

# **Justice: A Problem for Military Ethics during Irregular War**

**A Monograph**

**by**

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## **Abstract**

JUSTICE: A PROBLEM FOR MILITARY ETHICS DURING IRREGULAR WAR by Major John W. Bauer, US Army, 52 pages.

This monograph directly addresses the problem posed when considering the question ‘Who says what right is?’ or ‘Justice according to whom?’ The relative nature of the term ‘justice’ creates a problem for military ethics, particularly when soldiers try to determine what actions are morally acceptable while engaged in irregular war. This problem prompted a distinct way of thinking about ‘justice’ to form over the course of history, called the Just War Tradition. However, instead of encouraging ethical reflection, Just War Tradition has today caused military ethics to drift toward legalism. What can stop this slide into strict formalism, where law eclipses ethics? The research conducted for this monograph has led the author to believe that the answer lies in a philosophical current called personalism, which has synthesized the Aristotelian and Kantian positions. Simply stated, personalism promotes empathetic reflection prior to acting. Personalism does this by emphasizing the equal dignity of human beings, an idea that is particularly salient to irregular war. During irregular war, military actions are intended to win over the civilian population. The value, therefore, of adopting a personalist ethic is not only moral, but also pragmatic, guiding irregular warfare closer to success.

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## Introduction

Justice in war, or *ius in bello*, is perhaps the most difficult and controversial facet of military ethics. In particular, military combat actions that bring injustices upon the innocent are often cause for concern. From the perspective of outsiders, and for that matter our own national leaders, there is a high expectation for the American military. Take for instance the words of Joint Publication (JP) 1, *Doctrine for the Armed Forces of the United States*, which states: “Military power must be wielded in an unimpeachable fashion, with respect for human rights and adherence to the Geneva Conventions. This morality should not be a matter of legality, but of conscience.”<sup>1</sup> Yet within the conscience of the individual soldier, there is significant room for moral ambiguity. James Toner, in his book *Morals under the Gun: The Cardinal Virtues, Military Ethics, and American Society* (2000) warned that “soldiers deficient in the cardinal virtues will have serious defects of character – and of conscience.”<sup>2</sup> So how are the cardinal virtues (Prudence, Justice, Courage, and Temperance) relevant to military ethics? According to Toner, the cardinal virtues as they are formed within each soldier are absolutely foundational to ethical behavior. Of the four cardinal virtues, the virtue of particular interest to this monograph is the virtue of justice.<sup>3</sup>

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<sup>1</sup> U.S. Department of Defense, Joint Publication (JP) 1, *Joint Doctrine for the United States*. (Washington, D.C., 2007), I-4.

<sup>2</sup> James Hugh Toner, *Morals Under the Gun: The Cardinal Virtues, Military Ethics, and American Society* (Lexington, KY: University of Kentucky Press, 2000), 53.

<sup>3</sup> Plato, *The Republic*, trans. Benjamin Jowett (Cleveland: Fine Editions Press, 1946), 160. The four cardinal virtues (Prudence, Justice, Courage, and Temperance) are first named by Plato in *The Republic* (chapter 4). See also Toner, 26 and 52-53.

Consider the following recent example from Iraq that demonstrates the virtue of justice.<sup>4</sup>

One night in 2005, Army Special Forces soldiers conducted a raid on a building suspected of housing armed insurgents. During the course of the raid, one American soldier, Chief Warrant Officer Jim Porter (pseudonym), kicked open an interior door and entered a dark room. When Jim stepped inside, a man jumped up from his periphery and partially seized control of Jim's M4 carbine. As the muzzle of his weapon began to turn towards him, Jim instinctually reached for the pistol that was holstered across his chest. Slowing the movement of the rifle toward his own body, Jim drew his pistol and took aim at the Iraqi, preparing himself to shoot in self-defense. Yet before he pulled the trigger, Jim reconsidered. In a split-second decision, the Special Forces officer opted for an alternate solution. With the full force of his 225-lb frame, Jim clenched his fist and knocked the Iraqi man to the ground unconscious.

In the interview following this incident, Jim commented that he never knew whether the man he was facing was an insurgent. In retrospect, Jim realized that the Iraqi was probably "scared to death," and was most likely acting as instinctually as he was. Legally, would he have been justified in shooting the man? The answer is probably yes. Morally, would this have been the best action he could have taken? Considering the fact that the Iraqi may not have been an insurgent and that his death would thereby have been considered by other Iraqis to be an injustice, the answer is probably no. Justice and the legitimacy of American troops, which in many ways

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<sup>4</sup> The example that follows comes from an unpublished interview received by the author in April of 2008. The subject of the interview remains anonymous, since current USSOCOM policy requires that pseudonyms be used in unclassified historical interviews for soldiers in the rank of O-4 and below.

are based upon the attitudes of civilians, are fragile. As the late Dr. Martin Luther King, Jr. so eloquently proclaimed, “Injustice anywhere is a threat to justice everywhere.”<sup>5</sup>

However, the very meaning of justice is often disputed. It is here that the essential problem presents itself. The philosopher Michael Walzer, referring to the various interpretations of justice, calls its ambiguity an “anarchy of moral meanings.”<sup>6</sup> Before asking what is ‘just,’ one must first explore the two principle meanings of justice. At the most basic level, the distinction between competing definitions of justice is clear. The first two definitions given in the *The Oxford English Dictionary* demonstrate the dichotomy. “Justice: (1) the quality of being (morally) just or righteous; the principle of just dealing; one of the four cardinal virtues; (2) judicial administration of law or equity; infliction of punishment; legal vengeance on an offender.”<sup>7</sup> One pertains to virtue, the other to rules, or law. The philosopher Alasdair MacIntyre describes this difference in meanings as two “rival conceptions of justice.”<sup>8</sup> For the sake of clarity, this monograph will distinguish between the two fundamental types of justice using the terms ‘justice as virtue’ and ‘procedural justice.’ These will be discussed in greater detail in the third chapter entitled Competing Notions of Ethics and Justice.

The importance of justice to human beings is overwhelmingly apparent. Aristotle, for example, called justice “the very criterion of what is right.”<sup>9</sup> Kant, remarking on the primal necessity of justice for human beings, said that from the beginning of human history “some form

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<sup>5</sup> Martin Luther King Jr., “Letter from a Birmingham Jail,” in *I Have a Dream: Writings and Speeches that Changed the World*, ed. James Melvin Washington (San Francisco: Harper San Francisco, 1992), 85.

<sup>6</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (United States of America: Basic Books, 1977), 11.

<sup>7</sup> *The Oxford English Dictionary*, 2d ed., s.v. “Justice.”

<sup>8</sup> Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, Indiana: University of Notre Dame Press, 1988), 39.

of civil government and public justice began... From this first, crude structure, all human arts, of which sociability and civil security are the most worthwhile, could gradually develop..."<sup>10</sup> The philosopher John Rawls echoes the Kantian theme, calling justice "the first virtue of social institutions, as truth is of systems of thought."<sup>11</sup> Even the realist Hans Morgenthau in his book *Truth and Power* (1970) acknowledged, "To do justice and to receive it is an elemental aspiration of man."<sup>12</sup> Hence, no matter on what side of the distinction between the two types of justice one may fall, justice is nevertheless the cornerstone of ethical thought. If justice is so fundamental yet at the same time so vulnerable to interpretation, then the meaning of justice in *ius in bello* is clearly a problem for military ethics. An exploration into the "anarchy of moral meanings" is beyond the scope of this monograph. Rather, this project will focus on the following question: How can the two rival ethical theories of justice be reconciled so that the consciences of soldiers can be rightly formed (using justice as virtue) while at the same time decisions, unique to each situation, soldiers can be rightly informed (using procedural justice)?

This monograph is about the tension between two competing notions of justice and its importance to military ethics. In Western thought, the two meanings of justice have been recognized since antiquity. Over the course of over two millennia, a singular theory of justice as it relates to war has developed with enough consistency that it has become a tradition: the Just War Tradition.

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<sup>9</sup> Aristotle, *Politics* 1253a37-38 in Thomas P. Kiernan, ed., *Aristotle Dictionary* (New York: Philosophical Library, 1962), 312.

<sup>10</sup> Kant, *Perpetual Peace* in Immanuel Kant, *Perpetual Peace and Other Essays on Politics, History, and Morals*, trans. Ted Humphrey (Indianapolis, Indiana: Hackett Publishing Company, 1983), 56.

<sup>11</sup> John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 1999), 3.

<sup>12</sup> Hans J. Morgenthau, *Truth and Power: Essays of a Decade, 1960-1970* (New York: Praeger Publishers, 1970), 61.

Consequently, the first chapter of this monograph is entitled Just War Tradition's Drift toward Legalism, and it explores the development of *ius in bello* within Just War Tradition from the fourth century to the present. It includes the story of the Tradition as it took shape over time, evolving first from theory to norms of behavior, and then from norms to formally derived rules. These rules of *ius in bello* are codified in the international Laws of War.

The second chapter, entitled Competing Notions of Ethics and Justice, considers two ethical traditions, one emphasizing justice as virtue (the Aristotelian heritage) and the other placing primacy on procedural justice (the Kantian tradition). Confronted by relativism, the entire field of ethics finds itself in jeopardy, in part because of the seemingly irreconcilable nature of these two dominant schools of philosophy.

Finally, the third chapter highlights a twentieth century philosophical movement called phenomenology and the personalist ethic that has emerged from it, which has synthesized the two notions of justice represented by virtue-ethics and Kantianism. Personalism also leads one to believe that the problem of justice is both fundamental to the field of ethics and closely linked to the problem of empathy.

The conclusion of the monograph offers some personalist ethical strategies for military professionals. It suggests that the personalist synthesis of virtue and rule-based ethics under a single language for justice is greatly needed to help form the consciences of soldiers and to situationally inform their ethical decisions, particularly with respect to civilians. This aspect of ethics is critically important in irregular conflicts, such as the wars in Iraq and Afghanistan. Colin Gray states that "irregular warfare," as opposed to conventional warfare, "is waged to secure the acquiescence, if not the support, of the local people" and that "decisive combat occurs in the

minds of civilians.”<sup>13</sup> If we believe that justice is elemental to all people, then our military system of ethics must guide us in this regard in order for us ultimately to be successful. Personalism does just this by offering an approach that can lead soldiers in combat to contribute to, rather than hinder, *ius in bello*, or justice in war.

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<sup>13</sup> Colin Gray, “Irregular Warfare: One Nature, Many Characters,” *Strategic Studies Quarterly* (Winter 2007), 43.

## Justice War Tradition's Drift towards Legalism

Any discussion of justice as it applies to military ethics aptly begins with the age-old tradition that deals with justice and war, called Just War Tradition. The tradition begins with the ancient Greeks. Some suggest that Aristotle first coined the phrase 'Just War.'<sup>14</sup> Today, the tradition makes the distinction between the just war decision, *ius ad bellum*, and justice within the conduct of war, or *ius in bello*. The term *ius* translates from the original Latin to mean 'just' or 'right,' making a more literal translation "right to war" and "right in war," respectively.<sup>15</sup> From its first thorough treatment in the writings of Augustine to its formal implementation in modern international law, Just War Tradition continues today to be the language of justification for war and the measure of legitimacy within war. This chapter's analysis of Just War Tradition will focus on the development of *ius in bello* as it evolved first from a tradition rooted in virtue to one that today has become an extension of law.

