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Response

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Enemies, Foes, and Retributive and Restorative Justice in the Domestic and International Contexts

In Response to
James Turner Johnson's lecture

Can Force be Used Justly? Questions of Retributive and Restorative Justice

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Introduction

I should like to thank Gordon College Center for Christian Studies Director Harold Heie and Center for Public Justice President Jim Skillen for their kind invitation to visit with you this evening.¹ I further appreciate Professor James Turner Johnson's contribution in his essay concerning the Christian conception of just use of force.² His is a timely reminder of the historic legacy of distinctively Christian thought on this topic, from the earliest Christian communities, through the decline of the Roman Empire, and on through the Middle Ages and into the Reformation, and then up to our time. In fact, his essay sets the stage for our discussion so well, that I will not reiterate it, but rather use it as a launching point for further analysis of our understanding of the use of force in relation to the administration of justice, in the domestic and international context, with reference to contemporary modes of retributive justice and restorative justice. In the process I hope to stimulate you to examine our society's approach to these matters, especially in relation to a critical criterion that Professor Johnson identified in his essay: the criterion of right intention.

The Limitations of Christian Pacifism

Now to begin with, I am largely in agreement with Professor Johnson on his criticism of an uncritical Christian pacifism. If we take the Bible as a whole, even when accounting for the development and greater clarification of morals and doctrine within it, it is clear that the use of force, subject to certain conditions, is morally permissible by the governing authorities.

You will note that here I did not say, "the state", if only because in Hebrew antiquity, what we know of today as the state, or the nation-state, did not exist. Then there was no effective distinction between church, society and state, and the ruler or sovereign, who, whether a worshiper of Jehovah or not, contained within himself priestly, quasi-divine functions in addition to the roles of lawgiver, administrator (at least to the degree this was not already delegated to others), chief warrior and defender of the kingdom, and perhaps the key economic planner, to the extent that he could grant favors of land, tribute, taxes and tolls, and the right to enter certain trades in order to make a living. This rulership, its nature being highly personal and inhering in the personage of the sovereign, is among its most distinctive elements that separate it from our understanding of the normative nation-state today.³

Certainly the Bible not only permits the use of force, but the Hebrew Bible often commands it, in order to preserve the moral and physical integrity of the group. In numerous passages, entire kinship groups, tribes, and city-states were to be conquered and destroyed as an act of retributive justice that the Bible reports as being commanded by God.⁴

And we have the terror-inducing and awe-inspiring vision of the return of Jesus Christ, depicted in the book of Revelation as a warrior seated upon a white horse, with a personal mission to utterly destroy numerous nations and their inhabitants as an act of retributive justice prior to the close of the age.⁵ Few Christian pacifists that I am aware of have grappled with the implications of this. It appears they prefer to stick with their vision of a mild, unassuming Jesus who would never hurt a fly.

And, from the perspective of the numerous groups still struggling for liberty and peace, an unconditional pacifism seems immature, naïve, and even cruel and insensitive to the suffering of the oppressed who seek to be free. As we will discuss later, the Christian pacifists have good reason to be skeptical of assertions of right backed by might, and we always should apply rigorous self-examination of our motives before applying force. But this does not exempt the Christian from having to grapple with the issues, struggle with the moral ambiguities of force, and the real risks that force may actually make matters even worse, in spite of our extensive planning and good intentions. It seems easier to be a pacifist, since you can simply exempt yourself from these questions and opt-out from supporting the use of force. But I believe God is calling for us not to run from the challenge, but embrace it, and be transformed by the experience and actually learn something from it, so we can do it better next time. That opportunity for learning is lost if we excuse ourselves from taking responsibility for the proper use of force.

What are Retributive and Restorative Justice?

Let's give simple definitions of retributive and restorative justice *en route* to our discussion.

