



## Holy War and the Medieval Lawyers

Violence has always been a problem for human societies. Western European societies, which have traditionally identified themselves as Christian, tend to find this problem especially vexing. The Christian ethic, after all, gives particular prominence in its value system to love of one's neighbor, and violent behavior is the very antithesis of the virtue of love. Yet both private mayhem and organized public hostilities have continued to erupt in Western European societies. This fact presents a notable difficulty for Christian thinkers and writers, who have commonly felt a need to try to reconcile the violent, warring actions of men, including Christian men, with the theological values they profess.

War represents the ultimate degree of organized violence between communities. War has, accordingly, always been a thorny subject for Christian writers and the Church's attitude has been markedly ambivalent on this subject. Despite their pacific ideals, Christian moralists and theologians were compelled to recognize that war was a fact of life. During the Middle Ages, Western intellectuals began to analyze in some detail the various aspects of war. Their treatments of the subject became increasingly sophisticated during the years between about 1000 and 1300. Out of the discussions of war in this period there emerged a fundamental

transformation of the way in which the problem was treated. This change involved a transition from a consideration of war as primarily a moral and theological problem to a conception of war as fundamentally a problem of law. Likewise, as the Church's enforcement powers increased, theological moralizing tended to be replaced by a more rigorous categorization of hostile action.

One result of this transition from theological-moralistic thinking about war to a legal treatment of these activities was a change in the kinds of problems that were addressed. There was considerable overlap, of course. Both theologians and lawyers were concerned about such matters as whether a given war was just or unjust, licit or illicit. But they tended to be interested in these questions for different reasons and to judge them by different criteria. Both groups needed to deal with the problem of who has the power to declare war, but again they did so for rather different reasons and might arrive at differing conclusions. Other problems were far more central to the concerns of lawyers than of theologians—questions of property rights, for example, questions about liability for damage resulting from war, the legitimacy of conquest, its implications for possessory and jurisdictional rights.

Finally, there emerged the concept of holy war, of war that was not merely justifiable but justifying and spiritually beneficial to those who participated in it. This category was certainly theological in its basis; but this category, too, was transformed during the high Middle Ages into a fundamentally legal concern, with a resulting change in emphasis.

In order to make sense out of the ways in which medieval writers dealt with holy war, it is necessary to look first at the problem of war and its place in the juridical structure, as medieval lawyers saw it. We must begin by saying something, however brief and superficial, about the theological background and its scriptural basis. Medieval thinkers were, of course, aware that the Old Testament dealt rather ambiguously with war. Some passages in the Scriptures treated war as an evil, as a punishment inflicted upon the people of Israel for their sins.<sup>1</sup> But other Scriptural texts spoke of war in much more positive terms. They described God as the author of

victory in war, victory which Yahweh granted to His people when He was pleased with them.<sup>2</sup> God accompanied the Israelites' army, watched over it, and, when not otherwise engaged, might even serve as its commanding officer, in conjunction with His priests.<sup>3</sup>

The treatment of war and violence in the New Testament was even more ambivalent and medieval writers were aware of this inconsistency. If Saint Paul spoke, in standard Old Testament fashion, of the Lord as the author of victory,<sup>4</sup> he also spoke of Him as a God of peace.<sup>5</sup> Even more emphatic in the new dispensation than in the old, was an aversion to violence: "Those who take the sword will perish by the sword" are words attributed to Jesus.<sup>6</sup> Still more pointedly, Jesus was represented in Saint Matthew's Gospel as repudiating the approval given in the Old Testament to strong-armed resistance to aggressors. The Mosaic Law had accepted resistance and retaliation as appropriate responses to attack;<sup>7</sup> the Gospel rejected this conduct and proposed instead the ethic of nonresistance.<sup>8</sup> The Christian, it might seem, was obliged not to repay evil with evil, violence with violence; rather he was expected to overcome evil with good, to counter force with love.<sup>9</sup> Thus it might appear that Christianity from the outset was opposed to works of violence, that no Christian could with propriety dedicate himself to military affairs. Against this background it might seem that the concept of a holy war, sanctioned and supported by the Christian Church, must be an absurdity.<sup>10</sup>

Yet things are not so simple as they might at first glance appear. Historically it is clear from the evidence of Tertullian (ca. 160–ca. 250) and other early authors, that numerous Christians did in fact serve in the ranks of the Roman army and that pacifism was by no means a universally accepted stance in early Christian communities.<sup>11</sup> The words of Christian writers echoed the actions of Christian believers. The Fathers of the Western Church, at least by the fifth century, had begun to face up to the ambivalence of the Scriptures on the matter of violence and were trying to rationalize the apparent contradictions that they found. In this process, as in many others, the voice of Saint Augustine (354–430) was especially prominent.

Augustine conceived of God as the author of wars, or at least of some wars.<sup>12</sup> Augustine was, moreover, persuaded that righteous men were sometimes forced to wage war as a result of the wrongdoing of the wicked.<sup>13</sup> All wars, in Augustine's view, were fought in order to secure peace.<sup>14</sup> Hence the peaceful objectives of a war were not adequate criteria to determine whether or not a particular war was morally acceptable. Rather, in order to make a judgment as to the morality of a particular war one must, according to Augustine, consider the circumstances of the war's origin together with the motives and the moral authority of the combatants.

Augustine, then, distinguished between just wars and unjust wars. This distinction was not, to be sure, very novel. It can be found, for example, in Cicero.<sup>15</sup> But in Roman thought the term "just war" tended to have as much ceremonial as moral content. A *bellum iustum et pium* was a war that had been properly declared, with full observance of the appropriate public ceremonies and religious rites.<sup>16</sup> Still, the Roman concept of just war was not utterly devoid of moral content: *aequitas* required that a just war have a just cause. This normally meant a violation of Rome's legal interests in foreign territories, infringement on Roman territory itself by foreign powers, or disrespect for the immunities of Rome's allies or her representatives on alien soil.<sup>17</sup> Augustine's notion, however, went beyond such considerations as these. Although he adopted Cicero's terminology and the basic notion that *aequitas* distinguished just wars from unjust ones, Augustine analyzed the justice of war in terms of four basic criteria. There must be a declaration of war by a legitimate authority; there must be a reasonable and morally acceptable cause for the war; the war must be necessary, that is, there must be no other way of achieving the legitimate objective; and the war must be fought by acceptable means.<sup>18</sup>

From the fifth century onward Augustine's views shaped the basic attitude of most Christian thinkers toward organized public conflict.<sup>19</sup> The Augustinian analysis, often in a somewhat simplified form, provided the matrix for the treatment of war by medieval canon lawyers. But one thing Augustine did not give us

precisely was a doctrine of holy war. It is one thing to deal with just war, with war that is morally tolerable and not reprehensible in itself; it is quite another and distinct matter to take the further step of conceiving of war as sanctifying, and as an activity that actually confers spiritual merit on the warrior.

The history of the Christian doctrine of holy war is complex; numerous strands, often of strongly clashing colors, are woven into its fabric. It is not necessary to untangle all of those strands here; but it will be useful at least to mention some of them in passing.<sup>20</sup>

There is, for one thing, a suggestive parallel between Christian holy war and the Muslim *jihād*.<sup>21</sup> No one to date has been able to demonstrate a direct influence of the one upon the other. There is, in fact, a good argument to be made that what they really have in common with each other is a common root in more ancient ideas.<sup>22</sup>

Certainly, too, early medieval Christian wars against pagans, both in the Carolingian period and later, were a factor in the development of holy war ideology in the West. The expansionist wars of Carolingian and Ottonian monarchs, activities in which bishops and other prelates often figured prominently, were accompanied by the conversion of conquered populations to Christianity. The role of churchmen in these wars and the conversions that resulted from them led to an association of war with salvation; and military success was naturally ascribed to God's pleasure in seeing the number of the faithful increased.<sup>23</sup> Warfare, indeed, became a Christian duty for bishops in Ottonian Germany, and there was a strong inclination to take the further step of pronouncing participation in warfare as spiritually meritorious—provided, of course, that the war was just.<sup>24</sup>

In part, too, one can trace the roots of the holy war idea to a Christian transformation of more ancient German heroic traditions. As a newly converted Christian society gradually remodeled its older values into new forms, the pagan husks of the older heroic tradition were soon enough discarded and new, Christian outer wrappings substituted for the old ones.<sup>25</sup>

One striking example of this transformation may be found in the liturgical evidence.<sup>26</sup> In the tenth century, when the Church began

to bless knights and their weapons, in order to consecrate them to the defense of true religion and ecclesiastical possessions, Christian society was clearly shifting its attitude toward giving a more positive value to warfare and to the warrior in the scheme of salvation. All this was not quite the same as saying that war was holy and sanctifying; still it was not a startling leap from the notion that weapons (at least when destined for proper use) should be blessed and that their users (at least in principle) were consecrated persons to the further notion that the activities in which the consecrated warriors employed their blessed weapons were themselves pleasing in the sight of God.<sup>27</sup> By the eleventh century Christian warriors who worried about the salvation of their souls could avail themselves of another reassurance: under certain conditions they might march into battle under a sacred banner, blessed by the Church. The banner symbolized the justness of their cause and evidenced ecclesiastical approval of the warriors' martial activities often at the exalted level of Saint Peter's successor in Rome.<sup>28</sup> It was only a short further step from fighting under the banner of Saint Peter to fighting with a Crusader's cross sewn on one's cloak.<sup>29</sup>

The papacy itself was not directly involved in the active organization and direction of armies until the ninth century, when it faced the problem of defending its territories from attacks by Muslim invaders in central Italy.<sup>30</sup> The really radical change in papal policy toward warfare, however, occurred during the reign of that most warlike of pontiffs, Pope Gregory VII (1073–85).<sup>31</sup> It has been argued, with considerable justice, that Gregory VII revolutionized the Christian view of warfare and that he was the principal inventor of the holy war idea in medieval Christendom.<sup>32</sup> Gregory demonstrated his passion for sanctifying the grubby business of organized fighting on several different levels. In the realm of political theology and political rhetoric, there is much to be learned from his use of the metaphor of the sword.<sup>33</sup> In the more immediate and practical realm of action, one can also learn much from a study of his concept of the Christian army and the Christian knight.<sup>34</sup>

What is more to the point here, Gregory seems to have entertained the notion that those who died in battle on behalf of right-

eousness were automatically and deservedly freed from their sins.<sup>35</sup> Other popes before Gregory VII had spoken in roughly similar terms—notably Pope Leo IV in 853,<sup>36</sup> Pope John VIII in 878,<sup>37</sup> Pope Leo IX in 1053,<sup>38</sup> and Pope Alexander II in 1063.<sup>39</sup> Gregory VII's pontificate gave a new twist to the older idea that soldiers dying in battle for a just cause might thereby be saved. Whereas his predecessors had spoken primarily of defensive situations, of encounters in which Christian soldiers were defending persons and property against hostile incursions by non-Christians, Gregory carried the notion of justification by war into situations where active expansion of the Christian world and aggressive activities on behalf of papal interests were at issue.<sup>40</sup> Moreover, the notion of warfare as a holy activity was markedly more prominent in Gregory's thought and actions than it was in the works and words of earlier popes.