### Augustine: The 'Father' of Just War Tradition

Saint Augustine (354-430 A.D.), Bishop of Hippo, is widely considered the father of Just War Tradition.<sup>16</sup> Augustine lived at a time when war and the prospect of war were very real. Like other Roman citizens in North Africa, he was undoubtedly shaken when Rome was sacked by the Visigoths in 410, the first time Rome had been taken by foreign invaders in over eight hundred

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<sup>14</sup> Paul Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* (Englewood Cliffs, NJ: Prentice-Hall, Inc., 1994), 10. See also Aristotle, *Politics*, 1256 b25; Aristotle, *The Basic Works of Aristotle*, 18th ed., ed. Richard McKeon (New York: Random House, 1941), 1137.

<sup>15</sup> Timothy L. Challans, *Awakening Warrior: Revolutions in the Ethics of Warfare* (Albany, NY: State University of New York Press, 2007), 151.

<sup>16</sup> See for example Christopher, 30 or Martin L. Cook, *The Moral Warrior: Ethics and Service in the U.S. Military* (Albany: State University of New York Press, 2004), 23.

years.<sup>17</sup> Not only did the secular order seem to be crumbling, but the Church was in peril as well. At this time, virtually the entire Christian East was in rebellion against the Pope in Rome.<sup>18</sup> From the refuge of his North African home, a city that would itself fall to invaders a year after his death, Augustine defended the orthodoxy of the Christian faith against all manner of rival schismatic groups as the Donatists, Arians, and Pelagians. For Augustine, the theological and political order was threatened, setting the stage for him to pen a collection of writings that would have a profound influence on western thought for centuries.

Augustine's writings produced an ethic that would serve as the foundation for all Christian religions, Catholic and Protestant, and that would help shape even secular political thought into the modern era.<sup>19</sup> Synthesizing the ideas of Greek and Roman philosophy with Christian principles, his works essentially confirmed and built upon the writings of Plato, Aristotle, and Cicero.<sup>20</sup> In his work, *City of God*, he described two cities, one earthly and the other heavenly. True justice, said Augustine, was only possible in the heavenly city.<sup>21</sup> Nevertheless, justice must still be the goal of human political institutions, even if unattainable in the absolute sense.<sup>22</sup> On the indispensability of justice in the earthly city, Augustine wrote that

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<sup>17</sup> Warren H. Carroll, *A History of Christendom*, Vol. 2, *Building of Christendom* (Front Royal, Virginia: Christendom Press, 1987), 84.

<sup>18</sup> Carroll, 81.

<sup>19</sup> Pangle, Thomas L. and Peter J. Ahrens Dorf, *Justice Among Nations: On the Moral Basis of Power and Peace* (Lawrence, Kansas: University of Kansas Press, 1999), 73.

<sup>20</sup> See Christopher, 47. The writings of the Roman Senator Cicero, in particular, had a profound influence on the Roman world for centuries. Cicero called justice "the most illustrious of virtues, on account of which men are called 'good.'" He praised Roman generals when after conquering new lands would adopt the vanquished citizens under their patronage and held up such actions as a model for the virtue of justice in war. See *De Officiis* (On Duties) I 20 and I 35 in Cicero, *On Duties*, ed. M. T. Griffin and E. M. Atkins (Cambridge: Cambridge University Press, 1991), 9 and 15.

<sup>21</sup> See for example Augustine, *The City of God*, XIX 17 and XIX 24 in Augustine, *The City of God*, trans. Marcus Dods (New York: The Modern Library, 1950), 695-697 and 706.

<sup>22</sup> Christopher, 38-39.

without justice, kingdoms are nothing more than gangs of criminals on a large scale.<sup>23</sup> Therefore, justice for Augustine was preeminent in the political realm.<sup>24</sup>

Augustine also echoed Aristotle's assertion that the ultimate purpose of war was peace.<sup>25</sup> In the outcome of war, he made a clear distinction between mere short-term victory and lasting peace. Victory, he said, may be attained, but if it is poisoned by human vice and subjugates the vanquished, it is only momentary.<sup>26</sup> Conquest driven by a thirst for power cannot attain peace, for in this case goodwill is not the primary intention. In this way, Augustine defined true victory as the promulgation of lasting peace. From these two central ideas, the primacy of the virtue of justice and the intention of peace, Just War Tradition was born.

In order to achieve peace, the conduct of war for Augustine demanded the exclusion of injustice. Restraint, therefore, applied to both the initial cause to go to war as well as the way it is fought: "We do not seek peace in order to be at war, but we go to war that we have peace. Be peaceful therefore, in warring, so that you may vanquish those whom you are against, and bring them to the prosperity of peace."<sup>27</sup> From the idea of 'peaceful warring,' chivalry and the first principles of *ius in bello* later took shape during the Middle Ages.

Chivalry is in many respects the ethical legacy of the Middle Ages. Despite its parallels with the ideas of Christian restraint, some would argue that the Church's central role in medieval

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<sup>23</sup> *The City of God* IV 4, 112.

<sup>24</sup> See for example *The City of God* XIX 21, 699.

<sup>25</sup> Aristotle, in *Nicomachean Ethics* 1177b6, stated that "(We) make war that we may live in peace." See Aristotle, *The Basic Works of Aristotle*, 18th ed., ed. Richard McKeon (New York: Random House, 1941), 1105. Likewise, Augustine said that "it is therefore with the desire for peace that all wars are waged." See *The City of God*, XIX 12, 687.

<sup>26</sup> See for example *The City of God*, XV 4, 481.

<sup>27</sup> Augustine, *The Works of Saint Augustine*, part II, vol. 3, "Letter 189 (to Boniface)," trans. Roland Teske, ed. Boniface Ramsey (Hyde Park, New York: New York City Press, 2004), 261.

society was not the primary influence behind the ethic of chivalry, but rather land ownership.<sup>28</sup> Despite this debate, the fact remains that a western way of war emerged with a character of its own over the course of the thousand years known as the Middle Ages.<sup>29</sup> As Christendom coalesced in the centuries following Augustine, the cultural norm of chivalry directly led to an established norm of restraint in war. It was this ethic of chivalry, the military code that placed personal honor as paramount, which became the defining social character among the knightly class.<sup>30</sup> As a norm of behavior, chivalry conveyed a common set of virtues that were universally adopted by the knights of medieval Europe. As such, the tendency toward total war, while not completely eliminated within Europe, was significantly mitigated.<sup>31</sup>

### **The High Middle Ages and the First Legal Codification of Just War**

The High Middle Ages witnessed the first formal compilation of Just War Tradition, commissioned by Pope Gregory IX in 1234.<sup>32</sup> Codified in canon law, the Church's Just War Doctrine laid out the five conditions of *ius ad bellum*, the just war decision.<sup>33</sup> While *ius in bello* principles were conspicuously absent from this form of formal law, the experience of warfare had yet to necessitate them. The chivalric code of knights included norms that for the most part

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<sup>28</sup> See for example John France, *Western Warfare in the Age of the Crusades, 1000-1300* (Ithaca, New York: Cornell University Press, 1999), 11.

<sup>29</sup> The thousand years referred to here is the period from 500-1500 A.D.

<sup>30</sup> France, 53.

<sup>31</sup> France, 11.

<sup>32</sup> Russell, 127.

<sup>33</sup> See Russell, 128. The five conditions for *ius ad bellum* were: (1) the person waging war must be a layman; (2) war must have just cause; (3) a distinct necessity to go to war must be present; (4) the belligerent must have just intention, which excluded the intent to punish; and (5) he who waged war must have proper authority, which was for the most part reserved for kings.

prevented unrestrained warfare.<sup>34</sup> Nonetheless, certain *ius in bello* principles under the fourth condition of *ius ad bellum* (just intention) were implicit. ‘Just intention’ encouraged the attitudes of piety, justice, and obedience while describing as harmful the attitudes of hatred, cruelty, and greed.<sup>35</sup> The codification of Just War Tradition in canon law is significant in that a form similar to medieval Just War Doctrine would later reemerge in the United Nations Charter and the modern international Laws of War.

Following Augustine, the next important influence on Just War thinking was Saint Thomas Aquinas (1225-1274). Aquinas was largely responsible for the ‘Aristotelian Revolution’ that occurred in Europe in the thirteenth century.<sup>36</sup> In his writings, he emphasized the universal nature of natural law. The natural law, he said, belonged to “those things to which a man is inclined naturally... and among these it is proper to man to be inclined to act according to reason.” Therefore, “the natural law, as to first common principles, is the same for all.”<sup>37</sup> For Aquinas, the natural law defined certain principles of universal objectivity, principles that transcended culture, race, or religion and that applied to all human beings. In his explicit treatment of war, Aquinas drew extensively upon the writings of Augustine, emphasizing the peaceful purpose of war and the imperative to fight justly.<sup>38</sup> As a single synthesis of Augustine’s

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<sup>34</sup> See James Turner Johnson, *Just War Tradition and the Restraint of War* (Princeton: Princeton University Press, 1981), 45-49. While foot soldiers never took on the chivalric ethos, this was of little consequence, since knights were the dominant military entity of the period.

<sup>35</sup> Russell, 129.

<sup>36</sup> G. K. Chesterton, *Saint Thomas Aquinas: Saint Francis of Assisi* (San Francisco: Ignatius Press, 2002), 75.

<sup>37</sup> *Summa Theologica* I-II 94 4 in Thomas Aquinas, *The Summa Theologica*, trans. Fathers of the English Dominican Province (Chicago: Encyclopedia Britannica, 1952), 224.

<sup>38</sup> Aquinas quotes Augustine in *The Summa Theologica* II-II 40 2, “We do not seek peace in order to be at war, but we go to war that we have peace. Be peaceful therefore, in warring, so that you may vanquish those whom you are against, and bring them to the prosperity of peace.” See Thomas Aquinas, 579.

teachings and natural law, his ideas would serve to bridge the religious interpretation of Just War Tradition with the secular, legal form that would occur centuries later.

Aquinas is also credited with developing what is known as the Doctrine of Double Effect, which has been applied directly to modern *ius in bello*.<sup>39</sup> The Doctrine of Double Effect highlights the link between action and intention. “One act... having two effects, only one of which is intended, while the other is beside the intention.”<sup>40</sup> Hence, Aquinas’ doctrine stated that the good effect of an action must be intended as its direct result. Furthermore, the good effect must be proportionally greater than the bad effect, which is only morally permitted if it is an indirect result. Applied in the modern era to the Laws of War, this principle prevents the deliberate targeting of innocents as a primary intention during acts of war. Aquinas’ ideas on double effect have since been loosely incorporated alongside the modern rules of proportionality and discrimination that have taken shape in international law.<sup>41</sup>

The start of the Hundred Years War (1337-1453) between France and England marked the first time *ius in bello* principles were formally adopted into practice.<sup>42</sup> However, the universal application of these principles throughout Europe was relatively short-lived. As the unity of Christendom began to dissolve during the Protestant Reformation two centuries later, the Church’s Just War Doctrine declined in influence as well. Not until the nineteenth century did

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<sup>39</sup> See for example Larry May, Eric Rove, and Steve Viner, *The Morality of War: Classical and Contemporary Readings* (Upper Saddle River, NJ: Pearson Education, Inc., 2006), 160. These authors along with others place the origin of the Doctrine of Double Effect with Thomas Aquinas.