Retributive justice involves the notion of giving an offender, whether it is an individual criminal, or if during war, a nation, its just desserts in response to their prior act of injustice. It is oriented toward punishment, and involves the idea of giving someone punishment he or she has earned, just like wages. This notion has soteriological origins, since Romans 6:23 (KJV) states that "the wages of sin is death," with the sanctions of eternal separation and punishment for failure to be reconciled to a just and holy God. Many in the conservative wing of modern prison corrections implicitly borrow this concept, except that the state, standing in the place of God, administers deserved punishment on the offender. In regard to international conflict, the language that President George W. Bush has used regarding the hunting down of the terrorists and their state sponsors of the World Trade Center and Pentagon attacks is similar in nature to that used to describe sanctions for domestic criminals, and comes from his deep religious faith.

Restorative justice has gotten attention recently as an adjunct to retributive justice or being posed as an alternative to it. In its basic form, it seeks to repair the harm done by an offender, rather than seeking blame or punishment as such. In part it has a Biblical legacy, with the notion that once retributive justice to criminal offenders for non-capital crimes had been applied by the authorities (imagine, for example, the flogging of a thief), the punishment as such ended, and the task was to reintegrate the offender back into his or her community so they could exercise more responsible behavior. Ephesians 4:28 warns thieves to mend their ways, by stating, "Let him that stole steal no more: but rather let him labor, working with [his] hands the thing which is good, that he may have to give to him that needeth." I note here that unlike ex-offenders today, ex-offenders in Bible times did seem get a chance to have a clean start

after they had received their punishment, and could at least get up and go to a new town where no one knew him or her and attempt to get work. Our modern ex-offenders do not have such anonymity, as their criminal record always follows them.⁶

In the domestic context, restorative justice often takes the form of community members meeting in circles to arrange for meeting with the offender, her or his family, and others in the community, and quite possibly a victim, if the victim wishes, to discuss the seriousness of the offense to the community and to review what acts the offender must perform to repair the harm done, what can be done to help prevent the offender from re-offending, and to re-integrate him or her into the community. This is done to help elevate the moral awareness of the offender. This could involve restitution, community service, or an apology from the offender, and help in rehabilitation, job training, or education on the community's part, as it seeks to take ownership of the problem in order to help restore the wrongdoer to the community.⁷

Just last week there was a major conference at Suffolk University Law School sponsored by the Boston Theological Institute examining the domestic and international dimensions of restorative justice practices. One thing that is very notable is that by relying upon the internal resources of the community to try to resolve the conflict, it tends to empower the community and de-center the role of police and other entities of the state, promoting self-reliance by that community. The heritage of English customary law, and mediation techniques and informal harm resolution methods used by indigenous peoples are some of the other features of the restorative justice approach. The international dimensions of current restorative justice thinking are still in development. An example could include the efforts after World War II to rebuild our former enemies in Germany and Japan, so that now they are the best of friends. Yet another is the Truth and Reconciliation Commission in South Africa headed by Archbishop Desmond Tutu to bring together offenders of the former regime and their victims to learn what happened and why in the hope of learning truth and effecting reconciliation. Even the nation-building proposals of the current Bush Administration for Afghanistan after the war might be viewed in a restorative justice way.

Right Intention and the Enemy/Foe Distinction

Now we arrive at the core of my discussion, the question of right intention that Professor Johnson reminded us about.

Here I would like to introduce and borrow a concept of the Enemy and Foe distinction, developed by the late Carl Schmitt, a controversial political theorist who did much of his critical writing between World War I and the Weimar Republic in Germany and continued to write and theorize into the eighties, when he died in 1985.⁸ Schmitt has been examined by both conservative and left intellectuals as to his criticisms of bureaucracy, the unrepresentative nature of parliamentary rule, and the need to reestablish a new normative system of nation-state relations in the aftermath of the Napoleonic Wars and the faltering attempts to reconstruct this order in the years prior to the rise of Nazi Germany. I should note that Schmitt did join the Nazi Party, and like many of his time did produce anti-Semitic articles during his holding of a university chair. He was briefly imprisoned after the war as part of the de-nazification program, and was later released.

