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THE JUST ENEMY IN A TIME OF TERROR AND CONFLICT

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Dedicated to Walter and Vicki Tschinkel, my parents, who have been with me every step  
of the way.

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## **Introduction: A World in Turmoil**

We live in frustrating times. The tenets of liberal democracy are tested daily by internal political conflicts characterized by differences of a very basic nature, and the West is engaged in a war of annihilation with a terrorist Other. This is a moment when difference has become toxic, when disgust towards the Other is bubbling to the surface of public debate and discussion. Political debates have become vindictive battles fought for the humiliation and/or ruination of the other side. The “War on Terror” is tinged with disgust towards Muslim peoples and racist debates over immigration rage on in the public sphere. It seems as though any disagreement in political circles is tantamount to a battle between good and evil. Politicians are rewarded for partisanship and scorned when they attempt any degree of understanding of the opposition. Attempts to empathize with the enemy in the War on Terror are virtually unheard of, as they would be met with outrage.

Something about this seems inherently wrong. Isn't empathy supposed to be a good thing? Why has it suddenly become a bad thing, when it is applied to people who disagree with you or are unlike you? It feels as though we have lost some of our humanity when it comes to political and armed conflict, not to mention losing the richness of society that comes from incorporating opposing viewpoints. The effect on armed conflict has been to morph the War on Terror into a kind of just war; the righteous West against a sinister Other. The West ironically waves the banner of human rights as its humanity diminishes due to this disgust and hatred towards this Other. German jurist Carl Schmitt warns of this zealous type of war in his 1932 text, *The Concept of the Political*. In this iconic text, Schmitt writes, “humanity as such

cannot wage war because it has no enemy...To confiscate the word humanity, to invoke and monopolize such a term probably has certain incalculable effects, such as denying the enemy the quality of being human and declaring him to be an outlaw of humanity; and a war can thereby be driven to the most extreme inhumanity.”<sup>1</sup> Yet this is the character of not only the War on Terror, but also of most contemporary wars.<sup>2</sup> The West frequently wages war in the name of humanity in the form of human rights, which has, in many respects, become the new Western religion. We are back to moralizing about war, with all its pitfalls.

I first read about Schmitt’s concept of the just enemy in college, upon picking up *Nomos of the Earth* for my senior thesis. At the time I was struck by how simple and rational the concept was, and also how much it contrasted with our present stances on armed conflict. Like many, I was long since frustrated at the dehumanization that was taking place as a result of talking about the wars we were currently engaged in, and knew about what a sinister past this sort of attitude had. The discussion, at least in the United States, seemed not to even admit of another potential attitude that might be more constructive, because we as Americans seemed assured of our righteousness. But I felt as though we were in need of a serious attitude adjustment, and the just enemy provided a potential tool to begin that adjustment, or at least, it seemed to be a good candidate. I came back to it

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<sup>1</sup> Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: The University of Chicago Press, 2007), 54.

<sup>2</sup> Truly this has to be the case now that war as such is outlawed but we still have something known as “humanitarian intervention” or “peace enforcement.” We technically can still wage war, but it has to be in the name of human rights in some capacity.

several times in graduate school, until I realized, upon choosing a topic for my dissertation, that this was something I had been interested in for a very long time.

I am reacting primarily to the War on Terror and its spinoff wars, as these have graced our newspapers and television screens the most frequently. One often hears the enemy in these wars described as something other than human, or at least certainly not as elevated as we are. There is never any kind of outreach or attempt to understand. This has always bothered me, as I cannot help but see these people as fellow human beings deserving of some kind of understanding, or at least attempt thereto. Thus I hope to play a note of dissent in this caustic environment, and begin a conversation in which we allow ourselves to think about our enemy without denouncing him. I realize that this is potentially a tall order, but I believe I will have accomplished what I set out to do if there is even a ripple of self-doubt in the consciousness of those engaged so fervently in this discussion. I have ambitions that this project will reach a large number of people, including people in power.

This project is somewhat difficult to place, in terms of discipline, but I shall attempt to do so anyway, beginning with a note about what type of project this seems to be, to me. It is clearly straddling history and theory. It is providing, on the one hand, a rather esoteric (because of my choice of texts) history of a particular series of questions, and on the other hand, a normative answer to those questions. I have chosen texts that, rather than provide a “canonical” list for the history of the just enemy, rather provide answers to my normative questions. Thus I am not intending to write a definitive history of the concept of the just enemy. The other thing that, while not unique to this project, is somewhat unusual, is that the

“primary” and “secondary” sources overlap. Some of the texts provide historical information as well as responses to my normative questions.

Given the methodological complications, in terms of placement within academic disciplines, I shall discuss texts whose methodologies I would like to employ in whole or in part, but whose subjects may be completely different. First of all, the model for how I chose my texts comes from Brian Leiter’s work, *Why Tolerate Religion?*<sup>3</sup> In this book, Leiter defines religion not as such, but only insofar as it answers his question, which is why should we allow specifically religious exemptions over those that may be recognized by other (secular) moral systems? I believe this is the only way to define religion in a defensible way. Attempting to define religion as such would leave one open to massive amounts of criticism that could be avoided by doing exactly what Leiter has chosen to do. Similarly, I do not feel that I could possibly make a defensible argument for why the texts I have chosen are somehow “canonical” to this topic, if for no other reason than I am more or less creating this topic from scratch. This would also have been very limiting, in my opinion; in fact too limiting to be of any use in answering my normative question. Leiter’s book, which I believe is very rigorously argued, is a model of how to define something in such a way that is accurate, useful, but avoids being open to a particular type of criticism that is, in the end, never a productive one. We, as scholars who study theory, will be arguing over “The Canon” for all eternity. I do not in any way wish to be a part of such a debate because I think these debates are truly only useful when one is designing a survey course. Otherwise, they somewhat

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<sup>3</sup> Brian Leiter, *Why Tolerate Religion?* (Princeton: Princeton University Press, 2013).



resemble my parents arguing over whether or not one of them does or does not put things away after they are through with them—they are an argument whose only purpose seems to be to keep the argument going.

As for historical models, though I disagree with the minutiae of language analysis he advocates in his methodological work, my high intellectual methodological model is primarily Quentin Skinner, most notably in his essay, “Meaning and Understanding in the History of Ideas.”<sup>4</sup> First of all, what I am writing is truly a history of ideas, given that I am not making a claim that these scholars necessarily wrote directly to one another, though some of them did. Second of all, I believe Skinner’s “mythologies” are one of the most useful set of methodological constructs in the entirety of this field, and I have always attempted to avoid them because I believe he is absolutely right about their lack of both rigor and logic. Skinner’s suggestion of how to avoid these pitfalls is to understand the context in which texts are written, which is precisely what I am going to do. I believe understanding the era in which these thinkers lived, and to what and whom they were responding is key to not only understanding what they wrote, but how it can be useful today, a question Skinner of course does not have any interest in. While I do not agree with his sentiments on “timeless questions,” or the emphasis on the type of pseudo-semantic analysis he advocates in this essay, I do feel that overall, this essay is, and has always been, a model for the way I want to do, and want to be seen doing, intellectual history, in terms of how I think and write about texts.

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<sup>4</sup> Quentin Skinner, “Meaning and Understanding in the History of Ideas,” in *Visions of Politics*, ed. Quentin Skinner (Cambridge: Cambridge University Press, 2002).

As for the question of how to fit them together, I would point to Koselleck's vision of conceptual history as one possible methodology.<sup>5</sup> Though I feel it has never been a particularly clearly articulated methodology, its emphasis on the two-way interaction between concepts and history/reality is appealing and I think maps on rather well to what I want to do. He also, like I do, eschewed the idea that concepts were merely language, and insisted that the historical times in which these concepts existed was of the utmost importance. While I would argue that a conceptual history as Koselleck envisions it is more than just a history of how concepts come and go, and change over time, and makes a more specific statement about the nature of the evolution (for lack of a better word) of concepts, it is a bit hard to pinpoint what that is. I would argue that for my purposes, it is a type of history of a concept that can be given a rather simple identifier (like "liberalism" or "democracy"), in which one recognizes that some aspects of concepts cannot be elucidated by language alone, and in which understanding how "modern" understandings of these concepts come from a highly contextual reading of texts, which could, in theory, be far beyond the "classics," as Skinner often calls them. It is also much more cognizant of the use of concepts than Skinner's project is, rather than merely the meaning of the words of the authors. I do feel that, while this is a very rough sketch of what I believe to be a rough sketch in itself (Koselleck's own work on the topic), this resembles how I wish to put these texts together.

Lastly, in terms of methodology, I might be wise to think of the historical section as borrowing in some way from the genealogical method, perhaps more of

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<sup>5</sup> This is best articulated in *The Practice of Conceptual History: Timing History, Spacing Concepts*, trans. Todd Samuel Presner and Others (Stanford: Stanford University Press, 2002).

the Foucauldian<sup>6</sup> variety than the Nietzschean<sup>7</sup> one. Specifically, I am interested in something Foucault feels is central to the genealogical approach to history, namely discerning what is contingent about certain modes of thinking, and what is universal, though he usually comes to the conclusion (and this is part of his reading of the historical present more generally) that everything is contingent, a conclusion I would dare not draw at this stage. Teasing out these characteristics of the various arguments in these texts could be key in understanding my normative question and, perhaps more grandiosely, coming to a more productive way of thinking about our opponents during armed conflict more generally. Foucault himself used this technique of genealogy in order to make statements about the present, which is another similarity to what I am attempting to do here. It should be reinforced at this point that the concept in question, and term, that I am wanting to study is Carl Schmitt's "just enemy," which will be explained in detail in Chapter One.

As for the type of normative theory I want to write, there are several possible ways of going about this. The first thing to note is that rather than analyzing, philosophically, the arguments of the "canonical" philosophers, I am trying to advance a point of my own, in some capacity. This places me at least somewhat in the category of Martha Nussbaum, whose theory is designed largely to advance a mode of thinking, or a framework, but in any case, it is not an analysis of existing ideas in the sense that, something like Leiter's work on Nietzsche or Alison Simmons' work on Descartes is. I believe this type of theory is very hard to write

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<sup>6</sup> My best understanding of his methodology comes from *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995).

<sup>7</sup> Friedrich Nietzsche, *On the Genealogy of Morality*, trans. Maudemarie Clark and Alan Swensen (Indianapolis, IN: Hackett, 1998).

without leaving some gigantic logical holes, though I would wish to avoid those, obviously. Given that the scope of the project is somewhat narrow, I may be able to avoid some of those pitfalls.

It should be noted that in addition to the interventions I wish to make regarding our contemporary thinking about war and our enemies, I am also wishing to make an intervention into the scholarship of Carl Schmitt. I do not believe he can simply be described as a Nazi warmonger, and that his Nazism can be read into everything he wrote. He seemed, rather, to make a shift after World War II (despite never apologizing for his Nazism) first of all, towards more international/global thinking, and second of all, away from the kind of authoritarian work he did during the Weimar and Nazi periods. His later work is, in my opinion, quite prescient, and I believe worth paying close attention to.

The project is divided into four chapters. The first will be an analysis of the just enemy, so that we know exactly what we are dealing with for the rest of the text. It will discuss the just enemy as an amoral concept, which will continue to be a theme for the rest of the project. The second chapter will discuss the similarities between the project of the just enemy and liberal theory, as well as the differences in how these projects are thought to be accomplished. Moving onto the third chapter, we will have a historical interlude, tracing the foundations of the just enemy through the work of some prominent thinkers. Lastly, the fourth chapter will examine echoes of the just enemy in the work of 20<sup>th</sup> century philosophers on war, and how the question of amorality continues to be problematic for the implementation of a just enemy. As we will see throughout my project, the key

question in the just enemy is that of amorality and how this can fit into the contemporary mindset, or even *if* it can fit into the contemporary mindset, where war and conflict are governed by a just war mentality. We are left wondering, does this make the just enemy a pipe dream? Or is it still useful in some capacity? The conclusion will address these questions, and provide some potential answers.

# Chapter One: The Concept of the Just Enemy (*Justus Hostis*)

## Introduction

Before we begin our journey into the history and use of this idea, we must first know what it is. The “just enemy,” as I will refer to it, is a concept created by German jurist Carl Schmitt, beginning during the latter part of WWII. Its clearest exposition is in *The Nomos of the Earth*,<sup>1</sup> written in 1950, though it is also discussed in “The Turn to the Discriminating Concept of War”<sup>2</sup> (1937) and *The Theory of the Partisan* (1975).<sup>3</sup> I will be drawing from these three texts in this chapter. In future chapters I will use this analysis to help us understand more about the texts I have chosen, and how I perceive their relationship to this important concept.

Schmitt’s concept of the just enemy is taken from a specific time in European history, namely the 18<sup>th</sup> and 19<sup>th</sup> centuries.<sup>4</sup> It is during this time that Schmitt believed Europe stopped moralizing about war as it had during the Middle Ages, when just war theory was predominant, and found itself in an era of positivism, i.e., the detachment of something (in this case war) from morality. Schmitt’s concept of the just enemy is thus tied

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<sup>1</sup> Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, trans. G.L. Ulmen (New York: Telos, 2006).

<sup>2</sup> “The Turn to the Discriminating Concept of War (1937),” in *Writings on War*, ed. Timothy Nunan (Cambridge, MA: Polity Press, 2011).

<sup>3</sup> *Theory of the Partisan: Intermediate Commentary on the Concept of the Political*, trans. G.L. Ulmen (New York: Telos, 1975).

<sup>4</sup> See for example William Doyle, *The Old European Order, 1600-1800*, The Short Oxford History of the Modern World (Oxford: Oxford University Press, 1992); Dena Goodman, “Public Sphere and Private Life: Toward a Synthesis of Current Historiographical Approaches to the Old Regime,” *History & Theory* 31 (1992); E.J. Hobsbawm, *The Age of Revolution 1789-1848* (New York: Vintage Books, 1996); Marc Raeff, “The Well-Ordered Police State and the Development of Modernity in 17th and 18th Century Europe,” *American Historical Review* 80 (1975); Hans Rosenberg, *Bureaucracy, Aristocracy, and Autocracy; the Prussian Experience, 1660-1815* (Cambridge, MA: Harvard University Press, 1958).

to a specific time in history, though as it is used in his texts, it faces both the present and the future. Specifically, he is superimposing this concept onto his contemporary circumstances and also warning against its loss for future international relations. Because of the concept's historicity, it is worth saying a bit about the landscape of Europe during these two centuries before moving on to an analysis of Schmitt's texts, because the types of wars and state to state interactions during this time shed light on how Schmitt came to his conclusions.

The 18<sup>th</sup> and 19<sup>th</sup> centuries in Europe could be described as a period of state-building, state-trading and land acquisition. Wars were not fought over ideals, but primarily over territory. The context for this is, in part, both the French and German Enlightenments, which strongly favored rationality over religion. The category of the "Enlightened Despot" led to what we would recognize as the modern state. These Enlightened Despots no doubt comprise the collection of sovereigns Schmitt believed to relate to each other as equals.<sup>5</sup> They were daughters and sons of the Enlightenment, the first leaders to be educated with Enlightenment ideals, though it is in doubt whether or not their "conversion" to Enlightenment ideals was sincere. Regardless, they created a series of reforms that all—whether they were bureaucratic, social, or legal—tended towards secularization.

These leaders were no strangers to war, however, and there were several relevant wars fought during this period, such as the War of Austrian Succession, the Seven Years War, and the unification of Germany under Bismarck, an event that Schmitt discusses explicitly in his text. There was also, of course, the French Revolution, which is somewhat

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<sup>5</sup> And they were often related, besides.

of an outlier here, given that it was both intrastate and fought over ideals. Napoleon's rise to power in 1802 brought France back to the type of state Schmitt was interested in, namely a state ruled by a single sovereign who considered his fellow sovereigns in other nations to be peers. In general, wars were between two states, or two parts of a state, and fell far short of what we now call "total war," in which all of society is incorporated into that war. Nearly every war consisted of two opposing armies coming together to battle for some piece of land or political title. This is part of what fueled the containment of these wars to Schmitt—these wars were not of an ideological nature.

### **Categorization of the Just Enemy**

It is difficult to place the just enemy in any one category, so I will focus on three. These three categories are the chivalric, the legal, and the humanitarian. To Schmitt, it seems to be a chivalric concept, deriving from the aforementioned period of history in which Schmitt argued that Europe was able to "bracket" war, its greatest achievement, and something he calls "nothing short of a miracle."<sup>6</sup> This "bracketing" turned war into an event akin to a duel between two equal sovereign states (see footnote),<sup>7</sup> and thus abolished all of what he calls "wars of annihilation" (such as WWII).<sup>8</sup> This equality is key, because part of what made this "bracketing" possible was the fact that states could not judge each other morally or legally. Schmitt believed that the existence of equal sovereign states created a

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<sup>6</sup> Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, 151.

<sup>7</sup> I do not think Schmitt means to say here that all states had equal firepower or ability to fight, but the idea of "equal sovereign states" has more to do with how states treated one another in an international context. One can think of it a bit like how in the U.S. individuals have "equality before the law." Schmitt believed that during this period of European history, states had a kind of "equality before the law" and before each other, since there was no official, codified law to guide them. It should be noted that recent literature on international law takes into account the inner workings of the states, and would never call states "equal," since no two states will have exactly the same structure or fighting capacity.

<sup>8</sup> Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, 242.



spatial order that made war easy to regulate and contain (or as he says, “bracket”) because a state had real business only with its immediate fellow states on its borders. This spatial order would last until after WWI. At this time the League of Nations, because of its failure to address war properly, would destroy both it and the existing concepts of war, by creating a political entity in which every state had business with every other state by virtue of the communal structure of the league.<sup>9</sup> Schmitt believed the loss of the spatial order to be the reason Europe fell so easily into another war.

In addition to being a chivalric concept, the just enemy was clearly a legal concept according to Schmitt, one dealt with extensively, in one way or another, in the jurisprudence and philosophy of the time. Vattel, writing in the 18<sup>th</sup> century, was the most significant jurist who touted this idea, though there was work by other earlier jurists, such as Gentili and Vitoria, that Schmitt believed was a precursor to Vattel’s work. These jurists worked to give some form to international customary law, since international law as we know it today had not been codified, and would not be until the first Hague Convention in 1899.<sup>10</sup> Schmitt believed the just enemy to have become part of international customary law (implied in his writing on the subject) during the time of the bracketing of war. Just war theory, which required recognition of a higher moral order, no longer dominated thinking on war, as it had in the Middle Ages, and thus states were able to recognize each other as just enemies during war and not see their opponents as criminals. Schmitt remarks that most wars during the 18<sup>th</sup> and 19<sup>th</sup> centuries were terminated with a peace treaty that contained an amnesty clause as proof of this relationship between warring

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<sup>9</sup> Ibid., 243.

<sup>10</sup> Codification actually began with the Lieber Code during the American Civil War, but because this was unique to the American situation, it is obviously not considered part of international law. It did, however, play a role in deciding the types of things that would be outlawed by the Hague Conventions.

states.<sup>11</sup> Thus the just enemy was in a sense legally institutionalized, especially in such peace treaties, besides being the primary force in deciding how war should be conducted and what it should mean. This legal institutionalization will become especially important when we discuss the relationship between legality and legitimacy (below), one of Schmitt's lifelong projects. This is a distinction we face every day in states that are ruled by laws and not men. Legitimacy, Schmitt believed, came from being ruled by a person, or what he calls "personality." Legality, merely words on a page deemed meaningful by some legislative body, lacks this kind of backing. One of the topics Schmitt continued to revisit was the lack of legitimacy, under his definition, in states ruled by laws. But for now, it is key to know that legality and legitimacy are not the same thing. It is a bit like the difference between morality and legality—there is often some overlap, but they should be distinguished from one another.