Gregory VII has been described, with justice, as one of the forefathers of the Crusade, which embodied the holy war in its most characteristic medieval form. Certainly by the time that Urban II (1088–99) inaugurated the First Crusade at Clermont in 1095, the holy war was well on its way to becoming a fixture of papal policy and religious discourse in the West. Urban II's primary contribution was to bring together a number of accepted and relatively popular ideas in a new form, one that had the good fortune to achieve a spectacular and impressive success. This new institutional entity was the Crusade.<sup>41</sup>

By the pontificate of Urban II Western churchmen had in principle embraced the concept of holy war and viewed warfare as a positive value in the Christian life. "Such is the history of society," wrote Cardinal Newman, "it begins in the poet and ends in the policeman."<sup>42</sup> And one might paraphrase his observation by saying that the history of the medieval Church begins in the Gospel and ends in the Military Orders.<sup>43</sup>

But what of the lawyers, especially the canon lawyers, in all of this? Certainly it would be true to say that they played a role in it; but prior to the time of Gratian (fl. ca. 1140) theirs was a subordinate role. Before Gratian, canon law was not a science, certainly,

nor even a very consciously defined discipline.<sup>44</sup> It was not clearly distinguished or distinguishable from moral theology. The growth of canon law as a distinct instrumentality in the life of the Western Church was largely a twelfth-century development.

Still, there were canonists before Gratian, and some of them had dealt with the problem of warfare and its relationship to Christian life. Anselm of Lucca (+1086), for one, devoted the thirteenth book of his *Collectio canonum* to the theme of violence and the use of coercive force by the Church.<sup>45</sup> And the great Ivo of Chartres (+1116), writing just at the time when Urban II was launching the First Crusade, dedicated one book in each of his major canonistic collections to the problem of Christian violence and warfare.<sup>46</sup>

Although these earlier canonists played a part in the process, it is hard to escape the conclusion that Gratian did much more than any of his predecessors to transform the law of war into an ecclesiastical institution.<sup>47</sup> In Causa 23 of his *Decretum*, Gratian examined in detail the whole problem of violence and Christian life. In this context, he dealt with war as a particular species of violence.<sup>48</sup> Throughout his treatment he employed the familiar metaphor of the sword to express the general concept of coercive force. Two swords were in play: the spiritual sword and the material sword. These metaphorical swords, however, did not stand for "Church" and "State." Rather, they stood for two different kinds of coercive force—spiritual coercion (i.e., interdict, excommunication, and other spiritual penalties that might be employed against the offender) and material coercion (i.e., physical force and violence). The Church, according to Gratian, had the right to use both swords when necessary to secure obedience to legitimate commands.<sup>49</sup> It is clear that when Gratian spoke of the Church's right to use material coercion, he meant that the Church had the right to employ physical force, including the right to kill or to mutilate the offender, in the exercise of its functions.<sup>50</sup> The use of physical force by the Church, however, was subject to one significant limitation: violence was not to be employed directly and immediately by clerics; rather it was employed indirectly and mediately, through the agency of laymen.<sup>51</sup>



Within this general theoretical context, then, let us examine Gratian's treatment of war. In *Causa* 23, in his usual fashion, Gratian outlined a basic situation, from which he then isolated a series of specific questions for discussion. The situation described in this *Causa* is one in which some heretical bishops have been using threats and force to compel the faithful roundabout to embrace their heresies. The pope, in turn, has commanded the other bishops of the vicinity to defend the faithful from the wayward shepherds and their helpers and to compel the heretics to return to the Catholic fold. The obedient bishops thereupon assembled soldiers to do battle with the heretical forces. In the fighting some of the heretics were slain, others jailed and imprisoned; and thus they were forced to return to the unity of the Catholic faith.<sup>52</sup>

Given this situation, Gratian then posed eight questions, which he discussed in the light of the canonical sources: Is it sinful to make war? What is a just war? Should one use arms to ward off injuries done to others? Ought one to take revenge? Is it sinful for judges and other officials to kill guilty persons? Ought evil persons be forced to be good? Should heretics be despoiled of their goods? Do those who take the goods of heretics in fact take the possessions of other people? Can bishops or clerics take up arms on their own authority or on that of the pope or the emperor?

From Gratian's discussion of these questions and from the welter of authorities whom he cited, I should like to abstract four themes for comment here: first, the treatment of the evils of war and its sinfulness; next, the problem of the salvation of soldiers; third, the justifications for war; and finally, Gratian's approach to war as a legal category.

As to the first of these, Gratian's treatment of the sinfulness of war, it may be thought that in some sense Gratian was setting up a straw man, destined from the beginning for demolition. I am not wholly persuaded that this was so. At the least, Gratian's arguments for the proposition that war is morally wrong and not to be tolerated in a Christian society represented very fairly a continuing viewpoint among Christians. He cited the scriptural authorities for a nonviolent position, and he developed with some vigor the argu-

ment that the practice of war and violence is foreign both to the spirit and the explicit teaching of the Gospels.<sup>53</sup> Further, he cited a passage from Origen (although he attributed it wrongly to "Gregory") to show that various Old Testament passages that seem to condone war and physical violence ought to be interpreted in a Christian context as referring to spiritual struggles.<sup>54</sup> In short, although Gratian finally rejected the position that war is inherently sinful and wholly incompatible with Christian values,<sup>55</sup> he did report that position and gave it a reasonable presentation in the *Decretum*. Gratian, to put it another way, was fully conscious of the arguments that Christians should reject war, and he rejected that position consciously.

Next, Gratian held that it was no sin for a Christian to serve as a soldier. For this position he found support among the Fathers of the Church, principally from Saint Augustine.<sup>56</sup> There was a significant reservation in Gratian's thought on this matter, however: for Gratian distinguished between those who fight and kill on their own authority, which he thought wrong, and those who do so on the command of public authority, which he thought allowable.<sup>57</sup> This distinction was both basic and important. By introducing the notion of public authority into the discussion, Gratian really transformed his treatment of war into legal, rather than moral, categories. Public authority, to be sure, was not the only factor involved in distinguishing the righteous war from the unrighteous. A just war must be fought for a good reason, to serve just and proper ends,<sup>58</sup> in addition to having the sanction of legitimate public authority. Given these necessary conditions, there emerged in Gratian's treatment a Christian obligation to fight under certain circumstances. Wars are fought by Christians in order to protect the good and repress the evil, according to Gratian's doctrine; thus those who fail to oppose evildoers are in fact their helpers.<sup>59</sup> The man who did not help to put down the unjust and to protect the righteous was in effect consenting to evil and rejecting the good. So there were some circumstances, according to Gratian, where the Christian had a positive duty to engage in war.<sup>60</sup>

For Gratian, that war was just which was fought by sanction of rightful authority. But he also taught that wars to redress wrongs

were just and he implied that this was true whether they were proclaimed by public authority or not.<sup>61</sup> He cited some precedents, too, in order to make his meaning clear: as for example a war fought in order to maintain a right-of-way,<sup>62</sup> a war fought to protect the faithful against heretics,<sup>63</sup> a war fought to protect one's homeland against barbarians,<sup>64</sup> and a war fought to ward off robbers and pirates.<sup>65</sup>

This in turn led Gratian to a discussion of property rights in war. He concluded his discussion of this topic by determining that property captured and appropriated in a just war was rightfully taken and that title to it legitimately passed to the victor.<sup>66</sup>

It is reasonably clear, I think, that Gratian took the moral-theological category of the just war, as it had previously been treated by theologians, and transformed it into a judicial institution. He defined the circumstances under which war was just and lawful. Then he added the further basic premise that only a just war resulted in legitimate legal consequences. Rights to tangible property and intangible rights might both be won in a just war, but not in an unjust war.

Both the criteria and the consequences of this legal category of the just war were explored and developed more fully by Gratian's successors. A few of the decretists who commented on the *Decretum* chose not to deal with Gratian's treatment of war, or did so very scantily,<sup>67</sup> but most of them gave the subject full-scale treatment, as befitted a matter of continuing practical importance.<sup>68</sup> In the decades following Gratian there gradually took shape as well a body of new law, mainly derived from papal decisions in specific cases, but stemming partly also from the decrees of the great twelfth- and thirteenth-century councils. The treatment of war in this new law, and in the writings of the decretalists who commented on it, extended and refined, but did not supersede, the fundamental principles set down in Gratian's *Decretum*.

This canonistic literature is enormous; the portions of it dealing with warfare alone are very sizeable, and I do not propose to make anything like a complete survey of all of it here.<sup>69</sup> It will be worthwhile, however, to take a brief look at some of this literature in order to understand how the holy war fit into the lawyers'

analysis of warfare as a whole. There are four topics I should like to touch on, before coming to grips with the lawyers' views on holy war. These topics are: (1) the authority to initiate war; (2) the power to wage war; (3) limitations on armed conflict; and (4) property rights and liability for damages suffered as a result of hostilities.

