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PREVIEW

**SALVE REGINA UNIVERSITY
NEWPORT, RHODE ISLAND**

JUS IN BELLO:
KEY ISSUES FOR A
CONTEMPORARY ASSESSMENT
OF JUST BEHAVIOR IN WAR

**A DISSERTATION
SUBMITTED TO**

THE FACULTY OF THE DEPARTMENT OF HUMANITIES

**IN CANDIDACY FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY**

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BY

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SALVE REGINA UNIVERSITY

GRADUATE SCHOOL

The dissertation of Louis V. Iasiello: *JUS IN BELLO: KEY ISSUES FOR A CONTEMPORARY UNDERSTANDING OF JUST BEHAVIOR IN WAR*, submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy in Humanities from Salve Regina University, has been read and approved by:

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DEDICATION AND ACKNOWLEDGEMENTS

First, I would like to dedicate this dissertation to my God who has gifted me with rationality, insight, and a thirst for knowledge. Second, I dedicate this work to my parents who gave me both the gift of life and the morals to live with dignity, meaning, and integrity. Third, I dedicate this work to the Franciscan Order of Friars Minor and its members who have walked with me in my faith journey and illuminated the road for the journey. Finally, I dedicate this work to all those who serve this nation and the world in the armed forces, especially, the military chaplains, noncombatants who defensively risk life and limb to serve the spiritual and ethical needs of military personnel in every clime and in every level of combat.

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Abstract

Civilized humanity has long pondered the morality of war and the parameters of just behavior in war. Since ancient times philosophers, theologians, civic leaders, warriors, and jurists have formulated concepts and theories outlining the ethical boundaries of a justified use of force (*jus ad bellum*) as well as for just behavior in war (*jus in bello*). Taken together, these principles define a *bellum justum* or just war. Just war theory, legal interpretation, and international law help to define the rationale for a just declaration of war and for just behavior of those tasked with conducting and fighting wars. This dissertation examines the relevance of just war theory for the 21st century, specifically, the relevance of *jus in bello* to contemporary issues and trends.

Following a survey of major philosophies, strategies, and personalities that have significantly contributed to the development of just war theory, the author surveys contemporary scholars who have advanced this theory. The dissertation then examines some modern issues that challenge the application of *jus in bello* principles. These issues call for further study, both external (international law and ethics) and internal (military culture, law, traditions and strategy), in defining the parameters of just behavior in war. Such issues include modern military technology (i.e., precision guided munitions and cyberwarfare), the vulnerability of non-combatants, the ethical use of military contractors, and ecological concerns. This work concludes with suggestions for further scholarship and discussion regarding just war developments.

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PREVIEW

INTRODUCTION

CHAPTER ONE:

Introduction

What we need to discover in the social realm is the moral equivalent of war; something heroic that will speak to men as universally as war does, and yet will be as compatible with their spiritual selves as war has proved itself to be incompatible. ---William James

As part of this doctoral investigation, this student spent hours discussing with Navy and Marine Corps lawyers the contemporary significance of just war theory and its relevance or non-relevance to modern culture, especially military culture. Three very competent lawyers, senior in rank and experience, passionately maintained that, while the just war tradition has served civilization well in the past, it no longer enjoys the status that it once possessed. They see this theory as less relevant for the countries that declare wars and the combatants who fight in these conflicts. For many lawyers, just war theory lost its relevance after the adoption of international law with its universal codification of laws, conventions, and treaties. For them, international humanitarian law has supplanted the just war theory; international law, they contend, now guides both rulers and warriors in areas once guided by theory. These legal experts pressed the point by alleging that all contemporary soldiers enter combat with clearly defined *rules of engagement* (ROE). ROEs outline what is just and legal behavior in war. International law and ethics constitute 'external' sources of just war study and discussion.

