



# “With whom he was in a state of just war...”: A Review of the Just War Tradition

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In an imaginary conversation, Martin Luther upbraids Michael Kohlhaas, namesake of Heinrich von Kleist’s 1810 novella: “Irredeemable and appalling man! ... ‘Who gave you the prerogative, in pursuit of arbitrary rights, to attack the Junker [i.e., minor nobleman] von Tronka, and when you didn’t find him in his castle to beleaguer with fire and sword the entire community that sheltered him?’”<sup>1</sup> Short moments later, after hearing Kohlhaas’s retort, Luther sketches a plan that would bring an end to the young man’s rebellion and allow him to return to his horse farm. (Naturally, Kleist allows the historical Luther’s well-known antipathy to the rebels’ causes in the actual Peasant Wars of the 1520s and to later rebellions to show through in his fictional character.) Kohlhaas can live with all of the fictional Luther’s conditions except one: he cannot accept a peace with the *Junker*. The prince must pay for all that Kohlhaas has suffered. Faced with the young man’s intransigence, his unwillingness to forgive even as he seeks to be understood and forgiven, Luther dismisses him.

<sup>1</sup>Heinrich von Kleist, *Michael Kohlhaas: Aus einer alten Chronik* (1810; reprint, Stuttgart: Reclam, 1982) 43–44. Translations throughout are mine unless otherwise noted. (Although not available to the author, an English translation of Kleist’s work does exist: *Michael Kohlhaas: From an Old Chronicle*, trans. James Kirkup [London; Blackie, 1967].)

*The just war tradition functions as a guideline, not as a set of formulaic answers. An examination of conversations with a fictional Luther in a novella by Heinrich von Kleist illustrates how the guidelines might be applied to present situations.*

In this brief exchange between Kohlhaas and Luther, Kleist managed to represent what many call the just war tradition.<sup>2</sup> The dialogue attends both to the reasons why Kohlhaas initiated hostilities as well as the particular ways in which he and his ragtag army fought. Did he have just cause to launch an armed attack on a nobleman's fortress, followed by several attacks on armies in the field and towns that refused to bow to his will? Did he have the moral authority to commence what became an armed rebellion of significant scope? Did he give fair warning to those affected? Did he do everything in his power to avoid combat? These are among the questions addressed under the rubric of the *jus ad bellum*—the justification for going to war.

The complementary category, the *jus in bello* (just conduct in war), deals with how war may rightly be conducted once hostilities have in fact commenced. What respect must an army in the field pay to noncombatants it encounters? Are any means of war off limits, or is war by nature unlimited? These questions represent the concerns of the *jus in bello*.

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None of the principles in either category should be understood to provide formulaic answers that can be applied to any scenario. Rather, the tradition as a whole offers guidelines for framing problems and evaluating them according to the nuances of each individual case.

#### A COMMON REPRESENTATION OF THE *JUS AD BELLUM* AND *JUS IN BELLO*

Over the centuries, the just war tradition has developed from Augustine's broad focus on cause, authority, and aim into seven *jus ad bellum* rules (just cause, right authority, right intention, proportionality of ends, last resort, reasonable hope of success, and aim of peace) as well as two *in bello* principles (proportionality of means and noncombatant protection/immunity). A reflective student of history and contemporary events can well imagine the problems each of these principles sought to forestall. Still, it is worthwhile to review how each of the principles actually applies in a given scenario. Doing so reveals both the admirable spirit of the tradition and the complications that arise when one tries diligently to apply it.

<sup>2</sup>One also hears other designations, e.g., “just war theory” (as in the title of a volume edited by Jean Bethke Elshtain, *Just War Theory* [New York: New York University Press, 1992]) or “classical just war doctrine” (see William O'Brien, *The Conduct of Just and Limited War* [New York: Praeger, 1981]). I prefer “tradition” because in aggregate the guidelines fail to have the coherence that “theory” and “doctrine” sometimes connote, yet for generations they have guided reflections on the morality of commencing and prosecuting war. Better than *theory* or *doctrine*, *tradition* implies this looseness and historical longevity.