The last category that could contain the just enemy is merely implied in Schmitt's writing, but still necessary to examine. I believe the just enemy is lastly a simple humanitarian notion. When I say "simple," I mean in the sense of doing good to one's fellow man, emphasizing a sort of fellowship of man, in spite of potential violence of man against man. The just enemy is also the humanized enemy, and thus an enemy with as much right to settle scores by violence as its opponent. One could even say that, instead of merely humanizing him, it presupposes the enemy's humanity. To "humanize" implies that the one confers humanity onto his enemy, rather than the enemy possessing that innate quality of humanity. Schmitt's main concern was of course not humanitarian, thus these ideas here are not explicitly dealt with. It is difficult, however, not to see such an idea present in the

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<sup>11</sup> Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, 148.

text regardless, as justice and even reason could not readily be conferred onto a non-human object. The ability to presuppose the enemy's humanity feeds into the bracketing of war and adherence to the laws of war, though at this point in Schmitt's text only in the context of wars between two sovereign states. This humanitarian valence of the just enemy concept may be the most useful for the purposes of this text, despite its merely implicit nature.

The terms "humanitarian" and "humanity" should bear more scrutiny. Normally the term "humanitarian" implies a rather heavy morality, and, in my opinion, a great deal of hypocrisy. I say "heavy morality" because it makes moral judgments about the most basic and broadest characteristics of human beings, namely their humanity. By "humanity" I mean to imply that which we believe separates us from animals, namely the ability to reason, empathize, and communicate with one another through speech. These abilities make humans subject to particular reactions due to certain kinds of treatment. Thus one could argue that because of our capacity for emotions, if we are hurt physically by oppressors, we feel more than just physical pain. Furthermore, when we see others being hurt, we have the capacity to empathize with those people. The latter characteristic is the claimed basis for humanitarianism—in theory we want to help others who are in trouble, whether it be by natural disaster or political disaster. But humanitarianism is more than just being a good Samaritan. Humanitarianism, by being attached to the concept of humanity in this way, is capable of distinguishing between the human (worth helping) and the non-human (not worth helping), between good humans (worth helping) and bad humans (not worth helping). It can be a weapon, as well as a tool to help others, and is incapable of being a neutral idea, even though it professes to be a neutral one.

In contrast to what I believe is the current state of the word “humanitarian,” I mean something altogether quite different, as I began to say above. I mean what is perhaps the ideal of the term, or maybe even a literal meaning. In other words, I mean that humanitarian, in relation to the just enemy, means that which confers humanity, as I have explained it above, or even assumes it. To be humanitarian in these terms means to assume that the enemy is more than just an animal, and because of his capacity for higher level reasoning, and emotion will be harmed more than an animal through poor treatment. Thus humanitarian, meant in this way, implies the need to treat the enemy according to these characteristics, with a view towards causing as little harm as possible under the circumstances.<sup>12</sup>

Thus the morality of the terms “humanitarian” and “humanity” seem to be in tension with the fact that the just enemy is not a moral concept, or could even be an amoral one, as I will discuss below. One must keep in mind, however, that not all moralizing is good. Let us leave the idea of “moral” as a neutral concept, since whether it helps or harms depends on the context. Unlike the more harmful notion of “humanitarianism” present in public discourse, the concept of humanitarianism I use here is distinct by virtue of the fact that it is incapable of conferring sub-human status. It remains, however, a moral concept. This moral concept is one that does not confer sub-human status, and it is perhaps some of the only moralizing Schmitt ever does.

### **What is the Just Enemy? Parsing the Term**

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<sup>12</sup> These views on animals vs. humanity are obviously in dispute by many, but this discussion is not meant to add to those debates.

These categories begin to give us a way of thinking about the just enemy, but they do not really tell us what it *is*. I will now present a way to think about what the just enemy might be, beyond whatever immediate notions come to mind. First of all, while thinking about all its other attributes, one must remember that it is originally a concept that Schmitt views as tied to a specific situation, namely one in which wars are basically competitions between equal sovereign states. (He later tries to port this idea to partisan or guerilla warfare, though less successfully.) But for our purposes, we want to know what it is, when extracted from the 18<sup>th</sup> and 19<sup>th</sup> centuries of bracketed war, otherwise it has very little use in today's world, where wars are primarily intrastate. At its most basic, the just enemy is someone against whom you are fighting, but view as having just as much claim to legitimacy as you. One might be tempted to say that in just war theory terms, they could be said to have a recognized "just cause," just as you do, so that both sides are equally "just," but this would vastly misconstrue the notion of the just enemy, as we will see below.

Perhaps it is best to begin the analysis of the term "just enemy" itself with the apparently simplest of the terms, namely the word "enemy." It is crucial to remember that the just enemy is in fact an enemy, and one in which enmity has come to the point of physical confrontation in the form of war. This is of course why the term "just enemy" can seem contradictory, or maybe even "impossible," would be the correct term. How can someone you are physically harming be someone you, at the same time, view as just? But no matter for now on that particular issue. For now we are only interested in what the just enemy is, not whether or not such a thing is possible. That will come later. But what is an "enemy" in this sense? It is not the private enemy of the feud or what Schmitt calls "private wars." It is the public enemy, whether that be of a state or a non-state actor (or group, such

as insurgents).<sup>13</sup> It is someone against whom one holds not merely a grudge, but against whom one has a legitimate (though in whose eyes, one might ask) reason to engage in physical fighting. This could be for any number of reasons, though Schmitt believes that international law, and thus the laws of war, originated primarily from wars of land appropriation, which are as old time immemorial.<sup>14</sup> Here he is discussing the appropriation of the New World, but of course bits of Europe changed hands multiple times, including during the times in which war was bracketed. Most wars during Schmitt's period were wars of land appropriation. War was a way of a state taking land that it wanted from another state. But of course there are many other reasons states or non-state actors go to war. During the Middle Ages these reasons were often religious in nature, and one could say the same thing about some wars now. Or of course during the middle of the last century there were wars of liberation, which Schmitt discusses extensively in *The Theory of the Partisan*. These are all "public" reasons to go to war, and why it counts as war and not merely a feud or scuffle. Thus the enemy, in this case, is the public enemy, because this concept is one exclusive to war.<sup>15</sup>

Equally importantly, the enemy is to be distinguished from the criminal. This is perhaps to Schmitt the most important facet of the concept of the just enemy. He believes that beginning with the Romans, the ability to distinguish between the enemy and the criminal, i.e. the recognition of the just enemy, "is the beginning of all international law."<sup>16</sup>

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<sup>13</sup> Ibid., 51. I am including non-state actors here due to the international customary law of the recognition of belligerency and Schmitt's later discussions on partisan or guerilla warfare, as well as attempting to keep reminding my reader that the just enemy concept has relevance for today's non-international armed conflicts.

<sup>14</sup> Ibid., 83.

<sup>15</sup> Much later in this text I will address this idea within the context of liberal theory, where I think it can be ported over to discussions of pluralism in the public sphere.

<sup>16</sup> Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, 52.

What basis does he have to make such a bold statement? It would seem that his reasoning is that international law could not exist without the recognition of other legitimate actors within the international sphere, and most of the time, that recognition consists of physical confrontation in the form of war. Given the time period within which Schmitt is working, and when *Nomos* was written, this seems accurate. Until various economic treaties began to be concluded in the late 19<sup>th</sup> century, most treaties, i.e., most formal agreements between states, were peace treaties, and thus related to war. And without the formal recognition of other states as deserving of some type of equal treatment, there could be no international law. Thus Schmitt's claim that international law originated with the recognition of the just enemy does not seem so bold after all.

To move back to our discussion of the enemy versus the criminal, Schmitt states that the ability to distinguish between these two began with the recognition of every state by every other state as a sovereign state.<sup>17</sup> He calls this war between equal sovereign states, and thus just enemies, "war in form," meaning that it was a highly self-regulated practice that was specific in the way it took place.<sup>18</sup> Part of the reason this was possible, Schmitt argues, is that every state was backed in some way by a person, conceived as what he calls "*magni homines*," because they were headed by a crowned prince or king (or even queen in a few cases).<sup>19</sup> This, he argues, is why the duel analogy, though not to be overstated, works as well as it does. Wars were almost a way of continuing conversation between two persons in order to settle disputes. However this is a very antiquated way of looking at war,

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<sup>17</sup> Ibid., 142. Clearly Schmitt must have thought this had an earlier origin of some sort in Roman law, but he is not completely clear on what that is other than a quote from a Roman law treatise. Perhaps he believed this was not something that was practiced during Roman times, but merely recognized.

<sup>18</sup> Ibid., 143.

<sup>19</sup> Ibid.

and Schmitt no doubt romanticizes it, since war has always involved killing and brutality. A more useful analogy is the difference between the enemy and the pirate, who is a criminal because he is only fighting for his own personal benefit. This draws upon our earlier distinction between the public and private. What is the real difference between an enemy and a criminal? It seems to be that the enemy is a public construction, and the criminal a private one. This is why the recognition of sovereign states created the space for the just enemy (and in some sense in Schmitt's texts, "enemy" and "just enemy" are synonymous—all other entities one fights against are criminals). It was one public entity against another.

Thus the difference is clear when we are discussing sovereign states. What if we are discussing a state versus a non-state actor such as a guerilla fighter group? Luckily, in *The Theory of the Partisan*, Schmitt begins to illuminate this problem, and it is definitely a problem for both international law and war more generally. In this text, Schmitt is discussing partisan or guerilla warfare, in which the combatants fight irregularly. Schmitt has famously said in many places that one cannot regulate the irregular (by definition), and thus attempts to regulate partisan warfare in international law are doomed to failure, and so in some sense the partisan will always be a criminal, which, by our terms, would mean he cannot be a just enemy. However, there seem to be some caveats, because of the state of international law. Schmitt writes that the 1907 Hague Conventions recognized new categories of combatants that would have previously been excluded from the protections of international law given to regular fighters.<sup>20</sup> This makes at least certain groups of irregular fighters not criminals, and thus possibilities for just enemies. Furthermore, international customary law has provisions, beginning in the 19<sup>th</sup> century, for the recognition of

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<sup>20</sup> *Theory of the Partisan: Intermediate Commentary on the Concept of the Political*, 23.



belligerency, which gives rebel groups within states the same rights as regular troops. However, because this amounts to the recognition that a state has lost control over its population in some form, the states in which the insurgency is taking place rarely recognize the rebels as belligerents, even if some third party states do. Because of this, Common Article 3 of the Geneva Conventions of 1949 (a basic set of rules and regulations, sometimes said to be a “convention in miniature”) comes into effect when a conflict within a state reaches a certain level and type of violence, and the non-state actors certain characteristics, thus granting them some form of legitimacy under international law, regardless of whether or not such non-state actors have been recognized as belligerents.<sup>21</sup> Though considerably more complicated, clearly, beginning in the 19<sup>th</sup> century with the recognition of belligerency, it would seem that there are ways non-state actors can leave the realm of the criminal, This would make them potential just enemies, at least in the legal sense, though states would usually fail to recognize them as such.

But this is not the end of the problem by any means, and not just because international law still has a tendency to create criminals out of non-state actors. In fact as Schmitt sees it, the problem is potentially greater from the perspective of the non-state actor, especially if they are fighting a war of revolution or liberation. Schmitt writes that the “revolutionary fighter...declares his enemy to be a criminal” and that this fighter “enforces the death penalty against the criminal, and, if the tables are turned, risks being treated as a criminal or a parasite. That is the logic of a war of *justa causa* [just cause] without

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<sup>21</sup> The recognition of belligerency and use of Common Article 3 is outlined in some detail in "Article 3: Conflicts Not of an International Character," ed. International Committee of the Red Cross (Geneva2016).

recognition of a *justus hostis* [just enemy].”<sup>22</sup> Thus it almost seems as though in certain types of war, criminalization is impossible to avoid and therefore there can be no just enemy. Nonetheless, for the time being, it is merely important to be clear that the concept of the just enemy is tied very closely to the concept of the criminal. A just enemy, or enemy at all in Schmitt’s mind, is not a criminal, and is not treated like a criminal. Otherwise, “war” is mere police action (or as we will later say, “the realization of justice”) and not worthy of the name. Thus it appears that at this point in our analysis, to Schmitt, the just enemy and enemy are synonymous, and war is only war when fought against a just enemy. These are interesting notions to keep in mind as we continue to delve deeper into the concept of the just enemy. We will be able to see the consequences of such thinking when discussing Schmitt’s views on the criminalization of aggressive war.

The foregoing discussion provides an overview of the term “enemy” in Schmitt’s “just enemy.” But what of what it means to be “just” in this sense? Here is one way to think of it: first of all, though just war language is useful, it is not truly accurate under these circumstances. Schmitt’s concept of the “just enemy” does not come with a concept of justice per se, and therefore just war theory is in many ways an inappropriate lens through which to view the just enemy because it is highly moralistic. In fact one might argue that the just enemy is an amoral concept, or even a positivistic one. It makes no judgment on the actual justice of the enemy’s cause. It is in fact an agent-centered concept about how one warring party thinks about another, unconnected to an objective notion of justice. Going back to my conceptual categorization, one can see that it requires that one grant legitimacy

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<sup>22</sup> *Theory of the Partisan: Intermediate Commentary on the Concept of the Political*, 30. Note that Schmitt’s use here of the language of just war theory is somewhat metaphorical—Schmitt does not really believe in the idea of just cause.

of some sort to the other side, which requires some sort of either moral relativity or positivistic outlook. The result of this is that to a present-day reader, the just enemy is more difficult to swallow. Our current concepts of war are highly moralistic, and we must leave this morality behind in order to adopt the concept of the just enemy. This does not mean one necessarily spends hours thinking about what the cause might be for the opposing side to go to war (though in today's world this might be necessary), but rather that the immediate reaction would be to give them the benefit of the doubt, to put it in more vernacular terms.

It should be noted at this point that Schmitt has virtually no discussion on the concept of "justness" in his text, and thus my discussion comes both from the way the term is used, and from what is left out of the texts on this subject, which is primarily a discussion of justice. A "just enemy" without a discussion of justice is a curious thing indeed, but Schmitt cannot be said to have a comprehensive theory of justice by any means, especially given that his work changed a great deal during his lifetime. In fact, one could even argue he is cagey about imposing any framework of justice and/or morality onto his writing. His arguments are often written descriptively, but we are here to tease out how he thinks things *ought* to be, i.e., the normative. The existence of the "just enemy" is something it is clear he believes ought to be, and its loss after WWI is clearly something he views as lamentable. Another thing that is clear from the text is that he has a romantic notion of war and statehood.

The idea of "romanticization" requires further examination. I believe it is important because understanding Schmitt's tendency towards romanticizing the 18<sup>th</sup> and 19<sup>th</sup> century "bracketed" wars will help us gain more of a sense of whether or not there can be a just

enemy, since we must ask ourselves, were these “bracketed” wars really as benign as Schmitt makes them out to be? It should be clear from his discussion of bracketed war as “war in form” that Schmitt is almost picturing war as a couple of well-dressed generals sitting at a chessboard, even as he tells us not to look too far into the analogy of the duel. He has forgotten the human element. But we must not. We must remember, throughout this analysis, that regardless of whether or not war was “bracketed” or a “war of annihilation,” war is still and will always be hell.

A historical example will serve as an illustration, one that Schmitt very much opens himself up to critique by praising the brilliance of the “diplomacy” that ended a series of wars “before further complications ensued” (“complications” seems like an interesting choice of words considering the already high death tolls). This was the series of three separate wars that led to Bismarck’s unification of Germany in 1871:<sup>23</sup> the defeat of Denmark, the defeat of Austria, and the Franco-Prussian War. We will focus here on the defeat of Austria. This is a particularly useful example because the war was unusually short due to a huge defeat for Austria at the famous Battle of Königgrätz on July 3, 1866. However, in this battle alone, the Austrians lost 45,000 and the Prussians 9,000.<sup>24</sup> A painting of this battle, of which there are many due to its decisiveness, should serve well to show the brutality:<sup>25</sup>

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<sup>23</sup> *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, 189.

<sup>24</sup> Martin Kitchen, *History of Modern Germany: 1800 to the Present* (Hoboken: Wiley, 2011), 99-100.

<sup>25</sup> Georg Bleibtreu, *The Battle of Königgrätz, 3rd July, 1866*, 1869.



Figure 1 The Battle of Königgrätz, 3rd July, 1866, by Georg Bleibtreu, 1869. Source: Wikipedia ([https://en.wikipedia.org/wiki/Georg\\_Bleibtreu#/media/File:1868\\_Bleibtreu\\_Schlacht\\_bei\\_Koeniggraetz\\_an\\_agoria.JPG](https://en.wikipedia.org/wiki/Georg_Bleibtreu#/media/File:1868_Bleibtreu_Schlacht_bei_Koeniggraetz_an_agoria.JPG))

Notably the foreground consists of horses and carts that have been toppled over and a man being led off in a stretcher. Fires burn in the background and smoke from the guns looms over the left side of the painting. This is not a pretty sight. Schmitt would have done well to remember that regardless of this not being total war, it was still quite clearly hell, even in this painting, which undoubtedly is toned down so that the spectator is not overwhelmed by the violence. In fact there is probably no perfect example of a “war in form” or “bracketed war” the way Schmitt thinks of it. Perhaps he thinks this is how wars *ought* to be, and not how they are/were. But because there is a disconnect between Schmitt’s apparent vision of war and how war actually was, it makes it a little more difficult for us to rip concepts of morality and justice from war as present-day readers, and thus a bit more difficult to come with him on the notion that the just enemy contains no concept of justice. However, despite this criticism of Schmitt’s romanticism, I want to remind my reader that the fact that war is not actually the way Schmitt portrays it does not mean there is no use for this concept. I hope to convince my reader, at least by the end of this text, that in fact

this concept is relevant even today when war is completely different than it ever was. What is key to remember is that regarding the large amounts of violence that Schmitt seems to neglect, the just war concept is meant to be that which contains that violence. These wars, like the example I use above, did not become “total wars” or “wars of annihilation” because the observance of the just enemy was in play. I hope to show my reader down the line that this idea of the just enemy as containment can still be possible.

Going back to concepts of positivism and moral relativity, one passage that supports my claim that the concept of the just enemy is relativistic or positivistic comes from his 1937 essay “The Turn to the Discriminating Concept of War,” where he writes, when speaking of the turn back to just war theory after WWI,<sup>26</sup>

*In praxi* the real question is whether every state can make the decision, can have the *jus supremae decisionis* of the justice or injustice of a war, or whether another state or group can make the legal decision on the justness or unjustness of a war in such a way that this decision becomes valid for a third party.

Here the “group” he is obliquely referencing is the League of Nations, was of concern to Schmitt because he viewed it as the beginning of the dissolution of the concept of war. But more importantly for our purposes at the moment is that it appears that justness or unjustness is a “decision” made by a state or even a person, not an abstract objective moral entity that one can turn to. This of course turns just war theory on its head, which requires some sort of objective moral backing. Schmitt is clearly thinking at least partially in legal terms, and those terms appear to be free of moral content, and thus positivistic (though I would be loathe to call Schmitt a positivist). In fact, they harken back to Schmitt’s infamous “decisionism” in his 1934 treatise *Political Theology*, where he is famous for saying that the

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<sup>26</sup> Schmitt, “The Turn to the Discriminating Concept of War (1937),” 64.

