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# AS JUSTICE AND PRUDENCE DICTATE: THE MORALITY OF AMERICA'S WAR AGAINST TERRORISM - A RESPONSE TO JAMES V. SCHALL, S.J.

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In his essay, "On the Justice and Prudence of this War," James V. Schall, S.J. fashions a moral defense of the current American military action against international terrorism, in the terms supplied by traditional just war reasoning. In undertaking the task, he understands himself to be offering philosophical support for the judgments in prudence that a nation and its representatives must make about political action. He stipulates that his defense of the war does not guarantee either that history will judge the United States to have been in the right, or that the unfolding of events will reward the United States' action with practical success. He asserts only that knowledge of its morally justifiable character will "avoid putting a nation in moral conflict with itself" as it seeks to defend itself. His argument aims at ensuring integrity in moral reasoning and decision, which, in turn, will tend to increase the freedom of the nation to act well in the current crisis.

This response to Father Schall's article explores just how three principles, which he proposes in general terms as central to integrity in moral reasoning and decision over the use of military force, serve, in fact, to organize an assessment of the rights and wrongs of actions by states and individuals within a conflict like the one coming to a crisis on September 11th. In the course of its analysis, the article means to show that prudence has a role, not only once the requirements of justice are satisfied, as a too casual reading of Father Schall's article might perhaps imply, but rather, in keeping with the larger import of Father Schall's argument, at the moment of first evaluating facts as in or out of accord with distinctions arising under the principles of justice he elaborates. In particular, the article calls attention to ontological assumptions underlying such threshold judgments of prudence. It then concludes by arguing that the dependence of prudential judgment on these assumptions means that America's war effort cannot be justified in a simply static sense, but, rather, that it may licitly be pursued only as a part of a larger plan of commitment, also undertaken as a matter of law

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and politics, to preserve the ontological conditions essential to the nation's integrity as it resorts to arms.

#### I. MORAL INTEGRITY IN THE RESORT TO MILITARY FORCE DEPENDS ON THREE BASIC PRINCIPLES

In the course of his article, Father Schall cites a total of ten criteria traditionally used in "just war" reasoning: seven to determine *jus ad bellum*, and three to determine *jus in bello*. In order to isolate the central or pivotal principles relating to moral obligation or justice, one can begin by setting aside two of these criteria which are purely prudential, *probability of success* and *last resort*. One may also eliminate purely procedural principles, *right intention* and *comparative justice*. One may also reduce them from two to one, where *discrimination* may be considered as a corollary of *proportionality*. The consolidation of the principles covering both *jus ad bellum* and *jus in bello* into a single list then results in a statement of three principles: (1) *just cause*; (2) *public authority*; and (3) *proportionality of response*.

At first glance, international conflict appears in its material and subjective dimensions, as the two sides' reciprocal experience of harm, as a violation of their subjective senses of what is acceptable. Thus considered, the resolution of disputes would have to occur either by one side simply overpowering the other, or, at best, by pragmatic mutual compromise. Father Schall suggests, however, that a rule of reason can be brought to bear in the resolution of such disputes whether the parties can manage this amicably or do so by morally sanctioned force of arms. The three principles mentioned above comprise an important part of that rule of reason. Yet the judgment of right which each principle permits is not automatic. It hinges on certain morally cogent distinctions and the capacity to apply these distinctions to the facts of the situation. Since his focus is on the broader sweep of philosophical argument, Father Schall does not develop this aspect of the case in particular detail. But, in doing so one gains most in clarity regarding why some claims made by America and its terrorist opponents, respectively, are rightly affirmed and others set aside as against reason. The gain is, at once, one of understanding our opponents even as we affirm our right to redress against them and of properly discerning the conditional nature of that affirmation.

##### A. *Just Cause*

Many causes of grievance exist in international relations, but only some justify military redress. The latter such grievances are based on redressable wrongs. The principle of *just cause*, as Father Schall develops

it, thus distinguishes between wrongs that are redressable and those which are not. The distinction turns on the blameworthiness of the perpetrator's will, in the terms of criminal law, his or her *mens rea*.<sup>1</sup> In this context, *mens rea* arises through some act or omission of the will yielding some material harm, which identifiable human beings suffer involuntarily, without any sufficient justification deriving from their guilt. The justice of America's cause in its war against terrorism flows from its ability to show that it is acting to redress such wrongs, where its opponents are not able to do so. The inability or unwillingness of America's opponents to reason in accord with this distinction is at the heart of their fanaticism and it intensifies the moral necessity of military redress against them.