*Satellite Principles: Right Intention, Proportionality of Ends, Last Resort, Reasonable Hope of Success*

Historically, as well as conceptually, just cause provides a focal point around which the other principles tend to revolve. For example, the *Junker* who had incurred Kohlhaas's wrath fled before the young man and his band of outlaws. Kohlhaas pursued, but could not find his quarry. In that context, Kohlhaas not only claims to pursue a just cause but implies that his grounds for taking up arms warrant his growing army to do as it will in the field:

[He] penned a so-called Kohlhaasian Mandate, in which he called on the region not to succor the Junker Wenzel von Tronka, *with whom he was in a state of just war*, and further bound every inhabitant, not excluding the Junker's relatives and friends, under penalty of death and unavoidable burning of their property, to deliver the Junker to him.<sup>3</sup>

The irony of the passage is clear: Kohlhaas claims to have engaged in a "just war," yet he threatens the lives and property of many who could never have heard of his grievances until the moment they encountered his hastily written "mandate." (The personal flavor of the mandate finds a contemporary echo in charges that President Bush has pursued a grievance that began with the confrontation between the previous President Bush, his father, and Saddam Hussein.) Later on in his campaign, Kohlhaas gives even less warning before he attacks armies traversing the countryside and sets cities ablaze. One need only recall President Roosevelt's address to Congress and the nation following Pearl Harbor to understand Kleist's implication here: Kohlhaas's last-second mandate hardly counts as fair warning; there is a distinct infamy in the lack of declaration, and the lack indicates that he does not have the prerogative to start an armed conflict.

Kohlhaas similarly fails the requirement of having a reasonable hope of success before commencing hostilities. At the moment he wrote this first mandate, the horse farmer-turned-guerrilla leader had but a handful of men in his nascent army. Opposing him were significant regular forces, among them many combat-hardened professional soldiers.<sup>4</sup> Surely there was little chance that Kohlhaas could succeed in bringing about what he considered a just resolution to his grievances.

Again, Kohlhaas causes significantly more suffering than he and a servant of his endured at the hands of the *Junker*; to burn cities and destroy armies is certainly not to achieve a proportional end. It might be argued that Kohlhaas viewed his own travails as *pars pro toto*, that is, as representative of what a cruel nobility was doing to the peasantry in general. However, while there is textual evidence to show that Kohlhaas worried other merchants might be abused by the *Junker*, the young

<sup>3</sup>Kleist, *Michael Kohlhaas*, 31, emphasis added.

<sup>4</sup>There are many reasons why a leader such as Kohlhaas might enjoy initial success given the relative weakness of his "army." A classic account can be found in chapter 31 of Richard Friedenthal's *Luther: His Life and Times*, trans. John Nowell (New York: Harcourt Brace Jovanovich, 1970).

horse farmer's concerns seem too self-centered overall to permit a justification based on proportionality of ends.

After causing significant loss of life and destruction of property through his depredations, Kohlhaas asks Kleist's Luther for safe passage to Dresden so that he may continue to pursue justice in the courts. In other words, it is clear that Kohlhaas used armed conflict as a kind of attention-getter, not as his last resort.

For these and other reasons, it seems clear that Kohlhaas severely violates several principles of the just war tradition with the excuse that his cause is just. Is he right at least on that count?

*The Traditional Threesome: Just Cause, Right Authority, Aim of Peace*

*1. Just cause*

Traditionally the redress of wrongdoing (e.g., recovery of territory and possessions lost to unlawful aggression), the retributive punishment of those who had transgressed, and self-defense against continuing or imminent aggression were all considered to be just causes for engaging in war. However, each of these causes requires that difficult moral judgments be made: we must be able to identify wrongdoing in complicated contexts, to know whether aggression is lawful even when its roots are hundreds or even thousands of years old, to understand when an armed power has overstepped moral boundaries even though some of its claims may be reasonable. In each such instance it can be difficult to establish that a given position is clearly and completely right or wrong. The world's mixed reaction to the Israeli-Palestinian dynamic may well result from such difficulty.

