

# Book Reviews

## A Triumph of Law

*Simple Justice.* By Richard Kluger. *New York: Alfred A. Knopf, 1976.*  
Pp. x, 823, xxiii. \$15.95.

### Reviewed by Burke Marshall†

Of the attorneys and teachers mentioned in this book, Charles Hamilton Houston brings the vaguest flickers of recognition to white lawyers. Yet he was the first, and among the most gifted, of the extraordinary group who guided the litigation leading to *Brown v. Board of Education*<sup>1</sup> and its enormous progeny of case law. There is a chair named for him at Howard Law School; based on the accomplishments and legacy of its namesake, it deserves to be the preeminent chair in legal education. Consider the exceptional distinction of only some of the black lawyers who worked as his colleagues and his apprentices: Thurgood Marshall, Robert L. Carter, William Henry Hastie, Spottswood Robinson III, James M. Nabrit, Jr. (and later James M. Nabrit III), William T. Coleman, Constance Baker Motley, and Franklin H. Williams. They were, of course, assisted by some white lawyers, including several distinguished legal academics associated with the Yale Law School; indeed, a white man, Jack Greenberg, succeeded Thurgood Marshall as the director of the NAACP Legal and Educational Defense Fund, the organization that spearheaded the litigation. But those white men and women, with the exception of Mr. Greenberg, were dabbling part-time. Credit for the stunning professional success of the strategy and tactics of the litigation culminating in *Brown* rests firmly on the work of black men and women, barred at the time from jobs in the mainstream of their profession, from education in most of the nation's law schools, and, in the states where they did most of their work, from even the simplest conveniences of the life of a litigator on the road, such as a room in a good motel or a meal at a decent restaurant.

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1. 347 U.S. 483 (1954).

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Richard Kluger's book<sup>2</sup> is a detailed account of the work of these men and women. Based on extensive research of the kind that is possible when many of the actors are still alive, the book is rich in anecdotes about those who did the courtroom work, anecdotes colorful and often funny, probably embellished over the years, and perhaps even apocryphal in part. Compassionately, and sometimes movingly, the author describes the lives and courage of the black people who, as clients of Charles Houston and his colleagues, put themselves and their families out in front of their communities and the society in which they lived, so as to become persons with standing to bring a justiciable case or controversy before a federal court.

As popular, almost contemporary, history, written by a man with the experience and technique of a journalist, *Simple Justice* is justifiably subject to the criticism that it does not reflect a complete understanding of legal processes. This is particularly evident in Mr. Kluger's attempt to describe and analyze the work of the Supreme Court and of various individual Justices.<sup>3</sup> Nevertheless, a review of *Simple Justice* should start with an unstinting and unqualified commendation of the book—particularly to lawyers, law students, and anyone considering the law as a profession. Its subject matter, the American struggle for racial and human justice, inexorably reveals the intricate splendor of the American constitutional structure and the creative invention of the process of constitutional litigation that the structure makes possible, indeed necessary. It describes lawyers' work at its pinnacle—intellectually demanding, technically inscrutable, difficult both physically and mentally, focused in the disciplined confines of a judicially permissible record, using the process of law simultaneously to affect the decision of government on great issues and to gain for a client,

2. R. KLUGER, *SIMPLE JUSTICE* (1976) [hereinafter cited by page number only].

3. The section dealing with the *Brown* decision itself includes significant materials from the papers of Justices Burton, Frankfurter, and Jackson, materials that suggest the ebb and flow of the Court's decisionmaking, extending even into the Justices' conference room. Mr. Kluger supplemented this spotty record by using it, in the classic journalistic manner, as a lever to elicit interviews with some law clerks who served during the October 1952, 1953, and 1954 Terms. In this way he obtained a fair amount of original and valuable historical matter concerning the views of individual Justices on the school segregation issue. The most controversial bit of evidence of this sort, however, concerns the views not of a Justice but of one of the law clerks, William H. Rehnquist, who was then clerk to Justice Jackson. In a lengthy footnote (pp. 606-09), Mr. Kluger argues that a memorandum written by Mr. Rehnquist to Justice Jackson, urging reaffirmance of *Plessy v. Ferguson*, 163 U.S. 537 (1896), reflected Mr. Rehnquist's own views on the cases, rather than those of the Justice. If so, this would conflict with Mr. Rehnquist's testimony on the point during his confirmation hearings in 1971. But Mr. Kluger's evidence does not seem compelling. In my judgment, an equally plausible interpretation corresponds to Mr. Rehnquist's testimony: that the memorandum was requested by Justice Jackson so that he could evaluate the strongest argument to be made in favor of *Plessy*.

and an enormous number of other people in the same situation, the relief to which he is entitled. As the foreword points out, the nature of the lawsuit that the book chronicles, the story that it has to tell, requires an imposing length; yet Kluger writes with an ease that makes its reading a pleasure, and he describes events that ended, after all, in a triumph of law.

*Simple Justice* does, however, have serious limitations, for Mr. Kluger writes as a journalist, not as a legal scholar. An underlying problem is apparent in the title, so apt a phrase for Mr. Kluger's own assessment of *Brown* and related decisions that it seems deceptively inevitable.<sup>4</sup> The justice that was done in *Brown* can be fairly described by the adjective "simple" in one of its meanings—that of "[a]bsolute, unqualified."<sup>5</sup> The trouble is that Mr. Kluger plainly also believes the adjective is accurate in another sense—that of "[n]ot compound, consisting of only one element, . . . not analysable."<sup>6</sup> From that belief stem serious limitations on the book's scholarship, for the justice dispensed by *Brown*, whatever else it is, is not in that sense simple.

One example of these limitations is Mr. Kluger's notion that constitutional litigation is entirely a political process, with issues being manipulated by the Justices solely to achieve preconceived substantive ends. In his foreword, Mr. Kluger refers to the Court as "these insulated nine men [to whom] the nation has increasingly brought its most vexing social and political problems,"<sup>7</sup> a loose but not outrageous description of the process. But he then goes on to say that the problems "come in the guise of private disputes between only the litigating parties," even though "everybody understands that this is a legal fiction and merely a convenient political device."<sup>8</sup> To traditional scholars of constitutional and Supreme Court history this characterization of the process contains not only loose but fighting words. It ignores the entire development, starting in 1792, of the restriction of the Supreme Court's role to the decision of "cases and controversies" in a constitutional sense.

