

Noncombatant Immunity and St Thomas: carrying the debate further

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In 1983 one of the most powerful nations in the world, the United States, fought one of the weakest, Grenada. Even in this lopsided affair, which lasted only a few days, twenty innocent people were killed when United States fire hit a mental hospital.¹ The American people received this news with equanimity, in that they had become inured to the slaughter of innocent people, say by the Nazis against the Jews or by the Soviets against their own people, but also by their own government's bombers at the end of World War Two or by its lieutenants at My Lai. Nuclear weapons notwithstanding, the issue of noncombatant immunity poses the greatest threat to the continued efficacy of the just war theory.

At present James Turner Johnson, of Rutgers University, editor of *The Journal of Religious Ethics*, offers perhaps the most sophisticated treatments of just war theory², specifically Christian just war theory, and he astutely claims that a primary task of the Christian ethicist is to reintroduce acquaintance with what has been lost in Christian tradition (HT, 300). But what *is* the Christian tradition regarding noncombatant immunity? Obviously no answer to this question can afford to ignore St. Thomas Aquinas, but exactly was *his* position on this issue? The American Catholic Bishops and various Thomistic textbooks, acting as distilling agents for the various drops of Catholic tradition, imply that for St Thomas it is always wrong to *intentionally* kill noncombatants, which leaves open the possibility of killing *some* noncombatants if such killing is compatible with the proportionality dimension of the principle of double effect³. The scholarly formulation of something like this view, developed long ago by Alfred Vanderpol⁴, is criticized by Johnson (IR, 27). In this short article I will disagree with Johnson's treatment of St. Thomas, but not in order to defend Vanderpol, et al., for I contend that St Thomas' position on noncombatants in war (or, if you prefer, innocents⁵) has yet to receive adequate analysis.

Johnson's thesis regarding St Thomas is that he only lists three criteria that have to be met for a war to be just, all of them within the domain of *jus ad bellum*: (1) right authority; (2) just cause; and (3) right intention. That is, issues concerning *jus in bello* (such as noncombatant immunity, proportionality, and weapons restrictions) are not explicitly treated in St Thomas, and are only implicitly treated in his discussion of right intention, in that without the right intention in war one may *desire* to harm others, rather

than only harm them reluctantly through a benign severity (IR, 25, 39, 40, 171). As evidence that *jus in bello* was only a 'germinal idea' in St Thomas, Johnson implies that St Thomas' prohibition of churchmen from fighting was the most important *jus in bello* concern for him (IR, 42, 44). In short, if one is interested in noncombatant immunity 'one must look elsewhere than to ... Thomas Aquinas' (IR, 43). When Johnson does mention obliquely that 'Charity demands that the innocent be spared', it is by no means clear that he is referring to the position of St Thomas (IR, 44).

Johnson has no objections to St Thomas still being cited as authoritative on war issues, but St Thomas' authority only lies in the region of *jus ad bellum*; medieval principles regarding *jus in bello* derived neither from St Thomas nor St Augustine, but from nonintellectual sources: the chivalric code, custom, or *jus gentium* (IR, 32, 34, 75, 150; HT, 305–306). It is not that Johnson has some idiosyncratic conceptions of what discrimination or proportionality are (HT, 301), but he feels that because the chivalric code of noncombatant immunity was historically conditioned it no longer obtains in the same way it did in the middle ages (HT, 311). The content of the chivalric (not Thomistic) code of noncombatant immunity 'may easily appear out of step with contemporary reality' (HT, 314), hence it does not have the endurance of more formal philosophic principles. Therefore we should now be 'more sensitive' to *jus ad bellum* and the start of wars, because once wars start new weapons and modes of war are more than a match for antiquated chivalry (HT, 311, 315), and hence, we are to assume, innocent people will be killed.