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Even in the case of self-defense there often are difficult determinations to be made. Before hostilities have commenced, a potential party to war must decide whether it is in fact threatened. In recent months, many have labored to differentiate between preemptive versus preventive wars. By convention, unquestioned imminence is implied by the qualifier *preemptive*, while *preventive* war intends to forestall a threat that is not imminent. Precisely because the threat is not immediate, there will be those who discount it. And even if it is acknowledged that a danger may likely confront us in the future, is that possibility, at an unforeseeable point in time, sufficient moral license to make war? Such are the questions posed by politicians, clerics, strategists, and scholars with respect to the second war in Iraq, a possible second war on the Korean Peninsula, and a possible war with Iran. As this issue is debated, we can expect to hear many variations of a charge heard with increasing frequency: that President George W. Bush misinformed his U.S. and, indeed, world audiences by alluding to bogus evidence that Iraq posed a nuclear

threat. In the terms of the just war tradition, the charge is that the President tried to fabricate a just cause.

Ironically, a blockbuster film released only months prior to the attack on Iraq, Steven Spielberg's *Minority Report*, dealt with the issue of preventive law enforcement. Among other questions, the film asked whether one can ever be certain that a crime will be committed. Even if one were certain, what would be the moral implications of punishing a future perpetrator *prior* to commission of the crime? In general, criminal law focuses on individual miscreants (although racketeering laws of course extend this interest to small collectives as well) while international law attends to rogue states. Thus the analogy may not be perfect, but often the moral issues presented in the film neatly paralleled the ethical questions addressing the legitimacy of preemptive attack against Iraq. While the movie's release nearly coincided with the United States' decision to go to war, the moral resolution was quite different: in the film it was determined that no matter how certain one might be that a given individual would commit murder, it would be immoral to punish that individual preemptively. Just because the stakes are higher, may nations take the "safe" course of waging preventive war? Doubtless the debate will continue.

Whereas the question posed by Kleist's Luther—What authority could Kohlhaas have to commence armed aggression?—is rhetorical, it is clear that this fictional Luther doubts not only Kohlhaas's authority but also the legitimacy of his cause. And, of course, a just cause is an absolute prerequisite for a just war. In a passage as humorous as it is dramatic, Shakespeare's Henry V asks Canterbury whether it is moral to make war on France with the aim of consolidating the thrones. Following the archbishop's dizzying account of Salic law, the young king seems thoroughly exasperated and rephrases his question so as to receive a simple yes or no. Canterbury insists that Henry's right to the throne is unquestionable. Would it were so simple in all cases!

## *2. Right authority*

Who has the right to begin a war? At least in the United States and many other Western democracies, the answer to that question might at first glance appear to be clear-cut. Surely the United States isn't going to be forced into a war under some Dr. Strangelove-like scenario in which a deranged military officer, mumbling about the purity of bodily fluids, commits nuclear assets and starts an irreversible chain of events. But in fact the principle can be quite problematic. Luther's question—"Who gave you the prerogative...to attack?"—is rhetorical: he knows that the young Kohlhaas had sought vigilante justice after he had failed to achieve satisfaction through established means of legal redress. By raising an army of disaffected peasants Kohlhaas had violated a rule that has been central to the just war tradition since Augustine. Often referred to as "right authority," the principle arrogates the sole prerogative of authorizing force to the leader of a sovereign collective.

Naturally, the salient terms of this principle are colored by culture. Since the 1648 Treaty of Westphalia, the West tends to think in terms of nation-states repre-

sented by monarchs or, in the wake of revolutions beginning in the late eighteenth century, of directly or indirectly elected officials such as presidents and prime ministers. When such an official is deemed the “right authority”—by which we can understand *rightful* authority—to declare war, it is implied that there exists no higher power who could gainsay the decision.

