

## THE RETURNING WARRIOR AND THE LIMITS OF JUST WAR THEORY

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*In this essay, I seek to explore a Christian tradition that is neither the just war theory nor pacifism. Unlike pacifism, this tradition teaches that war is a necessary and inescapable aspect of the human condition, and that Christians cannot escape from engaging in it. Unlike just war theory, this tradition holds that engaging in war is intrinsically sinful, however justifiable that activity may be considered to be in the light of human law, morality or reason. Michael Walzer captured the essence of this way of thinking in a celebrated essay on the problem of "dirty hands."<sup>1</sup> Although Walzer's essay was chiefly about political rather than military action, he rightly observed that there was a strand in Christian reflection that saw killing, whether in a just or unjust war, as defiling or even sinful, even if it conformed to moral and legal standards. That tradition, though subordinate, still survives in Christian, especially Lutheran, thought.*

*The Church's thought about war and peace went through several phases before finally settling on the just war theory. Throughout much of the Middle Ages, the Church's approach to war was primarily pastoral and unsystematic. Although opinions varied widely depending on the circumstances, the early medieval Church was commonly skeptical of the permissibility of killing in warfare. Rather, the Church at that time tended to the view that killing – even in a just war – was sinful and required penance. The decisive change from that attitude towards a systematic just war theory took place during the great eleventh century Reform – some would say, Revolution -- under Pope Gregory VII (Hildebrand) and his immediate predecessors and twelfth century successors. These papacies marked the emergence of the Church as a prototype of the early modern European State, equipped with legislative authority,*

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See Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160 (1973).

*courts, a legal and administrative bureaucracy and even a military enforcement arm. As an essential part of this epochal transformation, the Papal program required the Church to abandon its earlier skepticism about war and to settle on the view that war could be justifiable, even sanctified.*

Just war theory has unquestionably become the predominant account of the morality of initiating war in contemporary secular thought.<sup>2</sup> Indeed, so pervasive is its influence that it was unsurprising to hear the President refer pointedly to it in his Nobel Prize acceptance speech on December 10, 2009, or even to learn that his Administration has sought to apply it to the execution of its military policies.<sup>3</sup> Even “revisionist” critics of the theory acknowledge its current hold on our public discourse.<sup>4</sup> Likewise,

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2. See James Turner Johnson, *The Just War Idea: The State of the Question*, 23 SOC. PHIL. & POL'Y 167 (2006); Michael Walzer, *The Triumph of Just War Theory (and the Dangers of Success)*, 69 SOC. RES. 925 (2002). See generally DAVID FISHER, MORALITY AND WAR: CAN WAR BE JUST IN THE TWENTY-FIRST CENTURY? (2011).

3. Just war theory has also been said to inform the Department of Justice's legal advice to the President concerning U.S. drone strike policy. Press Release, President Barack Obama, Remarks by the President at the Acceptance of the Nobel Peace Prize (Dec. 10, 1999), <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>. See Susan Brooks Thistlethwaite, *U.S. Drone Strike Policy: Just War or Just Targeted Killing?*, WASH. POST BLOG, (Feb. 7, 2013) [http://www.washingtonpost.com/blogs/guest-voices/post/us-drone-strike-policy-just-war-or-just-targeted-killing/2013/02/07/239e0696-712e-11e2-ac36-3d8d9dcaa2e2\\_blog.html](http://www.washingtonpost.com/blogs/guest-voices/post/us-drone-strike-policy-just-war-or-just-targeted-killing/2013/02/07/239e0696-712e-11e2-ac36-3d8d9dcaa2e2_blog.html).

Legal scholars have evaluated the President's and his Administration's views on just war doctrine. See STEPHEN CARTER, THE VIOLENCE OF PEACE: AMERICA'S WARS IN THE AGE OF OBAMA 21 (2011); David Luban, *What Would Augustine Do? The President, Drones, and Just War Theory*, BOSTON REV. (June 6, 2012), <http://www.bostonreview.net/david-luban-the-president-drones-augustine-just-war-theory>; Kenneth Anderson, *Just War Ethics in the Obama Nobel Prize Speech*, VOLOKH CONSPIRACY (Dec. 14, 2009), <http://www.volokh.com/2009/12/14/>. So, too, have media commentators, see, e.g., Joe Boyle, *Just War: From Augustine to Obama*, BBC NEWS (May 24, 2013), <http://www.bbc.co.uk/news/world-us-canada-22653473>. Without specifically referring to just war doctrine, the Catholic bishops of the American Church questioned whether the Administration's drone policy complies with “moral norms.” Peter Jesserer Smith, *Bishops Say Grave Concerns Remain Over Obama Drone War*, NAT'L CATHOLIC REG. (May 21, 2013), <http://www.ncregister.com/daily-news/bishops-say-grave-concerns-remain-over-obama-drone-war/>.

4. See Jeff McMahon, *Rethinking the Just War, Part I*, N.Y. TIMES, Nov. 11, 2012, [http://opinionator.blogs.nytimes.com/2012/11/11/rethinking-the-just-war-part-1/?\\_r=0](http://opinionator.blogs.nytimes.com/2012/11/11/rethinking-the-just-war-part-1/?_r=0); Jeff McMahon, *Rethinking the Just War, Part II*, N.Y. TIMES, Nov. 12, 2012, <http://opinionator.blogs.nytimes.com/2012/11/12/rethinking-the-just-war-part-2/>.

just war theory has long been the dominant opinion in Christian thought, and some thinkers in the mainstream even argue that pacifism is a Christian “heresy,” reflecting the perfectionist ideals of the eighteenth century rather than the Gospels.<sup>5</sup>

Nonetheless, debate both between and within the Christian churches over just war theory continues.<sup>6</sup> Despite its widespread current acceptance, however, the course of the theory did not always run smooth.<sup>7</sup>

For many centuries, the Christian Church was deeply skeptical about the permissibility of engaging in war and of military service, at least for its own members. Indeed, early Christian sources condemned such engagement as prohibited or sinful, and interpreted the Christian scriptures to have enjoined some form of pacifism upon believers.<sup>8</sup> (In the strong form usually relevant here, “pacifism” means the belief that it is wrong, for either moral or religious reasons, for the believer to use lethal force against a human target, in circumstances in which such a use of force risks the loss of the target’s life or serious injury to the target’s body, either under

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5. See Michael Novak, *Why the Church is Not Pacifist*, CRISIS MAGAZINE (June 1, 1984), <http://www.crisismagazine.com/1984/why-the-church-is-not-pacifist>. Novak’s argument was intended to track Reinhold Niebuhr’s chapter, *Why the Christian Church is not Pacifist*, in REINHOLD NIEBUHR, CHRISTIANITY AND POWER POLITICS 1 (1940).

6. Compare OLIVER O’DONOVAN, THE JUST WAR REVISITED (2003) with JOHN HOWARD YODER, WHEN WAR IS UNJUST: BEING HONEST IN JUST WAR THINKING (1984). For a discussion of both ancient and modern Jewish thought regarding war, see REUVEN FIRESTONE, HOLY WAR IN JUDAISM: THE FALL AND RISE OF A CONTROVERSIAL IDEA (2012). For a brief account of the Hebrew Bible’s view of war, see MICHAEL WALZER, IN GOD’S SHADOW: POLITICS IN THE HEBREW BIBLE 34 (2012). For the Book of Deuteronomy in particular, see Yoram Hazony, The Philosophy of Hebrew Scripture 153-54 (2012); Alexander Rofé, *The Laws of Warfare in the Book of Deuteronomy*, 32 J. Study Old Testament 23 (1985). For Moslem views, see John Kelsay, Arguing the Just War in Islam (2007); DAVID COOK, UNDERSTANDING JIHAD (2005); RUDOLPH PETERS, JIHAD IN CLASSICAL AND MODERN ISLAM (1996); JOHN KELSAY, ISLAM AND WAR: A STUDY IN COMPARATIVE ETHICS (1993).

7. For a critical evaluation of recent applications of just war doctrine to American military actions, see John Howard Yoder, *Just War Tradition: Is It Credible*, RELIGION ONLINE, <http://www.religiononline.org/showarticle.asp?title=107> (last visited Apr. 15, 2014).

8. For recent collections and translations of many primary sources with commentary, see GEORGE KALANTZIS, CAESAR AND THE LAMB: EARLY CHRISTIAN ATTITUDES ON WAR AND MILITARY SERVICE (2013); THE ETHICS OF WAR: CLASSIC AND CONTEMPORARY READINGS (Gregory M. Reichberg, Henrik Syse & Endre Begby eds., 2010).

State orders or in self-defense.)<sup>9</sup> Even now, the Christian “Peace” Churches – Mennonites, Quakers, Anabaptists and other heirs of the “Left Wing” or “Radical” Reformation<sup>10</sup> – vigorously maintain a Gospel-based pacifist position.<sup>11</sup> Further, among those Christians who accept the dominant just war teaching, there are sharp differences over its meaning and application.<sup>12</sup> Leading Christian Bibli-

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9. For a brief account of the various meanings of the term “pacifism,” see DAVID CORTRIGHT, PEACE: A HISTORY OF MOVEMENTS AND IDEAS 8-11 (2008); SEE GENERALLY MARTIN CEADEL, THINKING ABOUT PEACE AND WAR (1987); John Howard Yoder, *How Many Ways Are There to Think Morally about War?*, 11 J.L. & RELIGION 83 (1994) (providing categorizations of various positions). The definition given in the text above is intended to approximate closely to what Cortright calls “absolute” (as distinct from “contingent”) pacifism, but it leaves open the possibility of the legitimacy of the private use of lethal force to protect an innocent third party. See JEROME F.D. CREACH, VIOLENCE IN SCRIPTURE 221 (2013) (“Perhaps [Jesus] left open the possibility of defending the abused with physical force”). The New Testament appears to approve of one such act—Moses’ slaying of an Egyptian who was abusing a Hebrew (see Acts 7:24-5; Exodus 2:11-12). See David B. Kopel, *The Torah and Self-Defense*, 109 PENN ST. L. REV. 17, 23 (2004).

10. For a comprehensive account of the origins and beliefs of the peace churches, see PETER BROCK, PACIFISM IN EUROPE TO 1914 (1972). On the early Anabaptists, see James T. Johnson, *Two Kinds of Pacifism: Opposition to the Political Use of Force in the Renaissance-Reformation Period*, 12 J. STUD. 39, 51-56 (1984); Harold S. Bender, *The Pacifism of the Sixteenth Century Anabaptists*, 24 CHURCH HIST. 119 (1955). On early Quaker pacifism, see MEREDITH BALDWIN WEDDLE, WALKING IN THE WAY OF PEACE: QUAKER PACIFISM IN THE SEVENTEENTH CENTURY (2001); John Howard Yoder, *William Penn’s “Holy Experiment” in John Howard Yoder, Chapters in the History of Religiously Rooted NonViolence: A Series of Working Papers of the Joan B. Kroc Institute for International Peace Studies*, (Jun. 2011), <http://www3.nd.edu/~theo/jhy/writings/history/pennsexp.htm>. On the “Radical Reformation,” see Roland H. Bainton, *The Left Wing of the Reformation*, 21 J. RELIGION 124 (1941).

11. These churches may even go further than what I am here calling “pacifism,” by prohibiting even private violence intended to protect innocent third parties from harm. For a sensitive and informed discussion from the perspective of a leading Mennonite thinker, see JOHN HOWARD YODER, WHAT WOULD YOU DO? 11-42 (1992).

12. See, e.g., the debate between Rowan Williams, then Archbishop of Canterbury, and George Weigel, a leading American Catholic theologian, over whether the United Nations Security Council is the only “public authority” in the contemporary world empowered to declare a non-self-defensive war. George Weigel, *Moral Clarity in a Time of War*, FIRST THINGS (Jan. 2003), <http://www.firstthings.com/article/2008/01/001-moral-clarity-in-a-time-of-war-30>; Archbishop Rowan Williams, *Just War Revisited*, ROWAN WILLIAMS ARCHIVES (Oct. 14, 2003), <http://rowanwilliams.archbishopofcanterbury.org/articles.php/1827/just-war-revisited-archbishops-lecture-to-the-royal-institute-for-international-affairs>; George Weigel & Rowan Williams, *War & Statecraft*, FIRST THINGS (Mar. 2004), <http://www.firstthings.com/article/2007/01/war-and-statecraft-9>.

cal scholars even disagree over whether Jesus Himself should be understood to have been a proponent of revolutionary political violence or not.<sup>13</sup>

In this essay, I seek to explore a Christian tradition that is neither the just war theory nor pacifism. Unlike pacifism, this tradition teaches that war is a necessary and inescapable aspect of the human condition, and that Christians cannot escape from engaging in it. Unlike just war theory, this tradition holds that engaging in war is intrinsically sinful, however justifiable that activity may be considered to be in the light of human law, morality or reason.<sup>14</sup> Michael Walzer captured the essence of this way of thinking in a celebrated essay on the problem of “dirty hands.”<sup>15</sup> Although Walzer’s essay is chiefly about *political* rather than *military* action, he rightly observed that there was a strand in Christian reflection that saw killing, whether in a just or unjust war, as defiling or even sinful, even if it conformed to moral and legal standards.<sup>16</sup>

This way of thinking about war, although recessive in the Christian tradition, has not been obliterated. It survives especially in Lutheranism. For example, the German Biblical scholar Martin

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13. Compare S.G.F. BRANDON, JESUS AND THE ZEALOTS: A STUDY OF THE POLITICAL FACTOR IN PRIMITIVE CHRISTIANITY (1967) WITH MARTIN HENGEL, VICTORY OVER VIOLENCE, JESUS AND THE REVOLUTIONISTS (David E. Green trans., Fortress Press 1975) (1973).

14. Accordingly, the position I am describing differs from the “revisionist” critique of just war theory, even though it shares some of revisionism’s views. Revisionists point out that according to traditional just war theory, an individual soldier will do no wrong by fighting in an unjust war provided that the soldier complies fully with the *jus in bello*, or the rules that regulate the conduct of war. See Jeff McMahan, *Forum: The Moral Responsibility of Volunteer Soldiers: Should they say no to fighting in an unjust war?*, BOSTON REV. (Nov. 6, 2013), <http://www.bostonreview.net/forum/jeff-mcmahon-moral-responsibility-volunteer-soldiers>. The position I am describing agrees with revisionism in rejecting that consequence of just war theory. But revisionists also argue that individual soldiers (at least if they are volunteers) have a duty to examine whether a war in which they are called on to fight is just, and to refuse to serve if they conclude that it is unjust. Revisionists therefore seem to believe that if a soldier fights in what he or she conscientiously finds to be a just war, and observes the *jus in bello* while engaging in that conflict, that soldier has acted in a morally acceptable fashion. The position I am describing would hold that even such a conscientious soldier would nonetheless be committing sin (and moral wrong) if he were to take human life in such a war.

15. See Walzer, *supra* note 1.

16. *Id.* at 167, n. 8.

Hengel articulated it well towards the end of his masterful book, *Victory over violence*. Hengel wrote that

[T]he Christian knows that he faces a conflict that – humanly speaking – is insoluble. For the forms of human society in which he finds himself claim that, for their own protection and in order to preserve or establish freedom and justice, they cannot renounce the use of such destructive violence in cases of necessity, such as always arise . . . [But] [f]or the Christian, appeal to such “necessity” can never “justify” such violence; its use – even in self-defense – brings guilt upon the individual and upon society. The Christian knows that he cannot live in this world without now and then incurring guilt; but for this very reason he has no use of “self-justification” and palliation when he believes that he or the society of which he is a part cannot, for the sake of justice, forgo taking human life.<sup>17</sup>

The conception of a situation in which an agent is both compelled to engage in destructive violence in order to preserve certain values, and yet at the same time sin because he does so, is deeply rooted in Lutheran thought. As the great German philosopher G.W.F. Hegel (a Lutheran, albeit an unorthodox one) argued, such a situation embodies the essential structure of tragedy, in which the “ethical substance” or “ethical order” is divided against itself.<sup>18</sup> “For Hegel tragedy is the conflict of two substantive positions, each of which is justified, yet each of which is wrong to the extent that it fails either to recognize the validity of the other position or to grant it its moment of truth.”<sup>19</sup> The tragic hero “acts both for and against the good”; she is “both innocent and guilty: innocent insofar as she adheres to the good by acting on behalf of a just principle; guilty insofar as she violates a good and wills to identify with that violation.”<sup>20</sup>

Guilt without fault seems a strange or even repellent notion to most of us, and perhaps especially so to those trained in the law. A soldier who has fought honorably and lawfully in a just war, or even killed in such a conflict, should (we consider) have nothing for which to repent. Troubled as that soldier might well be to recall what he or she has seen or done, it would (we say) be irrational to

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17. HENGEL, *supra* note 13, at 65.

18. See KLAUS BRINKMANN, IDEALISM WITHOUT LIMITS: HEGEL AND THE PROBLEM OF OBJECTIVITY 195 (2011).

19. Mark W. Roche, *The Greatness and Limits of Hegel's Theory of Tragedy*, in A COMPANION TO TRAGEDY 51, 52 (Rebecca Bushnell ed., 2005).

20. *Id.* at 54.

feel personal guilt or shame on that account. Yet the experience of returning warriors is often directly to the contrary of our (rationalist and optimistic) view. In David Finkel's unflinching account of the after-war experiences of several American veterans returning home from wars in Iraq or Afghanistan, one veteran (Nic) admits that he is afraid to tell his wife (Sascha) about the nightmares he repeatedly has about killing. Nic explains his silence by saying that he fears that Sascha will hate him: "What kind of person has dreams like that?", he asks.

"I don't hate you," Sascha says.

"So do you feel like a monster?" the counselor asks.

"I feel like a monster," Nic says, turning to Sascha.

"It's not your fault," the counselor says.

"I know it's not my fault," Nic says, and then when no one says anything, not the counselor or Sascha, he says, crying harder now, "Oh fuck."<sup>21</sup>

Nic's overwhelming sense of guilt – inescapable despite his consciousness that he is in no way at fault—illustrates the tragic predicament in which many other returning warriors over the centuries have found themselves.<sup>22</sup> Nic thinks of himself as a "monster" even though he knows that he is an innocent. This common experience, I believe, plays a critical role in understanding the background to the western Church's turn away from its earlier view of war (which sought to alleviate that unbearable burden of guilt) to the just war theory (which entails that such guilt is mistaken and irrational).

My chief object in this paper is thus to explore the relationship between a "tragic" conception of warfare, which deems war-making to be both inescapably necessary and yet inherently sinful, and the just war theory, which holds that war-making in itself is intrinsically neither good nor evil and indeed, may be fully justified in some circumstances.<sup>23</sup> The early medieval church held the view

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21. DAVID FINKEL, THANK YOU FOR YOUR SERVICE 65-66 (2013).

22. See Part III, *infra*.

23. John C. Yoo and I have examined just war doctrine critically, in a non-religious setting, in Robert J. Delahunty & John C. Yoo, *From Just War to False Peace*, 13 CHI. J. INT'L L. 1 (2012). See also Robert Delahunty & John Yoo, *Making*

that killing – even in a just war – was sinful and required penance.<sup>24</sup> This was true even though the papacy had itself sponsored or engaged in wars, *e.g.*, from the late-eighth century onwards against the Saracens.<sup>25</sup> What is interesting is to see when, and why, the Church's attitude to warfare decisively and lastingly changed. We know that by the 12<sup>th</sup> century a form of just war doctrine was the emerging position of the Western Church. Fashioned out of materials quarried from the writings of St. Augustine,<sup>26</sup> this

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*War*, 93 CORNELL L. REV. 123, 139-49 (2007) (reviewing early modern just war theories).

24. “[W]ar was deemed to be a sinful occupation and killing in battle, even when fighting for lord or king in a just cause, had to be atoned for by penance.” KARL LEYSER, COMMUNICATIONS AND POWER IN MEDIEVAL EUROPE: THE CAROLINGIAN AND OTTONIAN CENTURIES 43 (Timothy Reuter ed., 1994).

25. See John Gilchrist, *The Papacy and War against the ‘Saracens’*, 795-1216, 10 INT'L HIST. REV. 174, 179 (1988). (“[T]he papacy from the late eighth century onwards conducted aggressive war in Italy against its enemies – essentially those who blocked its territorial ambitions – and from the late eleventh century ardently espoused war against Muslims throughout the Mediterranean”).

26. The view that Augustine *originated* just war theory remains standard, but has encountered substantial criticism in recent scholarship. See PHILLIP WYNN, AUGUSTINE ON WAR & MILITARY SERVICE 9-31 (2013). The main criticisms of the standard view are three-fold. First, Augustine never treated the subject of just war in a comprehensive or systematic way; although he has occasional references to the topic (some of which were later fashioned by canonists into a true *doctrine* of justice in war), his remarks are generally fragmentary, scattered, and made in a pastoral context. Second, Augustine’s various treatments of the topic vary with the occasion and contradict one another. Broadly speaking, his later writing is more critical of war of *any kind* than is his earlier work. Third, throughout most of the Middle Ages, until about the start of the Gregorian Reform, there was no recognizably doctrinal discussion of justice in war that consciously followed Augustine – an absence that would be strange if he had invented it in the fourth century. If this view of Augustine is correct, it would reinforce a main contention of this paper – that the just war doctrine was fashioned by leading prelates and lawyers during the Gregorian Reforms in order to serve the interests and further the programs of the papacies of that period. Thus, the emergence of just war doctrine in the eleventh century would not be a “return” to or “recovery” of Augustinianism, but rather a more radical breach with the Church’s earlier thinking, which used ingredients drawn from Augustine’s writings but which could not be said to represent *his* fully considered and final position.

Nonetheless, in this paper I will generally assume the truth of the “standard” view that Christian just war doctrine originated with Augustine. Although I consider the objections to the standard view to be correct, the Gregorian reformers probably thought that they were *re-appropriating* Augustine’s ideas, not fashioning something unprecedented out of them. Moreover, since the *revisionist* view is more favorable to my argument, it will strengthen my case if I can establish it on the assumption of the *standard* view.

emergent doctrine is found, e.g., in the celebrated Causa 23 of Gratian's *Decretum* (ca. 1141).<sup>27</sup> Although earlier medieval penitential writers had advised confessors to require soldiers returning from battle to impose penances for any killing they had done, "Gratian himself vigorously rejected the notion that guilt attached to soldiers who killed enemy troops in a just war."<sup>28</sup>

The decisive intervening events occurred during the Gregorian Reform (or Revolution<sup>29</sup>) of the eleventh century. These episodes included Pope Gregory VII's offer of the absolution of sins to the warriors who would fight for the Papacy in Germany – an offer that was perceived as "a startling development" to all those accustomed to the Church's earlier views.<sup>30</sup> Indeed, H.E.J. Cowdrey,

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27. Relevant extracts from Gratian's *Decretum* can be found in THE ETHICS OF WAR, *supra* note 8, at 125. For a very helpful commentary on Causa 23, see Ernst-Dieter Hehl, *War, Peace and the Christian Order*, in 4 THE NEW CAMBRIDGE MEDIEVAL HISTORY PART I, 185, 218-22 (David Luscombe & Jonathan Riley-Smith eds., 2004).