“sovereign is he who decides on the exception.”<sup>27</sup> War was considered an “exception” for Schmitt, so the above passage from his 1937 essay most likely implies some element of both sovereignty and personality of the state or group making the decision over the justness (or justice) or a war.

Taken altogether, I believe we would be most correct in placing the just enemy in the “positivistic” camp. A “moral relativistic” camp might still leave room for a just cause, but the concept of the just enemy essentially negates the idea of just cause. In fact, even thinking about just cause shows we are not quite focused on the right thing. The just enemy requires focus on how we think about the other side as individuals fighting a war, or a state fighting a war (depending on who we are while looking at the other side, i.e. a soldier on the battlefield or a general on a hill), separate from the reason they go to war. It in fact ignores the reason they go to war, not merely condones it. Merely condoning it, i.e., saying both sides have a just cause, would not necessarily lead us to the just enemy. There could be a number of ways in which one could still have an unjust enemy when the just cause is in play. Thus the just cause must be rejected entirely. This is one of the foundations of the just enemy concept.

It is curious, though perhaps too fine a point, that Schmitt uses “justice” and “injustice” when discussing the state decision and “justness” and “unjustness” when describing the decision of a group. Knowing Schmitt’s careful writing style, I would be hesitant to call this merely a word choice designed to make the text more elegant—I suspect there is some deeper meaning. “Justice” and “injustice” have a more moral-philosophical meaning than “justness” and “unjustness,” which would seem to have an

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<sup>27</sup> *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: The University of Chicago Press, 2005), 5. This is actually so important that it is the first sentence of this text.

entirely legal meaning, and are attached to what he calls the “legal decision.” For example, when describing the League’s distinguishing between just and unjust wars (something which requires an objective higher moral order), he says, “an armed action on the side of justice is nothing else than the realization of justice.”<sup>28</sup> This is clearly indicative of the moral realm. The phrase “realization of justice” makes sense in no other context.

However, when he is discussing whether or not a war is just as a legal decision, he uses the word “justness,” as in, “The goals of this method [referring to the League]—the institutionalization, federalization, and concretization of the decision on the justness or unjustness of war—are, we think, only a tangent to the ultimate goal that we can agree upon.”<sup>29</sup> As we have discussed earlier, the decisionist element of the just enemy is a positivistic element, since it does not rely on a higher moral order. It can thus be a legal one, and in this case Schmitt is referring to it as such.

The reason for this would be, I imagine, that even though the outcome of calling something just or unjust may be the same, regardless of whether or not we are speaking morally or legally (and such does seem to be the case for Schmitt), we are back to the legality/legitimacy distinction. The only real arbiters of legitimacy, i.e. those who can rightfully use “justice” and “injustice” are states or entities with “personality,” as discussed above. This is perhaps why he views the League as so vastly misusing these concepts and terms. It lacks personality but continues to make (misguided, to Schmitt) moral judgments. However, when he talks about the League on a more technical level as a legal organization, i.e. one run by the rule of law, he must distinguish this from when it is making moral distinctions. Thus new terminology is needed. This nuance is perhaps underscored by a

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<sup>28</sup> "The Turn to the Discriminating Concept of War (1937)," 66.

<sup>29</sup> *Ibid.*, 74.



quote he cites from Grotius' *jus belli ac pacis*, "*Justitiam in definitione (sc. belli) non includo*,"<sup>30</sup> meaning "Justice does not belong to the definition of war." "Justice" and "injustice" must thus belong to the moral-philosophical realm, while "justness" and "unjustness" belong to the legal one.

Where does this leave us with respect to the just enemy? Let us now take a look. If we go back to the quote from the 1937 essay, we could say that the "just" in "just enemy" belongs to both the moral-philosophical realm and the legal one, though perhaps the latter only after WWI, since there was no group to make such a decision during the heyday of the sovereign state in Europe. With this in mind, it would seem that in its original framing, the "just" in "just enemy" belongs to the moral-philosophical realm, but as a decision made by every individual state, not adhering to any kind of higher order of morality. It was not originally a legal institution or connected to a legal institution. Later, one could make the argument that, were the later legal institutions permissive of such a concept (which they were not), it would belong to both this moral-philosophical realm *and* the legal realm, but the same rule of lack of a higher moral order would apply. The "just" is not connected to such an order. That much is clear from Schmitt's text and lack of discussion of justice. The "just" is a decision, and during a particular period of European history, it is one that was always made a certain way, i.e. in favor of the opponent (the "enemy").

Now that we have studied these two terms separately from one another, it is time to put them back together. If we take the foregoing analysis and condense it to a single sentence about what the "just enemy" is, we would get something like this: the "just enemy" is a decision by a state or group about justness of the opponent of the public realm of said

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<sup>30</sup> Ibid., 64.

state or group within the context of physical fighting, i.e., a war, free from a shared higher moral order. This is what can be extracted from the context of Schmitt's romantic heyday of the sovereign state in Europe, and what will be used throughout my text, except that in the later parts of this text, "physical fighting" will be replaced by any kind of political conflict. It is important to note that while Schmitt does not purport any kind of higher moral order in the thinking on the just enemy, I have written "shared higher moral order." The reason for this is simple: though Grotius may have said justice has no place in thinking on war, and my reader may agree, others may not. Yet, the decision is still left up to the state or groups with some sort of interest in the fighting. Schmitt allows his perception of war to dominate the definition of the just enemy, but I would like to allow for the notion that a state or group can have a moral outlook but still make the decision to call its opponent a just enemy. This brings us back to my earlier categorizations, especially the humanitarian category, in which this concept belongs. It should not matter what the basis of this decision is, whether it be moral or legal or otherwise—it should only matter that such a decision is made to call the opponent a just enemy. There is nothing in Schmitt's texts to suggest this is an incorrect way of thinking about his concept, but it is never made explicit other than a few stray quotes from Grotius and other thinkers that bring the just enemy out of the realm of just war theory in its moralistic state, a line of thought I believe I have continued despite this addition, since just war theory as it is currently practiced and has generally been practiced in the past precludes the concept of a just enemy.

## Just Enemy: Contexts and Consequences

Now that we know what the just enemy is, we can discuss its various contexts and more importantly, its consequences, the one with the greatest impact, for Schmitt, anyway, being the existence of neutrality. The logic to this is fairly simple. If one party to a war can see another party as just, then it logically follows that third party neutrality is possible because there would be no pressure to take sides and no moral reason to either, since the just enemy is detached from morality. Schmitt considers this one of the key elements of statehood, namely the ability to be a neutral party to a conflict. Neutrality is also part of what keeps war bracketed, because it does not escalate the conflict by adding in parties that otherwise have no interest. In order to discuss the importance of neutrality, it might be best to discuss what happens when it does not exist, as was the case with the League of Nations. The League of Nations made an attempt to abolish war, as we know, but Schmitt believes that because it did not create a new spatial order that could bracket war, this abolition was doomed to failure. He writes of this lack of spatial order and thus neutrality,

On the contrary, the destruction of neutrality led to the spatial chaos of a global world war and to the dissolution of “peace” into ideological demands for intervention lacking any spatial concreteness or structure...In like manner, the vigorous attempt to make aggression a crime in international law, to make it a *crime international*, came to naught.<sup>31</sup>

A word on Schmitt and the spatial order before we continue our discussion of neutrality: the existence of a concrete spatial order is key to the ability to bracket war according to Schmitt, because it sets important boundaries (in the form of states) that perpetuate a set of rules governing war. Schmitt believes that this spatial order of states during the 18<sup>th</sup> and 19<sup>th</sup> centuries in Europe was the reason Europe was able to bracket war and have a just

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<sup>31</sup> *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, 246. The latter half of this quote, on aggressive war, will be discussed later on in this chapter.

enemy. Think of it like assigned seats at a large dinner party. Each person has their own seat, and thus their own space. Seats can be traded if both parties agree it is fair, but in general, people will stick to the seat they were assigned to. Fights may break out, but there are a limited number of people with whom they can break out, because they are surrounded by a specific and limited number of people. Thus so long as people stick to what are essentially assigned conversation partners, fights do not spread to the entire table and ruin the evening. The spatial order of states is somewhat similar. Each state is surrounded by a limited number of states, and wars break out between states that touch each other, but this does not spread across the globe, and other states that are not involved can remain not involved, i.e., neutral or ignore the conflict altogether. Going back to our earlier example of the defeat of Austria, it should be remembered that other non-adjacent states were not drawn into the fighting itself, and France was only brought in (Napoleon, specifically) as the mediator for the peace treaty.<sup>32</sup> Thus the spatial order helped keep the war from spreading. (Or at least, he implies that the spatial order keeps the war from spreading.) There was no way, for example, that Bismarck would have even dreamed of going off to conquer Spain—every state he warred with touched Germany.

Once this order is disrupted, or, to go back to our dinner party example, once the conversations start spreading to people who have not been sat next to each other, and are yelling across the table, chaos can erupt in no small way. Schmitt saw the League of Nations as, because it was an attempt at some kind of pseudo-federal system, a breaking up of the spatial order, giving states an ability to yell across the table, as it were, in the sense that now every state had a relation to every other state in the same way. Physical proximity was

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<sup>32</sup> Kitchen, *History of Modern Germany: 1800 to the Present*, 100.

no longer a decisive factor in state relations. To bring neutrality back into the fold, because the League of Nations brought states together as some kind of unit, however one wants to describe this unit, there became a sense in which one could not remain neutral within the unit. Joining the unit meant adhering to a set of rules, and rule breakers were not to be tolerated. This wiped out the concept of neutrality almost completely, though some states, like Switzerland and Belgium, attempted to retain their neutrality, which further confused the situation. As Schmitt writes in the quote above, this loss of neutrality was one of the events that made WWII possible, as was the confusion created by the dissolution of the existing spatial order. Schmitt in fact fully blames the League of Nations for being the primary cause of Europe descending into another world war.

What are the reasons for this loss of neutrality and thus the loss of the just enemy? One will be discussed later on, which is the creation of the crime of aggression. Another reason, perhaps equally important but far less dramatic, was this imposition of rules within the League for which sanctions could be imposed upon the breaking of those rules. This introduced a kind of peer pressure among states to conform to rules and to judge, and thus not remain neutral towards the rule breakers. On this subject Schmitt writes,

On the one hand, the League remained committed to the interstate, military war of traditional European international law; on the other, it sought, by means of economic and financial pressures, to introduce new means of compulsion and sanction, whereby the non-discriminatory war of interstate international law, and with it the former right of neutrality, would be destroyed.<sup>33</sup>

From this quote one can see Schmitt saw the League as being a contradiction. On the one hand, it tried to retain certain aspects of the structure of war; on the other, it destroyed them by adding elements to international interactions that hacked away at the most basic

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<sup>33</sup> Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, 246.

tenets of this structure. Schmitt sees the first set of sanctions imposed as the key example of this confused international relations, which was on Italy for the annexation of Ethiopia, which was a League member state.<sup>34</sup> These sanctions lasted from 1935-1936 and were what Schmitt called “discriminatory,” meaning they distinguished between “right” behavior and “wrong” behavior, and even “just” and “unjust” war. The annexation of Ethiopia was seen as “unjust” because Italy was an aggressor, and thus a sort of peer pressure in the form of economic sanctions was imposed on it as a kind of punishment.<sup>35</sup> Because the League made a moral distinction in this case (and of course many others down the line), and going back to Schmitt’s earlier quote about the imposition of “ideological demands,” neutrality became impossible. Without neutrality, there can be no just enemy. Thus this crucial concept was destroyed along with the creation of the League of Nations. And as I have stated earlier, the dissolution of the just enemy paves the way for a “war of annihilation,” in Schmitt’s mind, which is precisely what came next.

What of the crime of aggression? To Schmitt, this multifaceted problem was one of the League’s most confusing rules. In his earlier 1937 essay, Schmitt writes that “the concept of the federation presupposes the renunciation of the *jus belli* within the federation.”<sup>36</sup> Thus it would seem that Schmitt saw the outlawing of war more generally as necessary for any federation, which seems intuitively correct, but the crime of aggression was more specific than merely outlawing war. To begin with what it meant to outlaw war,

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<sup>34</sup> Ibid., 242.

<sup>35</sup> The even more confusing thing to Schmitt about this example was the fact that the sanctions were lifted and the annexation recognized legally on July 4, 1936 by several important member states, thus rendering previous moral judgments in the form of sanctions all but meaningless. The League could not even make up its own mind about what should count as “just” or “unjust,” which just further added to the confusion caused by the dissolution of the spatial order and loss of neutrality.

<sup>36</sup> Schmitt, “The Turn to the Discriminating Concept of War (1937),” 71.

one can turn to Schmitt's simple but salient statement, "[j]ustice and injustice cannot be bound to the same concept."<sup>37</sup> Thus for Schmitt, the idea of there being a "just" and "unjust" war is actually nonsensical. As he later states, the real question is, "war or no war?"<sup>38</sup> Why is this? If only one side of a "war" is "just," then the "unjust" side becomes mere criminals or rebels, and such "war" a kind of police action. Schmitt believes, as we have seen many times, that "war" as such is a very specific entity, namely a contest between two parties that see each other as equals. Once one side sees the other as "unjust," or a federation such as the League marks one side as "unjust," this is no longer war, but the "realization of justice."<sup>39</sup> And since "justice" and "war" have nothing to do with each other, as we have seen, such "war" cannot truly be said to be war.

Making "aggression" a crime went beyond outlawing war, according to Schmitt. For one thing, "aggression" was not the only possible crime in this realm. The 1924 Geneva Protocol made three separate but related acts a crime: aggression, aggressive war, and unjust war.<sup>40</sup> The idea of an international "crime" in this sense (as opposed to a crime aimed at the individual like piracy) was a completely new concept in international law, and as it was stated in the Protocol, a confusing one, because on the one hand the focus on the state as the bearer of this crime upheld traditional European notions of statehood, but on the other hand tore them down because it dissolved the traditions of bracketed war, or non-discriminatory war.

It is not necessary for our purposes to go into an analysis of the distinction amongst these three crimes. It is enough to know that the concept of "aggression" as such was new,

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<sup>37</sup> Ibid., 66.

<sup>38</sup> Ibid., 70.

<sup>39</sup> Ibid., 66.

<sup>40</sup> *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, 273.

and because any war begun as “aggressive” was “unjust,” the possibility of both neutrality and the just enemy were precluded from this new international scheme. One cannot remain neutral in the face of a criminal act (or rather it is not morally permissible), and furthermore, a person committing such an act can never be just. To go back to our dinner party analogy, we can liken an aggressor to when Aunt Marge asks a person a rather blunt and invasive question, and everyone turns against her in defense of said person as the yelling across the table begins. This is basically how sanctions work—a state does wrong against another state and suddenly all states are involved via the imposition of sanctions. The creation of such international crimes aimed at states immediately polarize the federation in which such rules apply when such a rule is breached, which is of course exactly what happened in WWII, though in this case the United States and Russia, neither of which were parties to the League, were brought into the fold (eventually, at least).

### **A Note Going Forward**

It should become apparent at this stage that Schmitt, in his discussion of the just enemy, was referring back to a very specific form of war that no longer exists. My reader might be wondering what use such an idea is if its original application is gone and nothing similar has taken its place. Let my reader rest assured that subsequent chapters will make it clear that this concept is applicable to today’s world, and that I have not done this analysis in vain. Because of my amoral definition of the just enemy, I will be able to show clearly how it was, though not in Schmitt’s terms, discussed throughout subsequent time periods and texts by a variety of authors. Next, however, I will talk about Schmitt’s



predecessors, and how they maintained concepts of the just enemy, to demonstrate that, though Schmitt may have coined the term, the idea was not new.

## **Chapter Two: Liberal Theory, or How I Learned to Stop Dehumanizing and Love the Enemy**

### **Introduction**

Since the end of the Second World War, with the reinstatement of the just war under the guise of human rights, both actual battles and political battles have frequently devolved into battles between good and evil. Thus we have returned to moralizing about war, something that Schmitt was very much against. Though this moralizing heavily influenced all the armed conflicts that took place during the Cold War due to the nature of the clash between democratic and communist ideologies, it has continued to the present moment. The “War on Terror,” a term coined by George W. Bush in 2001, contains a wealth of examples of this moralizing. However, the rhetoric used in this period went far beyond mere moralizing, but into the realm of the criminalization and dehumanization of the enemy, by no less than the Commander in Chief, to boot. In October of 2001, President Bush released a statement in which he called the enemy “barbaric criminals who profane a great religion by committing murder in its name.”<sup>1</sup> Though it is impossible to say for sure, is it not entirely possible that this statement, along with many other similar statements from a variety of sources, contributed to the torture and degrading treatment at Abu Ghraib?

We can see echoes of this kind of situation in domestic political conflict as well. In the 2016 Presidential Election, the rhetoric and sentiments towards opponents got quite heated. Worse than that, however, it was often fueled by disgust directed at the candidates themselves. This has continued long after the election. For example, in mid-2017, an

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<sup>1</sup> "Bush Announces Strikes against Taliban," *The Washington Post* 2001.

unflattering photo of Trump in a white tennis outfit went viral, and was photoshopped in all sorts of mean and cruel ways, along with unkind captions. This focus on the body is a sign of the deepest disgust towards President Trump. Even celebrities got on the bandwagon, such as a tweet by Cher showing the photo and reading, “Trump has a mammoth ass and visible panty line,” under which there is a comment reading, “I think he wore the see-through romper to show he wasn't wearing his diaper on that day. He's got big boy pants!”<sup>2</sup>

The disgust was not limited to Trump, however. In October of 2016, a life sized and extremely unflattering naked statue of Hillary Clinton was erected in Lower Manhattan, in which Clinton was depicted overweight, with hooves, and a caricature of a face.<sup>3</sup> This was seen as a potentially worse offense than an earlier naked statue of then citizen Trump that was also erected in New York City earlier that year, due to women's age-old treatment by society based upon their looks. In any case, again, due to the focus on the body, this statue stands as a prime example of disgust.

These unflattering depictions of both Trump and Clinton are colorful examples of the division along party lines that has deepened since the 2016 Presidential Election, but this division has become insidious, infecting nearly all of American politics. The middle has more or less been lost, with the voting out of politicians like Susan Collins, who remains one of the few moderates in the U.S. Senate.

What does the just enemy have to say about this predicament? We learned in the previous chapter that the just enemy is a wartime concept whereby one side can choose to

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<sup>2</sup> Cher, <https://twitter.com/cher/status/878469866121908224?lang=en>.

<sup>3</sup> Associated Press, "Life-Size, Naked Hillary Clinton Statue Appears in Downtown Manhattan," *ABC New York* 2016.

view the other side in a more constructive and positive manner with a view towards containing hostilities. This moves away from the old way of moralizing about war, and into a post-just war world where morality is removed from war, thereby making it possible to view an opponent in a favorable and human light.

But what happens when we uncouple the just enemy concept from armed conflict? At its heart, the just enemy concept is a way of attributing more positive qualities to one's opponents, such as humanity, righteousness, and justness. One could, in theory, find a similar idea in a peaceful context. It is possible to conceive of a kind of political conflict to which war is analogous and as shown above, contemporary political conflicts in the United States have a level of vitriol that resembles the attitude many have towards our opponents in the War on Terror. Thus, what if we said that the type of armed conflict argued against in the just enemy concept is analogous to an intractable domestic political conflict? Though there are obvious differences, namely that uncoupling the just enemy concept from armed conflict is not an insignificant move, this could be a useful way of studying some of the basic ideas in the just enemy concept.