The terrorists can recite many harms to the people they claim to represent. Some such harms are material, as in the case of economic losses caused by America's pursuit of its commercial interests. Others are less tangible, but still empirically demonstrable, such as the erosion of cultural assets through a kind of imperialism of American business practices and the penetration of its media. Nearly all the harms they allege imply moral failing on America's part, if only through its pervasive amoral preference for wealth and convenience, over higher cultural and spiritual values.<sup>2</sup>

Some of the more intangible harms alleged imply something akin to a true depravity of aspects of American culture. Those with a spiritual sensitivity somewhat less than that of the biblical prophets, in watching the transmission of *Saturday Night Live* following Mayor Rudolph Giuliani's guest appearance on that show<sup>3</sup> to reinforce American self-esteem and patriotism, may perhaps, nonetheless, have been stirred to realize, if only dimly, that they were viewing material reflecting a mentality which was low, if there is such a thing as low, and morally insolent, if moral insolence exists, and inclined, in fact, to moral corruption and to spiritual perdition, especially of children, if such things exist. Some, who are prone to cast the current conflict as one between Islam and the heirs of Christendom, seem to derive consolation from pointing out the mote in the eye of Islam. If the current state of Western culture, sometimes in leading aspects referred to by the present Pope as

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1. *Mens rea* is defined as "[a] guilty mind; a guilty or wrongful purpose; a criminal intent. Guilty knowledge and wilfulness." BLACK'S LAW DICTIONARY 889 (5th ed. 1979).

2. David Ignatius, *The Psyche of Bin Laden*, WASH. POST, Oct. 28, 2001, at B7.

3. Tom Shales, *Getting Serious on Saturday Night*, WASH. POST, Oct. 1, 2001, at C1.

“the culture of death,”<sup>4</sup> is a natural outgrowth of Christianity, then “beam” indeed is too small a concept for what Christendom has in its eye.<sup>5</sup>

And, yet, however credible each of these complaints by the terrorists is a source of sorrow, moral indignation, political opposition, or legal action, the terrorists have made no credible case that any is a redressable wrong giving rise to a just cause of war. At the root of none can they point to an act or omission of the will making the United States responsible for material harms involuntarily suffered by identifiable people. It is a sign of the fanaticism of America’s enemies, of their rejection of reason as the basis of human relations, that they believe they are entitled to smite those with harm in retaliation for what they perceive guilt, in an abstract sense, dissociated from the blameworthiness of actions intended to harm identifiable people in concrete ways.

If the terrorists were to attempt to reformulate their claims in terms of the distinction being discussed here, it would greatly reduce the offensiveness of their position. Even then, however, their argument would rely on complex and artificial characterizations of purposes and effects making it doubtful at best. They would more appropriately register it in a court of law or propose it as the basis of political consensus.

Other grievances recited by the terrorists deserve much closer consideration as a just cause of war against us. They allege, for example, that we have intentionally inflicted, or at least, with malignant indifference, through our neglect, have allowed, the children and infirm of Iraq to die or suffer irreparable injury to their health through our enforcement of our embargo against that country, that we have killed and injured substantial numbers of Iraqi civilians in our Gulf War, and that our military aid has, with our knowledge and tacit consent, done the same to Palestinian civilians.<sup>6</sup> Such harms have occurred, whether or not

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4. “This reality is characterized by the emergence of a culture which denies solidarity and in many cases takes the form of a veritable ‘culture of Death.’” Pope John Paul II, *Evangelium vitae* 12 (1995).

5. “*And why beholdest thou the mote that is in thy brother’s eye, but considerest not the beam that is in thine own eye? Or how wilt thou say to thy brother, Let me pull out the mote out of thine eye; and, behold, a beam is in thine own eye? Thou hypocrite, first cast out the beam out of thine own eye; and then shalt thou see clearly to cast out the mote out of thy brother’s eye.*” *Matthew* 7:3 (King James) (emphasis added).

6. A demographer at the U.S. Census Bureau drawing on unclassified estimates places the death toll for civilians directly attributable to the Gulf War at 13,000, with another 110,000 civilians dying in the aftermath of the war through civil unrest, disease, and malnutrition. Roger Normand & Chris af Jochnick, *The Legitimation of Violence: A Critical Analysis of the Gulf War*, 35 *HARV. INT’L L.J.* 387, 398 (1994). The Iraqi Red

to the extent alleged by the terrorists, and they are in fact *prima facie* redressable wrongs whose redressability needs to be rebutted by a showing of justification. Such justification would lie in our showing that we accepted the occurrence of such injuries only with regret as the indirect result of proportionate military redress for wrongs committed by the state we or our allies have attacked. We have thus in fact offered arguments that in such instances our actions were justified. If our arguments in this regard persuade, then our opponents' attack on us of September 11th was unjustified in all respects, the attack on the Pentagon representing one of its worst features, an unjustified and intentional infliction of a material harm on the United States in its capacity as a sovereign state charged with defending its citizens' security.

But even if our past infliction of such material harms was unjustified, the greater part of the September 11th attack was beyond the scope of just redress. Father Schall introduces his second pivotal distinction, at this point. This principle makes some direct and intentional harms intrinsically wrong and never justifiable under any circumstances, even to redress past injuries. His distinction is this: those guilty of redressable wrongs may be directly attacked in redress of their offenses only because they are guilty; material harm may never be intentionally and directly inflicted on innocent people for any reason. The distinction originates in the concept of the human person as an end in him or herself who may never be used as a means. The attack on the World Trade Center was an intrinsically evil act which remains unjustified, regardless of its perpetrators' redressable grievances, and its scale would seem to ensure that it is, itself, independently a redressable harm. The failure of America's opponents to have insight into this point is another hallmark of their fanaticism, intensifying the moral necessity of military redress against them.