The frame of mind, not just the language used in a short introduction, is the problem. The author's approach to the case law that grew from the *Civil Rights Cases*<sup>9</sup> and *Plessy*<sup>10</sup> to *Brown* is almost totally

4. Mr. Kluger uses the phrase "simple justice" to describe the decision itself on the occasion of its rendering. P. 710.

5. THE CONCISE OXFORD DICTIONARY 1189 (4th ed. 1951).

6. *Id.*

7. P. x.

8. *Id.*

9. 109 U.S. 3 (1883).

10. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

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result-oriented, conceding not even a presumption of principled good faith, much less careful analysis, to the grounds advanced by the Court for its decisions. An example will suffice. *Cumming v. Richmond County Board of Education*<sup>11</sup> hardly qualifies as a masterpiece of judicial craftsmanship, but it did involve a serious problem of remedy. The school board was maintaining separate school systems, in which the whites had a high school but the blacks did not. The plaintiffs at first sought relief against the tax collector for permitting public funds to be expended in that fashion, but they did not appeal from the denial of that specific prayer for relief by the Georgia courts. Nor did they attack the separate school systems as such, except, apparently, in oral argument before the Supreme Court. In any event, *Plessy* had just been decided, and the separate-but-equal issue was not really open. The question as framed by the Supreme Court on the record before it was whether the Fourteenth Amendment required the Georgia court to close the white high school. The Court held that it did not, finding no “hostility” to the blacks, but also stressing its reluctance to grant the particular kind of relief requested.<sup>12</sup> In his opinion for the Court, Justice Harlan, a hero in other pages of *Simple Justice* for his dissents in the *Civil Rights Cases* and *Plessy*, wrote that the case would have been a different one if the plaintiffs had sought to compel the school system to maintain a black high school as well, and if the element of “hostility” had been present.<sup>13</sup> But even if so framed, the issue of relief ultimately would have involved the complex question of the power of the federal courts to compel the states to tax for a particular purpose. A similar question was raised after *Brown* by the closing of the schools in Prince Edward County, Virginia in 1959;<sup>14</sup> resolution took five years of litigation. The *Cumming* decision may be plainly wrong, but “grievous pettifoggery”<sup>15</sup> it is not.

Even more serious, Mr. Kluger fails to recognize the enormous significance of the decision by the NAACP lawyers to ground the challenge to separate school systems in part on educational theory. The Court’s apparent adoption of an educational theory as the doctrinal underpinning of *Brown* has raised problems of legitimacy and relief

11. 175 U.S. 528 (1899).

12. *Id.* at 545.

13. *Id.*

14. *Griffin v. County School Bd.*, 377 U.S. 218 (1964).

15. P. 83. Mr. Kluger elsewhere calls the unanimous decision in *Grovey v. Townsend*, 295 U.S. 45 (1935), “judicial sophistry at its most flagrant.” Pp. 167-68. *Grovey* upheld the exclusion of blacks from voting in Texas Democratic primaries because conducting the primaries was a party function and did not constitute state action. The opinion does not represent modern state action analysis, but it was joined by Justices Brandeis, Cardozo, and Stone, and at the time was not considered to be a radical departure from doctrine.

that were brilliantly examined by the late Alexander Bickel.<sup>16</sup> Mr. Kluger is evidently oblivious to the jurisprudential significance of the Court's seeming reliance on the NAACP's educational theory; he describes it, admittedly at great length, only as an element of litigation strategy.<sup>17</sup>

But that is what this book is about—the litigation that led to *Brown* and the lawyers who conducted it. In spite of the book's scholarly shortcomings, Mr. Kluger tells this triumphant story masterfully. After reading *Simple Justice*, most good lawyers will wish that they too had been a part of the process it describes.

16. See A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 119-66 (1970). I say "apparent adoption" by the Court because its use of per curiam opinions and memorandum orders in subsequent cases, involving such varied state facilities as golf courses and swimming pools, simply cannot be explained on the ground of an educational theory.

In brief, the underlying educational theory identified by Professor Bickel as "another element" in *Brown* is that black children do not distinguish between de jure and de facto reasons for their segregated schooling, and since separation "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954), the public schools, as instrumentalities of the state, have a constitutional obligation to give black children a racially integrated education. The Court's use of the word "solely" and of implicit state action concepts makes unclear, at least to me, that the Court actually had this theory in mind. Yet the opinion is imprecise and certainly susceptible of that interpretation. The decision then would have rested in part on an unproved and really untested theory as to the educational effect of racial school segregation (which, absent a dual school system, simply reflects a society segregated residentially, economically, and socially). See, e.g., J. COLEMAN *et al.*, *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1965); Simon, *The School Finance Decisions: Collective Bargaining and Future Finance Systems*, 82 *YALE L.J.* 409, 409-21 (1973) (citing numerous studies of the impact of public school finance systems on educational quality). This interpretation of *Brown* is still an underlying issue in current school litigation. Cf., e.g., *Keyes v. School Dist. No. 1*, 413 U.S. 189, 196 (1973) (noting district court's use of racial statistics "to signify educationally inferior schools" but not "to define a 'segregated' school in the de jure context").

17. Pp. 315-45, 396-425.

## In Defense of *Tornillo*

*Freedom of the Press vs. Public Access.* By Benno C. Schmidt, Jr. New York: Praeger Publishers, 1976. Pp. xiii, 296. \$17.50.

### Reviewed by Floyd Abrams†

In law the moments are few when a genuinely innovative idea flashes onto the intellectual landscape. Such a moment occurred less than a decade ago when Professor Jerome Barron published the first article of an extraordinary series.<sup>1</sup> Professor Barron contended that the First Amendment should be construed to require the press to print—or, at least, to permit legislatures to require the press to print—articles that its editors and publishers chose not to print. As initially phrased and as often repeated, Barron's thesis was that First Amendment theory was "in the grip of a romantic conception of free expression, a belief that the 'marketplace of ideas' is freely accessible."<sup>2</sup> Since many ideas, particularly unorthodox ones, have no effective outlet, and since the "right to be heard" was, in Barron's view, central to the First Amendment, he urged that First Amendment theory be "liberated from its outmoded underpinnings" and that newspapers be required, at least in some circumstances, to print such ideas.<sup>3</sup>

The initial reaction to Barron's view was enthusiastic. Law reviews published a substantial body of commentary generally favorable to the ideological "liberation" of the First Amendment.<sup>4</sup> Judicial decisions initially lent support to the thesis that in the interest of First Amendment "values," the government could compel the media to broadcast<sup>5</sup> or publish<sup>6</sup> certain material.

