. REV., Autumn 2002, at 72, 74 ("I share the view that Israel was lawfully defending itself against an imminent attack."); Dinstein, supra note 2, at 172-73 (legitimate "interceptive" self-defense).
1967, Egypt placed its armed forces on alert, began massing forces in the Sinai, ordered U.N. forces out of the Sinai and Gaza strip, and closed the Straits of Tiran to Israel. \(^{105}\) President Nassar of Egypt declared that in the event of war, Egypt would seek the complete destruction of Israel. \(^{106}\) Israel unsuccessfully pursued various diplomatic initiatives and appealed in vain for international assistance. \(^{107}\) First Syria, then Jordan and Iraq, formed a wartime alliance with Egypt against Israel. \(^{108}\)

Militarily, the Arab coalition posed a significant threat to Israel. The Egyptian army deployed in the Sinai consisted of over 100,000 soldiers with some 900 tanks. \(^{109}\) Within striking distance of Israel were approximately 240,000 hostile Arab soldiers supported by approximately 1,700 tanks. \(^{110}\) Additionally, the Egyptian Air Force enjoyed numerical superiority over its Israeli counterpart and the Egyptian aircraft were capable of striking “the main Israeli bases [in] between seven and fifteen minutes, i.e., not enough time for interception.” \(^{111}\)

On June 5, 1967, the day after Iraq joined the Arab alliance, Israel determined that military action was required and launched a preemptive strike. \(^{112}\) Although Israel may not have exhausted all possible peaceful alternatives to war, in the face of an imminent and escalating threat, Israel pursued those peaceful alternatives it believed were reasonably available to it within the time allowed before striking.

Operation Iraqi Freedom illustrates another and more expansive type of proactive war. Although the recent invasion of Iraq has been described by some as a preemptive war, it is more

104. See, e.g., Michael Walzer, Just and Unjust Wars 85 (1977) (“The Israeli first strike is, I think, a clear case of legitimate anticipation.”); Thomas Ryba, Countdown to Iraq: Is It a ‘Just War’ or Just Another War?, J. & Courier (Lafayette, Ind.), Mar. 9, 2003, at 11 (“[T]he Six Day War, in 1967, was viewed as just . . . .”).

105. Walzer, supra note 104, at 82-83. The Straits of Tiran were an international waterway. Id. at 83.

106. Id. at 83; see Edward Luttwak & Dan Horowitz, The Israeli Army 224 (1975) (“[T]he Arabs were proclaiming the imminence of a war of extermination . . . .”).

107. Walzer, supra note 104, at 84; Luttwak & Horowitz, supra note 106, at 221, 224 (noting that the Israeli Foreign Minister traveled “back and forth in a humiliating quest for help from Washington, London or Paris”).

108. Walzer, supra note 104, at 93.

109. Luttwak & Horowitz, supra note 106, at 222.

110. Id.

111. Id.

112. Walzer, supra note 104, at 82.
appropriately characterized as a preventive war. The key difference between the two types of proactive wars is that a preventive war lacks an imminent threat. "Rather than trying to preempt specific, imminent threats, the goal is to prevent more generalized threats from materializing." Indeed, in his January 28, 2003, State of the Union address, President Bush acknowledged that the threat posed by Saddam Hussein was not an imminent one. However, the President pointed out that terrorists and tyrants do not normally give advanced notice of their intention to strike and posited further that if the threat posed by Saddam Hussein "is permitted to fully and suddenly emerge, all actions, all words and all recriminations would come too late."

Not surprisingly, the partial justification of Operation Iraqi Freedom as a preventive war has proved controversial both with religious leaders and with legal scholars. American bishops questioned "the moral legitimacy of any preemptive, unilateral use of military force to overthrow the government of Iraq." The apparent focus of their concern was both general and specific with regard to an invasion of Iraq. First, the bishops were concerned that permitting "preemptive or preventive uses of military force to overthrow threatening or hostile regimes would create deeply troubling moral and legal precedents." Next, the group opined that based on the factual information in their possession, "It is difficult to justify resort to war against Iraq, lacking

113. Miriam Sapiro, Iraq: The Shifting Sands of Preemptive Self-Defense, 97 AM. J. INT'L L. 599, 599 (2003) (noting that it is "more accurate to describe it as 'preventive' self-defense"); see also Jim VandeHei, Clark Says Bremer Should Be Replaced, WASH. POST, Nov. 7, 2003, at A3 (Retired General Wesley Clark stated "that Bush's policy is more one of 'preventive war' . . . ."); Wagner, supra note 99, at 53 (arguing that the war "should be characterized as a preventive war").

114. Sapiro, supra note 113, at 599; see also VandeHei, supra note 113, at A3.

115. Sapiro, supra note 113, at 599.


117. Id. at A11.


120. Id.
clear and adequate evidence of an imminent attack of a grave nature or Iraq's involvement in the terrorist attacks of September 11."121 Some scholars critical of the preventive war doctrine argue that it is an illegal use of military force and that it is an unwise exercise of foreign policy.122

In contrast, the country's largest Protestant church, the Southern Baptist Convention, opined that the Bush administration's application of the preventive war doctrine to Iraq fell "within the time-honored criteria of the just war theory as developed by Christian theologians in the late fourth and fifth centuries A.D."123 Additionally, the general proposition that under certain conditions a nation may attack another nation preemptively before a threat is imminent has gained support from a wide variety of sources, including various scholars124 and just war theorists.125 The argument in support of the legitimacy of a preemptive strike when a threat is not imminent seems particularly strong when the menacing nation is one that has indicated an unwillingness to abide by acceptable standards of behavior—the "rogue" nation—and is either developing, or stockpiling, weapons of mass destruction.126 Indeed, one ethicist has posited that "there is a moral obligation to ensure that this lethal combination

121. Id.

122. Murdoch, supra note 98, at 26 (arguing that preventive war "is an illegitimate use of force," and that "foreign policies based on prevention may actually lead to an increase in the use of force, especially when adopted in a tense situation like between India and Pakistan").

123. Feuerherd, supra note 118, at 3.

124. See, e.g., Nye, supra note 103, at A27 (stating that preemptive wars may be justified against terrorists and "deviant" nations, but recommending achievement of broad international consensus).

125. Regan, supra note 1, at 51 ("[A] would-be victim nation [need not] wait until a would-be aggressor nation is immediately poised to attack before the would-be victim nation has just cause to strike preemptively . . . although the more remote the threat, the more the opportunity to redress by means short of war (e.g., diplomacy, economic sanctions.").

126. Id. ("Nor need a would-be victim nation wait until a would-be aggressor nation has stockpiled nuclear or chemical weapons before the potential victim nation has just cause to strike plants producing such weapons of destruction."); see also Turner, supra note 103, at 74 ("This is all the more important in an age when the first attack could involve the slaughter of literally millions of innocent people."); Weigel, supra note 88, at 24 ("The peace of order is also under grave threat when vicious, aggressive regimes acquire weapons of mass destruction—weapons that we must assume, on the basis of their treatment of their own citizens, these regimes will not hesitate to use against others."). A recent poll of Presbyterian pastors and elders found that a significant minority, thirty-nine percent, viewed as just a "war 'to preemptively destroy weapons of mass destruction' . . . ." Jack Marcum, War and Peace, Presbyterians Today, Mar. 2003, at 5 (Presbyterian Church U.S.A.).
of irrational and aggressive regimes, weapons of mass destruction, and credible delivery systems does not go unchallenged."127 Side-stepping the issue of the effect on the just war calculus of America’s mistaken belief that Iraq possessed weapons of mass destruction immediately prior to the invasion, few would contest that it would have been simply unacceptable for Saddam Hussein to possess nuclear weapons or other weapons of mass destruction.

Arguments in favor of the legitimization of a preventive war doctrine are particularly persuasive in cases involving the threat of terrorists obtaining weapons of mass destruction. Various commentators now argue that terrorism has changed the just war calculus, making “preemptive military strikes . . . a Christian option in a just war . . . .”128 Further, there is growing support for the position that should a terrorist organization, such as al Qaeda, be discovered attempting to develop weapons of mass destruction, that the United States, or other potential victim nations, could legitimately destroy the terrorist facility before the weapons had actually been developed or the threat had become immediate.129 Characterized as an exercise in self-defense, this is the position of the Bush administration.130

The just war requirement to exhaust available avenues of peaceful redress before resorting to the use of force is not absolute. In theory, other avenues for the peaceful resolution of conflict always exist. A nation may surrender, elect not to respond to acts of aggression, or concede unlawfully seized territory. After the Japanese attack on Pearl Harbor, the United States could have sued for peace with Japan, but the failure to resort to such peaceful recourse did not deprive the United States of the characterization of hostilities against Japan as being just.


129. Michael N. Schmitt, Bellum Americanum Revisited: U.S. Security Strategy and the jus Ad Bellum, 176 MIL. L. REV. 364, 393–96 (2003); cf. Regan, supra note 1, at 53–54 (“Nations whose citizens are targets at home and abroad may have just cause to use military force to prevent or deter foreign governments from lending support and to destroy terrorist bases in foreign countries.”).

130. The National Security Strategy of the United States, ch. III, 6 (2002), available at http://www.whitehouse.gov/nsc/nss.pdf (on file with the Notre Dame Journal of Law, Ethics & Public Policy) [hereinafter National Security Strategy] (We will “exercise our right of self defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country.”). The Bush administration offered a three-prong criteria: “[t]he inability to deter a potential attacker, the immediacy of today’s threats, and the magnitude of potential harm that could be caused by our adversaries’ choice of weapons.” Id. at 15.
Quite simply, there are reasonable limits to the requirement of exhausting peaceful means for conflict resolution. Israel's preemptive strike against Egypt in 1967 in the face of the menacing Egyptian threat was not unjust simply because other diplomatic initiatives remained available. Similarly, the United States and its allies launched a just war during the 1991 Persian Gulf War even though they could have allowed Iraq to retain the unlawfully seized nation of Kuwait or pursued further diplomacy without a reasonable expectation of success. In all these cases, potential avenues for peaceful resolution continued to exist and, at least in theory, held some small possibility of success, but the use of military force was justified nonetheless.

Additionally, the imminence of the military threat that legitimizes a preemptive strike takes on a different analysis when the potential threat is one posed by a terrorist organization in the process of obtaining weapons of mass destruction. The temporal imminence of the threat shifts from the traditional short period of time before an attack is likely to be launched to "the last viable window of opportunity, the point at which any further delay would render a viable defense ineffectual." In the case of secretive, highly mobile terrorists, any opportunity to strike may be the last viable window of opportunity to prevent a terrorist attack.

The real objection to preventive war appears not to be with its morality *per se*—because it is not inherently immoral—but rather with its susceptibility for abuse. In the case of Iraq, few would contest that the Iraqi people and the world at large are better off without Saddam Hussein, who was undeniably a tyrant responsible for the deaths of thousands, who waged an aggressive war against Kuwait, and who used poison gas against his own people. Opponents of the doctrine do not focus on the unfairness or unjustness of removing Hussein from power, but rather voice a legitimate concern that sanctioning the use of a preventive war by the United States against Iraq will open a Pandora's box, encouraging preventive military campaigns under less justifiable, and potentially more catastrophic, circumstances. Also, critics

132. *Id.* (noting that the acquisition of intelligence about the location of a terrorist planning cell may "represent the last opportunity to prevent the attack").
134. See, e.g., Miriam Sapiro, *War to Prevent War*, Legal Times, Apr. 7, 2003, at 43 ("Imagine for a moment that India or Pakistan had adopted a similar security strategy at any time during the past few years. A preventive strike by
argue that justifying the invasion of Iraq by characterizing it as a preventive war will establish a dangerous precedent. Further, as exemplified by the recent invasion of Iraq, the determination of when a preventive strike is necessary is highly subjective, and an accurate prediction of the threat justifying military action in the preventive war context against a nation is difficult to make.

In sum, the just war doctrine should be flexible enough to accommodate at least some military response to the threat posed by terrorist organizations seeking to obtain and use weapons of mass destruction. Although the modern notion of a just war envisions self-defense against aggression, the classic just war tradition had a broader view of legitimate reasons to go to war, which may have renewed application in the war against terrorism. A justifiable reason to engage in hostilities under the classic tradition included "the punishment of evil." Further, a nation could justly oppose acts of aggression leveled against other nations or peoples who could not adequately defend themselves. Finally, as discussed above, the exercise of legitimate self-defense is not limited to a military response to an actual attack but includes a preemptive strike in the face of an imminent military threat. With respect to the threat posed by terrorists, an expanded view of the imminency of that threat is appropriate, if not compelling.

2. Role of the United Nations

The role of the United Nations in the just war calculus became a significant issue on the eve of the invasion of Iraq. In a September 2002 letter to the President, the Administrative Committee of the U.S. Conference of Catholic Bishops opined that the just war criteria of legitimate authority required, in part, "some form of international sanction, preferably by the U.N. either country would have brought the world to (or past) the brink of a nuclear disaster."); see also Wagner, supra note 99, at 53.

135. USCCB Feb. 2003 Statement, supra note 119 ("To permit preemptive or preventive uses of military force to overthrow threatening or hostile regimes would create deeply troubling moral and legal precedents.").

136. Colonel Gordon R. Hammock, Iraq, Preemption, and the Views of Poland, the Czech Republic, and Hungary, 17 AIR & SPACE POWER J. 84, 85 (2003) ("[I]t injects a fair amount of subjective judgment into an equation that had historically been more objective in nature.").


139. The Bush administration has taken this position as part of its national security strategy. NATIONAL SECURITY STRATEGY, supra note 130, at 15 ("We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries.").
Security Council."  

Further, an envoy from the Pope to President Bush reportedly stated that "war would be 'illegal' and 'unjust' without further U.N. authorization." Similarly, various lay commentators, including the United Nations Secretary General, asserted that United Nations approval was required before the United States and its allies could legally take military action against Iraq. Although not specifically requiring United Nations approval as a prerequisite for either the legality or justness of military action, other commentators opine, nonetheless, that there should be some role for the United Nations in this moral calculus.