As to the first of these topics, the basic rule laid down in the *Decretum* was followed by subsequent generations of legal writers: namely that a legitimate public authority must declare a war, since to kill a person without public authority was homicide.<sup>70</sup> Thus it was not a substantial question for the canonists whether a public authority was required. What did trouble them and what they did disagree about was the question of whether or not the pope and the bishops were public authorities entitled to declare war. Paucapalea (fl. 1140–48), the earliest of Gratian's pupils to write a *Summa* on the *Decretum*, thought that no cleric, not even the pope, had the right to initiate a war. He did concede that the clergy could properly exhort princes and secular rulers to take up arms in order to defend the oppressed or to resist the machinations of God's enemies.<sup>71</sup> Rolandus Bandinelli (who later reigned as Pope Alexander III, 1159–81) likewise held that clerics, since they were prohibited from fighting in wars, also lacked the power to declare war.<sup>72</sup> A later generation of decretists, however, was not so certain of this point as the early commentators had been. Huguccio, writing about 1188 or 1190, was at least willing to admit that there was some point to an argument that justified the declaration of war by ecclesiastical judges.<sup>73</sup> The *glossa ordinaria* to the *Decretum* (first compiled by Johannes Teutonicus between 1215 and 1217; later edited by Bartholomaeus Brixienensis ca. 1245) adopted the position that ecclesiastical princes had the power to declare war.<sup>74</sup>

One of the more interesting and original commentators on this matter was Pope Innocent IV, who wrote his *Apparatus* on the *Liber Extra* amid the crises and distractions of his pontificate (1243–54). In his opinion, clerics as a general rule were forbidden to declare war and would be subject to ecclesiastical penalties if they did so.<sup>75</sup> But there were important exceptions to this generalization. Clerics could properly initiate a defensive war, for one

thing; and they could likewise declare war in order to recover their possessions from an illegal taker.<sup>76</sup> Further, Innocent believed that bishops who held territorial jurisdiction could undertake wars to protect that jurisdiction, although they could not personally participate in the prosecution of such a war.<sup>77</sup> Hostiensis (+1271), another great thirteenth-century canonist, agreed in large part with the positions taken on this question by Innocent IV,<sup>78</sup> but added one further observation that is particularly significant for our purposes here. Ecclesiastical authorities, said Hostiensis, could properly declare war against the enemies of the Christian faith and against those who attacked the Church or rebelled against it.<sup>79</sup>

It is worth noting, too, that Gulielmus Durantis (1237-96), writing shortly after Hostiensis, taught that when the cause of a war arose out of a matter falling under ecclesiastical jurisdiction, any ecclesiastical judge had a right to declare war. Otherwise, he thought, such jurisdiction would be delusory.<sup>80</sup>

The power to wage war is closely linked with the power to declare war, and the canonistic writers reflected this connection. From quite early times, ecclesiastical regulations provided that the shedding of blood, even in a just war, constituted an impediment to the reception of holy orders and forbade clerics to use weapons, even in self-defense.<sup>81</sup> Gratian's *Decretum* incorporated these viewpoints. Priests should be concerned with the law, not with war, according to one of the canons,<sup>82</sup> and when force was required for the protection of the Church and its interests, then recourse should be had to the secular power for defense.<sup>83</sup> Bishops and other clerics might, under some circumstances, accompany an army, but their role was to assist it with prayers and spiritual aids, not to fight in its ranks.<sup>84</sup>

Later legal writers sometimes qualified this stance. Rolandus Bandinelli, for example, admitted that there was a case to be made for clergymen bearing arms, but concluded that it was always illicit for priests to do military service. Clerics in minor orders, however, could, in his opinion, wage war if commanded so to do by a prince or by the pope.<sup>85</sup> Rufinus (+ before 1192) strongly disagreed. "Some of our predecessors," he wrote, "have tried to distinguish,

more drunkenly than soberly, which clerics can take up arms and which cannot." As for himself, Rufinus wanted no part of such dangerous casuistry. No cleric of any kind, in his view, should fight in a war. To this he admitted two possible exceptions: a cleric might, under most extraordinary circumstances, fight to defend himself when required by necessity, which knows no law; and clerics might conceivably fight against pagans on the orders of a superior.<sup>86</sup> Although other decretists—the anonymous authors of the *Summa Parisiensis* and the *Summa 'Elegantius'*, as well as Sicard of Cremona (+1215), for example<sup>87</sup>—agreed in principle with Rufinus, they expressed their views less pungently. Huguccio was inclined to join Rolandus in distinguishing the question, but on different grounds. Clerics, Huguccio thought, could legitimately accompany an army and they could bear weapons, but only defensive weapons: shields, helmets, body armor, and the like. It was wrong for them to employ offensive weapons—lances, swords, bows and arrows—and if they did so they could be punished.<sup>88</sup> One anonymous glossator thought, on the other hand, that bishops not only could, but should, fight in defense of their sees. He went on to add that a bishop who failed to resist the enemies of the Church ought to be punished; apparently he reconsidered and thought this last sentiment too daring; at least, this statement is deleted in the manuscript that reports it.<sup>89</sup>

Following generations of popes, seeing that this aspect of the canon law was unclear, took pains to remedy the defect. A series of conciliar enactments and papal decretals flatly forbade clerics of whatever rank or grade, to engage in warfare directly and personally, even against the Saracens. Clerics could, however, give aid and counsel in just wars and might thus be indirect participants.<sup>90</sup>

The notion of a law of war, of a set of rules that defines the limits within which war can be waged, has in our own times been labeled a myth,<sup>91</sup> and certainly is somewhat paradoxical.<sup>92</sup> In medieval Europe, however, the notion of a functional set of laws of war was taken with extreme seriousness and, within limits, actually did dictate the bounds within which organized fighting usually took place.

Toward the very beginning of his *Decretum*, Gratian defined the law of war in a canon drawn from Isidore of Seville (ca. 560–636). The terms of this definition were broad enough to embrace not only the formalities attending the declaration of war and such matters as military discipline within an army but also, what was more important, the division of the spoils of conquest.<sup>93</sup> In a later canon, drawing this time on Saint Augustine, Gratian outlined the general principles that should govern conduct in war. The basic thrust of this canon was to rule out unnecessary cruelty, conquest for its own sake, and savage treatment of defeated foes.<sup>94</sup>

The canonists who commented on these passages were interested in part in the theoretical problems that they presented for the nature of law: What was the relationship of the law of war to other kinds of law? Their observations on this matter, though interesting in themselves, are not much to the point for our purposes. More relevant is the way in which they drew upon the Roman law to establish a distinction between public enemies (*hostes*) and mere brigands or robbers (*latrunculi vel praedones*).<sup>95</sup> The significance of this distinction lies in its consequences, since goods and persons captured from public enemies became the legitimate property of the conqueror, while those captured by brigands or robbers did not become the property of their captors. Similarly, the soldier fighting in a properly established army had a public function, which also created property claims, and this, too, helped to differentiate him from the ordinary predator.<sup>96</sup>

The importance of all this was stated most clearly by a civilian lawyer, Cino da Pistoia (1270–1336/37). A time of war, Cino declared, is different from a time of peace; it follows that what is lawful in wartime differs from what is lawful in time of peace.<sup>97</sup> The implications of this insight both for the criminal and civil jurisdictions are fundamental.

In a just war, for one thing, killing in battle was no crime; war, in other words, legitimized homicide and no legal action lay against the slayer. This was laid down by Gratian.<sup>98</sup> The implications of the principle were stated succinctly by an anonymous Anglo-

Norman decretist: "Homicide is licit in three ways, namely when God secretly inspires one person to kill another; or when a judge having the power of the sword slays someone; or when, on command of a prince, a soldier slays an enemy."<sup>99</sup> Interesting as the first two conditions are, it is the third one in this series that is germane here—slaying a public enemy in time of war is licit homicide. The topic was treated by other legal writers as well, but the statement of the anonymous glossator represents the general opinion.<sup>100</sup>

Solutions to questions of liability for damages in wartime were resolved differently, depending on whether the war was legally just or not. In a war against the infidel, which Hostiensis labeled a "Roman" war,<sup>101</sup> enemies who lost property had no claim whatever to restitution, though such a claim might lie in other types of war.<sup>102</sup> In contrast, the person initiating an unjust war was liable for all damages arising therefrom, according to Joannes Andreae (ca. 1270–1348). Joannes further maintained that there was a legal presumption that every war was unjust. The burden of proving that a given conflict was just, in other words, lay with the person advancing that claim.<sup>103</sup> Those who fought in an unreasonable war, Joannes thought, were not to be distinguished from robbers and brigands and they bore absolute liability for any damages they caused.<sup>104</sup>

Innocent IV even earlier had established that participants in an unjust war had no right to claim against the person declaring the war for losses suffered as a result of service rendered in the war. Those who were summoned to fight in a just war had a limited claim; if they owed military service to the person declaring the war, participants had no claim against him, unless the war was manifestly evil.<sup>105</sup> This position was adopted by later commentators as well.<sup>106</sup>

It is the function of human law, according to one of the decretist writers, to restrain violence.<sup>107</sup> It is well known that the medieval canon law did, in fact, attempt to fulfill this function, both by limiting warfare to certain periods of the year and by exempting certain classes of persons (priests, clerics, monks, lay brothers,



pilgrims, merchants, peasants, and travelers) from attack during time of war.<sup>108</sup> Beginning in the late ninth century, the medieval peace movement sought to use the penal sanctions of the canon law to punish those who violated these norms. By the late twelfth century, these provisions had been incorporated into the general law of the Western Church, particularly as a result of the constitutions adopted by the third Lateran Council in 1179.<sup>109</sup> Other councils sought to impose further limits on violence—by forbidding Christians to procure assassinations, for example.<sup>110</sup> Although these restrictions were in theory supposed to apply to all just wars, the canonists realistically admitted that they failed to work well and that they were not in practice observed.<sup>111</sup>

There was also an attempt to limit war by outlawing weapons that were thought to be too murderous and too effective in their results—the crossbow and the ballista, in particular. In this connection an interesting distinction was drawn between wars against Christians and wars directed against non-Christian enemies. The crossbow and the ballista were outlawed in the former class of wars; in wars against non-Christians, however, the use of these weapons was allowed.<sup>112</sup> The justification for this invidious distinction was not spelled out either in the canon itself or by the commentators on it; perhaps because it was thought to be self-evident. At any rate, these weapons, which contemporary opinion regarded as excessively dangerous and cruel, were in principle restricted to use in the holy war. A few canonists sought to broaden the interpretation of the canon to mean that these weapons might be used in just wars, but not in unjust ones.<sup>113</sup> In practice the effort to restrict crossbows and ballistas to wars against non-Christians had little effect, and these weapons by the beginning of the thirteenth century were coming into common use in European wars.<sup>114</sup>

More effective in practice than attempts to limit the seasons of war, the classes of persons against whom action was directed, or the weaponry used in warfare were the efforts to restrict indiscriminate looting in time of war. Possibly this sort of control was more effective precisely because its implementation depended, in the final analysis, upon the courts, rather than upon soldiers in the

field. It made little sense to loot, after all, if subsequently one's possession of the looted goods could successfully be challenged in the courts.