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1. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); see J. BARRON, *FREEDOM OF THE PRESS FOR WHOM?* (1973); BARRON, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 478 (1969); BARRON, *Access—The Only Choice for the Media?*, 48 TEXAS L. REV. 766 (1970).

2. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641 (1967).

3. *Id.* at 1678.

4. For a compilation of some of this literature, see Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media*, 52 N.C. L. REV. 1, 2 n.5 (1973).

5. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971), *rev'd sub nom.* *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *Hale v. FCC*, 425 F.2d 556, 561-62 (D.C. Cir. 1970) (Tamm, J., concurring).

6. See *Rosenbloom v. Metromedia*, 403 U.S. 29, 47 n.15 (1971); *Tornillo v. Miami Herald Publishing Co.*, 287 So. 2d 78 (Fla. 1973), *rev'd*, 418 U.S. 241 (1974).

But the idea of compelled access, at least as it related to the print press, was to be short-lived. The Supreme Court's decision in *Columbia Broadcasting System, Inc. v. Democratic National Committee*<sup>7</sup> signaled the beginning of the end. Holding that broadcasters were not obliged by the First Amendment to carry unwanted editorial advertisements, the Court strongly emphasized the First Amendment right of broadcasters to make programming decisions.<sup>8</sup> The end came with the unanimous decision of the Court a year later in *Miami Herald Publishing Co. v. Tornillo*,<sup>9</sup> the case holding unconstitutional a Florida statute requiring newspapers to print the replies of candidates who had been attacked editorially while they were running for office.

Today, only nine years after Barron's first article, the access controversy already has an antique ring to it.<sup>10</sup> Yet the movement Barron inspired—and it was no less than that—did raise serious questions about the meaning and the future of the First Amendment. It deserves, at the very least, a fair and sober obituary. Professor Benno Schmidt's new book<sup>11</sup> is all that and more.

Schmidt begins by discussing the notion of compelled access in First Amendment history and theory. He then reviews the common perception that control of the media is overly concentrated and that news is inaccurately presented, a perception that gave impetus and strength to the access movement. Next, Schmidt skillfully surveys the arguments for and against access to the print press, exploring areas as diverse as libel, antitrust, "commercial speech," and the "public forum" cases. For example, Schmidt considers the contention that *New York Times*

7. 412 U.S. 94 (1973).

8. The Court noted, for example, that

[f]or better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression.

*Id.* at 124-25.

9. 418 U.S. 241 (1974). Professor Barron personally argued *Tornillo* on behalf of the president of a Florida teacher's union who had been attacked by the *Miami Herald*.

10. Of course, the requirement of adherence to governmentally defined "fairness" still persists in the telecommunications area, but even in that discrete field it remains subject to continuing challenge, refinement, and limitation. *See, e.g.,* Straus Communications, Inc. v. FCC, 530 F.2d 1001 (D.C. Cir. 1976); National Broadcasting Co. v. FCC, 516 F.2d 1101 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976). A recent ruling emphasizing the limited nature of the powers of the FCC over television content is *Writers Guild of America, West, Inc. v. FCC*, 45 U.S.L.W. 2241 (C.D. Cal. Nov. 4, 1976).

11. B. SCHMIDT, *FREEDOM OF THE PRESS VS. PUBLIC ACCESS* (1976) [hereinafter cited by page number only].

## In Defense of *Tornillo*

*Co. v. Sullivan*<sup>12</sup> and later libel cases so limited the right of individuals to recover for nonmaliciously published defamatory material that access requirements should be enacted to redress the balance. Schmidt examines *Gertz v. Robert Welch, Inc.*,<sup>13</sup> and persuasively concludes that the concern for the demise of defamation law is overblown,<sup>14</sup> a conclusion buttressed by cases decided since the publication of his book.<sup>15</sup>

Perhaps the most significant contribution of the book is its exquisitely drafted section on access to television and radio. There Schmidt best displays the wide range of his abilities: the overview of broadcast regulation law is as perceptive as any that has been written, and the discussions of both the "equal opportunities" provision and the "fairness doctrine" are pointed, accurate, and provocative.<sup>16</sup> Indeed, given the breadth and complexity of the issues Schmidt considers, the care and conciseness of his treatment are remarkable.<sup>17</sup>

Yet, for all the skill of Schmidt's analysis, I must dissent from his most important argument: his harsh disapproval, indeed denunciation, of the *Tornillo* decision. I should, in fairness, state at the outset that I write as one who believes that *Tornillo*, even more than *New York Times Co. v. Sullivan*, was an occasion for dancing in the streets.<sup>18</sup> Schmidt disagrees. He characterizes *Tornillo* as "something of a curiosity"<sup>19</sup> and its holding as "almost devoid of reasoned support."<sup>20</sup> *Tornillo's* use of precedents is said to be "disingenuous,"<sup>21</sup> its justifica-

12. 376 U.S. 254 (1964).

13. 418 U.S. 323 (1974).

14. Pp. 84-85.

15. See, e.g., *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

16. The "equal opportunities" provision of the Communications Act is found in 47 U.S.C. § 315(a) (1970 & Supp. V 1975); the FCC's "fairness doctrine" derives implicit legislative support from the same section. See pp. 141, 159.

This portion of the book may be read profitably in conjunction with Fred W. Friendly's new study of the fairness doctrine. F. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT* (1976). Much of Friendly's book is based upon personal investigative journalism. In the course of describing the *Red Lion* litigation, Friendly reveals that the Democratic National Committee deliberately set out to inhibit right-wing radio broadcasts by demanding free reply time. His story is evidence of the potentially repressive effects of governmentally compelled access.

17. In the high tradition of book reviewers, I have combed the book for factual errors—and located but one. Schmidt, in the course of suggesting that the emergence of television network news has led to a concentration of presidential and vice presidential candidates from the Senate, observes that since 1956 "every person nominated for these offices has been either an incumbent or former Senator, with the exception of Spiro Agnew." P. 65. One may forgive Schmidt for not foretelling the rise of our new President; neither Sargent Shriver nor William Miller, however, has likely forgotten his own performance on the national scene so quickly.

18. It was Alexander Meiklejohn whose enthusiasm for *New York Times* reached as far as his toes. See Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 221 n.125.