Looked at in this way, there is an entire intellectual tradition devoted to studying issues related to intractable political conflict, namely the tradition of political liberalism. This tradition arose in reaction to the authoritarian governments in Europe in the 19<sup>th</sup> century, which often dictated a national perspective on specific issues, and disagreeing with which could get one in trouble. John Stuart Mill is considered the beginning of this intellectual tradition, and he argued in his seminal text *On Liberty*, that not only is political disagreement not inherently harmful, it is actually necessary for growth: "...the only way in which a human being can make some approach to knowing the whole of a subject, is by

hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind.”<sup>4</sup> Thus it is accepting and learning from disagreement that creates understanding.

With this in mind, it seems that preserving difference and finding a way for society to tolerate it is paramount to building a society that will continue to grow intellectually. Common sense would also tell us that living peacefully with difference is better for one’s emotional health, and society might be overall happier if the reaction to difference is not disgust and hate. If one wants to preserve difference, one must first have an idea of how to exist peacefully with difference in society. What would it take for people who are different and who disagree to live together? The thinkers in this chapter, both liberal theorists, have some ideas on this subject. In this chapter I aim to show some ways in which liberal theory helps explain the just enemy concept and vice versa, and how the just enemy concept might actually be implemented. I will begin by discussing in more depth just what sort of problem contemporary liberal theory is meant to ameliorate, and how the just enemy might help us understand this problem.

### **The Problem**

In the last few decades, as it has become increasingly easy for people to migrate and as wars forced those people to migrate, and as politics in democratic society have become increasingly polarized, it seems as though society is in need of ways of understanding how to live together in relative peace. Democratic societies are inherently pluralistic, full of

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<sup>4</sup> John Stuart Mill, *On Liberty; the Subjection of Women* (New York: H. Holt, 1895), 41.

people and groups with different backgrounds and perspectives, and, importantly, who are allowed to express those perspectives. Obviously these people with a variety of viewpoints are going to disagree on a number of issues, including the most fundamental questions of human existence. These fundamental questions influence the political thought process. For example, an atheist and a Christian disagree on whether or not there is a god. For many Christians, believing there is a god influences their views on hot button topics like abortion or gay marriage, issues that have become integral to political discussions in the United States, at least. Issues such as these can cause extreme feelings like anger or even disgust. Yet somehow, these very people have to live together in one nation and obey the same set of rules.

More recently in American politics, nearly all debate has been infused with disgust and hate, and vindictive political emotions have become the norm. Conservatives and liberals have become seemingly mortal enemies vying for a place of power within the governing structure. Fellow citizens turn into the Other, and suddenly there ceases to be any understanding or even attempt to understand between two sides of the political spectrum. Any time a politician shows a hint of agreeing with something that their political opponents have said or endorsed, they are derided by their base. Most political discussions turn into moralizing, and the morality of one side is incompatible with the other. It is essential now, more than ever, to examine both the basis of this kind of intractable political conflict, and ways in which we might go about alleviating it.

These extreme feelings are amplified further in the War on Terror, to which I am primarily reacting in this project. Because the opponent in this war, whether it be ISIS or whatever the latest enemy happens to be, is so different from our fundamentally Western

ideals, the level of vitriol, anger, and disgust towards these human beings is truly appalling. One hears them described as “barbarians” or “animals,” as if they are, by virtue of their difference, inherently less than human. This is taken as normal or even useful somehow, and thus this rhetoric is never quelled.

### **Nussbaum on Disgust and Anger**

This dehumanization, specifically in the form of identifying other human beings as non-human “animals,” is central to the emotion of disgust, an emotion that all too often permeates political life. In discussing the cognitive components of disgust, Martha Nussbaum writes that “disgust pertains to our problematic relationship with our own animality” and is represented by anything that reminds of us of our common animal origins as they relate to vulnerability and decay.<sup>5</sup> It is a distancing emotion, which treats something unwanted as a contaminant, and which is centrally antisocial.<sup>6</sup> It stands in stark contrast to anger or indignation, which stand in relation to some harm or wrong, and act as incentives to right that wrong. As a distancing emotion, it is not difficult to see why it is socially unproductive—as soon as we feel disgust for another person or group of people, there is no chance for getting along. And because of its irrational basis (what Nussbaum calls “magical thinking”), once it takes hold, convincing people that they should not be disgusted is nearly impossible.

It may seem surprising to turn to Nussbaum in a project largely based off of work by Carl Schmitt. They make incredibly strange bedfellows who are on nearly opposite ends of

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<sup>5</sup> Martha Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton: Princeton University Press, 2004), 89.

<sup>6</sup> *Ibid.*

the political spectrum. However, a look at the just enemy again might provide us with some rationale for this juxtaposition. This comparison is borne primarily of both authors' concern over moralizing in the political sphere. To both authors, moralizing has led to destructive developments, which include the inability to empathize or at the very least, understand the other side of a conflict.<sup>7</sup> To be sure, the situations upon which their philosophies are based are very different. The base state of Schmitt's just enemy concept is one of war; of Nussbaum's writing on vindictive political emotions, it's one of peace. Furthermore, Schmitt is talking about an international problem, and Nussbaum is discussing a domestic one, primarily. However, is it not possible to envision an analogy between the base state of (positive) war and the base state of intractable domestic political conflict? In this age of malicious and venomous political disagreement, it does not seem implausible to create such an analogy.

Just as Schmitt thinks of the just enemy as a different and better way of engaging the opponent in war, Nussbaum believes that it is possible to engage in political conflict in more productive ways. While disgust is a wholly unproductive emotion in politics because of the way it distances parties from one another and creates barriers to understanding, anger has more potential to be useful. In her book, *Anger and Forgiveness*, Nussbaum analyzes the functions and mechanism of anger. She begins by arguing that without some forward-looking mechanism, anger is problematic because it contains what she calls a "payback wish." In other words, there is some thought that when someone is angry, they believe that damage done to the offender will repair the damage done to them. Nussbaum calls this "magical thinking," because it does nothing of the sort. Importantly, what

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<sup>7</sup> I am here, much like Schmitt, thinking of war as part of politics.



separates anger from hatred or disgust is that it focuses on an act. This focus requires a negative moral judgment about that act.<sup>8</sup>

How does one turn anger into something useful? To discuss this, Nussbaum asserts that beyond the traditional forms of anger, there exists something she calls “transition-anger.”<sup>9</sup> Transition-anger is forward looking, and does not include a payback wish. It is an emotion leading to or hoping for action to prevent wrongful acts. Furthermore, her analysis does not speak to the motivation behind an act—it is interested only in the act, itself, and the response to that act, because it focuses on the person or entity who is angry. This kind of anger bears some resemblance to the attitude towards the just enemy. There is no payback wish associated with the just enemy. One can be outraged by an action taken by the enemy, but instead of wishing for payback, one simply desires to prevent future harms. In the case of the just enemy, this prevention takes the form of violence. This wish for payback, because it is a wish to inflict pain or diminish the status of the enemy, is fundamentally dehumanizing, and thus incompatible with the concept of the just enemy. Transition-anger, on the other hand, need not demean or diminish the enemy because it seeks a solution to a problem and thus the moral judgment serves only as a tool to motivate the action taken. In addition, the removal of motivation of the offending act from the conversation about transition-anger is similar to the negation of just cause in the case of the just enemy.<sup>10</sup>

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<sup>8</sup> Martha Nussbaum, *Anger and Forgiveness: Resentment, Generosity, Justice* (Oxford: Oxford University Press, 2016), 262.

<sup>9</sup> *Ibid.*, 35.

<sup>10</sup> The result of this facet of Nussbaum’s account of transition-anger seems to be that offenders with morally neutral or good motivations are not “let off the hook,” and offenders with morally wrong motivations are given the benefit of the doubt. This seems in keeping with the need to hold states responsible for wrongdoing,

The idea that the prevention of future wrongs present in the just enemy takes the form of violence may seem problematic to the analogy between the attitude towards the just enemy and transition-anger. But they are less far apart than one might think. Nussbaum's discussion about revolutionary justice carves out a space for violence, as well. She argues that, unlike some positions, such as that of Ghandi, non-anger (or transition-anger) does not necessarily entail nonviolence. Sometimes violence is the correct response to a political problem. She uses Ghandi's example of Hitler to talk about the fact that violence always had to be the correct response to Hitler, and dealing with Hitler "through nonviolence and love was simply absurd."<sup>11</sup> The problem would never have been solved by peaceful means. Thought of in this way, the analogy between transition-anger and the disposition towards the just enemy seems tighter than it first appeared. The just enemy concept contains violence often because that is the proper or only response to the political conflict.

As discussed above, Nussbaum argues that revolutionary justice requires a form of transition-anger, which is non-anger. The search for revolutionary justice must be completely free of the payback wish, and move straight to the Transition. One example of this is found in the political activism contained in lamentation rituals on the Korean island of Jeju. Heonik Kwan tells us in his book *The Other Cold War*, that these public lamentations of the dead were the primary form of political activism in the 1990s.<sup>12</sup> They stood in direct relation to an event in 1948 known as the "4.3 Incident," in which a large communist

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regardless of the reason, make sure that all criminal acts are acknowledged as wrong, and humanize the criminal.

<sup>11</sup> Nussbaum, *Anger and Forgiveness: Resentment, Generosity, Justice*, 219.

<sup>12</sup> Heonik Kwan, *The Other Cold War* (New York Chichester, West Sussex: Columbia University Press, 2010), 106.

uprising was brutally put down by the U.S. occupying forces, which was thought to be a prelude to the Korean War of 1950-1953. Subsequently, this history was essentially buried in the public consciousness. The lamentation rituals beginning in the 1990s are a revival of this history, in the form of a “moral rehabilitation” those people killed by the counterinsurgency operations of the occupying forces.<sup>13</sup> This response illustrates a primary difference between the just enemy and transition-anger. The anger over the suppression of history and condemnation of loved ones contains a moral judgment about this suppression and condemnation. Though this judgment is free of a desire for punitive action against the offender, it is still inconsistent with the just enemy’s disavowal of morality as it relates to war, and more consistent with just war, which is exactly what the just enemy is meant to combat. This is because transition-anger cannot accept that the injured party might decide from the outset that the offender is “just” in the amoral way Schmitt implies. The only similar kind of decision one could make in transition-anger is to forgive or love the offender, both of which have moral content. In other words, when one begins to look at examples of war, both the just enemy and transition-anger come up short when it comes to judgments made about the enemy: the choices given by transition-anger would force us to love or forgive in impossible situations, and the just enemy would force us to judge the same people as just.

However, this is still an important difference between the just enemy and transition-anger, and indeed underlines the main problem that Schmitt is trying to solve with his just enemy concept. Upon further examination, one can see that examples of transition-anger with regard to armed conflicts post-World War I results in a separation between transition-

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<sup>13</sup> Ibid.

anger and the just enemy. The initial reaction to 9/11 further reinforces this difference. Immediately after the terrorist attack on the Twin Towers in 2001, the U.S. government decided to go to war with Al Qaeda, which was believed to be behind the attacks at the time. Because this is a reasonable response to a morally outrageous (by our standards, anyway) act, it falls neatly under the realm of transition-anger. However, for the same reasons as the Korean War, it falls short of being an example of the just enemy concept. There was quite extreme moral outrage throughout the U.S. in response to 9/11, and while this does not seem unreasonable in itself, said moralizing led to the initial and immediate armed conflict, and also has served to continue subsequent conflicts to this day, a fact that diverges with the amorality of the conflict associated with the just enemy. Indeed, any example of armed conflict, at least that the West has been involved in, after World War I, seems to confirm Schmitt's observation that moralizing about war has returned and become the primary or even sole way we think about war, while also being examples of transition-anger.

Yet, while examples of transition-anger in armed conflict do serve to underscore the differences between transition-anger and the just enemy, there is something fundamentally helpful in looking at the just enemy through the lens of transition-anger. The effects of transition-anger, when applied to armed conflict, could be very similar to the just enemy because actions taken according to transition-anger are not meant to be punitive. Furthermore, transition-anger is viewed as incompatible with the concept of punishment, a characteristic it shares with the just enemy. This is important because it illustrates a key connection between the just enemy and transition-anger, namely the refusal to lower the status of the offender or opponent, in any way, and demonstrates that this essential facet of

the just enemy, the one that is perhaps most connected to action taken against the enemy, may be possible in an environment where war has a moral character. Because this moralizing now seems so ingrained in our consciousness, especially with human rights being an almost ubiquitous framework for armed conflict, this component of transition-anger could be vital in turning some kind of just enemy concept into reality.

This turn to punishment may alleviate some of the discomfort that becomes apparent when turning to actual examples of past and present armed conflicts, because it is based on action rather than emotion or judgment. While finding justness in the enemy may seem like an impossible challenge for the general population (understandably so), the concept of transition-anger as it relates to the disavowal of punishment leads us to a more plausible position, namely that we do not do anything that would lower the status of the enemy, specifically, treat him inhumanely. However, choosing this similarity strips the just enemy and transition-anger of a key difference, as I discussed above, namely a difference between the amorality of the just enemy, and the necessary moralizing of transition-anger. But going forward, does it not seem true that society requires some kind of moralizing over acts? And is moralizing about an act really incompatible with the just enemy, which focuses on the offender rather than an act? I would argue that Nussbaum and Schmitt talk past each other on the issue of judgments about an act. The point of justness being a decision unconnected to morality is to more or less ignore the act in question, because focusing on the act would lead to a focus on the cause of a war, and it begins to be increasingly difficult to avoid the harmful moralizing Schmitt is worried about when discussing the cause of a war. On some level, as soon as there becomes a focus on the cause, is a state not required to view the cause of the enemy's attack or other harmful act as "unjust" in order to fight back?

Why would a state deliberately engage in an “unjust war” in response to a “just” act by an opponent? Or would we be back in that strange medieval situation where both sides are “just”? One could argue that ignoring the cause of the war or initial attack serves to avoid these and similar objections. The just enemy concept would become quite absurd once one starts moralizing about the cause for action taken against the enemy. Thus, because focus on the cause is essential to Nussbaum’s transition-anger concept, it is difficult to compare the two ideas on this issue. I am not willing to put words in Schmitt’s mouth because this question remains somewhat open.

While it is clear that any comparison between transition-anger and the just enemy concept poses problems upon closer examination, the basic idea or purpose of lessening harm and containing conflict still makes this comparison useful. Transition-anger and the just enemy provide two different but related ways of keeping conflicts from resulting in the dehumanization of the other side, and leaving out emotions like disgust and hate. Furthermore, this comparison to the work of the liberal theorist Martha Nussbaum does serve to demonstrate the way in which the just enemy falls under the liberal project of tempering disagreement within society.

### **Rawls on Political Liberalism**

In his seminal work *Political Liberalism*, John Rawls conceives of a political philosophy that does not pick sides and can contain a society that is comprised of a large number of deeply held, conflicting convictions while still managing to work for everyone. In this philosophy, citizens will support a political conception of justice based on these

convictions, which he calls “comprehensive doctrines.” The allowing of citizens to use their own beliefs to provide the basis by which to support this political conception helps to lessen, if not eliminate, the problems presented by pluralism, which are common to contemporary democratic societies. Because pluralism in this case is the existence of a variety of incompatible comprehensive doctrines, this could in theory lead to existential clashes, such as a clash between evangelicals and atheists. Rawls wants to say that even though these comprehensive doctrines are completely opposed to one another, there is no need for this to be an existential clash because they both subscribe to the political conception of justice. Thus regardless of their disagreement, they are still bound by a common cause, if you will. Rawls distinguishes in this case between a public justification for the political conception, which is shared by everyone, and the private justification, which aligns with the comprehensive doctrines of individual citizens. He believes that this “dualism”<sup>14</sup> between the public conception of justice and the numerous private comprehensive doctrines is born out of the establishment of modern democracies.

One can conceive at this point of an analogy between the just enemy and the political conception of justice. Both are designed to alleviate intractable conflicts, creating a situation where, in the case of just enemy, the violence is contained and does not get out of hand, and in the case of the political conception, the conflicts between those with different comprehensive doctrines are contained and do not erupt into violence or anything that causes the political system to fail. However, like with Nussbaum, there is a principal difference between the basis for the just enemy and the political conception of justice. The political conception of justice is obviously a moral idea, detailing what the fair terms of

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<sup>14</sup> John Rawls, *Political Liberalism*, Columbia Classics in Philosophy (New York: Columbia University Press, 2005), xxi.

social cooperation are for society and the state, whereas the just enemy is, as stated before, an amoral concept. Rawls' concept of society is one that is intolerant of the intolerant, as illiberal comprehensive doctrines cannot endorse the political conception, and are thus not included in the terms of social cooperation. This would never be satisfactory for Schmitt, who would argue that Rawls' political liberalism does not go far enough and that the only way one can truly contain conflict is by ripping morality out of the heart of these conflicts.

Contrary to this, Rawls argues that the purpose of the political conception is not to replace any comprehensive doctrine or religion, but rather "to be equally distinct from both."<sup>15</sup> In other words, the problem with the moralizing of the comprehensive doctrine when it comes to the formation of the state is not the moralizing per se, but rather that it is the wrong kind of moralizing. Like Nussbaum, Rawls believes that an element of moralizing is necessary to the promotion of liberal ideas, thus making liberal theory a moral theory. Though the purpose of this moralizing is meant to have a similar outcome as that of Schmitt's just enemy, namely making it possible for people with conflicting comprehensive doctrines to interact in more constructive ways, it comes at it from a completely different perspective. Rawls himself says at one point that the "political conception of justice is a normative and moral conception"; thus even he recognizes the moral nature of his liberal theory, something which is antithetical to Schmitt's just enemy.<sup>16</sup>

The question is then, is this kind of *détente* possible when moralizing still exists? Schmitt would say no. The only way the lessening of hostilities is possible is when you remove those conflicts from the realm of morality because moralizing is part of the problem. But that seems like a tall order, given that the entirety of Rawls' political

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<sup>15</sup> Ibid., xxxviii.

<sup>16</sup> Ibid., xxxix.



liberalism is based upon individuals having different moral conceptions within a single society. Rawls' political liberalism is thus not reconcilable with Schmitt's just enemy, but rather serves to illustrate the different paths that these similar objectives can take, and just what makes Schmitt's just enemy so unusual.

### **Conclusion: Strange Bedfellows**

By now it should be apparent that the relationship of the just enemy to liberal theory is a complex one, largely because liberal theory is a type of moral theory, and the just enemy is amoral. While there are other obvious differences, for example that the just enemy is not confined to domestic politics and its base state is one of war, we have seen that in practice, the primary difference at work is the one of morality, or lack thereof. Yet, despite this important difference, the project of the just enemy, and the project of liberal theory, are quite similar. Both are looking for ways of containing conflict by virtue of endorsing an idea or set of ideas that emphasizes similarity over difference, of rules over anarchy, and of understanding over intolerance. In Nussbaum's work on disgust and anger it is the idea of transition-anger that should win out over more destructive emotions that lead to more divisiveness in society, and with Rawls it is the principle of equal liberty that forms the basis of shared political conception of justice. We have seen how these concepts bear similarities (as well as key differences) to the just enemy, and those similarities may start to show us how the just enemy could be realized.