Gratian had thought (relying on Saint Augustine) that soldiers should not loot at all, but should be paid for their service with established stipends,<sup>115</sup> a notion that conformed to the law and practice of ancient Rome.<sup>116</sup> Although the decretists tended to follow him on this point,<sup>117</sup> the question was wholly academic. Medieval soldiers looted and tried to keep what they took, insofar as their leaders did not claim it for themselves. By the thirteenth century canonists had adjusted their treatment of the law to take account of this fact of life. The ordinary gloss to the *Liber Extra* invoked the just war distinction once more in this matter: if the war were unjust, no spoils legitimately could be taken; if the war were just, however, then spoils were legitimate.<sup>118</sup> This rule applied not only to the property of the vanquished but also to the defeated soldiers themselves. They, too, became the property of the conquerors, to be divided among the members of the victorious army and, in the usual course of things, to be held for ransom.<sup>119</sup>

What I have said thus far will hopefully have given you some notion of the place of war in the medieval lawyers' scheme of things. Now we come at last—at long last, you may think—to the holy war.

Before we try to fit the holy war into the larger legal framework, it would be best to define the term, holy war, at least roughly. For our purposes here, I understand holy war to mean a war that is not only just, but justifying; that is, a war that confers positive spiritual merit on those who fight in it. This requires some positive action, in turn, from a religious authority, accepted as having the requisite power to grant official sanction to a holy war, to confer its particular sacred character upon it. Commonly, though not invariably, such a war will be rather closely directed by religious authorities, fought with the purpose of achieving some religious goal. But the outstanding characteristic of the holy war, I repeat, is that it is viewed as securing personal religious merit for those who participate in it.<sup>120</sup> Thus defined, the holy war may be viewed—and I shall

shortly show that it was so viewed by medieval lawyers—as a subset of the just war. Every holy war, to put it another way, was a just war; but not every just war was a holy war.

Now there was a feeling abroad in Western Europe during the Middle Ages that warriors who died in defense of Christendom or in battles to advance the spread of the Christian faith were *ipso facto* meritorious.<sup>121</sup> It was in fact reasonably common literary form to describe them as martyrs for the Christian faith.<sup>122</sup> The tradition embodied in this thinking was ancient, and it was rooted not only in popular piety but also in ancient legal sources. “Because they died for the *re publica*, they are, indeed, understood to live in perpetual glory,” the *Institutes* of Justinian declared, referring to soldiers who died for the Roman *patria*.<sup>123</sup> Tribonian, Justinian’s principal legal counsellor, was not fabricating this sentiment *ex nihilo*—it is founded upon statements of the classical Roman lawyers (Papinian, Ulpian, and Marcellus, for example),<sup>124</sup> as well as upon common opinions expressed by Roman literary types.<sup>125</sup>

Other scholars have suggested that the emergence of the idea of holy war in Western Europe was favored by the disappearance of the Roman Empire in the West and that medieval wars against the pagans may be seen as a continuation of Roman wars against the barbarians.<sup>126</sup> It has been persuasively argued, too, that during the early Middle Ages there took place a transformation of the classical tradition of glorified death for the secular *patria* into a Christian tradition of sanctified death for the Christian *patria*—heaven; or alternatively for the advancement of the Christian faith here on earth.<sup>127</sup>

Gratian incorporated in the *Decretum* a number of statements from authorities who reflected this view, most especially a letter of Pope Leo IV in which the pontiff stated that those who died for the truth of the faith, the salvation of the *patria*, and the defense of their fellow-Christians merited a heavenly reward.<sup>128</sup> This statement might be construed, though the evidence is rather slim, as a legal foundation for a doctrine of holy war. In any event, it was not until about a century after Gratian’s time that a well-developed scheme was framed to fit the holy war into the larger context of legal thought

about war in general. For this development, Hostiensis is our most important witness.

Hostiensis divided wars into seven different categories, of which the first is one that he labeled rather curiously "Roman war." This is the war between the faithful and the infidel; it is also our holy war. The other varieties of war in this scheme were, briefly, the judicial war, the presumptuous war, the licit war, the casual war, the voluntary war, and the necessary war.<sup>129</sup> Hostiensis's notion of the "Roman war" was evidently an adaptation of categories used by the medieval Roman lawyers,<sup>130</sup> but used by him to mean the holy war, that is, the Crusade. The holy war, thus, was what other writers called a "hostile war," that is, one in which the enemy were *hostes* in the full legal sense, the result of which was that their persons and property passed fully and rightfully to the ownership of those who defeated them.<sup>131</sup>

There was a further turn to this development, which I mention only in passing, since it has been more fully explored by others.<sup>132</sup> The identification of the holy war with the Crusades seems to have gone one step further in the thirteenth century, so that writers, especially lawyers but also theologians, come to apply to wars declared by secular rulers the full panoply of legal rights earlier assigned to the Crusades. By the end of the thirteenth century some writers attribute to those who fall in battle on behalf of a national interest that eternal glory once reserved for Crusaders and earlier still for the defenders of the ancient Roman empire.<sup>133</sup>

If the principal characteristic of the holy war is the spiritual merit that it is thought to confer upon those who participate in it, then we must take some account of what precisely that spiritual merit consisted. In the medieval Christian tradition the conventional response to a question on this point was: the indulgence. But what is an indulgence?

The answer to that question is unfortunately complex.<sup>134</sup> We have already noted that from as early as the mid-ninth century there are papal letters that link death on the battlefield with salvation of the deceased warrior's soul.<sup>135</sup> The early papal letters on the subject, however, were not indulgences in any recognizable sense

of the term. They were rather expressions of pious hope coupled with intercessory prayers for the salvation of the souls of the dead. Shortly after the middle of the eleventh century, Pope Alexander II (1061–73) moved closer to granting an indulgence when he proclaimed a commutation of penance for soldiers fighting in the wars of reconquest in Spain. Participation in war against the Moors was expressly stipulated by the pope as adequate satisfaction for the penance imposed upon these soldiers by their confessors.<sup>136</sup> Now there is a difference between a commutation of penance and an indulgence (at least as the term indulgence is conventionally understood). An indulgence is satisfaction for the temporal punishment required by God in satisfaction for sin. A commutation of penance, on the other hand, is satisfaction for the penance imposed by a confessor for the sins confessed to him. Punishment and penance are not necessarily the same at all; punishment is determined by God and the full extent of it is presumably known only to Him; penance is determined by the confessor and his estimate of the seriousness of a particular sin (and consequently the punishment required for that sin) is not necessarily identical with the judgment made on the matter by God.

When the Council of Clermont in 1095 adopted its provisions for the spiritual reward of the participants in the First Crusade, it specified that this reward should take the form of a commutation of penance.<sup>137</sup> There is some question, however, as to exactly what was meant, or thought to be meant, by that canon. Pope Urban II, who presided at the Council, seems to have felt unsure about the matter. In one of his letters, about a month after the Council, he blandly referred to the Council as having granted Crusaders “remission of all their sins”;<sup>138</sup> a few months later, in another letter, Pope Urban was more circumspect and described the spiritual reward granted the Crusaders as a commutation of penance.<sup>139</sup>

Whatever doubts or uncertainties Pope Urban may have had about the Crusade “indulgence,” his twelfth-century successors, when bestowing similar spiritual favors, took care to state that they were granting them in the same sense that Pope Urban had.<sup>140</sup> Thirteenth-century popes and councils grew bolder about the mat-

ter and gradually the Crusade indulgence came to have the character of an indulgence proper, that is a remission of the temporal punishment for sin.<sup>141</sup>

Pope Innocent IV certainly had no doubt that the pope had the right to grant indulgences to those who went on Crusade,<sup>142</sup> a power that he thought was linked to the fact that the Saracens possessed the Holy Land illegally. The holy war and the grant of indulgence for its participants rested, so far as Innocent IV was concerned, upon a property claim, fortified by the holiness of the particular territory involved.<sup>143</sup>

Hostiensis's treatment of the indulgence for the holy war likewise rested the justification for the Crusade upon the pope's claims to a peculiar jurisdiction over the Holy Land, in virtue of its sanctity as the birthplace and home of Christ.<sup>144</sup> The indulgence, he also argued, was founded upon the papal plenitude of power. Proclamation of the Crusade and the Crusade indulgence was, therefore, limited strictly to the pope.<sup>145</sup> Hostiensis also defined what he meant by an "indulgence"—the first canonist, so far as I know, to do so—but his definition was lamentably vague and sweeping: an indulgence, he said, was a remission of all sins, plain, simple, and without qualifications.<sup>146</sup>

The arguments raised in defense of indulgences for those who participated in the Crusades, the holy wars par excellence of the Middle Ages, point in turn to an even more basic question: How is it that Christians have the right to make war upon the Saracens and, indeed, on other unbelievers? What is the basis of that right and whence does its justification spring?