19. P. 13.

20. *Id.*

21. *Id.*



tion for its result "surprisingly apologetic,"<sup>22</sup> and its response to opposing arguments "lame."<sup>23</sup> Strong statements all, yet all statements that I believe to be unsupportable.

*Tornillo*, of course, is hardly immune from scholarly attack. As Schmidt contends,<sup>24</sup> Chief Justice Burger's opinion in *Tornillo* relies heavily on opinions that assumed the unconstitutionality of access requirements without justifying that assumption substantively.<sup>25</sup> But Chief Justice Burger's opinion claimed no more of the earlier opinions than that they had long since placed a "judicial gloss" on the First Amendment strongly pointing to the unconstitutionality of compulsory access.<sup>26</sup> And they had. Schmidt is also correct in observing that the Court's citation to previous opinions is, in a sense, selective.<sup>27</sup> For instance, in reversing the decision of the Florida Supreme Court,<sup>28</sup> the *Tornillo* Court not only failed to cite or consider the case on which the state court had in good part relied—*Red Lion Broadcasting Co. v. FCC*<sup>29</sup>—but set forth views facially inconsistent with those expressed in *Red Lion*.<sup>30</sup> Though the failure of the Court to grapple with *Red Lion* is striking, it hardly detracts from the persuasiveness of *Tornillo*.

22. P. 227.

23. *Id.*

24. P. 229.

25. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 391 (1973); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 117 (1973); *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972); *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945).

26. 418 U.S. at 254.

27. Pp. 230-31.

28. *Tornillo v. Miami Herald Publishing Co.*, 287 So. 2d 78 (Fla. 1973), *rev'd*, 418 U.S. 241 (1974).

29. 395 U.S. 367 (1969). The failure to deal with *Red Lion* might be explained, as one judge has urged, on the ground that the law of the print press and that of broadcast journalism are so unrelated that the Court perceived no need to advert to any broadcast decisions. *National Broadcasting Co. v. FCC*, 516 F.2d 1101, 1193-94 (D.C. Cir. 1974) (Tamm, J., dissenting), *cert. denied*, 424 U.S. 910 (1976). However, this seems an unlikely explanation. More likely, the Court chose not to explicate *Red Lion* further until a telecommunications case requires it to do so. *Red Lion* must surely rank as one of the more besieged unanimous opinions of recent years. See, e.g., *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 63 (D.C. Cir. 1972) (Bazelon, C.J., dissenting). The growing doubts of two members of the Court about the wisdom of the decision are set forth in *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 146, 148 (1973) (Stewart, Douglas, JJ., concurring, respectively). It is difficult to predict whether other members of the Court will come to share these doubts. But the failure of the Court to deal with *Red Lion* in *Tornillo* is probably more a product of the Court's reluctance to treat the subject than a conclusion that the fields are unrelated. For Schmidt's provocative speculation on this question, see p. 241.

30. For example, in *Red Lion* the Court rejected as "speculative" the argument that the fairness doctrine is likely to result in self-censorship by broadcasters. 395 U.S. at 393. The Court's conclusion is utterly irreconcilable with its conclusion in *Tornillo* that "under the operation of the Florida statute, political and electoral coverage would be blunted or reduced" and that "Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'" 418 U.S. 241, 257 (1974) (footnote omitted) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)).

## In Defense of *Tornillo*

From *Tornillo*'s commencement through its conclusion, the ultimate issue was one of power—the power of the press to decide what to print versus the power of governmental entities, whether legislative or judicial, to tell it what to print. “From the very nature of things,” Justice Story once wrote, “the absolute right of decision, in the last resort, must rest somewhere—wherever it may be vested it is susceptible of abuse.”<sup>31</sup> That the press sometimes abused the power to determine what to print had been acknowledged by the Court prior to *Tornillo*.<sup>32</sup> But that the press should be free to decide what to print, subject only to later criminal or civil penalties, had also been established in a series of cases all but totally prohibiting prior restraints on publication.<sup>33</sup>

*Tornillo* thus raised the question whether a government powerless to impose prior restraints on the publication of certain views had the power to require the publication of others. The answer of the Court in *Tornillo* is worth repeating:

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.<sup>34</sup>

It is difficult to fathom precisely what it is that Schmidt finds so objectionable, not to say unreasoned, in this conclusion. It is consistent with the many prior intimations by the Court that access re-

31. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 345 (1816).

32. See, e.g., *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973).

33. See, e.g., *Kunz v. New York*, 340 U.S. 290, 307 (1951) (Jackson, J., dissenting); *Grosjean v. American Press Co.*, 297 U.S. 233, 249 (1936); *Near v. Minnesota*, 283 U.S. 697, 713 (1931); *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). Post-*Tornillo* decisions include *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975), and *Nebraska Press Ass'n v. Stuart*, 96 S. Ct. 2791 (1976). In *Nebraska* the concurring opinion of Justice Brennan (joined by Justices Stewart and Marshall) urged that the *only* exception to the prohibition on prior restraints on news reporting is a single narrow category of cases in the national security area. *Id.* at 2818. Concurring opinions of Justices Stevens and White (as well as Justice White's concurring opinion in *Tornillo* itself), although not as far-reaching as that of Justice Brennan, also appear sympathetic to this view.

34. 418 U.S. at 258 (footnote omitted).

quirements would be held unconstitutional; the principle established by the case is surely a neutral one—one which may be easily applied in future cases in a predictable, if not always certain, fashion;<sup>35</sup> and the decision is one that does not shy from asserting and defending its central theme—the need to protect the “exercise of editorial control and judgment.”<sup>36</sup>

Schmidt suggests that the decision is internally inconsistent: its conclusion that editorial decisions “‘whether fair or unfair’” are constitutionally protected, he contends, is broader than its earlier statement that what is at issue in the case is “[c]ompelling editors or publishers to publish that which ‘‘reason’’ tells them should not be published’.”<sup>37</sup> Given the Court’s reference to the word “reason,” Schmidt infers that an “unreasonable” refusal to publish may not be protected.<sup>38</sup> But so to read the Court’s reference to the word “reason” would be inconsistent not only with later language in *Tornillo* itself<sup>39</sup> but also with *Associated Press v. United States*,<sup>40</sup> the case from which the Court in *Tornillo* was quoting. There is simply no basis for Schmidt’s reliance on language in *Associated Press* as support for his contention that *Tornillo* can conceivably be read to *permit* judicial decisionmaking as to what to print.