Carl Schmitt, in his book *The Concept of the Political*,⁹ draws a distinction in warfare among nations between an Enemy (*inimicus*) and a Foe (*hostis*). The Latin word *inimicus* is where we get the word "inimical" or in opposition to, and *hostis* is related to

the word “hostility”, although the manner which Schmitt redefined these concepts differed somewhat from their literal meanings.

To explain this simply, we can imagine a military conflict. In warfare, one might face an Enemy. One struggles with one’s enemy, seeking his or her defeat on the battlefield. Once hostilities have ended, and a peace treaty or armistice signed, the parties in conflict ideally return to a neutral corner, so to speak. Somewhere along the line, the nations can set about getting things back to normal. In time, the combatant nations might be able to treat each other with respect, and just might become the best of friends. An example from our own history might be our relations with England after the War of 1812, which throughout the nineteenth century finally did improve so that by the time of World War I, we could be allies.

But sometimes the conflict between the parties gets ideological, or otherwise of such an intense nature, that the parties in conflict feel that their opposite number is such a super-threat that one’s own future existence as a people and nation are at risk from an implacable, unmerciful, unredeemably malevolent opponent. Schmitt notes that in a conflict, “(e)ach participant is in a position to judge whether the adversary intends to negate his opponent’s way of life and therefore must be repulsed or fought in order to preserve one’s own form of existence.”¹⁰ In this way, the Enemy becomes transformed into a Foe, which cannot be compromised with, nor merely defeated, but rather liquidated. In essence, the world is not big enough for both groups, and so one must go. Schmitt states,

The war is then considered to constitute the last war of humanity. Such a war is necessarily unusually intense and inhuman because, by transcending the limits of the political framework, it simultaneously degrades the enemy into moral and other categories and is forced to make of him a monster that must not only be defeated but also utterly destroyed. In other words, he is an enemy who no longer must be compelled to retreat into his borders only.¹¹

And, once again Schmitt makes the Enemy-Foe distinction clear: “The adversary is thus no longer called an enemy but a disturber of peace, and thereby designated to be an outlaw of humanity.”¹²

When enemies become foes, wars can become wars of extermination. In the twentieth century alone, we find the genocide of Armenians by the Turkish Government in the guise of military conflict, the Bolshevik/Soviet liquidation of the kulaks in Russia under the rubric of class struggle, the Nazi Holocaust, and more recently, the ethnic cleansing in the Balkans, and the Rwandan genocides as clear examples of this.¹³

Now we must face the question of right intention, in relation to the modern habit of turning Enemies into Foes. Are we guilty of Foe thinking, which not only initially applies retributive justice through the use of force, but which ONLY gives retributive justice, and does not seek to restore the offending nation-state or non-state entity back into the international community?¹⁴

Terrorists and other non-state actors, like drug dealers, might need some form of restorative justice as well as retributive justice. Some recent examples include former combatants after civil wars attempting reconciliation and land reform in El Salvador, Nicaragua, etc. This almost happened in Colombia among rebels, drug lords, right-wing

death squads, and the government, but this was aborted. All the parties involved there have decided for now to continue fighting.¹⁵

In order to preserve our claim to right intention, we may want to view the justice process on a continuum, starting with retributive justice, and progressing to restorative justice, with the notion that restorative justice may be justice's highest form or mode, especially when viewed from a Christian perspective. Perhaps each intervention of force should look not only to the retributive act, but also look down the road to the restorative act.