What is odd is that Johnson develops his position on St Thomas while chastising scholars like Vanderpol and Paul Ramsey⁶ for telling us more about their own thought than that of St Thomas when they discuss St Thomas (JW, 9–10). For example, Johnson is sceptical of the likelihood that Ramsey's notions (from which Ramsey himself sometimes veers) can be traced back to St Thomas, specifically the notions of discrimination as an absolute guide and proportionality as only a relative guide to conduct in war. For Johnson, the earliest formulation of the notions of *jus ad bellum* and *jus in bello* together is in Victoria, and not before (JW, 105, 175). The use (or better, abuse) of St Thomas' comparatively minimal writings on war issues is analogous to the use (or abuse) Christians have made of the Bible for purposes of their own choosing (HT, 312–313; CW, 12). From all of this one would expect that Johnson himself would be meticulous in his citation of St Thomas, carefully teasing out St Thomas' own words and phrases so as to avoid the apriorism he sees in other scholars. But this is not at all what Johnson does (perhaps because he is more interested in the *development* of the just war tradition than in exegesis of St Thomas). Hence I claim that his approach to St Thomas on noncombatant immunity is inadequate for the following eight reasons. These eight reasons are sufficient, I think, to at least cast doubt on Johnson's claim that St Thomas did not have an ethics of *jus in bello*.

1. Although Johnson admits that for St Thomas there is a presumption against war, he does not emphasize the extent to which St Thomas is sceptical of the justness of war. In St Thomas' key question on war (2a 2ae, 40, 1) in the *Summa Theologiae*⁷ he asks, 'Is it always (*semper*) a sin to wage war?', which seems to imply that normally, or on prima facie grounds, it is a sin to wage war. Or, at the very least, St Thomas implies that it is undeniable that sometimes it is a sin to wage war. The key question from the perspective of my article is whether the prima facie sinfulness of war is always due to *jus ad bellum* considerations.

2. Even if Johnson is correct that St Thomas' criteria for a just war are only three in number, and almost exclusively concerned with *jus ad bellum*, it is not the case that only right intention has implications for *jus in bello* issues. Just cause also has such implications. St Thomas defines just cause in such a way that 'those who are attacked are attacked *because they deserve it* on account of some wrong they have done'—my emphasis (*requiritur causa justa: ut scilicet illi qui impugnantur propter aliquam culpam impugnationem mereantur*). If persons are attacked who are innocent of wrongdoing (2a 2ae, 40, 1), they have not been killed in a *just* war.

3. This is perhaps why St Thomas, relying on St Augustine, exhorts us (2a 2ae, 40, 1) to 'be peaceful even while you are at war' (*ergo bellando pacificus*). Not all actions in war are to be forbidden, but only those which are excessive (*sed inordinata*). Excessive response even in a war with *jus ad bellum* is to be prohibited.

4. Johnson fails to mention altogether that St Thomas commends (1a 2ae, 105, 3) the law of moderation that should be adhered to in victorious wars, especially in the sparing of women, children, and fruit trees—the latter so as to prevent starvation (*instituit ut victoria moderate uterentur, parcendo mulieribus et parvulis, et etiam ligna fructifera regionis non inidendo*).

5. The only 'exception' (1a 2ae, 105, 3) to the law of moderation in war (i.e., *jus in bello*) is when we are ordered to kill innocents by God (as in Deuteronomy 9:5). Only when acting as executor of divine justice (*quasi divinae justitiae executorum mittebat*) can noncombatants be killed (also see 2a 2ae, 64, 6 where the Abraham-Isaac story is cited). Frederick Russell is surely correct⁸ that St Thomas' use of *deus ex machina* explanations diminishes the vigor of his prohibitions against killing innocents, but he is premature, along with Johnson, in claiming that it is difficult, if not impossible, to find a clear doctrine of noncombatant immunity in St Thomas. As I see it, the cliché is helpful here in understanding St Thomas: *the* exception proves the rule. Or, more precisely, a divine order to kill the innocent is not an exception to the rule, for in this instance (2a 2ae, 64, 6) it is God who is responsible for the act, not God's human agent⁹.