Equally unpersuasive is Schmidt’s suggestion that *Tornillo* is flawed because it “betrays no hint of relativity.”<sup>41</sup> The absolute “constitutional principle announced” by *Tornillo*, Schmidt concludes, “is not consistent with other rules grounded in the First Amendment.”<sup>42</sup> But it is. The Court’s rulings in *Tornillo* and other recent cases indicate

35. A concurring opinion of Justices Brennan and Rehnquist in *Tornillo* explicitly leaves open the possibility that statutes requiring newspapers that have printed defamatory falsehoods to print retractions may be constitutional. *Id.* Schmidt appears to view such a result as likely. *See* p. 246. I think it unlikely in light of the strong emphasis in *Tornillo* on the risks of judicial dictation of what may be printed. In any event, *Tornillo* is surely more predictable in its application than *New York Times* was—or is.

36. 418 U.S. at 258.

37. Pp. 229-30 (quoting *Tornillo*, 418 U.S. at 258, 254).

38. P. 231.

39. This language is set out at p. 365 *supra*.

40. 326 U.S. 1 (1945). In *Associated Press*, the Court stated:

It is argued that the decree interferes with freedom “to print as and how one’s reason or one’s interest dictates.” The decree does not compel AP or its members to permit publication of anything which their “reason” tells them should not be published. It only provides that after their “reason” has permitted publication of news, they shall not, for their own financial advantage, unlawfully combine to limit its publication.

*Id.* at 20 n.18.

41. P. 13. Schmidt is not alone in his qualms about the breadth of the Court’s language. *See* Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 50 (1975) (*Tornillo* “is so sweeping that it is hard to believe the Court could possibly mean what it said.”)

42. P. 13.

that the degree of First Amendment protection afforded the press depends on the extent to which the alleged intrusion on press freedom impinges on the editorial decisionmaking process. The cases fall into three categories, each of which involves a different degree of protection. First, the press enjoys virtually absolute protection when the state, through the judiciary or otherwise, attempts to determine either what must not be printed (*i.e.*, prior restraint)<sup>43</sup> or what must be printed (*i.e.*, access).<sup>44</sup> Second, when the state seeks to punish the press after publication, the First Amendment requires an extremely high, although by no means absolute, degree of protection.<sup>45</sup> Third, and least protected, is the right of the press to gather information. Here there is extensive First Amendment protection, but it is based upon a balancing test that often provides the press with less protection than that afforded under the other two categories.<sup>46</sup> So viewed, *Tornillo* is hardly absolutist; rather, it is representative of the vast freedom afforded the press at the apex of its First Amendment protection.<sup>47</sup>

Ultimately, *Tornillo* demanded a choice of First Amendment philosophies—a choice between the possibility of more expression reaching more people, but decreed and enforced by the machinery of the State, and the principle that “[f]or better or worse, editing is what editors are for.”<sup>48</sup> In *Tornillo* the Court concluded that any “intrusion into the function of editors” would pose too grave a threat to the freedom of the press.<sup>49</sup> As Justice White observed in his concurrence:

We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of

43. See, *e.g.*, *Nebraska Press Ass'n v. Stuart*, 96 S. Ct. 2791 (1976).

44. See, *e.g.*, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

45. See, *e.g.*, *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (privacy); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (libel); *Bridges v. California*, 314 U.S. 252 (1941) (contempt).

46. See, *e.g.*, *Pell v. Procunier*, 417 U.S. 817 (1974); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *KQED, Inc. v. Houchins*, 45 U.S.L.W. 2242 (9th Cir. Nov. 1, 1976); Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 *HASTINGS L.J.* 709 (1975); Note, *The Rights of the Public and the Press to Gather Information*, 87 *HARV. L. REV.* 1505 (1974).

47. Schmidt reaches a different conclusion when he analyzes *Tornillo* in the context of other First Amendment decisions. Pp. 232-33. He correctly observes that “[i]n other First Amendment contexts . . . the scope of constitutional protection varies.” P. 233. Schmidt concludes that since “all other rules emanating from [the First] Amendment are relative,” the principle of *Tornillo* “probably is destined for uncharted qualifications and exceptions.” *Id.* His error lies in his failure to recognize that *Tornillo* is located at the apex of the First Amendment hierarchy.

48. *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973).

49. 418 U.S. at 258.

controlling the press might be, we prefer "the power of reason as applied through public discussion" and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.<sup>50</sup>

In a world in which Indian newspaper editors have been accused of not printing enough photographs of Prime Minister Gandhi on their front pages,<sup>51</sup> and Peruvian newspaper editors have been required by law to publish all official governmental communications on their front pages,<sup>52</sup> Justice White's fears do not appear excessive.<sup>53</sup>

As even its critics recognize, *Tornillo* is a "landmark in First Amendment theory."<sup>54</sup> Its rejection of what Justice Stewart had earlier referred to as "blind pursuit" of First Amendment "'values'" at the expense of the First Amendment itself<sup>55</sup> marks it as a seminal ruling. The scholarly judgment passed on such a decision is influential, particularly that of so distinguished a figure as Schmidt. As he correctly notes:

When Supreme Court decisions are not grounded in reason, they are fragile. A subsequent Court, when exposed to similar problems, is less likely to follow an earlier decision if the logic of that

50. *Id.* at 259 (White, J., concurring) (footnote omitted) (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

51. 24 IPI REP., Sept. 1975, at 4. A recent summary of the state of the press in India concludes as follows:

In the Government's view, what has happened to the newspapers is that they have become more responsible during the 19 months of the new political order since they no longer devote their columns to the views of dissidents who, as the Prime Minister says repeatedly, "had no popular following."

Information Minister V.C. Shukla, asked recently about what used to be a conflict between government and the press, replied: "Now there is full understanding between the two."

N.Y. Times, Dec. 5, 1976, at 24, col. 1.

52. L.A. Times, Jan. 25, 1970, § A, at 16, col. 1. The Peruvian military junta called the law a "freedom of the press" law. *Id.*

53. Past studies support Justice White's warning. A survey of the International Press Institute reported that

[c]ompelling newspapers to publish official handouts or any other material inspired by the government is certainly one of the worst abuses of power. It is current practice in totalitarian countries. In [Franco's] Spain, for example, papers [were] bound to publish material issued by the government, but [had] to pretend that it [was] put out by the newspaper office itself.