<sup>40</sup> *The Summa Theologica* II-II 64 7 in Thomas Aquinas, *The Summa Theologica*, trans. Fathers of the English Dominican Province (London: R&T Washbourne, Ltd., 1918), 209.

<sup>41</sup> See U.S. Department of the Army, Field Manual (FM) 3-24, *Counterinsurgency* (Washington, DC, 2006), 7-6 to 7-7.

<sup>42</sup> Johnson, 48.

*ius in bello* principles in Europe once again take on a universal transnational character.<sup>43</sup> In the meantime, Just War Tradition continued to survive to a greater degree in theory than in practice. During this time, Just War Tradition became secularized, following a trend that has most often been attributed to the seventeenth century jurist, Hugo Grotius.

### **Hugo Grotius: The ‘Father’ of International Law**

Various figures provided contributions to Just War Tradition following Aquinas. Among them, none was more influential than the Dutch Protestant lawyer named Hugo Grotius (1583-1645), considered by many to be the ‘father’ of international law.<sup>44</sup> In his writings, Grotius primarily sought to prevent war, and if that failed, then his aim was to limit its brutality.

The essence of Grotius’ ideas pertaining to *ius in bello* was to emphasize the protection of ‘innocents.’ “No action,” he said, “should be attempted whereby innocent persons may be threatened with destruction.”<sup>45</sup> He went on to assert that civilians should not be punished due to their proximity to the enemy, saying it was necessary “not to involve the innocent in the same punishment as the guilty, but even to spare those who are guilty for the sake of the innocent.”<sup>46</sup> For Grotius, the purpose of granting immunity to a specific class of protected persons was to prevent human suffering in war. Grotius’ ideas were influential in introducing this particular intent behind *ius in bello*, a purpose that would later carry over into international law.

The significance of Grotius was not as much his seminal contributions to Just War Tradition, but his important influence on modern, secular international law. Grotius in his

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<sup>43</sup> The first universal implementation of *ius in bello* in Europe occurred following the Geneva Convention of 1864. See Christopher, 111.

<sup>44</sup> Christopher, 70.

<sup>45</sup> *The Law of War and Peace* III 11 VIII; Hugo Grotius, *The Law of War and Peace*, trans. Francis W. Kelsey (Indianapolis: The Bobbs-Merrill Company, Inc., 1925), 734.

<sup>46</sup> *Ibid.* Grotius defined innocents as noncombatants, such as women, children, and old men.

writings made extensive reference to the classics. Since most European rulers in the seventeenth century received a classical education, Grotius' works had great appeal.<sup>47</sup> As such, Grotius had a profound influence on the leaders of Europe in his day. His work, *The Law of War and Peace* (1625), was dedicated to King Louis XIII of France and was intended as a handbook for international rulers.<sup>48</sup> Grotius' handbook provided the monarchs, statesmen, and generals of Europe a comprehensive moral guide on how to nobly wage war.

Grotius lived during the calamity of the Thirty Years War (1618-1648), the trans-European conflict that prompted him to write *The Law of War and Peace*. The devastation of the Thirty Years War brought warfare to a level never before seen within Europe in a war between Christian armies. For Germany, the loss of life was proportionally greater than even that of the Second World War, and the economic and material destruction was nearly as extensive.<sup>49</sup> Grotius stated in his prologue to *The Law of War and Peace*:

I have had many and weighty reasons for undertaking to write upon this subject. Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly let loose for the committing of all crimes.<sup>50</sup>

Grotius' reaction to the horror of the Thirty Years War prompted him to advocate the formal implementation of a law for all humanity that would dictate limits to the conduct of war. In his mind, only formal law could prevent a human tragedy of such a degree from ever happening

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<sup>47</sup> Christopher, 82.

<sup>48</sup> *Ibid.*, 99.

<sup>49</sup> Geoffrey Parker, *The Thirty Years War* (London: Routledge and Keegan Paul, 1984), 215.

<sup>50</sup> *The Law of War and Peace Prolegomena* 28; Grotius, 20.

again. To convey his message in a manner that was widely accepted in his day, Grotius used Aquinas' language of natural law.<sup>51</sup>

For Grotius, natural law was “unwritten laws... which nature prescribes.”<sup>52</sup> He believed that justice, as an aspect of the natural law, represented a universal mandate for rulers, armies, and soldiers to exercise restraint in war. Because natural law was both universal and ‘objective,’ he envisioned that rules of justice based on natural law should be codified in the form of formal law. “In discussing the law of nature,” he stated, “the question is this, whether an act can be performed without injustice; and injustice is understood to be that which is utterly repugnant to a rational and social nature.”<sup>53</sup> Therefore, human reason could guide man to create laws that would achieve a type of ‘objective’ justice. This idea, together with his emphasis on protecting innocents and reducing suffering, were Grotius’ most profound contributions to the development of *ius in bello* in the Just War Tradition, contributions that form the basis for today’s international law of armed conflict.

### **The Laws of War: *Ius in Bello* as it Exists Today**

The first codification of *ius in bello* in international treaties occurred two centuries following Grotius as the initiative of the International Committee of the Red Cross. Held in 1864, the first-ever Geneva Convention addressed the obligatory care for the sick and wounded.<sup>54</sup> It was followed by the Hague Conventions of 1899 and 1907, as well as by two other Geneva Conventions in 1906 and 1929. The spirit of these conventions was summed up the preamble to the 1907 Hague convention given by the Russian jurist Feodor Martens:

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<sup>51</sup> Christopher, 74.

<sup>52</sup> *The Law of War and Peace* Prolegomena 26; Grotius, 19.

<sup>53</sup> *The Law of War and Peace* I 2 I; Grotius, 52.

<sup>54</sup> Christopher, 111.

These provisions, the drafting of which has been inspired by the desire to diminish the evils of war, so far as military requirements permit, are intended as a general rule of conduct for the belligerents in their own mutual relations and in relation to the inhabitants... In cases not included in the Regulations adopted... the inhabitants and the belligerents remain under the protection and the rule of the principles of the laws of nations, derived from the usage, established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.<sup>55</sup>

Here, three of Grotius' themes are readily apparent. First, the language that was used referred to a universal "law of humanity," an appeal to natural law as discerned by human reason. Second, the convention's preamble expressed the desire to protect "inhabitants," or innocents, who would be affected by armed conflict. Finally, the "desire to diminish the evils of war" was a direct reflection of Grotius' aim to reduce human suffering. Despite these intentions, however, none of the treaties that were successfully ratified prior to World War II explicitly mentioned civilians.<sup>56</sup> This failure to fulfill Grotius' vision demonstrated the reluctance of sovereign states to place restraints on their ability to wage war.

The aftermath of the Second World War, however, created renewed impetus to recognize the shortcomings of international law while attempting to codify *ius in bello* to a greater degree in international treaties. The enormous loss of human life during that war had been the highest in history, estimated at forty to fifty million people, half being civilians.<sup>57</sup> Furthermore, the first use of nuclear weapons had made the possibilities for future war frightening. Sixty-four nations gathered in Geneva in 1949 to reach a decision on expanding the canon of the international Laws of War. Four conventions were held that year:

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<sup>55</sup> Michael Howard, George J. Andreopoulos, and Mark R. Shulman, ed. *The Laws of War: Constraints on Warfare in the Western World* (New Haven: Yale University Press, 1994), 8.

<sup>56</sup> Pictet, Jean S. ed. *Commentary IV Geneva Convention, Relative to the Protection of Civilian Persons in Time of War* (Geneva: International Committee of the Red Cross, 1958), 26-27.

<sup>57</sup> John Keegan, ed. *Atlas of the Second World War* (New York: Harper and Row, Publishers, 1989), 204.

(I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field; (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea; (III) the Treatment of Prisoners of War; and (IV) the Protection of Civilian Persons in Time of War.<sup>58</sup>

Since the fourth convention explicitly named the protection of civilians in its title, the Geneva Convention seemed to be close to reaching a legal solution to the problem of *ius in bello*.

To the disappointment of the natural law proponents present at the fourth convention, international consensus once again prevented the full implementation of natural law-based principles. The delegates instead opted to construct specific conditional articles, describing only specific situations in war rather than overarching moral principles. The International Committee of the Red Cross (ICRC) later noted in its 1958 commentary on the conventions that “it is too much to expect every soldier and every civilian to know the details of the four hundred and more Articles of the four conventions, and to be able to understand and apply them.” Recognizing this at the time during the convention in 1949, the ICRC had recommended that an underlying principle be included in the convention’s preamble: “Respect for the personality and dignity of human beings constitutes a universal principle.”<sup>59</sup> However, the nations in attendance were unwilling to agree upon any universalist wording, and so the ICRC preamble was left out.

Acknowledging the problem that the ICRC identified in 1949, United States Military lawyers have since attempted to communicate a set of general *ius in bello* principles to those in uniform. The four principles used by Judge Adjutant Generals are (1) proportionality, (2) military necessity, (3) discrimination, and (4) the prevention of unnecessary suffering.<sup>60</sup> Doctrine has also

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<sup>58</sup> Pictet, 10 and n11.

<sup>59</sup> Pictet, 13.

<sup>60</sup> See Derek I. Grimes, John Rawcliffe, and Jeannine Smith, eds. *Operational Law Handbook* (Charlottesville, Virginia: The Judge Advocate General's Legal Center and School, 2006), 12-14. The principle of military necessity authorizes the use of force required to accomplish the mission, although it does not authorize acts otherwise prohibited by the law of war. Field Manual 27-10 defines proportionality as “The anticipated loss of life and damage to property incidental to attacks must not be

made an attempt to simplify even further the essence of the Laws of War. For example, Field Manual (FM) 3-24, *Counterinsurgency*, makes mention of two *ius in bello* principles, proportionality and discrimination.<sup>61</sup> The manual does, however, also advocate a variation of the Doctrine of Double Effect, stating “it is wrong to harm innocents, regardless of their citizenship...” (however) “Soldiers and Marines may take actions where they knowingly risk, but do not intend, harm to noncombatants.”<sup>62</sup> Hence, rather than emphasizing a strict adherence to the most formal type of procedural justice, the Laws of War, the Army today has chosen in practice to implement *ius in bello* principles that can situationally guide ethical decisions in combat.

From its origin in pure theory to its later form in moral principles and finally its modern codification in formal law, Just War Tradition has evolved over the course of more than two millenia. Throughout its history, the tendency within the tradition has been to apply greater external controls over human behavior, first in the form of the Church’s canon law and later in the Laws of War. Its present form in international law has taken *ius in bello* almost entirely away from the field of ethics, required instead as a matter of legality. Our own military, on the other hand, has preserved some of the traditional moral principles behind *ius in bello*, and in doing so it has maintained the ethical dimension behind *ius in bello*.