In contrast to the grievances recited by the terrorists, the harms suffered by America are clearly blameworthy because they originated with acts of will directing material harm at identifiable people without their consent and without justification. The World Trade Center attack

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Crescent Society estimates the death toll from the eleven-year embargo which the United States has led against Iraq at 1.6 million and attributes thousands of civilian deaths to the continuing U.S. air bombardments of Iraq as well. *Iraqi Red Crescent Expresses "Sympathy" with Victims of 11 September Events*, BBC WORLDWIDE MONITORING, Oct. 30, 2001. The Palestinian Red Crescent Society estimates the number of Palestinians killed in the West Bank and Gaza at 908 since September 29, 2000, with 17,032 injured. See Palestinian Red Crescent Society Web Site, at <http://www.palestinercs.org/> (last visited Jan. 8, 2002).

sought to take the lives of the innocent.<sup>7</sup> Victims included not only those directly killed or injured, but also millions of others whose economic well being was indirectly harmed in a substantial way by the damage done.<sup>8</sup>

In the case of the attack on the Pentagon, the terrorists did not clearly state a claim to act in redress of specific past wrongs, as opposed to for the sake of terror, and even if they had, we have asserted that our own previous actions were justified and thus not redressable by attacking the Pentagon. In addition to the tangible harms of death and economic loss, the terrorists sought beyond any conceivable just redress, through terror, to injure the United States' capacity to care for the basic needs of its people and to reason fairly and effectively about its future. These are also very serious redressable wrongs.

The wrong perpetrated by the terrorists is more blameworthy for its flouting of the inviolability of innocent life; the malice of its intending to destroy America's capacity to reason and to care for those dependent upon it; and, as it was, its sheer scale aggravated by accompanying threats of further harm. Their unwillingness or inability to embrace basic principles of moral accountability both explains their failure to present a cogent case for the redressability of America's alleged past wrongs and the gravity of the redressable offenses they have now committed against America. Not only is the harm they have done redressable, it is so extreme that legal or political means of redress might well be per se insufficient to redress it, making a military response not only licit, but morally necessary.

### B. Public Authority

Human beings align themselves in diverse kinds of groups according to various common purposes, values, and interests. These various groups come into conflict with one another. But, according to Father Schall's principle of *public authority*, only a state, organized under a public authority, can redress wrongs through the use of military force. America's conflict with its terrorist opponents can be understood as

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7. As of January 2, 2002, the number of deaths caused by the attack on the World Trade Center is cited as 2,936. See *Trade Center Death Toll now 2,936*, at <http://www.cnn.com/2002/US/01/03/rec.wtc.toll/index.html> (last visited Jan. 8, 2002).

8. New York City lost 44,200 jobs during the month of October 2001, attributable to the World Trade Center attack, and another 50,000 jobs in New York City are considered to be at risk due to the economic impact of the attack through mid-2002. Amy Cortese, *New York, Badly Battered but Stronger Than in the 1970's*, N.Y. TIMES, Dec. 17, 2001, at C4. The total economic cost of the September 11th attack is estimated by the International Monetary Fund at \$21 Billion. *IMF Estimates U.S. Cost of Terror Attacks at \$21 Billion, Predicts Recovery in 2002*, WALL ST. J., Dec. 19, 2001, at A2.

running between groups or associations at diverse levels. It can be seen as a conflict between certain adherents of Islam and certain adherents of Western secularism, global and regional commercial interests, or believers and nonbelievers. But, resort to military redress may not be licitly considered at the level of grievances experienced at any of these levels of disagreement. It becomes a moral option only at the level of social organization under a public authority.

Father Schall's principle assumes that authority arises when society organizes itself to ensure its preservation and to guarantee the basic requisites of living for its members. The function of the authority includes the establishment of an order of justice, both among the society's members and between the society and those who would attack it from without. Because public authority arises from the social nature of man, and is autonomous of any kind of delegation by religious or other privileged perspective, it extends both to the finality of judgment and its execution. Conscientious critics may offer valid objections, but the state's authority does not depend on their approval.

America's terrorist enemies do not appear willing or capable of reasoning or acting according to this concept. They assume that the authority of the state derives from its serving the purposes of a religious movement. Their imperviousness to the distinction between public authority and religious conviction heightens the importance of the public authority which they attack vindicating itself. Insight into the principle of public authority is not to be taken for granted in any quarter. Historically, this principle has been contested by religious believers in many different religions, including Western Christianity.<sup>9</sup> At present, it is under pressure both from the side of resurgent tribalism and supranational economic relationships. In seeking redress for the wrongs of September 11th, the public authority of the United States is defending not just the concrete good of its people, but the very concept of public authority as a principle of societal order.