The Bush administration posited that "previous U.N. Security resolutions confer international legal authority for a 'just' war against Iraq to oust President Saddam Hussein and rid the country of weapons of mass destruction." As noted above, the role of the United Nations in the just war analysis has been linked to the requirement that a war be waged pursuant to legitimate authority. Originally, the legiti-


143. See Peter Slevin, Legality of War is a Matter of Debate, WASH. POST, Mar. 18, 2003, at A16 ("Russian President Vladimir Putin said a military assault without U.N. authorization would be illegal and harmful" and noting conflicting opinions of various academics as to war's legality without a new U.N. Security Council resolution); see also Jimmy Carter, Just War—or a Just War?, N.Y. TIMES, Mar. 9, 2003, at 13 (suggesting international authority is required).

144. See, e.g., Nye, supra note 103, at A27 ("[T]he price of moving from preemption to prevention should be some form of collective legitimization, preferably under Chapter 7 of the U.N. Charter, which is concerned with threats to the peace as well as acts of aggression."); see also Joseph R. Biden, Jr., Why We Need a Second U.N. Resolution, WASH. POST, Mar. 10, 2003, at A21 (arguing that a second resolution would not be a legal requirement but would prove beneficial to the United States for strategic and political reasons).

145. Slevin, supra note 143, at A16; see also Novak, supra note 89 ("[T]his war is a lawful conclusion to the just war fought and swiftly won in February 1991.").

146. United States Conference of Catholic Bishops, Statement on Iraq (Nov. 13, 2002), at http://www.usccb.org/bishops/iraq.htm (on file with the Notre Dame Journal of Law, Ethics & Public Policy) [hereinafter USCCB Nov. 2002 Statement]; see Gary Payton, Who Makes the Call?, PRESBYTERIANS TODAY, Nov. 2003, at 17 ("In our interdependent world the only 'legitimate authority' on such crucial questions as war and peace is the United Nations."); cf. Regan, supra note 1, at 24–47 (discussing the role of the UN in his chapter entitled "Legitimate Authority.").
mate authority prong of the just war theory had no international component to it. The Augustinian view of legitimate authority was limited to the secular authority of a properly constituted leader. Concerned about the particular horrors and anarchy associated with civil wars, Luther considered any war launched by a nation’s citizenry against its lawful prince as unjust. Calvin permitted Christian participation in a war of rebellion against a corrupt lawful authority, but only if led by “someone in a place of authority.” However, the traditional just war theorists focused exclusively on the just war’s requisite legitimate authority as being the prince or princes of the belligerent nations, rather than any international body.

It appears that two prongs to the legitimate authority element of the just war theory are now developing—the traditional national prong and the more recent international prong. When a nation takes military action in satisfaction of the requirements of its domestic law, coupled with United Nations Security Council authorization, then the legitimate authority component of the just war theory should be satisfied. Conversely, if the military forces of a nation were to take military action in contravention of its domestic laws and after the United Nations had affirmatively condemned or forbidden such action, then it would appear equally clear that the legitimate authority component had been violated. The more difficult question arises when a nation acts militarily where only one of the two authority prongs have been satisfied.

Were the United Nations to authorize, or even mandate, the use of military force by a member state in the face of that nation’s refusal, under its own domestic law to authorize the

147. BAINTON, supra note 67, at 97 (“On the prince rests the responsibility for determining when the sword may be used.”); see also COLE, supra note 38, at 78 (noting that the traditional just war doctrine requires that the decision to go to war be made by proper authority, that is, by “[a] nation’s sovereign leaders”).

148. COLE, supra note 38, at 78-79.

149. Id. at 79.


In the international context, right authority was provided [in the Persian Gulf War] by the Security Council’s resolution authorizing force. In the U.S., right authority consists in the powers granted to the President by the Constitution and by the War Powers Act and by the congressional resolutions decisively adopted on January 12 and 13 authorizing use of force against Iraq.

Id.; COLE, supra note 38, at 78 (“A nation’s sovereign leaders” are the proper authority to declare war); id. at 80 (“[T]he United States and other nations have theoretically agreed to allow the UN the privilege of being the only entity with the proper authority to sanction such a war.”).
commitment of military forces, the legitimate authority component of the theory would not be satisfied. The satisfaction of a member state's domestic legal requirements is a condition precedent to meeting the just war doctrine's legitimate authority criteria.

Just war theorist Richard Regan persuasively argues this point. Article 43 of the U.N. Charter requires member countries to make military forces available to the United Nations for enforcement actions, pursuant to Article 42, and is subject to the proviso that the special agreements providing for such forces "shall be subject to ratification by the signatory states in accordance with their respective constitutional processes."\(^{151}\) Absent such special agreements, "the charter presumes that members should and would [contribute forces in response to a UN Security Council mandate] according to their own constitutional processes."\(^{152}\) Similarly, should the United Nations Security Council authorize or encourage the commitment of military forces, a member state would determine whether or not to participate in accordance with its domestic law.\(^{153}\) In short, the Charter contemplates that any member state's commitment of military force will be accomplished only after its domestic legal requirements are satisfied.

In contrast, should the United Nations Security Council fail to take a definitive position authorizing or condemning the use of force, and a nation elects to take military action after satisfying its own domestic legal requirements, then the legitimate authority component should be met. Indeed, the Charter contemplates that a country may have to take military action before the Security Council has acted. Article 51 of the Charter specifically provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."\(^{154}\)

Although United Nations Security Council authorization and/or widespread international support for military action would serve as evidence that the international community views that campaign as a justified one, the absence of a definitive position by the United Nations should not be viewed as dispositive when evaluating the justness of war. The only part of the Catho-

\(^{151}\) U.N. CHARTER art. 43, para. 3; REGAN, supra note 1, at 29–30.
\(^{152}\) REGAN, supra note 1, at 30.
\(^{153}\) Id. at 32.
\(^{154}\) U.N. CHARTER art. 51.
lic Catechism (i.e., 2308) to address the role of international bodies in the just war context states: “All citizens and all governments are obliged to work for the avoidance of war. However, 'as long as the danger of war persists and there is no international authority with the necessary competence and power, governments cannot be denied the right of lawful self-defense, once all peace efforts have failed.’”155

Nations support or oppose the military campaigns of other countries for a variety of reasons, and the just war objection is merely one. The United Nations is rarely an impartial body when deliberating such matters. Further, the lack of U.N. approval, particularly by the U.N. Security Council, may have little, if anything, to do with the justness of the proposed campaign. During the Cold War, the Soviet Union would have vetoed any resolution supporting military action against a Warsaw Pact country or one of the Soviet client states, as the United States likely would have vetoed a resolution authorizing military force against one of our allies. In some cases, it may simply be impossible to gain U.N. authorization to use force, regardless of the righteousness of the cause for taking military action.

The Korean War illustrates this point. The June 25, 1950, North Korean invasion of its southern neighbor is viewed as an illegal aggressive war, and the commitment of forces by the United States and her many allies is generally viewed as a just war. On the same day as the invasion, the United Nations Security Council approved an emergency resolution calling for North Korea to immediately stop hostilities and to withdraw to the 38th parallel.156 Two days later, the U.N. Security Council passed a second resolution calling on U.N. member states to “furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.”157 Numerous countries committed military forces to the conflict, which was fought under the U.N. flag—albeit under U.S. command.158 The aggression was eventually repulsed.

Significantly, however, U.N. Security Council approval was achieved only because the Soviet delegate was fortuitously absent, having elected to boycott security council meetings over the fail-

155. CATECHISM, supra note 95, at 555-56.
157. Id. at 86.
158. REGAN, supra note 1, at 28.
ure to include communist China within the council.159 Further, in the event of a Soviet veto, the United States was prepared to take military action without U.N. authorization.160 Assuming that the American commitment of military forces to stop the North Korean invasion was "just," it seems almost farcical to suggest that the same commitment of military force would be unjust had the Soviet delegate been present and vetoed the second resolution that called upon U.N. members to assist in repelling the North Korean invasion. Similarly, were North Korea to launch an unwarranted invasion of its southern neighbor today, the justness of American military intervention should not be called into question simply because China elected to veto any resolution authorizing military force to repel North Korean aggression.

With respect to the recent military operations against Iraq, numerous commentators have charged that the United Nations proved largely impotent in its ability to deal with longstanding Iraqi misconduct.161 Some commentators have attributed the inability of the United States to obtain a favorable U.N. Security Council resolution to the questionable motives of various members of the Council.162 If the criticisms of the United Nations are

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159. Fehrenbach, supra note 156, at 77 ("But for all his determination and swiftness of action, only one fact allowed [Secretary General] Lie to succeed: the Soviet Union, which with the other four great powers enjoyed the veto, was not in attendance.").

160. Callum A. MacDonald, Korea: The War Before Vietnam 32 (1986) ("Washington' was prepared to act in default of UN backing if the Russians cast a veto, arguing that unilateral action was in support of the UN charter.").

161. Alan W. Dowd, Thirteen Years: The Causes and Consequences of the War in Iraq, 33 Parameters 46, 52-53 (2003) (noting that despite a U.N. Security Council Resolution finding "that Iraq had failed to provide accurate and full disclosure of its nuclear, chemical, and biological programs, had repeatedly obstructed access to weapon sites, and was in material breach of UN disarmament demands," and the failure of U.N. inspectors to account for Iraq's biological and chemical weapons, when the United States and Britain sought U.N. authorization for the use of force, France and Germany opposed it "and the rest of the Security Council shrugged"); see Feuerherd, supra note 118, at 3 ("12 years of [Iraqi] resistance to 17 U.N. resolutions' and ongoing efforts to 'maintain a chemical and biological weapons stockpile and to develop a nuclear capability.'" (quoting ethicist George Wiegel)); cf. Katz, supra note 142, at 1623 (recognizing that Saddam Hussein played a decade-long "game of cat and mouse with the U.N." and stating that "[t]welve years of wrangling with Saddam over U.N. weapons inspections was rendered moot in a few weeks of ground combat").

162. George Will, U.N. Absurdity, Wash. Post, Mar. 13, 2003, at A23 ("For France . . . the objective of disarming Iraq, if ever seriously held, has been superseded by the objective of frustrating America."); see also Phyllis Schlafly, Why U.N. Is Not the Solution, Wash. Times, May 26, 2004, at A17 (alleging that France and Russia opposed the military invasion of Iraq because they were
correct, then it hardly would constitute the "international authority with the necessary competence and power" referred to in the Catholic Catechism. Indeed, one international law scholar forcefully posited: "If the Security Council lacks the courage to uphold the Charter, enforce its edicts, and protect international peace and security after recognizing the existing threat that Saddam poses to the world community, the states that are threatened by his unlawful behavior have a right to protect themselves."\(^{168}\)

Within the United States, the legitimate authority prong of the just war test refers to the actions of Congress and the President, under the appropriate oversight of the United States judiciary. Optimally, the United States would go to war after Congress declares war and the President orders American forces into combat. However, for various political or legal reasons, a formal declaration of war may not be desirable. Indeed, the United States has not formally declared war since World War II. The legitimate authority prong would nevertheless be satisfied following congressional action short of a formal declaration of war, such as the Gulf of Tonkin Resolution (Vietnam), the 1991 Gulf War Resolution, or the October 2002 Congressional Resolution authorizing the use of force against Iraq.\(^{165}\) At an absolute mini-

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prime beneficiaries of the lucrative Oil-for-Food Program); Brian Stiltner, *The Justice of War On Iraq*, J. LUTHERAN ETHICS, Mar. 20, 2003, at 4 ("France, Russia, and China proceeded with war completely ruled out as an option. . . . [T]he moral high ground of these three countries is also questionable, given the economic ties they have and seek with Iraq."). available at http://www.elca.org/jle/articles/contemporary_issues/article.stiltner_brian_pf.html (on file with the Notre Dame Journal of Law, Ethics & Public Policy); Damjan de Krnjevic-Miskovic, *French Toast: Paris Has Overplayed Its Hand*, WASH. TIMES, Mar. 17, 2003, at A17 (opining that French opposition was part of its efforts to rival "America’s global preeminence"); Dowd, *supra* note 161, at 54 ("Still others, from US senators to academics, argue that the French and Germans were simply using Iraq to send the Bush Administration a message.").

163. *Turner, supra* note 103, at 75; *cf. Regan, supra* note 1, at 44 ("The [Security Council], of course, may fail to act, and individual nations retain their moral and legal right to defend themselves.").

164. One possible legal reason counseling against a declaration of war is the resultant expansion in military criminal jurisdiction. During periods of declared war, the military possesses court-martial jurisdiction over civilians "serving with or accompanying [a United States military] force in the field." Uniform Code of Military Justice, art. 2(a) (10), 10 U.S.C. § 802(a)(10) (2000). Such jurisdiction would extend to civilian contractors and members of the media among others.

165. *See* Jim VandeHei & Juliet Eilperin, *Congress Passes Iraq Resolution*, WASH. POST, Oct. 11, 2002, at 1 ("The House and Senate voted overwhelmingly to grant President Bush the power to attack Iraq unilaterally, remove Saddam
mum, presidential action, coupled with congressional inaction, should still satisfy the just war's legitimate authority prong.\textsuperscript{166}

It is unclear what role international approval, particularly that of the United Nations, currently enjoys in the just war calculus. Clearly, a U.N. resolution authorizing the use of force would serve as some evidence that a particular military campaign is just, or at least evidence that it is perceived as such by the international community. Further, United Nations resolutions authorizing member states to use military force such as occurred during the Korean and first Gulf wars, cloak such military campaigns with legal legitimacy, at least under international law. Of course, United Nations resolutions authorizing, or even mandating, United States commitment of military forces do not, by themselves, resolve the issue of legality under United States domestic law.

It would seem then that U.N. or widespread international support for military operations is desirable, and an aspirational component of the just war analysis, but it is not a prerequisite to a just war determination. Further, the morally responsible soldier of the nation about to participate in a military campaign that is authorized by its constitutional authorities in accordance with its domestic laws, and ordered by its military leadership, should feel secure in assuming that such a campaign proceeds under the mantle of legitimate authority.