However, the aforementioned difference in morality may be instructive. In liberal theory, the existence of morality makes it more intuitive, and I would argue more likely to be endorsed. The amoral nature of the just enemy is somewhat problematic, especially

because at first blush, it appears as though it *should* be a moral concept. However, going back to more positivistic views on war could make the endorsement of such a view possible. In other words, war should have a more specific goal, one that is tangible and utilitarian (in the mundane sense of the word) rather than moral. By this I mean something such as regime change or refugee support. Perceived in this way, moralizing is not necessary to achieve these goals. However, the just enemy still seems like weak tea, as moralizing about war is so ingrained in the contemporary mindset.

Perhaps we will find more answers by looking towards the ancestors of the just enemy. The next chapter will explore earlier texts that share some of the just enemy's characteristics. We will do so by analyzing texts from authors as diverse as Vattel to Kant to Rousseau, all of whom at one time wrote about concepts that have features in common with the just enemy. By looking into the potential genealogy of the just enemy, we may be able to see its realization.

## Chapter Three: An Intellectual History of the Just Enemy

### Introduction

So far, we have examined Schmitt's views in detail, and a potential way of understanding the just enemy via an examination of liberal theory. The latter reinforced the notion that the just enemy is amoral, and that it is this characteristic that separates it from other views of war and conflict. At this moment in our present, the idea of an amoral theory of war appears to be tough to swallow. Our study of liberal theory demonstrated that the moralization of conflict is the norm in liberal democratic societies. However, we would do well to remind ourselves that this was not always the case. The moralization of war is both a modern idea, and a very old idea, but there was a period between these times of moralizing, namely in the 17<sup>th</sup> through the 19<sup>th</sup> centuries, where war was viewed amorally. The cliché said about this period is that war was viewed as an extension of foreign policy, but in fact this cliché exists for a reason. The solidification of state sovereignty and the rise of the view of the international sphere as a collection of equal sovereign states, were contemporaneous with the onset of this amoral concept of war in which each war had a specific, finite purpose. Usually it was land acquisition, which stands in stark contrast to the nebulous conflicts we have today, such as the War on Terror, whose goals are very hard to discern. As we will see in this chapter, it is not difficult to understand how such finite goals can exist well with an amoral concept of war.

In *The Nomos of the Earth*, which is largely a work of history, Schmitt gives an account of both the development and demise of positivism in both the laws and practice of war, which is the foundation for the just enemy as I wrote back in Chapter One.

Broadly speaking, the just enemy is based on the Hegelian and Kantian models of state sovereignty, Hegel's and Rousseau's conceptions of war, and Emer de Vattel's conception of the rules of war. The ideas contained in these authors' work lays a foundation on top of which one can build a system of an international arena based on individual state sovereignty, and a positivistic view of war. In this chapter I will show that a study of these texts will lead us to the conclusion that not only is the amorality of war key in situating the just enemy, but it will reinforce the notion that the just enemy is rooted to a specific kind of international order that does not currently exist, one which is governed by amoral war and a positive relation among territorially bound states.

### **The Historical Landscape**

In the international arena of the 17<sup>th</sup> through the 19<sup>th</sup> centuries, the picture of the state as a unified, sovereign entity began to take form.<sup>1</sup> The starting point for this is considered to be the Treaty of Westphalia in 1648, which put an end to Europe's religious Thirty Years War between Catholic factions in the Holy Roman Empire and Protestant factions in France and other powers, and the Eighty Years War between Spain and the Dutch Republic, with Spain recognizing the independence of the latter. Out of this treaty arose a system of what Schmitt calls "spatially concrete" sovereign states, which would continue through the 19<sup>th</sup> century. Schmitt argues that it was this spatial orientation that

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<sup>1</sup> See for example William Doyle, *The Old European Order, 1600-1800*, The Short Oxford History of the Modern World (Oxford: Oxford University Press, 1992); Dena Goodman, "Public Sphere and Private Life: Toward a Synthesis of Current Historiographical Approaches to the Old Regime," *History & Theory* 31 (1992); E.J. Hobsbawm, *The Age of Revolution 1789-1848* (New York: Vintage Books, 1996); Marc Raeff, "The Well-Ordered Police State and the Development of Modernity in 17th and 18th Century Europe," *American Historical Review* 80 (1975); Hans Rosenberg, *Bureaucracy, Aristocracy, and Autocracy; the Prussian Experience, 1660-1815* (Cambridge, MA: Harvard University Press, 1958); Hans Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (New York, NY: McGraw-Hill, 2006).

brought a period of balance and unity to Europe, which allowed for the creation of a new international law, complete with a realization a “concept of a justus hostis,” and distinguishing between the “traitor and [the] criminal in international law.”<sup>2</sup> In other words, in order for a new international law to arise, states had to be distinct sovereign entities standing in some positive relation to one another.

The interaction of these sovereign states in the 18<sup>th</sup> and 19<sup>th</sup> centuries was a that of state-building, state-trading and land acquisition. Wars were fought primarily over territory. Because the French and German Enlightenments favored rationality over religion, a type of leader known as the “Enlightened Despot” began to arise. The nature of these Enlightened Despots and their actions led to the advent of what we would consider to be the modern state, and the collection of which is most likely what Schmitt refers to when he considers the arbiters of international relations as equal sovereigns. These Enlightened Despots were the first to be educated with Enlightenment ideals, though doubt arises as to whether or not their adherence to Enlightenment ideals was sincere. Nevertheless they created a system of bureaucratic, social, and legal reforms that all tended towards secularization.

Because of the onset of rationality as key to all relations, war was considered just a fact among them, and several important wars were fought during this period, such as the War of Austrian Succession, the Seven Years War, and the unification of Germany under Bismarck, an event that Schmitt discusses explicitly in his text. As an exception that proves the rule, the French Revolution was fought for ideals during this time, as well, and though Napoleon’s rise brought the state back to the kind of state Schmitt was interested in, the

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<sup>2</sup> Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europeaum* (New York: Telos, 2006), 148.

ideals of the French Revolution continued in his conflicts. Wars took place between two states or two parts of a state, and did not involve the citizenry deliberately. Rather they were akin to a duel, where two opposing armies came together to battle over land or political title. In other words, they were basically a contest between two princes. This fact was part of the reason that war was limited during this period.

Another reason was what took place between states and diplomats, and between diplomats alone. Governments were completely aristocratic during this time, and often bound together by family ties. These aristocratic leaders had a code of ethics and honor that bound all of them together, and considered each other not enemies so much, but rather competitors. Yet they could be bought, and frequently were, by opposing states in a conflict. This form of bribery was used to get the diplomat to resolve the conflict in the favor of the opposing state, or at least shorten a war, and thus there was a great deal of incentive to limit or “bracket” any war. No aristocratic leader was loyal only to his state or nation, but rather had loyalties that led him outside of his home state. This was often further compounded by the fact that there was quite a great deal of horse trading with these diplomats. One might find the Austrian ambassador in the French court, or a French ambassador in the Austrian court. Thus all of these international ties gave those involved in statecraft the feeling that they belonged to a larger whole than their own state, and this contributed to the containment of war in this European peer group during the 18<sup>th</sup> and 19<sup>th</sup> centuries.

## Hegel's Theory of the Sovereign State

This section will flesh out the kind of state that is the basis for the existence of the just enemy, with the international order, above, in which that type of state finds its home. To Schmitt, the greatest theorist of the kind of international order and sovereign state described above was Georg Wilhelm Friedrich Hegel. His 1820 treatise, *Elements of the Philosophy of Right*, outlines the nature of the sovereign state and how it stands in relation to other states in the international arena. Hegel argues that what he calls “external sovereignty,” meaning sovereignty insofar as a state is related to other states, is based upon the state as an individual, which has a “duty” to retain its independence and sovereignty regardless of whatever must be done to do so.<sup>3</sup> The state as individual thus has a right to pursue whatever ends contribute to the “universal duty” of sacrificing for the individuality of the state.<sup>4</sup>

What does it mean for sovereignty for the state to be an “individual” in Hegel's terms? Hegel writes that the state stands in negative relation to oneself, meaning that it is distinguished from other states.<sup>5</sup> This is the most important thing about the sovereign state, namely that it is an independent unit, independence being something he calls “the primary freedom and supreme dignity of a nation.”<sup>6</sup> Thus the collection of states in the international order is a collection of independent units in which no one unit is above other units, and each unit is free to pursue its end of remaining independent from other units. This extensive independence of the state is of course exactly the kind of international order

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<sup>3</sup> G.W.F. Hegel, *Elements of the Philosophy of Right*, ed. Raymond Geuss and Quentin Skinner, trans. H.B. Nisbet, Cambridge Texts in the History of Political Thought (Cambridge: Cambridge University Press, 2011), §324.

<sup>4</sup> *Ibid.*, §325.

<sup>5</sup> *Ibid.*, §323.

<sup>6</sup> *Ibid.*, §322.

that made the just enemy possible. To Schmitt, the individuality of the states translated into “state territories with firm borders” that led to a situation in which European states were all equal. Furthermore, because no state was above any other state, the institution of the just enemy was possible. After all, the just enemy cannot exist in a condition where a state had the capability to judge another state. This adds a moral dimension to international relations that would be anathema to the just enemy’s amoral nature. The independence of sovereign states present in Hegel’s analysis of the state, keeps a certain kind of morality out of the picture.

The bracketing of war that is concomitant with the just enemy is due in large part to the creation of a new international law, made possible by the way the European states stood in relation to one another and the prevailing rationality of the time. In the 18<sup>th</sup> and 19<sup>th</sup> centuries, because of the kind of state individuality that existed at the time and their positive relation to one another, states could begin to decide upon rules of international law and war. These rules were not codified as we think of them today until the turn of the 20<sup>th</sup> century beginning with the Hague Convention of 1899, but there were a number of jurists, such as Grotius or Vattel (whom we will discuss below) who wrote treatises on the current state of international law, or as it was called at the time, the law of nations. The rules contained in these treatises were generally agreed upon and adhered to, and thus became a kind of semi-codified international law. We might think of this now as something called “international customary law,” which means that they are rules adhered to by custom, not by written rule. There is still a large body of international customary law today.

One might ask what the impetus for the creation of or writing down of these rules was, i.e., why this time and not others. I would argue that the background of the



Enlightenment and subsequent rationalism is necessary to understand why this took place at this time. Before, when religious notions dominated all manner of thought, including that on war and international relations, it would have been impossible to develop a set of rules of war that treated both sides of a war equally and got rid of the concepts of just war, which were ingrained in Catholic theology. Instead, reason and rationality ruled the scene, allowing the thinkers writing about war and international relations to give a more balanced assessment of war and where states stood in relation to one another. This was fueled in large part by the fact that war did not have a moral character and could be viewed in a potentially regulatory way as only something amoral as a practice can be. For these reasons, war was able to be bracketed the way Schmitt endorses, and thus war itself could be discussed in a completely different and strictly rational manner.

This is the intellectual environment in which Hegel argues that international law “assumes the form of an *obligation*, because its actuality depends on *distinct* and *sovereign wills*.”<sup>7</sup> The nation state itself is a rational unit that is sovereign and independent from others, that is further entitled to this independence and sovereignty “*in the eyes of others*.”<sup>8</sup> In other words, international law is an ought-to-be because states are completely autonomous entities, but because states stand in some relation to each other, they have to be recognized by other states as such autonomous entities. Therefore the relation of states to each other is far less tight than the relation of individuals within the state. Hegel calls the idea that states should recognize one another because they are also states “abstract” because it depends on the content of that state, and the assumption that form and content

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<sup>7</sup> Ibid., §330.

<sup>8</sup> Ibid., §331.

are “identical.”<sup>9</sup> Thus while it is not quite the Hobbesian state of nature, because each state’s primary end is its sovereignty, it cannot have the same relations as individuals (humans) to one another. This means that sometimes agreements in the form of treaties cannot be made, and these disputes “can be settled only by war.”<sup>10</sup>

### **Hegel’s and Rousseau’s Theories of War**

This section will explain the attitude towards war necessary for the just enemy to flourish. To continue Hegel’s line of thought, because the purpose of war is to settle disputes, war “should preserve the possibility of peace,”<sup>11</sup> which was often the case during the 18<sup>th</sup> and 19<sup>th</sup> centuries due to the certainty of peace treaties and amnesty clauses. The relation of states as sovereign individuals continues even in war, and thus war is something finite between states, not the institutions contained within the states or the private life of the citizens.<sup>12</sup> Similarly, Jean-Jacques Rousseau writes in his seminal text *On the Social Contract* that “war is a relationship between one state and another.”<sup>13</sup> Schmitt in fact quotes this as “Rousseau’s world-famous maxim” that began the epoch of bracketed war, which is the period in which the just enemy thrived.<sup>14</sup>

What are the consequences of war being between states and not private individuals, beyond the potential for preserving civilian life? This boils down to something we discussed in Chapter One, namely the separation of the enemy and the criminal. Remember

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<sup>9</sup> Ibid.

<sup>10</sup> Ibid., §334.

<sup>11</sup> Ibid., §338.

<sup>12</sup> Ibid.

<sup>13</sup> Jean-Jacques Rousseau, *The Basic Political Writings* (Indianapolis, Indiana: Hackett Publishing Company, Inc, 1987), 145.

<sup>14</sup> Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europeum*, 149.

that Schmitt argues that the distinction between the enemy and the criminal is essential to the existence of the just enemy, and stands in stark contrast to the attitudes towards the enemy that existed during the period in which Schmitt was writing. Because of this separation, the enemy is never viewed as a criminal, as he is part of the state apparatus and war is a formal institution. The criminal by contrast is a private individual, such as a pirate, whose violence does not belong to any state in particular. Only when the enemy is not criminalized can he be just. In contrast, during the 1950s when Schmitt was writing *Nomos*, the enemy was also a criminal, thanks to the outlawing of war by the U.N. Charter. In a resurgence of just war, the enemy cannot be just, and is therefore criminalized as an outlaw.

Arguing along similar lines, Rousseau writes that individual citizens of a state are only enemies by virtue of the states being at war, i.e., they have no personal grudges with the people they are fighting; they are just soldiers meeting in battle. Because of this, even the individual soldier in battle can view his enemy as just, because they both have the same position in the war. In addition, Rousseau argues that a state cannot have a man as its enemy, only another state, because a man and a state are of “disparate natures” and thus cannot relate to one another in any real sense.<sup>15</sup> Going back to our pirate of the previous paragraph, he is not an enemy, like Rousseau says, but has an altogether different relationship to the state, which is no real relationship at all. His nature is disparate from the state. Rousseau continues that a person such as a pirate, or anyone who causes harm to the citizens of another state without a declaration of war is a criminal, just as Schmitt says. In other words, there is a big difference between the enemy in a situation of formal war, and

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<sup>15</sup> Rousseau, *The Basic Political Writings*, 146.

the criminal who simply breaks rules. Only the enemy can be afforded the description “just,” as a criminal can never be just. This fact may actually be the foundation of the majority of problems that we currently have with our modern thinking about war. With war outlawed, anyone who takes up arms is automatically a criminal, and this creates no space for thinking of that entity as a just enemy. It does not require much of a leap to realize that ability to reasonably, within the current system, condemn the other side of a war as a criminal (even if perhaps you are one also), means that any framework of respect or humane treatment is obliterated. It is only human that psychologically criminalization leads to dehumanization, and from there all manner of atrocities can take place. We must ask ourselves if the outlawing of war was really the answer to the ills of the early 20<sup>th</sup> century. Perhaps the better framework is one created by Hegel or Rousseau, that separates the enemy in war from the criminal, and creates space for the fair treatment of a just enemy.

### **Kant’s Unjust Enemy**

Immanuel Kant’s treatment of the enemy seems to have a double face, and serves potentially as a viewpoint that stands in contrast to the one required for the just enemy. This section will explore what this double face can tell us about the nature of the just enemy, and how Schmitt read or did not read the just enemy into Kant’s analysis. On the one hand, Kant reinforces the idea that in the current international order, war is just another relation between equal sovereign states. On the other hand, he seems to endorse some notion of just cause through a discussion on the “unjust enemy.” Obviously there is a contradiction here, because this implies that one state is fit to judge another state, which

makes them unequal. Contrary to the unjust enemy claims, Kant writes, “No war of independent states against each other can be a *punitive* war.”<sup>16</sup> He continues that the implication of punitive war is that one state is superior to another, but that states stand in a different relation to one another. Thus Kant here seems to be content with what Schmitt believes was the status quo at the time, namely an order of equal sovereign states. He further says that “the right of nations” can only involve disagreements where all states are able to maintain that which is theirs, meaning a state cannot gain more power at the cost of another state’s power.<sup>17</sup> This situation seems to make space for the just enemy, since it implies that no state can be more just than another state. In addition, because Kant is a firm believer in the right to neutrality, this reinforces the just enemy concept and the amoral state of war.

However, shortly thereafter, Kant begins to discuss the fate of the “unjust enemy.”

He defines it as

“an enemy whose publicly expressed will (whether by word or by deed) reveals a maxim which, if it were made a universal rule, any condition of peace among nations would be impossible and, instead, a state of nature would be perpetuated.”<sup>18</sup>

Schmitt’s own analysis here is important. He argues that the unjust enemy is a sort of lawless figure which provokes action among states in order to protect the freedom of the state who is under threat, even if by preventative war. This seems to imply some sort of fellowship among states in which other states would feel compelled to come to the rescue of a threatened state, similar to the system we have now with the United Nations, and in

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<sup>16</sup> Immanuel Kant, *The Metaphysics of Morals*, ed. Karl Ameriks and Desmond M. Clarke, trans. Mary Gregor, Cambridge Texts in the History of Philosophy (Cambridge: Cambridge University Press, 2011), §57.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid., §60.

stark contrast to the notion of equal sovereign states where one state cannot be more just than another.

What would be an example of an unjust enemy? Kant gives only one:

“Violation of public contracts is an expression of this sort. Since this can be assumed to be a matter of concern to all nations whose freedom is threatened by it, they are called upon to unite against such misconduct in order to deprive the state of its power to do it.”<sup>19</sup>

One can imagine that an international treaty would be one of those “public contracts,” and that a treaty such as one of amnesty or peace would target a specific state that might feel threatened upon the treaty’s violation. The rationale is presumably that a state that breaks one contract could break any contract, and this makes it a danger to all the other states. Thus all states have a duty to unite against such a rogue state in the defense of the threatened state.

For Schmitt, however, this is not enough. He sees the above statement as merely an extension of an already existing mantra, not an actual example that might help us understand what exactly Kant is talking about. Nevertheless, one thing is clear to Schmitt, namely that this sounds like “the old doctrine of just war.”<sup>20</sup> This could be one in which, as I said above, states could gather together to defeat a common enemy, one that, as Schmitt puts it, was a grave threat to the future of the existing order. This is not a unique idea, but the notion of ripping the just enemy from such a coalition would stand in stark contrast to the work of the jurists of the 18<sup>th</sup> century, according to Schmitt. It would also stand in stark contrast to the actual order of the time, one whose horse-trade and familial relationships of

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<sup>19</sup> Ibid.

<sup>20</sup> Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europeum*, 170.

diplomats led to a European feeling greater than any nation but preserving the power of individual princes to make their own decisions for their states.

Despite the appearance of advocating for some kind of just war theory, which Schmitt believes is just another war of appropriating land, Kant argues that the territory of the vanquished state should not be divided up, as this would be an injustice to its citizens. As far as Schmitt is concerned, this makes Kant a great humanitarian and one who rejects some of the ideas contained within just war theory. However, the victor does have some rights against the vanquished state, according to Kant. It can force the vanquished state to rewrite its constitution so that it is unlikely to go to war again. This seems like quite a disruption for the citizenry as well, though it is likely Kant thought that this would be favorable to it and thus a worthy disruption.