28. James A. Brundage, *The Hierarchy of Violence in the Twelfth- and Thirteenth-Century Canonists*, 17 INT'L HIST. REV. 670, 679 (1995).

29. See GERD TELLENBACH, CHURCH, STATE AND CHRISTIAN SOCIETY AT THE TIME OF THE INVESTITURE CONTEST 111 (R.F. Bennett trans., 1940) (locating in ideas from the mid-eleventh century the beginning of "a great revolution in world-history" soon to be led by Gregory VII). Later scholars have also insisted on the revolutionary character of Gregory VII's papacy. See KARL LEYSER, COMMUNICATIONS AND POWER IN MEDIEVAL EUROPE: THE GREGORIAN REVOLUTION AND BEYOND 1-20 (1994) (Gregorian era saw the "first European Revolution"); HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 99-107 (1983) (specifying criteria for "revolution" and contending that Gregorian era changes satisfied them); NORMAN CANTOR, CHURCH, KINGSHIP AND LAY INVESTITURE IN ENGLAND 6-9 (1958) (characterizing investiture controversy as one of four great "World Revolutions"). Berman's work in particular was inspired by EUGEN ROSENSTOCK-HUESSY, OUT OF REVOLUTION: THE AUTOBIOGRAPHY OF WESTERN MAN (2d ed. 1969). For a brief survey and appraisal of later scholarship on the questions whether the mid-to-late-Eleventh Century witnessed a "revolution" (and, if so, whether it was "Gregorian"), see KATHLEEN G. CUSHING, PAPACY AND LAW IN THE GREGORIAN REVOLUTION: THE CANONISTIC WORK OF ANSELM OF LUCCA 12-15 (1998). As the title of Cushing's work indicates, she too appears to believe that the description was correct.

Of particular relevance here, however, later scholarship suggests that the legal innovations associated with the "Gregorian Revolution" may not have been as radical and discontinuous with earlier law as Berman, for one, had argued. See GRETA AUSTIN, SHAPING CHURCH LAW AROUND THE YEAR 1000: THE DECRETUM OF BURCHARD OF WORMS 235-36 (2009). For a brief overview of the historiography of the period, see KATHLEEN G. CUSHING, REFORM AND THE PAPACY IN THE ELEVENTH CENTURY: SPIRITUALITY AND SOCIAL CHANGE 32-37 (2005).

30. LEYSER, COMMUNICATIONS AND POWER: CAROLINGIAN AND OTTONIAN CENTURIES, *supra* note 24, at 43.

Gregory VII's leading biographer, assigns the major responsibility for the change in the Church's attitude to war to Gregory *personally*:

[R]ight into the second half of the eleventh century, and therefore on the very eve of the First Crusade, the Christian West was also teaching that killing in warfare, however legitimate the cause, was gravely sinful and merited severe penance. From this point of view, warfare was far from having the Church's blessing and approval: it stood under its condemnation. Far from being a legitimate service in the name of Christ, the profession of arms was not really fitting for a Christian man . . . . The change of mind that occurred in the late eleventh century was largely owing to one man, who, as Hildebrand, was archdeacon of Rome in 1059 to 1073, and who, as Gregory VII, was pope from 1073 to 1083 . . . . No aspect of this change of front in the so-called Gregorian Reform is more significant than the transformation of the Church's official attitude to warfare, so that, from being inherently sinful, it was, or at least might be, meritorious to engage in it, and so promote "right order" in human society by force of arms.<sup>31</sup>

Likewise, the distinguished historian of canon law, James Brundage, has argued that:

The really radical change in papal policy toward warfare . . . occurred during the reign of that most warlike of pontiffs, Pope Gregory VII (1073-85). It has been argued, with considerable justice, that Gregory VII revolutionized the Christian view of warfare and that he was the principal inventor of the holy war idea in medieval Christendom.<sup>32</sup>

It is fascinating too that the great Russian novelist, Fyodor Dostoyevsky, seems to have seen this period in the history of the Latin Church as marking a decisive change. In his novel *The Brothers Karamazov*, he has his Grand Inquisitor (a figure apparently representing the Latin Church) say to the returning Christ:

For a long time now – eight centuries already – we have not been with you, but with *him*. Exactly eight centuries ago we took from

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31. H.E.J. Cowdrey, *The Genesis of the Crusades: The Springs of Western Ideas of Holy War*, in THOMAS PATRICK MURPHY, THE HOLY WAR 9, 17-19 (1976).

32. James A. Brundage, *The Holy War and the Medieval Lawyers*, in THOMAS PATRICK MURPHY, THE HOLY WAR 99, 104 (1976).

him what you so indignantly rejected . . . . [W]e took Rome and the sword of Caesar from him.<sup>33</sup>

This epochal transformation is the focus of the present study. In a word, my argument is that the just war theory went wrong by eliminating the *grounds*, but not the *need*, for expiation after killing in war. A deeper understanding would explain both need and grounds.

In Part I below, I briefly outline the teachings on war in the New Testament and the early Church through to the end of the third century.

In Part II, I introduce the subject of the “penitentials” – the documents that provide the core of my evidence for an historical Christian position that is neither just war doctrine nor pacifism. I shall explain what the penitentials were, the purposes for which they were used, and their relevance to Christian thinking about killing in war, including public war.

In Part III, I address the situation of the “returning warrior”—a theme that has haunted the Western imagination since Homer’s *Odyssey*. In this Part, I summarize a large body of evidence in support of the claims that (most) human beings have a strong inhibition against killing their fellow humans in (close) combat, and that they experience a need or desire for purification or forgiveness if they do commit such killing. This survey is designed to illuminate the spiritual and psychological attitudes to which the penitentials’ teaching on “homicide” in war was addressed.

In Part IV, I sketch out a theory why the understanding of war and killing found in the penitentials was displaced in later Christian thought by the just war theory. I suggest that two converging lines of teaching were at work: one whose source was the Papacy, the other whose source was canon law. Both lines of development, I shall argue, served the policies and ambitions of the Church before and during the Gregorian papacies of the mid-to-late eleventh century and after. The programmatic necessities of the Gregorian Popes, I shall argue, led the Church to adopt an “Augustinian” way of thinking about war and to discard the alternative represented by the penitentials.

Finally, I shall conclude by considering whether this radical reorientation of the Church’s teaching involved a significant loss for Christianity. By adopting a highly legalized understanding of

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33. Fyodor Dostoyevsky, *The Brothers Karamazov* 257 (Richard Peaver & Larissa Volokhonsky trans., Farrar, Straus, & Giroux 2002) (1976).

war, did the Church forsake an alternative that afforded greater psychological realism, deeper moral insight, and closer fidelity to the Gospels?

## I.

It would obviously be impossible in an essay on this scale to survey the course of Christian thought on war and peace over several centuries. Nonetheless a very short sketch must be attempted. This Part is divided into two sections: one dealing with the sacred texts of Christianity, the next with early Church history. Thereafter, in Part II, I will turn to the special concern of this essay, the Celtic (and later) penitentials.

### A. *The New Testament*

The New Testament's teaching on war has seemed ambiguous to many Christians.<sup>34</sup> One careful New Testament scholar has recently concluded that the question of Jesus' attitude to "just" wars is "impossible to answer with certainty."<sup>35</sup> The texts marshalled below have provided Christians with material for thought, reflection and debate for centuries, without yielding conclusions that command general agreement.

On the one hand, in the Sermon on the Mount, Jesus enjoins what seems to be a pure form of pacifism:

You have heard that it was said, "An eye for an eye and a tooth for a tooth." But I say to you, Do not resist an evildoer. But if anyone strikes you on the right cheek, turn the other also; and if anyone wants to sue you and take your coat, give your cloak as well; and if anyone forces you to go one mile, go also the second mile . . .

You have heard that it was said, "You shall love your neighbor and hate your enemy." But I say to you, Love your enemies and pray for those who persecute you, so that you may be children of your Father in heaven; for he makes his sun rise on the evil and on the good, and sends rain on the righteous and on the unright-

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34. For a classic interpretation of the scriptural sources from a Christian pacifist's viewpoint, see C. JOHN CADOUX, THE EARLY CHRISTIAN ATTITUDE TO WAR (1919).

35. CREACH, *supra*, note 9 at 221. Creach adds, however, that "none of the teachings of Jesus directly promotes or even offers support for the use of force, even against a brutal aggressor." *Id.*

eous. For if you love those who love you, what reward do you have? Do not even the tax collectors do the same? And if you greet only your brothers and sisters, what more are you doing than others? Do not even the Gentiles do the same? Be perfect, therefore, as your heavenly Father is perfect.<sup>36</sup>

And Jesus' actions correspond closely to that teaching. When a party comes to arrest Him on the evening before the Crucifixion, one of Jesus' disciples raises his sword to defend Him and cuts off the ear of a slave of the High Priest. "Then Jesus said to him, 'Put your sword back into its place; for all who take the sword will perish by the sword.'"<sup>37</sup> Again, Jesus appears to be teaching non-resistance to violence.

But other scriptures in the New Testament arguably contradict this understanding. There are, e.g., several reported encounters between Jesus and Roman centurions.<sup>38</sup> These reports portray the centurions in a highly favorable light – incongruously, it would seem, if their chosen profession of arms were intrinsically a sinful one like, say, pimping. Jesus even accepts, without demurral, a direct comparison between His spiritual authority and the authority of a centurion over his troops, and indeed praises the centurion who offers the comparison for his singular faith.<sup>39</sup> Likewise, in the Apostle Peter's dealings with the Roman centurion Cornelius, the centurion emerges as a man of faith, fit for baptism; indeed, an angel visits him.<sup>40</sup> And when Roman soldiers sought out John the Baptist, he advises them: "Do not extort money from anyone by threats or false accusation, and be satisfied with your wages."<sup>41</sup> Again, this passage seems to legitimize the profession of soldiering (and was much emphasized for that purpose by St. Augustine).<sup>42</sup>

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36. *Matthew* 5:38-41, 43-8 (New Revised Standard Version). For a close commentary from an Evangelical Christian perspective on these passages, exploring alternative readings and finding the teaching of non-violence in the texts, see Richard B. Hays, *The Moral Vision of the New Testament: A Contemporary Introduction to New Testament Ethics* 319-29 (1996).

37. *Matthew* 26:52

38. See *Matthew* 8:4-14; *Matthew* 27:54; *Mark* 15:39; *Luke* 7:1-7; and *Luke* 23:47.

39. See *Matthew* 8:10.

40. See *Acts* 10:1-23.

41. *Luke* 3:14.

42. On the favorable portrayal of Roman Army officers in the New Testament, see JOHN F. SHEAN, *SOLDIERING FOR GOD: CHRISTIANITY AND THE ROMAN ARMY* 144-46 (2010) (Shean argues that these portrayals suggest that the early Church evangelized and welcomed military converts).

Then there are the various Gospel accounts of an incident known as Jesus' cleansing of the Temple in Jerusalem. In John's version of the event, Jesus found people in the Temple selling cattle, sheep, and doves, and the money changers seated at their tables. Making a whip of cords, he drove all of them out of the temple, both the sheep and the cattle. He also poured out the coins of the money changers and overturned their tables. He told those who were selling the doves, "Take these things out of here! Stop making my Father's house a marketplace!"<sup>43</sup> Although Jesus' use of a whip here may have been directed only to sheep and cattle,<sup>44</sup> the passage has been construed to permit righteous violence against human wrongdoers.

Both Chapters 13:1-7 of Paul's *Epistle to the Romans*<sup>45</sup> and Revelation have also figured prominently in the long debate. Paul's counsel to the early Christian community at Rome has often been understood to mandate the practice of submissiveness to the commands of whatever the governing authority happens to be. On the other hand, the depiction of the Roman Empire in *Revelation* as "Babylon"<sup>46</sup> is so uncompromisingly hostile that one might wonder whether early Christians were indeed obligated to recognize the Empire's temporal authority and to honor its commands. Likewise, we may contrast the Apostle Peter's injunction "Honor the Emperor,"<sup>47</sup> with the same Apostle's statement that "We must obey God rather than any human authority."<sup>48</sup>

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43. *John* 2:14-16.

44. See JOHN HOWARD YODER, THE POLITICS OF JESUS: VICIT AGNUS NOSTER 42-43 (2d. ed. 1994). For a close and scholarly reading of the text that concurs in Yoder's interpretation, see N. Clayton Croy, *The Messianic Whippersnapper: Did Jesus Use a Whip on People in the Temple (John 2:15)?*, 126 J. BIBLICAL LITERATURE 555 (2009). See also Mark R. Bredin, *John's Account of Jesus' Demonstration in the Temple: Violent or Nonviolent?*, 33 BIBLICAL THEOLOGY BULL. 44 (2003).

45. These verses were often cited, most particularly perhaps in traditional Lutheran circles, in support of the view that the Christian was bound to submit to secular authority. For an important post-Second World War explication by a leading Lutheran Biblical theologian, see ERNST KÄSEMANN, COMMENTARY ON ROMANS 350-59 (Geoffrey W. Bromiley ed. & trans., 1980).

46. See Wayne Meeks, *Apocalyptic Discourse and Strategies of Goodness*, 80 J. RELIGION 461, 465-66 (2000).

47. 1 Peter 2:16.

48. *Acts* 5:29 (New Revised Standard Version). For analysis of the conflicting trends in the New Testament's thought on politics, see Frances Young, *Christianity, in CHRISTOPHER ROWE & MALCOLM SCHOFIELD, THE CAMBRIDGE HISTORY OF GREEK AND ROMAN POLITICAL THOUGHT* 635, 637-39 (Simon Harrison and Melissa Lane eds., 2006).

Finally, the author of the *Epistle to the Hebrews*, in a long paean to the Jewish heroes and heroines who had steadfastly kept their faith, wrote:

For time would fail me to tell of Gideon, Barak, Samson, Jephthah, of David and Samuel and the prophets—who through faith conquered kingdoms, administered justice, obtained promises, shut the mouths of lions, quenched raging fire, escaped the edge of the sword, won strength out of weakness, became mighty in war, put foreign armies to flight.<sup>49</sup>

There is no trace of pacifism here.

In addition to these longstanding interpretative difficulties, the just war scholar James Turner Johnson has identified another issue. Johnson argues that even if the New Testament texts are taken to prescribe pacifism, the question remains whether they did so “because they regarded violence itself as always and inexorably evil” or because they were written in the mistaken belief that the world was soon to end, and that believers should attempt to practice the “morally pure life” that the new age would usher in.<sup>50</sup> Johnson points out that New Testament scholars disagree over the importance of the eschatological element in Jesus’ teaching, with some scholars taking the view that Jesus and His followers had apocalyptic expectations and believed that the end of the present age was at hand.<sup>51</sup> If Jesus was an apocalyptic prophet and early Christianity was a millenarian movement, then, Johnson contends, the New Testament’s teachings on violence represent a kind of *interimsethik*, binding on Jesus’ followers only during the interval between the death of Jesus and His second coming. During that interval, Christians should hold themselves apart from the world and seek to live now in ways that anticipated the age to follow. In particular, Christians should hold themselves apart from the State and the violence associated with it, whether in judicial

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49. *Hebrews* 11:32-34 (New Revised Standard Version).

50. JAMES TURNER JOHNSON, THE QUEST FOR PEACE: THREE MORAL TRADITIONS IN WESTERN CULTURAL HISTORY 13 (1987).

51. For a recent statement of that view, see BART D. EHRMAN, DID JESUS EXIST? THE HISTORICAL ARGUMENT FOR JESUS OF NAZARETH 298 (2012) (“Jesus was an apocalyptic prophet who predicted that the end of this evil age is soon to come and that within his generation God would send a cosmic judge of the earth, the Son of Man, to destroy the forces of evil and everyone who has sided with them and to bring in his good kingdom here on earth.”). For a defense of the view that Jesus was *not* an apocalyptic prophet (but was misrepresented as one by the apostolic church), see J.A. T. ROBINSON, JESUS AND HIS COMING (1957).

executions or military combat. Once it became apparent, however, that Jesus would not return soon, the Church could have, and would have, come to terms with the world, in particular by abandoning the ideal of the life of nonviolent resistance. Instead, the Church would seek to restrict the circumstances in which believers participated in State violence, but would not forbid such activity altogether.

Obviously, the question whether the New Testament's teachings – above all, the Sermon on the Mount – represent an abiding command, binding even now, to live a certain kind of life or merely state a provisional ethic is far too large to attempt to settle here. Indeed, I would note that there are really at least *three* distinct questions: 1) whether Jesus Himself believed and taught that the present age was soon to end and that His return (*the parousia*) was imminent; 2) if so, whether He laid down His ethical teaching on violence in that belief; and 3) whether the delay in the *parousia* instigated a crisis in the early Church, leading it to reappraise Jesus' teachings. New Testament scholars have vigorously debated these issues.<sup>52</sup> Johnson's argument seems to assume at least the last of the three points; but at least one leading recent New Testament scholar, N.T. Wright, finds it unsupported by the evidence.<sup>53</sup> Indeed, Wright concludes that even in the second century, "there is no sense that Christianity had changed its character or been put in jeopardy, by the failure of Jesus to return within a generation of Easter."<sup>54</sup> Likewise, in his standard work on eschatology, Hans Schwarz found, "We cannot detect a disappointment either with Jesus or in the early Christian community in general over . . . the expectation of an imminent future event . . . [B]oth the Jesus of history and the early Christian community were rather close to each other in their expectation of the future and that

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52. For summaries of aspects of these debates, see Randall Otto, *Dealing with Delay: A Critique of Christian Coping*, 34 BIBLICAL THEOLOGY BULL. 150 (2004); Howard Marshall, *Slippery Words: I. Eschatology*, 89 EXPOSITORY TIMES 264 (1978). Among other results to have emerged from these debates, there is ample reason to doubt that the delay of the *parousia* caused a crisis within the early Church. See Richard H. Bauckham, *The Delay of the Parousia*, 31 TYNDALE BULL. 3, 19-28 (1980); Charles H. Talbert, *II Peter and the Delay of the Parousia*, 20 VIGILIAE CHRISTIANAE 137 (1966).

53. See N.T. WRIGHT, THE NEW TESTAMENT AND THE PEOPLE OF GOD 342-43 (1992); see also Bauckham, *supra* note 52, at 19-28; Talbert, *supra* note 52, at 137.

54. WRIGHT, *supra* note 53, at 343.

expectation did not include the concept of imminence.”<sup>55</sup> In any case, it may well be that Johnson has posed a false dilemma: the ethic prescribed and practiced by an apocalyptic community may also be intended to endure for as long as that community does.

### B. The Early Church

The teachings and practices of the early Church have an exceptional (and continuing) significance for later Christian thought. While not as authoritative as the New Testament itself, they are considered to have a unique value, both as guiding the interpretation of the scriptures and as supplementing scriptural teaching when interpretation does not yield definitive answers. Because of those reasons, as well as because of the scarcity (and occasionally the ambiguity) of evidence, the question of the early Church’s views remains controversial, despite the undoubted advances made by recent scholarship.<sup>56</sup> Two basic disagreements persist: first, whether the Church from the apostolic period up to the late third century (and even after) was predominantly pacifist in outlook; and second, whether the conversion of Constantine to Christianity in 312 marked a decisive departure from the earlier Church’s attitudes to war (as well as much else).<sup>57</sup>

I cannot possibly hope to treat these important subjects fully here. Moreover, the state of the evidence must induce caution. Given that for much of its early existence the Church was an underground, persecuted and decentralized organization, it is hard to affirm with confidence how large a Christian presence there was in

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55. HANS SCHWARZ, ESCHATOLOGY 118 (2000).

56. For recent studies coming to very different conclusions, compare Kalantzis, *supra* note 8 with PETER J. LEITHART, DEFENDING CONSTANTINE: THE TWILIGHT OF AN EMPIRE AND THE DAWN OF CHRISTENDOM ch. 12 (2010).

57. It has even been disputed whether Constantine’s conversion was genuine or opportunistic. Reason to question Constantine’s sincerity has been found in the fact that he sought baptism only when he was close to death in 337 – about twenty-five years after the famous vision of the Cross (or of the “Chi-Rho” symbol) before the Battle of the Milvian Bridge that led to his conversion in 312. For a review of this controversy, see Paul Keresztes, *Patristic and Historical Evidence for Constantine’s Christianity*, 42 LATOMUS 84 (1983). The best explanation for the delay between Constantine’s conversion and his baptism may well be, however, was that it was consistent with the years-long process of preparing potential converts for reception into the Church that is described in third and fourth century Christian documents. See Alan Kreider, *Conversion and Christendom: An Anabaptist Perspective* (Paper presented at Mennonite-Roman Catholic international dialogue (Dec. 2000), <http://personal2.stthomas.edu/gwschlabach/kreider.htm>.

the Roman Army before the third century – although we can be reasonably confident that there *was* such a presence by the early third century.<sup>58</sup> Indeed, the existence of the “Theban Legion” – a Roman legion to which the Christian Saint Maurice belonged at the time of his martyrdom in c. 286 – though once regarded as a legend,<sup>59</sup> appears now to have a basis in fact.<sup>60</sup> And even where evidence can be found, it is open to debate whether Christian service in the military was approved of, condemned or simply ignored by Church authorities, or whether they spoke, or would have spoken, with a single voice.

On balance, however, I agree with George Kalantzis’ recent argument that “the literary evidence confirms the very strong internal coherence of the Church’s non-violent stance for the first three centuries.”<sup>61</sup> That conclusion can be based, not only upon the writing of early Christian theologians, but also on more pastoral documents, including “Church Orders” and Conciliar Canons, and on

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58. In the late 1990s, Israeli archaeologists excavated a site near Tel Megiddo that the excavators identified as the earliest Christian church in the Holy Land, dating it to the first half of the third century, around 230, *i.e.*, before the reign of the persecuting Emperor Maximilian began in 235. The church was located near a Roman military camp that had been established during the second and third centuries. At least two Roman legions, the Second *Traiana* and the Sixth *Ferrata*, were stationed there. The entire region came to be known as *Legio* (Legion). The church was constructed for the use of the Christian community attached to the military base, which in all likelihood included Christian soldiers serving in the Army.

An inscription in the church indicates that a Christian woman named Akeptous dedicated a table in the center of a prayer hall for the use of the congregation. The inscription reads: “The God-loving Akeptous has offered the table to God Jesus Christ as a memorial.” The inscription is the earliest yet to be found in Israel that refers to “Jesus Christ.” The term “memorial” (*mnemosynon*) points to the presence of Christian soldiers in the congregation. In the Acts of the Apostles 10:4, where the Roman centurion Cornelius becomes the first Gentile convert to Christianity, an angel tells him that his prayers and alms have ascended as a *mnemosynon*. The epigraphical and numismatic evidence, together with the remains of pottery found on the site are also consistent with the early dating. See Vassilios Tzaferis, *Oldest Church Found? Inscribed “To God Jesus Christ”*, 33 BIBLICAL ARCHAEOLOGY REV. (Mar./Apr. 2007), <http://www.bib-arch.org/online-exclusives/oldestchurch-02.asp>. Overall, Shean’s recent study finds that “the inscriptional evidence for Christian soldiers prior to Constantine is meager but not insignificant.” SHEAN, *supra* note 42, at 185. Only eight inscriptions can be securely identified as pre-Constantinian. Id.