In the minds of the first theorists of Just War Tradition, *ius in bello* was not intended as a means to impose arbitrary limits to warfare. It had a purpose, and the purpose was that which Augustine had advocated, a lasting peace. There is evidence to suggest that this idea became an

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excessive in relation to the concrete and direct military advantage expected to be gained.” (para. 41, change 1.) The prevention of unnecessary suffering differs from Grotius’ definition in that it only applies to the type of weapons chosen. This is caused in part by the fact that there is no agreed upon definition for unnecessary suffering. Discrimination is often paired a fifth principle called distinction, and both terms reflect the obligation to protect the civilian population, other noncombatants, and private property.

<sup>61</sup> See Field Manual (FM) 3-24, *Counterinsurgency*, 7-6 to 7-7.

<sup>62</sup> *Ibid.*, 7-22 to 7-23.

integral part of the Western way of war. Colin Gray, for example, has argued that Clausewitz, fourteen centuries after Augustine, considered the purpose of war to be peace: “Clausewitz insists that war is an instrument of policy. What that means is that war should be waged not for the goal of victory, necessary though that usually is, but rather for the securing of an advantageous peace.”<sup>63</sup> If the goal of war is an authentic peace, and if Grotius and the natural law proponents are correct in demanding protection for innocents, then the greatest challenge to *ius in bello* in modern war is the preservation of justice for civilian inhabitants subjected to war. This has become the challenge our military faces as it engages in irregular warfare, where the lines between noncombatant and combatant become increasingly blurred and the problem of military ethics becomes even more tactically relevant.

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<sup>63</sup> Colin S. Gray, “How Has War Changed Since the Cold War,” *Parameters* (Spring 2005), 18.

## Competing Notions of Ethics and Justice

Just War Tradition's drift toward legalism has left in its wake an ethical void. If Just War Tradition is today nothing more than the Laws of War, then the Tradition has effectively been divorced from traditional ethics in favor of the most rigid and formal of ethical structures. The summarizing principles of the Laws of War (the so-called *ius in bello* principles) on the other hand comprise a more informal ethical system than the Laws of War but are nonetheless a form of procedural justice. Distinct from the procedural approaches, however, is the even more informal notion of ethics often associated with virtue-ethics. In order to simplify the distinction between these two types of ethics, this monograph will describe the ethics of virtue in terms of the Aristotelian tradition and the ethics of procedure in terms of the Kantian tradition. For Aristotle, virtue was the basis of ethics and had primacy; for Kant, whose tradition is associated with formalism, duty to abide by the formal norm was the foundation of ethics. While Aristotle stressed the formation of the whole man, Kant stressed procedure, or principles. Few can deny the need for both approaches to ethics: one that emphasizes the formation of the virtuous man and the other that emphasizes moral rules that can directly inform ethical decisions. Indeed, the actual views of both Aristotle and Kant cannot be so easily characterized in these terms, for while both thinkers tend to their respective extremes, neither saw justice completely one-dimensionally. Yet the fact remains that on the surface these two systems of ethics seem so fundamentally opposed. This has left an opportunity for relativism, which goes so far as to question the need for any ethics whatsoever, to further doubt the existence of any universal meaning of justice.<sup>64</sup>

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<sup>64</sup> See William Frankena, *Ethics*, 2<sup>nd</sup> Edition (Upper Saddle River, New Jersey: Prentice Hall, 1973), 110. Frankena argues that the notion of meta-ethical relativism cannot be proven and is therefore an oxymoron.

## Virtue Ethics: The Aristotelian Heritage

The Western tradition of virtue-ethics originated with the Ancient Greeks. Beginning as far back as sixth-century Homeric Greece, the Greeks taught societal values using epic stories whose heroes represented model traits of behavior. Epic stories were meant to convey the difference between outstanding and flawed character, for the Greeks considered man and his actions one.<sup>65</sup> The Greek word *arête*, later translated as virtue, was in many ways the purpose of these stories and at the time connoted excellence of any kind.<sup>66</sup> Two centuries later, Plato (427-347 B.C.) named four cardinal, or foundational virtues: prudence, justice, temperance, and fortitude.<sup>67</sup> Plato's cardinal virtues were intended to encompass the core of man's character, distinguished from other forms of *arête* that the Greeks held to be outstanding. The cardinal virtues were subsequently adopted and recognized not only among the Greeks, but also among the various societies for whom the intellectual heritage of the Greeks was passed on for centuries. For this reason, the philosopher Alasdair MacIntyre calls the Greeks and their cultural successors, which include all of Europe, down through the Middle Ages 'heroic societies.'<sup>68</sup>

Plato sustained the Homeric notion that an effective society must have a means to convey *arête* to itself and its subsequent generations. In fact, one of Plato's central theses was that only a community led and taught by philosophers could learn true virtue.<sup>69</sup> The most important virtue from a social point of view was the virtue of justice. Plato, who placed justice among the four

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<sup>65</sup> Alasdair MacIntyre, *After Virtue*, 2d ed. (Notre Dame, Indiana: University of Notre Dame Press, 1984), 122.

<sup>66</sup> *Ibid.*, 122.

<sup>67</sup> See Plato, *The Republic IV*, trans. Benjamin Jowett (Cleveland: Fine Editions Press, 1946), 160.

<sup>68</sup> MacIntyre, 121.

<sup>69</sup> Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, Indiana: University of Notre Dame Press, 1988), 98. See also Plato, *Republic*, VI and VII.

Cardinal Virtues, called justice the overarching virtue of societies, so that all that is ethical falls under justice.<sup>70</sup> While subsequent Greek thinkers may have disagreed with the particular details of Plato's theory of justice, they continued to give justice its place of primacy.

The exploration of the meaning of justice was so important to Plato that he devoted his entire work, *Republic*, to the question.<sup>71</sup> There is little doubt that Plato had the moral errors of Peloponnesian War in mind when he composed many of his works on philosophy and politics. To understand the context of this period, it is useful to examine the Melian Dialogue from Thucydides' *The Peloponnesian War* as it relates to Plato's virtue of justice.<sup>72</sup>

In 416 B.C., the Athenians sent a naval force to demand the submission of the neutral island city-state of Melos. Despite the threats made by the Athenian emissaries and the hopeless situation of the Melians, the Melians refused to surrender. The Greek historian Thucydides captured the essence of this dialogue between the Athenians and the Melians in his final justification for the attack. The Athenians say "that in human disputation justice is then only agreed upon on when the necessity is equal; whereas they that have odds of power exact as much as they can get, and the weak yield to such conditions as they can get."<sup>73</sup> In other words, the Athenians were not concerned primarily with doing what was objectively right, or just. Rather, their superior military strength, they believed, gave them license to do what they pragmatically

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<sup>70</sup> See Plato, *The Republic IV* and MacIntyre, *Whose Justice? Which Rationality?*, 96.

<sup>71</sup> Richard Kraut, "Introduction (to Plato)" in Steven M.Cahn, ed., *Classics of Moral Philosophy*. (New York: Oxford University Press, 2002), 3.

<sup>72</sup> The Peloponnesian War (431-404 B.C.) was considered by Plato and many of his contemporaries in retrospect to be an ill-advised conflict between the Athenian-led Delian League and the Spartan-led Peloponnesian League that in the end served only to harm the two city-states and threaten the Greek Civilization. Plato's works such as *Republic*, *Gorgias*, and others suggest not so much that Plato was directly responding to Thucydides' account, but that he was addressing the various errors in justice and rational decision-making that led to the defeat of Athens. For a more complete discussion, see MacIntyre, *Whose Justice? Which Rationality?*, 51-68.

<sup>73</sup> Thucydides, *The Peloponnesian War*, V 89 (Hobbes' translation) from MacIntyre, *Whose Justice? Which Rationality?*, 53.

‘could’ do rather than what they morally ‘should’ do. What followed was a long siege, after which all of the Melian adult males were killed and its women and children were enslaved.<sup>74</sup> Ironically, when Athens was defeated twelve years later, its leaders feared that they would receive the same fate as the Melians, although they never did.<sup>75</sup> Perhaps it was only when Athens was placed at the mercy of Sparta that the Athenian leaders realized the injustice of their actions against the people of Melos.

Greek history and anthropology had led Plato to believe that justice was the fundamental element of all human virtue.<sup>76</sup> In this regard, his pupil, Aristotle (384-322 B.C.), finished his project.<sup>77</sup> Aristotle’s idea of justice was for him ‘complete’ virtue:

Justice, then, is complete virtue, but not absolutely, but in relation to our neighbor. And therefore justice is often thought of as the greatest of virtues... proverbially ‘in justice is every virtue comprehended.’ And it is complete virtue in its fullest sense, because it is the actual exercise of complete virtue.<sup>78</sup>

Addressing the problem of an ‘objective,’ or universal, notion of justice, Aristotle claimed that this type of justice was “natural:” “Of political justice part is natural, part legal – natural, that which everywhere has the same force and does not exist by people’s thinking this or that; legal, that which is originally indifferent.”<sup>79</sup> The notion of ‘natural’ justice reinforced Plato’s claim that justice was one of the four foundational virtues for a model society, or *polis*. From this point of departure, a school of moral philosophy known as Aristotelian virtue-ethics was born.

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<sup>74</sup> Strassler, Robert B, *The Landmark Thucydides: A Comprehensive Guide to the Peloponnesian War* (New York: Touchstone, 1998), 357.

<sup>75</sup> MacIntyre, *Whose Justice? Which Rationality?*, 53.

<sup>76</sup> *Ibid.*, 96.

<sup>77</sup> *Ibid.*, 89.

<sup>78</sup> Aristotle, *Nicomachean Ethics* 1129b.25-30 in *The Basic Works of Aristotle*, 18th ed., ed. Richard McKeon (New York: Random House, 1941), 1003.

<sup>79</sup> *Ibid.*, 1134b.18-21.

For Aristotle, virtues are dispositions to act that have been developed through formation, or education.<sup>80</sup> One achieves an education in virtue through experience, habit, and right reason.<sup>81</sup>

Aristotle stressed the importance of virtue especially when considering unforeseen actions:

It is thought the mark of a braver man to be fearless and undisturbed in sudden alarms than to be so in those that are foreseen; for it must have proceeded more from a state of character, because less from preparation; acts that are foreseen may be chosen by calculation and rule, but sudden actions must be in accordance with one's state of character.<sup>82</sup>

Hence, Aristotle advocated the need for the ethical formation of the whole man, which is the basis for a virtue-based ethical system.

Today, as in ancient Greece, virtue ethics theory focuses mainly on the character of the agent, as opposed to the moral correctness of action as adjudicated by rules.<sup>83</sup> For the United States military, the virtue-ethics approach is clearly evident in various lists of professed 'values,' which are essentially virtues that military organizations universally wish to foster among their members. In particular, the United States Army has its own list of seven values: loyalty, duty, respect, selfless service, honor, integrity, and personal courage.<sup>84</sup> Of specific note, the definition of respect ("treat people as they should be treated") resembles one commonly recognized definition for the virtue of justice.<sup>85</sup> Declaring the importance of Army Values, the Army's

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<sup>80</sup> MacIntyre, *Whose Justice? Which Rationality?*, 109.

<sup>81</sup> *Ibid.*, 106.

<sup>82</sup> Aristotle, *Nicomachean Ethics* 1117a.17-22, 979.

<sup>83</sup> Per Sandin, "Collective Military Virtues," *Journal of Military Ethics* 6 (Issue 4, 2007), 303.