II. Fighting in an Unjust War?

Assuming that a war is unjust, can a soldier, who wants to do so, legally and morally participate in combat? Legally, the answer is clearly "yes." In contrast, ethicists and religious institutions have not achieved a clear consensus of opinion, but so long as the he or she fights the war properly, the soldier participating in such a war should be viewed as doing so with a clean moral slate.

A. International Law Permits Participation

International law's closest analogue to an unjust war is a war of aggression, also known as a crime against peace or a crime of aggression. Indeed, one commentator characterized the post-World War II effort to outlaw aggression as "a secular reinterpre-

\textsuperscript{166} Although most members of Congress initially supported President Truman's decision to commit military forces to South Korea, Truman never requested a congressional resolution authorizing or supporting his actions. MacDonal\textsuperscript{d}, \textit{supra} note 160, at 91.
tation of the just and unjust war doctrine." For individuals, the legal offense was created at the end of World War II, and several Nazi and Japanese leaders were subjected to trial for such a crime.

The 1945 Charter of the International Tribunal at Nuremberg defined the offense as: "planning, preparation, initiation or waging of a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy [to do so]." The crime was controversial when first created and remains so today. Although the international community had attempted to outlaw war in the Kellogg-Briand Pact of 1928, the Pact "only rendered aggression an illegal act for States, not a criminal act for which individuals could be tried." The most frequent criticism of the individual convictions for crimes of aggression was that the offense was applied ex post facto. In 1946, the United Nations passed a resolution affirming the legal principles established by both the tribunal's charter and judgment that aggressive war was a crime; however, that body has since failed to formally codify aggressive wars as a criminal offense.

At least with respect to aggressive wars, international law appears to permit individual participation, extending its punitive arm to those who plan such wars, but not to the foot soldier ordered by the State to participate in it. The crime of aggression is committed only by high-level policy makers and not by

167. Maguire, supra note 133, at 83.
169. Ratner, supra note 168, at 109 ("The idea of charging the Nazis with the crime of starting World War II was controversial at the time and has remained so ever since.").
170. Id.
171. James Podgers, Remembering Nuremberg, ABA J., Oct. 1993, at 88, 91 ("[Former American war crimes prosecutor Telford] Taylor acknowledges lingering unease about the fact that the aggressive war charge raised fundamental ex post facto issues, since aggressive war was not articulated as a crime until the end of the war.").
172. Id. at 92 ("[W]hile recognizing the conceptual illegality of aggressive war, the UN has yet to codify it as a crime.").
173. See Maj. Michael A. Carlino, The Moral Limits of Strategic Attack, 32 Parameters 15, 17 (2002) ("[C]ombatants are not considered criminals for fighting in a war even if they are fighting for the 'wrong side,' since they are not responsible for the jus ad bellum decision.").
soldiers and their commanders.\textsuperscript{174} Indeed, in the wake of World War II, it was only Hitler’s inner circle—not lower-level commanders or common soldiers—who were called to task for waging aggressive war.\textsuperscript{175}

In the High Command case, the American Military Tribunal limited responsibility for wars of aggression to those “individuals at the policy-making level.”\textsuperscript{176} The tribunal did not define precisely who those criminally responsible individuals were, but it did draw “the boundary between the criminal and the excusable participation in the waging of an aggressive war” at a point well beyond that of “the common soldier.”\textsuperscript{177}

Similarly, in the Krupp case, Judge Anderson noted that the crime of waging an aggressive war was concerned “not with fighting a war but with promoting one” and that “a line officer performing strictly tactical duties” was not the object of such a charge.\textsuperscript{178} Further, Judge Anderson opined:

\begin{quote}
[O]nce the war has begun, a different case is presented insofar as crimes against the peace are concerned. I do not believe there was or is any law requiring that a citizen not privy to the prewar plans, but who after the war has begun is called upon to aid in the war effort, must determine in advance and at his peril whether the war is a justifiable one and refuse his aid if he concludes that it was not. A contrary view would have no support in the usage and customs
\end{quote}

\begin{footnotes}
\item[174.] Whitney R. Harris, Tyranny On Trial: The Evidence at Nuremberg 534 (1995) (“This crime cannot reach beyond the heads of states and those who knowingly join with them in making the political decisions for war. Military leaders, and others who do not share in that responsibility, should not be charged with crime for doing their part in support of their country at war, even if the war was commenced wrongfully and is in fact illegal.”).
\item[175.] Four German military leaders were “convicted of initiating and waging wars of aggression,” and one (Doenitz) was convicted of waging an aggressive war. Goering, more politician than professional soldier, commanded the Air Force; Keitel was Chief of the High Command of the Armed Forces; Jodl was Chief of Staff of the High Command; Doenitz commanded the submarine force and later the German Navy; and Raeder commanded the Navy until replaced by Doenitz. \textit{Id.} at 532.
\item[177.] \textit{Id.}
\end{footnotes}
of nations and certainly none in the experience of the peoples of all countries.\textsuperscript{179}

As a matter of law then, soldiers are not criminally responsible for fighting in support of an illegal war, assuming that their wartime conduct is otherwise proper.

**B. The Position of Ethicists and Just War Theorists**

At least with regard to aggressive wars, the law and most religions agree in principle in their general condemnation of wars of aggression.\textsuperscript{180} During World War II, Pope Pius XII "stated explicitly the immorality of 'wars of aggression as a legitimate solution of international disputes and as an instrument of national aspirations.'"\textsuperscript{181} Further, the general condemnation of wars of aggression is not limited to Christianity. The Qur'an states, "Fight for the sake of Allah those that fight against you, but do not attack them first. Allah does not love the aggressor."\textsuperscript{182}

Similar to the position taken by the law, many ethicists and just war theorists properly opine that the general condemnation of aggressive wars does not extend to the individual soldier participating in it. Further, some ethicists put soldiers on both sides of such a conflict on the same moral plain. Professor Michael Walzer in his seminal book *Just and Unjust Wars*, when evaluating the justness of how the war is fought (*jus in bello*), as opposed to the rationale for the State's military action (*jus ad bellum*), opined:

> [W]e abstract from all consideration of the justice of the cause. We do this because the moral status of individual soldiers on both sides is very much the same: they are led to fight by their loyalty to their own states and by their lawful obedience. They are most likely to believe that their wars are just, and while the basis of that belief is not necessarily rational inquiry but, more often, a kind of unquestioning acceptance of official propaganda, nevertheless they are not criminals; they face one another as moral equals.\textsuperscript{183}

\textsuperscript{179} *Id.* at 449.

\textsuperscript{180} See McCormick, *supra* note 90, at 803 ("Thus it would seem that (1) wars of aggression, whether just or unjust, are immoral . . . .").

\textsuperscript{181} *Id.*

\textsuperscript{182} KURAN 2:190, at 352 (N.J. Dawood trans., 1974).

\textsuperscript{183} WALZER, *supra* note 104, at 127; see also Carlino, *supra* note 173, at 17 (positing that members of the military "operate on a good-faith principle regarding their country's intentions . . . . [T]he moral responsibility of engag-
Augustine appears to have taken a similar position, writing: "[A] righteous man, serving it may be under an ungodly king, may do the duty belonging to his position in the State by fighting by the order of his sovereign,—for in some cases it is plainly the will of God that he should fight, and in others, where this is not so plain, it may be an unrighteous command on the part of the king, while the soldier is innocent, because his position makes obedience a duty . . . ." Additionally, although positing that a war could only be objectively just for one of the warring parties, both Victoria and Grotius believed that the unjust side, while acting "in good faith under 'invincible ignorance' either of fact or of law," could also subjectively view their cause as just.

However, the moral and ethical latitude afforded soldiers in this area appears premised on their belief, or at least uncertainty, as to the justness of the war. Accordingly, it remains uncertain whether these ethicists and theorists would afford such latitude to soldiers who knowingly fight in a clearly unjust war. Some ethicists still would excuse—at least in part—soldiers who knowingly fight in an unjust war on the grounds that they have little choice on the matter.

There are significant practical advantages to having the morally responsible, professional soldier participating in a war of questionable morality, or even in an unjust war. It is far better for all concerned—the hapless civilian, captured enemy combatant, or conscript—to have war's hostilities managed by a professional soldier committed to following the laws of war and mired in institutional norms of duty, honor, and morality. Anecdotal evidence shows that atrocities are most prone to occur when
poorly trained or ill disciplined soldiers are commanded by sub-
standard leaders.\footnote{189} Even if this country were to become
involved in a war of questionable morality, the American people
and their clergy should encourage, if not insist upon, leaders of
the highest caliber being entrusted with the lives of their sons
and daughters and the safety of property and noncombatants on
the battlefield. It is when the war is unpopular and/or contro-
versial that the potential for atrocities increases and the need for
quality military leadership is most keenly required.

Indeed, merely because a war is unpopular, censured by the
clergy, or even deemed unjust, does not mean that it will not be
fought and that otherwise morally blameless individuals will be
compelled to participate in it. Under such circumstances, the
morally responsible soldier may feel obligated, both profession-
ally and morally, to provide quality leadership and ensure that
hostilities are conducted legally. The soldier is no less the just
warrior for participating in such a war when doing so with honor-
able intent. Further, so long as the soldier follows the recog-
nized rules of armed conflict, the taking of life is morally
permissible. Any moral sanction associated with the conduct of
hostilities in an unjust war should be leveled at the public offi-
cials who are responsible for the war, rather than against the oth-
ervise just warrior.

III. CAN YOU REFUSE TO FIGHT IN AN UNJUST WAR?

Earlier, this Article examined the legal and religious views
toward the soldier who desired to participate in an unjust war.
Now I would like to look at the issue from the opposite side. Can
soldiers legally and morally refuse to fight in a war that they
believe to be unjust when called to arms by their government?
This is probably the area with the greatest disparity between the
views of organized religions and of domestic United States law.
Most religions support a person’s refusal to participate in a war
that the individual views as immoral. Although the American
military has attempted to accommodate religion-based refusals to
fight, the scope of this accommodation is decidedly narrower
than what some religions support.

\footnote{unjust; I merely point out General McCaffrey’s attitude as one that society
should seek in its soldiers regardless of the justness of the military conflict.}

\footnote{189. \textit{Id.} at 235 ("[T]he two most common contributors [to human rights
abuses] are poor leadership and poorly trained or ill-disciplined troops.").}
A. Religious Institutions

Contrary to the position taken by some ethicists, and of international and American domestic law, many Christian faiths posit that once a war is determined to be unjust, the soldier cannot fight in it. This prohibition may be triggered by an individual's subjective determination of unjustness. Most recently, the Archdiocese for the Military Services reaffirmed this position, stating: "If a Catholic is utterly convinced in conscience that a war is unjust and his own role constitutes direct participation in the effort, he has the right and obligation to object and even refuse to participate, regardless of the consequences to person and career."

In a similar vein, the vast majority of Christian religions recognize the legitimacy of conscientious objection to war in any form. Catholic Catechism 2311 encourages “[p]ublic authorities [to] make equitable provisions for those who for reasons of

190. See Cole, supra note 38, at 78 (arguing that if the just war criteria is not satisfied, "Christians are forbidden to fight"); id. at 80 ("Christians must say no to proposed wars in which the people being attacked do not deserve to be attacked."); Gillette v. United States, 401 U.S. 445, 471 (1971) (Douglas, J., dissenting) ("[A] Catholic has a moral duty not to participate in unjust wars.") (citing from the brief of "an authoritative lay Catholic scholar" who in turn refers to Pope John XXIII's encyclical Pacem in Terris); cf. Bainton, supra note 67, at 141 (noting Luther believed "that a private citizen might refuse to serve in war if he knew the cause to be unjust and opposed to the gospel").

191. See U.S. CONFERENCE OF CATHOLIC BISHOPS, supra note 35. The statement qualified its position by cautioning, “[P]rior to taking such a drastic step, I vigorously urge any Catholic in such a position to seek out counsel of a Catholic chaplain.” Id.

192. Id. ("If an individual Catholic objects to all war, however, the Church and our Nation have recognized this as an exception that must be honored, if it is rooted in authentic conscientious objection and not lesser motives."); Fourth Churchwide Assembly, Evangelical Lutheran Church of America, supra note 91, § 4(B) ("We support members who conscientiously object to bearing arms in military service."); PRESBYTERIANS AND MILITARY SERVICE, supra note 2, at 5 ("The church also supports conscientious objectors, those who are conscientiously opposed to participating in war of any form."); Assemblies of God USA, Assemblies of God Beliefs: War And Conscientious Objectors, at http://www.ag.org/top/beliefs/contemporary_issues/issues_11_war.cfm (last visited Mar. 1, 2005) (on file with the Notre Dame Journal of Law, Ethics & Public Policy) (supporting a member's decision to declare conscientious objector status); The United Methodist Church, Military Service, at http://www.umc.org/interior.asp?ptid=1&mid=1830 (last visited June 1, 2004) (on file with the Notre Dame Journal of Law, Ethics & Public Policy) ("We support and extend the ministry of the Church to those persons who conscientiously oppose all war . . . ." (citing THE BOOK OF RESOLUTIONS OF THE UNITED METHODIST CHURCH ¶ 164(G) (2000))); see also Winn, supra note 37, at 196 ("Most churches support individual members who take this position [of refusing to participate in any wars], usually called conscientious objection.").
Some churches also support selective conscientious objection, that is, an objection to a particular war.194

B. Military Law and Conscientious Objectors

1. Partial Accommodation: The Conscientious Objector Program

Since its very beginning as a nation, the United States has enjoyed a comparatively laudable history of attempting to accommodate conscientious objectors. As the American colonists first began to take up arms against England, the Continental Congress expressed sympathy openly for pacifists whose religious principles precluded them from joining the fight.195 Exemptions from conscription for religion-based conscientious objectors were not uncommon, and at least five of the new states specifically provided for such exemptions in their constitutions.196

193. CATECHISM, supra note 95, at 556. In comparison, Catholicism has not embraced pacifism; that is, the belief that "war is always wrong." Joseph Boyle, Just War Thinking in Catholic Natural Law, in THE ETHICS OF WAR AND PEACE 49 (1996).