However, it will be noted that in the steps leading up to its resort to a military response, the United States specifically chose to reject the claims of the Taliban regime as the public authority functioning within

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9. The relation of civil and religious authority has a complex history in Christian Europe, but the turning point in which the autonomy of civil authority is recognized, as it now is, for example, in the first amendment of the United States Constitution, is probably the Peace of Westphalia of 1648, concluding the Thirty Years War, a war of religion. *ENCYCLOPEDIA OF RELIGION* 3733 (1979). The treaty is known for the principle *cuius regio eius religio*, which may be loosely translated as "state decision dictates the religion to be established." *Id.*



Afghanistan. It refused to honor the assertions of due process set forth by that government and eventually declared it to be illegitimate and overthrew it.<sup>10</sup> The United States did so without contradicting its respect for the principle of public authority, since no claim to hold public authority is absolute, but can be invalidated by offenses against the very order of justice it exists to uphold. The offenses against justice that are alleged might be against persons external to the society over which the public authority presides, as was the case with the Taliban's support for international terrorism.<sup>11</sup>

And, the question then is fairly asked of whether any injustices committed by the United States deprive it of its status as public authority. Even if the United States' record with respect to direct injustices against persons external to American society appears to be comparably good in relation to that of other states (one may here bracket what one thinks of the indirect harms caused by the advancement of American interests – since these are not redressable harms in the sense described above), with respect to the moral rights of persons within its jurisdiction, one may think of substantial historic abuses such as the enslavement of African Americans or the displacement or even genocide of Native Americans. Or, one may instead consider the alleged contemporary abuses, such as the promotion of abortion, which led serious thinkers in a mainstream journal to question whether the United States had, in fact, lost its status of public authority.<sup>12</sup>

There is no bright line test for determining whether the injustice

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10. The Taliban's ambassador to Pakistan stated that his government required proof that bin Laden was involved in the attacks on the World Trade Center and the Pentagon before it would consider extraditing him. Rajiv Chandrasekaran, *Taliban Vows "Showdown of Might" With United States; Afghan Regime Asks for Evidence Against Bin Laden*, WASH. POST, Sept. 23, 2001, at A3.

11. European diplomats who heard the United States' briefing of NATO on its case for military action stated that they had been "provided an array of evidence that would be enough to indict bin Laden, his al Qaeda network and the Taliban in complicity to commit terrorism." William Drozdiak & Rajiv Chandrasekaran, *U.S. Evidence on Bin Laden "Compelling"; Allies Give Unconditional Support for Retaliatory Strikes; Taliban Official Asks to See Proof*, WASH. POST, Oct. 3, 2001, at A11. Subsequent evidence emerging after the collapse of the Taliban government is confirmatory. It appears that the Taliban government accepted direct financial and material assistance from bin Laden. Peter Baker, *Defector Says Bin Laden Had Cash, Taliban In His Pocket*, WASH. POST, Nov. 30, 2001, at A1.

12. "The question here explored, in full awareness of its far-reaching consequences, is whether we have reached or are reaching the point where conscientious citizens can no longer give moral assent to the existing regime." *The End of Democracy? The Judicial Usurpation of Politics*, 67 FIRST THINGS 18 (1996).

perpetrated by a state deprives it of its status as a public authority. The question is not one which generally is, or can be, adjudicated by a court, even a competent international tribunal. It is one, rather, to be decided in raw contests of who can garner the power necessary to coordinate the interests of the society. Paradoxically, the assessment of assertions of the illegitimacy of a regime, in principle, cannot be separated from the *real politik* of whether the critic, in fact, has the power to substitute a new regime for the one whose legitimacy he or she questions. The value of stability in human social organization entails a presumption in favor of the arguments of whomever has the power to coordinate the life of society as a going concern. Because America appears to have the power to broker the creation of a substitute regime by the people of Afghanistan, its critique of the justice of the Taliban regime, therefore, will be taken to be presumptively valid. The test then becomes effectively whether the usurper of the old regime displays a will, prospectively, to permit the formation of a new public authority in the society which has been overtaken. The same is true of every revolution which succeeds.

The U.S. government's status as public authority with the function of redressing redressable wrongs by military means is to be presumed based on its effectiveness in coordinating the fulfillment of the basic needs of American society. If the U.S. government were not so recognized, then by what alternative means would American society preserve the order of justice which properly unites it?

Even if one were to succeed in establishing serious injustices on the part of the government, one would not necessarily be entitled to challenge its authority in principle, as opposed to resist injustices actually established, or perhaps ignore the government's elective undertakings. One would presumptively not be justified in denying the authority of the government to undertake its essential and basic functions. Defending society against an intentional, direct, and malicious assault on the most fundamental conditions of its security, as seen in the attacks of September 11th, would be such an essential and basic function. Governments can be quite corrupt without sacrificing their interim authority to advance this most basic interest. The government of Joseph Stalin appears to have been thoroughly vicious, and yet it seems fair to say that it did not lose its authority to defend the peoples of the Soviet Union from the unjust military invasion of Hitler's Germany. If Stalin's government never sacrificed this authority, then the government of the United States certainly has not.