<sup>84</sup> Some of the seven Army Values directly correspond to the Cardinal Virtues. For example, respect (justice), honor (moral fortitude), integrity (moral fortitude), and personal courage (physical fortitude).

<sup>85</sup> U.S. Department of the Army, *Field Manual 1, The Army* (Washington, D.C, June 2005), Figure 1-2). For example, see Rawls' "justice as fairness" in John Rawls, *A Theory of Justice*, revised ed. (Cambridge, MA: Harvard University Press, 1999), 3 and Morgenthau's "give to others, and receive from others, what is their due" in Hans J. Morgenthau, *Truth and Power: Essays of a Decade, 1960-1970* (New York: Praeger Publishers, 1970), 63.

leadership manual, Field Manual (FM) 6-22, says that the Army Values “are fundamental to helping Soldiers and Army civilians make the right decision in any situation.”<sup>86</sup> Hence, for Army ethics the values-based approach is mandatory: “Army Values firmly bind all Army members... (and) apply to everyone, in every situation, anywhere.”<sup>87</sup>

While the notion of virtue-ethics contains within it a degree of universality, its lack of assurance that individual action will be guided toward a right, or just, moral outcome appears to some to be a weakness. In many respects, this became the undertaking of Enlightenment ethics, to point out the shortcomings of virtue and instead offer alternatives. In this vein, Kant proposed an entire system of ethics that emphasized rule-based principles over virtue as a guide for moral action.

### **Kantian Universalist Ethics**

The Prussian philosopher Immanuel Kant (1724-1804) was the most important philosopher of the European Enlightenment.<sup>88</sup> Kant was an heir of Grotius in that he confirmed the seventeenth century doctrine of natural law pertaining to the dignity of human beings while advocating the formal adoption of rational principles.<sup>89</sup> Yet in Kant’s moral philosophy, Kant represented a break with the Thomistic and Aristotelian traditions in that he placed the “duties of right” (universal moral norms) over “duties of virtue” (virtue-ethics).<sup>90</sup> Among his most

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<sup>86</sup> U.S. Department of the Army, Field Manual (FM) 6-22, *Army Leadership* (Washington, D.C., 2006), 4-2.

<sup>87</sup> Ibid.

<sup>88</sup> Paul Guyer, “Introduction (to Immanuel Kant)” in Steven M. Cahn, ed., *Classics of Moral Philosophy* (New York: Oxford University Press, 2002), 731.

<sup>89</sup> Leszek Kolakowski, *Modernity on Endless Trial* (Chicago: University of Chicago Press, 1990), 49. The lineage that developed from the ideas of Hugo Grotius on natural law, ethical principles, and social contract, taken together, can in many ways be traced to Kant.

<sup>90</sup> See Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1991).

important books on ethics were *Groundwork* (also called “Fundamental Principles”) *for the Metaphysics of Morals* (1785) and *Metaphysics of Morals* (1797). In these two works, the system of morality Kant outlined put greatest weight on formal laws of institutions, laws founded upon reason. As Kant himself stated, the goal of his ethics was to establish a “supreme principle of morality,” a maxim that could guide all moral behavior.<sup>91</sup>

Kant articulated his “supreme principle” in the form of a maxim, known as the Kantian categorical imperative: “I am never to act otherwise than so that I could also will that my maxim should become a universal law.”<sup>92</sup> In other words, Kant required that moral actions, in order to be ‘right,’ must be able to pass a test of universality. This principle logically led to another maxim, considered the second formulation of the Kantian imperative: “So act as to treat humanity, in every case as an end withal, never as a means only.”<sup>93</sup> Therefore, because of the demands of his first maxim’s test of universality, all human beings must have equal dignity when made the object of action. The obvious benefit of Kant’s moral system was that it was applicable, in concrete, human terms because it was based upon rules and maxims.

In a sense, the effect of Kant’s maxims was to bring law, or the formal codification of norms, to the fore. Kant did not discount, however, the necessity for virtue, but his idea of virtue was very different from Aristotle’s:

But virtue is not to be defined and valued merely as an aptitude and a long-standing habit of morally good actions acquired by practice. For unless this aptitude results from considered, firm, and continually purified principles, then, like any other mechanism of technically practical reason, it is neither armed for all situations nor adequately secured against the changes that new temptations could bring about.<sup>94</sup>

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<sup>91</sup> Immanuel Kant, *Fundamental Principles of the Metaphysic of Morals*, trans. T. K. Abbott (Buffalo, New York: Prometheus Books, 1987), 15.

<sup>92</sup> Kant, *Fundamental Principles of the Metaphysic of Morals*, 27.

<sup>93</sup> *Ibid.*, 58.

<sup>94</sup> Kant, *The Metaphysics of Morals*, 189.

Kant believed that any talk of virtue was frivolous unless equipped with a guiding moral formula, or procedure, aided by sound reason. In this way, the Kantian tradition has been associated with procedural justice.

Kant's moral philosophy influenced the author of one of the most important books on justice written in the twentieth century, a book entitled *A Theory of Justice* (1971) by John Rawls.<sup>95</sup> Some have even suggested that it was Rawls' work that sparked a renewed interest in the field of ethics after relativism had succeeded in reducing the utility of ethics altogether.<sup>96</sup> Rawls' main goal was to reduce the abstraction of Kant's philosophy and present justice in a more accessible formulation, along the lines of social contract theory found in Kant and others.<sup>97</sup> In his book, he proposed that his use of the term 'justice' did not conflict with the traditional, Aristotelian notion of justice.<sup>98</sup> Pointing out its universal reach, Rawls defined justice at its most fundamental level as "fairness."<sup>99</sup> In doing so, Rawls intended to reassert the universalist claim that justice could not be discounted as entirely relative. Yet some, such as Alasdair MacIntyre, have gone to great lengths to show that Rawls' theory and the notion of justice as virtue nonetheless have "too many disparate and rival concepts" and are therefore irreconcilable.<sup>100</sup> The unresolved debate between Aristotelian virtue-ethics and Kantian universalism following Rawls'

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<sup>95</sup> The American philosopher John Rawls (1921-2002) is best known for his intellectual contribution to the notion of justice. He is widely regarded as the most important political philosopher of the twentieth century. See Eric H. Gampel, "John Rawls," *Ethics*, rev. ed., vol. 3, ed. John K. Roth (Pasadena, California: Salem Press, Inc., 2005), 1244.

<sup>96</sup> John J. Drummond, "Introduction: The Phenomenological Tradition and Moral Philosophy" in Drummond, John J. and Lester Embree, eds., *Phenomenological Approaches to Moral Philosophy* (Dordrecht, The Netherlands: Kluwer Academic Publishers, 2002), 1.

<sup>97</sup> Gampel, 1244.

<sup>98</sup> John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 1999), 10.

<sup>99</sup> *Ibid.*, 11.

<sup>100</sup> See MacIntyre, *After Virtue*, 246-252.

*A Theory of Justice* therefore still seemed to suggest that ethics were not as universal and hence not as necessary as was once believed. This idea has perpetuated the age-old message of relativism to the present day, that any discussion about the universality of ethics and any objective standard for justice are hardly worth serious consideration.

### **The Danger of the Relativist Critique**

Relativism as a philosophy, or more generally as a way of thinking, has been in existence since antiquity. The sophists of ancient Greece, for example, were relativists.<sup>101</sup> Today, relativist arguments often make claims based upon the idea of ‘cultural relativism.’ Cultural relativism maintains that what is ethically and morally right in one society is not necessarily the same for another.<sup>102</sup> Hence, ethical ambiguity is often the result of cultural differences. Interestingly, very few writers actually call themselves relativists, with the exception of social scientists.<sup>103</sup> Notwithstanding, relativists use moral arguments to object to universal moral claims by highlighting differences in culture, and they do this by posing the questions: ‘Who says what right is?’ and ‘Justice for whom?’

A number of prominent philosophers and theorists throughout history have made similar objections to universal justice that could be interpreted as relativistic, such as the nineteenth

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<sup>101</sup> See Hans Kelsen, *What is Justice? Justice, Law, and Politics in the Mirror of Science* (Berkeley: University of California Press, 1957), 204. The term sophist literally meant a “teacher of rhetoric.” Aristotle’s criticism of the sophists was harsh, calling them “one who makes money by sham wisdom.” See *Sophistical Refutations* 165a22 in G. B. Kerferd, “Sophists,” *The Encyclopedia of Philosophy*, vol. 7 (New York: Macmillan, 1967), 494-496.

<sup>102</sup> Frankena, 109.

<sup>103</sup> Richard Brandt, “Ethical Relativism,” *The Encyclopedia of Philosophy*, vol. 3 (New York: Macmillan, 1967), 75.

century German philosopher Friedrich Nietzsche.<sup>104</sup> In his *Genealogy of Morals* (1887), Nietzsche aptly warns against what he calls the “naivest moral canon of justice... the good will among parties of approximately equal power to come to terms with one another, to reach an ‘understanding’ by means of a settlement – and to compel parties of lesser power to reach a settlement among themselves.”<sup>105</sup> Nietzsche’s cynicism reflects in part his view of human nature. For him, justice is a matter of power since the strong are the ones who are able to determine what is just.<sup>106</sup> Hence, paradoxically injustice can be and is regularly committed in the name of justice.<sup>107</sup>

Nietzsche’s point is echoed by the twentieth century international relations theorist, Hans Morgenthau.<sup>108</sup> Morgenthau expressed the human tendency toward injustice in his book, *Truth and Power* (1970):

We judge and act as though we were at the center of the universe, as though we see what everybody must see, and as though what we want is legitimate in the eyes of justice. Turning Kant’s categorical imperative upside down, we take for granted that the standards of our judgment and action produced by the peculiarities of our perspective can serve as universal laws for all mankind... This capacity for self deception is mitigated by man’s capacity for transcending himself, for trying to see himself as he might look to others... Yet where rational, objective knowledge is precluded from the outset, as it is with justice, the propensity for self-deception has free rein.<sup>109</sup>

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<sup>104</sup> Friedrich Nietzsche (1844-1900) is regarded as one of the most influential individuals in modern philosophy. See Walter Kaufmann, “Friedrich Nietzsche,” *The Encyclopedia of Philosophy*, vol. 5 (New York: Macmillan, 1967), 504.

<sup>105</sup> Friedrich Nietzsche, *Genealogy of Morals*, II 8 in *The Basic Writings of Nietzsche*, Translated by Walter Kaufmann (New York: Modern Library, 1992), 506.

<sup>106</sup> Nietzsche equates the good with power, yet power is not necessarily brute force, but is also any state of human excellence, such as that possessed by Leonardo da Vinci. See Frankena, 87.

<sup>107</sup> Nietzsche, *Genealogy of Morals*, II 14, 518.

<sup>108</sup> Hans Morgenthau (1904-1980) was a German-born American political scientist who was a leading figure in the realist school of international relations. See for example *The New Encyclopedia Britannica*, 15<sup>th</sup> ed., s.v. “Hans J. Morgenthau.”

<sup>109</sup> Hans J. Morgenthau, *Truth and Power: Essays of a Decade, 1960-1970* (New York: Praeger Publishers, 1970), 64-65.