Int'l Press Inst., Government Pressures on the Press 99 (IPI Survey No. 4, 1955), reprinted in INTERNATIONAL PRESS INSTITUTE SURVEYS NUMBERS 1-6 (1972). Further examples were cited from Yugoslavia, Lebanon, Ecuador, Argentina, and Colombia. *Id.* at 100-01. Another IPI publication detailed the activities of totalitarian governments in the Soviet Union, East Germany, and Spain in issuing press "directives" requiring the publication of government-inspired news. Int'l Press Inst., The Press in Authoritarian Countries 23-25, 87-89, 134-45 (IPI Survey No. 5, 1959), reprinted in INTERNATIONAL PRESS INSTITUTE SURVEYS NUMBERS 1-6 (1972).

54. *E.g.*, p. 237.

55. *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 145 (concurring opinion).

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decision is not visible. It will be more difficult to persuade new personnel on the Court of the sanctity of the earlier result. Commentators will create doubts. If [*Tornillo*] is not a reasoned treatment, political and popular pressures for guarantees of access will build up again.<sup>56</sup>

Schmidt's "doubts" about *Tornillo* and repeated suggestions that it is not "reasoned" are thus all the more troubling.

Yet, at least to this reader, they remain unpersuasive. *Tornillo* is not only a "reasoned treatment"; it is that most unlikely and attractive of all governmental acts—a renunciation of power.

56. P. 13.

## The Just War Doctrine

*Ideology, Reason, and the Limitation of War: Religious and Secular Concepts, 1200-1740.* By James Turner Johnson. Princeton: Princeton University Press, 1975. Pp. x, 291. \$12.50.

Reviewed by G.I.A.D. Draper†

Like natural law, the just war doctrine may be described as a perennial concept with a shifting content. From his perspective as a Christian theologian and moral thinker, Professor Johnson traces the successive ideological phases of the just war doctrine.<sup>1</sup> Ranging considerably wider than the period stated in his title, he follows the doctrine's development from St. Augustine, the founder of the Christian doctrine of the just war, to commentators on the armed conflicts of our own time, such as the war in Vietnam.

In the Introduction Johnson tells us that his book has two fundamental aims: "first, to explore the nature of the interaction between religion and secular society, not just in the dissolution of just war doctrine but also in its formation; and second, to investigate just war doctrine as an ideological pattern of thought, expressive of a greater ideology,"<sup>2</sup> namely, the notion of justice common in pre-Reformation Europe. The book's chief interest, to this reviewer, lies elsewhere, in its consideration of the *jus ad bellum* and the *jus in bello*<sup>3</sup> as components of the just war doctrine. The author unfortunately fails to explore the historical and ideological interaction between the two; yet that interaction must be clearly understood, if not for the sake of history, then for the very practical reason that just war thinking is once again ascendant, and the rules governing conduct in war may suffer as a result.

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1. J. JOHNSON, IDEOLOGY, REASON, AND THE LIMITATION OF WAR: RELIGIOUS AND SECULAR CONCEPTS, 1200-1740 (1975) [hereinafter cited by page number only].

2. P. 5.

3. The *jus ad bellum* is that part of international law governing resort to international armed conflicts. The *jus in bello* is the law of war properly so styled, namely, the body of rules governing the conduct of parties engaged in international armed conflict.

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In Chapter I Johnson treats the emergence and fashioning of the “classic just war doctrine.” He sees the main constituents of this doctrine as two-fold, theological and secular. Johnson detects the theological element in the scholastic theology of St. Thomas Aquinas, who derived it in part from St. Augustine; but the author also quite properly emphasizes the importance of the canon law tradition from Gratian onwards. The doctrine received its first formulation in St. Augustine’s letter *Contra Faustum*. Therein St. Augustine asked the critical question: “Is it necessarily sinful for a Christian to wage war?” His negative and exceptive answer—that wars are just if waged to avenge injustice or to coerce the enemies of the Church<sup>4</sup>—is generally considered as the first appearance of the specifically Christian doctrine of the just war.<sup>5</sup> As he so often did, St. Thomas Aquinas, in his *Summa Theologica*, repeated and elaborated St. Augustine’s view. The Thomist formula embodies the medieval and scholastic thinking about the just war and remains of great influence in the doctrine of the Catholic Church today.<sup>6</sup> Aquinas answered the question posed by St. Augustine in the negative, provided: (i) the Prince had authorized the war; (ii) there was a “just cause” against the adversary on account of some guilt on his part; and (iii) the belligerent had a “right intention,” *i.e.*, to promote good or to avoid evil. The main emphasis was upon the requirement of a just cause, which was considered to be a matter of moral theology. Thus the Thomist view made the question of the “justness” of all wars one that fell within the jurisdiction of the Church.

Johnson finds the secular contribution to the formation and the maturation of the classic just war doctrine in the chivalric ideals of the knightly classes and in the conception of the *jus gentium*. That concept first appeared in the writing of the Roman jurist Gaius (circa 165 A.D.) as “the law that natural reason establishes among all mankind [and] is followed by all peoples alike . . . as being the law observed by all mankind.”<sup>7</sup> It was contrasted with “natural law” (*jus naturale*), which embodied those principles that, founded on the very nature of man as a rational and social being, ought to control human conduct. In time *jus naturale* and *jus gentium* came to be regarded as the same set of rules seen from different points of view, for rules that were everywhere observed (*jus gentium*) must surely be rules that the

4. P. 36.

5. See A. NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 35 (rev. ed. 1954).

6. See V COMMENTARY ON THE DOCUMENTS OF VATICAN II: PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD 354-55, 356-57 (H. Vongtimler ed. 1969); J. EPPSTEIN, *THE CATHOLIC TRADITION OF THE LAW OF NATIONS* 90-93 (1935).

7. I THE INSTITUTES OF GAIUS 3 (F. de Zulueta trans. 1946).



rational nature of man prescribed for him (*jus naturale*), and vice versa. Both the canon law and the military law (*jus militare*) were seen as part of the *jus gentium*. Both were universally applied throughout Christendom—the canon law to all clerics and, in many matters, to all laymen, and the military law to all who followed the professions of arms.