59. For the historical difficulties in the account, see SHEAN, *supra* note 42, at 199-200.

60. See Donald F. O'Reilly, *The Theban Legion of St. Maurice*, 32 VIGILIAE CHRISTIANAE 193 (1978).

61. KALANTZIS, *supra* note 8, at 7.

the biographies of early saints. And while there is indeed evidence from the late second century and after that individual Christians had enlisted (or remained) in the Roman Army after their baptism,<sup>62</sup> that evidence seems to me insufficient to show that the prevailing Christian teaching and practice in the first three centuries was not pacifist. As Kalantzis observes, we have *no* written evidence from the first three centuries that:

Christians were actively encouraged to participate in warfare or to pursue military service as a pious, Christian, vocation or civic duty . . . [T]here is [not] a single writer from this period who promotes, or even condones, such a practice . . . On the contrary, early Christian writers uniformly assumed a basic posture of pacifism.<sup>63</sup>

Accordingly, I shall limit myself here to a brief survey of the evidence. This review has three parts. First, I will consider the statements of three leading theologians of the early Church: Tertullian, Origen and Lactantius. Second, I will mention the most relevant pastoral documents of the early Church, most importantly the “Church Orders,” but also a perplexing and controversial Canon from the Synod of Arles (314). Finally, I will take up one of the so-called *Acts of the Military Martyrs*.

*Tertullian.* The earliest Church father to address the question of a Christian’s participation in military service with specificity and in depth was Tertullian of Carthage (ca. 160-220), sometimes known as the “father of Latin theology.” In his book *Idolatry (De idolatria)*, Tertullian addressed a variety of arguments that had been put forward to justify some Christians’ decisions to join the Roman Army (or to remain in it after conversion). The bare fact that Tertullian felt compelled to answer these arguments suggests, of course, that some individual Christians of the late second century were engaging in, or at least contemplating, military careers; but we cannot say how widespread the practice was, nor what the-

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62. For a survey of some of the evidence of a pre-Constantinian Christian presence in the Roman Army, see WYNN, *supra* note 26, at 37-38.

63. KALANTZIS, *supra* note 8, at 45. One should, however, note the figure of Sextus Julius Africanus, a Christian who was also a Roman Army officer, a diplomat, and a writer on military affairs. Africanus’ work *Kestoi* dealt with topics such as military morale, tactics and swordsmanship. Unfortunately, most of his work has been lost. See SHEAN, *supra* note 42, at 193-94; Christopher Jones, *Christians in the Roman Army: Countering the Pacifist Narrative*, RIVERS FROM EDEN (Apr. 20, 2012), <http://riversfromeden.wordpress.com/2012/04/20/christians-in-the-roman-army>.

ologists, bishops or pastors of the period (other than Tertullian) made of it.<sup>64</sup>

The arguments attempting to justify participation in the military seem to have taken several forms: that rank and file soldiers (unlike officers) were not required to conduct pagan sacrifices or to order capital punishments; or that military service was justified by Biblical precedent, including Moses' use of a rod, Aaron's wearing of a buckle, John the Baptist's girdling himself with a belt (all items of Roman military equipment); by Joshua's leadership of a military host and the Apostle Peter's use of a sword; and, by the advice that John the Baptist gave to the Roman soldiers who came to him and by the confessions of faith on the part of centurions that are recorded in the New Testament. In chapter 19 of *Idolatry*, Tertullian rejects all these arguments:

The question is whether a believer can become a soldier and whether a soldier can be admitted into the faith, even if he is a member only of the rank and file who are not required to take part in sacrifices or capital punishments. There can be no compatibility between the divine and the human sacrament [i.e., the

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64. The question of Christian service in the Roman Army does not seem to have arisen before the late second century. The reason appears to be two-fold: first, the military needs of the Empire did not require the enlistment of Christians until that period; and Christian pastors likely counseled young Christian men not to pursue military careers, if only because of the many occasions for sin that such careers would present, including Emperor worship and fornication. (Soldiers were not allowed to live in marriage or to marry.) In any case, many early Christians were ineligible for military service as Jews, slaves or women. See Edward A. Ryan, S.J., *The Rejection of Military Service by the Early Christians*, 13 THEOLOGICAL STUD. 1, 8-12 (1952). (It should be observed, however, that Jews could and did earn Roman citizenship through military service. See Andrew J. Schoenfeld, *Sons of Israel in Caesar's Service: Jewish Soldiers in the Roman Military*, 24 SHOFAR 115 (2006); SHEAN, *supra* note 42, at 182.)

The situation changed dramatically during the Severan dynasty (193-217). The Emperor Septimius Severus, who ascended the imperial throne in 193, permitted soldiers to form *collegia*, to marry, and to keep their families on camp precincts. Frontier troops were given grants of land for private cultivation; local service became more common. Severus' son Caracalla raised regular military pay by fifty percent and supplemented it with frequent donatives. To a great extent, the Empire became militarized as officers and troops assumed civilian functions. At the same time, the prestige of the military increased. It seems likely that these inducements attracted even baptized Christians (as well as non-Christians) to a military life. Tertullian's severe attacks on military service, which date from the Severan period, probably flowed from his growing recognition of the danger. See Stephen Gero, "Miles Gloriosus": *The Christian and Military Service According to Tertullian*, 39 CHURCH HIST. 285, 289-91, 298 (1970).

military oath], the standard of Christ and the standard of the devil, the camp of light and the camp of darkness. One soul cannot serve two masters: God and Caesar. Moses, to be sure, carried a rod; Aaron wore a military belt, and John (the Baptist) is girt with leather [*i.e.*, like a soldier]; and if you really want to play around with the subject, Joshua the son of Nun led an army and the people waged war – and Peter waged war, if I may sport with the matter . . . . But how will a Christian go to war? Indeed how will he serve even in peacetime without a sword which the Lord has taken away? For even if soldiers came to John and received advice on how to act, and even if a centurion became a believer, the Lord, by taking away Peter's sword, disarmed every other soldier thereafter. We are not allowed to wear any uniform that symbolizes a sinful act.<sup>65</sup>

Tertullian returned to the question of military service by Christians in *The Crown* (*De corona militis*). The occasion for this work was the refusal of a Christian serving in the Roman Army to wear a garland or “crown” that had probably been awarded to the soldiers in his legion by the emperors Caracalla and Geta in 211. This Christian soldier was brought before the authorities and examined for his refusal to wear the imperial honor. He stated that he objected to wearing it “because I am a Christian.” Tertullian defended the soldier’s response and denounced the Christian legionaries who had criticized him for exposing them to danger. In the course of his remarks, Tertullian also argued that those who had undergone conversion during their military service should abandon the Army as soon as possible, take extraordinary pains to avoid sin while serving, or be prepared for martyrdom (as they had been prepared to die in combat).<sup>66</sup> He wrote as follows in chapter eleven:

Now, to come to the very heart of this question about the soldier’s crown, should we not really first examine the right of a Christian to be in the military service at all? In other words, why discuss the merely accidental detail, when the foundation on which it rests is deserving of censure? Are we to believe it lawful to take an oath of allegiance to a mere human being [*i.e.*, the Emperor] over and above the oath of fidelity to God? Can we obey another

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65. Translation in KALANTZIS, *supra* note 8, at 119-20. As Shean notes, Terullian is objecting here, not to idolatry, but to killing as such. “Killing is immoral regardless of whether it takes place in war or peace.” SHEAN, *supra* note 42, at 96.

66. See Gero, *supra* note 64, at 295-96.

master, having chosen Christ? . . . Is it right to make a profession of the sword, when the Lord proclaims that he who takes the sword shall perish by the sword? Will the son of peace take part in battle when he should not even go to court? Will a Christian, taught to turn the other cheek when struck unjustly, guard prisoners in chains, and administer torture and capital punishment? . . . To be sure, the case is different for those who are converted after they have been bound to military service. John [the Baptist] admitted soldiers to baptism; then there were the two most faithful centurions: the one whom Christ praised and the other whom Peter instructed. But once we have embraced the faith and have been baptized, we either must immediately leave military service (as many have done); or we must resort to all kinds of excuses in order to avoid any action which is also forbidden in civilian life, lest we offend God; or, last of all, for the sake of God we must suffer the fate which a mere citizen-faith was no less ready to accept.<sup>67</sup>

Tertullian's position on Christian participation in the Roman Army seems, therefore, to be unequivocal: Christians may not enter the military after their baptism; and if they are converted while in military service, they ought to abandon their careers or be prepared for martyrdom.<sup>68</sup>

What has caused some controversy, however, is whether Tertullian's objections to military service are based on the objection that Christians in the Roman Army would be forced to engage in Emperor-worship and other idolatrous practices offensive to their *religion*, or instead derived from a pacifist *ethic*.<sup>69</sup> In the 1970s and after, the historian John Helgeland pressed the argument that the patristic objections to military service (including Tertullian's) were *religious* rather than *ethical*.<sup>70</sup> But even allowing that Helgeland is

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67. Translation in KALANTZIS, *supra* note 8, at 122-23.

68. See Ryan, *supra* note 64, at 17-18 ("In the *De idolatria* (202), Tertullian is decisively against all military service by Christians . . . . 'In the *De corona* (211), Tertullian develops about the same position as in the *De idolatria*, but the treatment is fuller and more pointed and the additions are of importance.'").

69. It is also argued that Tertullian's objections to military service are secondary, while his defense of the soldier's refusal to wear the crown is primary. See ERIC OSBORN, TERTULLIAN: FIRST THEOLOGIAN OF THE WEST 84 (1997). But even though Tertullian devotes more attention to the issue of the crown, he says that the question of military service is "the heart" of the matter.

70. See John Helgeland, *Christians and the Roman Army A.D. 173-337*, 43 CHURCH HIST. 149, 151-52 (1974) ("The arguments Tertullian put forward against Christians serving in the army revolve around its religious observances . . . . Tertullian's problem with Christian military service was idolatry, not bloodshed.").

right in characterizing the army of the Roman Empire as a “sacred cosmos” which pervasively shaped and structured the lives of its officers and men from the day that they enlisted, his claims have not proven persuasive to later scholars. Apart from anything else, Tertullian’s arguments, as we have just seen, raise objections *both* to the bloodshed *and* to the idolatry that normally attend military service.<sup>71</sup> Furthermore, it is problematic in any case to parse apart the *religious* and the *ethical* concerns that Tertullian raised: Christianity confronted the Roman military system as one comprehensive way of life (or “sacred cosmos”) confronts another.

*Origen.* A second early Church father who prescribed pacifism for Christians was the brilliant third century theologian and martyr, Origen of Alexandria (ca. 184/5 – ca. 253/4). Origen’s major work, *Against Celsus (Contra Celsum)*, written in the mid-third century, is a sustained reply to the criticisms of Christianity put forward by the pagan philosopher Celsus. Among other things, Celsus had argued that the Christian sect had begun in a violent revolt against the Jews. Origen responded:

If a revolt had indeed given rise to the Christian community, if Christians took their origins from the Jews, who were allowed to take up arms in defense of their possessions and to kill their enemies, the Christian Law-giver would not have made homicide absolutely forbidden. He would not have taught that his disciples were never justified in taking such action against a man even if he were the greatest wrongdoer. [Jesus] considered it contrary to his divinely inspired legislation to approve any kind of homicide whatsoever. If Christians had started with a revolt, they would never have submitted to the kind of peaceful laws which permitted them to be slaughtered “like sheep” and which made them always incapable of taking vengeance on their persecutors because they followed the law of gentleness.<sup>72</sup>

Again, on the subject of Christian beginnings, Origen writes:

To those who ask us where we have come from or who is our author we reply that we came in accordance with the commands of Jesus to beat the spiritual swords that fight and insult us into plough-shares, and to transform the spears that formerly fought against us into pruning-hooks. No longer do we take the sword

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71. See David G. Hunter, *A Decade of Research on Early Christians and Military Service*, 18 RELIGIOUS STUD. REV. 87, 88 (1992).

72. Translation in KALANTZIS, *supra* note 8, at 136.

against any nation, nor do we learn war any more, since we have become sons of peace through Jesus who is our leader . . . .<sup>73</sup>

Origen also allegorized and spiritualized the Hebrew Bible's account of (divinely-ordained) war. In his *Homilies on Joshua*, Origen explained the Book of Joshua's narrative of the conquest of Canaan as an allegory of the soul's conflict with sin, not as a description of a genocidal conflict between Israel and the native inhabitants of the Promised Land. He wrote:

When that Israel that is according to the flesh read these same Scriptures before the coming of our Lord Jesus Christ, they understood nothing in them except wars and the shedding of blood, from which their spirits, too, were excited to excessive savageries and were always fed by wars and strife. But after the presence of my Lord Jesus Christ poured the peaceful light of knowledge into human hearts, . . . he teaches us peace from this very reading of wars. For peace is returned to the soul if its own enemies – sins and vices – are expelled from it.

And therefore, . . . when we read these things, we also equip ourselves and are roused for battle, but against those enemies that "proceed from the heart": obviously, "evil thoughts, thefts, false testimony, slanders" and other similar adversaries of our soul. Following what this Scripture sets forth, we try, if it can be done, not to leave behind any "who may be saved or who may breathe." For if we gain possession of these enemies, we shall fittingly also take possession of "the airy authorities" and expel them from his kingdom, as they had gathered within us upon thrones of vices.<sup>74</sup>

Unless those physical wars bore the figure of spiritual wars, I do not think the books of Jewish history would ever have been handed down by the apostles to the disciple of Christ, who came to teach peace, so that they could be read in the churches.<sup>75</sup>

Further, Origen addressed the argument that Christians were not good citizens of the Empire because they were unwilling to fight for it. His answer was that they served the Empire better by *praying* for it rather than by *waging war* for it; that their prayers were a more effective, if bloodless, form of warfare; and that just as the Romans exempted pagan priests from military service (on

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73. *Id.*

74. *Id.* at 146-47.

75. *Id.* at 147.

the grounds that it was defiling), so too they should be prepared to exempt the Christians, who were performing a similarly priestly function. He wrote:

We would also say this to those who are alien to our faith and ask us to fight for the community and kill men: that it is also your opinion that the priests of certain images and wardens of the temples of the gods, as you think them to be, should keep their right hand undefiled for the sake of sacrifices, that they may offer the customary sacrifices to those who you say are gods with hands unstained by blood and pure from murders. And in fact when war comes you do not enlist the priests. If, then, this is reasonable, how much more reasonable is it that, while others fight, Christians also should be fighting as priests and worshippers of God, keeping their right hands pure and by their prayers to God striving for those who fight in a righteous cause and for the emperor who reigns righteously, in order that everything which is opposed and hostile to those who act rightly may be destroyed?<sup>76</sup>

Origen's reference to the "righteous causes" for which the Roman military might be fighting has led some to suggest that he envisages that, on occasion, wars will be "just."<sup>77</sup> But even if that is so, it does not follow that Christians may fight and kill in such wars. Origen obviously believes that Christians may *render assistance* to Rome in such wars (through prayer and ascetic practices) even if they may not *kill* in them: in other words, he assumes, correctly, that pacifism does not entail neutrality.<sup>78</sup> Indeed, Christians praying for Roman victories in just wars need not even have been praying for *the death* of Rome's enemies, but only that God would cause them to *retreat*.

*Lactantius.* Lactantius (ca. 240-ca. 320), a distinguished professor of rhetoric, converted to Christianity when middle aged. His most famous surviving work, the *Divine Institutes*, was designed to provide a summary of Christian thought for educated Roman readers of the early fourth century. In that work, Lactantius states, first, that Christians must not attend or take part in gladiatorial games and, second, that they must avoid killing in war.

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76. *Id.* at 143-44.

77. For discussion of this argument, see KALANTZIS, *supra* note 8, at 42-44.

78. Similarly, some conscientious objectors considered that they could serve close to the front lines in ambulance units that assisted wounded Allied soldiers. The Quaker "Friends Ambulance Unit" performed this function in both the First and Second World Wars.

Indeed, he goes further and proscribes military service for them even, apparently, in peacetime:

It is not right for those who are striving to stay on the path of virtue to become associated with [the gladiatorial games] or to take part in it. For when God forbids killing, he is not only ordering us to avoid armed robbery, which is contrary even to public law, but he is forbidding what men regard as ethical. Thus, it is not right for a just man to serve in the army since justice itself is his form of service. Nor is it right for a just man to charge someone with a capital crime. It does not matter whether you kill a man with the sword or with a word since it is killing itself that is prohibited. And so there must be no exception to this command of God. Killing a human being whom God willed to be a sacred creature, is always wrong.<sup>79</sup>

*The Church Orders.* The historian Peter Leithart has argued: [H]owever vigorously intellectuals like Origen and Tertullian opposed service in the army, and whatever their reasons, it is entirely possible that they represented a small, articulate minority that has come to be considered spokesmen only because they had the wherewithal to speak. What did the countless, nameless and forgotten local pastors think? How did they treat the converted soldiers who dropped in wanting to share the Eucharist with them?<sup>80</sup>

The questions are fair.<sup>81</sup> As it happens, however, we have useful evidence of *pastoral* attitudes from the early Church. The evidence is found from documents known as the “Church Orders.” The historian Alan Kreider has carefully studied these documents, and I shall follow his analysis here.<sup>82</sup>

The Church Orders were manuals, “often claiming apostolic or even dominical authority [that] purported to guide church leaders

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79. Translation in KALANTZIS, *supra* note 8, at 182. Note, however, that Lactatius’ later work, the *Epitome*, a summary of the *Divine Institutes* composed after the conversion of Constantine, does not identify military service as a prohibited act, but instead substitutes suicide as an example of a violation of God’s commands. *See id.* at 183.

80. LEITHART, *supra* note 56, at 259.

81. Consider, however, that the views and practices of the “laity” do not define Church teaching; rather, that is generally understood to be expressed by Church leadership. Even though most American Roman Catholics may not accept or comply with their Church’s teaching on birth control, the Papal encyclical *Hu-manae vitae* is the authoritative Church doctrine on the matter.

82. *See* Kreider, *supra* note 57.

in ordering the liturgy, organization, communal life and discipline of early Christian communities.”<sup>83</sup> Among their uses was to determine eligibility for admission into the “catechumenate.” (“Catechumens” were persons not yet fully initiated into the worship of the Church, but actively being prepared for it.) Many later Orders borrowed from earlier ones, so that when read together they can provide a continuous view of Church teaching over several centuries. In particular, they can provide a view of the early Church’s teaching, in practical and pastoral applications, on war and military service.

One such document is the late fourth century *Apostolic Tradition* (ca. 380), which may have originated much earlier for use in the church at Rome. Chapter 16 of that document, which addresses the question of military service, survives in three versions: Sahidic (Coptic), Arabic and Ethiopic.<sup>84</sup> The surviving versions may well be the results of aggregating materials created by different sources over a period that may have covered two centuries and from local churches in several different areas.

In its Ethiopic version, the *Apostolic Tradition* declares soldiers ineligible for the catechumenate (even, it appears, if they refuse to kill). The text reads: “They are not to accept soldiers of an official.” Further, once someone is accepted as a catechumen or has received baptism, he may not become a soldier on pain of expulsion from the church (“A catechumen or believer, if they wish to become a soldier, are to be expelled because they are far from God.”). This requirement is repeated in near-identical terms in the other two versions. Further, in the Sahidic version, an officer (a “soldier who has authority”) is forbidden to kill, even if so ordered; should he be willing to kill, “let him be cast out.” In the Arabic version, the corresponding text states that a “soldier in the sovereign’s army” should not kill and, if ordered to do so, “should refuse.” If he kills, “he should be excluded” from the church. As Kreider concludes, the *Apostolic Tradition* in its more lenient forms “attempted to provide a way for Christians to be in the legions without taking life . . . Christians could be soldiers, but they were not to fight.”<sup>85</sup>

Another Church Order, the *Canons of Hippolytus* (ca. 336-340), takes the position that a Christian is not to become a soldier, ex-

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83. *Id.* at 418.

84. Translations of all three versions are found in KALANTZIS, *supra* note 8, at 194. A Latin version also survives, but is missing Chapter 16. A purported Greek text is lost.

85. Kreider, *supra* note 57, at 424.

cept under duress. Should he become a soldier, he may not shed blood. Should he shed blood, “he is not to partake of the mysteries, unless he is purified by a punishment, tears, and wailing.”<sup>86</sup>

The *Testament of Our Lord*, another fourth century Church Order, claimed dominical authority. In its Syriac version, it stated:

If anyone be a soldier or in authority, let him be taught not to oppress or to kill or to rob . . . But if they wish to be baptized in the Lord, let them cease from military service or from the [post of] authority. And if not let them not be received.

Let a catechumen or a believer of the people, if he desire to be a soldier, either cease from his intention, or if not let him be rejected . . .<sup>87</sup>

Finally we should note the *Apostolic Constitutions* (ca. 375-380), a late fourth century compilation that is more accommodating to warfare than any of the other Church Orders considered here. Closely following the narrative in Luke’s Gospel of the encounter between John the Baptist and the Roman soldiers,<sup>88</sup> this document states: “Let a soldier who comes be taught to do no injustice or to extort money, but to be content with his given wages. Let the one who objects be rejected.”<sup>89</sup>

In this Church Order, compiled two generations after the conversion of Constantine, we first observe the absence of any prohibition on killing in military service. By contrast, as Kreider concludes, in the early Church Orders, killing – not idolatry – was repeatedly identified as the abuse that precluded or restricted Christian military service.<sup>90</sup>

*The Third Canon of the Council of Arles (314).* Two years after his conversion, the Emperor Constantine summoned a council of bishops to meet at Arles in the Roman province of Gaul. The primary subject matter of the council was the situation of the Church in North Africa, and especially the question of the rightful ownership of Church property that had been confiscated by the earlier, persecuting emperors. Among the twenty-three “Canons” issued by the assembled bishops, the Third Canon dealt with military service. Unfortunately the Latin of this Canon is ambiguous, and it

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86. Translation in KALANTZIS, *supra* note 8, at 194.

87. Translation in KALANTZIS, *supra* note 8, at 194-95.

88. See Luke 3:14.

89. *Id.* at 192.

90. See Kreider, *supra* note 57, at 430.

has been interpreted in several different and inconsistent ways. A fair but not uncontroversial English translation is: Concerning those who lay down their weapons in peacetime, be it resolved that they be excluded from fellowship (“*De his qui arma proiciunt in pace, placuit abstineri eos a communione*”)<sup>91</sup>.

Some scholars have contended that the Canon represents a politically motivated change in Church teaching regarding military service, brought about by the then-recent conversion of Constantine. In my opinion, the most defensible interpretation is that given by Larry Kuenning.<sup>92</sup> On this interpretation, the bishops were enjoining a Christian in the military from throwing down his arms in tranquil times (that is, periods when there was neither war nor persecution of the Church). To that extent, the Canon enjoined co-operation with the Empire: Christians could serve in the Roman military, and indeed if already enlisted, were bound to stay in service during peacetime. But the Council *reserved* the questions whether a Christian soldier would be permitted, or required, to decline to use his weapons *during wartime*. On this reading, the Canon does *not* represent a change in the earlier, pacifist position that killing in wartime was forbidden.