For the past twenty years this military officer and chaplain has had the privilege and duty of ministering to soldiers, airmen, marines, sailors, and coast guardsmen during

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periods of peace and war. His responsibilities have also provided a rare opportunity to study national strategy, policy, and military operations. This combination of factors parallels a line officer's appreciation for the operational and moral complexity of the challenges that military leaders must face in times of conflict. As a student at the Naval War College this researcher was required to learn the language, culture, and concerns of the line community. Consequently, he is called on to provide guidance as an ethical advisor to military commanders who must wrestle with the moral complexity of planning and fighting wars.

Having had the humbling experience of accompanying troops and their senior leaders under hostile fire, this author holds that, while useful in some combat settings, pre-arranged rules of engagement provided by operations planners and their lawyers are not adequate to answer all warriors' questions about just behavior in war. In fact, they rarely provide adequate guidance to the myriad dilemmas faced by commanders as they lead their troops through the fog and uncertainty of war. Rarely do these rules enlighten or empower either group to deal with the innate tensions that exist between military necessity (mission accomplishment) and the basic principles of proportionality and discrimination. While pre-directed rules of engagement do provide some guidance to warriors and their commanders, they are not designed to answer the complex moral questions that inevitably arise in the heat of combat. These ROEs and the general direction offered by military lawyers, as directed by the National Command Authority, do give insight into *what is legal* and expected from our warriors in conflict scenarios. They often provide little insight, however, as to *what may be right*. Doing what is right is at the heart of just behavior (*jus in bello*) in combat. Even with the aid of legal and military

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experts, the guidance given to officers and troops may still not be written with the clarity and precision necessary to provide moral direction. Therefore, the only way that warriors might hope to reconcile their responsibilities with the demands of just behavior in modern war is through thorough training in just war principles. Thus empowered, they then will be able to apply their understanding of the theory to the military tasks and objectives at hand.

Military action now spans a conflict spectrum ranging from humanitarian operations to nuclear exchanges, with all levels of military interaction and levels of force application between. To conduct war and military operations other than war (MOOTW) successfully and morally in the future, military leaders must equip their warriors and officers with sufficient operational knowledge and judgment to handle complex scenarios in diverse political, cultural, and military settings. Leaders must also train all concerned to think in ethical terms, especially in the confusion of war. Military law, culture and strategy thus constitute 'internal' sources of just war study and discussion.

The writer of this dissertation, *Jus in Bello: Key Issues For A Contemporary Assessment of Just Behavior In War*, trusts that the defense establishment will recognize the need for knowledge of just war theory as an essential component of military training and education. Although some doubt whether a moral theory such as just war is applicable to the practical dilemmas and scenarios faced by those in combat, this student believes that education in this moral background will provide warriors with decision-making tools critical to *jus in bello* behavior on the battlefield. As a result this type of moral empowering can equip warriors to succeed no matter the level of moral complexity. This recognition will provide the knowledge necessary to deal successfully

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with the complex moral issues that will confront them in modern conflicts. It is to be hoped that this dissertation will spark military discussion of the utility of just war training so as to broaden and deepen knowledge of the moral issues only partially addressed by the rules of engagement carried into war (see appendix with sample ROEs).

Like others, this chaplain has been honored to serve with outstanding young Americans who have willingly put life and limb on the line to serve their country and their world. Standing with them in conflict on three separate occasions, he has personally experienced some of the moral dilemmas faced by both troops and their commanders in combat. He thus understands that just war theory, properly taught and understood, can be a powerful tool to assist combatants in the fulfillment of their duties. Ultimately, it will aid them to complete their military mission with the honor, courage, and commitment that guides all moral combatants on and off the field of battle. This academic endeavor is dedicated to all those who willingly sacrifice their own liberties to safeguard the liberties of others, to all who are ready to lay down their lives to protect the lives of others, and to all those who are prepared to bring justice and peace to those unjustly deprived of both. Consequently, if this dissertation helps shed more light on a human technology that has protected countless generations in the past, then one of its major goals will have been accomplished. For only when the waging of war is a just enterprise can it contribute to a just and lasting peace.