### C. Proportionality of Response

The just cause of redressable injury and the redress being sought by public authority ensures *jus ad bellum*. But, just how that authority seeks its redress is also subject to assessment for *jus in bello*. The further distinctions to be observed flow from the principle of *proportionality*. The harm inflicted must be proportionate to the wrong redressed. Redress can be conceived of in terms either of retribution or deterrence. Proportionality covers the amount of harm which may be directed against the enemy. The harm inflicted must be proportionate to the injustice redressed. If the conception is one of deterrence, it must be proportionate to what is required to prevent a recurrence. The precision of America's advanced technology of warfare ensures that America has proceeded in its defense with an exquisite proportionality that could only have been marveled at in earlier military campaigns that dragged on for years over vast terrain.

But, there is a second aspect of proportionality. The harm inflicted must be distributed in proportion to guilt: as was mentioned above, it may only be inflicted directly on those who are guilty. This is true under the principle of *discrimination*, which may be understood as a corollary of the principle of *proportionality*. It was this principle which America's terrorist enemies so egregiously violated by flying planes of innocent passengers into buildings filled with innocent office workers, thereby greatly heightening the blameworthiness of their attack on the United States. America has attempted to be, and all evidence so far indicates has succeeded in being, exquisitely discriminatory in this positive sense.

In the context of America's present dispute with terrorism, the true challenge to prudence posed by the principle of proportionality is, yet again, different and it could easily be overlooked. The perpetrators of the wrongs of September 11th were not themselves the representatives of a sovereign state. They were rather individuals aligned with a movement of cultural and religious reform. As individuals, they would ordinarily be entitled to the due process of law. Thus, the Taliban asked for proof of Osama bin Laden's guilt before they would agree to his extradition by the United States. On the face of it, they were observing the appropriate form which is a prerequisite to the coercion of an individual. To directly attack an individual to remedy redressable wrongs without notice or hearing would ordinarily be itself a serious violation of the due process of law. The violation would be twofold. It would be to disregard the public authority charged with maintaining the order of justice under the rule of law within the individual's society. And, it would be to deprive the individual affected of the respect owed every person until there is a legal

adjudication of his guilt. For these reasons, targeted killings, whether of Fidel Castro, as reportedly once pursued by the CIA,<sup>13</sup> or more recently undertaken by Israel against Palestinian leaders,<sup>14</sup> are presumptively illicit.

The nature of terrorism, however, ensures that the problem will endure. The public authority of the society attacked must vindicate the rights and interests of its citizens against assailants who are themselves individuals, rather than representatives of any state. One principled construal of the situation would allege that the public authority with jurisdiction over the terrorist is ineffective and substitute its own authority in a policing action. Such a construal would require the public authority seeking redress to exercise a number of key judgments of prudence. These judgments would be far trickier than judgments about the degree of physical risk to noncombatants that is compatible with the principle of nondiscrimination in conventional scenarios, because they are judgments about attaching legal characterizations to situations, i.e. that the local public authority is to be deemed “nonfunctioning.” A government’s failure to make these difficult judgments could well result in its being fairly charged with an intrinsically unjust direct attack on the innocent.

Moreover, individuals in the territory subject to military redress would, in keeping with the legal characterization justifying intervention, be entitled to the protections at least of the norms of probable cause and imminent danger of serious bodily harm to others restricting the use of lethal force by the police. The intervening state would also be required to discriminate adequately in distributing the indirect costs of its action on residents of the country who are not suspected terrorists. The country seeking redress would necessarily impose many indirect costs on the residents of the country invaded without regard to their being suspected terrorists. These costs would include fear, loss of property, and disruption of common life. They would be imposed by the intervening country without any specific comprehensive authority to make the many calculations of the common good of the country invaded appropriate to the distribution of such costs. The harms would be suffered through both

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13. A congressional investigation undertaken in 1975 determined that poisoned cigars, exploding seashells, and a contaminated diving suit had been tested by the CIA for use in assassinating Fidel Castro. George Lardner, *Target Castro*, WASH. POST, June 7, 1999, at C13.

14. For example, the Israeli assassination of Abdel Rahman Hamad who was suspected in a Tel Aviv discoteque bombing which left twenty-two dead. Steven Mufson, *U.S. Denounces Targeted Killing; Israel Rebuked for Assassinating Palestinian Suspect*, WASH. POST, Oct. 16, 2001, at A18.

the concrete effect of the invasion and the intangible harm to the society of the invaded country of disregarding the authority of its political representatives. The principal of proportionality demands also that both of these kinds of harm be justified. They would be justified by the comparatively greater harm suffered in the injury being redressed.

According to an alternative construal, the country seeking redress could charge the public authority in the society in which terrorists reside as itself guilty of the independent redressable offense of complicity in the terrorist action. In this construal, the invading country would be charging the local regime not with guilt for the terrorist attack, but with a blameworthy act or omission of the will in somehow aiding, permitting, or tolerating the commission of such acts by others. A judgment of prudence would be required as to when the ineffectiveness of the local government in policing its own country or when its indirect support of the terrorists became blameworthy. The assessment of blameworthiness now would regard actions and attitudes difficult to separate from the multifarious prudential judgments that every sovereign state must make, and which each regime will necessarily make according to its own competing set of interests.