Not everyone, to be sure, agreed that the Crusades were justified. Ralph Niger, for one, writing about 1189 was dubious of the proposition that Christians had a right to conquer the Holy Land and maintained that the shedding of human blood was in no way a fitting atonement for sins.<sup>147</sup> Criticism of the Crusades in the thirteenth century was even more widespread than in Ralph Niger's day and created some problems for the papacy in pursuit of its crusading goals.<sup>148</sup>

Still, such views were distinctly minority opinions and were not at all commonly held, at least not by widely influential writers. From at least the mid-twelfth century, when the question seems first to have been discussed, the general opinion was that the Crusades were undoubtedly holy wars and as such were fully justified.<sup>149</sup> This viewpoint found support among the lawyers. Although the canonists occasionally conceded that in principle Saracens and Jews were their neighbors and that they ought to love their neighbors as themselves, still this tended to be a qualified concession: "In truth, however, we ought to apply all the works of love according to each man's condition," as the ordinary gloss put it.<sup>150</sup>

On one basic matter there was a sharp difference of opinion among the thirteenth-century canonists. This was the question of the legitimacy of the rights of Saracens and other non-Christians to hold lands and to rule them. One view was expressed by Innocent IV, who held that infidels did indeed have a legitimate right to hold possessions and that they were entitled to rule their lands and exercise jurisdiction over them. God, after all, made the sun to shine on the good and the evil alike, said Innocent, and it was not proper for the pope or the Christian faithful to take away the rights and possessions of infidels who possessed these things without sin.<sup>151</sup> This position, Innocent also thought, was perfectly compatible with his views of papal power. The pope, he held, had jurisdiction and power, at least *de jure* if not *de facto*, over all men, infidels included. If therefore infidels were guilty of offenses against the natural law, the pope had a right to punish them.<sup>152</sup> Innocent likewise claimed a right to punish Jews who embraced heresies against their own faith.<sup>153</sup>

Although infidels, according to Innocent IV, should not be forced to embrace Christianity, they did have an obligation to allow Christian missionaries to preach the Gospel.<sup>154</sup> Should they fail to do this, or should they fail to obey other legitimate commands of the pope, then the pope had the right to punish them and to declare war against them.<sup>155</sup> Thus Innocent IV assimilated the holy war,

that is, a war declared by the pope against disobedient non-Christians, to the category of judicial wars, fought to execute the judgments of a judge against those who disobeyed a lawful command.

A sharply differing view of these questions was expressed by Hostiensis. He held that all jurisdiction and right to rule were taken away from non-Christians by the coming of Christ, who conveyed to His own followers exclusive rights to the exercise of power and jurisdiction on this earth.<sup>156</sup> Infidels were, therefore, subject to the Church; those infidels who accepted the Church's power over them were to be tolerated. Those who demurred, however, and refused to accept the Church's governance forfeited thereby the privilege of toleration.<sup>157</sup> Disobedient infidels were subject to papal punishment, and the pope was entitled to declare war against them, a war that was by definition both just and justifying.<sup>158</sup>

Although Innocent IV and Hostiensis disagreed sharply on the basis for the holy war, they both agreed that the holy war represented a legitimate exercise of papal power and both of them found adequate juristic grounds for it. The grounds of their disagreement had to do with the legitimacy of possession, jurisdiction, and rule by non-Christians. These differences were of great significance for later lawyers, who had to wrestle with the problem of the legitimacy of the governments and property rights of non-Christian Indians in the New World.<sup>159</sup>

We have seen how the canonists legitimized the holy war against Saracens, pagans, and other infidels. The legal commentators similarly taught that under some circumstances holy wars might be proclaimed against Christians whose interpretation of their faith was unorthodox and heretical. There were passages in the *Decretum* of Gratian to support this contention. Causa 23 itself was based on a situation in which heretics were coercing the faithful to embrace erroneous views, and a number of the authorities whom Gratian cited lent support to the view that under such circumstances it was legitimate for the Church to use force to oppose heretics.<sup>160</sup> Some, indeed, held that rebellious churchmen lost the right to use either the material or the spiritual sword, and hence forfeited all ecclesiastical rights and possessions.<sup>161</sup>



Gratian himself sanctioned the use of force against wicked persons and characterized such use as a legitimate employment of authority.<sup>162</sup> Some of his followers went still further. Heretics, according to Rolandus, lost all their rights to property<sup>163</sup> and Huguccio emphasized that princes had an obligation to defend the Church against heretics and schismatics by making war against them.<sup>164</sup>

A concerted holy war by the Church against heretics was first proclaimed by the third Lateran Council in 1179. Significantly, the pope who presided at this council was Alexander III, that same Rolandus who, as a law professor at Bologna, had taught that heretics forfeited their property rights. The decree of the third Lateran Council assimilated those who took up the sword against heretics with Crusaders who fought against the infidel in the Holy Land and granted fighters against heresy the same indulgence and other privileges enjoyed by Crusaders in the Latin East.<sup>165</sup> This proclamation was ineffective, at least in the sense that it produced no immediate practical action. In 1208, however, Pope Innocent III succeeded in translating the conciliar decree into practice when he launched what was to be called the Albigensian Crusade.<sup>166</sup>

The canonists were not bashful about providing juristic justification for this papal action. Joannes Teutonicus in the *glossa ordinaria* to the *Decretum* taught that if there were heretics in a city, the whole city might lawfully be burnt.<sup>167</sup> Doubtless he had in mind the massacre at Béziers (22 July 1209).<sup>168</sup> Raymond of Peñafort (1175–1275) went further still. Not only was it lawful and laudable for princes to undertake holy wars for the repression of heretics, it was a duty required of them and those who failed to take part in such a war sinned by withholding their help.<sup>169</sup> Hostiensis thought it clear that the Crusades could be preached against heretics and Saracens. Although it was not quite so clear that the Church was authorized to proclaim a holy war against rebels and schismatics, Hostiensis finally concluded that it was reasonable and proper thus to extend the holy war concept.<sup>170</sup>

To summarize briefly, the medieval canonists, beginning with Gratian, worked out a structured discussion of war as a Western Christian legal institution. Generally, the canonists sought to limit

warfare, to protect property rights, to define the circumstances within which wars could be fought. In the process the canonists combined elements drawn from Christian theology and from the ancient Roman law and welded them together into a doctrine of war. This doctrine, in turn, enabled them to analyze warfare, to establish criteria to classify various kinds of wars. To each variety of war they assigned conditions and limitations, which determined the legal consequences that flowed from that particular kind of conflict. Foremost in the minds of the commentators was the interest of the Christian religion and the interest of the institutional Church. Differing views of what best served these interests are reflected in the clashing views of different canonistic writers.<sup>171</sup>

Within the overall framework of the legal institution of war, the canonists recognized the holy war as a specific variety of just war; one that, like the others, had its own proper legal characteristics and limitations. The holy war was the most favored variety of war known to the canon law, for it allowed the widest latitude of action to its participants, and the fruits of victory in the holy war were more generously allocated to the victors than in any other type of war that the canonists acknowledged.

During the period dealt with here, there was a slow broadening of the circumstances under which a war might be classified as a holy war. Originally the holy war, otherwise known as the Crusade, was authorized only against Muslims and only in the Holy Land. Then it was enlarged to include wars against the Muslims in Spain. Enlarged again, it embraced wars against pagans. Subsequently the holy war was further extended to include wars against Christian heretics, schismatics, and other rebels against ecclesiastical authority.

By the end of the Middle Ages the holy war had become a model for expansionist campaigns by European Christians against non-Europeans and non-Christians in all parts of the world. It was in this way that the holy war institution was employed, for example, by the Spanish conquistadores in Latin America. The Protestant Englishmen and others who played the major role in the expansion of European-based colonies and settlements in North America

were not overly concerned with the formal trappings of holy war. Still it is not particularly difficult to see some dim vestiges of holy war ideology and the presuppositions that accompanied it in the westward expansion of the United States.

In the twentieth century people still speak of "Crusades" against one thing or another, but in modern times the term has been stripped of its former juridical content and effect. Some muted overtones of the holy war's older characteristics linger on. They are its legacy to modern thought and modern attitudes toward war.

So long as Europeans derived their cultural identity largely from their self-identification as Christians, the Church was able to exercise considerable control over warfare. This control reached its peak in the holy war. But with the rise of strong monarchies and nation-states, ecclesiastical control waned. Kings and their ministers, however, found it useful to adapt ecclesiastical concepts and the categories of the canon law to serve their own purposes. As cultural identifications have changed, however, the remnants of the older categories of warfare have become increasingly dangerous and misleading. The holy war served particular purposes in a specific social and cultural environment. In modern society its vestiges probably do more harm than good.

1. Thus, for example, Deut. 28:46-53; Lev. 24:26; Judges 2:14, 3:8, 4:1-2, 6:1-2, 10:6-9, 13:1; Isa. 5:24-30; Jer. 5:14-19. Scriptural passages throughout are cited from the Vulgate text, ed. Aloisius Gramatica (Città del Vaticano: Typis Polyglottis Vaticanis, 1959).

2. E.g., 1 Par. 29:11; 1 Mach. 2:19-22; 2 Mach. 10:38.

3. 2 Par. 13:12; Jer. 7:3.

4. 1 Cor. 15:57.

5. 2 Cor. 13:11; Rom. 15:33.

6. Matt. 26:52.

7. Exod. 21:24; Lev. 24:20; Deut. 19:21.

8. Matt. 5:38-48; Rom. 12:19.

9. Rom. 12:17, 21.

10. Carl Erdmann, *Die Entstehung des Kreuzzugsgedankens*, Forschungen zur Kirchen- und Geistesgeschichte 6 (1935; rpt. Stuttgart: W. Kohlhammer, 1955), p. 3. Erdmann's book is a basic point of departure for all subsequent studies of holy war in medieval Christian thought prior to the Crusades.