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Background

February 25, 1969, Navy Lieutenant Bob Kerrey and an elite Navy SEAL team conducted a commando raid on the Vietnamese village of *Thanh Phong*. Their objective was to capture or kill enemy officials who were allegedly meeting in the village that night. Kerrey was awarded the Bronze Star for his actions in that engagement, despite the fact that thirteen civilians, including women and children were killed in the raid. Lieutenant Kerrey would eventually direct another covert raid, a raid directed at another enemy stronghold. During this second raid, young Kerrey lost part of his leg to a grenade explosion. For his bravery and sacrifice under fire he was awarded the nation's highest honor, the Congressional Medal of Honor.

Thirty-two years later, former United States Senator Bob Kerrey found himself the object of national scrutiny when another member of his elite SEAL team accused him of directing fire against innocent civilians in the *Thanh Phong* raid (Fisher 2001, 4). This accusation challenged the military record of what happened in a raid that had taken place decades ago. Kerrey's former comrade accused him of violating the principles of just behavior in war and, most notably, the principle of respecting noncombatants' lives, a potential criminal offense. He further suggested that war crimes may have been committed under Kerrey's leadership by this highly regarded and decorated SEAL unit. Many Americans were shocked at the allegations brought against this respected lawmaker, war hero, academic leader, and potential presidential candidate. This public figure, who had earned the respect and trust of the American people, had now become an

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object of public scrutiny, forced to defend his wartime record and his personal honor decades after the Vietnam conflict had ended.

Why did the allegations receive such comprehensive media coverage and arouse so much outrage? Traditionally, noncombatant immunity is a right afforded to all non-participants in interstate warfare. When innocents are injured or killed in war, people want to know why and how it occurred. They also want to know what actions will be taken to ensure that horrors of this type can be avoided in any future war. When accusations were made against Senator Kerrey, the American media recalled the crimes of *My Lai* and compared Kerrey to former Army officer, LT William Calley. These images of atrocity, which outraged both civilian and warrior alike, evoked the worst aspects of war.

When violations of the established war codes are uncovered, no group is more concerned or more outraged than professional warriors themselves, for these are the individuals who must prepare for and fight our wars. Most warriors so appreciate and honor the principles of noncombatant discrimination and proportionality that they include them in the planning and execution of any military operation. Warriors, more than others, tend to appreciate the delicate connection between right behavior in war and the eventual establishment of a just and lasting peace. Understanding that violations to the principles of proportionality and discrimination jeopardize the establishment of a “just peace,” they comprehend that violating the code of war is both counterproductive and potentially destructive to establishing a just and lasting peace.

Civilized humanity has long pondered the morality of war and the parameters of moral conduct in war. Since ancient times, philosophers, theologians, politicians,

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warriors, and now lawyers have formulated concepts and theories outlining the ethical boundaries of a justified use of force in conflict (*jus ad bellum*), as well as the appropriate, just, or legal parameters of ethical behavior in war (*jus in bello*). Taken together these principles are critical in defining a *bellum justum* or just war. The work of these “students of warfare” is reflected in international law, treaties, rules and conventions, rules of engagement, and even ecclesiastical pronouncements. All of these factors help to regulate the waging of wars and the behavior of those who must fight in them. In brief, what is commonly described as the just war theory or tradition consists of a body of ethical reflection on when force is justified and what behavior is just on the field of battle.