*Acts of the Military Martyrs.* There can be little doubt that Christians served in the Roman Army well before the conversion of Constantine, and that their numbers included both those who entered military service after baptism and those who remained in the military after becoming Christians. Indeed, as noted above, it appears that the growing number of Christians entering military service in the early second century provoked Tertullian to censure the practice. And we hear of a predominantly Christian legion in the Roman Army, the *Legio XII Fulminata* (usually translated as “The Thundering Legion”), serving in a campaign under the Emperor Marcus Aurelius against the Quadi as early as 172.<sup>93</sup> How-

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91. CHARLES JOSEPH HEFELE, A HISTORY OF THE CHRISTIAN COUNCILS, BOOK II, CH. III, SEC. 15 (1894).

92. See Larry Kuenning, *The Council of Arles in its Political Setting*, QUAKER HERITAGE PRESS (1989), <http://www.qhpress.org/essays/arles.html>. For a different interpretation, see WYNN, *supra* note 26, at 57-59.

93. See KALANTZIS, *supra* note 8, at 55-56. The early Church historian Eusebius reported that the Christian soldiers in this legion prayed for rain during a battle that was going badly for the Romans. The thunder from the rainstorm that followed drove away the enemy, while the rain from it refreshed the legionaries. See Eusebius Pamphilus, *Church History*, Book V, ch. 5, CHRISTIAN CLASSICS ETHEREAL LIBRARY, <http://www.ccel.org/ccel/schaff/npnf201.iii.x.vi.html>. Alt-

ever, we also have pre-Constantinian accounts, known as the *Acts of the Military Martyrs* (260-303), that commemorate the sanctity of some Christians who in different ways faced the choice between their military obligations and their faith, and who suffered martyrdom for choosing to follow their faith.<sup>94</sup>

One such case is found in the *Acts of Maximilian*, which records an event in Tebessa in Numidia in March 295. This document consists chiefly in a dialogue between the Roman proconsul Dion and Maximilian, a young Christian whom Dion seeks to compel to enter the Army. Interestingly, Maximilian's father, Victor, is described both as a Christian and as a recruiter for the Army. Maximilian protests against giving his name, providing his measurements for a uniform or accepting a military seal because he is a Christian. Dion insists on recruiting him and threatens him with death if he will not agree to serve. Victor, when asked to persuade his son to change his mind, replies that he "can take his own counsel." Dion persists, telling Maximilian that Christian soldiers serve in the "sacred bodyguard" under the Emperor's direct command. Maximilian answers, "They know what is best for them. But I am a Christian and I cannot do wrong." Asked by Dion what wrong is committed by those who serve in the Army, Maximilian replies, "Why, you know what they do."<sup>95</sup> Finally Dion orders Maximilian's death. Victor, who has undergone a change of heart, returns home "in great joy" at his son's martyrdom.

What explains Maximilian's refusal to serve?<sup>96</sup> Arguably, Maximilian believed that his faith prevented him from taking an oath, or at least an oath to serve Caesar. But it is also plausible to infer that Maximilian believed that as a Christian he could not bear, let alone *use*, arms.

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hough the story enjoyed wide circulation in Christian circles, an alternative version of it attributed the miracle to pagan gods. See SHEAN, *supra* note 42, at 91.

94. Shean argues that this *genre* of literature reflects the existence of a large Christian presence in the Roman Army and the need the Church felt to find models for these soldiers of Christian conduct in a military setting. He sees these narratives as evidence that the Church at this period did not adopt a dogmatically pacifist position. SHEAN, *supra* note 42, at 194-96.

95. Translation in KALANTZIS, *supra* note 8, at 159.

96. See Peter Brock, *Why Did St. Maximilian Refuse to Serve in the Roman Army?*, 45 J. ECCLESIASTICAL HIST. 195, 209 (1994) (surveying different scholarly traditions and arguing that Maximilian, consistently with the rigorist teaching of the African Church to which he belonged, refused military service on pacifist grounds: "His protest was directed against the whole military system, in peacetime as much as in war").

In summary, then, for the period covering the first three centuries of Christianity, the evidence shows that the Church's teaching on war had a generally pacifist tenor.<sup>97</sup> Even after the conversion of Constantine in 312, there was not an abrupt change. And both theological and pastoral sources point to the same conclusion. To be sure, the sources reveal a spectrum of opinions. At the most rigorous end of the spectrum, participation in the military was forbidden; even those who converted while in service were expected to leave the military as soon as possible. Other sources considered military service licit, but not killing in warfare. There does not appear to be *any* written evidence from this period that the Church regarded warfare, or killing in warfare, as intrinsically neutral, or that killing might be permissible, or even required, in a "just" war under rightful authority.

*Ambrose and Augustine: Just War Doctrine.* On the prevailing accounts of Church history, the mind of the Church began to change with St. Ambrose, Bishop of Milan (ca. 340-397) and, still more, with St. Augustine (354-429), Bishop of Hippo and the most influential Western Church father.<sup>98</sup> It remains the generally accepted view that Augustine "decisively arrested the apolitical or even anti-political tendencies of early Christian thought and elaborated a [just war] teaching that 'continues to this day in all essentials to be the ethic of the Roman Catholic Church and of the major Protestant bodies.'"<sup>99</sup>

The tradition of just war thinking in the Church is often said to have originated with Ambrose, who followed Cicero in acknowledging the *jus belli*, or the ethic of war. Ambrose followed the Roman tradition in maintaining that in order to be just, a war must be defensive or be undertaken to punish a wrong; that international agreements were to be honored; that it was improper to take unfair advantage of an enemy; and that the defeated were to be

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97. It bears saying that the early Church's ethical teaching on war and peace was intended for Christians, not for others. "The early Church had nothing whatever to say as to what non-Christians ought or ought not to do, nor had it any intention of changing the order of this passing world in a Christian sense." HANS VON CAMPENHAUSEN, TRADITION AND LIFE IN THE CHURCH: ESSAYS AND LECTURES ON CHURCH HISTORY 160 (A.V. Littledale trans., 1968).

98. *But see* WYNN, *supra* note 26.

99. THOMAS L. PANGLE & PETER J. AHRENSDORF, JUSTICE AMONG NATIONS: ON THE MORAL BASIS OF POWER AND PEACE 73 (quoting ROLAND H. BAINTON, CHRISTIAN ATTITUDES TOWARD WAR AND PEACE: A HISTORICAL SURVEY AND CRITICAL RE-EVALUATION 39 (1960)).

shown mercy.<sup>100</sup> If undertaken and waged within such limits, war could be considered justifiable. Likewise, Ambrose apparently considered that war could and should be fought to combat heresy and to maintain, or even to spread, orthodoxy.<sup>101</sup> But Ambrose sternly maintained that the Church and the clergy could not wage war: the Church conquers by spiritual, not worldly, arms.<sup>102</sup> And waging war is only legitimate when it is necessary to put human attachments aside in order to protect and uphold the higher claims of the divine law.<sup>103</sup> War may not be fought rightfully if the belligerents fight from improper inward dispositions.

Augustine grappled with the conflict between violence and Christian love in greater detail and depth than Ambrose, but their conclusions were fundamentally the same.<sup>104</sup> To be sure, Augustine did not consciously develop a doctrine of just war; indeed, his writings concerning war are scattered and unsystematized, usually occurring in a pastoral setting. Still, what became – centuries later – the customary elements of just war doctrine can be previewed in Augustine's thought.

For Augustine, a just war can be seen as analogous to a judicial proceeding against a wrong-doer, in which the war-making body acts at different points as police, prosecutor and judge against a criminal; in other lights, it can also be seen on the model of a private law suit for compensatory or even punitive damages.<sup>105</sup> First, only the State may make war; private wars are unjust. Second, a just war requires a just "cause," of which the paradigm is the State's defense of itself, its allies, or its people. But war can be fought justly for other causes as well, including punishment of an

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100. See Louis J. Swift, *St. Ambrose on Violence and War*, 101 TRANSACTIONS AND PROCEEDINGS OF THE AMERICAN PHILOLOGICAL ASS'N 533, 534 (1970). On Cicero, see G.A. Harrer, *Cicero on Peace and War*, 14 CLASSICAL J. 26 (1918).

101. See Swift, *supra* note 100, at 534, 536.

102. See *id.* at 537-38.

103. See *id.* at 539-41.

104. For a close and sensitive reading of the complexities and changes in Augustine's thought on these matters, see John Langan, *Elements of St. Augustine's Just War Theory*, 12 J.RELIGIOUS ETHICS 19 (1984). Henrik Syse has recently made a powerful case for viewing Augustine's just war doctrine in light of the tradition of "virtue ethics." See Henrik Syse, *Augustine and Just War: Between Virtue and Duties*, in ETHICS, NATIONALISM, AND JUST WAR: MEDIEVAL AND CONTEMPORARY PERSPECTIVES 36 (Henrik Syse & Gregory M. Reichberg eds., 2007).

105. See FREDERICK H. RUSSELL, *THE JUST WAR IN THE MIDDLE AGES* 19 (1975); Joachim von Elbe, *The Evolution of the Just War in International Law*, 33 AM. J. OF INT'L L. 665, 668-69 (1939).

unavenged wrong or the recovery of stolen property. Even an *offensive* war may be just. (Augustine cites the case of Moses, who justly drove the Amorites out of their homeland when they wrongfully refused his request for the innocent passage of the Israelite army.)<sup>106</sup> Finally, a war is just only if it is undertaken and fought with the right disposition.<sup>107</sup> The State that makes war justly and its soldiery must conduct themselves in the spirit that befits Christian judges and executioners. They may punish and even kill, but only in love and with compassion; war that is fought from or in anger, greed, or the desire for revenge is not just.<sup>108</sup>

If the pre-Constantinian Church of the third and fourth centuries had been willing to yield, to some extent, to the participation of Christians in military life and warfare, Ambrose and Augustine appeared to carry the accommodation much further. To simplify: for them, the key question is not the *act* of killing in warfare, but the *intention* with which the killing is done. The mind of the Western Church has come, by and large, to settle in this accommodation, which we call the “just war tradition.” But as we shall see in the next section, the Church remained, for centuries after Augustine, deeply suspicious of war and convinced of its inherent sinfulness.

## II.

Students of international humanitarian law owe a debt of gratitude to Colonel G.I.A.D. Draper for the publication of a pair of essays in 1961 in the *International Review of the Red Cross*.<sup>109</sup> In those essays, Draper drew attention to the interest and importance for the study of the law of war of two neglected medieval sources.<sup>110</sup> The first of these were the so-called “penitentials,” which originated in the monastic

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106. See *Numbers* 21:21-5; see also Syse, *supra* note 104, at 48 (arguing that entire just war tradition from Augustine onwards makes “no real opposition to initiating warfare for the sake of repelling injustice”).

107. Johnson rightly emphasizes the importance and novelty of this test, and its close connection with Augustine’s overall theological position. See JOHNSON, *supra* note 50, at 61.

108. My summary here draws chiefly on the accounts in PANGLE & AHRENSDORF, *supra* note 99, at 77-78 and RUSSELL, *supra* note 105, at 16-20.

109. See G.I.A.D Draper, *Penitential Discipline and Public Wars in the Middle Ages*, in REFLECTIONS ON LAW AND ARMED CONFLICTS: THE SELECTED WORKS ON THE LAWS OF WAR BY THE LATE PROFESSOR COLONEL G.I.A.D. DRAPER, OBE 20 (Michael A. Meyer & Hilaire McCoubrey eds., 1998).

110. No penitentials are included in the excellent recent anthology edited by Reichberg, Syse and Begby, THE ETHICS OF WAR, *supra* note 8.

houses of Celtic Christianity in the 6th century, and which included the topic of killing in war among the subjects of which they treated. Draper also examined the “penitential decrees” of two synods of the medieval French Church, one of which occurred soon after the Battle of Soissons in 923 and the other soon after William the Conqueror’s great victory in the Battle of Hastings in 1066. Draper’s work on these subjects helped to stimulate later scholarly interest in the relationship between the penitentials and law. In his 1983 work *Law and Revolution*, Harold Berman considered the similarities and differences between the practices of the penitentials and those of Germanic folk law in early medieval Europe.<sup>111</sup> Later scholars exploring the relationship between the penitentials and the development of war law include Bernard J. Verkamp, *The Moral Treatment of Returning Warriors in Early Medieval and Modern Times* (1993) and, more recently, David S. Bachrach, *Religion and the Conduct of War c.300-c.1215* (2003).

#### A. The Penitentials

What were the penitentials?<sup>112</sup> They were, at least originally, written manuals providing guidance for the use of confessors in hearing private confessions.<sup>113</sup> They were developed for use in what is known as the procedure of “tariffed penance” – a system that represented a marked departure from the penitential procedure that had previously been dominant in the Western Church, which is known as “canonical penance.”<sup>114</sup>

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111. See BERMAN, *supra* note 29, 1t 68-75.

112. A collection of representative penitentials may be found in MEDIEVAL HANDBOOKS OF PENANCE: A TRANSLATION OF THE PRINCIPAL LIBRI POENITENTIALES AND SELECTIONS FROM RELATED DOCUMENTS (John McNeill & Helena M. Gamer trans., Columbia University Press 1990) (1938).

113. Penitentials appear to have originated for use in confessions within monasteries by penitent monks themselves. See Rob Meens, *Frequency and Nature of Early Medieval Penance*, in HANDLING SIN: CONFESSION IN THE MIDDLE AGES 35, 47 (Peter Biller and A.J. Minnis eds., 1998).

114. The brief and schematic account that follows in the text is based on the historiography found in most modern scholarship. See, e.g., JEAN DELUMEAU, SIN AND FEAR: THE EMERGENCE OF A WESTERN GUILT CULTURE 13TH-18TH CENTURIES 195-97 (Eric Nicholson trans., Pallgrave MacMillan May 1999) (1990). However, it has been argued that the currently dominant historiography is inaccurate or incomplete for a variety of reasons, among them that it does not give sufficient weight to narrative as well as legal sources, and that the distinction it draws between public and private penance does not correspond to actual practice and lacks contextualization. For a restatement of the prevailing position and an

In its earlier medieval period form, penance “was directed by a bishop, could only happen once, and imposed lifelong disabilities on its beneficiary.”<sup>115</sup> Public shaming was an integral feature of such “canonical penance;” penitents were required to dress in sackcloth after confessing their sins, and even after being readmitted and reconciled to the Church in a public ceremony, could not thereafter marry or hold public or sacerdotal office.<sup>116</sup> This practice caused more than a little discomfort to ordinary Christians, and perhaps especially to soldiers, who would have been expected to abandon their military careers after having confessed.<sup>117</sup> The fifth century correspondence between Bishop Rusticus of Narbonne to Pope Leo I on the subject of participation by soldiers in the rite of penitence illustrated the problem. In reply to Rusticus (whose letter of inquiry is not extant), Pope Leo affirmed that “it is completely contrary to all the rules of the church for a soldier to return to duty after receiving penance.”<sup>118</sup>

In response to such difficulties, the Church gradually came to accept the practice of “tariffed penance.” This newer system permitted the faithful to obtain forgiveness from their sins and spiritual renewal on repeated occasions, without having to engage in life-long penitential obligations. Penitents were not identified as such in a public ritual, and shame was not an essential ingredient of the penitential process. Moreover, confession could be made to a priest rather than to a bishop. We first hear of this form of penance in the Council of Toledo in 589, and then again at the Council of Chalon-sur-Saône in ca. 650.<sup>119</sup> This innovation in penitential practice was made possible by the highly decentralized structure of the Western Church in the early Middle Ages: “there was as yet no separate, corporate, organized Roman Catholic Church in the West, no unified legal entity, but rather an invisible spiritual community of individual bishoprics, local churches, and monaster-

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accompanying critique, see SARAH HAMILTON, THE PRACTICE OF PENANCE, 900-1050 2-23 (2001).

115. Alexander Murray, *Confession Before 1215*, 3 TRANSACTIONS ROYAL HIST. SOC'Y (6TH SERIES) 51, 55 (1993). Confessions made to the bishop were private, not public. See *id.* at 57; see also MEDIEVAL HANDBOOKS OF PENANCE, *supra* note 112, at 14-55.

116. HAMILTON, *supra* note 114, at 3.

117. Murray, *supra* note 115, at 55.

118. Quoted in DAVID BACHRACH, RELIGION AND THE CONDUCT OF WAR C.300-C.215 26 (2003).

119. Murray, *supra* note 115, at 56.

ies subordinate to tribal and territorial and feudal units as well as to kings and emperor.”<sup>120</sup>

“Tariffed penance” appears to have originated in Wales and Ireland and spread out from its Celtic homelands after 650.<sup>121</sup> Monastic houses and, later, individual bishops or clergy began to create pastoral manuals that presupposed repeated acts of confession over the course of a lifetime, and that authorized penance on each such occasion, thus enabling the sinner to be reconciled with God more than once. These manuals “were essentially schedules of sins with corresponding penances, and therefore have been labeled . . . ‘tariff books.’ . . . This development in practice was of particular importance to soldiers as it meant that they could now reasonably hope to die in a state of grace. In addition, soldiers could continue to serve in the army however often they confessed.”<sup>122</sup> The penances that could be imposed differed in duration, severity and content: typically they included fasting on bread and water for a certain length of time or at certain periods; almsgiving; compensation for victims; prayer; or pilgrimage.<sup>123</sup> The “tariff penance” system grew up alongside the older practice of “canonical penance” and did not wholly displace it. Rather, under an arrangement now known as the “Carolingian dichotomy,” the canonical penance was reserved for public sins, while tariffed penance was used for private sin.<sup>124</sup>

By the eleventh century, scores of penitentials used in connection with “tariffed penance” were found throughout much of Western Europe and not merely in the British Isles. Over the course of their long development, the penitentials underwent substantial modification, refinement and systematization.<sup>125</sup> They might, e.g.,

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120. BERMAN, *supra* note 29, at 69.

121. Hamilton notes, however, that there is evidence that secret penance had evolved independently on the Continent. See HAMILTON, *supra* note 114, at 4.

122. BACHRACH, *supra* note 118, at 28-29.

123. See BERMAN, *supra* note 29, at 69-70.

124. Murray, *supra* note 115, at 56. Murray argues that before this arrangement emerged, the canonical penance had been imposed for grave (but not necessarily public) sin. Although tariffed penance came to be used for private sin, the penances imposed in it might be public. See *id.* at 56-57. Hamilton argues that the Carolingian dichotomy was “mostly confined to legal texts,” as distinct from narrative or liturgical sources, which convey a more ambiguous picture. See HAMILTON, *supra* note 114, at 5.

125. Thus, penitentials sometimes became compilations of penitential decisions rather guides for a priest’s ordinary use – source books rather than service manuals. See Allen J. Frantzen, *The Penitentials Attributed to Bede*, 58 *SPECULUM* 573, 593 (1983). For a review of the development of the penitentials from the late

be infused with or blended into canon law. An influential, late penitential that incorporates such development is Book Nineteen of the *Decretum* of the early eleventh century German bishop and canonist, Burchard of Worms.<sup>126</sup> Book Nineteen of the *Decretum* forms part of a much larger work on canon law compiled by Burchard. The inclusion of Book Nineteen in this larger work has itself given rise to scholarly reconsideration of the usual view that the Book should be considered a “penitential,” and it may be better to characterize it as “first and foremost a didactic work, which was not meant to function in the same way as the older penitentials, that is in direct support of pastoral care.”<sup>127</sup> Book Nineteen may instead have been intended for use in instructing young clerics connected to the Cathedral school at Worms in the practice of hearing confessions.

The novel combination of three formal features of Book Nineteen distinguish it from earlier penitentials, such as that of Regino of Prüm, from which Burchard borrowed. First, it includes an *ordo* regulating the liturgical practices surrounding penance. Second, it contains questionnaires designed to assist confessors in interrogating penitents about their sins and thus in arriving at more carefully individualized sentences. These questionnaires adapted and improved upon an earlier model of the simple form: “if someone has done such-and-such a sin, he should do the following penance.” Instead, the confessor was to take a more active role in leading the penitent to a full acknowledgement and disclosure of his or her sins. Thus, Burchard suggested that the confessor should address the penitent by saying: “Perhaps, most beloved, you are unable to remember everything you have done. Therefore, I will interrogate you. Be careful not to hide anything by diabolical deception.” Moreover, Burchard’s questionnaires broke down the relevant characteristics of sinful acts into more detailed and specific categories than had existed before. Thus while Regino’s penitential had

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medieval period up to the Reformation, see DELUMEAU, *supra* note 114, at 198-205.

126. See Greta Austin, *Jurisprudence in the Service of Pastoral Care: The “Decretum” of Burchard of Worms*, 79 *SPECULUM* 929, 931-32, 959 (2004). A biography of Bishop Burchard was composed, apparently not long after his death in 1025, by a canon of Worms (perhaps Ebbo or Eberhard) who had known him personally. See *Medieval Sourcebook: The Life of Burchard Bishop of Worms 1025*, FORDHAM U, (Oct. 1998), <http://www.fordham.edu/halsall/source/1025burchard-vita.asp>.

127. See Ludger Körntgen, *Canon Law and The Practice of Penance: Burchard of Worms’s Penitential*, 14 *MEDIEVAL EUR.* 103, 114 (2006).

compendiously asked: “Did you perpetuate homicide, either by accident, or on purpose, or without willing to do so, or as revenge for your parents, or on the orders of your lord, or during a military expedition?” Burchard instead posed discrete questions on each of these aggravating or mitigating circumstances of a homicide. Third, Burchard included specific sentences for the various types of sins confessed, and these sentences were keyed to, and consistent with, the analysis of canon law found in the other books of his compilation. Confessors were thus enabled to use the fuller treatment of authorities found elsewhere in the compilation to determine what penance was most appropriate for a specific type of sin.<sup>128</sup> Burchard’s sentences were also designed to be proportionate to the gravity of the sin in question. Thus, for the sin of homicide, the heaviest penance of all was for the willful murder of a spouse: penance for life or entry into a monastery. For the murder of a penitent, the penance was fourteen years—for the murder of a priest, twelve years.<sup>129</sup>

Characteristically, the penitentials included “homicide” among the sins for which penance had to be made, alongside other categories such as idolatry, sexual immorality, and other forms of violence. “Homicide” subsumed killing in war. Eighth and ninth century penitentials standardly imposed a penance of forty days for those who killed in battle.<sup>130</sup> Thus the Penitential of Theodore, attributed to a seventh century Archbishop of Canterbury, stated: “One who slays a man by command of his lord shall keep away from the Church [semble, refrain from communion] for forty days; and one who slays a man in public shall do penance for forty days.”<sup>131</sup> But the penance might be harsher. An Old Irish Penitential from about 800 read: “Anyone who kills a man in battle or in a brawl . . . a year and a half or forty nights, provided he does not pursue the slaughter after the fight is won.” Here the alternative periods – eighteen months or forty nights – are of different levels of severity but equally expiatory. A Penitential from the Monastery of Silos in the Diocese of Burgos in Spain, also from about 800,

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128. See Körntgen, *supra* note 127, at 108-14.