194. PRESBYTERIANS AND MILITARY SERVICE, supra note 2, at 7 ("Both the United Presbyterian Church in the USA . . . and the Presbyterian Church in the United States . . . supported selective conscientious objection."); Most Reverend Wilton D. Gregory, President, United States Conference of Catholic Bishops, Statement On War With Iraq (Mar. 19, 2003), available at http://www.usccb.org/sdwp/peace/stm31903.htm (on file with the Notre Dame Journal of Law, Ethics & Public Policy) [hereinafter Statement On War With Iraq] (reiterating the U.S. Conference of Catholic Bishops "long-standing support for those who pursue conscientious objection and selective conscientious objection"); The United Methodist Church, supra note 192 ("We support . . . those persons who conscientiously oppose all war, or any particular war . . . .").

195. Ellis M. West, The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription, 10 J.L. & RELIGION 367, 375 (1993). In 1775, on the eve of the American Revolution, the Continental Congress stated: "As there are some people, who, from religious principles, cannot bear arms in any case, the Congress intended no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles." Id. (citation omitted).

ing the Civil War, federal law provided conscripts, who were
religion-based conscientious objectors, with alternatives to mili-
tary combatant service. The Confederate Congress enacted
similar legislation.

As the United States entered World War I, Congress enacted
legislation authorizing conscription, which contained a limited
exemption for those conscientious objectors who were members
of pacifist churches. This exemption allowed them to serve in
noncombatant roles and, later, in agricultural and industrial
positions. The Army expanded the exemption to anyone "who
possessed 'personal scruples against the war'" without requiring
religious-based objections. The expanded Army policy was the
first time that the United States had permitted an exemption for
those whose objections to serving were not rooted in their reli-
gious beliefs.

On the eve of World War II, Congress passed legislation to
provide for a draft, which contained an exemption for conscript
conscientious objectors. The legislation extended the consci-
entious objector ("CO") exemption from those who were mem-
bers of pacifist religions to anyone "whose objections were based
on 'religious training and belief,'" provided an appeals proce-
dure for those whose applicants for CO status had been denied
by their local draft boards, and permitted alternative civilian ser-
vice that was not subject to military oversight. A large number
of conscripts were granted CO status; the largest number
choose between fidelity to their religious beliefs and heavy taxes, fines and even prison.

197. Sturm, supra note 196, at 267; see also Palmer, supra note 196, at 183 ("[E]xemption was limited to only those members of religious denominations
whose religious tenants forbade the bearing of arms and who had conducted
themselves in a manner consistent with such beliefs.").
198. Palmer, supra note 196, at 183-84.
199. Id. at 184.
200. Id. (citation omitted).
201. Id. ("This was the first—and, until the Supreme Court interpreted
the exemption broadly beginning in the 1960s, the only—example of the fed-
eral government granting an exemption to conscientious objectors whose
objections may not have been based on religious belief.").
202. Id. (citing the Selective Training and Service Act of 1940, Pub. L.
No. 76-783, § 5(g), 54 Stat. 885, 889). The Act contained no provisions for
conscientious objectors already in the military. Id.
203. Id. at 185.
204. Depending upon the source of information, the number of those
granted CO status varies. Compare Palmer, supra note 196, at 185
("[A]pproximately 72,000 received, or were eligible for, conscientious objector
status.")., with H.A. Freeman, Conscientious Objectors, Legal Aspects (U.S.), in 4 New
Catholic Encyclopedia 206 (1967) ("Approximately 170,000 were classified as
conscientious objectors.").
being Methodists and Jehovah's Witnesses, but Protestants and Catholics received exemptions as well.  

Modeled after the 1940 Act, the Selective Service Act of 1948 was the United States' first true peacetime draft. The 1948 Act contained the earlier conscientious objector exemption, but expansively defined "religious belief and training" to include "an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation . . . ." During the Korean War, Congress passed the Universal Military Training and Service Act of 1951, which amended the 1948 Act, but which also retained the conscientious objector exemption.

Significantly, it was not until the Korean War that the American military began to accommodate in-service conscientious objectors. In June 1951, the Defense Department issued a directive permitting reassignments for conscientious objectors into noncombatant positions. This directive was a watershed event for members of the armed forces who developed moral objections to serving in combat after they had entered military service. As one legal commentator noted, "Neither the current draft law, nor any of its predecessors, ever provided a means for the soldier serving on active duty to apply for a change in duties or a discharge because of his or her conscientious objections to continued military service." Similarly, the current version of the Department of Defense's directive on point provides for discharge or reassignment to noncombatant duties of service members who become conscientious objectors after entering military service.

However, the United States military's conscientious objector program is not designed to accommodate those individual service members who object to a particular military campaign. Department of Defense Directive 1300.6, Conscientious Objectors, states: "An individual who desires to choose the war in which he will participate is not a Conscientious Objector under the law. His objection must be to all wars rather than a specific

205. Freeman, supra note 204, at 206.
206. Palmer, supra note 196, at 185.
208. Id. (citing Universal Military Training and Service Act of 1951, Pub. L. No. 81-51, § 6(j), 65 Stat. 75).
209. Id. at 186 (citing U.S. Dep't of Def., Directive No. 1315.1 (June 18, 1951)).
210. Id.
211. U.S. Dep't of Def., Directive No. 1300.6, Conscientious Objector, §§ 4.1, 4.2, 6.1, 7.1 (Aug. 20, 1971) (incorporating through change four, Sept. 11, 1975) [hereinafter DODD 1300.6].
Service regulations contain similar definitional restrictions. For example, the relevant Army Regulation states, "[R]equests by personnel for qualification as a conscientious objector after entering military service will not be favorably considered when these requests are ... (4) Based on objection to a certain war." A person who desires to choose the war in which he or she will participate is not a conscientious objector under this regulation.

2. Punitive Domestic Law: Where Accommodation Ends

For those members of the armed forces charged with crimes associated with the refusal to participate in military campaigns, published case law in both the federal and military legal systems have uniformly rejected defenses based on the illegality or immorality of the war. Further, courts have treated challenges to the legality of presidential orders deploying our military forces as a nonjusticiable political question. The following discussion of two cases, Gillette and Huet-Vaughn, illustrates the limits of accommodation that the law is willing to make for conscientious objection to participation in specific military campaigns.


During the Vietnam War, several Christians claimed selective conscientious objection to the conflict on just war grounds. One such case eventually made its way to the United
States Supreme Court. In *Gillette v. United States*, a "devout" Catholic soldier, Negre, who came to believe that Vietnam was an unjust war after completing infantry training, sought a writ of habeas corpus after unsuccessfully attempting to obtain a discharge from the Army as a conscientious objector. After the district court had denied the writ, and the appellate court affirmed, the United States Supreme Court considered "whether conscientious objectors to a particular war, rather than objection to war as such, relieves the objector from responsibilities of military training and service." After first pointing out that it had no doubt as to the sincerity of Negre's belief that as a Catholic he could not participate in what he considered to be an unjust war, the Court nevertheless affirmed. Applying the same standard to both pre-induction objectors and in-service objectors, the Court interpreted the conscientious objection provision of Military Service Act of 1967, and the Services' implementing regulations, "to exempt persons who oppose participating in all war—'participation in war in any form'—and that persons who object solely to participation in a particular war are not within the purview of the exempting section . . ." Further, the Court posited that only those who objected to war in any form could qualify as a conscientious objector even though their objection to a particular war "may have such roots in a claimant's conscience and personality that is 'religious' in character."

The Court also rejected a First Amendment challenge to the limitation on the conscientious objector exemption to those who are opposed to all wars. The petitioners argued that the failure to exempt selective objectors from military service violated the

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219. *Id.* at 441–42. A second petitioner, Gillette, challenged his conviction for failing to report for induction. Gillette also believed the war unjust and claimed conscientious status. His moral objection to the war was not rooted in religion but, rather, was "based on a humanist approach to religion." *Id.* at 440.
220. *Id.*
221. *Id.* at 441 ("[N]o question is raised as to the sincerity or the religious quality of this petitioner's views.").
222. The provision stated, "Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." *Id.* at 442 (citing 50 U.S.C. app. 456(j) (Supp. V 1964)).
223. *Id.* at 449. The Court clarified its holding by noting that the willingness to use force to defend oneself, home, family or against acts of violence against others, was not inconsistent with being a conscientious objector to war in any form. *Id.* at 448.
224. *Id.* at 447.
Establishment and Free Exercise clauses when the objection was "religious or conscientious in nature." The Court initially found the establishment argument flawed, noting that the statute on its face did not afford special treatment to any specific religion or religious organization.

The Court continued, however, and addressed the argument that a "de facto discrimination among religions" was affected because members of faiths that follow the just war theory cannot object to all wars; they can only object to those that are unjust. The Court found that the Government had a neutral, secular basis for drawing this distinction, because of its pragmatic considerations "such as the hopelessness of converting a sincere conscientious objector into an effective fighting man," and because the CO exemption "focused on individual conscientious belief"—objection to all war—rather than on "secular affiliation" or "adherence to any extraneous theological viewpoint." Plaintiff could not establish that the Military Service Act "intrude[d] upon 'voluntarism' in religious life," was intended to "promote or foster those religious organizations that traditionally have taught the duty to abstain from participation in any war," or "encourage[d] membership in putatively 'favored' religious organizations . . . ."

Finally, the Court determined that the United States had "valid neutral reasons . . . for limiting the exemption to objectors to all wars . . . ." Beyond the general need for manpower, the Court accepted the Government's argument that an expansion of the CO exemption to include selective objectors would endanger fairness in the process by which the United States determined who must serve in the military. Claims of selective objection were "intrinsically . . . of uncertain dimension," could be supported by a "limitless variety of beliefs" or other subjective variables, many of which might be indistinguishable from political, non-conscientious objections, or could be so fact specific that the objection could be readily susceptible to change or nullification. Further, the Court recognized the legitimacy of various perceived dangers associated with permitted selective objection, such as the potential to "weaken the resolve" of conscripts willing

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225. Id. at 448.
226. Id. at 450-51.
227. Id. at 451-52.
228. Id. at 452-54.
229. Id. at 454.
230. Id.
231. Id. at 455.
232. Id.
to serve in the military despite the attendant hardships and their personal reservations, and undercutting our democratic system of government by which individuals subordinate their interests to the public good as determined by our elected officials.  

b. Military Law: Captain Huet-Vaughn

The Uniform Code of Military Justice provides a number of provisions to punish the refusal of service members to participate in military campaigns, including most commonly Articles 85 (Desertion), 86 (Absent Without Leave), and 87 (Missing Movement). During the first Gulf War’s Operation Desert Shield/Storm, a number of service members were convicted of various military offenses associated with their refusal to participate in that conflict, despite their assertion that they were conscientious objectors. Although the incident rate seems lower than during the first Gulf War, Operation Iraqi Freedom also resulted in similar courts-martial.

One highly publicized case involved the court-martial of Captain Yolanda M. Huet-Vaughn. The accused, a physician, had re-joined the Army Reserve in order to satisfy a military commitment she assumed in medical school, to perform public service, and “to gain credibility in her political activism.” At the time she entered the Army Reserve, she was aware of, and

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233.  *Id.* at 459–60.
236.  *See, e.g.*, Margaret Roth, *Soldiers Go AWOL to Avoid Gulf War; Others Forced to Go*, *Army Times*, Feb. 25, 1991, at 61 (reporting a soldier who unsuccessfully attempted to apply for CO status after his unit was alerted for deployment, refused to participate in deployment, and was convicted, imprisoned, and sentenced to a bad conduct discharge); *Conscientious Objector Sentenced*, *Wash. Post*, May 24, 1991, at A24. A Marine who claimed CO status was sentenced to four months incarceration for “missing his unit’s activation”; six other Marines were found guilty of desertion and sentenced to various periods of incarceration. *Id.*
237.  *See, e.g.*, *Split Decision on Marine Objector, Reservist Innocent of Desertion, Will Do Time for Absence*, *San Fran. Chron.*, Sept. 7, 2003, at A27 (Marine Reservist who failed to report for duty, claiming he was a conscientious objector, convicted of unauthorized absence. In comparison, twenty-seven other Marines who declared they were also conscientious objectors, but still reported for duty, were not prosecuted).
238.  Within the military justice system, an “accused” is the equivalent of the civilian term “defendant.”
opposed to, earlier military action in Panama and against Libya.\textsuperscript{240} Despite her reservations about supporting Operation Desert Shield, Huet-Vaughn complied with her orders to report for active duty on December 23, 1990,\textsuperscript{241} and was subsequently assigned to a medical unit that was pending deployment to Southwest Asia.\textsuperscript{242}

However, Huet-Vaughn then absented her unit on December 31st and publicly protested the upcoming war.\textsuperscript{243} At a news conference, she stated, "I am refusing orders to be an accomplice in what I consider an immoral, inhumane and unconstitutional act . . . "\textsuperscript{244} While she was absent, her unit deployed to Saudi Arabia.\textsuperscript{245} After returning to military control on February 2, she filed for conscientious objector status.\textsuperscript{246}

Slightly more than a month after she returned to the Army, military authorities preferred charges against her, ultimately resulting in a conviction, pursuant to Article 85, for "desertion with the intent to avoid hazardous duty and shirk important service . . . "\textsuperscript{247} The panel (military jury) sentenced Huet-Vaughn to be dismissed from the Army, to forfeit all pay and allowances, and to be confined for thirty months.\textsuperscript{248} Her confinement was reduced as an act of clemency to fifteen months. Later, she was released after approximately eight months confinement.\textsuperscript{249}

On appeal, the U.S. Army Court of Military Review ("ACMR") reversed, holding that the military judge erred when he precluded the defense from contesting the specific intent element of the desertion charge through the presentation of evi-