Right Intention and Domestic Criminal Justice

We are reminded in the book of Romans that all people, not just criminals, and terrorists, but ordinary, nice people just like you and me, come into the world as ENEMIES of God (Romans 5:10, Colossians 1:21), whom God opposes. This same God, however, has the power to save, reconcile, and make friends of all sorts of people: various ethnic groups, various sins, various crimes, both genders, etc., so that they will be called Friends of God. Even murderers, like the Apostle Paul himself, who was before his conversion an admitted gangster with a license to kill Christians, can become friends of God and be restored to a right relationship to him. This should fill us with gratitude, and with awe. We are likely to see a lot of thugs up in Heaven, should we get there, a lot more than we thought; and might see a lot fewer of the "nice people" than we thought.

In addition to the Foe thinking that we may choose to adopt in international relations, our society has most definitely adopted it in regard to domestic criminal justice. Time does not permit me to describe in detail the disdain and, in some cases, outright hatred, of persons who are involved with the criminal justice system. Certainly I empathize with and understand the revulsion that the public has toward violent criminals, like murderers and rapists. However, what about all the non-violent offenders who languish as internal exiles in our prisons year after year, without rehabilitation, nor education or training, but solely on the receiving end of punishment? These folks will not be in jail forever. They will be coming home, some to our own neighborhoods. Are we ready to receive them? Can we reintegrate them into our communities? Or will we continue to delegate this problem to the state instead of taking ownership of this in behalf of our own communities?

Foe thinking in domestic criminal justice can also result in destroying the lives of the innocent. Just last week, a man on death row for 20 years was found to be innocent, and a court in Illinois awarded him \$15 million dollars for unjust imprisonment. Two homicide detectives were alleged to have framed the man, and he was exonerated due to DNA evidence. We have the case of the innocent West African immigrant in New York City, Amadou Diallo, who was shot at forty times and killed with 19 bullet wounds fired by police officers who viewed him as a Foe. And of course, we have the situation of Abner Louima, an innocent Haitian immigrant who was sodomized with a broomstick handle up his rectum by a member of New York City's finest. I think most of us would agree that these cases were certainly unjust, were not born of right intention, and lacked legitimate authority as police abuses. But does the Foe thinking so common today in regard to domestic justice create a climate of hatred that logically leads to these outcomes? Our legislators and civic officials take their cues from us as to what type of behavior will be permitted by the justice system. Have we, whether through our silence or in an active way, given folks the green light for further abuses?

Conclusion

Let me conclude by saying that as Christians, we face a tremendous task in thinking through matters in a Christian way, with our minds transformed by the Gospel, so that we can see things aright and promote justice and peace in the domestic and international community. In this, the Christian pacifists may be right in suggesting that searching self-criticism is needed before we rush to apply justice, especially retributive justice. We need to be alive to the possibility of opening doors to restorative justice towards those that have done us wrong. In this way, we can help satisfy the criterion of right intention that is critical to the application of justice, whether in war among nations, or in dealing with wrongdoers here at home. I look forward to the group discussion, and I thank you for your time and attention.

NOTES

¹ As indicated, these remarks were intended for oral delivery, and therefore originally no footnotes were included. Only fifteen minutes were available to deliver it. Because of this, I include these notes to clarify and in some cases expand on ideas in the text. The text itself remains as it was delivered.

² I had not previously known of Professor Johnson's thought, but some of his recent books dealing with just war theory are: *Morality and Contemporary Warfare* (New Haven: Yale University Press, 1999), and *The Holy War in Western and Islamic Traditions* (University Park: Penn State University Press, 1997). Note also that during his lecture, *Can Force be Used Justly* (November 1, 2001), Professor Johnson delineated the seven criteria for just war, the first four of which stem originally from the classical Christian tradition: 1) sovereign (legitimate) authority, 2) just cause, 3) right intention, 4) purpose of establishing peace, 5) proportionality, 6) reasonable hope of success, and 7) last resort. My primary focus is on the criterion of right intention.