129. See Austin, *Jurisprudence in the Service of Pastoral Care*, *supra* note 126, at 949.

130. See CARL ERDMANN, THE ORIGIN OF THE IDEA OF CRUSADE 17 n.32 (Marshall W. Baldwin & Walter Goffart trans., 1977) (1938); BACHRACH, *supra* note 118, at 29. By contrast, more severe penances were usually imposed for homicide of other kinds: killing in a brawl, e.g., might draw four years of penance. *Id.*

131. See Draper, *supra* note at 109, 22-23.

stated: "He who has killed a man in battle, let him do penance for one year."

Later penitentials also considered killing in war to be sinful in most or all cases. Two ninth century penitentials, copied in the tenth century, imposed penances for killings in war between kings. Motivation could also be taken into consideration: killing in battle from greed drew a more substantial penance than it did if done from a sense of duty. A ninth century penitential by Halitgar of Cambrai imposed a fast of twenty one weeks on anyone who killed in a public military expedition "without cause;" of twenty eight weeks for killing in battle from greed or hostility; but no penance at all for killing in battle in defense of oneself or one's close kindred. But Regino of Prüm considered all killing to be sinful, even if it occurred in a just war, and prescribed a forty-day penance (as older Penitentials had) for killing in a public war. For Burchard of Worms, a penance of three Lents was due for killing in defense of peace on the orders of a legitimate prince; if the killing were done without the orders of such a prince, the penance was forty days of fasting on bread and water for seven consecutive years. Burchard, following earlier writers, regarded killing even in a just war as sinful.<sup>132</sup> Specifically, Burchard wrote that the penitent was to be asked, "Have you killed in war, on the orders of a legitimate ruler, who ordered it for the sake of peace, and did you kill a tyrant who wished to violate the peace?" "The deed itself – any shedding of blood in war – required penance . . . Killing a human being shook the very foundations of Christian belief."<sup>133</sup>

As Harold Berman has emphasized, "[t]he basic conception of the penitentials was that penance was medicine for the soul."<sup>134</sup> Berman cites the opening of Burchard of Worms' penitential: "This book is called 'the Corrector' and 'the Physician,' since it contains ample corrections for bodies and medicines for souls and teaches every priest, even the uneducated, how he shall be able to bring help to each person, ordained or unordained, poor or rich; boy, youth, or mature man; decrepit, healthy, or infirm; of every age;

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132. See HAMILTON, *supra* note 114, at 191-92. See also BACHRACH, *supra* note 118, at 101 (stating, "As was true of his predecessors, Bishop Burchard of Worms strongly advocated the position that any type of homicide, including killing in the course of a just war or a publicly sanctioned war (*bellum publicum*) was sinful . . . Burchard held a nuanced view of wartime killing, but nevertheless saw the act as innately sinful.")

133. Hehl, *supra* note 27, at 187-88.

134. BERMAN, *supra* note 29, at 71; see also John T. McNeill, *Medicine for Sin as Prescribed in the Penitentials*, 1 CHURCH HIST. 14, 21 (1932).

and of both sexes.”<sup>135</sup> The overriding objectives were to bring spiritual comfort and restoration of spiritual health, to purge the soul of the remnants and effects of sin and to renew it in a right relationship to God. In our terms, the penitentials had a therapeutic use, as well as moral and spiritual aims.

### B. Two Penitential Decrees

In addition to the penitentials themselves, we must consider two very striking penitential decrees issued by Church authorities after major battles. Both decrees imposed harsh penances on the warriors involved in those battles for the blood they had spilt.

*The Penitential Decree after the Battle of Soissons (923).* The Battle of Soissons was an episode in a civil war over the throne of France, in which the forces of the usurper Count Robert of Paris fought with those of King Charles the Simple. Charles’ army of about 10,000 fell on Robert’s larger army of 20,000 by surprise on a Sunday morning, June 15, 923. In the ensuing battle over 19,000 men were killed. The French Church was horrified by this “terrible instance of human butchery,” especially perhaps because it involved Christians killing Christians and Franks killing Franks. The bishops convened a synod not long after the battle at Soissons, near the field of slaughter. The synod imposed a severe penitence *on all who had participated in the battle*, regardless of which side they had fought for and regardless of whether they had wounded or killed anyone else.

The penance required that “all those who have taken part in the battle of Soissons . . . do penance for three 40-day periods for three years.”<sup>136</sup> For the first forty-day period, the warriors were to be “outside the Church and let them be reconciled at the Table of the Lord.”<sup>137</sup> Throughout all three forty-day periods they were to “abstain in bread and water” on appointed days.<sup>138</sup>

Draper views the synod’s decree as evidence of “the traditional aversion of the Christian Church to the shedding of blood, and in particular, of Christian blood. Fitful and erratic though the public expression of this aversion may have been, yet the evidence shows

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135. BERMAN, *supra* note 29, at 71.

136. Draper, *supra* note 109, at 27.

137. *Id.*

138. *Id.*

that on occasion the Church could be shocked into decreeing a public anathema.”<sup>139</sup>

*The Penitential Decree after the Battle of Hastings (1066).* In the Battle of Hastings (1066), the invading forces of William, Duke of Normandy (William the Conqueror) won a decisive victory over the Anglo-Saxon infantry under Harold, King of England. William’s victory is depicted and celebrated in the famous Bayeux Tapestry.

William’s invasion was considered just and even holy. His careful diplomacy had laid the groundwork for that perception. He had successfully persuaded the influential Roman clergyman Hildebrand, later Gregory VII, to have Pope Alexander II furnish him with a specially blessed banner for use as a sign of the Church’s support for his invasion.

The carnage in the Battle of Hastings was appalling. So too was the ensuing suffering of the defeated Anglo-Saxons under the Normans. From 1066 to 1070 England was wracked with misery and distress. “Churches were spoiled, homes were burnt and the Saxon women took refuge in nunneries to escape the insane lust of the Normans. Men were cut down like standing corn.”<sup>140</sup>

In 1067, the Bishops of Normandy issued a penitential ordinance directed solely at William’s troops at the Battle of Hastings. “The ordinance itself is highly nuanced and contains thirteen clauses, including sections dealing with soldiers who killed the enemy in battle, with those who simply struck the enemy in battle without killing him, with those who did not know whether they had killed the enemy in battle, and with those who did not kill the enemy but had wanted to do so.”<sup>141</sup> The soldiers were required to carry out one-year penances for every man they had killed – a much more severe penance than the usual forty-day standard. As Bachrach writes, “the very intensity of the penitential discipline imposed by the Norman bishops would seem to indicate their clear adherence to the view that all homicide, and even violence against a fellow man, was sinful whether committed in the course of a just war or otherwise.”<sup>142</sup> One might add that even the *desire* to commit such violence was considered sinful.

In 1070, the Pope sent a legate, Ermenfrid, Bishop of Sion, to preside over a Council of the English Church, held at Eastertide at

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139. *Id.* at 28.

140. *Id.* at 29.

141. BACHRACH, *supra* note 118, at 102.

142. *Id.* at 102.

Winchester. The Council undertook a number of reforms of the church in England. On his return journey, Ermenfrid stopped in Normandy. There he confirmed the Norman Bishop's penitential decree of 1067. "In so doing, Ermenfrid sanctioned the view that even soldiers who had fought under a papal banner in a manifestly just cause were required to carry out penances for killing the enemy in battle."<sup>143</sup>

The Norman Bishops' penitential decrees were apparently the high water mark of the penitential tradition. At a minimum, it reveals a deep and unsettled conflict in the mind of the Church: the very same campaign that had been conducted under a Papal banner was also condemned – under the auspices of a Papal legate – as a cause for penitence.<sup>144</sup> As we shall see, however, during the papacy of Alexander II's successor Gregory VII, the Church's teaching began to become settled.<sup>145</sup>

### C. *The Relevance of the penitentials to Christian Thought on Peace and War*

What relevance do the penitentials and the penitential decrees have for understanding the Christian view of war? Colonel Draper, who emphasizes the leniency of the standard penance of forty days for killing a man in war, sees them as a "lingering vestige of the early Christian aversion to killing and bloodshed . . . a bridge of expiation between this wicked world and the lofty traditions of an earlier, simpler and more saintly Christian era."<sup>146</sup>

Draper's judgment is obviously a weighty one. A penance of forty days of fasting for killing another human being seems disproportionately small in relation to the gravity of the offense. Moreover, what we would consider lesser (sexual) offenses often attracted harsher penances. Moreover, Draper's judgment can be reinforced by two further considerations. First, the very *practice* of repeatable confessions was less demanding and more remissive than the earlier system of confessing once in a lifetime. If nothing else, the newer practice arguably tended to make repeated sinning more likely and less worrisome, because the possibility of later penitence

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143. *Id.* at 104-05.

144. For a very different account of the event, calling into question whether the Papacy had even sought to assist the Norman cause in England, see Catherine Morton, *Pope Alexander II and the Norman Conquest*, 34 LATOMUS 362 (1975).

145. See Part IV, *infra*.

146. Draper, *supra* note 109, at 24.

remained available. Second, “commutations” and “compositions” were often interwoven with the prescribed penances. Thus, according to some penitentials, as an alternative to a year of penance, a penitent might pay the value of a female slave. The possibility of paying fines in lieu of penances was also on occasion turned to the advantage of the Church, which might direct that the fines be paid to itself rather than to a victim or a victim’s relatives. Thus, King Artmail of Ghent reportedly atoned for his fratricide by deeding land to the Church.<sup>147</sup> At least to modern eyes, the practice of commutations diminishes the moral and spiritual value of the penitential system. Indeed, the very idea that the “debt” incurred by sin can be “paid for” by acts or gifts may appear to post-Reformation minds to be unseemly and unbiblical.<sup>148</sup>

Nonetheless, I would offer a very different judgment of the value of the penitentials from Colonel Draper’s. First and foremost, the penitentials regularly, if not in all cases, insisted upon the intrinsic sinfulness of killing in warfare, regardless of the justice of the war and regardless of the authority that had proclaimed the war. In that crucial respect, the penitentials were arguably much closer to the original teaching and practice of the Gospels and the early Church than the just war tradition is.<sup>149</sup> True, the penance standardly assigned for killing in war was, by our lights, rather lenient. But the penitentials originated in a violent society<sup>150</sup> that Christianity had only recently penetrated, and it is remarkable to

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147. See MEDIEVAL HANDBOOKS OF PENA NCE, *supra* note 112, at 37-38.

148. See GUSTAF AULÉN, CHRISTUS VICTOR: AN HISTORICAL STUDY OF THE THREE MAIN TYPES OF THE IDEA OF ATONEMENT 81-84 (A.G. Herbert trans., 1931) (medieval origins of “Latin” theory of atonement, based on ideas of merit and satisfaction).

149. Before the penitentials (but also after Constantine), at least one Church father had taught that killing in war was intrinsically sinful. In his Letter 188, St. Basil the Great (329-379) wrote that “[h]omicide in war is not reckoned by our Fathers as homicide, I presume from their wish to make concession to men fighting on behalf of chastity and true religion. Perhaps, however, it is well to counsel that those whose hands are not clean only abstain from communion for three years.” The First Canonical Epistle of Our Holy Father Basil, Bishop of Caesarea in Cappadocia to Amphilochius, Bishop of Iconium, available at <http://www.tertullian.org/fathers2/NPNF2-141185.htm>; see also Wynn, *supra* note 26, at 107.

150. Approximately 13% of all skeletal populations from excavated early medieval cemeteries in Ireland show evidence of weapon trauma. Irish war practices of the period included cutting off a slain enemy’s head or ear for display as a trophy. See J. Geber, *Comparative Study of Perimortem Weapon Trauma in Two Early Medieval Skeletal Populations (AD 400-1200) from Ireland*, INT’L J. OSTEOARCHAEOLOGY (2012) DOI: 10.1002/oa.2281.

find in them a condemnation of warfare *at all*. In that light, we should see the early penitentials as an effort to bring a measure of gentleness, peacefulness and restraint to a culture unaccustomed to those habits. Moreover, some penitentials, such as Burchard's, imposed a far heavier penance than forty days of fasting – even in cases in which the war had been undertaken on royal authority. On the other hand, even when killing in war in itself was lightly sanctioned, the offense was considered aggravated if it had been motivated by greed or hatred – and since such wrongful motives are surely prevalent in wartime killing, this treatment too often amounted, effectively, to a general condemnation of wartime killing.

As to the argument that the practice of repeated confession represented a regression from the Church's earlier and purer practice, one may observe that the earlier system had simply proven to be too strenuous for ordinary, faithful Christians to bear; that it did not address the need they felt for periodic spiritual renewal; that a penitential practice that had proven too burdensome even for the Latin Christians of Rome would have been utterly impracticable as applied to newly Christianized barbarians; that the habit of regular confession may bring the penitent to a better life instead of merely offering "cheap grace;" and that the widespread use of repeated, secret confession in much of the Christian Church for well over a millennium attests to the spiritual benefits of the later practice. One might also note that as the Church's thinking evolved on the categorization of and cures for "sin,"<sup>151</sup> the necessity for repeated confession was perhaps more keenly felt: it might be possible to abandon a career as a soldier after confessing, but was it likely that thereafter the shriven penitent could avoid *all* acts of sin? Despair of salvation could lie that way.

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151. For studies of changing conceptions of sins and vices in late antiquity and the middle ages, see Eileen C. Sweeney, *Aquinas on the Seven Deadly Sins: Tradition and Innovation*, in RICHARD G. NEWHAUSER & SUSAN J. RIDYARD, SIN IN MEDIEVAL AND EARLY MODERN CULTURE 85 (2012); RICHARD G. NEWHAUSER, SIN: ESSAYS ON THE MORAL TRADITION IN THE WESTERN MIDDLE AGES, Ch. VIII (2007) (transformations in idea of sin of avarice); William Ian Miller, *Gluttony*, 60 REPRESENTATION 92 (1997); Peter Toohey, *Acedia in Late Classical Antiquity*, 15 ILL. CLASSICAL STUD. 339 (1990); Lester K. Little, *Pride Goes before Avarice: Social Change and the Vices in Latin Christendom*, 76 AM. HIST. REV. 16 (1971); Siegfried Wenzel, 'Acedia' 700-1200, 22 TRADITIO 73 (1966). See also GARY A. ANDERSON, SIN: A HISTORY 6 (2009) ("[T]he concept of sin and forgiveness changes over time . . . [T]he term *sin* does not have the same meaning in the book of Genesis as it does in the book of Daniel or the Gospel of Matthew.").

As for commutations and compositions, I would observe that both Christian and Jewish thought have long conceptualized sin in terms of debts and payments. Thus, Second Isaiah says that Jerusalem “has served her term” so that “her penalty is paid” and she has received “double for all her sins.”<sup>152</sup> And Paul says that “the wages of sin is death”<sup>153</sup> Jesus apparently endorsed the Jewish ritual practice of making an offering in the Temple on the Day of Atonement in propitiation for sin (just as the rabbis had prescribed), provided that the repentant sinner also sought reconciliation from those he had sinned against.<sup>154</sup> Rabbinical texts dating back almost to the time of Jesus assign “costs” to various sins or stipulate “payments” for them; and Christian patristic writings do the same.<sup>155</sup> For example, the early Church document known as the Second Epistle of Clement (dated by one commentator to 98-100<sup>156</sup>) states that

Alms giving therefore is a good thing, even as repentance from sin. Fasting is better than prayer, but almsgiving than both. And [love covereth a multitude of sins,] but prayer out of a good conscience delivereth from death. Blessed is every man that is found full of these. For alms-giving lifteth off the burden of sin.<sup>157</sup>

The Didache, another early Church document (dated to the late first-early second century<sup>158</sup>) says: “Of whatsoever thou hast gained by thy hands thou shalt give a ransom for thy sins. Thou shalt not hesitate to give, nor shalt thou grumble when thou givest, for thou shalt know who is the good Paymaster of the reward.”<sup>159</sup> Performing acts of penance in expiation of “major sins” was practiced in the church “since at least the second century,”

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152. *Isaiah* 40:2 (New Revised Standard Version).

153. *Romans* 6:23 (New Revised Standard Version).

154. See *Matthew* 5:23-24; see also George Wesley Buchanan, *The Day of Atonement and Paul's Doctrine of Redemption*, 32 NOVUM TESTAMENTUM 236, 239 (1990).

155. See Anderson, *supra* note 151, at 8; 43-44; 96; 135-37; 149-51.

156. See Karl Paul Donfried, *The Theology of Second Clement*, 66 HARV. THEOLOGICAL REV. 487, 499 (1973).

157. *Second Clement* 16:4-8 (J.B. Lightfoot ed., trans.), available at <http://wesley.nnu.edu/sermons-essays-books/noncanonical-literature/noncanonical-literature-the-fathers-of-the-church/second-clement/>.

158. See Jonathan A. Draper, *The Apostolic Fathers: The Didache*, 117 EXPOSITORY TIMES 177, 178 (2006).

159. The Didache 4:6-7 (Kirsopp Lake trans.), available at <http://www.earlychristianwritings.com/didache.html>.

and later, in Ambrose's Milan, "wealthy penitents were expected to put off their expensive robes and precious jewels, and to put on cheap, shabby clothing."<sup>160</sup> Augustine taught the African Church that "almsgiving was an obligatory pious practice" that "had always had an expiatory function. Alms atoned for sins."<sup>161</sup> There is therefore nothing untoward, or at least nothing untraditional, in the penitentials' thinking of sin and repentance in similar terms.

Moreover, it is essential to note the great variety of expiatory practices found in the penitentials. One scholar observed three distinct practices regarding the alleviation of penances: a very severe one, a very lenient one, and a moderate one.<sup>162</sup> Some penitentials refused to permit alleviations at all. Burchard's penitential allowed for alleviations, but these do not appear to be overly lax.<sup>163</sup> Alleviations could take the form, e.g., of ransoming captives or freeing slaves in lieu of fasting. Overall, the penitentials allowing practices of alleviation that led to corrupt results were "rare."<sup>164</sup>

Finally, let us ask if the penitentials' view of war had become the *dominant* position in the Western Church as of the time that Burchard wrote. Any defensible answer will have to be hedged about with qualifications. For one thing, before the Gregorian Reform of the eleventh century,<sup>165</sup> the "Church" itself was a highly localized and decentralized organization, encompassing many different perspectives and shades of opinion. Indeed, the Gregorian Reform was to some extent *called forth* by the Church's somewhat ramshackle structure. (And even now, one might reasonably ask: What is the "Church"?). On the particular question of war and peace, moreover, the "Church" spoke with different voices on the very eve of the Gregorian Reform. A liturgical document like the

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160. WYNN, *supra* note 26, at 105.

161. PETER BROWN, THROUGH THE EYE OF A NEEDLE: WEALTH, THE FALL OF ROME, AND THE MAKING OF CHRISTIANITY IN THE WEST, 350-55 AD at 361 (2012). Augustine relied on the Book of Daniel 4:24 to sustain his view that every Christian was bound to redeem sins with alms. *Id.*

162. See Thomas P. Oakley, *Alleviations of Penance in the Continental Penitentials*, 12 *SPECULUM* 488, 490 (1937).

163. "[T]he right of partial redemption of fasting by money payments, or by feeding the poor, is granted to those willful slayers who may be on a long journey, or in the royal army, etc., or in any infirmity; but the penitent may enjoy this privilege only until he returns to his home or recovers his health, and he must observe some abstinence during the time for which mitigation is allowed." *Id.* at 498.

164. *Id.* at 502. Contrast Keith Haines, *Attitudes and Impediments to Pacifism in Medieval Europe*, 7 *J. MEDIEVAL HIST.* 369, 380-81 (1981).

165. See Part IV *infra*.

Pontifical of Cologne, which probably dates from that period, contains an order for the ritual of consecrating knights, and invokes soldier-martyrs such as Saints Maurice, Sebastian and George.<sup>166</sup> Well before the Reform, the Church had come to accept and support chivalric ideals, and the process of course intensified after the Reform and during the Crusades.<sup>167</sup> Even in the Church of late antiquity and the early Middle Ages, one can see the interpenetration of soldierly and monastic ideals.<sup>168</sup>

Sensitive to the conflicting trends of thought and practice in the medieval Church, Richard Kaeuper takes the view that although “Christianization of violence and war loaded one side of a balance . . . the other side carried a weight of continuing Christian doubt about war.”<sup>169</sup> There was, in short, a moral *debate* within the medieval Church – one that, as we have seen, can be identified even within the pre-Constantinian Church, and that persists to the present. The tensions, conflicts and inconsistencies in Christian attitudes to war in the period of special interest here should already be obvious: the penitential decree after the Battle of Hastings is surely compelling evidence of such ambivalence. And indeed, the penitentials as a whole can be seen as embracing, rather than resolving, the conflict in the mind of the Church: killing in war is at once necessary and sinful.

What *can* safely be said is this: the prevailing attitude of the Church towards war and killing *did* change in an important way during the Gregorian Reform and in its aftermath. Even if the Gregorian Reform did not *decisively* resolve the moral debate within the Church, it tilted the balance strongly in favor of justifying, and even sanctifying, warfare.

### III.

Before turning to the further development of the Western Church’s thinking about war, it will be illuminating, I believe, to consider the penitentials in the broader context of purification rituals for returning warriors. It would, I think, be going too far to claim that an aversion to killing other human beings and the emo-

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166. See ERDMANN, *supra* note 130, at 273.

167. See PHILIPPE CONTAMINE, *WAR IN THE MIDDLE AGES* 275-78 (Michael Jones trans., 1984 [first French ed. 1980]).

168. See John T. McNeill, *Asceticism Versus Militarism in the Middle Ages*, 5 CHURCH HIST. 3 (1936).

169. RICHARD W. KAEUPER, *HOLY WARRIORS: THE RELIGIOUS IDEOLOGY OF CHIVALRY* 12 (2009).

tions of guilt, shame or defilement if one does so are embedded in human "nature." But whatever the sources of such aversion and emotions may be, they are clearly recurring, and perhaps near-universal, features of human experience. Over a broad range of human cultures and historical periods, we find evidence both of an inhibition against killing other humans and of a powerfully felt need for atonement or purification if one has killed. Thus, the practice of the penitentials with respect to returning warriors is by no means an isolated or exceptional one; rather, it has clear affinities with the processes found in many other societies to reintegrate into a more peaceful way of life those who have seen or inflicted extreme violence during war. On this view, the experience of war inflicts psychic, moral or spiritual wounds on those who wage it – wounds that need to be treated before the returning warrior can fully be "at home" again.

In his important study of the penitentials, Bernard Verkamp proposed exactly such a comparative understanding:

The Christian community of the first millennium generally assumed that warriors returning from battle would or should be feeling guilty and ashamed for all the wartime killing they had done. Far from having such feelings dismissed as insignificant or irrelevant, returning warriors were encouraged to seek resolution of them through rituals of purification, expiation, and reconciliation. To accommodate these latter needs, religious authorities of the [early medieval] period not infrequently imposed various and sundry penances on returning warriors, depending on the kind of war they had been engaged in, the number of their killings, and the intention with which they had been carried out.<sup>170</sup>

Verkamp then surveys a range of practices in different cultures by which societies of varied kinds seek to reintegrate warriors returning from war and slaughter. In such societies, the return is marked by rituals of purification, atonement or expiation for the killings that the warriors have witnessed or committed. There is, so to say, a common grammar of purification or of forgiveness in these societies.