Ultimately to Schmitt, the whole thing leaves more questions than answers. Kant essentially gives conflicting accounts of the just enemy vs. the unjust enemy, appearing at once to endorse both the former and the latter at the same time. It seems like this cannot stand, and these endorsements together are why Schmitt says about Kant that he is only a philosopher and ethicist, but a rather poor jurist. It seems as though on the one hand, the right of states not to be judged by other states is paramount to a peaceful international society, but on the other someone who breaks the rules of the international society is unjust, and suddenly such judgments about states are necessary and prudent. Thus it is hard to see who exactly in history might be an unjust enemy, and where Kant's system might prevail. The just enemy only belongs to a system where states cannot judge other states, and never in a situation where one leaps to the defense of a state against a "rule-breaking" state, which would be immediately outcast as a criminal.

## Vattel and the Laws of War

In this section we will discuss the kinds of rules that exist in the epoch of the just enemy, and what may be necessary for the just enemy to flourish. Emer de Vattel was the first jurist to indirectly codify, by way of writing his treatise on the law of nations, the rules regarding sovereignty and war as a contest between two equal sovereign states. To Schmitt, Vattel's writing in the 18<sup>th</sup> century marks the firm institution of "war in form," due to the international order now consisting of a spatial system that benefited everyone. The very existence of this set of rules by Vattel implies that the thinking on war had changed since the period of just war, and was now able to be regulated in a more complete sense. This was of course the case, as war had become a contest between two princes rather than a contest of ideals, as we have seen in an earlier section. Vattel writes in his 1758 text, *The Law of Nations*, with regard to this international order, that

"we must necessarily have recourse to rules that shall be more certain and easy in the application [than the law of nature], and this for the very safety and advantage of the great society of mankind."<sup>21</sup>

In other words the international order is benefitted by having concrete rules that can be followed during both peace and war, and that this would improve relations among states. Continuing on, he writes war must be just on both sides, which is a way of saying that war and justice have nothing to do with one another. Obviously this is a far cry from the rules of just war, and in fact negates its basic ideas. Vattel believes that this basic rule is necessary for the formation of any sort of order or further rules, and the possibility of peace. This is similar to Schmitt's idea that in order for a new international order to arise,

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<sup>21</sup> Emer de Vattel, *The Law of Nations* (Indianapolis, Indiana: Liberty Fund, Inc., 2008), §189.



states had to be standing in a positive relation to one another. Otherwise no kind of cooperation is possible and thus no international order. If war is just on both sides, and there is therefore no attempt to judge one state superior to another, then it is possible to create rules within that system of equals, and preserve the possibility of peace. This means that, to quote Vattel, any consequence stemming from war does not “depend on the justice of the cause, but on the legality of the means themselves,—that is, on every thing requisite to constitute a *regular* war.”<sup>22</sup> This means that states could only be judged on how they conducted war, not on why they went to war, hence the existence of rules for the conduct of war. Because equal sovereign states could no longer attempt to judge each other on the justice of the cause of a war they were conducting, wars could not escalate to the same hostility as before. As we have seen in previous chapters, it is moralizing that often makes people (and states) go to extreme ends for their cause.

It is worth drawing attention to a real advantage of making war legal, something I began to discuss in a section above, which is demonstrated by the customs and laws of war during this positivistic era. If one reads the entirety of Vattel’s *The Law of Nations*, one can see that the laws of war he writes about are not that different from the Geneva Conventions of 1949. One might ask why no more “progress” has been made in terms of these rules. Is it simply that they were already perfect? Or does it not stand to reason that something can only be regulated properly if one does not view it as morally reprehensible to begin with? I believe that this is the main reason that the bulk of the ideas we now know as international humanitarian law were created during the 18<sup>th</sup> and 19<sup>th</sup> centuries, when war was formal

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<sup>22</sup> Ibid., §190. It should be noted that “regular” here does not mean “normal” or “typical,” but rather something that is regulated.

and legal, and why they have not caught up with the type of moralistic warfare we now conduct.

Furthermore, it is simply illogical to “regulate” something that is illegal, and let us make no mistake that the laws of war are regulations. It is a bit like saying that murder is illegal, but if one is going to murder anyway, it should only be done in a particular way, and done in this way, murder is legal. We would never say this as it is simply preposterous. If one goes so far as to outlaw a practice, there are no circumstances where any behaviors in that practice are going to be legal in normal circumstances. Yet this is precisely how war is treated now. The crime of aggression, i.e., starting a war, is rarely prosecuted. (Of course no doubt part of this is political, given that states that seem to start wars the most are often the most powerful.) Yet people are prosecuted for individual war crimes, or alternately, if they adhere to the rules of international humanitarian law, they are left to their own devices. If war is illegal, should not every act under it also be illegal?

In fact there is a debate in the literature on international humanitarian law about whether or not this should be the case. Yet this seems bizarre to start with, if we think of other practices which are outlawed, and how we treat those practices, such as murder, burglary, rape, etc. Why does war, if it is illegal, get so many special privileges? There seems to be no satisfying answer for this, unless we look back to what thinkers such as Vattel believed war to be, namely a contest between two sovereign entities. With the ability to recognize belligerency and insurgency now, one could argue even a non-state actor can be treated as a sovereign entity, and thus it is not impossible to imagine situating Vattel’s rules of and thought about war onto contemporary conflicts. If we were to think of it more this way, suddenly the regulation would make sense, and prosecutions would become

simpler and sensible. Of course we cannot think of war in this way now, because of its moral character. The rules of war no longer make the same sense they once did, because of the implicit decrease in protections for civilians under the rule of total war, at least in practice. As we shall see in the next chapter, this is the key to understanding contemporary conflicts and losses.

Continuing with Vattel himself, one of the key passages states that during a regular war, both sides are permitted to do the same things. This is the result of the equality of sovereign states, which was the basis of what Schmitt writes is the “logic of an interstate international law.”<sup>23</sup> Because all states stood as equals, no state had a right to judge any other state for its actions. This meant that international law could apply to all states in the same way, and everyone could adhere to the same set of rules. This is the only scenario in which the just enemy can play out, according to Schmitt. Any other scenario would permit of the evaluation of just cause, and the reversion to the rules of just war, in which, as we have seen, there can be no just enemy. The result of this equality of states and the imposition of the rule of law onto war was that states never complained about the fact that another state was going to war, but only whether or not the state stayed within the limits of international law. Thus with the notion of just cause all but erased, the only grievance one state could have with another during war is that the state in question was not obeying the laws of war.

That the breaking of rules was the only objection a state could have to another state’s behavior is a signal that this was a coherent international order. As we learned in Chapter One, this was in part because of, to quote Schmitt, the “spatial order of territorial

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<sup>23</sup> Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europeum*, 167.

powers on European soil.”<sup>24</sup> For a moment let us remember the dinner party analogy back in Chapter One. As we may recall, the spatial order in which Vattel is writing is like a dinner party where guests only speak to the person sitting next to them, and thereby keep the atmosphere and conversation to a fairly relaxed level. Because of this, old or new grudges between relatives do not break out into massive fights. However, our contemporary situation looks like a rather different dinner party. The organization binding states together, the U.N., creates a situation where, if we continue the analogy, conversation is allowed between any guests. Thus if a fight breaks out in one place, soon everyone is yelling across the table and chaos breaks out, because people will immediately take sides in that disagreement. Similarly, the way an international organization such as the U.N. creates a situation where we can interact with states that are nowhere near us means that the entire world can get involved in a fight that began between two states. Vattel’s desired spatial orientation of states is implied to be the first option, namely where states only engaged with the states next to them and thus his firm international order could not exist without such a spatial orientation that created strict borders and limited disputes between states.

This is ultimately what makes it possible to have the only accusations between states during war being those of breaking the laws of war. Without a positive relation between sovereign states, there could be no rules to break. Rulemaking requires some basis for agreement among states, and all European states could agree on their sovereignty and how that made them stand in relation to one another. Each state stood from a theoretically equal position of strength to every other state because of this. In actuality of

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<sup>24</sup> Ibid., 166.

course some states were certainly stronger than others, but the theories of state sovereignty governing relations between states gave them a theoretical equality necessary for the creation of treaties and rules. Contributing to this equality was the fact that the European states had a particular spatial orientation, as stated above, where they were rigidly bordered and took care of issues within themselves without the help of other states. This meant that those treaties and rules affected every state the same way and that states had no control over the inner workings of other states. Thus states could come to view any rules as fair, and this is the advantage of this positive relation that Vattel argues for. As we have seen, the way he conceived of relations between states allowed him to build upon existing customary law to create a system of rules whereby states can both coexist peacefully and wage wars without undue damage and destruction, as much as that is possible.

### **Discussion: Situating the Just Enemy**

One thing should become apparent after learning about Schmitt's influences, namely that the attitude they have about war is entirely dependent upon a certain international order that existed at the time. This international order was free from any sort of institution that would bind states at an international level and facilitate contact between states that did not touch each other, such as the League of Nations or the United Nations. It was an order in which no state could judge another state because every state was equal to every other state. As we have seen, it was an order in which regulation of war was possible, because war was viewed as amoral, and this prevented armed conflicts from spilling over into too many states and instigating a world war. All of this was made possible by a Europe

that was made up of equal sovereign states that stood in a positive relation to one another in a way necessary for the creation of treaties and rules. This kind of communication between states necessary for this creation of rules was in part a consequence of there being nothing higher than a state in terms of governing bodies, which stands in contrast to our current international situation, where we have the United Nations. These characteristics made it an international order in which war was considered a contest between two sovereign states, and not any sort of crime. At this point, Europe was a collection of sovereign states that sometimes had disputes with one another that were settled by formal war.

What is the most important piece to examine from Schmitt's time period of the just enemy versus the situation in which he wrote, and we live? I would argue that it is the type of positive relation between states that existed then vs. now. The above authors experienced a kind of international situation where states generally only had relations with states next to them, and thus conflicts never spun out of control. Furthermore, because all states were sovereign and equal to one another by virtue in part of being ruled by a single individual, war came to be a contest or duel between princes. This made it rather easy to view war as amoral, which appears in the writing of these authors. Vattel's status as a jurist would have made him more of a source to draw upon for people actually practicing any sort of international diplomacy, and of course he writes "that regular war, as to its effects, is to be accounted just on both sides."<sup>25</sup> This is naturally as good as saying that whether or not a war is "just" is irrelevant since it strips "just" of any meaning whatsoever. This was no

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<sup>25</sup> Vattel, *The Law of Nations*, §190.

longer a factor in terms of the how states treated one another during war. As we have seen, this is the attitude required to have a just enemy.

As we have seen, Schmitt thought that an international body such as the League of Nations was detrimental to attitudes about war in part because it created a group that was of a legally higher order that could pass judgment on states. Immediately the world found itself in a situation where a higher body was the arbiter of justice in the international sphere, and something that was certainly not an option during Schmitt's chosen time period could exist, namely collective action against a state that committed some sort of offense against the international community, something similar to what Kant suggests should exist. This situation of course injected some form of morality into war, because war was outlawed among member states, and this was clearly not a time of positivistic thinking about the law, despite a few lone jurists who still maintained some notions of positivism.

Though the League of Nations is long gone, the United Nations continued many of the same traditions, the most notable for our purposes being the outlawing of war altogether, which is in the U.N. Charter. Because of this action and the existence of the United Nations, we are now in the exact opposite situation that Schmitt found admirable about the time of the just enemy. Once again we have an institution capable of judging states, and thus forcing a morality onto war that did not previously exist, and further forcing states to choose sides in a conflict simply by virtue of the collective existence.

There is no question that, like in the previous chapter, this examination of these texts has taught us that amorality is key for the existence of the just enemy. However, in addition, we now also understand better the theories of the state that accompany this amorality, and they are far removed from our current practice of statehood and

international law. We now find ourselves deeper in the position that the just enemy most likely does not belong in our present context. In the next chapter we will examine modern theories that touch on the just enemy, and the fact that they still endorse a morality of war.



## Chapter Four: Morality and War in 20<sup>th</sup> Century Contexts

### Introduction

In the previous chapter, we saw how firmly situated the just enemy is in the 18<sup>th</sup>-19<sup>th</sup> century European international order, where states were concrete territorial sovereign entities whose common relations included war as a kind of duel. Under these circumstances, war was limited to the military only, and civilian deaths were relatively uncommon. By the First World War, the situation had changed, and war took on a “total” character, meaning that every aspect of the citizenry became involved in the war, and, despite prohibitions in the Hague Convention of 1899, civilians became legitimate targets in practice. Over seven million civilians died in World War I, including approximately one to one and a half million in the Armenian Genocide of 1915, which was denounced by some powers as a “crime against humanity” at the time. Civilian deaths on this scale were previously unheard of, and represent a shift in the thinking about war that took place during this period of the rise of both democracy and nationalism, which, as we will see in the text of Hans Morgenthau below, may have gone hand-in-hand.

What was this shift from the 18<sup>th</sup>-19<sup>th</sup> century style of amoral (perhaps more “pragmatic”) warfare to total war? In the early 20<sup>th</sup> century, beginning with World War I, war began once again to take on a moral character. In Schmitt’s essay, “The Turn to the Discriminating Concept of War,” he writes that Woodrow Wilson’s pronouncement about “making the world safe for democracy” as the reason for entering WWI marks the beginning of this turn.<sup>1</sup> This declaration gave the war an ideological character, and one in

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<sup>1</sup> Carl Schmitt, “The Turn to the Discriminating Concept of War (1937),” in *Writings on War*, ed. Timothy Nunan (Cambridge, MA: Polity Press, 2011).

which there was a distinct morally “right” and “wrong” side. Suddenly war became a kind of holy war yet again, and Schmitt writes that it was not so different from the morality of a Crusade.<sup>2</sup> This made it altogether more dangerous and more importantly, more lethal. While a citizenry might not be able to get fired up about a contest between princes, they could certainly rally behind an ideology, making total war possible. This huge expansion of the mechanism of war also expanded “legitimate” targets due to the fact that so many regular citizens participated in some capacity in the war effort.<sup>3</sup> Therefore the civilian loss was something worth risking in order to save the world with a state’s preferred ideology.

This holy war morality has continued to the present day and we are continually made aware of it in the news about current armed conflicts. In this chapter we will investigate the possibility of a just enemy within modern contexts by examining work from Jacques Derrida, Thomas Nagel, and Hans Morgenthau. While each of these authors professes some of the tenets of the just enemy, we will see quickly that we are back to the same conundrum we had in Chapter Two, namely the question of disconnecting morality from conflict. We will also see the just enemy decreasingly present in the authors as we start with Morgenthau, who has a similar mentality to Schmitt, and end with Derrida, who embraces the holy war morality.

Back in Chapter One we learned that the just enemy is an amoral concept that is primarily agent-centered, in terms of it being a decision we make on how to view our enemy. Rather than making our enemy morally just, it instead removes morality from the question of the enemy, and war more broadly, completely. In Chapter Two, when we

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<sup>2</sup> Ibid.

<sup>3</sup> I use quotes here because of course this kind of civilian targeting was not actually legally permissible, but it took place anyway.

explored the relationship of the just enemy to liberal theory, we learned that while the projects of liberal theory and the just enemy are rather similar, they get to that understanding from completely different places. Liberal theory is impossible to separate from morality, and this in fact makes it more intuitive. On the other hand, the just enemy requires we remove ourselves from moral questions when thinking about conflict. We decided that this made the just enemy difficult to swallow under any contemporary circumstances.

However, with this different set of authors, we will find ourselves in a somewhat similar position, because while all three authors lament our treatment of the enemy in some fashion, none of them even begin to think of the removal of morality from the enemy question. Are they at all successful in convincing us that we should have this different viewpoint of the enemy without the removal of morality? This chapter will explore this question in detail.

### **Morgenthau: Echoes of 19<sup>th</sup> Century Europe**

Morgenthau, in his text *Politics Among Nations*, has a viewpoint of just cause that is significantly different than the holy war morality thinking of the time, where the spread of democracy is the ultimate just cause.<sup>4</sup> He seems to reject just cause altogether, while retaining some notion of what he calls “international morality.” As we shall see, changes in the notion of just cause go hand-in-hand with changes in the concept of the enemy.

Morgenthau, who was himself a statesman, recognizes the toxicity of the holy war morality. He blames the rise of democracy and with it nationalism as a kind of “standard-

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<sup>4</sup> Hans Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (New York, NY: McGraw-Hill, 2006).

bearer[] of [an] ethical system” for the destruction of what he calls “international morality.”<sup>5</sup> Simply put, the resurgence of the holy war morality, which is the imposition of morality onto war, is actually immoral, or at least antithetical to an international moral system.

At first blush it might seem like a strange thing to say, but a closer examination of the kind of morality nationalism imposes will bring us closer to understanding its destructive power. Like Schmitt, Morgenthau begins with an analysis of a positivistic era of limited war in the 18<sup>th</sup> and especially 19<sup>th</sup> centuries.<sup>6</sup> He argues that this period in history was characterized by personal relationships between aristocratic diplomats, and that this created an international system of shared morality and interests. One reason for this is that states would often bribe the ambassadors and foreign ministers of other states for favorable outcomes in treaties and conflicts, or even alliances. This was a largely successful endeavor, and gave the diplomats loyalties that lay outside their country of origin. Furthermore, states would often trade diplomats. For example, Morgenthau writes that the Austrian ambassador to France would have felt more at home in Versailles than in the court of his country of origin.

This trade of diplomats bound European states together in a way that made alliances more possible and shortened the length of conflicts, because it would have been possible to bribe the diplomats of the other side to avoid too much bloodshed. Ultimately all this horse-trading and bribery led to an aristocratic system of conduct and shared morals, where loyalty was supranational rather than national, and where personal honor was more important than loyalty to one’s country of origin. Morgenthau quotes University

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<sup>5</sup> Ibid., 262.

<sup>6</sup> See *ibid.*, 252-55.

of Cambridge professor John Westlake in 1894 about this supranational loyalty, in which he says,

“It is almost a truism to say that the mitigation of war must depend on the parties to it feeling that they belong to a larger whole than their respective tribes or states, a whole in which the enemy too is comprised, so that duties arising out of that larger citizenship are owed even to him.”<sup>7</sup>

The system that contributed to this larger whole was a very personalistic system, writes Morgenthau, and such a system is impossible without the whole of government resting in the hands of one person.<sup>8</sup> This is the only way there can be agreement on international morality, because there has to be one single conception of morality coming from each country in order to have a meaningful character of international affairs. As we shall see below, Morgenthau blames the loss of this international morality squarely on the shoulders of democracies.

The foregoing analysis, much like Schmitt’s analysis of this time period, seems to romanticize the relationships between states, and the type of statecraft that existed to maintain international order. While it neglects to mention any of the negative elements of having these personalistic, aristocratic governments, it does make up for some of the deficiencies in Schmitt’s argument about these centuries. Specifically, it explains in much better detail why these connections between European states existed to the extent that they did. Schmitt is a bit foggy on this point, and is much more inclined to present the larger picture without this attention to these particular details.

However, Morgenthau’s analysis of diplomatic relations during the 18<sup>th</sup> and 19<sup>th</sup> centuries does provide us a window through which to see why war was limited during that

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<sup>7</sup> Quoted in *ibid.*, 250.