³ The last real personifications of sovereignty in kingly rule were in the 20th Century. Some examples might include the Russian Czar, Nicholas II ("Supreme Autocrat"), Emperor Hirohito of Japan (whose function before the end of World War II flowed from his supposed divine nature), or Haile Selassie of Ethiopia. Since then, the bureaucratic state has supplanted the personal sovereign state in most places. But there are still some places where personal rule attempted a comeback, such as the late Ayatollah Ruhollah Khomeini in Iran, the late Mobutu Sese Seko as president of the former Zaire, and current Liberian dictator Charles Taylor. Professor Johnson is working on a new book about the role of sovereignty and its relation to legitimate authority for waging just war. This would be most timely. Most critics on the left, including pacifists, and some in the paleoconservative movement, have concerns about the exercise of military force because in their view, much state authority lacks legitimacy, and the state usually gets it wrong. The Christian sovereign in antiquity and in the Middle Ages was at least in theory held to account to a higher authority, and God's own self, for the proper exercise of war making within the limits of just war traditions. Leaders in the modern state, on the other hand, acting as sovereigns, have no such limits and desire none. **This is the case even for Christians today who serve in the highest public offices.** Instead, the logics of *realpolitik*, and of "reasons of state" are normative for war-fighting today.

⁴ See for example, the books of Numbers 21:1-3, 25:16-18, 31:1-18, Deuteronomy 2:31-34, 3:3-7, 7:1-6, 13:12-15, 20:10-18, Joshua 6:20-21, 10:34-43, 11:7-15, 11:20. Or, consider God's command to Jonah to pronounce doom upon the city of Nineveh. These are truly "hard sayings", but I know of few thinkers in the conservative Evangelical tradition who have seriously grappled with the implications of these texts for the practice of warfare and especially the issues of war crimes and genocide. Some defend the texts because they view the commands as being issued directly by God, who is viewed as inherently just, and

thus not capable of issuing an unjust directive. It was my intent to have the listeners confront these matters in their own thinking, and come to their own conclusions.

⁵ See Revelation 19:11-18.

⁶ For an excellent discussion of the challenge facing ex-offenders and their re-entry to the community, see the January 2002 report, *From Cell to Street: A Plan to Supervise Inmates After Release* by Dr. Anne Morrison Piehl of Harvard's Kennedy School of Government, at <http://www.massinc.org/research/index.html>.

⁷ See the publication of the Office for Juvenile Justice and Delinquency Prevention (OJJDP), *Guide for Implementing the Balanced and Restorative Justice Model*, (Washington D.C.: U.S. Department of Justice, 1998), for a more detailed discussion of restorative justice as applied in the criminal justice system. Also see the outline of basic principles, *Fundamental Concepts of Restorative Justice* (Mennonite Central Committee, 1996), by Howard Zehr and Harry Mika, online at <http://www.ojp.usdoj.gov/nij/rest-just/ch1/fundamental.html>, for a briefer exposition of these concepts.

⁸ Schmitt, of course, was best known for his concept of the Enemy and Friend distinction, whereby he believed that a state could only be defined as such by declaring some to be enemies as distinguished from friends. The grouping of friends in opposition to enemies is thus defined as a state. Without this fundamental distinction, the state as such would not exist. However, the Enemy and Foe distinction, while sometimes overlooked, was also a part of Schmitt's thought.

⁹ *The Concept of the Political* (trans. George Schwab. New Brunswick: Rutgers University Press, 1976.)

¹⁰ *The Concept of the Political*, p. 27.

¹¹ *The Concept of the Political*, p. 36.

¹² *The Concept of the Political*, p. 79

¹³ Osama Bin Laden appears guilty of Foe thinking, in that he views the United States as an implacable enemy that cannot be compromised with. In an article, "The Gospel According to Osama Bin Laden," (*The Atlantic Monthly*, January 2002) reporter Reuel Marc Gerecht presents the following comments from Osama Bin Laden from an interview in the October-November 1996 issue of *Nida'ul Islam (The Call of Islam)*, a militant Islamic magazine in Australia:

What bears no doubt in this fierce Judeo-Christian campaign against the Muslim world, the likes of which has never been seen before, is that the Muslims must prepare all possible might to repel the enemy, militarily, economically, through missionary activity, and all other areas. It is crucial for us to be patient and to cooperate in righteousness and piety and to raise awareness of the fact that the highest priority, after faith, is to repel the aggressive enemy that corrupts the religion and the world. Nothing deserves a higher priority, after faith, as the religious scholars have declared. It is crucial to overlook many of the issues of bickering to unite our ranks so that we can repel the greater Kufr.