Framed in this way, the notion of right authority presents an obvious problem. Nations can be jointly governed. The sometimes shared leadership of Rome presents interesting case studies. More recently, it might seem a stretch to cite the Magna Carta, but certainly the English Civil War of the 1640s ushered in an era in the English-speaking world in which power, including the authority to make war, is shared. When the U.S. Congress feared its authority might be usurped, the War Powers Act resulted. Conversely, U.S. presidents have guarded their authority to commit troops to combat. The United States must feel its way toward a harmony of these authorities in many situations. One product of this dynamic relationship in recent months was the joint resolution that endorsed President George W. Bush’s intent to attack Iraq; among other results are the ongoing allegations that the president and his administration misled Congress and the American people in claiming that Saddam’s government had tried to purchase “yellowcake” uranium from Niger.

Finally, armed conflict can arise in many circumstances; interstate war is only one of these. Kohlhaas is involved in what might be termed a civil war, and while he does not coerce others to join his cause, it is also unclear to what degree he does or does not represent the interests of his peers. That uncertainty does not arise from any secrecy. One modern scholar would have it that “[t]he covert, secret character of modern revolutionary movements is such that it is often hard to judge their claims to qualify as the competent authority for oppressed people.”<sup>5</sup> Kohlhaas is in fact very open in his conduct of the rebellion; he wants all to know what he is doing and why. But that openness does not give insight into the moral authority of his leadership any more than the American Declaration of Independence tells us whether a majority or at least a plurality of colonists favored revolution.

### 3. *Aim of peace*

From the perspective of Kleist’s Luther, the only way peace can be had is for Kohlhaas to cease his pursuit of the *Junker*. Put another way, Kohlhaas must give up the hope of *absolute* justice on earth. But as we have seen, the young man refuses. That refusal signals to Luther that Kohlhaas’s aim is not peace, and that in turn is a violation of a critical just-war principle.

One of the cornerstones of the just war tradition, Saint Augustine’s *City of God*, book 19, offers what may at first glance seem a surprising reflection on the aim of peace: as a matter of descriptive (as opposed to normative) truth, peace is always sought in human activities. The point is worth emphasizing: it is not just that we all *should* seek peace; in fact, we *do*. But we must understand this claim in con-

<sup>5</sup>William V. O’Brien, *The Conduct of Just and Limited War* (New York: Praeger, 1981) 18.

text. In his *Republic* Plato speaks of the harmony that must exist even among a gang of robbers in order for them to pursue their ends most efficiently. But this prudential harmony does not in itself mean that the robbers, individually or in aggregate, are just. Similarly, in the first book of his *Nicomachean Ethics*, Aristotle notes that all things seek the good. Yet this teleological claim does not mean that all men flourish equally; some live miserable and petty lives and are in fact deeply unhappy (though they might think otherwise).

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Augustine’s point about the universal pursuit of peace can be understood in a similar way, and this perspective can inform our understanding of contemporary conflicts. If the United States and her allies in Iraq claim that peace is their goal, well and good. Critics and perhaps many Iraqi citizens as well will not be satisfied merely to hear that the invading coalition prefers an end to combat rather than having to face a tenacious insurgency. Of course! The aim of peace-as-absence-of-war demonstrates merely common sense in the service of self-interest; it does not suffice to establish that the U.S.-led coalition desire a *just peace for its own sake and as its primary end*. Yet surely that is what the just war tradition requires, and thus the United States must continue to meet the rhetorical challenge. It is historically common to resort to violence as though it were merely another tool of statecraft, but we must see that practice as a violation of the just war tradition’s demand that a just war seek a just peace.

*The jus in bello: Noncombatant Immunity and Proportionality of Means*

The decision to go to war having been taken, the just war tradition next addresses the moral limits on the way combat is conducted. Kleist’s Luther is alarmed at Kohlhaas’s willingness to attack civilians in order to get at the *Junker*. To use “fire and sword” against the community violates the *in bello* principle of noncombatant immunity, that is, discrimination between combatants and various species of noncombatant (e.g., civilians, who are obviously neither fighting nor contributing directly to the enemy’s war effort, and *hors de combat*, those former combatants who are prisoners or severely wounded or disarmed or in some other status that renders them harmless).