In this second construal, which the United States has in fact pursued, there is danger of substituting a legal fiction of guilt for true moral responsibility on the part of those who are being retaliated against. There is the danger of incurring the redressable wrong of an unjustified attack on another society's public authority. Acting without sufficient prudence would place America in a posture difficult to distinguish from that of the very terrorists it is combating. In the present conflict, the U.S. government has taken care to create a case for the proportionality of its overriding the public authority of the Taliban regime. It appears to have insisted on reliable intelligence of Taliban complicity in the September 11th bombings,<sup>15</sup> and it has worked promptly and effectively to restore an autonomous regime in Afghanistan capable of serving as that society's independent public authority.<sup>16</sup> In addition, it has struggled to minimize, and even reverse, harm to the separate, comprehensive common good of the region, by providing it with massive humanitarian aid.

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15. See *supra* note 11.

16. Hamid Karzai was sworn in as chairman of a new interim government in Afghanistan by mid-December 2001. David Rohde, *A Nation Challenged; Transfer of Power; Afghan Leader is Sworn In, Asking for Help to Rebuild*, N.Y. TIMES, Dec. 23, 2001, at 1A.

## II. THE ONTOLOGICAL CONDITIONS NECESSARY TO ASCERTAIN THE JUSTICE OF REDRESS

By situating reasoning about the justice of military redress within the broader context of practical reason or prudence, Father Schall, on the one hand, places it within an open-ended context, in which plans of action must be formulated with uncertainty about both practical outcome and the ultimate correctness even of one's judgments about justice. On the other hand, he places it in the context of objective values knowable in relation to the agent's last end. This second assertion calls for an exploration of the ontological conditions which are objectively necessary for a nation to act rightly in seeking military redress. All three principles of justice considered so far, *just cause*, *public authority*, and *proportionality of response* are grounded ontologically, and the distinctions flowing from each can be applied concretely only in reference to considerations of ontology.

Father Schall does not dwell upon these questions of ontology, but they are, nonetheless, essential to the integrity of the mode of reasoning Father Schall advances. The teleology they offer provides a basis for dialogue with all those who lack the insight into the truth of the principles enumerated above, including the perpetrators of terrorism against America. Three considerations of ontology present themselves in this context. These are: (1) God as the *summum bonum*; (2) subsidiary forms of human association as essential to human fulfillment; and (3) the comprehensive scope of the rule of law, as the basis of human social life.

### A. God as the *Summum Bonum*

Both in its references to prudence and to justice, the mode of moral reasoning that Father Schall employs assumes that a *summum bonum* exists, which is the human person's true last end. That *summum bonum* is God. All more particular goods derive their intelligibility from this ultimate good. The obligations of justice are grounded in the objective hierarchy of goods experienced in relation to God as the highest good. Father Schall advances a mode of moral reasoning which is inherently theistic.

This theistic reference can be passed by in silence even by believers in many forms of moral discourse, for example in conversation with non-theists who are persons of good will and who are attentive to the shared intuitions of morally persuasive reasoning. But, in an age when references to God are tolerated only as emotivism, and when the U.S. Supreme Court has interpreted the First Amendment as entailing a far-reaching exclusion of God from public life, the question necessarily arises

of whether the maintenance of an order of justice by the public authority can itself be undertaken without reference to God. In point of fact, America's opponents in its present conflict charge it with having lost its legitimacy precisely through losing its sense of God as the source of all moral order. If we were to mistake this objection for just another sign of the fanaticism of our antagonists, we would be at risk for failing to honor an essential element of moral reasoning with the consequence that we would end up as "a nation in moral conflict with itself."

The autonomy of the political order and the finality of public judgments of right and wrong, underived from any delegation by religion, that were stressed above as implicit in the concept of *public authority*, should not be mistaken for the exclusion of God from public reasoning about right and wrong. To the contrary, and in a manner that could appear paradoxical, the political order must properly acknowledge God as the *summum bonum* in relation to which relationships of justice ultimately assume their logic and proportion. This principle is clearly recognized by the Basic Law of the Federal Republic of Germany, which acknowledges in its Preamble that it is adopted, "in consciousness of its accountability before God."<sup>17</sup> It also underlies the U.S. Supreme Court's continuing unwillingness to require the abolition of prayers opening legislative sessions.<sup>18</sup> It is evident in the American Declaration of Independence, a founding document of the United States.<sup>19</sup> It is seen as well in St. Thomas Aquinas<sup>20</sup> and Plato's<sup>21</sup> common explanation of the

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17. "Im Bewußtsein seiner Verantwortung vor Gott . . . , hat das Deutsche Volk . . . dieses Grundgesetz der Bundesrepublik Deutschland beschlossen . . ." GRUNDGESETZ [Constitution] Preamble (F.R.G.). The statement is translated as "[i]n consciousness of its accountability before God, the German People has resolved upon this Basic Law of the Federal Republic of Germany."