Morgenthau, then, is stating that the idea of justice presents one of the greatest challenges to even the mere existence of ethics. Humans are easily fooled into thinking that they know what is just and in their error make a mockery of justice. Therefore, what is the point of talking about justice if in the real world justice becomes mere rhetoric?

Taking this line of relativist thinking to its logical extreme presents a range of problems. First, where does the distinction between cultures lie? Does cultural relativism apply to differing ethnic groups, to religions, to nations, or to even smaller groups of people, such as individuals? The slippery slope of cultural relativism often ends at the ethical proclamation ‘what is right for you may not be right for me.’ Yet some often point to the Nazi extermination of millions of ‘undesirables’ during the Second World War as proof of the fallacy of cultural relativism, and because of the Nazi experience relativism in international law has been dead since the Holocaust.<sup>110</sup> While the Holocaust may have purged relativism from international law, it is far from being defeated. The relativist assault on any universal notion of justice continues to this day.

In 2004, the American Psychological Association published a book written by its former president that largely discredited a relativistic view of justice.<sup>111</sup> The eight hundred-page book entitled *Character Strengths and Virtues: A Handbook and Classification* presented an empirically-based study that spanned the major world cultural traditions. The authors, Martin Seligman and Christopher Peterson, concluded that there was a surprising similarity, or a “historical and cross-cultural convergence” of six core virtues: courage, justice, humanity, temperance, transcendence, and wisdom.<sup>112</sup> They determined that a universal conception of

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<sup>110</sup> Martin L. Hoffman, *Empathy and Moral Development: Implications for Caring and Justice* (Cambridge: Cambridge University Press, 2000), 273.

<sup>111</sup> See Christopher Peterson and Martin Seligman, *Character Strengths and Virtues: A Handbook and Classification* (New York: Oxford University Press, 2004). Dr. Martin Seligman was elected President of the American Psychological Association in 1997.

<sup>112</sup> *Ibid.*, 36.

'justice' could be encapsulated in the statement "that which makes life fair," a definition that supports Rawls' definition of justice.<sup>113</sup> Therefore, in light of this work of modern psychological research combined with the soundness of the Aristotelian and Kantian traditions, cultural relativism's claim that justice is entirely subjective has for this author remained unconvincing.

Nevertheless, a problem for ethics remains. If it is false to presume that all justice is relative, then the work of ethics should be to uncover the nature of justice inasmuch as it is not relative. Some notion of 'objective' justice must exist between groups of people that are not alike, and more importantly for this project, between the Armed Forces of the United States and the 'population' that soldiers are trying to win over during the course of irregular wars. In war, the determination of what is 'fair' is difficult at best. The Aristotelian and Kantian philosophical traditions do little to inform this type of moral decision-making. The problem therefore lies in finding a sense of 'objectivity' in justice, a task that phenomenology and the personalist movement that grew from it have endeavored to uncover.

If the virtue-ethics and Kantian schools of ethics disagree on the role of justice in ethics and on how to go about acting justly, then relativism can continue to point to this lack of consensus to support its anti-ethical argument. However, if the two theories can be reconciled, as phenomenology and personalism have together attempted to accomplish, then the ethics of justice can present an effective means of countering relativistic thought within the American military.

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<sup>113</sup> Ibid. See also John Rawls' definition of justice as "fairness" in Rawls, *A Theory of Justice*, 3.

## Phenomenology and the Intersection between Rival Theories of Justice

The fractured state of philosophy at the close of the Enlightenment left virtually any notion of ‘objectivity’ confined to the physical sciences. For many, unless something could be proven scientifically, its existence was immediately suspect. This troubled era prompted the rise of a new school of philosophy called phenomenology that was intended to counter an ever-growing current of relativism. The phenomenological movement in turn gave birth to a system of ethics known as personalism, which has inspired renewed confidence in the existence of ethical ‘objectivity’ within the meaning of justice.

Phenomenology began as a new school of philosophy that at first included a small circle of Jewish philosophers living in Germany at the beginning of the last century. The movement was inaugurated in the year 1900 when its founder, Edmund Husserl, announced the need to break with contemporary philosophy that, in his mind, had become mired in abstract metaphysical speculation.<sup>114</sup> As a mathematician but also with training in physics, astronomy, and philosophy, Husserl believed philosophy should be scientific.<sup>115</sup> In an attempt once again to address the possibility of philosophical realism, phenomenology relied heavily upon psychology, which at the time had yet to become its own discipline and was still considered a branch of philosophy. As the movement grew and broadened, phenomenology became the most important philosophical current in Europe during the twentieth century.<sup>116</sup>

At its inception, Husserl intended phenomenology to be a philosophical attempt to get to the truth of matters as contained within the consciousness of the so-called experiencer, the living

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<sup>114</sup> Dermot Moran, *Introduction to Phenomenology* (London: Routledge, 2000), xiii.

<sup>115</sup> Emerita S. Quito, *Phenomenology: Edmund Husserl and Edith Stein* (Manila, Philippines: De La Salle University Press, 2001), 77.

<sup>116</sup> Moran, 2.

human subject.<sup>117</sup> The word ‘phenomenon’ came from the Greek *phainomenon* for ‘that which appears.’<sup>118</sup> For Husserl and his colleagues, this was an exploration into the world of perception, one that was made possible by ‘suspending’ the natural world in order to understand ‘pure’ human consciousness. Consciousness was thus a collection of ‘acts’ of thinking and perceiving. Husserl called each man’s zero-point of orientation the “I.” Those who similarly lived in the world of consciousness were the “other.” Hence both the “I” and the “other” were subjects, capable of finding ‘intersubjectivity,’ or shared meanings and perceptions.<sup>119</sup> For Husserl, this interchange between persons was the key to finding ‘objectivity’ within the realm of consciousness.<sup>120</sup>

Yet his quest for an ‘objective’ state of shared meanings between human subjects exposed for him a problem. The difficulty was the problem of empathy, or *Einfühlung*:

Thus the problem is stated at first as a special one, namely, that the ‘thereness-for-me’ of others, and accordingly as the theme of a transcendental theory of experiencing someone else, a transcendental theory of so-called empathy.<sup>121</sup>

‘Empathy,’ from the Greek, literally means to ‘feel or suffer in,’ distinguished from the word ‘sympathy,’ which means to ‘feel or suffer with.’<sup>122</sup> Husserl was not speaking of a sense of psychological compassion between subjects (sympathy), but rather the possibility of an equivalence of perception (common understanding) that could be attained through empathy.

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<sup>117</sup> Moran, 4-5.

<sup>118</sup> Quito, 9.

<sup>119</sup> See Husserl’s Fifth Cartesian Meditation, 55 for a complete discussion of intersubjectivity; Edmund Husserl, *Cartesian Meditations: An Introduction to Phenomenology* (The Hague: Martinus Nijhoff, 1960), 120-128.

<sup>120</sup> Husserl used the term “apodicticity,” which meant phenomenological truth, or “genuinely scientific” knowledge. See *Cartesian Meditations: An Introduction to Phenomenology* 63 in Husserl, 151.

<sup>121</sup> *Cartesian Meditations: An Introduction to Phenomenology* 63 in Husserl, 92.

<sup>122</sup> Quito, 55.

Taking a particular interest in ‘empathy,’ one of his doctoral candidates, Edith Stein, approached him and proposed it as the theme for her dissertation.<sup>123</sup> Stein completed *On the Problem of Empathy* for her doctoral dissertation in 1916.

## The Problem of Empathy

While empathy posed a problem, Stein and Husserl both agreed that ‘empathy’ held great promise.<sup>124</sup> Stein’s purpose was to show that while empathy was elusive, it was nonetheless attainable. In her dissertation, Stein showed that first, to achieve empathetic awareness, one must move from considering oneself as the “zero-point of orientation” to becoming “a spatial point among many.”<sup>125</sup> “By this means, and by only this means, I learn to see myself as a physical body like others.”<sup>126</sup> Hence, before attaining empathetic understanding, a person must make a conscious act of recognizing the point of view of the ‘other.’ Implicit within Stein’s argument is the ‘I’s’ consideration of the ‘other’ as a human being of equal dignity. Next, to achieve authentic understanding by means of empathy, “I project myself into the foreign living body” and “simultaneously experience that which is given.”<sup>127</sup> This projection of self requires a deliberate act of the consciousness, an act that seeks to occupy the point of view of the ‘other.’ Together with this sense of empathetic awareness, the “I” must actively receive those outward signs communicated by the ‘other’ subject. The goal, therefore, of empathetically experiencing the world is to strive for the ideal state of true empathetic understanding.

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<sup>123</sup> Waltraud Herbstrith, *Edith Stein: A Biography*, trans. Bernard Bonowitz (New York: Harper and Row, 1985; reprint, San Francisco: Ignatius Press, 1992), 42-43.

<sup>124</sup> See Edith Stein, *On the Problem of Empathy*, trans. Waltraud Stein (The Hague: Martinus Nijhoff, 1964), 64. Stein stated that “empathy as the basis of intersubjective experience becomes the condition of possible knowledge of the existing world.”

<sup>125</sup> *Ibid.*, 63.

<sup>126</sup> *Ibid.*

Yet even in the ‘suspended’ realm of pure consciousness, obstacles to empathetic understanding exist despite these conscious acts of awareness and projection. For example, certain barriers can hinder ‘givenness.’<sup>128</sup> In this regard, there is a difference between the “perceived world” and the “world empathetically given.”<sup>129</sup> Stein warned that if I am “imprisoned within the bounds of my individuality,” then I cannot “get beyond the world as it appears to me” and hence “others become riddles for us, or still worse, we remodel them into our image so as to falsify historical truth.”<sup>130</sup> On the other hand, if these obstacles can be cast aside completely (in the absolute sense), it becomes possible to arrive at what she called “divine empathy.”<sup>131</sup> Stein called this ideal state the “whole man,” free from barriers and hence able to perfectly understand the ‘other.’<sup>132</sup>

While Stein’s dissertation was not intended to specifically address ethics, it had clear ethical implications.<sup>133</sup> Psychologist Martin Hoffman, who has spent his career studying empathy as it relates to moral development, says that empathy and justice principles have congruence.<sup>134</sup> Most likely, this was also the thinking of the first phenomenologists to address the field of ethics,

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<sup>127</sup> Ibid., 76.

<sup>128</sup> Ibid., 106

<sup>129</sup> Ibid., 59.

<sup>130</sup> See *ibid.*, 59 and 105.

<sup>131</sup> Ibid., 12 and 15. While Stein spoke of “divine empathy,” she clearly did not intend to make a theological statement, for at the time she was a professed atheist. Empathy in the ideal sense contained “no deception.”

<sup>132</sup> Ibid., 105.

<sup>133</sup> When Husserl published *Logical Investigations* in 1900 and 1901, he considered phenomenology to be a new philosophical investigation into logic and epistemology (the nature of knowledge). It is most likely, then, that Stein considered her work an epistemological exploration. See Moran, 74.

<sup>134</sup> Martin L. Hoffman, *Empathy and Moral Development: Implications for Caring and Justice* (Cambridge: Cambridge University Press, 2000), 237.

as they attempted to apply Husserl's method of intersubjectivity to the problems of moral philosophy.