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170. BERNARD J. VERKAMP, THE MORAL TREATMENT OF RETURNING WARRIORS IN EARLY MEDIEVAL AND MODERN TIMES 11 (1993).

### A. The Figure of the Returning Warrior

From Homer's *Odyssey* and Aeschylus' *Agamemnon* to such modern films as *Brothers* (2009); *Straight Story* (1999); *Forrest Gump* (1994); *Born on the Fourth of July* (1989); *The Return of Martin Guerre* (1982); *The Deer Hunter* (1976) and *The Seventh Seal* (1957), the theme of the returning warrior has haunted the Western imagination. Often these returning warriors are represented as damaged, destructive or disillusioned men, unable to find peace within themselves at home but also convinced of the futility of the combat they had left behind.<sup>171</sup> The historian Eric Leed has described the figure of the returning warrior as an example of the "liminal type":

He derives all his features from the fact that he has crossed the boundaries of disjunctive social worlds, from peace to war, and back. He has been reshaped by his voyage along the margins of civilization, a voyage in which he has been presented with wonders, curiosities, and monsters – things that can only be guessed at by those who remained at home.<sup>172</sup>

Many combat veterans bring the suffering of war back home, but inside themselves. As one First World War veteran put it, "We ourselves are the war."<sup>173</sup>

### B. Resistance to Killing

Often the cause of these warriors' mental torment is the fact that they have killed other human beings. For although there is much evidence that some men experience the killing of others with almost ecstatic pleasure,<sup>174</sup> there is also extensive and compelling evidence that "there is within most men an intense resistance to killing their fellow man. A resistance so strong that, in many cir-

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171. See, e.g., Joanna Bourke, *War and Violence*, in 86 THESIS ELEVEN 23, 35-6 (2006) (discussing prevalence of feelings of guilt and unwillingness to speak among returning combatants who have killed in wartime).

172. ERIC J. LEED, NO MAN'S LAND: COMBAT & IDENTITY IN WORLD WAR I 194 (1979).

173. Quoted in GEOFF DYER, THE MISSING OF THE SOMME 51 (1994).

174. See Edgar Jones, *The Psychology of Killing: The Combat Experience of British Soldiers during the First World War*, 41 J. CONTEMP. HIST. 229, 230, 245 (2006).

cumstances, soldiers on the battlefield will die before they can overcome it.”<sup>175</sup>

Military historians and psychologists have actively studied this resistance since at least the publication in 1947 of Brigadier General S.L.A. Marshall’s classic *Men Against Fire: The Problem of Battle Command*. Marshall and a team of Army historians working under him interviewed thousands of U.S. soldiers from more than 400 infantry companies that were fighting in Europe or the Pacific. The interviews took place immediately after these soldiers had been in close combat with Axis troops. The results were astonishingly consistent: only fifteen to twenty percent of the American riflemen would fire at the enemy. Those who would not fire often performed tasks on the battlefield that involved them in greater risk: they rescued wounded comrades, fetched ammunition or carried messages; they did not usually run or hide. But they simply would not fire their weapons against the enemy.

Although later students have questioned Marshall’s research methods,<sup>176</sup> there is substantial support for his overall conclusion. Recent studies in clinical psychology have confirmed that killing in combat is often closely associated with Post-Traumatic Distress Disorder (PTSD).<sup>177</sup> PTSD is, sadly, a common condition among the two million American veterans of the country’s recent wars in Iraq and Afghanistan: “studies suggest that 20 to 30 percent have come home with . . . PTSD – a mental health condition triggered by some type of terror, or traumatic brain injury – TBI – which occurs when a brain is jolted so violently that it collides with the inside of

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175. LT. COL. DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY 4 (rev’d ed. 2009). See also DAVID LIVINGSTONE SMITH, THE MOST DANGEROUS ANIMAL: HUMAN NATURE AND THE ORIGINS OF WAR 155-57 (2007).

176. See SMITH, *supra* note 175, at 149.

177. The PTSD syndrome is by no means necessarily connected to wartime combat alone, but may result from traumas such as sexual assaults or life-threatening accidents. The diagnostic category brings together certain effects of traumatization, including the experience of the recurrence of the original traumatizing situation, evidence of tendencies to disengage from the external world, and restlessness, severe insomnia, inability to concentrate, impatience and/or feelings of guilt. The construction of this diagnostic category and the identification of its symptoms were the product of the War in Vietnam. In the First World War, what we know characterize as PTSD cases would have been understood in normative rather than clinical terms. See HANS JOAS, WAR AND MODERNITY 118-19 (Rodney Livingstone trans., 2003 [original German edn. 2000]).

the skull and causes psychological damage.”<sup>178</sup> In all, these wars have left about half a million mentally wounded Americans.

A team led by Brett Litz of the National Center for PTSD and of Boston University reported in 2009 that

Killing, regardless of role, is a better predictor of classic PTSD symptoms than other indices of combat, mirroring some of the results on atrocities. For example, MacNair found that Vietnam veterans who killed and experienced light combat had more PTSD symptoms than those who did not kill and experienced heavy combat. Among Vietnam veterans, killing was a significant predictor of PTSD symptoms, dissociation, functional impairment, and violent behaviors, after controlling for general combat exposure . . . . Also, after controlling for combat exposure, taking another life was a significant predictor of PTSD symptoms, alcohol abuse, anger, and relationship problems among Iraq War veterans.<sup>179</sup>

Severe psychological effects were even more likely to be found when the veterans reported killing non-combatants.<sup>180</sup>

Studies in other disciplines point to similar results. The British social historian Joanna Burke, surveying the accounts of British combat veterans of the First World War, found that

[T]he individual memory of *having killed* [original emphasis] was relentless in refusing to be repressed. Terrifying nightmares of being unable to withdraw bayonets from the enemies’ bodies persisted long after the slaughter. The dreams might occur ‘right in the middle of an ordinary conversation’ when ‘the face of a Boche that I have bayoneted, with its horrible gurgle and grimace, comes sharply into view,’ an infantry captain complained. Another 23-year-old infantryman took emotional refuge in conversion hysteria after stabbing to death a man with his bayonet: ‘That bothered me’, he stammered, ‘my father taught me never to kill.’ Memory of violence refused to be silenced, but erupted in painful memories, nightmares, or compulsive, repetitive behaviours. But its most common manifestation was melancholia, a mourning process in which the object of loss was absent, creating an unde-

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178. FINKEL, *supra* note 21, at 11.

179. Brett T. Litz, Nathan Stein, Eileen Delaney, Leslie Lebowitz, William P. Nash, Caroline Silva & Shira Maguen, *Moral Injury and Moral Repair in War Veterans: A Preliminary Model and Intervention Strategy*, 29 CLINICAL PSYCHOL. REV. 695, 697 (2009).

180. See Shira Maguen & Brett Litz, *Moral Injury in Veterans of War*, 23 PTSD RES. Q. 1, 2 (2012).

fined, free-floating anxiety. William Broyles described it as a form of listlessness: ‘Something had gone out of our lives forever, and our behavior on returning was inexplicable except as the behavior of men who had lost a great – perhaps the great – love of their lives, and had no way to tell anyone about it.’ . . . The underlying fear of the ex-serviceman was based on a latent recognition that he had killed. How could anyone who spilt human blood remain untainted?<sup>181</sup>

To avoid killing an enemy, soldiers may deliberately waste their shot or fail to fire, even at great risk to their own lives. A small group of British soldiers at Rorke’s Drift in South Africa, surrounded and vastly outnumbered by the Zulu, fired volley after volley into enemy ranks at close range. Extraordinarily, it appears that for each hit, thirteen rounds of fire were discharged.<sup>182</sup> Similar results have been found when the attacker fires from a position of relative safety: French forces in fortified positions firing on German forces advancing across open fields in the Battle of Wissembourg in 1870 fired 48,000 rounds in order to hit a mere 404 Germans – a ratio of one hit for every 119 rounds fired.<sup>183</sup>

Non-Western cultures also demonstrate the workings of an inhibition against killing an enemy. According to the anthropologist Lawrence Keeley,

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181. Joanna Bourke, ‘Remembering’ War, 39 J. CONTEMP. HIST. 473, 478-79 (2004).

182. See GROSSMAN, *supra* note 175, at 11-12.

183. *Id.* at 12. The eighteenth century legal régime of the *jus victoriae* may perhaps also be cited as evidence of a resistance against killing, although these rules served several purposes and were rooted in the political culture of the period. Under the *jus victoriae*, armed combat took the form of a “pitched battle” between armies, and victory was accorded to the side that was in possession of the field at the close of the battle. Pitched battle was “a ritualized means of focusing, and therefore containing, the violence of war – a means, in the words of anthropologists, of ‘limiting the engagement, and thus the losses.’” The legal convention that awarded victory to the army in possession of the field “defined victory in ways that stopped short of annihilation,” in part by sparing “everybody on both sides the dangers of a pursuit” of the retreating forces. JAMES Q. WHITMAN, THE VERDICT OF BATTLE: THE LAW OF VICTORY AND THE MAKING OF MODERN WAR 5, 197-98 (2012).

Sparing retreating soldiers from further attacks by the victorious army has been known to happen in post-18th century Western warfare. “A German battalion commander recalls that after the British began their retreat from the battlefield at Loos in September 1915, ‘no shot was fired at them from the German trenches for the rest of the day, so great was the feeling of compassion and mercy for the enemy after such a victory.’” DYER, *supra* note 173, at 50.

On Tahiti, where warfare was especially brutal and merciless, ‘exhorters,’ called Rauti, circulated constantly among the warriors during combat, urging the latter to spare no enemy – even relative or friends – and to display the ferocity of ‘the devouring wild dog.’ When they were being browbeaten into doing something, Tahitian men would murmur, “This is equal to a Rauti.” This custom strongly implies that even when enemy atrocities to avenge were plentiful and where warfare was customarily exceptionally cruel, men had to be persistently nagged into committing acts of inhumanity.<sup>184</sup>

Likewise, warfare among the Plains Indians of North America emphasized feats of individual courage, and touching an enemy warrior, whether alive or dead, with a *coup* stick was considered to be the ultimate form of bravery.

It was regarded as an evidence of bravery for a man to go into battle carrying no weapon that would do any harm at a distance. It was more creditable to carry a lance than a bow and arrows; more creditable to carry a hatchet or a club than a lance; and the bravest thing of all was to go into a fight with nothing more than a whip, or a long twig – sometimes called a coup stick.<sup>185</sup>

These practices of course limited the amount of killing actually done in battle.

Emilio Lussu’s novel of the First World War, *Sardinian Brigade* (1939), includes an unforgettable episode dramatizing the resistance to killing. The novel is set on the Austro-Italian front. The protagonist, an Italian Army officer apparently based on Lussu himself, has crawled to within firing range of an Austrian encampment. Kneeling to steady his rifle, he has taken aim at an unsuspecting Austrian officer:

The Austrian officer lit a cigarette. Now he was smoking. This cigarette formed an invisible link between us. No sooner did I see its smoke than I wanted a cigarette myself; which reminded me that I had some with me. All this took place in a moment; but the act of aiming, which had been automatic, became rational. I was forced to remember that I was taking aim, and that I was taking

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184. LAWRENCE H. KEELEY, *WAR BEFORE CIVILIZATION: THE MYTH OF THE PEACEFUL SAVAGE* 146 (1996).

185. George Bird Grinnell, *Coup and Scalp Among the Plains Indians*, 12 AM. ANTHROPOLOGIST 296, 297 (1910).

aim at somebody. The finger that was on the trigger slackened its pressure. I began to think. I found I was forced to think.

There was no doubt that I considered the war morally and politically justified. My conscience as a man and a citizen was not in conflict with my military duties. War was, for me, a hard necessity, terrible, to be sure, but one to which I submitted, as one of many necessities, unpleasant but inevitable, of life. Moreover, I was on campaign and there were men fighting under my orders. That is to say, morally, I was fighting twice over. I had already taken part in many engagements. It was therefore quite logical for me to fire on an enemy officer . . . . There was no doubt about it: I ought to fire.

And yet I did not . . . .

In front of me I had a young officer who was quite unconscious of the danger that threatened him. I could not have missed him. I could have fired a thousand rounds at that range and never have missed once. All I had to do was to press the trigger and he would have fallen dead. The certainty that his life depended solely on my will made me hesitate. What I had in front of me was a man. A man!

I could see his face perfectly clearly. The light was increasing and the sun was just becoming visible behind the tops of the mountains. Could I fire like this, at a few paces, on a man – as if he were a wild boar?

I began to think that I ought not to do so. I reasoned like this: . . . To fight is one thing, but to kill a man is another. And to kill him like that is to murder him.

. . . . I put down the rifle and I did not fire . . . .

The corporal was close beside me. Signing him to take the [rifle] butt, I whispered: "Look here – I'm not going to fire on a man, alone, like that. Will you?"

The corporal took hold of the rifle butt. Then he said:

"No, I won't either."

We crept back into our trenches, on all fours. Coffee had already been served and we had ours too.<sup>186</sup>

### C. Caveats

Having briefly reviewed evidence supporting the claim that human beings are strongly inhibited from killing others of their own kind during war, we must also acknowledge important qualifications in or caveats about that thesis. (Indeed, some would surely argue that these observations refute the inhibition thesis.) At least five such qualifications or caveats are needed.

First, human beings often *do* kill one another with weapons. Indeed, there is evidence of such events from very early periods. Archaeologists have found such evidence in the fourteen thousand-to twelve thousand year old cemetery near Jebel Sahaba in Sudanese Nubia, close to the Nile River. The cemetery “contains remains of fifty-nine individuals of whom twenty four (40.7 percent) show evidence of being killed with weapons: stone projectile points and barbs embedded in the skeletons or resting within them (110 stone artifacts in all).”<sup>187</sup>

Second, students of animal behavior have noted that raiding bands of young male chimpanzees deliberately seek out, attack and kill chimpanzees from other groups.<sup>188</sup> This behavior on the part of the species closest to our own raises the possibility that killing other humans in war may have an evolutionary basis.<sup>189</sup>

Third, some combatants are not resistant to killing and seem even to enjoy it. During World War II, one percent of U.S. Army Air Corps fighter pilots accounted for thirty to forty percent of all enemy aircraft destroyed in the air.<sup>190</sup> Grossman estimates that “2 percent of the male population . . . , if pushed or given a legitimate

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186. EMILIO LUSSU, THE SARDINIAN BRIGADE 169-71 (Marion Rawson trans., 1939).

187. See KEITH F. OTTERBEIN, HOW WAR BEGAN 74 (2004); see also Patricia M. Lambert, *The Archaeology of War: A North American Perspective*, 10 J. ARCHAEOLOGICAL RES. 207 (2002) (surveying evidence of prehistoric warfare in North America).

188. See DALE PETERSON AND RICHARD WRANGHAM, DEMONIC MALES: APES AND THE ORIGINS OF HUMAN VIOLENCE (1997); Nicholas Wade, *Chimps, Too, Wage War and Annex Rival Territory*, N.Y. TIMES, June 21, 2010, at D1.

189. See William H. McNeill, *Violence & Submission in the Human Past*, 136 DAEDALUS 5 (2007); SMITH, *supra* note 175, at 73-80, 162-4.

190. GROSSMAN, *supra* note 175, at 31.

reason, will kill without regret or remorse.”<sup>191</sup> One First World War veteran wrote that he would gladly re-enlist if war returned:

[M]erely to experience again that voluptuous thrill of the human brute who realizes his power to take away life from other human beings who try to do the same thing to him. What was first accepted as a moral duty became a habit, and the habit . . . had become a need.<sup>192</sup>

Fourth, the inhibition against killing can be significantly weakened by conscious training. During the War in Vietnam, U.S. Army instructors, concerned about the low- and no-fire rates reported for the Second World War, transformed traditional marksmanship training into combat simulation. Recruits were drilled to fire unreflectively if they found themselves in life-threatening situations. This conditioning process drastically increased the firing rate of U.S. soldiers in Vietnam, as compared with their Second World War counterparts. British soldiers fighting in the 1982 Falklands War, who had been drilled in these modern methods, appear to have fired at significantly higher rates than the Argentine soldiers opposing them, who had received the earlier type of training.<sup>193</sup>

Fifth, the distance between the attacker and his target affects the willingness to fire. The inhibition against killing appears to be strongest at close range, tapering off as the distance between attacker and target increases. Grossman writes, “At close range the resistance to killing an opponent is tremendous. When one looks an opponent in the eye, and knows that he is young or old, scared or angry, it is not possible to deny that the individual about to be killed is much like oneself . . . . Most simply cannot or will not do it.”<sup>194</sup> Terrorism expert John Horgan points out that terrorist executions often involve hooding the victim or slitting the throat from

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191. *Id.* at 180-81.

192. Henry de Man, quoted in LEED, *supra* note 172, at 201. Declassified transcripts of secret tape recordings of German prisoners of war made by Allied intelligence during the Second World War were discovered in governmental archives, edited and analyzed by two German researchers, Sönke Neitzel and Harald Welzer. Their findings were published as SOLDATEN: ON FIGHTING, KILLING, AND DYING: THE SECRET TRANSCRIPTS OF GERMAN POWS (Jefferson Chase trans., 2012). The candid and informal conversations among these POWs, recorded without their knowledge, often reveal similar delight in killing, even when the victims were in close range and fully visible. *See id.* at 44-119.

193. *See* GROSSMAN, *supra* note 175, at 178.

194. *Id.* at 118-19.

behind. Horgan argues, “Watching the face when you kill someone is a very difficult thing to do.”<sup>195</sup> Likewise, historian Christopher Browning found that Nazi reservists who had been ordered to shoot Jews at close range initially felt a physical revulsion at performing such an act.<sup>196</sup> The Jalé, a warrior tribe in New Guinea, have a proverb: “People who have faces should not be eaten.”<sup>197</sup>

Killing at long range, by aerial bombardment or artillery, in which the victim is not perceived at all or is perceptible only with mechanical aids, is much easier.<sup>198</sup> As psychologist Steven Pinker observes, it is hardly likely that the American pilot who dropped the atomic bomb from the *Enola Gay* on Hiroshima would have agreed to immolate a hundred thousand people with a flamethrower one at a time.<sup>199</sup>

#### *D. Reintegrating Returning Warriors: Purification and Forgiveness*

What happens when a soldier overcomes the resistance to killing and takes the life, in combat, of a human being whom he can see close-up? Many soldiers who have been in that situation experience an overwhelming need to be forgiven. Likewise, the society to which they return will likely demand from them that they relinquish the power over life and death that it had granted them. Both the returning warrior and the society to which he returns understand, or should understand, that the killing he did in war, however necessary or justifiable it may have been, “was outside the norms of human existence” and must somehow be purged away. By asking for forgiveness, the returning warrior “acknowledge[s] that the rules that generally govern the social contract are valid and do apply to them. They accept ownership of their actions and symbolically ask to be allowed back into the fold of their community, released from the guilt of the acts they committed in the ‘fog of war.’” For these reasons, many cultures “have understood the need

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195. Quoted in Katrin Bennhold, *Behind Flurry of Killing, Potency of Hate*, N.Y. TIMES, Oct. 12, 2013, <http://www.nytimes.com/2013/10/13/world/europe/behind-the-flurry-of-killing-potency-of-hate>.

196. See CHRISTOPHER BROWNING, *ORDINARY MEN: RESERVE BATTALION 101 AND THE FINAL SOLUTION IN POLAND* 74 (1992).

197. BRUCE LINCOLN, *DEATH, WAR AND SACRIFICE: STUDIES IN IDEOLOGY AND PRACTICE* 141 (1991).

198. See GROSSMAN, *supra* note 175, at 107-08.

199. See STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* 568 (2011).

for some form of spiritual cleaning and ritualized transition for the warrior passing from the world of war into the world of peace.”<sup>200</sup>

The anthropological literature is rich in cases.<sup>201</sup> For example, among the Adangbe people of West Africa, it was the custom for all those who had shed blood during war to undergo a special cleansing ritual on their return. A priest prepared a strong medicine to wash off the blood stain. The priest then placed the sacred water into the soldier’s mouth, saying: “The [blood] stain which you have brought home, I wash it off from you, so that no headache may trouble you!” Further, some alcohol with drops of blood from the head of a beheaded enemy may have been given to such a warrior to protect him against the enemy’s ghost.<sup>202</sup> Sir James Frazer’s classic *The Golden Bough* (1922) includes a lengthy discussion of “Manslayers tabooed” (Ch. 20, sec. 5) which refers to purification rituals for returning warriors.<sup>203</sup> Among the scores of cases Frazer records, we may note three from different continents:

In the island of Timor, when a warlike expedition has returned in triumph bringing the heads of the vanquished foe, the leader of the expedition is forbidden by religion and custom to return at once to his own house. A special hut is prepared for him, in which he has to reside for two months, undergoing bodily and spiritual purification. During this time he may not go to his wife nor feed himself; the food must be put into his mouth by another person . . .

. . .

Among the Basutos “ablution is specially performed on return from battle. It is absolutely necessary that the warriors should rid themselves, as soon as possible, of the blood they have shed, or the shades of their victims would pursue them incessantly, and disturb their slumbers. They go in a procession, and in full armour, to the nearest stream. At the moment they enter the water a diviner, placed higher up, throws some purifying substances into the current . . . The javelins and battle-axes also undergo a process of washing.” . . .

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200. Shannon E. French, *Warrior Transitions: From Combat to Social Contract*, JSOPE (Jan. 2005), available at <http://isme.tamu.edu/JSOPE05/French05.html>.

201. See the anthropological studies summarized in Keeley, *supra* note 184, at 144.

202. See Hugo Huber, Adangme Purification and Pacification Rituals (West Africa), 53 *Anthropos* 161, 175 (1958).

203. Sigmund Freud borrowed heavily from Frazer’s discussion in his *TOTEM AND TABOO: RESEMBLANCES BETWEEN THE PSYCHIC LIVES OF SAVAGES AND NEUROTICS* 62-75 (A.A. Brill trans., 1918).

When a Choctaw had killed an enemy and taken his scalp, he went into mourning for a month, during which he might not comb his hair, and if his hair itched he might not scratch it except with a little stick which he wore fastened to his wrist for the purpose. This ceremonial mourning for the enemies they had slain was not uncommon among the American Indians.