11. Tertullian, *Apologeticum* 37.4-5, ed. and trans. Jean-Pierre Waltzing, 2d ed., Collection Guillaume Budé (Paris: Société d'édition 'Les Belles Lettres', 1961), p. 79. Other evidence is cited by P. L. T. G. Goyau, "L'Eglise catholique et le droit de gens," *Recueil des cours de l'Académie de Droit International* 6 (1925): 129-32, and especially by Adolf von Harnack, *Militia Christi: Die christliche Religion und der Soldatenstand in den ersten drei Jahrhunderten* (Tübingen: J. C. B. Mohr, 1905). See also R. H. Bainton, "The Early Church and War," *Harvard Theological Review* 39 (1946): 189-212, and Remo Cacitti, "Il cristianesimo primitivo di fronte al problema della guerra e del servizio militare," *Vita e pensiero* 54 (1972): 77-90.

12. Augustine, *De civitate Dei* 1.21, ed B. Dombart and A. Kolb, Corpus Christianorum, series Latina 47 (Turnhout: Brépols, 1955), p. 23; Erdmann, *Die Entstehung*, p. 7, maintains that Augustine's *bellum Deo auctore* is synonymous with holy war.

13. *De civitate Dei* 19.7 (ed. Dombart and Kolb, 2:672).

14. *De civitate Dei* 19.12 (ed. Dombart and Kolb, 2:675).

15. Cicero, *De officiis* 1.11.36, ed Hubert Ashton Holden (1899, rpt. Amsterdam: Adolf M. Hakkert, 1966), p. 15; *De re publica* 3.23.35, ed. and trans. Clinton Walker Keys (Cambridge, Mass.: Harvard University Press, 1928; rpt. 1959), p. 212.

16. P. Bierzanek, "Sur les origines de la guerre et de la paix," *Revue historique de droit français et étranger*, 4th ser. 38 (1960): 85; A. Nussbaum, "Just War—A Legal Category," *Michigan Law Review* 42 (1943): 454-55; Cf. Lactantius, *Institutes* 6.9 in his *Opera*, ed. O. F. Fritzsche, 2 vols. (Leipzig: B. Tauchnitz, 1842-44), 2:18.

17. Bierzanek, "Sur les origines," pp. 85-86.

18. See the well-documented account of Augustine's writings on these matters by Juan Fernando Ortega, "La paz y la guerra en el pensamiento agustiniano," *Revista española de derecho canónico* 20 (1965): 5-35, and also Frederick H. Russell, "The Medieval Theories of the Just War According to the Romanists and Canonists of the Twelfth and Thirteenth Centuries" (Ph.D. diss., Johns Hopkins, 1969), pp. 47-73. [See now the published version of Russell's dissertation, *The Just War in the Middle Ages*, Cambridge Studies in Medieval Life and Thought, 3d ser. vol. 8 (Cambridge: Cambridge University Press, 1975).]

19. Goyau, "L'Eglise catholique et le droit des gens," p. 136 and passim. On the Christian idea of war generally, see also Robert Regout, *La Doctrine de la guerre juste de Saint Augustin à nos jours d'après les théologiens et les canonistes catholiques* (Paris: A. Pedone, 1935); Kurt Georg Cram, *Iudicium belli: Zum Rechtscharakter des Krieges in deutschen Mittelalter*, Archiv für Kulturgeschichte, Beiheft 5 (Münster: H. Böhlau, 1955); Ernst Nys, *Le Droit de guerre et les précurseurs de Grotius* (Brussels: Muquardt, Merzbach, et Falk, 1882); Alfred Vanderpol, *La Doctrine scolastique du droit de guerre* (Paris: A. Pedone, 1919); G. S. Windass and J. Newman, "The Early Christian Attitude to War," *Irish Theological Quarterly* 29 (1962): 235-47; and especially the works of Erdmann and Harnack previously cited.

20. I cannot agree with the position taken by some writers who hold that the idea of the holy war was universally known and accepted in the medieval period; see, e.g., Michel Villey, *La Croisade: Essai sur la formation d'une théorie juridique*, L'Eglise et l'état au moyen age 6 (Paris: J. Vrin, 1942), pp. 32-33; H. Pissard, *La Guerre sainte en pays chrétien: essai sur l'origine et le développement des théories canoniques* (Paris: A. Picard, 1912), p. 4.

21. The resemblances are summarized briefly by Albrecht Noth, *Heiliger Krieg und heiliger Kampf in Islam und Christentum: Beiträge zur Vorgeschichte und Geschichte der Kreuzzüge*, Bonner historische Forschungen 28 (Bonn: Ludwig Röhrscheid, 1966), pp. 139-46.

22. Noth's is the most recent attempt, but, at pp. 147-48, he confesses that he cannot prove any direct influence of the *jihād* on the Christian holy war. See also M. Canard, "La Guerre sainte dans le monde islamique et dans le monde chrétien," *Revue Africaine* 79 (1936): 605-23, where the author maintains *inter alia* that the Western Christian holy war idea emerges as a defense mechanism against Islamic pressures. For an account of Muslim holy war ideas, see Emmanuel Sivan, *L'Islam et la croisade: Idéologie et propagande dans les réactions musulmanes aux croisades* (Paris: A. Maisonneuve, 1968), pp. 9-22. The paper by Adolf Waas, "Der heilige Krieg in Islam und Christentum," *Die Welt als Geschichte* 19 (1959): 211-25, does little to advance the understanding of the question.

23. Erdmann, *Die Entstehung*, pp. 21, 86-106; cf. the studies of Hans-Dietrich Kahl, "Compellere intrare: Die Wendenpolitik Brunos von Querfurt im Lichte hochmittelalterlichen Missions- und Volkerrechts," *Zeitschrift für Ostforschung* 4 (1955): 161-93, 260-401, and "Zum Geist der deutschen Slawenmission des Hochmittelalters," *Zeitschrift für Ostforschung* 2 (1953): 1-14. Both of these studies have been reprinted by Helmut Beumann, ed., in *Heidenmission und Kreuzzugsgedanke in der deutschen Ostpolitik des Mittelalters* Wege der Forschung 7 (Darmstadt: Wissenschaftliche Buchgesellschaft, 1963), pp. 156-76, 177-274.

24. F. Prinz, *Klerus und Krieg im früheren Mittelalter: Untersuchungen zur Rolle der Kirche beim Aufbau der Königsherrschaft*, Monographien zur Geschichte des Mittelalters 2 (Stuttgart: A. Hiersemann, 1971), pp. 195-96. Edgar N. Johnson, *The Secular Activities of the German Episcopate, 919-1024*, University of Nebraska Studies 30/31 (Lincoln: University of Nebraska, 1932), pp. 166-88, 206-18, gives numerous examples of bishops' military involvement; on this, see also Leopold Auer, "Der Kriegsdienst des Klerus unter den sächsischen Kaisern," *Mitteilungen des Instituts für österreichische Geschichtsforschung* 79 (1971): 316-407; 80 (1972): 48-70.

25. Erdmann, *Die Entstehung*, p. 17.

26. Erdmann, *ibid.*, pp. 24-26, was the first to point out and to detail the significance of the liturgical evidence for the development of holy war ideology.

27. Erdmann, *ibid.*, pp. 74-77, discusses these blessings; at pp. 326-35, he gives examples of the prayers and ceremonies employed.

28. *Ibid.*, pp. 30-50, 166.

29. *Ibid.*, p. 171.

30. Pissard, *La Guerre sainte*, p. 10.

31. Erdmann, *Die Entstehung*, p. 161.

32. *Ibid.*, pp. 134-65; more recently, see I. S. Robinson, "Gregory VII and the Soldiers of Christ," *History* 58 (1973): 190-92.

33. Alfons M. Stickler, "Il 'gladius' nel Registro di Gregorio VII," *Studi Gregoriani* 3 (1948): 89-103.

34. Erdmann, *Die Entstehung*, pp. 185-87.

35. *Das Register Gregors VII.* 2. 54, ed. Erich Caspar, 2 vols., Monumenta Germaniae Historica: Epistolae selectae in usum scholarum 2 (Berlin: Weidmann, 1920-23), 1:199; cf. Erdmann, *Die Entstehung*, p. 197.

36. Leo IV, *Epistolae* 1, in *Patrologiae cursus completus . . . series Latina*, ed. J. -P. Migne, 221 vols. (Paris: J. -P. Migne, 1844-64; cited hereafter as *PL*), 115:655-57; P. Jaffé, S. Löwenfeld et al. ed., *Regesta pontificum Romanorum*, 2 vols. (Leipzig: Veit, 1885-88; cited hereafter as *JL*), no. 2,642.

37. *PL*, 126:816; *JL*, 3,195.

38. Erdmann, *Die Entstehung* p. 111; J. A. Brundage, *Medieval Canon Law and the Crusader* (Madison: University of Wisconsin Press, 1969), pp. 23-24.

39. *JL*, 4,530 and 4,533. For the literature on these letters, see Brundage, *Medieval Canon Law and the Crusader*, p. 24, n. 90.

40. The letters of Alexander II just cited do refer to expansion in Spain at the expense of the Moors. The situations dealt with by Gregory VII, however, are different in quality, if not entirely different in kind, from the one dealt with by Alexander II.

41. Brundage, *Medieval Canon Law and the Crusader*, pp. 30–32; E. O. Blake, "The Formation of the 'Crusade Idea,'" *Journal of Ecclesiastical History* 21 (1970): 12, 14–15, 18.

42. John Henry Newman, *The Rise and Progress of Universities* 3:77, in his *Works*, new impression, 41 vols. (London: Longmans, Green, 1898–1903), vol. 30.

43. This conjunction was pointed out, perhaps without ironic intent, by Ferminio Poggiaspalla, "La Chiesa e la partecipazione dei chierici alla guerra nella legislazione conciliare fino alla Decretali di Gregorio IX," *Ephemerides iuris canonici* 15 (1959): 148.