### **A Personalist Ethic Emerges from Phenomenology**

The first phenomenological treatment of ethics was by Max Scheler, who in many ways was the co-founder of phenomenology.<sup>135</sup> Scheler incrementally published his *Formalism in Ethics and Non-formal Ethics of Values* from 1913-1916.<sup>136</sup> Throughout the twentieth century, this ethical treatise remained as one of the most important contributions to phenomenological ethics.<sup>137</sup> Its significance was as much because of its merit as it was the fact that the greatest names in phenomenology, Husserl and Martin Heidegger, published next to nothing on ethics in their lifetimes.<sup>138</sup> Scheler stated that the purpose of *Formalism in Ethics and Non-formal Ethics of Values* was "to establish a strictly scientific and positive foundation for philosophical ethics with respect to its fundamental problems."<sup>139</sup> By the time of his death in 1928, Scheler had become the strongest philosophical force in Europe.<sup>140</sup> Yet because of his Jewish ancestry, the Nazis suppressed his works in the decades that followed.<sup>141</sup>

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<sup>135</sup> See Moran, 19 and 75.

<sup>136</sup> Max Scheler (1874-1928) was a German phenomenologist and social philosopher. See Peter Koestenbaum, "Max Scheler" *The Encyclopedia of Philosophy*, vol. 7 (New York: Macmillan, 1967), 302.

<sup>137</sup> Max Scheler, *Formalism in Ethics and Non-formal Ethics of Values*, (Evanston: Northwest University Press, 1973), xiii.

<sup>138</sup> Philip Blosser, "Max Scheler: A Sketch of his Moral Philosophy" in Drummond, 394.

<sup>139</sup> Scheler, "preface to 1<sup>st</sup> ed.," xvii.

<sup>140</sup> Blosser in Drummond, 391.

<sup>141</sup> *Ibid.*, 392.

Scheler's ethics have been called Phenomenological Value Theory, or 'value realism,' a systematic approach to ethics that proceeds naturally from a theoretical 'science of values.'<sup>142</sup> This contrasted with Kant's emphasis on moral idealism, and as such, Scheler devoted much of his text to critiquing Kant. Nonetheless, Scheler said that "Kant's ethics, and not the ethics of any other modern philosopher, represents the most perfect we have."<sup>143</sup> That being said, Scheler asserted that the "theory of virtue precedes the theory of duty."<sup>144</sup> Because of Scheler's high regard for Kant while emphasizing classical virtue-ethics, Scheler's theory marks a starting point of a phenomenological synthesis between Aristotelian and Kantian ethics.

Scheler's position is also known as anthropological personalism.<sup>145</sup> As such, he anticipates Stein's points about the barriers to intersubjectivity and the possibility of deception, seeking to correct any mistaken notions about empathy. Most fundamentally, he stressed that 'givenness' is a prerequisite to accurate perception.<sup>146</sup> Hence, the 'I' cannot begin to approach ethical 'objectivity' until the 'other' shares that which is within the consciousness of the 'other:'

Thus we understand the values of, say, the psychic activity of another which are not comprehended through a consideration of our own psychic being. We are able to do this because we neither infer nor empathize with the alter psychic, but perceive it in the phenomenon of *expression* (emphasis added).<sup>147</sup>

Like Stein, Scheler was a proponent of the outlook that recognized the dignity of the 'other,' an idea that goes beyond mere respect and instead demands a receptive posture of what can be called cognitive 'listening.' This active 'listening,' as a form of dialogue, can lead to a sense of shared

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<sup>142</sup> Steven Galt Crowell, "Kantianism and Phenomenology" in Drummond, 48.

<sup>143</sup> Scheler, "preface to 1<sup>st</sup> ed.," xviii.

<sup>144</sup> *Ibid.*, n28.

<sup>145</sup> Blosser in Drummond, 397.

<sup>146</sup> See Scheler's discussion of 'givenness' in *Formalism in Ethics and Non-formal Ethics of Values*, 398.

<sup>147</sup> Scheler, 266.

understanding. The condition of shared moral meanings, or ‘intersubjectivity,’ achieved through dialogue, becomes in itself a state of ethical ‘objectivity.’

Scheler rejected any theory that made a claim for the ‘subjectivity’ of values, such as cultural relativism.<sup>148</sup> For him, the relativistic position absolutized a difference in values and by doing so asserted that shared values can never exist.<sup>149</sup> Nevertheless, Scheler understood the weakness of man’s tendency to perceive others solely from the vantage point of the “I.” Scheler called this “‘empathizing’ one’s own experience into men.”<sup>150</sup> For him, this ethical error is caused by “an outlook that is conditioned by a deficient sense of awe and humility vis-à-vis the realm of moral values and its expanse and fullness.”<sup>151</sup> Therefore, empathy remained a problem for Scheler, but at the same time he agreed with Stein that empathy was nonetheless possible if due consideration was placed upon the anthropology of the ‘other.’

Another philosopher, Paul Ricoeur, continued the ethical project of personalist phenomenology.<sup>152</sup> In a sense, his goal at the end of his life was to reconcile the contributions of the Aristotelian and Kantian traditions using a personalist lens. To distinguish the two, Ricoeur called ‘ethics’ the aim of the virtuous life, or the Aristotelian heritage, and ‘morality’ the obligation to follow universal norms, or the Kantian heritage.<sup>153</sup> His ‘little ethics,’ which he

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<sup>148</sup> Ibid.

<sup>149</sup> Scheler, 304.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

<sup>152</sup> Paul Ricoeur (1913-2005) was a French personalist philosopher who taught extensively at French and American universities for over half a century. See Paul Dauenhauer, “Paul Ricoeur: The Just as Ingredient in the Good,” in Drummond, John J. and Lester Embree, eds., *Phenomenological Approaches to Moral Philosophy* (Dordrecht, The Netherlands: Kluwer Academic Publishers, 2002), 347 and Rufus William Rauch, Jr., “Foreword to Paperback Edition,” in Mounier, Emmanuel. *Personalism*. (England: Routledge and Kegan Paul Ltd., 1952; reprint, Notre Dame: University of Notre Dame Press, 2004), viii.

<sup>153</sup> Paul Ricoeur, *Oneself as Another*, trans. Kathleen Blamey (Chicago: University of Chicago Press, 1992), 170.

outlined in *Oneself as Another* (1992), were based upon three theses: (1) the primacy of the ethical over the moral; (2) the necessity nonetheless for the ethical aim to pass through the sieve of the norm; and (3) the permissibility of defaulting to the ethical aim if the norm and aim seemed in practice to be in conflict.<sup>154</sup>

Ricoeur associated the overlap between the moral and the ethical with the problem of justice. Consequently, his last two books, *The Just* (2000) and *Reflections on the Just* (2007), emphasized the fundamental importance of justice to the field of personalist ethics. Ricoeur had earlier alluded to this claim of the primacy of justice when he stated that “the principle legacy of ethics to morality lies in the very idea of the just.”<sup>155</sup> In terms of the ethical aim, Ricoeur stated that the “virtue of justice is based on a relation of distance from the other... The other for friendship is the “you;” the other for justice is “anyone,” as is indicated by the Latin adage *sum cuique tribuere* (to each his own).”<sup>156</sup> The ethical aim, if described spatially as the horizontal axis, intersects so to speak with the vertical axis of the moral norm. One finds at this point of “intersection” the philosophical placement of justice.<sup>157</sup>

Exploring this “intersection,” Ricoeur examined what he called “procedural justice,” which stemmed from moral norms. Considering Kant’s second imperative (“So act as to treat humanity, in every case as an end withal, never as a means only”), Ricoeur argued that the maxim lacks an anthropological dimension of caring, or solicitude.<sup>158</sup> Instead, Ricoeur suggested that the

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<sup>154</sup> Ibid.

<sup>155</sup> Ibid., 228.

<sup>156</sup> Paul Ricoeur, *The Just*, trans. David Pellauer (Chicago: University of Chicago Press, 2000), xiii.

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

<sup>158</sup> See *ibid.*, 56. For the second Kantian imperative, see Immanuel Kant, *Fundamental Principles of the Metaphysic of Morals*, trans. T. K. Abbott (Buffalo, New York: Prometheus Books, 1987), 58.

Golden Rule presents a more perfect formula: “Treat others as you would like them to treat you”<sup>159</sup> Ricoeur said that the Golden Rule brings together the ethical personalist aim and the procedural moral duty: the Golden Rule “represents the simplest formula that can serve as a transition between solicitude and the second Kantian imperative.”<sup>160</sup> What the Golden Rule has that the Kantian imperative lacks is an “intuition of genuine otherness” that establishes the sense of justice that is required for both the ethical aim (virtue) and an adherence to the moral norm (rules).<sup>161</sup> Therefore, the Golden Rule provides what Ricoeur says is the very best procedural guide for justice.

At the end of a long and distinguished career in ethics, Ricoeur had found himself unmistakably attracted to the question of justice. By claiming the primacy of virtue over procedure and yet recognizing the complementary function of the two, he in effect synthesized two theories of justice into one. Furthermore, Ricoeur recognized the requirement that the moral actor must empathize with the other in order to achieve justice. Applied to the second Kantian imperative, this idea led Ricoeur to assert that the Golden Rule was in fact the maxim’s perfected form. Only by projecting oneself into another could one hope to find the empathetic understanding needed to act in a way that was truly just.

### **Glimpses of a Personalist Ethic in Today’s Army**

The Army addresses ‘empathy’ and the Golden Rule in at least two forms in the context of military ethics. ‘Empathy,’ for example, is explicitly mentioned in Field Manual (FM) 6-22, *Army Leadership*. The Golden Rule, on the other hand, is perhaps somewhat more disguised,

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<sup>159</sup> Ibid., 53. Ricoeur remarked that the Golden Rule is contained in the Christian Bible (see Luke 6:31 and Matthew 7:12) but is also recognized by the Jewish tradition and appears to be a part of Aristotle’s *endoxa*, or the common wisdom of Athens.

<sup>160</sup> Ricoeur, *Oneself as Another*, 222.

found in the West Point Honor Code's "Three Rules of Thumb." Each requires a more detailed explanation.

First, consider the Army's use of the term 'empathy.' According to Field Manual (FM) 6-22, empathy is "the ability to see something from another person's point of view, to identify with and enter into another person's feelings and emotions."<sup>162</sup> A personalist definition might equate this meaning with the idea of empathetic awareness, but the doctrinal definition fails to include what Stein and Scheler both claimed was required for true empathetic understanding: a recognition of what the 'other' gives through expression. Doctrinally, the importance of empathy is stated as such: (empathy) "enables the Army leader to better care for civilians, Soldiers, and their families."<sup>163</sup> Regarding the application of empathy, doctrine states that it is an ethical requirement:

The requirement for leader empathy extends beyond civilians, Soldiers, and their families. Within the larger operational environment, leader empathy may be helpful when dealing with local populations and prisoners of war. Providing the local population within an area of operations with the necessities of life often turns an initially hostile disposition into one of cooperation.<sup>164</sup>

Stein and Scheler would agree with the Army's assertion that the inhabitant's disposition toward 'cooperation' in irregular war is closely linked to empathy. They would, however, add that military members must recognize and accept the 'givenness,' or outward expressions, of those inhabitants, accepting them as human beings with equal dignity. By acknowledging this 'givenness' and thereby experiencing the inhabitants' point of view, soldiers can best inform their decisions to ensure that their actions are in fact just.