6. What rule?, it might be asked. The one Johnson and Russell completely ignore (2a 2ae, 64, 6): 'There is, therefore, simply no justification for taking the life of an innocent person' (*et ideo nullo modo licet occidere*

innocentem). St Thomas could not possibly be clearer on this point! Yet just war theorists often speak as if St Thomas is only opposed to intending the death of noncombatants as an *end* and that he is not opposed to such deaths as a means. The bishops and the textbooks have ignored this quote as well, making it one of the best kept secrets in St. Thomas' thought. Because St Thomas believed that the cardinal virtue of justice referred to rendering to each his due, it is not unreasonable to speculate that it was because of a concern for justice that St Thomas was opposed to killing innocents, for the innocent person would never be receiving his due if he were killed in war. I know of no textual evidence from St Thomas for the claim that 'justice' 'requires' us to do things we know result in civilian casualties. In any event, there is not sufficient evidence to conclude that St Thomas' position regarding noncombatants rests exclusively on nonintellectual sources, as Johnson alleges.

7. Although Johnson does not use the principle of double effect to permit the killing of some noncombatants (as do the bishops and the textbooks), he does fail to notice how St Thomas' use of this principle has implications for noncombatant immunity. A defensive act can have two effects for St Thomas (2a 2ae, 64, 7): the saving of one's own life and the killing of the attacker. What is noteworthy is that St Thomas must use this famous principle to justify the killing of the attacker (*invadentis*); no other rational principles were left for St Thomas to justify the killing of innocents (only a divine command could do this). To speak colloquially, because of the fifth commandment, the pacifistic example set by Jesus, et al., St Thomas was forced to 'blow his wad' just to explain how a Christian could kill an attacker. There is no indication that the principle of double effect could be used properly so as to permit the killing of even some noncombatants. The burden of proof is thus on the scholar who alleges that St Thomas would allow foreseen but unintended killing of innocents in war; and this burden has not yet been met by Johnson or other just war theorists.

8. Johnson and Russell (r, 274—275) would probably claim that the passages treated in points (6) and (7) above do not deal with warfare, and hence are irrelevant to a consideration of noncombatant immunity in war. It must be admitted that 2a 2ae, 64 deals primarily with homicide, but when St Thomas states that 'somebody who uses more violence than is necessary to defend himself will be doing something wrong' (*et ideo si aliquis ad defendendum propriam vitam utatur majori violentia quam oportet, erit illicitum*), and when he favourably quotes the Decretals of Gregory to the effect that 'it is legitimate to answer force with force provided it goes no further than due defense requires' (*vim vi repellere licet cum moderamine inculpatae tutelae*), he also makes it clear (contra Johnson and Russell) that these statements are exemplified by the *soldier* who fights against the enemy (*ut patet in milite pugnante contra hostes*).

It must be admitted that St Thomas is here (2a 2ae, 64, 7) suggesting that

whereas a private person may not intend to kill another human being, public authorities may intend to do so. To be motivated by private passion when killing is a sin, he thinks, but not if one kills for the general good. But my position is not hurt by these admissions, because St Thomas' example here, once again, is the soldier who fights against the *enemy* (*contra hostes*). To say that public authorities or those acting for the common good can intentionally kill is *not* to deliver a carte blanche to kill innocents, nor even to permit the killing of a few innocents. Further, relying on Aristotle (*Physics* VIII, 4), St Thomas holds (2a 2ae, 64, 8) that those who kill innocent people unknowingly—which is different from killing them unintentionally while trying to invoke the principle of double effect—must have previously tried to remove all possible occasions of homicide when they used violence, at least if they want to avoid guilt. With sadness we should note that in contemporary war it is not common to remove these occasions; indeed, because of the nature of contemporary weapons, such occasions are often actually welcomed.

In short, even the best contemporary defenders of the just war theory (see CM) have not been careful enough in their treatment of St Thomas, and perhaps it is lucky for them that they have not read St Thomas carefully regarding the status of innocents in war¹⁰. One gets the suspicion, although no certainty can be gained here, that the stringency of St Thomas' prohibitions against the killing of innocents, when considered along with the fact that the killing of innocents has become a commonplace in contemporary war, would perhaps force the Thomist to lean more toward pacifism than the Thomistic tradition has indicated he should.