\textsuperscript{240} Huet-Vaughn, 43 M.J. at 108.
\textsuperscript{241} Id.
\textsuperscript{243} Kimberly J. McLarin, For Resisters, Gulf War Continues, PHILADELPHIA INQUIRER, Jan. 16, 1992, at 1-A ("Huet-Vaughn fled to the East Coast and began a whirlwind tour of speeches, rallies and appearances decrying the coming war."); 39 M.J. at 548 (absented unit on December 31st).
\textsuperscript{245} McLarin, supra note 243. Her unit, the 410th Evacuation Hospital, deployed to Saudi Arabia on January 27, 1991, to a location thirty miles south of the Iraqi border. 39 M.J. at 548 n.3. CPT Huet-Vaughn never alleged that she was unaware that her unit was about to deploy at the time she left it. 43 M.J. at 113.
\textsuperscript{246} McLarin, supra note 243.
\textsuperscript{247} 39 M.J. at 547.
\textsuperscript{248} Id.
\textsuperscript{249} Id.
dence concerning the accused’s motive for leaving her unit.\textsuperscript{250} The military judge had ruled that “[t]o consciously, intentionally quit one’s unit to avoid hazardous duty and/or important service because of one’s conscience, religion, or personal philosophies is not a defense.”\textsuperscript{251} However, the military judge had permitted Huet-Vaughn to briefly testify at trial about her motivations for leaving her unit, her objections to the war, and her belief that obeying the order to deploy to the Persian Gulf would have been immoral,\textsuperscript{252} and the judge further ruled that she was permitted “to testify without limitation on her intentions” during the court-martial’s sentencing phase.\textsuperscript{253} Huet-Vaughn posited that her intent was not “‘to avoid hazardous duty and shirk important service.’ Rather, her intent was solely to expose to the public the war crime nature of the impending Persian Gulf war.”\textsuperscript{254} Additionally, she wanted to present evidence concerning her belief that war crimes would be committed and that she was legally justified in refusing to serve in the war by virtue of the Nuremberg Principles and Army Field Manual 27-10, Law of Land Warfare.\textsuperscript{255} Huet-Vaughn believed “that support of the war would be morally and ethically wrong.”\textsuperscript{256} Recognizing that a distinction existed between intent and motive,\textsuperscript{257} and reaffirming that “evidence of motive is not an affirmative defense to desertion, [the ACMR nevertheless concluded that] it may be considered by the trier of fact to determine whether the appellant had the specific intent charged in the desertion offense, i.e. to avoid hazardous duty or shirk impor-

\textsuperscript{250} Id. at 548. The court determined that the evidence still supported a conviction of the lesser included offense of Absent Without Leave (“AWOL”). Id. at 555.

\textsuperscript{251} Id. at 550.

\textsuperscript{252} Id. at 550–51; 43 M.J. at 113.

\textsuperscript{253} 39 M.J. at 549. A military court-martial is bifurcated into a guilt/innocence phase and, if necessary, a sentencing phase.

\textsuperscript{254} Id.

\textsuperscript{255} Id. She also argued that such testimony was relevant to a mistake of fact defense.

\textsuperscript{256} 43 M.J. at 113.

\textsuperscript{257} 39 M.J. at 552. “Intent refers only to the state of mind when the act is done” and it may be an element of an offense. Id. In comparison, motive “is the human emotion which incites, stimulates, or prompts a person to act, and is the reason for a person’s behavior.” Id. Motive is not an essential element of an offense, but “motive may be considered . . . in determining the person’s intent.” Id. “If a person does an act which the law denounces as a crime, motive is immaterial, except insofar as evidence of motive may aid the trier of fact to determine the accused’s intent.” Id.
tant service." However, apparently concerned with the potentially far reaching implications of its holding, the ACMR moved to temper the impact of its decision. The court noted that even if Huet-Vaughn had been able to present evidence concerning her motivations for quitting her unit, the trier of fact was still free to reject such evidence and convict her of desertion. Further, the court cautioned, "It would be error to read our decision to mean that soldiers are now free to pick and choose which wars or battles to fight." The court’s decision did not “create a new affirmative defense to a charge of desertion predicated on a soldier’s ‘anti-war,’ ‘immoral war,’ ‘illegal war,’ ‘unnecessary war’ sentiments or ‘public health,’ ‘preventive medicine,’ ‘humanitarian,’ or ‘moral’ views.”

On appeal, the United States Court of Military Appeals ("COMA") set aside the decision of the ACMR and affirmed the conviction of the Army captain. The COMA distinguished between intent and motive, finding that evidence of the latter was simply irrelevant and, thus, inadmissible. Accordingly, “[t]o the extent that CPT Huet-Vaughn quit her unit as a gesture of protest, her motive for protesting was irrelevant.” Further, the COMA posited, “[t]o the extent that CPT Huet-Vaughn quit her unit because of moral or ethical reservations, her beliefs were irrelevant because they did not constitute a defense.”

The court also addressed Huet-Vaughn’s argument that the order to deploy to the Persian Gulf was illegal. Her “so-called ‘Nuremberg defense’ applies only to individual acts committed in wartime; it does not apply to the Government’s decision to wage war.” Huet-Vaughn, however, had presented no evidence that she had been ordered to engage in conduct constituting a war crime. Finally, any proffered evidence concerning the legality of the decision to deploy U.S. forces to Southwest

258. Id. at 554.
259. Id. at 554 n.10.
260. Id. at 554 n.11.
261. Id.
263. Id. at 113.
264. Id. at 114.
265. Id. (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, para. 14c(2)(a)(iii) (1984) for the proposition that "dictates of a person’s conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order.").
266. Id.
267. Id.
Asia was irrelevant because the issue was a non-justiciable political question.268

3. Reform Is Unlikely

Should the United States expand its conscientious objector exemption to those who object only to specific wars or military campaigns? In making such a decision, the government must balance its “interest in granting discharges to sincere conscientious objectors [against its] equal interest in preventing misuse of these procedures as a backdoor out of military service.”269 At least for in-service objectors, the balance of interests tilts against expansion of the exemption.

The advantages of extending the current conscientious objector exemption to in-service objectors who oppose particular wars are not inconsequential. An expansion of the conscientious objector exemption would comport with our deep-rooted tradition of accommodating those members of our citizenry with sincere moral or religious objections to participating in a war. Adopting such a policy may also generate positive public relations dividends. Further, there are practical advantages to allowing a potentially disruptive member of a unit to leave military service, or to be reassigned elsewhere, rather than jeopardizing unit coherence on the battlefield. A soldier who refuses to fight obviously reduces the combat efficiency of a unit.

However, expanding the military’s current conscientious objector exemption to include objections to specific wars by in-service objectors contains an obvious potential for abuse.270 Insincere objectors could join the military purely for economic reasons, such as obtaining a job during difficult economic times; or join to obtain educational benefits, such as a Reserve Officers Training Corps (“ROTC”) scholarship, academy appointment or government paid law or medical school, and then declare that they are opposed to participation in a particular military campaign at the point that their services are most needed. Soldiers

268. Id. at 115 (citing Flast v. Cohen, 392 U.S. 83, 95 (1968); Ange v. Bush, 752 F. Supp. 509, 518 n.8 (D.D.C. 1990)).

269. Roby v. United States Dep’t of Navy, 76 F.3d 1052, 1054 (9th Cir. 1996) (quoting Sanger v. Seamans, 507 F.2d 814, 816–17 (9th Cir. 1974)).

270. See R.T. Powers, Conscientious Objectors, in 4 NEW CATHOLIC ENCYCLOPEDIA 205 (1957) (“Some men try to avoid these obligations by reasons that are selfish or cowardly.”); cf. Marc Fisher, The Army’s Conscientious Question, Wash. Post, Feb. 9, 1991, at D1 (“Army spokesman . . . said claims received in recent weeks are generally not the result of serious philosophical objections to the war. ‘All of a sudden, when there’s a chance of hostilities, they’re conscientious objectors?’ he said. ‘I don’t think so.’”).
may elect to avoid combat, not because of any religious scruples, but because of a desire to avoid the attendant hardships and dangers of combat or to pursue more lucrative opportunities in the civilian job market.

Additionally, a significant administrative burden is placed on the unit whenever a service member seeks conscientious objector status. The commander of a unit receiving an application for CO status must arrange for an interview of the applicant by a chaplain, who must submit a detailed report to the commander, and by a psychiatrist, who must also generate a report. The commander must then forward the information to a higher-level commander, who will appoint an investigating officer. The Investigating Officer ("IO") must gather information "from commanders, supervisors, records, and any other sources" and then conduct a hearing, which may include witnesses from the applicant's unit. The IO must prepare a report for the appointing commander, which is then routed (after receiving any rebuttal statement) to the applicant's original commander for review and recommendation. Ultimately, the report is further routed through the applicant's chain of command to a general officer for review. If appropriate, the case file may be returned to the IO for additional investigation. Applications recommended for disapproval are forwarded to the Army's Conscientious Objector Review Board for final decision.

This administrative burden can be cumbersome particularly for a unit preparing to deploy overseas on short notice. The same unit must also compensate for the actual or potential loss of one of its number and the concomitant disruption to the smooth functioning of the unit that such a loss may entail. A tank crew, infantry squad, or artillery crew that has trained together for a lengthy period of time may go into combat short-handed, or while rapidly scrambling to train and integrate any subsequent replacement. Critical medical personnel may be absent on the eve of a casualty-intensive military operation.

271. Cf. Johnson, supra note 6, at 109–110, 117 (telling of a chaplain who doubts the sincerity of a soldier who seeks to avoid returning to field duty, claiming to have converted to being a Jehovah's Witness immediately prior to his arrival in Vietnam).


273. Id. ¶ 2-4, 2-5.

274. Id. ¶ 2-5, 2-6. The reviewing general officer is the General Court-Martial Convening Authority. Id. ¶ 2-6(c), 2-8.

275. Id. ¶ 2-6(e).

276. Id. ¶ 2-8(a). The Navy follows a similar procedure. See generally Roby v. United States Dep't of the Navy, 76 F.3d 1052, 1055 n.1 (9th Cir. 1996).
Further, the military must consider the affect on other members of that soldier's unit of exempting a recently declared conscientious objector from deploying overseas. Morale may be adversely affected when the remaining members of the unit, who also have no desire to be separated from their families and thrust into a hostile environment, see what they perceive as an insincere objector successfully avoiding wartime service, either by being granted an undeserved CO exemption or by delaying deployment through the administrative and judicial process until the end of hostilities.

IV. Who Decides?

A significant issue arising out of the national debate concerning the United States' military campaign against Iraq was the proper role of religious authorities in determining not only whether the war was just, but more importantly, whether they should (or could) forbid the participation of their congregations, or permit that decision to be made as a matter of individual conscience.

As noted in the Introduction, at least two religious leaders have either reserved or invoked the right to forbid participation in a military campaign. Such positions appear inconsistent with the just war concept that the decision to go to war be made by a legitimate secular authority. Further, the invocation of any such authority would be both unwise as a matter of policy and unfair as a matter of application.

The just war doctrine envisions that the ultimate determination of whether a moral basis exists to go to war resides in the first instance with secular public officials and not members of the clergy. Catholic Catechism 2309 provides, "The evaluation of these conditions for moral legitimacy belongs to the prudent judgment of those who have responsibility for the common good." This passage indicates that it is the secular leader who

277. See Baer, supra note 88, at 6 (noting "the responsibility of our political leaders"); Robert Benne, Beware of the Foreign Policy Opinions of Religious Professionals, J. LUTHERAN ETHICS, Sept. 2002, at *2, http://www.elca.org/scriptlib/dcs/jle/article.asp?aid=81 (on file with the Notre Dame Journal of Law, Ethics & Public Policy) (commenting that it is better to follow the advice of politicians rather "than that of religious leaders who have neither direct engagement nor accountability for the consequences of their opinions"); cf. Cole, supra note 38, at 78 (arguing that the proper authority criteria for a just war refers to a "nation's sovereign leaders").

278. CATECHISM, supra note 95, at 556.
decides that the moral criteria for a just war has been satisfied.\textsuperscript{279} Relying on this provision, Catholic ethicist George Weigel posited:

The meaning of this seems plain. The duty of religious leaders is to teach the principles of the tradition and urge that they be brought into public and governmental deliberation about the possible use of armed force in the service of peace, justice, and freedom; but it is not the duty of religious leaders to make the call as to whether those criteria have been satisfied in a particular case. That is the prerogative and the duty of those who have taken responsibility for the common good—public officials. This duty includes evaluating when the criteria of last resort has been satisfied.\textsuperscript{280}

It seems inconsistent to have a component of the just war doctrine affording such decisional authority to secular leaders but then permitting religious leaders the authority to mandate disobedience. If the just war doctrine had envisioned such ecclesiastic power, the legitimate authority prong would include both a secular and religious component, which it does not.

In a similar vein, uniquely American sensitivities counsel against proclamations by American religious leaders forbidding participation in particular military campaigns. Such dictates would intrude on the delicate balance between Church and State that exists in this country. Forbidding all or a large portion of the two-thirds of the armed forces that describe themselves as Christian from participating in military operations, ordered pursuant to lawful constitutional authority, would have the effect of religious leaders assuming the mantle of governmental authority and, in effect, dictating American foreign policy—an area beyond their basic field of competency.

As explained in greater detail below, the better position is that the decision whether to participate in a questionable war should remain a matter of individual conscience, guided—but not dictated—by the clergy. Some support may be found for this

\textsuperscript{279} Novak, supra note 89 ("[T]he final judgment belongs to public authorities."); see Statement On War With Iraq, supra note 194 ("We understand and respect the difficult moral choices that must be made by our President and others who bear the responsibility of making these grave decisions involving our nation's and the world's security.") (citing CATECHISM No. 2309).

\textsuperscript{280} George Weigel, Correspondence: George Weigel Replies, FIRST THINGS, Apr. 2003, at 4.
approach within various Christian religions and among various laypersons.

The reasons for allowing the decision to participate in a questionable war to be made by the individual soldier are numerous and varied. First, there will rarely exist a clear, uncontested factual basis to dispositively declare a war to be unjust. Rarely are wars clearly unjust. The reasons that nations go to war are often complex and cases of clear-cut, naked aggression, such as that exhibited by Nazi Germany or Iraq against Kuwait, are the exception rather than the norm. Frequently, both sides of a conflict believe in the justness of their cause.