In the Book of Numbers, ch. 31, vv. 19-20, the Hebrew Bible also records a form of purification rite for Israelite soldiers returning from a bloody campaign against the Midianites. Moses is angry with the soldiers because, despite having killed all the Midianite men, they had spared the women. Ordering the army to slaughter the Midianite women (except for the virgins) and male children, Moses says:

Camp outside the camp seven days; whoever of you has killed any person or touched a corpse, purify yourselves and your captives on the third and on the seventh day. You shall purify every garment, every article of skin, everything made of goats' hair, and every article of wood.<sup>204</sup>

The meaning of the passage is uncertain, and it may have to do more with the need for ritual purification after being contaminated by contact with a corpse than with expiation for the killing of other human beings.<sup>205</sup>

Whether the purification ritual in the Book of Numbers concerns cleansing for the killing of others, elsewhere the Hebrew Bible makes plain that at least a commander's responsibility for killing in warfare renders him unfit for some religious functions. In the First Book of Chronicles, ch. 22, vv. 6-9, King David addresses his son and successor Solomon, explaining why he, David, is unfit to carry out the project of building a temple:

Then he called for his son Solomon and charged him to build a house for the Lord, the God of Israel. David said to Solomon, "My son, I had planned to build a house to the name of the Lord my God. But the word of the Lord came to me, saying, 'You have shed much blood and have waged great wars; you shall not build a house to my name, because you have shed so much blood in my sight on the earth. See, a son shall be born to you; he shall be a man of peace. I will give him peace from all his enemies on every

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204. *Numbers* 31:19-20 (New Revised Standard Version).

205. See David P. Wright, *Purification from Corpse-Contamination in Numbers XXXI 19-24*, 35 VETUS TESTAMENTUM 213 (1985).

side; for his name shall be Solomon,[and I will give peace and quiet to Israel in his days.]<sup>206</sup>

#### IV.

During the course of the eleventh century – a period in which the teaching of the penitentials on homicide was being systematized and perfected – the Church began reconsidering its views on killing in warfare, which to that point had not been systematized.<sup>207</sup> This reconsideration was driven by the Church hierarchy, in particular the Papacy and the Roman curia, and was intimately bound up with the program of what is called the “Gregorian Reform” of the latter part of the eleventh century.<sup>208</sup> As David Bachrach puts it, “the most striking development in the religion of war during the entire period was the effort at the highest levels of the church to redefine homicide as an act that could be meritorious rather than sinful.”<sup>209</sup> We can watch this process begin to unfold in 1063 with the claim of Pope Alexander II (1061-1073) that he could grant soldiers volunteering to fight the Saracens in Spain “remission” of their sins for going on the campaign – meaning that their military service and all that it entailed, including the killing of enemies, now became a form of penance in itself, *i.e.*, a way of *expiating* sin rather than of *incurring* it.<sup>210</sup> Further, in a letter to the Archbishop of Narbonne, also in 1063, Alexander noted that although both secular and ecclesiastical law prohibited the shedding of blood, an exception from the general rule had to be made for the case of killing Saracens in war – an action that the Pope saw as

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206. 1 *Chronicles* 22:6-9 (New Revised Standard Version).

207. In what follows, it is important to bear in mind that the broad tendencies in Church thinking that I am attempting to describe admitted many exceptions. The thought of Pope Gregory VII himself reveals a large measure of inconsistency and uncertainty with regard to the morality of warfare, even though Gregory's papacy positively bristled with warmaking or the threat of it. Indeed, a decree of the papal synod of November 1078, which Gregory himself had summoned, affirmed that the calling of the knight was, in itself, sinful; and Gregory was later remembered for that very decree. See H.E.J. COWDREY, POPE GREGORY VII, 1073-1085 at 655-56 (1998).

208. The “Gregorian” reform, though generally and correctly linked to the papacy of Gregory VII (1073-1085) should not be understood to be limited to that period. Important as Gregory's role in the reform was (as both Pope and Archdeacon of the Roman Church), there were significant figures and events in the reform both before and after his papacy. See CUSHING, *supra* note 29, at 34.

209. BACHRACH, *supra* note 118, at 107.

210. *Id.* at 103.

praiseworthy.<sup>211</sup> The process of redefining killing in warfare against the Church's enemies – not only Moslems in both Palestine and Spain, but also heretics, schismatics and even excommunicated Christians – worked itself out in the ensuing papacies, and culminated in Urban II's promise at the Council of Clermont in 1095 of the remission of sins for those who answered his call to the first Crusade.<sup>212</sup>

In time, this development led to the Church's ratification of the just war doctrine as its authoritative understanding of the question of war. And in moving gradually but steadily towards the just war doctrine, the Church came to discard the penitentials' view that killing, even in a just war, was sinful and required penance. Two allied forces in the Church worked together to bring about this result: the reforming Popes, especially Pope Gregory VII, and the canon lawyers. We shall consider each of these in turn below.

#### A. *The Papacy*

Medievalists often see the second half of the eleventh century as the beginning of a period of sweeping revolutionary change, witnessing the emergence of a knightly aristocracy, the development of a legal system, altered patterns of land ownership, and major innovations in morals, religion and ecclesiastical government. Indeed the so-called "Gregorian papacy," above all that of Pope Gregory VII (or Hildebrand), has often been seen, not merely as one aspect of a broader revolution, but as a revolutionary moment in itself.

The central aim of the Gregorian papacies is encapsulated in the slogan: "*Libertas ecclesiae*" – the freedom of the Church from lay government or interference.<sup>213</sup> At the beginning of the great

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211. *Id.* at 103-04.

212. Medievalists dispute the meaning of Urban II's offer of remission of sin to those who accepted his call to crusade, but many crusaders seem to have understood it as a promise of eternal salvation if they died fighting to recapture Jerusalem. See *id.* at 124-25; see also JONATHAN RILEY-SMITH, THE FIRST CRUSADE AND THE IDEA OF CRUSADING 28 (2009; 1986) (interpreting Urban's promise as "an authoritative declaration that the crusade was so severely penitential an exercise that it would be satisfactory penance for all previous sins"); MARCUS BULL, KNIGHTLY PIETY AND THE LAY RESPONSE TO THE FIRST CRUSADE: THE LIMOUSIN AND GASCONY, c. 970-c.1130 166-71 (1993) (viewing Urban as drawing upon an older idea that penances could be fully "satisfactory" for sin but also as addressing emerging anxieties that penitential forms fell short of appeasing God).

213. See I.S. ROBINSON, THE PAPACY 1073-1198: CONTINUITY AND INNOVATION ix-x (1990). Robinson discerns two successive papal reform movements, of which

reform movement around 1050, the Church found itself deeply embedded in and constrained by the powers and claims of emperors, kings and feudal nobility. Even the Pope himself might be appointed or deposed by a secular authority, such as the German King or, earlier, the great families of the Roman nobility. Examples near or during the reform period were common. In 1048, King Henry III had appointed the monk Bruno, Bishop of Toul, as Pope Leo IX, subject only to the later acclamation of the clergy and people of Rome – a gesture on which Bruno had insisted in order to satisfy the requirements of a “canonical appointment.”<sup>214</sup> In 1046, Henry ordered three claimants to the papacy – Gregory VI, Benedict IX and the anti-Pope, Silvester III – to appear before a synod he was convening at Sutri. At the synod, Henry deposed Gregory and ordered Silvester to retire to a monastery; Benedict was excommunicated days later. Henry then installed a German bishop, Suidgar of Bamberg, as Pope Clement II.<sup>215</sup> And the Emperor Otto I had deposed Pope John XII; indeed, Otto’s coronation in 962 marked the beginning of a century of at least intermittent domination of the Empire over the Papacy.<sup>216</sup>

Likewise, secular authorities regularly claimed and exercised the powers to nominate, appoint and depose bishops. The lifestyles of bishops reflected those of their aristocratic patrons (who were often related to them): Archbishop Manasses of Rheims (1069-80) reportedly said that “the archbishopric would be a fine thing, if only one did not have to sing Mass for it.”<sup>217</sup> So enmeshed were the bishops in secular politics that they were often expected to be royal counselors and to raise military forces for their rulers.<sup>218</sup> Clerical offices were commonly for sale. Ownership of church land and the right to collect tithes had fallen on a massive scale into the hands of the laity, both the great rulers and the local magnates, in the

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the first was inaugurated under Gregory VII, though traceable back to the middle of the eleventh century. This movement aimed at eliminating simony and clerical marriage. The papacy’s effort to abolish simony led it to demand the “liberty of the church,” which in effect meant the elimination of lay control over ecclesiastical appointments. “The reformers’ objective was, in Gregory VII’s words, ‘to snatch [the Church] from servile oppression, or rather tyrannical slavery, and restore her to her ancient freedom.’” *Id.* at x. Robinson identifies a second reform period inaugurated in Pope Urban II’s Council of Clermont in 1130.

214. See TELLENBACH, *supra* note 29, at 100.

215. CUSHING, *supra* note 29, at 63.

216. See I.S. Robinson, *Church and Papacy*, in THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT 252, 296-97 (J.H. Burns ed., 1988).

217. CUSHING, *supra* note 29, at 63.

218. *Id.*

system of so-called “proprietary churches.”<sup>219</sup> Thus, the lay owners of these properties had the right to moneys that had been given to the Church.

Beginning in the mid-eleventh century, the reformers aimed to put an end to these practices. At the outset of the reform, at least, they took aim at two specific abuses: simony, or the sale of clerical office; and nicolaitism, or the practices of clerical marriage and concubinage.<sup>220</sup> But those objectives were only aspects of a more encompassing goal: that the Church become autonomous and self-governing. Thus, the reformers sought to disentangle the Church from the secular world, to safeguard its independence, to restore its lands and rights, and to hold the clergy to higher standards of conduct. Their program included the demand that bishops would not be appointed by secular rulers, but would instead be elected by the local clergy, subject to confirmation by the people of the diocese. (Cardinal Humbert of Silva Candida, a leading reformer, called for that change in an epoch-making book written in 1057 or 1058).<sup>221</sup> The objective was substantially achieved, at least with

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219. In this system, a church edifice belonged to the owner of the land on which the church was built. The administration of the church and its accompanying property could be bought, sold, exchanged or given in dowry. Although title to the church was in the name of the saint to which it was dedicated, the landowner had effective use of the land and building. The only restraint was that the church not be used for secular affairs. Over time, churches that had been entrusted to diocesan bishops came to be owned by kings, monasteries or noble magnates. For instance, the Bishop of Chur had thirty-one churches in his diocese at the start of the ninth century; the king and nobles had 200. See Ulrich Stutz, *The Proprietary Church as an Element of Medieval Germanic Ecclesiastical Law*, in MEDIEVAL GERMANY, 911-1250 35 (Geoffrey Barraclough ed., 1948).

220. See SUSAN WOOD, THE PROPRIETARY CHURCH IN THE MEDIEVAL WEST 854-55 (2006); UTA-RENATE BLUMENTHAL, THE INVESTITURE CONTROVERSY: CHURCH AND MONARCHY FROM THE NINTH TO THE TWELFTH CENTURY 71 (author's translation 1988). Both practices were targets at the outset of the reform under Pope Leo IX. See *id.* at 74. On the reformers' approach to clerical celibacy, see Charles A. Frazee, *The Origins of Clerical Celibacy in the Western Church*, 41 CHURCH HIST. 149, 160-67 (1972). On Gregory VII's campaign against simony and the conflict between the Church's spiritual and institutional perspectives to which the denunciation of simony led, see WOOD, *supra* note 220, at 856-59 (seeing simony as the underlying cause of the investiture controversy); Dominique Bauer, *Twelfth Century Views of Power in Peter the Venerable's *Contra Petrobrusianos* and in Canon Law*, in LAW AND POWER IN THE MIDDLE AGES 53, 54-58 (Per Anderson, Mira Münster-Swendsen, & Helle Voght eds., 2008).

221. See BRIAN TIERNEY, THE CRISIS OF CHURCH AND STATE 40-42 (1988) (translating extracts); TELLENBACH, *supra* note 29, at 108. Humbert was in fact calling for a return to what he considered to be canonical practice.

regard to papal elections, in the great “Decree on papal election” of 1059.<sup>222</sup>

The reformers’ demands for a papacy, episcopacy and clergy that were not subordinated to the secular world hinged on drawing a radical distinction between the clergy and the laity. The division of the world into two great orders – clerical and lay – was thus an overriding objective of the reform.<sup>223</sup> “In principle and increasingly in practice every community, from Christendom itself to the remotest hamlet, was to contain an independent clerical domain, with its own powers and functions, its own properties and incomes, its own laws, customs and jurisdiction, and its own membership, separated from others by a distinctive manner of life based on the rule of celibacy.”<sup>224</sup>

But the Gregorian popes and the reformers allied to them did not seek merely to secure the independence of the Church from lay control. Nor could they have stopped at that goal: the objectives of disengaging the Papacy and the episcopacy from secular power-politics, establishing the rights of the Church, restoring and enlarging the Church’s properties, and reshaping the functions and loyalties of the clergy entailed an equally revolutionary transformation of the laity.<sup>225</sup> The very fact of classifying the laity as an order distinct from the clergy carried immense and unsettling consequences – for example, categorizing the King as a layman pure and simple entailed the denial of the centuries-old claim that kingship carried a sacred or sacramental character.<sup>226</sup> The desacralization of kingship created the possibility of rending conflict between the spiritual and secular authorities: if kingship was not sacred or sacramental, a King or Emperor could be deposed by the Pope, and the King’s subjects released by Papal authority from their sworn feudal obligations to him.<sup>227</sup> Gregory VII was prepared both to de-

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222. See TIERNEY, *supra* note 221, at 42-43 (translating extracts). The Decree of 1059 vested the primary role in the selection of a Pope in the cardinal-bishops, subject to confirmation by the clergy and people of Rome. The Decree conceded King Henry IV (then a minor) “due honor and dignity” in the Pope’s selection, but provided no fixed entitlements for him. See CUSHING, *supra* note 29, at 70-72.

223. See I.S. Robinson, *Gregory VII and the Soldiers of Christ*, 58 HISTORY 169, 169-70 (1973).

224. R.I. MOORE, THE FIRST EUROPEAN REVOLUTION, C. 970-1215 11 (2000).

225. See Robinson, *Gregory VII*, *supra* note 223, at 170 (“The Gregorian warcry of ‘freedom from lay control’ was in practice a demand for a reshuffle of sources of wealth in Western Europe, where power depended on land and its accompanying privileges.”).

226. See TELLENBACH, *supra* note 29, at 109.

227. See Robinson, *Church and Papacy*, *supra* note 216, at 301.

duce and to act upon these unprecedented and alarming conclusions.<sup>228</sup> And it was precisely this Papal policy that “most violently affronted the received political ideas of the eleventh century.”<sup>229</sup>

In effect, the reformers demanded that the laity – *all* the laity, from the German Emperor and the French King on down – be subordinate to the Church, and specifically to the Pope. The “liberty” of the Church thus, in substance, meant the “sovereignty” of the Church. It may therefore not be too much to say that the Gregorian Popes and reformers were engaged in the kind of project that we would now call “state-formation;” that is, they were attempting to create the first modern European State of which the Pope was to be the monarch.<sup>230</sup> (And, indeed, the medieval Papacy that these Popes and reformers constructed came to serve as a prototype for the later, absolutist European State.<sup>231</sup>) In this endeavor, Gregory VII and his successors were remarkably successful (even though Gregory himself died in bitter exile, with the city of Rome having been devastated by his own Norman allies).

At the outset of Gregory’s papacy, the Church possessed, at least in still unstructured form, the necessary organizational elements of a government.<sup>232</sup> But without more extensive centraliza-

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228. See TELLENBACH, *supra* note 29, at 155-61; ERDMANN, *supra* note 130, at 162-63 (Gregory VII’s appeal to the French nobility against Philip I); *id.* at 172 (Papal deposition of Henry IV); Robinson, *Gregory VII*, *supra* note 223, at 174-75.

229. Robinson, *Gregory VII*, *supra* note 223, at 173.

230. See BERMAN, *supra* note 29, 113-14. The drive to unity during this period was remarkable.

[W]hile the political reality of the period took the multiple form of principalities themselves divided into catellanies, the idea of unity survived in the west. People continued to dream of an empire which Otto resuscitated, and the figure of Charlemagne obsessed the magnates. Christianity, in its armed contacts with the Saracens, became aware of its existence and aspired to unity. The struggle between the papacy and the empire, which assumed such prominence in the second half of the eleventh century, had many facets. One cannot be denied: the battle was in part to decide who would rule the united Christendom of which people dreamed.

Jean Flori, *Nightly Society*, in THE NEW CAMBRIDGE MEDIEVAL HISTORY, *supra* note 27, at 157-58.

231. See PERRY ANDERSON, LINEAGES OF THE ABSOLUTIST STATE 28, 145-46 (1974); see also LARRY SIEDENTOP, INVENTING THE INDIVIDUAL: THE ORIGINS OF WESTERN LIBERALISM 207 (2014) (“The example of the church as a unified legal system founded on the equal subjection of individuals . . . gave birth to the idea of the modern state”).

232. One vital point: the Church’s organization had not yet achieved the more developed form that it was to attain under Gregory’s twelfth century successors.

tion of authority over the government of the Church, the Papacy could not control and direct secular as well as spiritual affairs. A major part of Gregory's program, therefore, was to move the Church away from a decentralized, episcopal form of government towards a unitary, papalist one. An attempted power-shift of such dimensions predictably led to collision with entrenched interests: thus, just as Gregory found himself in conflict with the secular authorities of France and Germany, so his efforts to ensure Papal primacy within the Church led to conflicts with the episcopacy.<sup>233</sup>

The ultimate objectives that Gregory and his fellow reformers were pursuing may have been extraordinarily ambitious: the absorption of the secular world and its governments into a universal "Kirchenstaat," or Church-State. In the Roman curia, the system of Papal legates,<sup>234</sup> and a fully reformed and hierarchically-structured clergy, the Papacy would have the elements an administrative bureaucracy spread throughout the whole of Latin Christendom, possessing the requisite proficiencies in literacy, law and learning, and using a common language. (The adoption by the Roman Chancery in the early twelfth century of the minuscule script, a standardized form of writing that could be read throughout the West, made it still easier to extend Rome's administrative reach.<sup>235</sup>) In the Pope himself, the Roman curia, the ecclesiastical courts and judges and the papal synods, the Papacy would have a judiciary.<sup>236</sup> And in the "*Dictatus papae*" of March, 1075,<sup>237</sup> Gregory

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See H.E.J. Cowdrey, *The Structure of the Church, 1024-1073*, in THE NEW CAMBRIDGE MEDIEVAL HISTORY, *supra* note 27, at 230, 266; CUSHING, *supra* note 29, at 81-85.

233. See Uta-Renate Blumenthal, *The Papacy, 1024-1122*, in THE NEW CAMBRIDGE MEDIEVAL HISTORY PART 2 8, 14-15 (David Luscombe & Jonathan Riley-Smith eds., 2004); J. Gilchrist, *Gregory VII and the Primacy of the Roman Church*, 36 Tijdschrift voor Rechtsgeschiedenis 123 (1968); Cowdrey, *Structure of the Church*, *supra* note 232, at 260-61; CUSHING, *supra* note 29, at 84-85; Robinson, *Church and Papacy*, *supra* note 216, at 271-72, 277-88; TELLENBACH, *supra* note 29, at 137-47.

234. On the roles and functions of the Papal legates, see Blumenthal, *The Papacy*, *supra* note 233, at 24-26.

235. See CUSHING, *supra* note 29, at 82; COMPANION TO THE MEDIEVAL WORLD - (Carol Lansing & Edward English eds., 2012).

236. On the Papal judicial power, see ROBINSON, PAPACY, *supra* note 213, at 179-200; on the concentration of judicial power in the Popes and Curia, see Robinson, *Church and Papacy*, *supra* note 216, at 285-87.

237. For translation, see TIERNEY, *supra* note 221, at 49-50. For an analysis of the document, which sees it as Gregory's own attempt to sketch out headings under which ancient canonical material supporting papal claims could be placed, see COWDREY, GREGORY VII, *supra* note 195, at 502-07. But see Uta-Renata Blu-

was to proclaim himself a law-making authority.<sup>238</sup> Likewise, papal councils and synods served as law-making bodies.<sup>239</sup> What the Papacy would still have lacked, however, was an enforcement arm. With that addition, all the essential elements of true statehood, albeit in undeveloped form, would have been in place.

To address this need, Gregory aimed “to have at his disposal for papal service all the knights of Europe who duly acknowledged and understood St Peter’s patronage.”<sup>240</sup> In a famous letter of 1075 to his collaborator Abbott Hugh of Cluny, Gregory laid out his plan:

With brotherly charity we enjoin you to the best of your ability to extend your hand with watchful zeal by warning, beseeching, and urging those who love St Peter [*i.e.*, the Pope] that, if they would truly be sons and knights [“*milites*”], they should not hold secular princes more dear than him. For secular princes reluctantly grant wretched and transient things; but he, by loosing from all sins, promises things blessed and eternal, and by the power committed to him (Matt. 16:19) he brings men to a heavenly home.<sup>241</sup>

Accordingly, Gregory sought to mobilize the feudal nobility to serve the Church’s purposes, even if that meant nullifying knightly oaths to the King of France and the Emperor of Germany.<sup>242</sup> As Gregory had indicated in his letter to Abbott Hugh, the main (though not the only) incentive for the knights to offer their services to the Pope’s causes – to become “*Fideles Sancti Petri*”<sup>243</sup> – lay

menthal, *The Papacy and Canon Law in the Eleventh-Century Reform*, 84 CATH. HIST. REV. 201, 213-14 (1998) (doubting that interpretation).

238. Gregory’s claim to legislative power was fairly modest in scope, but was greatly enlarged by later Popes and canon lawyers. See ROBINSON, PAPACY, *supra* note 213, at 205-08. For the prolific lawmaking activity of his papal successors, see Stephan Kuttner, *The Revival of Jurisprudence, in RENAISSANCE AND REVIVAL IN THE TWELFTH CENTURY* 299, 316-17 (R.L. Benson & G. Constable eds., 1982).

239. On these bodies, see Blumenthal, *The Papacy*, *supra* note 233, at 16-32.

240. COWDREY, GREGORY VII, *supra* note 207, at 651.

241. Translated in COWDREY, GREGORY VII, *supra* note 207, at 651.

242. See Cowdrey, *Structure of the Church*, *supra* note 232, at 259-60 (Gregory’s confrontation with Archbishop Siegfried of Mainz); Robinson, *Gregory VII*, *supra* note 223, at 176-77.

243. See Hehl, *supra* note 27, at 198 (characterizing the “soldiery of St. Peter” as “a tool of generalship” akin to “the military retinue of a German bishop” but “recruited from a wider geographical area”).

in the offer of the remission of sins.<sup>244</sup> In the view of one leading medievalist, that offer, at least in the context of Gregory's contest with Henry IV, was "effectively a license to kill and murder."<sup>245</sup> To the consternation of many (including the German bishops), Gregory took this extreme step in the "investiture" controversy with King Henry IV.<sup>246</sup> Gregory also contemplated a military campaign that he himself would lead as "general and bishop" against the Moslems for the protection of Christians in the East<sup>247</sup> – a project he abandoned, but one successfully pursued (though not in person) by the later Pope Urban II.

Gregory's policies in military affairs can be illustrated by his appeal in 1075 to King Swein II Erithson of Denmark for military assistance against the "base and ignoble heretics" who, Gregory said, occupied "a certain very wealthy province by the sea" not far from Rome.<sup>248</sup> (Gregory may have been referring to southern Italy, then under Norman control, or perhaps to Dalmatia). Gregory expressed a wish that the King of Denmark would give one of his sons "to the apostolic court as a warrior, with a considerable following of knights" to subdue these heretics, in return for which Gregory would install the King's son as "duke and prince" of that province. Here the reward for waging war on the Papacy's behalf seems more material than spiritual; but it is important to note that the Papal enemies are described as "heretics," which indicat-

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244. See ERDMANN, *supra* note 130, at 214 ("The forgiveness of sins was the prospect that [Gregory] frequently proffered or regarded as the object striven for by his helpers."); see Robinson, *Gregory VII*, *supra* note 223, at 180.