To identify the just war theory as Roman Catholic doctrine or to view it as specifically Roman Catholic teaching would be a mistake. In fact, the theory is a multi-faith, multi-denominational, multi-cultural theory with application within many traditions:

The just-war theory is a common patrimony of Catholic, Protestant, and Orthodox Christians. (There are, of course, small Christian pacifist denominations.) Moreover, the teachings of Jewish tradition on war and peace are closely in line with it. Just-war theory is sometimes identified as “Catholic”, and it is true that modern popes have explicitly invoked it and made important contributions to its development. It is, however, by no means uniquely Catholic. (Lopez 2001, 1)

What is the ethical challenge in creating a theory of just war? In short, the answer is to justify the unthinkable: to provide moral justification for the killing of other human beings. As one scholar noted recently: “We must search for ways to understand the paradox of bringing together in a single concept the words justice and war, viewing moral righteousness, equity and honorable behavior against the hellish images of violence,

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aggressive and irrational behavior and death” (Solomon 1996, 159). As a result, just war theory is never static; it is continually reformulated and periodically redefined to balance the ever-evolving military technology with the never-changing principle of respect for life. In short, the just war theory is a historically dynamic doctrine. It begins with the premise that war,

...despite its coercive and destructive character, is morally justifiable in certain circumstances and under certain limitations. Just war doctrine differs from pacifism, which denies that war is ever morally justifiable; from a holy war or crusade, in which war is seen as divinely authorized and required and in which usually there is little concern about limiting the means and scope of warfare; and from *realpolitik*, in which war is primarily a means to advance national interest. (Daly 2001, 2)

Just war doctrine is, therefore, controversial by its very nature. It encompasses a tradition that specifies when force may be used, limits the scenarios in which resorting to force is justified, and prohibits direct and intentional attacks on civilians and disproportionate “collateral” damage done by military forces during war (NCCB 1993, 4).

In essence, just war theory, which this paper will refer to as realism, must be understood as a compromise between two conflicting schools of thought: the bellicist and pacifist positions. (Strictly speaking, most modern scholars speak of realist (just war) and pacifist views of war; for most Christians reject militarism or bellicism as a credible moral response to international relations). These viewpoints bridge the philosophical gap between those who believe in the inevitability or even the desirability of war and those who never consider war as a viable option. To a large degree, this philosophical tension between the realist/just war and idealist/pacifist schools has kept the just war theory fresh and relevant. It has also maintained as focused and productive the tension among those who would use war as an instrument of national policy and those that would

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not. The tension between pacifists who espouse an ethic of non-violence and realists who hold to an ethic of just war affects both legitimate authorities who can declare war and those who must fight in these wars (NCCB 1993, 5). While their ideologies and methods may differ, the goal of each tradition is to control or limit the use of force in the world: both the violence *of* war and violence *in* war. The most recent development in just war theory concerns discussion of a just or lasting peace. This perspective recommends spending more effort to diffuse the tensions that lead to conflict while creating conditions necessary to sustain a just and lasting peace.

The goal of this investigation is not to redefine just war theory or to suggest any radical departure from current understanding of it. Rather the author aims to illustrate the following key points: (1) the just war theory still holds relevance in 21st century statecraft; (2) knowledge and application of the theory is a critical skill that will well serve combatants of today's and tomorrow's wars; (3) the dissertation will emphasize those components of just war theory that have the greatest relevance to combatants: the category of *jus in bello*. In particular, special attention will be given to the principles of discrimination and proportionality, with a short discussion as to how certain types of military technology might affect the moral decision-making process of those called to serve in the uncertainty of war.

These key points aim at empowering warriors to do not only what is legal but also what is right, thus maintaining the moral high ground that has been, for the most part, an element of our American military history since its revolutionary beginning. In sum, the author hopes to provide some guidance to warriors, and especially their senior leadership, concerning the relevance of just war theory. By presenting the major historical

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developments of this theory, he wishes to help them understand today's moral challenges as illuminated by those of yesterday. Thus, this dissertation seeks to highlight the dynamic nature of the just war tradition and to empower combatants to apply lessons from past conflicts to tomorrow's struggles while remaining just and moral in any conflict where they are called to serve.