<sup>8</sup> *Ibid.*, 257.

time. Because the states overlapped through exchange of diplomats, there was more of a European character than a simply national one. Wars were just contests between princes, with the duel-like character Schmitt discusses in *Nomos*. They were not backed by an ideology, and completely negated the idea of just cause. This meant that there was no need to annihilate the other side, as there would be later. Armies were made of professionals, and states aimed to keep their assets alive, furthering the call for limited war. Additionally, these contests between princes were only contests between armies—the rest of the citizenry would have had no interest or role in the war. This completely changed with the onset of total war, as we will see in one of the following sections.

Morgenthau's analysis has an important difference to Schmitt's analysis of this period, namely that he believed it was a time of moral virtue, rather than mere amoral pragmatism. To Morgenthau, the relationships between diplomats were morally good, as was the system of international morality he describes. Limited war somehow fit into this moral system, though he recognized that there was no concept of just war during this time. He certainly would not have described this era as "positivistic," like Schmitt does. In fact it is hard to tell what precisely Morgenthau believed was in place of the just war tradition. He speaks of personal relations between diplomats as having an impact on the lessening of "long-drawn-out wars," but fails to say what sort of system governed war specifically.<sup>9</sup> It is certainly implied to be something closer to positivism, but on the other hand it clearly has some connection to the morality of personal honor and some type of cosmopolitanism. Interestingly, it is all down to the individuals involved in the conduct of war and statecraft themselves, and this goes for the entire international system. It would seem it is personal

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<sup>9</sup> Ibid., 252.

honor that feeds proper moral conduct, not some desire to do “good” in itself. In other words, it is not an ideological system in any respect.

Is this really an international moral system as we would call it, i.e., one governed by moral rules? Or does Morgenthau’s analysis actually describe a system of competing personal interests that happened to keep everyone in check by virtue of the fact that retaining one’s honor was of the highest importance? Even such a personal system could contribute to a shared European character and understanding, as everyone involved would know the rules of maintaining honor among their peers. Yet the rules of maintaining honor do not seem like moral rules, per se, and thus to speak of the “international morality” of this time seems like one is speaking more of the “accidental” consequence of following what is really a system of code of conduct to maintain one’s honor. Perhaps this is parsing this idea too far, but I see a difference between what Morgenthau calls “international morality/ethics” and what he later calls “national ethics,” in terms of whether that system is governed by personal interest or ideals, respectively.

Perhaps looked at this way, Schmitt and Morgenthau are less far apart than they appear at first blush. Though Schmitt would never have called it an “international morality,” he surely had a feeling for the system of personal honor governing diplomatic relations, given his romanticism of the aristocratic statesmen and sovereigns of this period, particularly his views on how sovereigns related to one another as peers and equals. The very idea of war being a “duel” implies a concept of personal honor governing state relations. Are Schmitt and Morgenthau therefore talking about the same thing by different names? Or is Morgenthau’s concept of “international morality” truly a system of morality and not personal interest? I would argue that because Morgenthau’s system of

“international morality” is not ideological, it is not a moral system in the way Schmitt implies is absent during this period, or in fact even in the way that Morgenthau implies is absent. The imposition of morality as we would normally speak of it onto international relations and war would come later, and in fact Morgenthau discusses this in great length further on in the text.

Thus Morgenthau and Schmitt likely had almost identical concepts of limited war during this time period, and both seem to be advocating for such a system. It would be fair to say that Morgenthau’s ideas about war and international conflict during the 18<sup>th</sup> and 19<sup>th</sup> centuries had space for the just enemy, and the way he discusses the exchange of diplomats implies that this was the case because of the existence of all these positive relations, even though he does not use the same terminology as Schmitt. To put it in Schmitt’s terms, Morgenthau did not believe that the idea of just cause existed during the 18<sup>th</sup> and 19<sup>th</sup> centuries, and this made way for the existence of the just enemy. Yet again it is the absence of just cause, or any kind of ideological war, that creates this space. As we shall see, unlike Derrida above, as well as Schmitt, Morgenthau rejects the idea of just cause and the holy war morality present in contemporary ideological warfare.

Morgenthau largely blames the rise of the just war tradition on the rise of democracy. He argues that such a system of international morality could not exist when power did not rest in the hands of one person. This is because the diplomats and statesmen were dependent upon the will of the people, and the people could not possibly have only one idea about how to govern international affairs. Morgenthau writes that those promulgating the rise of democracy were optimistic about democracy’s ability to unite the world under the banner of universal humanity, but in fact all the rise of democracy led to



was the rise of particular nationalism.<sup>10</sup> In a way, nationalism is a rational consequence of democracy, because the people now governed the state, and could take pride in this in some capacity, and officials were loyal to the people. This was a positive feedback mechanism that led to the nation becoming, as Morgenthau states, “the ultimate point of reference for the allegiance of the individual.”<sup>11</sup> Therefore there could be no supranational system, no one set of rules governing all states, because the state was the real arbiter of morality.

To Morgenthau, this meant a deterioration of international morality and the rise of the holy war morality and just cause. Like Schmitt, Morgenthau saw the 20<sup>th</sup> century as a century in which conflicts were essentially when “the moral code of one nation flings the challenge of its universal claim with messianic fervor into the face of another,” i.e. when the holy war morality takes over and every war is conducted with a just cause.<sup>12</sup> Clearly in the face of this international situation, there is no space for a just enemy, just like Schmitt lamented, himself. Morgenthau believes that this present conundrum began with Woodrow Wilson’s proclamation that his war was to “make the world safe for democracy,” thus beginning a period of a crusade for democracy, which I would argue continues to this present day.<sup>13</sup> As we will see below, this holy war morality paved the way for the existence of total war, which was far more destructive than the limited wars of the 18<sup>th</sup> and 19<sup>th</sup> centuries.

Morgenthau’s analysis, because it presents a picture of democracy that is at once destructive and nationalistic, offers a bit of a conundrum for the modern Western reader,

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<sup>10</sup> Ibid., 258-59.

<sup>11</sup> Ibid., 259.

<sup>12</sup> Ibid., 262.

<sup>13</sup> Quoted in *ibid.*

who likely believes that democracy is the best form of government. While I do not want to get into a discussion on what the best form of government is, suffice it to say that Morgenthau's analysis does complicate what we believe to be the universalism of humanity and democracy. Schmitt of course believed that these universal ideas were very dangerous, and like Morgenthau, blamed the existence of annihilation as a worthy goal in warfare on universal ethics governing the conduct of war. For both authors, just cause is that which taints every aspect of war, creating opportunities for war to exist in every space in society, and the absence of it is what leads to the limited warfare they both endorse, and to some extent romanticize. To be fair, both thinkers were born at a similar time in Germany (Schmitt in 1888 and Morgenthau in 1904), and educated there, and both lived through the especially turbulent Weimar Republic after a relatively calm period of German aristocratic government. Undoubtedly this has some impact on why both thinkers come to such similar conclusions on the advantages of aristocratic rule and the disadvantages of democratic rule. In any case, the primary lamentation about the resurgence of the holy war morality was the infiltration of war into the fabric of society, i.e. the onset of total war as being common to every modern war.

Since the resurgence of the holy war morality in World War I, war has become total, meaning that the war mechanism involves a huge segment of the civilian population. This could in theory include everyone from arms manufacturers to the farmers that make the food that feeds the military. The idea that civilians would be involved in the war effort stood in stark contrast to the limited war of the 18<sup>th</sup> and 19<sup>th</sup> centuries, in which the civilian populations were mostly unaffected by the activities of the military. This is because after the Thirty Years' War, the common conception of war shifted from war being a contest

between all persons in the states in question, to being a contest between those states' armies.<sup>14</sup> Therefore the civilian population in a state was no longer a legitimate target of attack, even if at times civilian deaths were considered a regrettable consequence of war.

It was during this time that various protections for civilians and human life more generally began to take a coherent shape, until they were codified beginning with the Hague Convention of 1899. This included protection not only for civilians, but also for the wounded and prisoners of war. It is worth pointing out that without this shift in the thinking about war and the role of civilians during war (or lack thereof), it would have been very difficult to make any improvements on civilian protections. As I stated in Chapter Three, this period of positivism in war resulted in a great deal more thinking about regulations because war was not an evil in itself and thus had the potential to be viewed more objectively, something which would be very hard to do today.

Regardless of the positive developments that this limited view of war allowed, the character of war changed beginning in World War I, as I said above. Wars were no longer fought for territory or political titles, but for ideals. Morgenthau argues that the limited war of especially the 19<sup>th</sup> century did not lend itself to getting the approval or even enthusiasm of the civilian population.<sup>15</sup> It would have been impossible to have total war with the kinds of amoral reasons for going to war present in limited warfare. In order for the population to get behind the war effort, a moral reason was needed for conducting the war. The revival of just war therefore went hand in hand with the development of total war.

As I discussed above, Morgenthau argues strongly that this revival of just war lead to a deterioration of international morality in general. One specific respect is especially

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<sup>14</sup> See *ibid.*, 245-46.

<sup>15</sup> *Ibid.*, 380.

important here, and that is how the advance of total war, in contrast to the limited war of the previous two centuries, led to the decreased observation of the limitations on the conduct of war. Logically this makes quite a bit of sense. If the population of a state is given a moral reason for going to war, i.e. a just cause, marking the beginning of a just war, this makes it possible for the war effort to consume a large percentage of that population. Then, because a large segment of the civilian population is involved in the war effort, they are seen as potential legitimate targets and thus the protections that civilians had been given all but cease to exist. One can easily see the outcome of this in the carpet bombing of World War II, or the bombing of Hiroshima and Nagasaki. In these cases none of the protections for civilians were observed, and the only morality present was one that allowed for the annihilation of both the productivity and capacity of the enemy to resist, i.e. a holy war morality. This morality amounted to, as Morgenthau argues, a “monopoly on truth and virtue,” and thus worth fighting for with reckless abandon.<sup>16</sup> In other words, without the altered concept of war, total war would likely not be possible.

Thus, in a sense, the imposition of morality onto war is responsible for decreased protections for civilians by way of the advance of total war. Schmitt, speaking from the perspective of an analysis on partisan warfare in *Theory of the Partisan*, argues that the Geneva Conventions themselves, by giving more protections to partisans than had existed previously, begin to lessen the distinction between military and civilian.<sup>17</sup> Partisans themselves are in a bit of a special category, away from actual civilians that one might think of in total warfare. Yet it is worth noting that any recognition of a previously civilian class

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<sup>16</sup> Ibid., 249.

<sup>17</sup> Carl Schmitt, *Theory of the Partisan: Intermediate Commentary on the Concept of the Political*, trans. G.L. Ulmen (New York: Telos, 1975), 22.

as a legitimate/legal combatant also makes them a legitimate target of killing. Thus by recognizing some of these classes as combatants, it does open the door to the possibility that other previously civilian populations could be recognized as combatants and therefore targets. In fact there are currently discussions in the international legal sphere about what members of the war effort can be considered combatants, in an attempt to expand (or not) this category.<sup>18</sup>

This latter point would not be possible without total war. Morgenthau argues that changes in the military itself have also led to total war, namely that armies have become “massive” and the technological aspect much more advanced and requiring a great deal more specialized equipment. This creates a need for a kind of war machinery that did not need to exist previously. A large segment of the population is needed to feed and clothe the army, as well as make the equipment that the army uses. The result of this is that the line between soldier and civilian is blurred, something which would, again, not be possible without the ability to arouse the enthusiasm of the population with an ideal to fight for. It is therefore possible to argue that some segments of the war effort might in fact be legitimate targets, because they are carrying or making weapons or ammunition, or something of that nature.

Along with these improvements in technology leading to more people being involved in waging war, they have also made war more “impersonal,” according to

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<sup>18</sup> This revolves primarily around the “direct participation in hostilities” standard, which can be found in the 1977 Additional Protocol I of the Geneva Conventions, and has attempted to be clarified in subsequent International Committee of the Red Cross commentary found in “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,” *Int'l Review of the Red Cross* 872 (2008). See Gary Solis, *Law of Armed Conflict: International Humanitarian Law in War* (New York, NY: Cambridge University Press, 2010), 202-16.

Morgenthau.<sup>19</sup> Without the need to look one's enemy in the eye because weapons are long range, it becomes easier (psychologically) to kill, and in a way more machine and less human. This just exacerbates the deterioration of morality caused by the revival of the holy war morality. While this increase in technology is not exactly a moral question in the same way total war itself is, I believe it is still worth noting as a factor in this deterioration of morality.

The worst consequences of both the holy war morality and the advent of total war were perhaps not the terrible civilian losses in both the world wars, but rather the fact that actions taken against civilians or prisoners were justified on moral grounds. As soon as one frames the enemy as evil, any action taken against him is allowed because the goal is his annihilation. The kinds of wars of ideals that have become commonplace do just that, and thus any kind of destruction is potentially morally permissible, despite the fact that there are treaties prohibiting such behavior.

In fact those treaties rely on some form of the just enemy to exist as such because otherwise they read as hollow words on a page. How could one be expected to follow rules on the protection of civilians when the enemy is evil, and the entire population is responsible for this evil because we are fighting against nations and not armies? The very foundation of wartime regulations both on the treatment of soldiers and civilians is the concept of the just enemy, and potentially limited warfare, as well, as it is only in this situation that one can conceive of treating one's enemy with humanity and dignity. These rules were written in a very different era in terms of the concept of war and how war was conducted, and therefore in some sense it is not surprising that they are often not adhered

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<sup>19</sup> Morgenthau, *Politics among Nations: The Struggle for Power and Peace*, 250.

to. They simply have not caught up with our current conceptions of war and the existence of total war. To have to argue over whether or not certain segments of the civilian war effort are combatants is to show that we are waging very different kinds of wars than we were when these rules were first codified at the end of the 19<sup>th</sup> century.<sup>20</sup> The imposition of morality onto war may in fact be completely incompatible with the existence of a set of regulations on war that can be adhered to with any consistency.

As we have seen above, Morgenthau argues that it is a holy war morality that dominates thinking about war and the enemy. In modern warfare, war is fought for an ideal or way of life against an other that represents a threat to this way of life. He writes that the only necessary distinction is the one between the “right and the wrong philosophy,” and that the other distinctions between combatants and noncombatants and so on simply fade away.<sup>21</sup> In sum:

“The moral duty to spare the wounded, the sick, and the surrendering and unarmed enemy, and to respect him as a human being who was an enemy only by virtue of being found on the other side of the fence, is superseded by the moral duty to punish and to wipe off the face of the earth the professors and practitioners of evil.”<sup>22</sup>

Once the enemy is described as “evil,” he ceases to be a human being and becomes only this dangerous other who is deserving of any and all kinds of violence. With just cause dominating our thinking about warfare, this relegation to an evil other is all too common. It is present in all contemporary wars of ideals.

One striking example of this is the War on Terror, which has been portrayed as a war between good and evil, exemplified by the iconic George W. Bush quote, “You’re either

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<sup>20</sup> There was of course the Lieber Code written during the American Civil War, but because this was not an international set of regulations, I have chosen not to include it here.

<sup>21</sup> Morgenthau, *Politics among Nations: The Struggle for Power and Peace*, 249.

<sup>22</sup> *Ibid.*, 249-50.

with us or against us in the fight against terror," which allows zero room for neutrality This is the typical position for the holy war mentality.<sup>23</sup> Bush went even further than that, however:

"This is an evil man that we're dealing with, and I wouldn't put it past him to develop evil weapons to try to harm civilization as we know it. And that's why we must prevail, and that's why we must win."

Note both the liberal use of the word "evil," and the emphasis on the destruction of our way of life. Both of these are key in the representation of a war as a struggle for the preservation of the "right" philosophy and way of life.

To push further into the idea of limited warfare, looking again at the quote from John Westlake in the Morgenthau text, Westlake argues that the only way to have limited warfare is if everyone believes themselves to be part of a "larger whole" and that that whole includes the enemy.<sup>24</sup> This was the mentality of the 18<sup>th</sup> and 19<sup>th</sup> centuries, that everyone was a part of some greater Europe and one fought against one's equals, leading to the existence of the just enemy. Today we might say our larger whole is "humanity" itself, but in practice this has utterly failed to unite us because we are divided into nations, whether they be the nation of a state, or of a non-state actor. Thus the difference in the identification of the enemy between the 18<sup>th</sup> and 19<sup>th</sup> centuries and today could not be greater. It is as big a difference as between good and evil itself.

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<sup>23</sup> "You Are Either with Us or against Us," *CNN* 2001. Note: I am using "neutrality" in a casual sense here, as I do not wish to add to the debate on what precisely that is.

<sup>24</sup> Quoted in *Politics among Nations: The Struggle for Power and Peace*, 250.



## **Nagel: A Just Enemy in an Unjust Enemy World**

Illustrative of the convergence of the imposition of morality onto war with the problematic treatment of soldiers and enemies is the work of Thomas Nagel in his essay "War and Massacre."<sup>25</sup> In this essay, Nagel explores what is or is not permissible to do to a soldier through the lens of what he calls "absolutism," which is about avoiding certain behaviors under nearly all circumstances, rather than preventing others from participating in these behaviors. Writing during the Vietnam War, Nagel observes that it seems to have become morally permissible to attack civilians in order to induce surrender of the enemy, much in the way Morgenthau observes the world is morally deteriorating.<sup>26</sup> He argues that the killing of noncombatants appears to be morally permissible if the results are substantial enough. Looking back at Morgenthau, this is evidence of the change in the concept of war to the holy war morality and to the concept of total war.

Nagel argues that the consequentialist defense of this kind of conduct is not even worth discussing, because he wants to understand this conduct from an absolutist perspective. He notes that many people believe that the conduct of war has taken a wrong turn when we admit of this consequentialist rationale, and in the essay he proposes to explore why we might admit of an absolutist perspective and how this might conflict with the utilitarian one. His suggestion on how we might go about behaving with absolutist prohibitions relies on a distinction between the true object of hostility and that which is hostile about them, and the persons themselves. Part of the way one might draw this distinction is to think about whether or not one can justify the treatment of a person to that

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<sup>25</sup> Thomas Nagel, "War and Massacre," in *Mortal Questions* (New York, NY: Cambridge University Press, 1979).

<sup>26</sup> *Ibid.*, 57.

person. For example, Nagel writes that one could abandon someone on a sinking ship by saying that he has to leave him to save others, but one could not justify to the victims of Hiroshima that they have to be killed in order to induce a Japanese surrender. Thus, Nagel argues that any justifications you make in the course of an absolutist position are “interpersonal” rather than “bureaucratic,” as they would be from the utilitarian perspective.<sup>27</sup> Thus to kill a combatant, one must be able to justify this decision, and one could never justify it to a noncombatant such as a victim of Hiroshima.

In his discussion on how combatants must be distinguished from noncombatants, Nagel grazes the current arguments about this distinction based on whether or not a person is currently doing harm or is a threat, which I discussed earlier. This includes the recognition of the difficulty of surmising the potential threat of the support staff. Nagel offers a potential solution to this problem, however. He argues that any action taken against a soldier must be taken against that which contributes directly to why he is a threat, and support staff should be approached in the same way. In other words, those that carry or make arms for the soldiers are legitimate targets because they contribute to why a soldier is dangerous, but those who supply food contribute to a soldiers’ “existence as men,” and thus do not affect that which makes the soldier a threat, cannot be legitimate targets. In fact this does mirror many of the distinctions suggested by scholars of international law, though the underlying reasoning is more substantial, I would argue.