- 1 See *Time*, Nov. 14, 1983, pp. 23–24. The *Time* writer called the bombing of the mental hospital an 'understandable error'.
- 2 See his: (1) *Ideology, Reason, and the Limitations of War: Religious and Secular Concepts, 1200–1740* (Princeton: Princeton University Press, 1975), hereafter: IR; (2) *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton: Princeton University Press, 1981), hereafter: JW; (3) 'Historical Tradition and Moral Judgement: The Cause of Just War Tradition', *The Journal of Religion* (1984): 299–317, hereafter: HT; (4) *Can Modern War Be Just?* (New Haven: Yale University Press, 1984), hereafter: CM.
- 3 The bishops are by no means clear on this issue, however. On pp. iii, 34, 47, 56–57, 81 they indicate that only the *intentional* or *deliberate* killing of noncombatants is always wrong. But on pp. 4, 61 they indicate that noncombatant immunity is *universally* binding and *any* violations merit unequivocal condemnation. Hence, on p. 34 they are forced to admit that debates are likely regarding the meaning of the term 'intentional'. See *The Challenge of Peace* (Washington, D.C.: U.S. Catholic Conference, 1983). Two examples from the Thomistic textbook tradition of allowing 'incidental' killing of noncombatants are Austin Fagothey, SJ, *Right and Reason* (St Louis: Mosby, 1976); and Joseph C. McKenna, 'Ethics and War: A Catholic View', *American Political Science Review* 54 (1960): 647–658.
- 4 *La doctrine scholastique du droit de guerre* (Paris: A. Pedone, 1919).
- 5 As John Ford SJ, 'The Morality of Obliteration Bombing', *Theological Studies* 5 (1944): 261–309, ably argues in his classic study, even if it is more difficult to determine who is innocent in contemporary war than in medieval war, the task is by no means impossible.
- 6 See, e.g., Ramsey's *The Just War* (N.Y.,: Scribners, 1968).

- 7 Blackfriars edition (London: Eyre & Spottiswode; New York: McGraw-Hill).
- 8 Frederick Russell, *The Just War in the Middle Ages* (Cambridge: Cambridge University Press, 1975), pp. 264, 273—274, hereafter: R. Russell has apparently convinced Johnson that it is only in retrospect that St Thomas looms as an important figure in the development of the medieval just war theory, and that the canonists were much more significant. *Even if* these claims are correct, which I will grant for the sake of argument, there is still a need to understand well St Thomas' contributions. At the very least, the fact that St Thomas is *assumed* by many to give the classic formulation of the just war theory makes it necessary to get to the bottom of his views.
- 9 Likewise if a judge knows that an innocent person is being convicted he should question the witnesses all the more searchingly. But if he cannot free the man he is not guilty; rather the guilt lies with those who allege the innocent man's guilt. See 2a 2ae, 64, 6. Again St Thomas is clearer here than Johnson and Russell indicate, and more consistent than they indicate.
- 10 One of the reasons why Johnson is not as precise as I would like about St Thomas' treatment of noncombatants is that he is sceptical as to whether 'absolute-sounding approaches' can attain practical results in time of war; on practical grounds he is more attracted to the 'contributions' of less absolute, secular versions of noncombatant immunity. Quite frankly, I am at a loss as to which modern restraints have had the efficacy Johnson claims, but it would take another article to confront Johnson on this issue.

The Return of the Roman Catholics to Oxford

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In 1830, three centuries after the Reformation, which had turned followers of 'the old religion' into an oppressed minority, there were some 700,000 Roman Catholics (hereafter 'Catholics') in England and Wales. The Catholic Emancipation Act had just become law. By 1903 their number had risen to at least a million and a half. During that period the Catholic Church in Britain could be described as made up of three groups: those old families that had hung onto their Roman faith and their English property (the 'recusant families'); the Irish, new families which had fled from famine and persecution and—devoid of property—had congregated in the larger towns; and the converts from the aftermath of the Oxford Movement. Intermarriage, industrialisation and the emergence of professional classes came to erode these distinctions, as did the power of an increasingly liberalised and fluid