Even as Kohlhaas’s attacks on noncombatants violate the immunity criterion, they also trample on the principle of proportionality of means. On more than one occasion Kohlhaas sets parts of Wittenberg ablaze in order to terrorize the citizens and so motivate them to give up the *Junker*. The cost of such tactics in lives and property is ludicrously disproportionate: for the sake of personal vengeance on one

man, Kohlhaas would lay waste an entire city. There is of course another side to the same coin: those who for a time would prefer to fight Kohlhaas than to punish the *Junker* themselves show a callous indifference both toward justice in the abstract and toward those who must pay with their flesh, blood, and property as Kohlhaas runs amok. One thinks of Hitler's or Saddam's exhortations to their followers to fight on even after their respective wars were as good as lost.

#### BACKGROUND COMMITMENTS AND THE FUTURE OF THE JUST WAR TRADITION

In considering the just war criteria above, it quickly becomes obvious that we will evaluate a given scenario differently depending on whether we focus more on absolute adherence to rule or allow ourselves to be satisfied with a good result even at the cost of a gnawing conscience. In the terms of ethicists: it matters where one happens to be on the spectrum between a thoroughgoing deontism on the one end and an equally absolute consequentialism on the other.

And of course the very nomenclature of the classic just war tradition may move us in one direction or the other. For instance, we might notice that the very term *proportionality* seems to invite a calculus of consequences: harm done and benefit gained, so far as we can foresee them, must be in the right proportions. In other words, we want to do more good than harm and not vice versa. That sort of talk has the ring of consequentialism, or more specifically, of utilitarianism. Consequentialist theory evaluates the morality of a course of action by the state of affairs it is likely to produce (or, in hindsight, has produced) without worrying overly much about the means. Similarly, reasonable hope of success is often interpreted in consequentialist terms.

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But when we speak of just war principles or criteria, it sounds as though we have a framework of *rules* that are important in themselves—so important, in fact, that we will tend to follow them if that entails sacrificing a preferred outcome. If we allow, as some do, that the nuclear attacks on Hiroshima and Nagasaki saved lives in the long run (perhaps both Allied and Japanese), compelling arguments still can be made that the attacks were immoral because they violated the principles of non-combatant immunity and proportionality.

However one might argue the morality of these and other historical examples, it seems clear that the just war tradition is just that—a rough guideline that by convention (as well, perhaps, as universal reason) we turn to over and over for



guidance as we go to and prosecute war.<sup>6</sup> The life of Kleist's Kohlhaas ends on the executioner's block, just as the historical figure on which the character was based, Hans Kohlhase, was executed in 1540. In some sense Kohlhaas is the embodiment of those who ignore the just war tradition or apply it selectively and wrongly. Of Götz von Berlichingen, another literary character who represented the difficulty of navigating just war dilemmas in Luther's era, it was said: "Woe to those descendants who misjudge him."<sup>7</sup>

One wonders who, among the leaders of our own generation, might come to be lumped together with such tragic figures. ⊕

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<sup>6</sup>The just war tradition is described here in Western terms, but just war scholars are paying increasing attention to Eastern and particularly Islamic traditions. An interesting comparative study can be found in Hilmi M. Zawati, *Is Jihad a Just War? War, Peace, and Human Rights under Islamic and Public International Law* (Lewiston, NY: Edwin Mellen, 2001). Zawati's bibliography cites superb works by James Turner Johnson, but was published before a recent popular piece: James Turner Johnson, "Jihad and Just War," *First Things* 124 (June/July 2002) 12–14.

<sup>7</sup>Johann Wolfgang von Goethe, *Götz von Berlichingen mit der eisernen Hand* (1773; reprint, Stuttgart: Philipp Reclam, 1993) 119.