18. *Marsh v. Chambers*, 463 U.S. 785 (1983) (upholding Nebraska legislature's practice of opening each legislative day with a prayer by a chaplain paid by the state).

19.

WHEN in the course of human Events, it becomes necessary for One People to dissolve the Political Bands Which have connected them with another, and to assume . . . the separate and equal State to which the laws of Nature and of Nature's God entitle them . . . . WE hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights . . . ."

THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

20.

Wherefor Isidore in determining the nature of law, lays down, its first three conditions; viz., that it *foster religion, inasmuch as it is proportionate to divine Law*, that it be helpful to discipline, inasmuch as it is proportionate to natural law; and that it further the common weal, inasmuch as it is proportionate to the utility of mankind.

THOMAS AQUINAS, *SUMMA THEOLOGICA*, I-II, Q. 95, art. 3 (1981) (emphasis added).

law's role in grounding social order.

The earnest and often fanatical nature of our opponents should not blind us to the truth of their criticism of our godlessness. The condition to our appeal to the principles developed above in justifying our redress against them is that we find a way to acknowledge, as a society, that our public authority has its authority and that our principles of just cause and proportionality have their testimony in relation to God. The Administration's rhetoric as it entered the military phase of the conflict was correct in the care it took to affirm this point.<sup>22</sup> The balance which we must strike is a subtle one, for it also includes respect for the autonomy of politics from religion and for the First Amendment liberty of the individual to believe or disbelieve as he or she likes.

### *B. Subsidiary Forms of Association as Essential to Human Fulfillment*

The legitimacy of the public order is measured only in part by whether it respects the freedom of the individual. It is also measured by whether it respects subsidiary forms of human relationship. These center above all on the family, but they also include a whole range of civic and cultural associations. The legal enforcement of criminal and tort law, as well as property rights and market transactions, is appropriately part of the order of justice maintained by the public authority. But, a state that protected only such rights and transactions would be unduly individualistic. The legitimacy of the public order also hinges, in part, on its protecting cultural assets, public morality, and family relationships.

The effect of one-sidedly equating law with the enforcement of market transactions in the context of economic globalization can be to undermine the stability of non-market relationships. One source of the discontent of America's terrorist opponents is undoubtedly the negative consequences for the stability of regional cultures of America's domination of the global market. Another contributing factor is the excessive individualism and the immodesty of the popular culture which

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21.

And this is the conclusion, which is also the noblest and truest of all sayings, – that for the good man to offer sacrifice to the Gods . . . is the noblest and best of all things, and also the most conducive to a happy life, and very fit and neat . . . . But the legislator who . . . has gone through all . . . [these] preliminaries may proceed to the work of legislation.

PLATO, *THE DIALOGUES OF PLATO* 488-89 (B. Jowett, trans., 1937).

22. President George Bush's address to a joint session of Congress and the American People on September 20, 2001, both called for the American people to pray and cited God as the arbiter of justice. See President George W. Bush, Address to a Joint Session of Congress and the American People at the United States Capitol (Sept. 20, 2001).



American entertainment industry takes around the world. The monolithic vision of a restoration of Islam, particularly through its denial of women's rights, is incompatible with what Western countries have come to understand as required by an enlightened order of justice. Nonetheless, the moral indignation which our culture arouses in our opponents should be to us not just a sign of their fanaticism but an occasion for acknowledging the due claims of subsidiary forms of family, civic, and cultural associations. And where the order of justice properly champions the rights of the individual as such, we should be prepared to acknowledge that it properly does so within an order of virtue, according to some credible concept of virtue.

At certain points, a credible order of justice subordinates individual autonomy to other relational values. As we reject the monolithic alternative of a restored Islamic order, it is essential to the integrity of our own reasoning about justice and social order that we be open to diverse cultural visions of how precisely the global market should exist in interplay with other forms of association and how American individualism can be rooted in a credible conception of public virtue as the basis of social life.<sup>23</sup>

### *C. The Comprehensive Scope of the Rule of Law*

In seeking military redress against its enemies, the United States aims at restoring an order of justice. This order of justice is, at one and the same time, the rule of law. At the very least, the order we seek to restore accords with natural law, understood as what reason ordains regarding right conduct. But, it is also an order under civil law, both domestic and international. Father Schall rightly stipulates that the uprightness of our intention in pursuing military redress depends on our willingness to persuade our opponents. Such persuasion must ultimately aim at obtaining their consent to a common rule of conduct, i.e., to compliance with a rule of law.