Having thus analyzed the strands that made up the fabric of the classic just war doctrine of the late Middle Ages, the author proceeds in Chapter II to consider what happened to the doctrine in the 16th and early 17th centuries. Medieval Christendom by then had ceased to be an ideological unity, the secular territorial states were emerging, and Europe was, from 1618 to 1648, riven by the Thirty Years War. This period of the bitter cleavage between Catholicism and Protestantism generated its own ideological contribution to the just war doctrine, described by Johnson as the “holy war” theory:<sup>8</sup> “the exaltation of a purely theological component of the *jus ad bellum*, war for the cause of religion.”<sup>9</sup>

Johnson contends that there was nothing inherent in holy war theory that led to an absence of restraint in the prosecution of war during the period.<sup>10</sup> Yet restraint was lamentably absent. The trouble was that the just war doctrine had relatively little to say about conduct in warfare (*jus in bello*) beyond condemning perfidy (breach of promises) and the slaughter of women and children because war against them was not “just.” The lack of restraint was compounded by 14th and 15th-century ideas that the victorious Prince was waging a just war and, as the agent of God, punishing the defeated, as the devils in hell would punish them in the next world. The victory was the judgment of God as to the justness of the cause of the victor. The war

8. Pp. 81-82.

9. P. 22.

10. The author's contention is well-illustrated by his discussion of Cromwell's campaign in Ireland. Historians differ as to what went wrong at Cromwell's sieges of Drogheda and of Wexford in 1649, when the garrisons were butchered and a large number of the inhabitants perished. Johnson prefers to think that the excess at Drogheda is attributable not to the holy war doctrine but to the more mundane consideration that the commander of the besieging forces got out of touch with his troops. P. 145. But Cromwell's troops were, as Johnson himself points out, “ordinarily superbly disciplined.” *Id.* Indeed, Cromwell used that excellent “discipline” to carry out the atrocities at Drogheda and Wexford, and his own explanation negatives Mr. Johnson's suggestion of loss of control. As Cromwell explained later, he intended to punish the Irish for their own appalling cruelties and to end further bloodshed by striking terror in the Irish. See I THE LETTERS AND SPEECHES OF OLIVER CROMWELL WITH ELUCIDATIONS BY THOMAS CARLYLE 465, 469, 486-87 (S. Lomas ed. 1904). Perhaps this may be one of the countless examples of the theory of restraint in resort to war, *jus ad bellum*, having singularly little effect upon the actual conduct in warfare.

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could not be considered just on both sides because God's will was not divisible.

Chapter III concentrates upon the writings of the two great Spanish theologian-jurists, Victoria and Suarez, and three English writers: Ames, a Puritan theologian; Fulbecke, a lawyer; and Sutcliffe, a courtier and divine. According to Johnson each of the Englishmen excluded religion as a basis for the just war doctrine. He explains their somewhat incongruous grouping with Victoria and Suarez by their part in forming a bridge between the classic just war doctrine and "the overtly secular war doctrine of modern international law."<sup>11</sup>

In Chapter IV he concentrates upon Grotius, Locke, and Vattel. The span of these writers is considerable, namely from 1625, the date of Grotius's great work, *De Jure Belli ac Pacis*, to 1758, when Vattel published *Le Droit des Gens*. Johnson's treatment of Grotius's approach to the just war doctrine is not the most satisfactory part of the work, though he is not the first writer who has encountered difficulties in attempting to analyze the shifting distinctions between *bellum justum* and *bellum injustum* employed by Grotius.<sup>12</sup> In fact, these distinctions never became part of international law. But Johnson is right in pointing out that the writers he considers in this chapter removed the last lingering traces of the medieval just war doctrine and thus led to the modern doctrine, which is based, in his view, "entirely in nature and agreements among men, with no backwards glances to search out divine approval."<sup>13</sup>

A weakness in Johnson's work is his unsatisfactory grasp of legal concepts, exemplified by his use of the phrase "nature and agreements" to describe the sources of customary and conventional international law. By choosing those terms he reveals that he entirely disregards secular humanitarian rules of armed conflict, judicial decisions, and "the general principles of law recognized by civilized nations."<sup>14</sup> Earlier in the book, Johnson encountered a similar difficulty with the concept of the *jus gentium* and its very specific connection with the law and custom of knights and men-at-arms. Also, he pays little attention to the subtle but coherent hierarchy of legal

11. P. 22.

12. Grotius's unique contribution to the just war doctrine is primarily in the vigor and clarity of his treatment of the topic. To him, a war must have a legal cause in order to be "just," *i.e.*, there must be a reason which would be recognized in a court of law as a cause of action. II H. GROTIUS, *DE JURE BELLI AC PACIS* 394 (W. Whewell trans. 1853). See also I *id.* at 204, 206. See generally H. LAUTERPACHT, *INTERNATIONAL LAW: COLLECTED PAPERS* 346-50 (E. Lauterpacht ed. 1975).

13. P. 23.

14. I.C.J. STAT. art. 38, para. 1(c).

regimes from the divine to the positive, which marked the thinking of the scholastics.

It is appreciated that Mr. Johnson is considering the just war doctrine as a theologian and moral theorist rather than as a lawyer. Even so, a more serious shortcoming remains. Once the author has brought the *jus in bello*, as well as the *jus ad bellum*, within the purview of what he understands by the just war doctrine, the theory of the one, no less than of the other, is germane to his topic. But our writer fails, for instance, to pay sufficient attention to the place in Grotius's work of the *temperantia belli* (moderations in war), which afterwards were incorporated, in large part, into the modern international law of war.<sup>15</sup> Another great principle that Grotius stressed, which receives no mention in the work under review and yet is highly pertinent to the writer's central theme, is that the justice or injustice of the war (*jus ad bellum*) is irrelevant for the purpose of determining the obligation to observe the rules of warfare between the belligerents (*jus in bello*).<sup>16</sup> Perhaps the reviewer may interpose at this point some matters to which he ventures to think that Johnson has not given sufficient attention, bearing in mind the express aims of the book.