Additionally, the factual basis for military action and the circumstances surrounding specific military conduct are often initially in dispute or not fully known, particularly by those far removed from the battlefield. National leaders oftentimes possess a wealth of information not available to the general public, including the clergy. For a variety of reasons, such as the protection of intelligence sources or other classified information, much of the Government's knowledge may not be disclosed to the public or to its religious leaders. Also, those facts that are available may be partially erroneous as well as incomplete, and an individual's interpretation of the significance of available information may be influenced by both personal biases and the

281. See, e.g., Gillette v. United States, 401 U.S. 437, 471 (Douglas, J., dissenting) ("No one can tell a Catholic that this or that war is either just or unjust. This is a personal decision that an individual must make on the basis of his own conscience after studying the facts."); id. at 473 ("While the fact that the ultimate determination of whether a war is unjust rests on individual conscience, the Church has provided guides."); PRESBYTERIANS AND MILITARY SERVICE, supra note 2, at 3 ("Faced with agonizing choices of war, each Christian must satisfy his or her own conscience under God and before other citizens, that any war is 'just and necessary'"); Assemblies of God USA, supra note 192 (acknowledging the "right of each member to choose for himself").

282. See Cooperman, supra note 21, at A28 ("Catholics who support the war say that the church's job is to explain just-war theory, but that applying the theory is a matter of individual judgment."); cf. JAMES H. TONER, TRUE FAITH AND ALLEGIANCE: THE BURDEN OF MILITARY ETHICS 21, 28 (1995) (opining that a soldier must decide whether to follow conscience or orders from political/military leadership).

283. See, e.g., BYLER, supra note 49, at 12 (noting that during the war between Great Britain and Argentina over the Falkland Islands "the clergy of both countries were routinely claiming the war met all the requirements of justifiable war").

284. Cf. Powers, supra note 270, at 206 ("Responsible leaders of government base defensive policies on economic, political, and technological facts that are to a large extent hidden from public knowledge.").
biases of outside influences,285 such as friends, family, professional commentators or the media.

Vietnam, which was America’s most controversial war, serves in part as an illustration of this point. Initially, America’s entry into Vietnam was looked upon favorably.286 A November 1966 pastoral statement, issued by the American Catholic bishops, viewed the American presence in Vietnam as an effort to assist another country “in its struggle against aggression” and opined that it was “reasonable to argue that our presence in Vietnam is justified.”287 However, eventually the protracted nature of the conflict and mounting casualties, both civilian and American, began to erode support for the war.288

By November 1968, the American bishops issued a pastoral letter questioning “whether ‘the conflict in Vietnam [had] provoked inhuman dimensions of suffering’” and questioned the justness of the war, under the proportionality prong of the just war criteria, based dubiously on “the financial resources ‘inevitably lost to education, poverty relief, and the positive works of social justice at home and abroad (including Southeast Asia) as a result of the mounting budgets for this and like military operations.’” Eventually, influential Catholic publications and various high-ranking Catholic clergy publicly denounced the war, the policy of Vietnamization, and even specific military operations such as the 1970 attack on North Vietnamese military bases in Cambodia.289

Two factual allegations, among others, arose and became widely believed among influential Catholic opinion makers and contributed to the eventual shift of Catholic public opinion against the war: (1) “that the Viet Cong were an independent force, not an instrument of North Vietnam” and (2) that American soldiers in Vietnam were “guilty of systematic atrocities and war crimes.”290 However, the Viet Cong were supported by and

285. See Henry Brinton, A Congregation Divided on the War, Not Just a Matter of Practicing What I Preach, WASH. POST, Apr. 20, 2003, at B2 (recognizing the “danger in using theology to justify personal political convictions,” finding that “a political gap often exists between clergy and parishioners,” and asserting that “it’s no great secret that clergy in mainline churches tend to be more liberal theologically and politically than the people in their pews”) (citation omitted).

286. G. Lewy, Vietnam War and the Church, in 18 NEW CATHOLIC ENCYCLOPEDIA 535 (1989) (“American Catholic opinion” initially supported the war.).

287. Id. at 536.

288. Id. at 537.

289. Id.

290. Id. The erosion of domestic support for the war was a product of a number of complex factors during this period of social upheaval (and not limited to these two examples).
received direction from North Vietnam. Indeed, following the unsuccessful Tet Offensive in 1968, Viet Cong units were staffed largely by North Vietnamese.

Further, while American soldiers did engage in some war crimes, and the incidents of such criminality appear to have been underreported, American forces generally behaved honorably while fighting in Vietnam. More to the point, the misconduct of American forces in Vietnam never rose to the levels alleged by the antiwar community. One prominent historian, Guenter Lewy, has been particularly critical of Vietnam-era “American Catholic opinion leaders” for falling prey to communist propaganda and for ignoring communist misconduct and the likely consequences of a North Vietnamese victory. Lewy admonished: “The moral calculus employed by the American bishops can be faulted because of empirical errors—the reliance on incorrect factual information concerning the American war

291. In 1959, Hanoi authorized military action in the South and sent 90,000 Vietminh soldiers in support. The following year, “at Hanoi’s direction, the southern revolutionaries, called ‘Vietcong’ (‘VC’) by the Saigon government, created the National Liberation Front . . . .” Michael R. Belknap, The Vietnam War on Trial 8 (2002); see also Lewy, supra note 286, at 538 (Following their 1975 victory in Vietnam, North Vietnamese leaders acknowledged that the Viet Cong “was created by the Communist party of Vietnam.”).

292. Belknap, supra note 291, at 45 (“After the Vietcong suffered heavy casualties in early 1968, these local recruits were increasingly supplemented with infiltrators from the North. Some Main Force regiments became as much as 70 percent North Vietnamese.”); see Don Oberdorfer, Tet! 329 (1971) (“The Viet Cong lost the best of a generation of resistance fighters, and after Tet increasing numbers of North Vietnamese had to be sent south to fill the ranks.”).

293. See Lewy, supra note 17, at 347 (“[I]t is apparent that the rules for reporting war crimes were often violated.”); cf. Belknap, supra note 291, at 48 (“[F]ar more [war crimes] went unpunished.”).

294. Lewy, supra note 286, at 538 (“The record certainly does not bear out accusations of genocide and of the wholesale, willful violations of the law of war, the kinds of charges which led well-meaning American Catholics, their bishops among them, to conclude that nothing could be worse than a continuation of the war.”); cf. Major General George S. Pruch, Law at War: Vietnam, 1964–1973, at 77 (Vietnam Studies 1975) (“Most [war crimes] were isolated incidents, offenses committed by individual U.S. soldiers or small groups.”).

295. Lewy, supra note 286, at 538. For a discussion of the repression inflicted on the Catholic church in South Vietnam following the communist takeover, see generally id. at 539–40; cf. S.A. Miller, Expatriates Mark Fall of Saigon, Say Abuses Continue in Vietnam, Wash. Times, Apr. 28, 2003, at B1 (“They’ve locked up priests. They’ve locked up monks. There are thousands imprisoned in gulags.”) (citation omitted).
effort—as well as because of insufficient awareness of the human cost of a communist victory."\(^{296}\)

Second, it is patently unfair to the individual soldier to forbid participation in a particular military campaign absent the most clear-cut, compelling factual circumstances. Members of the American armed forces take an oath upon entering the military. Officers swear to "support and defend the Constitution of the United States against all enemies, foreign and domestic" as well as to "well and faithfully discharge the duties of the office upon which [they] enter . . . "\(^{297}\) Enlisted members of the military also swear to support and defend the Constitution as well as to "obey the orders of the President of the United States and the orders of the officers appointed over me . . . ."\(^{298}\) Indeed, it is a foundational professional precept of the American armed forces that they will follow the lawful orders of their military superiors and of the nation's civilian leadership.\(^{299}\) As one military ethicist posited: "No stronger principle of American civil-military relations exists than this: In the United States, the professional military is wholly subsidiary to the civilians elected to high office in our republic."\(^{300}\) This "principle of civilian control is sacrosanct . . . ."\(^{301}\)

Further, unlike their civilian contemporaries, for the soldier the decision to participate in a war is dictated by the authority of the State. Most members of the armed forces have little, if any, input in this decision.

There are serious ramifications for the individual soldier who refuses or avoids combat duty. The refusal to fight can result in a court-martial, with resultant incarceration, fines, and ignoble discharge. Lesser forms of adverse administrative action

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\(^{296}\) Lewy, supra note 286, at 540; cf. Benne, supra note 277, at *1 (finding that, historically, certain "Protestant religious intellectuals and church leaders" have frequently had "too benign an assessment of the 'opposition' . . . ."). Lewy also charges that the American bishops misapplied the principle of proportionality by failing to properly consider "the importance of foreseeable geopolitical consequences such as the establishment of the powerful Russian naval base at Cam Ranh Bay . . . ." Lewy, supra note 286, at 540.


\(^{298}\) TONER, supra note 282, at vii.

\(^{299}\) See Crocker, supra note 297, at 22 ("The very foundation of the officer's code, the basic principle, is that all members of the Army accept and do their best to act upon all orders and missions directed to them by the President, within his authority under the Constitution. In practice, this means accepting also all orders and missions assigned by others lawfully appointed to positions of authority over the Army members.").

\(^{300}\) TONER, supra note 282, at 34.

\(^{301}\) Id. at 36.
will ruin that soldier's career. Even the development of an unfavorable professional reputation may serve as a career death knell. For many in the military, the loss of their career is much more than the loss of a job. It represents losing something more akin to a vocation or calling, such is the profound sense of duty that many in the American armed forces hold dear.

For the morally responsible soldier, an open conflict between our civilian and religious leaders risks placing the soldier in the unenviable position of having to choose between God and country. As one Presbyterian Minister, whose congregation included members of the military, noted during the national debate concerning the justness of the recent invasion of Iraq: "[T]he widespread religious opposition to invasion can put members of my parish in a tough spot, especially military officers, who are accountable to the chain of command and ultimately to the commander in chief."  

The United States government's reasons for entering military operations enjoy a reputable presumption of legitimacy that the American soldier should be able to rely upon. In his March 25, 2003, message to Catholics serving in the armed forces, Bishop O'Brien, Archbishop for the Military Services, wrote: "Given the complexity of factors involved, many of which understandably remain confidential, it is altogether appropriate for members of our armed forces to presume the integrity of our leadership and its judgments and therefore to carry out their duties in good conscience."  

This is not to say that religious leaders should remain passively silent either during the period leading up to hostilities or during the military campaign itself. Religious institutions serve as a check on the power of secular leaders by publicly questioning the morality of impending military action. Religious leaders


303. Powers, supra note 270, at 206 ("In case of doubt the presumption of right is in favor of legitimate authority."); cf. Byler, supra note 49, at 37-38. Martin Luther believed that Christians had a duty to obey the government when ordered to fight "[u]nless, of course, one knows clearly that the war in question is unjust." Id.


305. "[O]nly the political authorities can make . . . decisions [about going to war], but that does not mean that the Church cedes its moral authority to governments, or supinely rolls over or remains silent." Bruce Duncan, Iraqi War: Opinion, The Catholic Weekly, Apr. 20, 2003, at 3, available at http://www.catholicweekly.com.au/03/apr/20/18.html (on file with the Notre Dame Journal of Law, Ethics & Public Policy).
should educate laypersons about the just war criteria and spark a serious, educated debate about whether a nation should go to war. Further, after hostilities have commenced, the clergy has an appropriate role in encouraging, and monitoring, the lawful and moral conduct of the war. Further, an individual’s decision whether to participate in a particular war should not be made lightly; it must be an educated one. The decision should be based upon all reasonably available information, made after consulting relevant religious literature and after having obtained the benefit of clergy.\textsuperscript{306} As the Archdiocese for the Military Services instructed Catholic members of the military: “[W]e are obligated to form our consciences properly and in accord with the truth, as it can be known to us.”\textsuperscript{307}

V. How Do You Fight a Just/Unjust War?

Regardless of the legality or morality of a war, both the law and the vast majority of religions demand that the war be fought justly. Within this area lies the greatest overlap between the law and religion. Of significance, this is the one area of both the law and the just war doctrine for which individual members of the armed forces may, and should, be held individually responsible. As the President of the United States Conference of Catholic Bishops stated on the eve of the invasion of Iraq: “If the decision to use military force is taken, the moral and legal constraints on the conduct of war must be observed. This is expected of every civilized nation. It surely is expected of ours.”\textsuperscript{308}

Albeit individual soldiers may not be able to fully judge the justness of the war itself, nor be held responsible for fighting in a war eventually determined to be unjust, they can more readily be held accountable for their own conduct. After opining that individuals called upon by their country to fight in a war of aggres-

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306. Presbyterians and Military Service, supra note 2, at 3 (“We call upon each church member, facing these choices, to inform and enliven her or his conscience, using as resources the community of the Church, the counsel of the clergy, the Bible, sacraments, and prayer as a means of grace, the Confessions, statements, and traditions of the church, together with adequate information on the facts of a particular war.”); The Episcopal Church, The Episcopal Church and Conscientious Objection to War, at http://www.ecusa.anglican.org/5252_ENG_HTM.htm (last visited Mar. 1, 2005) (on file with the Notre Dame Journal of Law, Ethics & Public Policy) (“Today, the Episcopal Church continues to maintain that all decisions regarding participation or non-participation in war or the preparation for war be the fruit of mature and prayerful discernment informed by scripture, theology, and relevant knowledge of history and contemporary conditions.”).


sion should not be held criminally responsible for such conduct, Judge Anderson in the post-WWII Krupp case nevertheless posited "that in performing such service as he is called upon to render, a citizen is bound by the laws and customs of war and if he violates them he is subject to indictment and punishment on that ground."\(^{309}\)

There is less ambiguity as to what individual conduct is legally impermissible. Some forms of misconduct are simply wrong under any standard of behavior. Although military orders generally enjoy a presumption of legality,\(^{310}\) a "patently illegal order" enjoys no such presumption and must be disobeyed.\(^{311}\) Examples of obviously illegal orders include directives to kill unarmed noncombatants who pose no visible threat,\(^{312}\) to execute a detainee or prisoner of war,\(^{313}\) or to commit rape.\(^{314}\) Similarly, Catholic Catechism 2312 posits that "[n]on-combatants, wounded soldiers, and prisoners must be respected and treated humanely."\(^{315}\)

Further, since at least the end of World War II, international law and American domestic military law have rejected superior

\(^{309}\) Krupp Case, supra note 178, at 449.