To be just, the resort to military force may occur only after it has been determined that adequate means of redress under law are unavailable. As was noted above, the September 11th attack was of such a nature that

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23. A genuine dialogue across cultures on such issues, as necessary as it is, can in itself be quite difficult. Where cultural differences should be respected and where they should be subordinated to common standards stands to be determined. For an example of where the common standard would presumably apply, see the case of the Taliban's destruction of artworks considered to give religious offense. Molly Moore, *Taliban: Most Statues Destroyed: Afghan Rulers Reject Criteria for Purging "Idols,"* WASH. POST, Mar. 4, 2001, at A22.

any response less than one seeking military redress would have been per se inadequate. However, even in a case such as this, the rightness of America's intention in pursuing its action depends on its willingness to submit to the legal resolution of the dispute if such a resolution were available. One can say more than this. Immanuel Kant develops a compelling case that the justice of any nation's resort to war depends on its willingness to contribute to the gradual emergence of the legal means of resolving international disputes making future wars unnecessary.<sup>24</sup> The scope of the rule of law is, as Aquinas<sup>25</sup> no less than Kant asserts, always comprehensive, aiming at an order of universal happiness or universal mutuality of respect.

War can be justified only where an international legal order has not yet emerged adequate to the resolution of the dispute in question. The establishment of such an order in the future is a dynamic requirement of a right intention in pursuing war where no such order currently exists. Parallel principles apply domestically, so that the relaxation of due process guarantees for the sake of coping with a national emergency can be justified only as the strictest necessity, and only with a commitment to their full restoration at the first opportunity. By emphasizing that we have witnessed an attack on "America's freedom,"<sup>26</sup> the rhetoric of the Administration falls short in this regard. The attack as an assault more on "order" than "freedom." It was, specifically, an attack on the order of an international community of nations committed to peace and justice. America dismissed the Taliban request for proof of guilt as a condition of extradition as a ruse and then attacked and overthrew the regime. The American judgment in the matter would appear to have been justifiable, but we should remember with sober regard that necessity required us to fling the words of due process back in the faces of applicants, lest we someday find ourselves corrupted into lawlessly championing our "freedom" and "power" over the law which binds together the international community in ties of peace and justice.

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24. "After all, war is only a regrettable expedient for asserting one's rights by force within a state of nature, when no court of justice is available to judge with legal authority." IMMANUEL KANT, *Perpetual Peace: A Philosophical Sketch*, in KANT POLITICAL WRITINGS 117 (H.B. Nisbet trans., 1991).

25. "The law must need regard properly the relationship to *universal* happiness." THOMAS AQUINAS, *SUMMA THEOLOGICA* I-II, Q. 90, art. 2 (1981) (emphasis added).

26. President Bush characterized those responsible for the September 11th attack as the "enemies of freedom" in his address to a joint session of Congress and the American People on September 20, 2001. See Bush's Address, *supra* note 22.

### III. THE NATURE OF THE RENEWAL IN LAW AND POLITICS WHICH IS REQUIRED TO PRESERVE THE ONTOLOGICAL BASIS OF A JUST AMERICAN RESPONSE BY FORCE OF ARMS

If America is to wage war against its opponents justly, it must be able to show just cause, public authority, and proportionality of response. It can show these only if its concept of public authority, and the reasons which that authority offers to the world for its actions, are adequately grounded by reference to a *summum bonum*, subsidiary associations and relational values, transcending the individualism of the market, and integration within a comprehensive international rule of law. Such a tripartite ontological grounding calls for a renewal of the American soul both within international relations and within the categories of American law and political discourse.

Two basic themes emerge, then, as one considers the challenge of September 11th for law and politics: the role of liberalism and the future of sovereignty. The closer scrutiny of the just war principles proposed by Father Schall suggests, for example, that when defended against the spurious objections of America's adversaries, just war principles emerge as inherently liberal. They require that public authority be grounded with autonomy from religious authority, and they also require that wrongs redressable by military force be restricted to acts or omissions reflecting *individual* moral responsibility through the infliction of material harm on identifiable *individuals* without their consent. These two criteria of redressability define wrongs in individualist and liberal terms, rather than in terms of organic social relationships.

So, to some degree, the challenge is to persuade participants in the emerging global world order that it is destined to be a liberal order. And, yet, at the same time, liberalism's role in defining this new order is not unqualified. America is in need of, again, persuading itself that the credibility of its campaign for redress depends on its own acknowledgment of first principles now too often lost from sight. The rule of law under public authority must be free of the entanglement of religious authority, but it must still be seen as grounded in God as the uncreated ground of all human authority. The justice of individual claims must likewise be seen within a hierarchy of values that respects society's subsidiary associations and relationships for their essential contribution to human fulfillment.

A second key lesson of September 11th is the continuing importance of sovereignty in preserving an order of justice in the world. There is arguably no adequate, specifically legal, remedy for the attack which America suffered, so that its response as a sovereign by military force

became essential not only to its own welfare, but to the stability and justice of world order. Just war reasoning reinforces the importance of the concept of sovereignty through its deployment of the concept of *public authority*. The ideological fanaticism of America's opponents, by displaying willful disregard for the concept of sovereignty, has, in effect, underscored anew its continuing importance.

At the same time, America's exercise of its sovereignty with the rhetoric of "freedom" and "power" could be taken to imply wrongly that sovereignty may be exercised without regard for the comprehensive and universal scope of the rule of law. September 11th may show that sovereignty has a future in the new world order, but the principles of justice to which America refers to justify its military action also suggest that sovereignty must simultaneously be transcended by integration into an increasingly efficacious international legal regime.