The doctrine of the just war, religious or secular, has not had a fortunate impact upon conduct in warfare. The central vice of the medieval classic doctrine was that it oscillated between aggravation of the cruelties in war, because the victorious Prince as the agent of God was punishing the unjust defeated, and a high level of artificiality that left it without an impact upon the content of the *jus in bello*. In particular, it failed to give us the idea that the *jus in bello* applied irrespective of the justness of the cause. This idea has in fact been impeded by the long history of the just war doctrine and has taken centuries to become established. It is true that the Christian doctrine of charity was in theory capable of playing a part in restraining conduct in warfare. But however much it may be urged that the very justness of the cause for resorting to war may demand charity in its

15. The *temperantia*, which appear at the end of Grotius's work on war and peace, were pleas for moderation of the brutal practices common to the belligerents in the Thirty Years War, in progress when he wrote. At the time, 1625, Grotius put them forward not as representing the law of war of the day. On the contrary they were an expression of horror at what was happening and of shame that those practices were then considered consonant with the law of nations. The *temperantia*, Grotius urged, were based upon the virtues of justice, mercy, charity, and honor. Advanced almost tentatively as proposals for a better world, they became the most famous part of his great work, remembered long after the elaborate discussions of the just and unjust war had receded to the realm of historical curiosity. They became the prototypes of many of the customary rules of warfare of the 18th and 19th centuries which were well-established when the positivists began codifying such rules in the second half of the latter century.

16. III H. GROTIUS, *supra* note 12, at 74-75.

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execution, or that the “right intention” with which it must be waged demands restraint by an intent to do good and to avoid evil, these ideas never really had a chance. The indivisibility of God’s will was too serious an impediment to the notion that a war might be just for both sides engaged in it.<sup>17</sup>

It was, paradoxically, in the secular branch of the law of arms that restraints, of a kind, were demanded and sometimes obtained, although unfortunately such restraints operated only between members of the military class. Some of the most appalling atrocities of medieval warfare were visited upon civilians (who had not the honor to carry arms) at the hands of the military (for whom this privilege was reserved). Yet this law of arms yielded ideas not without value for the subsequent development of the modern international law of war. First, it contributed the idea of a body of rules governing the military class irrespective of frontiers or allegiance and irrespective of the justice or injustice of the initial resort to war. Second, it affirmed the idea that war, in its proper sense, could be waged only by sovereigns.

Restraint in the actual conduct of war became based on two considerations, essentially neither religious nor moral. One was the hope of financial gain and booty, to which a court would not give title unless the prisoner or spoils had been taken in a “public and open” war. The other was the chivalric idea that honor was the attribute of the military class. Acts contrary to honor and good faith were considered incompatible with behavior expected of a knight and were proscribed by law. What we would today call a war crime would, by the 15th century, have been termed, with some legal precision, an act *contra fidem et jus gentium*. Such an act often led to the public “dishonoring” of the offender. The law of arms of knights and professional men-at-arms, the *jus militare*, had both canon and civil law bases considered as common to “the Roman peoples,” a term that embraced all people subject to Mother Church. This provided the idea of a body of law, well-understood by canonists, civilians, knights, and heralds, even if not regularly observed, that applied to the military class as such. It was applied in the military and feudal courts universally.

This universal law of arms demanded one salient situation before

17. Victoria (1480-1546) may have been the first to apprehend that a war could be just on both sides. Victoria accepted the earlier view that the victorious Prince was the tool of divine punishment, but, finding it repugnant that in the war between the Spaniards and the American Indians justness should rest solely with the former, he posed the problem whether war could ever be just on both sides. Victoria’s starting point precluded a plainly affirmative answer, but he proposed that demonstrable or invincible ignorance would excuse the unrighteous party. In this particular sense, a war could be “just” on both sides. See A. NUSSBAUM, *supra* note 5, at 80, 82.

it could become applicable: the war must be "public and open," *i.e.*, waged by the authority of a Prince with the manifestations of war-like conduct. Thus the medieval legacy of the just war did yield something of value to posterity. Mainly under the force of Church disapproval, expressed by anathema, it gave no place to private war or indiscriminate foray, which were the curse of medieval society. To such private wars the law of arms gave no color. Claims to ransoms and spoils would not be upheld. It made some attempt to bring to book professional freebooters whose behavior was synonymous with terror, brutality, and looting.

The requirement that the war be public and open evolved out of the Thomist formulation of the just war doctrine, which excluded the "private war" of the feudal lord. The Thomist formula insisted that for a war to be "just" it had to be "public." Gradually, the theological and moral quality implicit in "just" disappeared, for no Prince would admit that the wars he authorized were other than "just." Finally, war came to be seen as a proper war with legal rights for those engaged in it if it was waged "openly," *i.e.*, by armed men in formation, displaying flags and pennants. The normal historical reversal then took place and the "openness" of the conflict became conclusive evidence of the existence of a "war." Once the modern territorial states had been established, their resort to arms became open by necessity, and soon no form of fighting could properly be a war other than that waged by a sovereign state.

In the second half of the 19th century, under the impact of a collection of ideals that might be termed secular humanitarianism, the laws and customs of war were subjected to a major codifying redaction at the First and Second Hague Peace Conferences of 1899 and 1907. This was the era of positivism, the high noon of state sovereignty, and the virtual expulsion of the just war doctrine from the picture. States might, in accepted international law of the day, resort to war as a legitimate instrument of national policy.

With the gradual recession of that claim, through the progressive stages of the Covenant of the League of Nations, the Pact of Paris, and the United Nations Charter, a new doctrine of the just and lawful war—limited to individual or collective self-defense—and of collective peace enforcement appeared as the new *jus ad bellum*. Necessarily, the old question reappears: Does the *jus in bello* bind the aggressor and the self-defender alike? Some would argue that waging an aggressive war is the supreme international criminal act and that those who take part in such a war are participants in this criminality and are not entitled to the protection of *jus in bello*. Such arguments would bring

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us back to the evils of the medieval classic just war doctrine and all the miseries that accompanied it. The humanitarian law theory and its associate, the human rights theory, reject discrimination among participants in war whether on the side of the aggressor or of the defender. The Grotian principle will have to hold firm unless all that has been gained in the development of the humanitarian law of armed conflicts is to be in peril. Perhaps the secular and more modest tradition of a law of arms, expanded with a humanitarian content aimed at restrictions upon entire classes of weaponry and the maximum protection of those defenseless in enemy hands, civilians and civilian objects, may be a more rewarding endeavour than the resurrection of just war doctrines with an ideological charge.

Nevertheless, it must be said that we are indebted to Johnson for pointing out that we may not have heard the last of the just war doctrine, although its content has moved far from its classical form. The *jus in bello* confers no legality upon those wars the resort to which was illegal and criminal. Let us hope that no new doctrine of *jus ad bellum*, of whatever ideology, will be allowed to undermine and negate the humanitarian restraints that are to be found, in increasing strength, in the modern and renovated *jus in bello*.