44. Stephan Kuttner, "The Father of the Science of Canon Law," *The Jurist* 1 (1941): 2–19; A. Van Hove, "Quae Gratianus contulerit methodo scientiae canonicae," *Apollinaris* 21 (1948): 12–24.

45. Paul Fournier and Gabriel Le Bras, *Histoire des collections canoniques en Occident depuis les fausses décrétales jusqu'au Décret de Gratien*, 2 vols., Société d'histoire du droit, Bibliothèque d'histoire du droit (1931–32; rpt. Aalen: Scientia Verlag, 1972), 2:28–29, 37; Alfons M. Stickler, "Il potere coattivo materiale della Chiesa nella riforma gregoriana, secondo Anselmo da Lucca," *Studi Gregoriani* 2 (1947): 235–85; Robinsin, "Gregory VII and the Soldiers of Christ," pp. 186–88.

46. Ivo, *Decretum* lib. 10 (*PL*, 161:689–746); *Panormia* lib. 8 (*PL*, 161:1303–18). On the dates of his canonistic collections, see Fournier-Le Bras, *Histoire des collections*, 2:55–57, 105–6; on Ivo's career generally, see Rolf Sprandel, *Ivo von Chartres und seine Stellung in der Kirchengeschichte* (Stuttgart: A. Hiersemann, 1962; *Pariser historische Studien* 1).

47. Stephan Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX.*, *Studi e Testi* 64 (1935; rpt., Città del Vaticano: Bibliotheca Apostolica Vaticana, 1961), p. 255.

48. G. Hubrecht, "La 'Juste guerre' dans le Décret de Gratien," *Studia Gratiana* 3 (1955): 175.

49. Alfons M. Stickler, "De ecclesiae potestate coactive materiali apud magistrum Gratianum," *Salesianum* 4 (1942): 97–119; briefly summarized in his "Magistri Gratiani sententia de potestate ecclesiae in statum," *Apollinaris* 21 (1948): 98–107, and also in "De potestate gladii materialis ecclesiae secundum 'Quaestiones Bambergenses' ineditas," *Salesianum* 6 (1944): 113; Stanley Chodorow, *Christian Political Theory and Church Politics in the Mid-Twelfth Century: The Ecclesiology of Gratian's Decretum*, Publications of the U.C.L.A. Center for Medieval and Renaissance Studies 5 (Berkeley: University of California Press, 1972), p. 86.

50. Chodorow, *Christian Political Theory*, p. 229; Stickler, "De ecclesiae potestate coactiva," p. 9.

51. C. 23 q. 8 d.p.c. 18 and d.p.c. 28. Citations to the *Decretum Gratiani* and the other parts of the *Corpus iuris canonici* are to the standard edition by Emil Friedberg, 2 vols. (1879; rpt., Graz: Akademische Druck- und Verlagsanstalt, 1959). The conventional canonistic citation system is employed throughout; for explanations, see Xavier Ochoa Sanz and Aloisius Diez, *Indices canonum titulorum et capitulum Corporis iuris canonici*, Universa bibliotheca iuris, Subsidia I (Roma: Commentarium pro religiosis, 1964), pp. iv–v. See also Chodorow, *Christian Political Theory*, p. 241; Stickler, "De ecclesiae potestate coactiva," pp. 112–13.

52. C. 23 pr.: "Quidam episcopi cum plebe sibi commissa in heresim lapsi sunt; circumadiacentes catholicos minis et cruciatibus ad heresim compellere ceperunt, quo conperto Apostolicus catholicis episcopis circumadiacentium regionum, qui ab imperatore civilem iurisdictionem acceperant, imperavit, ut catholicos ab hereticis defenderent, et quibus modis possent eos ad fidei veritatem redire compellerent. Episcopi, hec mandata Apostolica accipientes, conuocatis militibus aperte et per insidias contra hereticos pugnare ceperunt. Tandem nonnullis eorum neci traditis, aliis rebus suis uel ecclesiasticis expoliatis, aliis carcere et ergastulo reclusis, ad unitatem catholicae fidei coacti redierunt."

53. C. 23 q. 1 pr.; q. 3 pr.; q. 4 d.a.c. 16; q. 5 pr. and c. 1-8.

54. C. 23 q. 1 c. 1.

55. C. 23 q. 1 d.p.c. 7.

56. C. 23 q. 1 c. 3, 5.

57. C. 23 q. 5 d.p.c. 7 § 2 and c. 8, 13.

58. C. 23 q. 4 d.p.c. 37 and d.p.c. 54.

59. C. 23 q. 3 c. 6-8, 11.

60. C. 23 q. 3 d.p.c. 10.

61. There is an interesting shift here. At C. 23 q. 2 c. 1, Gratian cites Isidore of Seville's definition of the just war: "Iustum est bellum, quod ex edicto geritur de rebus repetendis, aut propulsandorum hominum causa" (Isidore, *Etymologiae* 18.2). One reading of this definition is that two conditions are necessary to make a war just: public authorization (*quod ex edicto geritur*) and legitimate purpose (*de rebus repetendis, aut propulsandorum hominum causa*). Gratian's interpretation is different. At C. 23 q. 2 d.p.c. 2, he restates the definition in a form which implies that either of these conditions is sufficient: "Cum ergo iustum bellum sit, quod ex edicto geritur, uel quo iniuriæ ulciscuntur. . . ."

62. C. 23 q. 2 c. 3.

63. C. 23 q. 3 c. 3-4.

64. C. 23 q. 3 c. 5.

65. C. 23 q. 3 c. 6.

66. C. 23 q. 3 d.p.c. 1.

67. Thus Huguccio did not gloss C. 23 at all (although he dealt with war in some of his other glosses), while Stephen of Tournai's commentary on C. 23 is merely a conflation of statements drawn from Paucapalea and Rolandus: *Die Summa des Stephanus Tornacensis über das Decretum Gratiani*, ed. J. F. von Schulte (1891; rpt., Aalen: Scientia Verlag, 1965), p. 230. Rufinus, although he commented on C. 23, found Gratian's treatment prolix: "Huius causae tractatus est prolixius, sed que dicuntur aperta sunt nec per omnia scientiae decretorum accomoda; et ideo a prudenti lectori satis nobis indulgendum credimus, si moras solitas in presentis cause questionibus non ponamus"; *Summa decretorum* ed. Heinrich Singer (1902; rpt., Aalen: Scientia Verlag, 1963), pp. 403-4.

68. The differences between the ways in which the canonists and the theologians dealt with the subject of war are described by Regout, *La Doctrine de la guerre juste*, pp. 57-58.

69. Many of these legal commentaries, including some of the most important ones, have never appeared in print. The remarks that follow will, for the most part, be confined to the doctrines of writers whose works have been published.

70. C. 23 q. 8 c. 33, and C. 23 q. 4 c. 36.

71. *Die Summa des Paucapalea über das Decretum Gratiani* to C. 23 q. 8 pr., ed. J. F. von Schulte (Giessen: Emil Roth, 1890), p. 103.

72. *Die Summa magistri Rolandi, nachmals Papstes Alexander III.* to C. 23 q. 3, ed. F. Thaner (Innsbruck: Wagner, 1874), p. 89; see also the remarks of Marcel Pacaut,

*Alexander III: Étude sur la conception du pouvoir pontifical dans sa pensée et dans son oeuvre*, L'Eglise et l'état au moyen âge 11 (Paris: J. Vrin, 1956), pp. 324–25.

73. Huguccio, *Summa* to C. 15 q. 6 c. 2 ad v. *materiali* [gladio], quoted in A. M. Stickler, "Der Schwerterbegriff bei Huguccio," *Ephemerides iuris canonici* 3 (1947): 225, n. 2.

74. *Glos. ord.* to C. 23 q. 1 c. 4 ad v. *principes*: "ut infra eadem q. 2 iustum [c. 1]. Nullus ergo bellare potest sine auctoritate principis, ut hic, et C. ut armo. usus. 1. 1 libro 11 [Cod. 11.47(46). 1]; similiter princeps ecclesiasticus potest indicare bellum, ut infra eadem q. 8 igitur [c. 7] et c. omni et c. seq. [c. 9–10]." The *glos. ord.* to C. 15 q. 6 c. 2 ad v. *materiali* also presented an argument that ecclesiastical judges could declare war: "Argum. quod iudex ecclesiasticus bene potest indicare bellum et in bello insequi hostes, ut 23 quest. 8 igitur [c. 7] et c. hortatu [c. 10] et c. ut pridem [c. 17] et 63 dist. Hadrianus [c. 22?]. Item arg. quod iudex ecclesiasticus potest praecipere iudici saeculari ut puniat maleficos, ut 23 quaest. 4 si quos [c. 47] et q. 5 relegendes [c. 45] et q. 8 ut pridem [c. 17]. Argu. contra 23 ult. his a quibus [C. 23 q. 8 c. 30]." The *glossa ordinaria* to the *Corpus iuris canonici* is cited from the edition in 4 vols. (Venice: Apud Iuntas, 1605).

75. Innocent IV, *Apparatus in quinque libros Decretalium* to X 2.13.12 (Frankfurt a/M.: [Sigmund Feyerabend] 1570; rpt., Frankfurt a/M.: Minerva, 1968), fol. 231<sup>va</sup>: "Vim quomodo hoc licuit, cum essent personae religiosae episcopos et canonicos et templarii vix potuit hoc fieri sine poena canonica, 17 quaestio 4 si quis suadente [c. 29]. Item cum non sit eis licitum mouere bellum, 23 quaest. 3 c. 1 argument. ff. de capti. et postli. hostes [Dig. 49.15.24], et si aliis liceret, clericis tamen non liceret, 23 quaestio 8 clericis et c. his a quibus [c. 5, 30] et infra de homicid. suscepimus [X.5.12.10]."