This article is also online at <http://www.theatlantic.com/issues/2002/01/gerecht.htm>.

¹⁴ Yet another example of Foe thinking comes from a conservative Christian, Ann Coulter, who until recently wrote columns for *National Review Online*. In the September 13, 2001 issue, she describes, in part, her desired form of justice not only toward terrorists, but also against **non-combatants** who reside in nations alleged to shelter terrorists:

This is no time to be precious [*sic*] about locating the exact individuals directly involved in this particular terrorist attack. Those responsible include anyone anywhere in the world who smiled in response to the annihilation of patriots like Barbara Olson [wife of Solicitor General Ted Olson, and a noted conservative political writer who was killed during the September 11, 2001 attacks].

We should invade their countries, kill their leaders and convert them to Christianity. We weren't punctilious about locating and punishing only Hitler and his top officers. We carpet-bombed German cities; we killed civilians. That's war. And this is war.

To the credit of *National Review*, it discontinued their working relationship with her a few weeks later due to the content and style of the article. However, we should note that Coulter might well represent the point of view of many conservatives in this country, some of whom have now been emboldened to express sentiments that in the past they would have been ashamed to utter publicly. This seems to fail several of the Christian just war criteria. Coulter's essay is still available online at <http://www.nationalreview.com/coulter/coulter091301.shtml>.

¹⁵ As of January 2002, the largest rebel group in Colombia, the Revolutionary Armed Forces of Colombia (FARC) has decided to engage in peace talks with the government. See the January 27, 2002 article by Juan Forero of the *New York Times*, "Colombia Riddle: What Drew Rebels to the Table?"

RECOMMENDED READING

On Carl Schmitt:

The Enemy-Foe distinction, along with some of Schmitt's other political ideas, are presented in *The Concept of the Political* (trans. George Schwab. New Brunswick: Rutgers University Press, 1976). Also several editions of the radical journal *Telos*, especially issue 72 (Summer 1987), 83 (Spring 1990), 91 (Spring 1992), 95 (Spring 1993), and 96 (Summer 1993), all have articles by Schmitt with helpful notes. Issue 109 (Fall 1996) is entirely devoted to discussion of Schmitt's thought. Finally, the recent collection of essays, *The Challenge of Carl Schmitt* (ed. Chantal Mouffe, New York: Verso, 1999) give a good overview of Schmitt's insights and limitations in relation to contemporary law and political theory.

On Restorative Justice:

Restorative Justice has caught on in a big way worldwide. Many jurisdictions in the U.S. are using it. There are both written and online resources that I have found helpful for this topic.

Books on Restorative Justice include *The Spiritual Roots of Restorative Justice* (Ed. Michael L. Hanley, New York: SUNY Press, 2001) that gives a good overview of how different religious traditions view the concept. Another good resource by Howard Zehr is *Changing Lenses: A New Focus for Crime and Justice* (Philadelphia: Herald Press, 1990).

Online resources include Fresno Pacific University's (a Christian institution) website devoted to its Restorative Justice Project, at <http://www.fresno.edu/pacs/rjp>, the U.S. Department of Justice at <http://www.ojp.usdoj.gov/nij/rest-just>, Justice Fellowship (a Charles Colson group), at <http://www.justicefellowship.org>, and the Restorative Justice website at <http://www.restorativejustice.org>. Finally, the Boston Theological Institute's Restorative Justice Working Group includes resources on international relations and intra-state conflict at <http://www.bostontheological.org/restore>.