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<sup>161</sup> Ibid., 225.

<sup>162</sup> U.S. Department of the Army, Field Manual (FM) 6-22, *Army Leadership* (Washington, D.C., 2006), 4-9.

<sup>163</sup> Ibid.

<sup>164</sup> Ibid., 4-10.

The next example to consider is the Golden Rule. The United States Military Academy has at the core of its ethic the Cadet Honor Code.<sup>165</sup> West Point defines the purpose of the Cadet Honor Code as “the means through which to apply the ethical ideal, honorable living.”<sup>166</sup> Recognizing the ambiguities that surround the prohibition against lying, cheating, and stealing, the Cadet Honor System advocates the use of three principles, called the Three Rules of Thumb, to determine dishonorable or unethical acts.<sup>167</sup> The third Rule of Thumb (“Would I be dissatisfied by the outcome if I were on the receiving end of this action?”), in a particular way, reflects the two contributions of personalist ethics addressed in this monograph. First, to imagine oneself “on the receiving end” requires both empathic awareness and cognitive listening. Second, the maxim clearly resembles the Golden Rule (“Treat others as you would like them to treat you”), differing only in that it is stated in the negative sense. As stated earlier, Ricoeur said that the Golden Rule represents the best rule or maxim for justice.

Ricoeur remarked that in practice justice considered in the negative sense is often more effective, since “our sense of injustice is ordinarily more reliable than is our sense of justice.”<sup>168</sup> Psychologist Martin Hoffman also supports this claim, stating that “while empathy may not make a structural contribution to justice, it may provide the motive to rectify violations of justice to

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<sup>165</sup> The philosophy behind the concept of ‘honor’ contained in the Cadet Honor Code closely resembles medieval chivalry inasmuch as it emphasizes the virtue of ‘honor’ as the foundation of the ethical formation of future military officers. While the code uses rules to inform ethical decisions, the concept of honorable living seems to be more strongly influenced by the theory of virtue-ethics than by Kantian formalism.

<sup>166</sup> U.S. Corps of Cadets, Pamphlet 632-1, *The Honor Code and System* (West Point, New York: March 2004), 1-1. The code states “A Cadet will not lie, cheat, or steal, nor tolerate those who do.”

<sup>167</sup> The “Three Rules of Thumb” are as follows: “(a) Does this action attempt to deceive anyone or allow anyone to be deceived?; (b) Does this action gain or allow the gain of privilege or advantage to which I or someone else would not otherwise be entitled?; (c) Would I be dissatisfied by the outcome if I were on the receiving end of this action?” See *ibid.*, 1-4.

<sup>168</sup> Ricoeur, *The Just*, 54.

others.”<sup>169</sup> Therefore, the Third Rule of Thumb, as an all-encompassing principle to inform just decisions, is perhaps a more effective form of the Golden Rule for application in military ethics.

The lack of mainstream attention paid to both phenomenology and the personalist ethic that has grown out of the phenomenological movement may cause some to wonder: why have we not heard of phenomenology? First of all, since the phenomenological movement (and hence developments in phenomenological ethics) have been limited for the most part to Germany, France, and Spain, an English speaking tradition of phenomenological ethics has yet to take shape.<sup>170</sup> Furthermore, the Nazi suppression of the first phenomenologists because of their Jewish heritage most likely slowed the development of phenomenological ethics during the first half of the twentieth century. Despite these obstacles, one branch of the movement in particular, personalism, has synthesized two rival theories of justice (justice as virtue and procedural justice) by using a language that does not leave the two meanings of justice opposed. In doing so, personalism makes the argument for authentic empathy, which is difficult to achieve but is nonetheless essential in order to arriving at a shared understanding between the “I” and the “other.” This empathetic understanding between subjects, called intersubjectivity, is the philosophical key to finding ‘objectivity’ between soldier and civilian, combatant and inhabitant. Therefore, in order for military professionals to act in a way that is truly just, objectively speaking, they must adopt a habitual posture that includes empathic awareness and cognitive listening.

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<sup>169</sup> Hoffman, 228.

<sup>170</sup> John J. Drummond in “Introduction: The Phenomenological Tradition and Moral Philosophy,” in Drummond, 2.

## Conclusion

The experience of recent conflict has taught the United States Military that the virtue of justice is a fundamental principle behind combat decisions. In irregular conflicts, just acts build legitimacy, win the support of the populous, undermine insurgencies, and bolster host nation governments. Injustices, on the other hand, fuel the ideological underpinnings of insurgencies and threaten American legitimacy in the eyes of the world. Since the attitudes of civilians are important to each of these factors, the central moral issue then becomes the just treatment of the civilian inhabitants affected by war. The international Laws of War were intended to work towards these ends. However, law by itself cannot achieve the full protection of civilians and ensure their just treatment.

The international Laws of War that are in effect today have to some extent descended from the Just War Tradition. As a result of the Geneva Conventions that followed the Second World War, modern *ius in bello* now includes the explicit protection of civilian inhabitants. This mandate comes after over two thousand years of development in *ius in bello*, the aspect of Just War Tradition that seeks to promote ‘justice in war.’ *Ius in bello* has over time evolved from a theory based upon the virtue of justice to what is now almost exclusively a legal formula. The transformation to legalism has occurred as the proponents of international law watched wars unfold and later sought to reduce the horrors of conflict, envisioning that the most effective means to impose restraint on militaries was to have them comply with international treaties.

Yet at its beginning, Just War Tradition had another purpose. Its earliest theorists emphasized that the goal of war was peace, and because of this assertion, it was essential that men of arms who were engaged in war embrace the virtue of justice. Advocated by Aristotle and Augustine, this was the moral philosophy behind the western way of war. Even Clausewitz, centuries later, acknowledged this traditional view of war’s purpose, that “the ultimate

objective... is to bring about peace.”<sup>171</sup> As such, justice has endured as the universal language of justification and ‘right’ actions during conflict.

The human aspiration for justice inspires man to search for its ‘objective’ meaning rather than to accept the notion that justice is entirely in the eye of the beholder, or ‘subjective.’ However, since injustices are easily committed in the name of justice and since history is rife with such examples, justice has for some become meaningless, devoid of a nature universally perceived by all. With this critique in mind, this monograph’s search for an explanation of an ‘objective’ notion of justice ended with a philosophical movement called phenomenology. Phenomenology optimistically offered this ‘objectivity’ through the idea of shared perceptions, which in the case of justice meant that two different individuals, one who performs the action and the other the recipient, could together agree upon what is ‘just.’

In the example given in the introduction, the actor in this case is the American soldier and the recipient is the Iraqi man awakened in the middle of the night. Would both agree that the final outcome of this altercation was ‘just?’ We’ll presume that this first answer is ‘yes.’ On the other hand, had the American soldier killed the Iraqi, and if the Iraqi was a mere innocent inhabitant, would the same answer hold true? Not only would the Iraqi believe it was unjust, but we have to assume that every other Iraqi learning of the story would cry ‘injustice.’ From the American’s perspective, then, would he believe in both cases that his acting in self-defense was ‘just?’ The answer is most likely ‘yes.’ So, in the actual outcome, we presume both men agree on the same notion of justice. Had the Iraqi been killed, however, the two men would have been in disagreement.

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<sup>171</sup> Carl von Clausewitz, *On War*, eds. and trans. Michael Howard and Peter Paret (Princeton: Princeton University Press, 1984), 159.

The action chosen by the American soldier was clearly a matter of restraint, and ethically this restraint can be attributed to what is known as personalism. The personalist ethic, which grew out of the phenomenological movement, echoed the Kantian idea of respect for the dignity of other human beings. According to personalists, this respect requires empathy, but empathy in the sense that one must go well beyond merely placing oneself in another's shoes. Empathy was not a mere simple cognitive maneuver. In fact, when phenomenology as a school of philosophy first came into being, empathy was an ordinary idea until Edith Stein made a problem of it.<sup>172</sup> Hence, the willingness to empathize is only the first step toward reaching 'objective' justice. Both Stein and Scheler warned against naively supposing that just anyone is naturally able to empathize and that deception is a real danger. Scheler argued that authentic empathy begins with humility, and then through the signs of expression conveyed by the other person, develops into a sense of true understanding. For the Iraqi man, he might have shown such signs in the fact that he was unarmed, for example. Realizing the nature of the Iraqi's outward expressions, the idea both Stein and Scheler called 'givenness,' the American soldier in this example was able to use empathetic understanding to arrive at a 'just' solution.

Beyond pointing out the ethical value of empathy, personalism also provides a starting point for empathetic consideration in the form of a single ethical rule, the Golden Rule. Ricoeur points out that the maxim known as the Golden Rule ("Treat others as you would like them to treat you."), which is presented alternately in the negative sense in West Point's Third Rule of Thumb ("Would I be dissatisfied if I were on the receiving end of this action"), can be an effective means to decide what actions are truly 'just.' Any derivative of the Golden Rule forces the acting person to reflect from the perspective of the recipient, or in other words, to empathize. In this way, the rule facilitates a shared meaning of justice because the rule requires the actor to

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<sup>172</sup> Quito, 76.

consider the other person with equal dignity and to experience the outlook of the other in a personal way.

In an ethic that applies the Golden Rule, justice must be both rule and virtue. The Golden Rule represents the Kantian tradition of procedural justice by using a “supreme principle” to inform decisions.<sup>173</sup> This principle, as Kant required, has been “purified” over the course of at least two thousand years and deemed “firm.”<sup>174</sup> Likewise, the personalist treatment of the Golden Rule acknowledges that virtue (the Aristotelian tradition) still has primacy, and that virtue must be developed by practicing empathy and perfecting it over time. In doing so, the virtuous man is formed and shaped into what Stein called the “whole man.” Therefore, the two rival theories of justice are in reality not at all opposed. On the contrary, both are necessary.

Nevertheless, when a soldier adopts an empathetic approach to discern ‘just’ acts, a tension forms. The tension is between empathy and military necessity, yet it is a tension that is nonetheless inescapable. This tension is unavoidable because it is precisely the moral tension inherent *ius in bello*, or justice in war. Ethically speaking, empathy must always remain the essential attitude of the soldier seeking to fulfill justice. In the irregular conflicts of our world today, the primacy of justice is as important as ever. Michael Walzer has said recently: “In a war for ‘hearts and minds,’ rather than for land and resources, justice turns out to be a key to victory... Justice has become a military necessity.”<sup>175</sup> If Walzer is right, justice is more than a mere moral stipulation on the fringes of military decision-making. Rather, adherence to the virtue

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<sup>173</sup> See Immanuel Kant, *Fundamental Principles of the Metaphysic of Morals*, trans. T. K. Abbott (Buffalo, New York: Prometheus Books, 1987), 15. The goal of Kant’s ethics was to establish a “supreme principle of morality.”

<sup>174</sup> Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1991), 189.

<sup>175</sup> Michael Walzer, *Arguing About War* (New Haven: Yale University Press, 2004), 9.

of justice can mean the difference between lasting peace and enduring conflict, victory and defeat.

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