While rudimentary elements of the just war theory are found in ancient civilizations like those of the Greeks, Israelites, and Romans, scholars credit Augustine of Hippo (A.D. 354-430) with the popularization of the Christian theory of just war. In fact, by building on the foundational thought of Plato, Cicero, and the Judeo-Christian Scriptures, Saint Augustine helped define the ethical boundaries of a just war for future generations. Was Augustine's primary goal theoretical or practical, that is, creating a just war theory or defining the parameters of just war? It is the writer's opinion that Augustine was more concerned with his responsibilities as pastor than in his desire to define a just war. As bishop of Hippo in North Africa, Augustine was deeply concerned with the impact that wars had on those who must fight in them. Consider his statement on war to Faustus the Manichean:

What is the evil in war?...The real evils in war are love of violence, revengeful cruelty, fierce and implacable enmity, wild resistance, and the lust of power, and such like; and it is generally to punish these things, when force is required to inflict the punishment, that in obedience to God or some lawful authority, good men undertake wars... (Augustine cited by Paolucci 1962, 164).

Augustine and the just war theorists who succeeded him would probably argue that the categories and principles of just war are important for a number of reasons. These reasons, which remain critical for maintaining peace and justice in the 21st century, include: 1) the doctrine guards against unjust conflict in the world, 2) it offers moral

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guidance to those who plan or fight in wars, 3) it insists that the goals of every just war (the establishment of a just and lasting peace) be paramount and eventually met, and 4) it helps warriors retain their ethical focus and humanity in one of the most stressful, dehumanizing, and spiritually dangerous situations of their lives. In essence, the just war theory promotes a humane focus and ultimately seeks to establish or restore peace with justice on earth.

Why do we need a theory of just war in an era of international law? A brief look at the history related to this question may shed light on the question. After our colonial war for independence, American diplomats met with representatives of the Kingdom of Prussia to establish a fair treatment of combatants who could no longer fight. In the 1860s Henry Dunant and some of his fellow Swiss citizens, concerned about the treatment of wounded combatants at the Battle of Solferino in North Italy (1859), met to organize what eventually became the International Committee of the Red Cross. A few decades later, Russia's Czar Nicholas II questioned the morality of using certain armaments and asked whether their use could be considered humane, even in war. All these initiatives set in motion the establishment of international humanitarian law in the 19th and 20th centuries.

The world's first international rules of war were established through Geneva Conventions (1864, 1906, 1929, 1948, and 1949) and International Peace Conferences held at The Hague in the Netherlands (1899 and 1907). These agreements and conferences defined the roles and rights of combatants as well as non-combatants, provided guidelines for the protection of prisoners of war, and offered proposals for the monitoring of combatant behavior in war (ICORC / Red Crescent 2000). These

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mechanisms for a modern code of war did not evolve spontaneously from the brilliance of a few statesmen, the seminal thoughts of a few lawyers, or the conscience of Henry Dunant. These were a series of steps in the evolution of just war theory.

And so, well before either of the World Wars, countries of the world had ratified many international treaties, laws, and conventions designed to limit or avert wars, while monitoring and limiting the behavior of combatants in war. Despite these pre-war advancements in international humanitarian law, scholars estimate that tens of millions of noncombatants were killed or seriously wounded in World War II: “In wars of the 18th, 19th, and early 20th centuries, only about half of the estimated victims [of war] were civilians. In World War II, the ratio rose to two-thirds (MacCormack 1999, 3). Since so many victims of these global wars were innocent civilians it may be said that international law did little to protect these innocents in the course of the war. Charles MacCormack writes that international law and international humanitarian law did little to ensure just behavior in war (*jus in bello*), legal guidelines that should have protected millions of innocents. What’s even more regrettable is the number of children that were directly or indirectly impacted by these wars, the high number that killed or perished in war.

Prior to the war crimes tribunals of World War II, few military persons or government officials were tried for such crimes. After this horrific war, statesmen, warriors, and even physicians were indicted, tried, and convicted of crimes against humanity. Some were even executed for their heinous behavior in wartime. Besides addressing the justice of conduct during this war, both the Nuremberg (Germany) and Tokyo (Japan) War Tribunals addressed the morality and justice of going to war (*jus ad bellum*). The world community’s most recent war crimes tribunals in The Hague (The