\(^{310}\) United States v. New, 55 M.J. 95, 106 (C.A.A.F. 2001) ("Orders are clothed with an inference of lawfulness."); see also Manual for Courts-Martial, United States, pt. V \(\S\) 14c(2)(a)(i) (2002 ed.) ("An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate.") [hereinafter MCM].

\(^{311}\) United States v. Austin, 27 M.J. 227, 231–32 (C.M.A. 1988) ("It is a . . . long-standing principle of military law that an order from a known superior is presumed to be lawful unless 'palpably illegal on its face.'") (citations omitted); MCM, supra note 310, \(\S\) 14c(2)(a)(i) (An order's inference of lawfulness "does not apply to a patently illegal order, such as one that directs the commission of a crime.").

\(^{312}\) United States v. Calley, 48 C.M.R. 19, 29 (C.M.A. 1973) ("An order to kill infants and unarmed civilians who were so demonstrably incapable of resistance to the armed might of a military force as were those killed by Lieutenant Calley is in my opinion, so palpably illegal . . . .")

\(^{313}\) United States v. Griffen, 39 C.M.R. 586, 590 (A.B.R. 1968) (Order to shoot unarmed, unresisting Vietnamese detainee, whose hands were tied behind his back, was "palpably illegal."); see Calley, 48 C.M.R. at 25 ("Military law has long held that the killing of an unresisting prisoner is murder.").

\(^{314}\) "Rape has been considered a war crime for centuries." Thom Shanker, Sexual Violence, in Crimes of War 323 (1999); see Alexandra Stiglmayer, Sexual Violence: Systematic Rape, in Crimes of War 327 (1999) ("Under the statute of the Yugoslavia Tribunal, a commander can be prosecuted for rapes committed by his subordinates if he ordered or aided and abetted the rapes . . . or knew or should have known of such misconduct and took inadequate steps to prevent or punish it.").

\(^{315}\) Catechism, supra note 95, at 556.
orders as a defense to clearly illegal orders. As the American Military Tribunal noted in the post-WWII Einsatzgruppen case: "The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a piece of machinery."

Similarly, the Catholic Church also rejects "blind obedience" as an excuse for committing war crimes. Catholic Catechism 2313 states in part: "Actions deliberately contrary to the law of nations and to its universal principles are crimes, as are the orders that command such actions. Blind obedience does not suffice to excuse those who carry them out."

However a fair amount of moral and legal ambiguity still surrounds wartime conduct. The concept of "proportionality" is largely a judgment call. One prophylactic measure employed by the U.S. military to meet its legal obligations is the judicious use of judge advocates (military attorneys) when making targeting decisions. These military lawyers "are integrated into military planning and operations at all levels" and they review proposed target lists to ensure that these targets "satisfy the definition of military objective; that the means selected in attacking the target be proportional to the military advantage gained; and that incidental damage to civilians and their property be minimized."

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316. W. Hayes Parks, A Few Tools in the Prosecution of War Crimes, 149 MIL. L. REV. 73, 79–81 (1995); see U.S. DEP’T OF THE ARMY, FIELD MANUAL NO. 27-10, The Law of Land Warfare, ¶ 509 (July 1956) [hereinafter FM 27-10] (Superior orders does not constitute a defense to a war crime "unless [the soldier] did not know and could not reasonably have been expected to know that the act ordered was unlawful."). However, the fact that a soldier committed a war crime pursuant to orders may be considered as a mitigating factor during sentencing. FM 27-10, supra, ¶ 509(a). Superior orders may also serve as the basis for jury nullification. See Belknap, supra note 291, at 226 ("[D]espite the dictates of international law and the army’s own regulations, officers sitting as jurors in such cases were likely to accept obedience to orders as a complete defense."). Commentators anticipate superior orders defenses to be raised by those soldiers charged with misconduct committed against detainees at the Abu Ghraib prison in Iraq. Roman Scarborough, Iraq Trials Expect ‘Following Orders’ Defense, WASH. TIMES, June 23, 2004, at A9.


318. CATECHISM, supra note 95, at 557.

319. Col. Frederic L. Borch, Targeting After Kosovo: Has the Law Changed for Strike Planners?, NAVAL WAR C. REV., Spring 2003, at 64, 68; see also Lt. Col. James K. Carberry & Scott Holcomb, Target Selection at CFLCC: A Lawyer’s Perspective, FIELD ARTILLERY, Mar.–June 2004, at 39 ("As a member of the targeting board, the judge advocate helps the commander make the right decision by highlighting and addressing important issues, such as military necessity, proportionality and collateral damage.").
Further, America's national, military, and religious leaders may differ as to the morality of certain weapons. However, American soldiers can safely presume that any weapon in our military arsenal is legal because all weapons used by the U.S. armed forces are subject to prior legal review.

Responsible nations will seek to go to war for proper reasons and then fight that war in a legal and restrained manner, to the extent practicable. Both the concepts of *jus ad bellum* and *jus in bello* determine whether the military campaign as a whole is a just one. However, the two concepts are analytically distinct, particularly at the individual soldier's level. Soldiers are expected to fight justly even when participating in an unjust war. Conversely, participation in a just war does not abrogate the soldier's obligation to fight that properly as well.

To illustrate, the United States' participation in the Korean War was proper, both morally and legally. It should be considered a just war. However, poorly trained American soldiers were found to have killed a large number of Korean civilians at No Gun Ri during the early days of the Korean War. The misconduct of these soldiers was both immoral and illegal. Isolated incidents, such as No Gun Ri, however, would not cause the United States' participation in the war itself to be deemed unjust.

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320. See, e.g., USCCB Nov. 2002 Statement, *supra* note 146 ("The use of anti-personnel landmines, cluster bombs and other weapons that cannot distinguish between soldiers and civilians, or between times of war and times of peace, should also be avoided.").

321. Borch, *supra* note 319, at 78 n.17 ("[E]very weapon in the U.S. inventory must be reviewed for legality under the law of war."); see U.S. Dep't. of the Air Force, Policy Directive No. 51-4, Compliance with the Law of Armed Conflict, ¶ 4 (Apr. 26, 1993) ("The Air Force will make sure all weapons it buys or develops are consistent with international law, particularly [the Law of Armed Conflict].").

322. Robert Burns, *GLs Killed Civilians Without Orders, Clinton 'Regrets' No Gun Ri Deaths In Korean War*, ARIZ. REPUB., Jan. 12, 2001, at A1 ("A joint U.S.-South Korean statement said, 'In the desperate opening weeks of defensive combat in the Korean War, U.S. soldiers killed or injured an unconfirmed number of Korean refugees the last week of July 1950 during a withdrawal under pressure in the vicinity of No Gun Ri.'"). South Korean survivors allege that as many as 400 Koreans were killed at No Gun Ri. *Id.* at A17. Retired Marine Lieutenant General Bernard Trainor, an official outside observer of the official Army investigation into the incident, did not believe a war crime had been committed because "[w]hat took place at No Gun Ri was perceived by those on the scene . . . as a legitimate act of self-defense against infiltrators hiding among the refugees." Bernard E. Trainor, *The Anguish of Knowing What Happened at No Gun Ri*, WASH. POST, Jan. 21, 2001, at B1, B4.

323. Trainor, *supra* note 322, at B4 ("[W]e went to Korea in a just cause and fought the war honorably, not withstanding the unfortunate incident at No Gun Ri."); see also Regan, *supra* note 1, at 98 ("Isolated acts of unjust war con-
In comparison, a historical example of an unjust war being fought justly is Rommel’s Afrika Corps during World War II. German General Erwin Rommel has been characterized as “an honorable man,” who followed the law of war: “He fought a bad war well, not only militarily but also morally.” Rommel refused to follow Hitler’s illegal orders, treated enemy prisoners well in accordance with the laws of war, and generally fought his unjust war in accordance with the law of armed conflict.

VI. THE LAW OF WAR AND DOMESTIC MILITARY LAW

The “law of war” refers to the legal constraints imposed on warring forces by international treaties, primarily the Hague and Geneva Conventions and portions of the Protocols to the Geneva Conventions, and by certain customary laws of warfare. A war crime is simply any violation of the law of war. However, some war crimes, such as “willful killing, torture or inhuman treatment, including biological experiments” committed against those persons entitled to protection under the Conventions, are deemed “grave breaches” of the Geneva Conventions. A signatory to the Conventions is under an affirmative obligation to suppress grave breaches or, alternatively, to search out and prosecute persons who committed or ordered such misconduct. Additionally, most, if not all, countries possess domestic laws that govern the conduct of their military forces.

324. WALZER, supra note 104, at 38.
325. RONALD LEWIN, ROMMEL AS MILITARY COMMANDER 310–11 (1968) (“It was Rommel who burned the Commando Order issued by Hitler on 28 October 1942, which laid down that all enemy soldiers encountered behind the German line were to be killed at once, regardless of whether they landed from sea or air.”).
326. See Martin Blumenson, ROMMEL, IN HITLER’S GENERALS 314 (Correlli Barnet ed., 1989) (“In a total war fought savagely and brutally, he inspired admiration for his treatment of prisoners.”).
327. FM 27-10, supra note 316, ¶ 4, 8(b)(c); Carberry & Holcomb, supra note 319, at 40. Although “[t]he United States has not ratified the Geneva Protocols, [it] considers many sections to be legally binding as customary international law.” Id. at 45 n.1.
328. LEWY, supra note 17, at 343 (“The term ‘war crime’ is the technical expression for a violation of the law of war by any person, military or civilian; every violation of the law of war is a war crime.”); see also FM 27-10, supra note 316, ¶ 499.
329. FM 27-10, supra note 316, ¶ 502.
330. Id. ¶ 506.
Generally, in addition to specific prohibitions of certain conduct, the law of war is premised on three basic principles that govern the use of force during armed conflict. The first principle is military necessity, which is “that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.” A critical qualifier to the notion of military necessity is the restrictive language “not forbidden by international law.” To illustrate, a retreating military force may be targeted and obliterated as a necessary step in ultimately defeating the enemy. However, the enemy’s civilian populace may not be deliberately targeted as a means of breaking the enemy’s will, even if such attacks would likely contribute to the successful conclusion of the war, because the targeting of civilians is forbidden by international law.

The second principle regulating the conduct of war is unnecessary suffering, which prohibits the use of “arms, projectiles, or material calculated to cause unnecessary suffering.” Examples of such prohibited weapons include dum-dum bullets, which flatten upon impact and thus increase damage, and glass-filled projectiles. Additionally, using white phosphorous artillery rounds on enemy soldiers solely to cause additional suffering and placing feces on punji stakes merely to increase the risk of infection serve as additional illustrations of weapons used in violation of this principle.

Finally, the principle of proportionality states that the “loss of life and damage to property must not be out of proportion to the military advantage to be gained.” For example, it would violate this principle to destroy an entire village in order to suppress a single sniper.

Misconduct that qualifies as a war crime may be prosecuted by international tribunals, the courts of conquering nations, or by the soldiers’ own judicial system. Following WWII, former

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332. FM 27-10, supra note 316, ¶ 3a; International Law Deskbook, supra note 331, at 2-2.

333. FM 27-10, supra note 316, ¶ 34a; International Law Deskbook, supra note 331, at 2-2.

334. FM 27-10, supra note 316, ¶ 34a.

335. Id. ¶ 41; see also Carberry & Holcomb, supra note 319, at 40 (“[T]he principle of proportionality requires that the anticipated loss of civilian life and damage to civilian property, or collateral damage, incidental to attacks not be excessive in relation to the concrete and direct military advantage expected to be gained.”).
members of the German armed forces were subject to prosecution by a variety of judicial bodies. Major Nazi war criminals were prosecuted before the international military tribunal at Nuremberg.\footnote{336} Additionally, military tribunals in the American, British, French, and Soviet zones of occupation carried out prosecutions against a significant number of lesser military officials.\footnote{337} The courts of other countries also conducted criminal proceedings against the Germans, including Belgium, Denmark, Luxemburg, Netherlands, Norway, Poland, Czechoslovakia, Yugoslavia, and Israel.\footnote{338} Finally, to its credit, the Federal Republic of Germany also prosecuted its nationals for various war-related crimes.\footnote{339}

Similarly, Japanese military officials were called to task for their war-time misconduct. The Supreme Allied Commander, General Douglas MacArthur, established the International Military Tribunal for the Far East ("IMTFE"), which was composed of judges from the United States and its wartime allies.\footnote{340} The IMTFE arraigned twenty-eight high-ranking military and civilian leaders, eventually sentencing seven to death, sixteen to incarceration for life, and the remaining two to prison terms of twenty

\footnote{336. \textit{Adalbert Ruckerl, The Investigation of Nazi Crimes 1945–1978}, at 24 (1979). Initially twenty-four Germans were to stand trial, but a suicide (Dr. Robery Ley) and a determination that one defendant was unfit to stand trial (Gustav Krupp von Bohlen und Halbach) reduced the number in the docket to twenty-two. \textit{Id.} at 24–25. Of those defendants, three were acquitted. \textit{Id.} at 26.}

\footnote{337. \textit{Id.} at 26–31. The American military tribunals charged 1,941 individuals, of which 1,517 were convicted and sentenced, 367 acquitted, and 57 had their charges dropped against them. \textit{Id.} at 28–29. The British tried 1,085 Germans by military tribunal in Germany, Italy, and Belgium. \textit{Id.} at 29. The French convicted 2,107 Germans in Germany, of which the majority were associated with the concentration camps, and sentenced at least another 1,918 Germans in France or French North Africa. \textit{Id.} at 29. No accurate records of Soviet prosecutions exist, but German records indicate that more than 13,000 Germans were serving tribunal-rendered sentences as of May 1950. \textit{Id.}}

\footnote{338. \textit{Id.} at 31. Israel captured, tried, and executed former SS officer Adolph Eichman in 1962. \textit{Id.}}

\footnote{339. West Germany's Federal Ministry of Justice reported at least 6,440 persons were convicted of "Nazi crimes and war crimes" and received "non-appealable sentences by the end of 1978." \textit{Id.} at 117. \textit{But cf. Maguire, supra note 133, at 285 ("Between 1958 and the end of 1985, West German courts convicted 992 Germans for war time atrocities. However, many of the sentences were extremely lenient.").}}
and seven years, respectively. Lesser military officials, categorized as class B and C war criminals, were prosecuted by Allied countries throughout Asia and the Pacific. By April 1951, approximately 5,700 Japanese, Formosan, and Korean alleged war criminals were prosecuted, of which 984 were sentenced to death, 475 to incarceration for life, and 2,944 to prison terms of various lengths. American military courts were responsible for prosecuting almost 1,300 Japanese military personnel for war crimes.