245. Hehl, *supra* note 27, at 202.

246. Gregory offered the Saxon opponents of Henry IV "absolution from all their sins." Erdmann cautiously asks whether this was "an actual indulgence, that is, a remission of penance . . . or only the grant of a blessing without canonical content?" He concludes that although the question cannot be decided with certainty, "this absolution comes close to being a real indulgence." ERDMANN, *supra* note 130, at 172-73. By contrast, Robinson forthrightly contends that Gregory granted his German supporters "unconditional absolution guaranteed by the Petrine authority." See Robinson, *Gregory VII*, *supra* note 223, at 182. Robinson also notes the shock and consternation caused by Gregory's violation of feudal oaths – the "sacred bonds" of the existing order. *See id.* at 183. *See also* J.A. Watt, *Spiritual and temporal powers*, in THE CAMBRIDGE HISTORY OF MEDIEVAL THOUGHT, C. 350-C.1450, *supra* note 216, at 367, 372. Finally, Cowdrey argues that the primary sources dealing with the matter may have misrepresented Gregory's intentions. See COWDREY, *GREGORY VII*, *supra* note 207, at 656-58.

247. See ERDMANN, *supra* note 130, at 164-69.

248. For the quotation from Gregory's letter and an account of the event, see ROBINSON, *THE PAPACY*, *supra* note 213, at 317.

ed that the Pope may have sought to portray the campaign as a holy war.

Summarizing Gregory VII's many and varied military activities, the great German historian Carl Erdmann concluded that although Gregory had never carried out a war of aggression, he

[O]ften sanctioned and supported the wars of secular princes and knights with the blessing of the church, and he stamped them as holy wars; moreover, he planned and pursued certain wars of his own, in which he intended to take personal part. Measured by his own wishes, he certainly was the most warlike pope who had yet occupied the chair of St. Peter . . . More than anyone before him, he overcame the inhibitions that had once restrained the church from being warlike in preaching and warlike in action.<sup>249</sup>

Plainly, then, the Gregorian process of state-formation – and its accompanying military programs – necessitated the development of a way of thinking about war that was quite different from the view of the penitentials. This development also began taking place in the late eleventh century, and is outlined in the section below.

Gregory personally seems to have been unaware of Augustine's just war teaching, and indeed his understanding of the morality of war did not cohere at all well with his actions and policies.<sup>250</sup> So it is not quite accurate to say that Gregory *himself* espoused a return to Augustinian just war theory. Nonetheless, that is what eventually, and ineluctably, happened. By the end of the process of ideological transformation, the Church had effectively left behind the earlier and more traditional view that war was intrinsically sinful, and that killing in war – *any* war – required penance.<sup>251</sup> What emerged was a (purportedly) "Augustinian" just war doctrine codified into canon law, and alongside that, the novel doctrine of the crusade.<sup>252</sup>

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249. ERDMANN, *supra* note 130, at 177, 181.

250. See COWDREY, GREGORY VII, *supra* note 207, at 655-56. Cowdrey argues that to the extent Gregory developed an ideological defense of his wars, he drew on an earlier Romano-German tradition of holy war. *Id.* at 653-54.

251. That is not to say that there were no later voices in the Church echoing the penitentialist tradition. After the Second Crusade, Patriarch Fulk of Jerusalem (1145-49) questioned whether it was permissible to kill heathens. He was answered with citations that Gratian had collected on just war. See Hehl, *supra* note 27, at 216.

252. See RUSSELL, *supra* note 105, at 38 "The most significant contribution of this period was the synthesis of the crusade out of the holy war and the just

### B. The canon law

The program of the Gregorian reformers and the development of the canon law were intimately intertwined and interdependent.<sup>253</sup> Legal arguments, drawn from the canon law, were indispensable if the reforming Popes were to justify their ambitious claims. The Papacy's title to the leadership of Christendom rested, not only on Christ's words to the Apostle Peter ("Tu es Petrus,")<sup>254</sup>, but also on earlier Church decretals.<sup>255</sup> "Hence the struggle for the [liberty] of the Roman-led Church inevitably implied an increased interest in the canonical tradition, and therefore in law generally."<sup>256</sup> Even before his pontificate began, Hildebrand requested the expert canonist Peter Damien in 1059 to provide him with a new collection of the statutes relating to papal prerogatives.<sup>257</sup> Hildebrand's own *Dictatus papae* (referred to above), composed during his papacy, might have been intended as a set of chapter headings for a collection of canons; in any event, its principles gradually entered into the fabric of ecclesiastical law.<sup>258</sup> From 1075 onwards, during Hildebrand's papacy, his legal advisers and associates produced a series of canonical compilations that were to become widely known and used. (They also wrote legal defenses of a more occasional kind in defense of particular papal policies.<sup>259</sup>) Thus, the development of a robust legal system was a fundamental feature of the Papal program in this period.

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war."); Hehl, *supra* note 27, at 211 ("The crusade was a just war which had been elevated to the status of a holy war.").

253. One can readily see the Gregorian Reform's emphasis upon the creation of a legal order as a necessary accompaniment of its program of state-formation. Certainly from the mid-eleventh century onwards, the Church actively promoted the cause of legalization. Increasingly detaching law from theology, the Church recognized and sponsored the autonomy – and therefore the secularization – of the legal order. See BERMAN, *supra* note 29, at 202. The gradual rediscovery of the entire corpus of the Emperor Justinian's *Digest* of Roman law also stimulated the growth of both secular and canon law. See PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 43-45 (1999); Kuttner, *Revival of Jurisprudence*, *supra* note 238.

254. Matthew 16:18.

255. See Peter Landau, *The Development of Law, in THE NEW CAMBRIDGE MEDIEVAL HISTORY*, *supra* note 27, at 116.

256. *Id.* at 116.

257. *Id.* at 120. Damien, a staunch defender of Papal primacy, argued that if a canon was contradicted by a later Papal decretum, the canon was no longer valid. See BLUMENTHAL, INVESTITURE CONTROVERSY, *supra* note 220, at 72.

258. Landau, *supra* note 255, at 121.

259. *Id.*

The eventual effects of this development on the Church's earlier understanding of warfare were profound. These effects were two-fold: substantive and formal. As to substance: if it was intrinsically sinful to kill in battle, war-making on the part of the Church or under its sponsorship would be effectively forbidden. Indeed, war-making would be sinful regardless of the justice of the war. Hence the penitentials' conception of war posed a problem for the implementation of the Papal program that had to be surmounted. To put the matter crudely: the increasing *militarization* of the Church required the *legalization* of its emerging practices. Under Gregory and his successors, the canonists' writings steadily worked themselves free of the earlier idea that homicide in war was intrinsically sinful.<sup>260</sup> In place of that conception, they reinstated (or constructed) an "Augustinian" view of just war, which condemned homicide only if it occurred from anger, greed or other separately sinful motives.<sup>261</sup> This line of thought in the canonists eventually yielded the idea of the crusade as the apex of *just war*.<sup>262</sup>

As to form: the Papal program also required that the Church develop a more highly centralized, uniform, self-consistent body of law, disengaged from purely local custom and practice,<sup>263</sup> in place of the more decentralized and variegated system represented by the penitentials.<sup>264</sup> Without losing its "primitive" quality, law was

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260. See Robinson, *Gregory VII*, *supra* note 223, at 186-88. For Anselm of Lucca in particular, see CUSHING, *supra* note 29, at 122-41.

261. For example, the canon lawyer Anselm, Bishop of Lucca, who was closely associated with the Gregorian reforms, wrote a treatise entitled *Liber contra Wibertum* ("The Book against Guibert") shortly after Gregory's death. Anselm sought to justify Gregory's position, and especially the appeal to coercive force, in the struggle against Guibert, the schismatic Archbishop of Ravenna, who became the Imperial Pope (or anti-Pope) Clement III. From Anselm's ("neo-Augustinian") standpoint, coercive force was an instrument that could be used in charity to restore the unity of the Church. See CUSHING, *supra* note 29, at 126, n.14; 134-37.

262. See Brundage, *Hierarchy of Violence*, *supra* note 28, at 677, 680, 682; RUSSELL, *supra* note 105, at 38. It also seems true that Papal wars caused some uncertainty and confusion among later canonists seeking to develop just war theory. See LEYSER, GREGORIAN REVOLUTION, *supra* note 29, at 200-01.

263. See Hehl, *supra* note 27, at 188 ("Penance for killing in war now appeared as a prescript of the local church law which the [Gregorian] reformers were seeking to undermine.").

264. That much is true even though some modern scholars question the bolder claim of Paul Fournier that the Gregorian reform marked the beginning of a systematic jurisprudence. See Paul Fournier, *Un tournant de l'histoire de droit 1060-1140*, 41 NOUVELLE REVUE HISTORIQUE DU DROIT FRANÇAIS ET ÉTRANGER 129 (1917).

set on the path towards becoming an autonomous system.<sup>265</sup> Further, a mature and fully rational legal system will require an inner normative consistency; and to say that killing in war was both unavoidable and yet sinful would seem to be normatively inconsistent.

For our purposes, it is sufficient to pick out three important points in this extended legal and moral development, all of them occurring at about the time of Gregory VII's papacy or shortly after. To be sure, both the development of the canon law and the elaboration of the Church's doctrine of just war continued well after the Gregorian period, culminating in the teaching of Thomas Aquinas.<sup>266</sup> But, by general consensus, the decisive turning point came in the early twelfth century with Gratian. Leading directly to Gratian's work and providing much of its substance were the somewhat earlier writings of Anselm of Lucca and Ivo of Chartres. Each of these three pivotal figures merits consideration.

*Anselm of Lucca.* The most influential works of canon law in this development were those by Gregory's follower, Anselm, Bishop of Lucca<sup>267</sup> and, later, Ivo, Bishop of Chartres. Anselm's *Collectio canonum* ("Collection of canons") of c. 1083 "opened a new era in the history of canon law" and is the first collection of its kind "to give extensive consideration to the problem of ecclesiastical coercion and war."<sup>268</sup> Anselm departs from the traditional practice of earlier such collections – including Burchard of Worms' – by omitting any reference to the imposition of penances on soldiers for having killed in a just war. Further, Book Thirteen of Anselm's *Collectio* deals with the morality of war, and was designed to show that wars on behalf of the Church against schismatics and heretics could be sinless, indeed meritorious. Just as Christ, in appearing to Saul of Tarsus, converted him by force and fear, Anselm argues, so the Church may use violence against its en-

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265. I use "primitive" in the sense found in David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L. J. 1, 7-8 (1986). More specifically, "primitive" law does not distinguish cleanly between law and morality.

266. For a survey of later developments, see Jonathan Barnes, *The Just War*, in CAMBRIDGE HISTORY OF LATER MEDIEVAL PHILOSOPHY 771 (Norman Kretzmann, Anthony Kenny, & Jan Pinborg eds., 1982).

267. Anselm's writing has been said to "mark[] a significant stage in the gradual but radical transformation of the ecclesiastical position regarding warfare that was taking place in the eleventh century." CUSHING, *supra* note 29, at 127.

268. ERDMANN, *supra* note 130, at 243.

mies.<sup>269</sup> The crucial question, for Anselm, is not whether a soldier has killed in war, but what his *disposition* was when he performed the act. “Thus [Anselm] avoids the concept that killing in a just war demands penance, because guilt springs from one’s mental state.”<sup>270</sup> Anselm acted on these ideas himself when, in 1084, he promised the “remission of sins” to the soldiers of Lucca as they were preparing to join battle at Sorbaria with the forces of Henry IV.<sup>271</sup>

*Ivo of Chartres.* Ivo of Chartres, a French bishop closely connected to the Gregorian reformers, published a collection of canons, entitled the *Panormia*, in the late eleventh or early twelfth century. Among other matters, Ivo treated the morality of war.<sup>272</sup> The *Panormia* includes no canon prescribing any penance for killing in war, even though Ivo had included nearly all of Burchard’s collection in another of his compilations, the *Decretum*.<sup>273</sup>

Further, in canon VIII.I of the *Panormia*, Ivo discusses the Augustinian idea that killing is not always sinful. Ivo distinguishes between the killing done by one who holds a “public” office, such as a soldier, and who is acting on behalf of others or of the state, from one who kills only on the basis of “private power.” The former may kill sinlessly, provided he has the authority to do so. Only “private” killing is inherently sinful. Ivo emphasizes the legitimacy of legally constituted punishment, which he describes as “not bloodshed, but service of the laws.”<sup>274</sup>

Ivo follows that discussion with the definition of just war in the early *Etymologies* of Isidore of Seville (c. 560-c.630). The citation read: “That war is just which is waged upon authority, to regain property or drive out enemies.” No previous collection of canons had included this one. By including it, Ivo “thereby disentangled war from the problematics of sin and penance. A just war is not an

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269. See Hehl, *supra* note 27, at 203.

270. Hehl, *supra* note 27, at 203.

271. See BACHRACH, *supra* note 118, at 104-05. On Anselm’s spiritual, military and polemical activities against the Henry IV and his allies, see ERDMANN, *supra* note 123, at 241-43.

272. On Ivo’s place in the just war tradition, see Dominique Bauer & Randall Lesaffer, *Ivo of Chartres, the Gregorian Reform and the Formation of the Just War Doctrine*, 7 J. HIST. INT’L. 43 (2005).

273. See Hehl, *supra* note 27, at 204. By including most of Burchard’s collection of canons, Ivo’s *Decretum* also included the sentence that penance must be performed for killing in war. This sentence does not appear in the *Panormia*. See ERDMANN, *supra* note 130, at 266.

274. Hehl, *supra* note 27, at 205.

injustice, but an attempt to combat injustice.”<sup>275</sup> We have arrived at the point at which the penitentials’ teaching about war is discarded and just war theory is poised to take its place.<sup>276</sup> Gratian, who takes the final, decisive step, cites Augustinian texts taken from Ivo.

*Gratian*. Gratian’s *Concordia Discordantium Canonum* or as it is more commonly known, the *Decretum*, is considered to be a “watershed” in the history of canon law.<sup>277</sup> It raised the process of systematizing canon law, already at work in Burchard and others, to a higher level, and thus it became the starting point for the later work of canon lawyers. Further, Gratian introduced the practice of commenting on the canonical texts he had assembled.<sup>278</sup> Still more relevant to our purpose, the lengthy and wide-ranging Causa 23 of the *Decretum*, which included eight questions, provided what became an authoritative source for the Church’s later thinking on the morality of warfare. Gratian’s compilation of sources drew on Ivo of Chartres’ work, especially in its liberal use of extracts from Augustine. Over the next two centuries, these canons were cited extensively by the authors who followed Gratian. Causa 23 also propounded a formulation of just war doctrine which subsequent thinkers borrowed or sought to improve. There is a direct path from Gratian to Thomas Aquinas.

Causa 23 starts by positing a hypothetical case – one that was realistic enough by the standards of Gratian’s period. Heresy has broken out in certain dioceses. The heretics are using torture and threats to compel local Catholics to accept their ideas. Hearing of this, the Pope orders neighboring bishops to defend the Catholics and compel the heretics to return to their faith. (The Emperor has granted temporal jurisdiction to the bishops.) On receiving these instructions, the bishops raise a military force and deploy it against the heretics, both openly and in ambushes. These soldiers kill some heretics, seize property belonging to them as well as recovering church property, and after imprisoning others, force them to return to the Catholic faith. Based on this hypothetical fact pat-

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275. *Id.*

276. See BACHRACH, *supra* note 118, at 105 (“Ivo’s treatment of the question of killing in a just war represented a final transitional stage in the history of the doctrine . . . , which culminated in the complete disappearance of post-battle penances for homicide.”).

277. See RUSSELL, *supra* note 105, at 55.

278. See K. PENNINGTON, *Law, Legislative Authority, and Theories of Government*, in THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT C.350-C.1450, *supra* note 216, at 424.

tern, Gratian raises, and proceeds to answer, a series of eight questions.

Three aspects of Gratian's widely ranging treatment in Causa 23 merit particular attention here. The first is his bare allusion to the tradition of thinking that considered killing in warfare intrinsically sinful. The second is his judgment that the profession of arms is fit for a Christian to follow. Finally we must consider briefly his view of what can make war just.

First, Causa 23 addresses (in Question Four) the issue whether vengeance is permissible in the use of force. Relying mainly on canons taken from Augustine, Gratian concludes that vengeance is only to be inflicted out of zeal for justice and for the purpose of correcting evil deeds. It may not be sought out of passion or for its own sake. In the course of his discussion, Gratian refers (in Canon 47) to a letter of Pope Urban II that enjoined penance for killing excommunicates. (Elsewhere in the *Decretum*, in Causa 33, Gratian also refers to a prohibition on returning to military service after making penance.) These bare allusions appear to be the only remnants of the penitentialist view of war that persist in the *Decretum* and, as Frederick Russell concludes, after Gratian's overall treatment of war, they "became in succeeding generations mere archaic survivals of medieval suspicions, serving henceforth as reminders of the abuses, rather than the uses of armed force."<sup>279</sup> Gratian does not exactly obliterate the earlier tradition but, effectively, he obscures it.

Second, Gratian discusses (Question One) whether it is a sin to serve as a soldier. Here he cites a long string of scriptural passages whose tenor seems to condemn military service. Again relying chiefly on counter-citations from Augustine, however, Gratian concludes that soldiering is not a sin, though soldiers are to practice the precepts of patience.

Finally, Gratian considers (Question Two) what sort of war is just. In this part of his analysis, he attempts to devise a formula that will encapsulate the elements of just war doctrine. This formulation is, probably, Gratian's single most influential contribution to the just war tradition. It is heavily indebted to Augustine. Gratian writes: "That war is just which is waged by an edict in order to regain what has been stolen or to repel the attack of enemies."<sup>280</sup> The criteria of proper authority and (objective) just cause

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279. See RUSSELL, *supra* note 105, at 60.

280. Translation in THE ETHICS OF WAR, *supra* note 8, at 113. For a close analysis of Gratian's formula, see RUSSELL, *supra* note 105, at 60-68.

are present here; the (subjective) element of rightful intention will be added later.<sup>281</sup>

We can see the *Decretum* as the capstone of the movement in canon law that rejects the penitentialist tradition of thinking about war and embraces the just war theory. It is by no means coincidental that Gratian's discussion is framed within a context that poses the use of force against heretics at the behest of church officials acting under papal authority. The papal policies of the Gregorian reform and the canon law's treatment of war cohere.

#### CONCLUSION

Did the rise of the Gregorian Papacies, and with it a refashioned "Augustinian" just war doctrine, represent a loss for Christianity and for the West? Certainly there were psychological and spiritual needs that the emergent, legalized vision of war could not meet. To that extent, the confessors seem to have seen more deeply than the ecclesiastical lawyers and theologians into the needs of the human soul. This conclusion is, of course, more than a little paradoxical, because the Church's (purported) return to "Augustinianism" in the late eleventh century reflected a shift from an acts-based morality to a fault-based one – a growing interiorization of the notion of sinfulness. But the experience of returning warriors in many different periods and cultures shows that human beings can have a strong sense of sinfulness without a corresponding awareness of fault. The penitentialist practice recognized the need to address that form of experience; just war doctrine, as applied to individual penitents, did not.

Moreover, the argument of this paper suggests that just war theory was a further, and perhaps mistaken, step in the Church's willingness to tolerate violence in war. If the early Church had sometimes agreed that Christians might serve in the military – albeit reluctantly and with significant restrictions – and if the authors of the penitentials had accepted that even killing in warfare was inevitable – though the act remained sinful and required penance – the post-Gregorian Church increasingly came to deny the intrinsic sinfulness of war and the lethal violence attendant to it. For just war theory (in its standard formulation), war is intrinsi-

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281. On the tension between objective and subjective elements of just war theory, see Dominique Bauer, *The Twelfth Century and the Emergence of the Juridical Subject: Some Reflections*, 90 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE, Kan. Abt. 207, 218 (2004).

cally neither good nor evil, laudable nor sinful. Its normative character depends on the circumstances in which it occurs, the purposes for which it is undertaken, and the authority of those who order it.<sup>282</sup> *Regulating* war by legal judgment entailed that it was not, as such *prohibited*: rather, the question of the morality of a war had to be “evaluated according to juristic distinctions.”<sup>283</sup> Those who fight just wars have nothing to confess or for which to atone, even if they kill other human beings, provided that they kill in “love.”

To be sure, the Gregorian Church’s adoption of just war doctrine in place of the condemnation of all warfare as sinful may well have made no practical difference. There is little evidence that just war doctrine has in fact deterred unjust wars from being fought. But there is also little reason to suppose that the condemnation of *all* warfare would have had a more powerful deterrent effect, especially if war is considered to be a necessary and inescapable facet of the human condition. The material stakes of war are so high that political and military leaders seem to have few compunctions about waging them. Even when the penitentials were in common use, their condemnation of war did not prevent massacres like those at Soissons and Hastings. But this is not to say that the Church’s decision in favor of just war doctrine made no practical difference at all. In fact there are two ways in which it might have done so.

First, it might have made a difference to the internal life and practice of the Church itself. In a notable article published in 1944 and condemning the “obliteration bombing” of Germany, the Jesuit theologian Fr. John C. Ford observed that confessional practice involving penitents actually engaged in combat operations was likely to be influenced by the prevailing opinion in the Church and society concerning the justice of the war in which those penitent-combatants were fighting. “[W]hen the priest in the confessional is presented with a comparatively new problem like [the permissibility of engaging in air raids involving obliteration bombing], . . . he will necessarily hesitate before refusing absolution. When he has, besides, a well-established rule based on the presumption which favors civil authorities, and on which ecclesiastical authorities have not laid down definite norms – he will necessarily hesitate before refusing absolution.”<sup>284</sup> As a logical matter, of course, just

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282. See JOHNSON, *supra* note 50, at 92, 110.

283. Hehl, *supra* note 27, at 218.

284. John C. Ford, S.J., *The Morality of Obliteration Bombing*, 5 THEOL. STUD. 261, 268 (1944).

war doctrine does not entail the acceptability of every military means or method used in a just war: that judgment lies within the sphere of *jus in bello*, not *jus ad bellum*. But in practice, as Fr. Ford suggests, just war thinking may encourage a more permissive attitude towards questionable military practices even in those charged with the care of souls.

A second difference made by the Church's historic choice may lie, not in the likelihood of preventing wars from happening, but in the ways of coping with the damage that wars do – above all, the damage that war inflicts on the combatants who wage it. Wars might well have been as frequent, as harrowing, and as unjust if the penitentialist position had been as entrenched in Church teaching as the just war doctrine has become. But the tact, the sympathy and the understanding that are essential to reintegrating returning warriors into post-war societies might have become more evident. *Eradicating* war surely lay beyond the Church's power; *confining* wars to those that are just seems also to have been so; but *mitigating* the after-effects of war on troubled hearts and consciences was, and remains, an attainable ideal.