Nagel suggests that the rules of war are, at least unconsciously, engaged in this reasoning. For example the prohibition on killing medical staff may be related to the fact that medical staff attend only to that which contributes to a soldier’s existence as a human

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<sup>27</sup> Ibid., 68.

being rather than a soldier who is a threat. Another example would be the prohibitions on certain types of weapons such as poison or flamethrowers, which do more than just stop a soldier from killing, but rather do damage to the soldier as a human, i.e., they are more than what is necessary and sufficient.

This line of thought leads Nagel to the argument that total war is morally impermissible because not all aspects of a nation contribute to the “pursuit of war.”<sup>28</sup> Notably, however, Nagel does not immediately dismiss the idea that the party to the conflict in war is the nation rather than the military. In other words, he does not argue that the fact that nations fight against other nations is at base morally impermissible, but rather that certain actions taken against the nation are. This is in contrast to what Morgenthau argues, namely that the very idea of nations fighting against other nations is symptomatic of our moral demise. Morgenthau would recognize, however, that the increase in the size of armies alone means that more of the population must be involved in the war effort, but he would reject the notion that this means one has to fight against an entire nation. This is mainly because to Morgenthau, a fight against a nation is a moral position in which one pits one’s own nation’s moral standard against another’s, which can lead to the deterioration of the protection of civilians. Nagel does not seem to think of a fight against a nation as such a moral position in itself, but rather the fight against the whole nation vs. that which directly relates to what makes soldiers a threat.

From the foregoing analysis of Nagel’s text, we can see that for it to be actualized, there must be some concept of the just enemy. It would be fair to say that in the period of limited war, the violence was focused entirely on that which made the enemy a threat, namely the

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<sup>28</sup> Ibid., 72.

army, and that the battles were often face-to-face and thus targeted only that which made each individual soldier a threat as well. In a way Nagel's argument is built into the just enemy in practice, because one must treat him like a fellow human being, and kill him as a soldier, but not annihilate him as a person. His argument requires that we do not view the soldier/enemy as evil, because that would immediately justify any action taken against him. In a way, the argument is misplaced in a world where the holy war morality dominates against any concept of the just enemy. I would argue that Nagel fails to recognize the importance of just cause in how the enemy is treated, though he does offer that what he is suggesting is "sufficiently utopian."<sup>29</sup> This is certainly true in our present day, though as we know, Nagel's way of enemy treatment did exist during the 18<sup>th</sup> and 19<sup>th</sup> centuries in practice. In some respects this is due to who was thought to be the enemy in those wars compared to who is thought to be the enemy now.

Nagel laments that we are "wallowing in the moral pit" where entire nations fight one another and pit good against evil, and suggests a way in which we might limit the "barbarity," much like they did in the 18<sup>th</sup> and 19<sup>th</sup> centuries.<sup>30</sup> This solution requires thinking of the enemy as a just enemy, and only perpetrating violent acts against that part of the enemy which is the threat. Once the enemy is thought of as an other, instead of a just enemy, no violence is too barbaric to be used against him.

### **Derrida: Transformation to the Holy War Morality**

Derrida flips the notion of just cause on its head in the context of terrorism, in an interview with Giovanna Borradori in 2003. Writing shortly after 9/11, Derrida cautions us

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<sup>29</sup> Ibid., 73.

<sup>30</sup> Ibid.

about what he calls “autoimmunity,” namely the fact that a state, or the United States in particular, may engage in some form of self-sabotage when it comes to terrorism. In fact, in the “first” autoimmunity, it was the American educational system that trained the 9/11 attackers, and America itself that armed them, leading to what Derrida calls a “suicide” of those who helped these individuals, and perhaps America itself.<sup>31</sup> This in essence makes the United States its own enemy, which creates some problems for just cause. It would seem Derrida means to destabilize and complicate the notion of just cause, apparently making it unclear who exactly is to blame for the attack on 9/11. Upon closer examination, the word “suicidal” clues us into another possibility, namely that the U.S. cannot possibly have a “just cause” in the proper sense, because how can a state be justly responsible for its own destruction? One could argue that if a state is evil, if the regime is evil, it would have just cause for destroying itself. However, this would put the evil regime on the side of righteousness even though it would still be considered evil. Truthfully, a “just suicide” sounds rather strange simply on its face.

Derrida does not just think that the U.S. is suicidal; he believes that the U.S. is “doubly suicidal,” because not only did it train and arm the 9/11 attackers, it also created what the attackers must have believed to be their just cause, namely the fact that certain alliances, wars, and interference in the Middle East drove them to somehow defend themselves against the intruder, i.e. the U.S.<sup>32</sup> This brings us to the idea of the “most terrorist.” Here is where we see the idea of just cause flipping from its comfortable place in the Western mind after 9/11 to someplace unfamiliar. Derrida notes that terrorism is

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<sup>31</sup> Giovanna Borradori and Jacques Derrida, “A Dialogue with Jacques Derrida,” in *Philosophy in a Time of Terror* (Chicago: The University of Chicago Press, 2003), 95.

<sup>32</sup> Ibid.

traditionally a response to some sort of undesirable political situation that is escalating, specifically a response that is considered a last resort. Therefore one must think of the terrorist as having no recourse to any other solutions, and viewing the “victim” of terrorism as the aggressor.<sup>33</sup> Thus when a state has somehow bred terrorism, it is thought of as the “most terrorist” rather than the “victim.”

This has some resemblance to the just enemy in terms of what I called the “humanitarian” notion, which was that the enemy is assumed to be human and must be treated according to the characteristics of being human. As we recall, this humanitarian notion, while not explicit, is a moral one. Derrida is implying something similar in his discussion of the terrorist in terms of his attempt to explain why someone might become a terrorist or commit an act of terrorism. The attempt alone assumes the humanity of the terrorist, unlike a great deal of the rhetoric at that time, for example the statement made by then Italian Prime Minister Silvio Berlusconi that the terrorists had “demonstrated a vile and brutal affront against humanity,” implying that they were not human themselves.<sup>34</sup> Furthermore, by suggesting that the U.S. might be the “most terrorist” while retaining the label of “terrorist” for the 9/11 attackers, it puts both the U.S. and those involved in the 9/11 attack under the same umbrella, making them man fighting fellow man, as Derrida makes no attempt to dehumanize the terrorist.

While Derrida’s treatment of the terrorist as human and worthy of understanding resembles the humanitarian notion of the just enemy, its similarities end there. For instance, Derrida seems to be saying something altogether different about just cause than Schmitt would approve of. Though he cautions against the western world believing that it

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<sup>33</sup> Ibid., 107.

<sup>34</sup> “World Shock over U.S. Attacks,” *CNN* 2001.

has just cause to fight the terrorist, he seems to accept the idea of just cause and the holy war morality completely. This is shown primarily in his use of the concept “most terrorist.” If there can be a “most terrorist,” it stands to reason that whoever that “most terrorist” is could not have a just cause in waging war against anyone. “Most terrorist” implies blame, and though Derrida recognizes that we will never know for sure who is the “most terrorist,” the existence of this idea at all and Derrida’s willingness to explore the question engages in the holy war morality. He calls this question of who is the “most terrorist” “necessary and destined to remain without any answer.”<sup>35</sup> In other words, even though we cannot know who is the “most terrorist,” someone must be. This stands in stark contrast to Morgenthau’s complete rejection of just cause, and Nagel’s lament that we are “wallowing” in a moral pit. Derrida wants to keep us in the pit.

Schmitt of course could not abide this concept of just cause, since the just enemy negates any idea of it. The impulse to return to old notions of just war is anathema to Schmitt, and exactly what he is trying to combat with his writings on war more generally. He would disagree even with the question of trying to find who has just cause, and at times Derrida seems to be doing more than that. In fact in moments of Derrida’s text, he seems to be answering the question on who is the most terrorist, as he is highly critical of actions taken by the United States. He argues that the “dominant power,” i.e., the U.S. is the one that imposes both the law and terminology for the world on any given topic, and that this imposition is that which “best suits it in a given situation.”<sup>36</sup> It is difficult to see this as anything other than critical, and thus a moral judgment both about how the U.S. manages its power, and, I’d argue, of power itself. As it happens, Derrida seems rather censorious of

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<sup>35</sup> "A Dialogue with Jacques Derrida," 107.

<sup>36</sup> *Ibid.*, 105.

the actions taken by the United States (not without reason) around the world, in part as a way to open a dialogue about the possibility of viewing the terrorists not as such, but as those taking action that is the “only recourse” against a dominant power such as the U.S.<sup>37</sup> Thus upon further inspection, Derrida does not seem all that neutral as regards the impossible to answer question of the “most terrorist.”

Derrida actually appears quite sensitive to the terrorists’ case, perhaps even suggesting that they are some kind of underdog not to be criminalized and dehumanized, but rather to be remembered as human beings who are fighting for a potentially worthy cause. This goes back to the humanitarian notion of the just enemy, as I was discussing earlier. At one point he seems especially critical of the identification of the terrorists as “*only* terrorists,” rather than complete human beings. Derrida is adamant that we do not dehumanize the terrorist, but rather look to the dominant power, especially the United States, for the potential rational reason for the actions taken by the terrorist.

Derrida’s analysis of the terrorist closely resembles Schmitt’s analysis of the partisan. Though Derrida himself only analyzes Schmitt briefly early on in the text, it seems as though Derrida’s terrorist is more or less equivalent to Schmitt’s partisan. As I discussed in Chapter One, Schmitt argues that international law has a tendency to create criminals out of partisans because the mechanisms by which states may recognize the partisan as legitimate usually fail due to the fact that they rely on the “good will” of the state to legitimize a war taking place on their own soil.<sup>38</sup> Derrida’s argument that the dominant power legitimizes and imposes the language we use to, in a sense, create the (criminal)

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<sup>37</sup> Ibid., 104.

<sup>38</sup> See Chapter One, page 11 and Schmitt, *Theory of the Partisan: Intermediate Commentary on the Concept of the Political*, 23.



terrorist, is analogous to the idea that a state's refusal to recognize the partisan as a belligerent creates a criminal out of him. In both cases, the implication is that a greater power, specifically what Schmitt calls a "regular" power, is largely responsible for that which aims to annihilate it. Thus Schmitt in some sense also speaks of what Derrida calls "autoimmunity."

However, continuing Schmitt's analysis, we see that the partisan criminalizes his "regular" opponent of the state, and makes it his goal to annihilate the state, despite the risk of becoming a criminal himself. When Derrida writes of the "most terrorist," he seems to be making a similar statement about the nature of the relationship between the dominant power and the terrorist. In both Schmitt and Derrida, these analogous relationships between the state and the partisan, and the dominant power and the terrorist, do not create any space for the just enemy. The just enemy cannot exist when any form of criminalization of the opponent is present.

Earlier I wrote of Derrida's work turning just cause on its head. By this I was referring to the fact that he seems to imply that it is the terrorist who has the just cause, rather than the West, which is what we in the West generally believe. Thus the imposition of the simple humanitarian notion of the just enemy can create a just cause fairly easily, as it is the only moral notion present in the just enemy concept. I would argue, however, that this simple humanitarian notion could potentially be the first step, or perhaps even the only step, in the right direction. But I would further ask, can it truly exist if we are still moralizing about war? Derrida may perhaps be too optimistic about the power of the simple humanitarian notion without any other part of the just enemy, but he is intent on retaining the holy war morality in his analysis of the terrorist and terrorism. This morality

is the ultimate cause of the disappearance of the just enemy; without its destruction, the simple humanitarian notion is impotent.

### **Conclusion: The Plague of the Holy War Morality**

Throughout this chapter, we have seen how the revival of the holy war morality has shaped both the thinking on war, and war itself, and how this obliterates any concept of the just enemy. We have also seen, however, how reluctant people generally are to let go of the idea of morality in war, and how the shift in thinking in the 20<sup>th</sup> century went away from the limited warfare of the 19<sup>th</sup> century and towards total holy war. From these three authors, there is some sense in which war still has to be moral, but there has to be a way around this total destruction and annihilation. None make the suggestion that the problem is with morality in war itself, on a specific kind of morality. Morgenthau comes the closest, with the complete rejection of the holy war morality, but he stops short of endorsing a view that morality should not govern war.

What does this all mean for the just enemy? As we learned in Chapter One, the just enemy simply cannot exist in any situation where war is governed by morality. Yet while some thinkers, such as the ones in this chapter, or even Chapter Two's liberal theorists, lament the nonexistence of some type of just enemy in contemporary conflict, both armed and unarmed, no one seems to be bold enough to suggest that the problem is the existence of morality itself in those situations. Why are we so convinced that a moral system, one which distinguishes in some capacity between "good" and "bad," is necessary in war? I would argue that one of the reasons for this is surely "moral condemnation of war," as

Morgenthau puts it.<sup>39</sup> Morgenthau writes that the avoidance of war has become a primary goal in statecraft since the turn of the century, and that war is only morally permissible in situations where a moral norm has been violated. This attitude has come primarily because war is hell, under any circumstances, and it therefore seems like something one wants to avoid. However, by condemning war in general, one immediately puts a moral character onto war. Because war continues to be hell, arguably more so now than in the 18<sup>th</sup> and 19<sup>th</sup> centuries, this moral condemnation is natural.

Thus, one could argue that in order to strip war of its moral character, we would have to ignore the fact that war is hell, and most simply do not seem to be willing to do that. In the 18<sup>th</sup> and 19<sup>th</sup> centuries, war was seen simply as a fact, and therefore it was irrelevant that war was hell. Now that fact of the nature of war seems to be impossible to ignore, and thus various treaties in the 20<sup>th</sup> century, culminating in the United Nations Charter, have made the outlawing of war and avoidance of war their primary goal.

The trouble with this is that on its face, it is hard to see how the avoidance of war could be anything but good. Killing is generally thought to be morally impermissible, therefore doing less of it seems like a good thing. Yet, on the other hand, there are still all these wars, despite war having been outlawed. Were 18<sup>th</sup> and 19<sup>th</sup> century statesmen and jurists right, that war is just a fact of foreign policy? Would looking at war in this way just create more wars?

I believe these questions will never be answered. As a modern species we seem married to the idea that war must have a moral character, and the very fact that we believe this allows the holy war morality to thrive, despite condemnation by various people and

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<sup>39</sup> Morgenthau, *Politics among Nations: The Struggle for Power and Peace*, 247.

groups. As long as we continue to be sure that war must be attached to morality, there can be no just enemy. This is the ultimate conundrum that my project has presented us with, which I will discuss next, in the conclusion.

## **Conclusion: The Rejection of Morality**

As we have seen, the just enemy is an amoral decision one makes about how to view one's enemy during war. It is not actually a judgment on "justness" as such. This, while being the defining characteristic of the just enemy, is actually what makes it so difficult to swallow. We saw in Chapter Two that the liberal project covered many of the same ambitions that the just enemy does, but it distinguishes between good and bad moralizing, as opposed to removing it altogether, as the just enemy would require us to do. We also saw in Chapter Four a number of thinkers advocate for similar positions to the just enemy as regards how we might think about our enemies, but none of these thinkers made an attempt to lift morality from their thoughts about war. In addition, we understood from Chapter Three that the foundational thinkers for the concept of the just enemy all spoke very precisely about the type of state and international order that was required for this attitude, which we no longer have.

Where does this leave us? There is no question that there are a number of thinkers who believe in the tenets of the just enemy related to attitude towards him and treatment of him specifically, but the idea that removing morality from the conflict is so foreign that it is not even mentioned as a possibility. We are, as a society, and potentially a world, completely convinced that morality has to play a part in war. We are only capable of attempting to distinguish between "good" moralizing and "bad" moralizing. It does not occur to us that perhaps it is moralizing itself that is the problem. We often speak of people being too "judgmental," meaning attaching morality to some of the pettier or more personal

aspects of life, but we are loath to detach anything serious from morality. The idea of being too “judgmental” of our enemy during war sounds silly by comparison.

In a way this is understandable. Simply by virtue of attacking us, it is easy to feel we have a right to judge him for his actions. Yet we always make the judgment the same way. It does not occur to us to ask questions about our own behavior as a state, with fingers in pies all over the world, that are critical to our behavior in light of having been attacked. To say so, one might say, would be to condone the attack. But this misses the point of the just enemy, which in some respects makes a statement about both parties at once that makes any kind of moralizing completely irrelevant, and thus removes it from the equation. It says that we are both human, we both have legitimate reasons for fighting, and we must treat one another as equals in battle. It implies a higher grouping beyond the groups of the two opponents, one that encompasses both at the same time. Perhaps it is an appeal to that elusive group known as “humanity,” a concept that has been used to divide more often than it has been used to unite.

An appeal to history is clearly important for the case of the just enemy, because we can demonstrate that there was a historical period where the just enemy existed as a concept that governed war and international relations. This is not some idea that simply popped up in Schmitt’s mind. It is this appeal to history that may be the key to beginning to talk about the just enemy in a broader context. There is no mystery of how we got from the just enemy in the 19<sup>th</sup> century to the unjust enemy of the 20<sup>th</sup> century. What is instructive about this move to total war and the unjust enemy? What have we gained or lost from this transition?

Furthermore, any argument that such an idea is preposterous can be met with examples of 18<sup>th</sup> and 19<sup>th</sup> century international relations, including war. We know that there is nothing preposterous about the idea of the just enemy, and that there were definite advantages to the system that existed during that time period. Yet bringing these ideas forward is indeed complex, because of all the changes that have taken place. I believe that it is with such examples of history in mind that we must approach any discussion of the present, because it is possible to see the potential of warfare being limited in some capacity from these examples. It is perhaps in this way that a discussion about the just enemy in a present context can be had with a greater understanding of its benefits.

Though the just enemy is a tiny part of Schmitt's oeuvre, it is a big idea. I invite other scholars to find other thinkers that expressed some version of it, especially if they included a critique of the moralization of war. Is there a way people might accept the notion that it is moralizing about war that creates the problems of dehumanization we face today? Can we get people to even care about this dehumanization when they are so assured of their righteousness? Is the just enemy too difficult a concept to swallow in its original form? These are some questions for the theorists and the political scientists that I am less adept to answer.

As I said in the introduction, as far as people working in the real world go (as opposed to academia), I hope only to sow some seeds of doubt, or to water the ones that might already be there. After doing this project, I do not believe that the just enemy can simply be transplanted onto contemporary warfare. Yet perhaps it can start a discussion about some of the errors our current thinking about armed conflict can lead to.

For the just enemy to truly reassert itself in Western society would require a complete cultural shift, and such a shift does not come quickly. I recognize this. I am merely hoping that the ideas presented in this project knock some holes in our preconceived notions about how we must judge our enemies, and how we think about war. I hope that my reader has come away with inkling of how things might be different, and what it might take for this change to occur. Finally, I hope that we may rethink concepts like “humanity” and “human rights” as a banner for war. To that end, I will leave my reader with the Schmitt quote from *The Concept of the Political* that I began this project with:

“humanity as such cannot wage war because it has no enemy...To confiscate the word humanity, to invoke and monopolize such a term probably has certain incalculable effects, such as denying the enemy the quality of being human and declaring him to be an outlaw of humanity; and a war can thereby be driven to the most extreme inhumanity.”<sup>1</sup>

Let Schmitt’s words be a warning that our holy war morality based on humanity and human rights is rife with hypocrisy, and that the only way away from dehumanization is to let it go altogether, and embrace the just enemy.

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<sup>1</sup> Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: The University of Chicago Press, 2007), 54.



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