The American military prosecutes its service members for misconduct that violates the laws of war under our own domestic military law, the Uniform Code of Military Justice. For example, during the Vietnam War the United States followed that policy, albeit with mixed results. War crimes committed by American service members are believed to have been underreported, difficult to prove under combat conditions, and judged by fellow soldiers who were sometimes sympathetic to the accused. Of 241 reported allegations of war crimes committed by members of the U.S. Army in Vietnam between 1965 and 1975, seventy-eight were considered to be substantiated after a finding of probable cause by Army investigators, but of those

341. MAGUIRE, supra note 133, at 191, 361 n.234. Five of the prisoners died; the remainder were all released by 1958. Id. at 361 n.234.
342. YUKI TANAKA, HIDDEN HORRORS: JAPANESE WAR CRIMES IN WORLD WAR II 2 (1996); see GAVAN DAVIS, PRISONERS OF THE JAPANESE: POWs OF WORLD WAR II IN THE PACIFIC 370 (1994) (stating that, of the more than 5,700 members of the Japanese armed forces prosecuted for war crimes, some 3,000 were convicted and 920 were executed). However, of those Japanese convicted and sentenced to confinement, the longest sentence actually served was less than thirteen years; all Japanese war criminals were released by December 1958. Id. at 373.
343. MAGUIRE, supra note 133, at 134.
344. FM 27-10, supra note 316, ¶ 507(b).
345. See LT. COL. GARY D. SOLIS, MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE 32–33 (1989) (“No Marine was charged with the commission of a war crime, as such, in Vietnam. Rather, any ‘violations of the law of war’ committed by a Marine against a Vietnamese was charged as a violation of the UCMJ.”).
346. LEWY, supra note 17, at 345–46. Although probably underreported, war crimes committed by American military personnel in Vietnam never rose to the levels claimed by some critics of our participation in the war.
347. For a discussion of the difficulty in proving a war crime at trial while in a war zone, see generally GARY D. SOLIS, SON THANG: AN AMERICAN WAR CRIME (1997).
348. CJ. BELKNAP, supra note 291, at 225 (stating that former Army prosecutor William Eckhardt opined “most military men believed that a conviction in a My Lai case would be a ‘slap in the face of the army’ and would undermine the war effort.”).
only thirty-six were referred to a court-martial and only twenty cases resulted in a conviction.349

Another possible avenue to prosecute war crimes is the War Crimes Act of 1996.350 This Act extends federal criminal jurisdiction to both members of the armed forces and to U.S. nationals who commit war crimes "inside or outside the United States."351 War crimes are defined as (1) a "grave breach" of the Geneva Conventions of 1949 or any protocol to those conventions to which the United States is a party; (2) conduct prohibited by certain provisions of the Hague Convention of 1907; (3) violations of common Article 3 of the Geneva Conventions of 1949 (or subsequent protocols to which the United States becomes a party) in cases on non-international armed conflict; and (4) willfully causing death or serious injury to civilians in violation of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices.352

The Military Extraterritorial Jurisdiction Act of 2000 was enacted to fill a jurisdictional void over certain categories of people who committed crimes overseas while "employed by or accompanying" United States forces.353 The Act gives the United States jurisdiction over the largest body of civilians accompanying U.S. forces into combat with increasing regularity—civilian contractors. With the recent amendments of section 1088 of the Ronald Reagan National Defense Authorization Act for Fiscal Year 2005, H.R. 4200, jurisdiction now extends to the Department of Defense ("DoD") civilian employees and civilian employees of other federal agencies supporting DoD overseas; contractors, subcontractors, and their employees, employed on a DoD contract or on a contract of an agency supporting DoD.

349. Lely, supra note 17, at 348. Soldiers were convicted of such crimes as murder or manslaughter (nine), rape (three), mistreatment of prisoners of war or detainees (three), and mutilation (five). Id.


352. 18 U.S.C. § 2441(c).

overseas; and their family members (dependents), if working or residing overseas and not a national of the host country.\textsuperscript{354}

Additionally, the Act permits the prosecution of soldiers who had committed crimes, such as war crimes, but who had left the military before the crimes had come to light or had been adequately investigated and were beyond the reach of military law.\textsuperscript{355} However, the Act's scope does not extend to civilian employees and contractors of other agencies, such as the CIA, or to members of the media, such as the embedded journalists who traveled with U.S. forces during the initial invasion of Iraq. The Act may see its first application as a result of reported detainee abuse at the Abu Ghraib prison in Iraq.\textsuperscript{356}

Finally, the 2001 USA Patriot Act\textsuperscript{357} expanded the overseas criminal jurisdiction of the United States. Section 804 of the Act amended Title 18 of the United States Code to provide for jurisdiction over U.S. nationals who commit, or are the victim of, crimes that occur overseas on “the premises of United States diplomatic, consular, military or other United States Government missions or entities . . . .”\textsuperscript{358} The Department of Justice relied on this provision to charge a CIA contractor with assault after he allegedly beat a detainee in Afghanistan.\textsuperscript{359}

\textbf{VII. The Just War Principles}

The just war tradition embraces two primary principles limiting the use of force: discrimination, also called “noncombatant immunity,” and proportionality.\textsuperscript{360} These principles are similar

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\item \textsuperscript{354} 18 U.S.C.A. § 3267(1), (2) (West Supp. 2004).
\item \textsuperscript{355} Id. § 3261(d)(1). Additionally, active duty members of the military fall within the scope of this Act if the United States charges at least two people with a crime, at least one of whom is not in the military. Id. § 3261(d)(2).
\item \textsuperscript{357} Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 [hereinafter USA PATRIOT ACT].
\item \textsuperscript{358} Id. § 804(a) (amendment codifying 18 U.S.C. § 7(9)).
\item \textsuperscript{360} Regan, supra note 1, at 87, 95; see also Pastoral Message, supra note 86, at 4 (“Even if the cause is just, the grave moral obligation to respect the principles of non-combatant immunity and proportionality remains in force
to, and derived from, the international law of armed conflict. The principle of discrimination holds that: "just warriors may directly target personnel participating in the enemy's wrongdoing but should not directly target other enemy nationals."[^361] "[C]ivilians may not be the object of direct attack and military personnel must take due care to avoid and minimize indirect harm to civilians."[^362]

The principle of proportionality states that "in the conduct of hostilities, efforts must be made to attain military objectives with no more force than is militarily necessary and to avoid disproportionate collateral damage to civilian life and property."[^363] If the loss of innocent life and/or destruction of property is grossly out of proportion to the military advantage to be gained, the just warrior must alter the military strategy.[^364]

A recent articulation of the just war theory includes a mental component to the just conduct analysis. The U.S. Conference of Catholic Bishops takes the position that combatants act with the right intention, that is "even in the midst of conflict, the aim of political and military leaders must be peace with justice, so that acts of vengeance and indiscriminate violence, whether by individuals, military units or governments, are forbidden."[^365]

The Islamic tradition has also embraced the principles of discrimination and proportionality.[^366] The Prophet reportedly would instruct his commanders to adhere to certain restraints

[^361]: Regan, supra note 1, at 87.
[^362]: Pastoral Message, supra note 86, Appendix; see also Davis, supra note 48, at 236 ("[D]irect, intentional attacks on non-combatants are prohibited."); Cole, supra note 38, at 95 ("[N]o innocent people are to be targeted intentionally.").
[^363]: Pastoral Message, supra note 86, Appendix; see also Davis, supra note 48, at 236 ("the use of force and violence must be limited in terms of legitimate military necessity . . .").
[^364]: See Cole, supra note 38, at 101 ("If our strategy demands, even indirectly, the lives of too many innocent people, we have to create another strategy.").
[^365]: Pastoral Message, supra note 86, Appendix; see also Harvest of Justice, supra note 89.
[^366]: Sohail H. Hashmi, Interpreting the Islamic Ethics of War and Peace, in The Ethics of War and Peace 146, 161 (1996) ("Thus, the Qur'an and the actions of the Prophet and his successors established the principles of discrimination and proportionality of means.").
during their military campaigns. Further, the Qur'an, which serves as the basis for Islamic just conduct in war, provides: "And fight in God's cause against those who wage war against you, but do not transgress limits, for God loves not the transgressors."

The first caliph, Abu Bakr, forbade mutilation, the killing of women, children, and old men, and unnecessary destruction (of palm trees, fruit trees, and animals). Early Islamic jurists placed limitations on the conduct of warfare, to include prohibiting attacks upon women and children and limiting the destruction of property to that necessary for military victory.

CONCLUSION

The just war doctrine is an imperfect attempt to place constraints on warfare and warriors. In many cases, it has merely served as a speed bump on the road to war. However, history has yet to produce a better mechanism for injecting moral reflection into the real politik decision-making that has historically characterized the decision to commit military forces. In western liberal democracies, particularly the United States, this moral calculus does have some influence on the decision-making process either directly on the decision-makers themselves or indirectly through the influence of public opinion. In the words of one ethicist, "just war thinking imposes constraints where they might not otherwise exist; generates a debate that might not otherwise occur; and promotes skepticism and uneasiness about the use and abuse of power without opting out of political reality altogether in favor of utopian fantasies and projects."

Religious figures who publicly challenge America's participation in military operations must be aware that their conduct has consequences. Members of the clergy do not pontificate from their pulpits, or in the media, in a vacuum. Practicing members

367. Id. ("According to authoritative traditions, whenever the Prophet sent out a military force, he would instruct its commander to adhere to certain restraints.").


369. Hashmi, supra note 366, at 161 (citation omitted); see also Broadway, supra note 368, at B9 ("Abu Bakr, the first caliph, or great Muslim leader, after Muhammad's death in 632, instructed his soldiers 'not to deviate from the right path,' which included not killing women, children, or old men, and not mutilating dead bodies.").

370. Id. at 162. However, women and children were still subject to enslavement and ransom. Id.

371. Elshtian, supra note 94, at 23.
of their faiths will give great weight to the opinions of clergy when discussing the justness of a war, and this is no less true of religious members of the armed forces and their families.

This is not to suggest that the clergy have no right to public protest, because in this country, with our democratic system of government and constitutional right to free speech, that right is certainly secure. Nor do I suggest that they should not scrutinize America's participation in its wars—indeed, given the nature of their profession they would be expected to do so. Although the evaluation of the moral basis for military action ultimately resides with secular public authorities, the Church should educate the public about the criteria for making such momentous decisions and participate in the national debate leading to the commitment of military forces. When factual and moral clarity exists, the Church may also opine on the justness of a particular commitment of force.

However, religious leaders should proceed cautiously when it comes to actions directly affecting the individual soldier, giving great deliberation to such conduct. One of the many lessons that this nation learned in the wake of Vietnam is that regardless of one's position on the legitimacy, legality, or wisdom of a particular military campaign, the individual soldiers called upon to fight in that campaign should not be the object of the emotional wrath of opponents to it. Opponents of military action should limit themselves to condemning the war, but not the warriors, so long as they fight it properly. The moral and legal consequences of initiating a questionable, or unjust, war properly is borne by those high-ranking government officials who ultimately are responsible for such military action, and not by the common soldier who is charged with executing that decision. This lesson appears to have been recognized by both the American people and the clergy, in the United States and abroad.

372. JAMES KITFIELD, PRODIGAL SOLDIERS: HOW THE GENERATION OF OFFICERS BORN OF VIETNAM REVOLUTIONIZED THE AMERICAN STYLE OF WAR 377 (1995) (During the Christmas season preceding Operation Desert Storm, American service members in South West Asia received "letters from people who said they couldn't support a war, yet who backed heart and soul the service members who might be asked to fight it. Perhaps most important, there were so many Americans who now understood the difference.").

373. See USCCB Feb. 2003 Statement, supra note 119, at 3 ("Our hearts and prayers go out especially to those who may bear the burden of these terrible choices—the men and women of our armed forces and their families . . . .").

374. In his post-invasion sermon, Australian Phillip Jensen, dean of Saint Andrew’s Anglican Cathedral, admonished: “[W]e must not attack the service-men and servicewomen who, obedient to the duly elected government of the day, are willing to lay down their lives to protect our freedom, including our
Further, the decision whether or not the individual soldier should participate in a particular military campaign must be an educated one, achieved after gathering all available facts and after seeking the advice and guidance of clergy. However, to the extent a service member bears the responsibility of making such educated decisions, the clergy's obligation to self-educate before taking a public position on the morality of a specific campaign is particularly acute. More importantly, the election to declare a war unjust, and to forbid the participation of members of the military, with all the associated ramifications visited upon the morally responsible soldier who elects to comply with such an edict, should be made under only the most compelling, and clear-cut, circumstances. Given the lack of factual clarity surrounding most military campaigns, and the continuing lack of consensus among some of the best legal and religious minds in the nation concerning the legality and justness of such controversial wars as Vietnam and Operation Iraqi Freedom, dispositive declarations that a particular military action is unjust, with a concomitant prohibition against participating in it, should be a virtual rarity. Ultimately, the decision as to the justness of a particular military campaign, and the appropriateness of participating in it, should be a matter left to the individual's conscience—a matter between the soldier and his or her God.