76. Innocent IV, *Apparatus* to X 2.13.12 ad v. *respondemus* (Frankfurt, 1570, fol. 231<sup>va</sup>): "[O]mnibus esse licitum mouere bellum pro defensione sua, et rerum suarum, nec dicitur proprie bellum, sed defensio, et quando quis est electus incontinenti, id est, antequam ad aliena negotia diuertat, licitum est sibi impugnare, ff. de verbor. obligat. 1. continuus respon. 1 [Dig. 45.1.37], ff. de duob. reis, duo § ultim. [Dig. 45.2.4], C. unde vi 1. 1 [Cod. 8.4.1] ff. de vi et vi ar. 1. 2 cum igitur [Dig. 43.1.6.2] et cum hoc a iure sit concessum, nec est autoritas principis necessaria, argum. 28 distinct. de his ad fin. [c. 5], ff. de condi. institut. 1. quae sub conditione § ultim. [Dig. 28.7.8.8], nec incidunt in excommunicationem, nisi in personas miserint manus, sed nec tunc, si sine violentia noluerunt exire domum, quod ex loco isto satis euidenter colligitur, et infra de homi. significasti [X 5.12.16] vel nisi modum excesserint, ut hic in fin. Item ubicunque per alium rem suam et ius suum prosequi non potest, licitum est autoritate superioris arma mouere et bellum indicare ad recuperandum suam, et etiam furtiue accipere, 23 quaestio 2 c. 2, C. de iudic. nullius [Cod. 3.1.11], tamen si principem super se habet, eius autoritate hoc faciat, et non aliter, 24 quaest. 2 c. 1 et hoc videtur iustum, quia nulli licet iura temperare sine autoritate conditoris iurium."

77. Innocent IV, *Apparatus* to X 5.37.5 (Frankfurt, 1570, fol. 542<sup>rb</sup>): "Nos credimus, quod licet episcopus ratione iurisdictionis temporalis possit bellum indicare et antequam sit in percussione horti ut utiliter pugnent et bellis interesse et possit semper hortari ad capiendum. Si quis autem, dum esset in percussione, incitauerit ad percutiendum alium, forte irregularis est, idem etiam si forte super bellatores vocem emitteret, dicens audacter pugnate, ar. contra, supra de ho. c. pe. [X 5.12.24] et de cle. percus. c. pe. et ult. [X 5.25.3,4]. Vel dic, quod in defensione possunt gubernare naues et alios ad pugnam defensionis incitare et intantum confligere hostes, quod eos dimittant, ar. de cle. percus. c. pe. et c. fi. [X 5.25.3,4], et nota supra ne cler. sententiam [X 3.50.9], alias autem in iniusto bello hoc non liceret, ut hic."

78. Thus Hostiensis, *Commentaria* [= *Lectura*] in *quinque libros Decretalium* to X 1.29.7; 1.34.1; 2.13.12; 5 vols. in 2 (Venice: Apud Iuntas, 1581; rpt., Torino: Bottega d'Erasmus, 1965), vol. 1, fol. 134<sup>ra</sup>, 176<sup>va</sup>; vol. 2, fol. 52<sup>vb</sup>.



79. Hostiensis, *Lectura* to X 5.7.13 (Venice, 1581, vol. 5, fol. 39<sup>rb</sup>): "[Accinxerint] Ar. quod autoritate ecclesiae bellum fieri potest, ad idem xxiii q. 8 si igitur et ca. hortatu [c. 10], xv q. vi autoritatem [c. 2], lxiii di. Adrianus [c. 2], quod verum est, contra inimicos fidei, vel existunt, quod dic, ut notavi supra eodem."

80. Gulielmus Durantis, *Speculum iuris*, lib. 2, partic. 1 § 5, no. 2 (Frankfurt a/M.: Sumptibus heredum Andrae Wecheli et Johannis Gymnici, 1592), p. 136: "Ipse [scil.: ordinarius] enim per se nequit bellum indicere, quia hoc solius principis est, 23 q. 3 cap. 1 et 2. Alii tamen dicunt, et bene, quod ex quo causa spectat ad forum ecclesiasticum, iudex ecclesiasticus, sive sit ordinarius, sive delegatus, sententiam exequetur, et dabit possessionem corporalem, etiam in possessionibus et rebus laicorum ac rg. in prae. § praeterea; alioquin delusoria talis iurisdictio uideretur, ut extra de offi. deleg. ex litteris [X 1.29.29]."

81. Poggiaspalla, "La Chiesa e la partecipazione dei chierici," 141-47, reviews the evidence on this topic.

82. D. 36 c. 3.

83. C. 23 q. 3 c. 2, 10; q. 8 d.p.c. 6, d.p.c. 18; and cf. Chodorow, *Christian Political Theory*, p. 241, as well as Stickler, "De ecclesiae potestate coactiva," pp. 113-14.

84. C. 23 q. 8 c. 26, 27, d.p.c. 27, and d.p.c. 28.

85. Rolandus, *Summa* to C. 23 q. 1 and q. 8 (ed. Thaner, pp. 88, 96-98).

86. Rufinus, *Summa* to C. 23 q. 8 pr; also to C. 23 q. 1 pr. (ed. Singer, pp. 404, 412).

87. *The Summa Parisiensis on the Decretum Gratiani* to c. 23 q. 1 pr., ed. Terence P. McLaughlin (Toronto: Pontifical Institute of Mediaeval Studies, 1952), p. 210; *Summa 'Elegantius in iure diuino' seu Coloniensis* 2.126, ed. Gérard Fransen and Stephan Kuttner, Monumenta iuris canonici, Corpus glossatorum 1 (New York: Fordham University Press, 1969), p. 101; Sicard's opinion is cited by Robert L. Benson, *The Bishop-elect: A Study in Medieval Ecclesiastical Office* (Princeton: Princeton University Press, 1968), p. 321.

88. Huguccio, *Summa* to D. 50 c. 5 ad v. *necesse sit*, in Stickler, "Der Schwerterbegriff bei Huguccio," p. 266, n. 1. A similar view was expressed in the *Glossa Duacensis*; see A. M. Stickler, "Die 'Glossa Duacensis' zum Dekret Gratians," *Speculum iuris et Ecclesiarum: Festschrift für Willibald M. Plöchl* (Wien: Herder, 1967), pp. 391-92; see also Poggiaspalla, "La Chiesa e la partecipazione dei chierici," p. 151.

89. Cambridge, Fitzwilliam Museum, MS. McClean 135, fol. 195<sup>va</sup>, gloss to C. 23 q. 8 c. 7 ad v. *decernimus*: "Episcopi ergo possunt interesse bellis, nam et Paulus interfuit, ut supra q. 3 Maximianus [C. 23 q. 3 c. 2] et Moyses, ut xxxvi di. c. ult. [c. 3; *MS. del.*] immo punitur episcopus qui non agreditur hostes ecclesie, ar. extra i de hereticis et brabacionibus [Comp. I 5.6.7 = III Conc. Lat. (1179) c. 27]."

90. These enactments are detailed by Rosalio Castillo Lara, *Coacción eclesiástica y sacro romano imperio: estudio jurídico-histórico sobre la potestad coactivo material supremo de la iglesia en los documentos conciliares y pontificios del periodo de formación del derecho canónico clásico como un presupuesto de las relaciones entre Sacerdotium e Imperium*, Studia et textus historiae iuris canonici 1 (Torino: Libreria del Pontificio Instituto Salesiano, 1956).

91. M. D. R. Foot, "Introduction" to *The Fourth Dimension of Warfare*, ed. Michael Elliott-Bateman (New York: Praeger, 1970), p. ix.

92. Georg Schwarzenberger, "Functions and Foundations of the Laws of War," *Archiv für Rechts- und Sozialphilosophie* 44 (1958): 351.

93. D. 1 c. 10, citing Isidore, *Etymologiae* 5.7.

94. C. 23 q. 1 c. 4, citing St. Augustine, *Contra Faustum* 22.74-75.

95. Thus Stephen of Tournai, *Summa* to D. 1 c. 10 ad v. *in hostes* (ed. Schulte, p. 11); Rufinus, *Summa* to D. 1 c. 10 ad v. *egressio in hostes* (ed. Singer, p. 11); as well as

Hostiensis, *Summa aurea una cum summariis et adnotationibus Nicolai Superantii* [= Niccolò Soranzo], lib. 1, tit. De treuga et pace [X 1.34], no. 4 (Lyon: Joannes de Lambray, 1537; rpt., Aalen: Scientia Verlag, 1962), fol. 50<sup>ra</sup>. These canonists incorporate part of *Dig.* 49.15.24. Citations from the Roman law throughout are to the standard edition by Theodore Mommsen et al., 3 vols. (1872; rpt., Berlin: Weidmann, 1963–65). The conventional citation system is explained in Xavier Ochoa Sanz and Aloisius Diez, *Indices titulum et legum Corporis iuris civilis*, Universa bibliotheca iuris, Subsidia 2 (Roma: Commentarium pro religiosis, 1965), pp. x–xi.

96. *Dig.* 49.16.1; cf. M. H. Keen, *The Laws of War in the Late Middle Ages* (London: Routledge and Kegan Paul, 1965), p. 65.

97. Cino da Pistoia, *In Codicem et aliquot titulos primi Pandectorum tomi, id est, Digesti veteris, doctissima commentaria* to *Cod.* 6.50.1.1 (Frankfurt a/M.: Johannes Feyerabend, 1578; rpt., Torino: Bottega d'Erasmus, 1964), fol. 423<sup>ra</sup>: "Not. primo quod aliud est ius tempore belli, et aliud tempore pacis. Sic et alius erat modus testandi tempore belli, ut insti. de testa. § 1 [*Inst.* 1.2.10.1]. ADDITIO. Et per hoc colligitur, quod aliud est iustum tempore guerrae et aliud est iustum tempore pacis, quia illud est iustum quod cuilibet in tempore suo expedit, sic et corpori humano aliud expedit tempore infirmitatis et aliud tempore sanitatis, et ita oportet legislatorem legem secundum tempora condere." See also Keen, *Laws of War*, p. 64.

98. C. 23 q. 5 d.p.c. 48.

99. Durham, Cathedral Library, MS. C.III.1, fol. 213<sup>ra</sup>, gloss to C 23 q. 5 c. 9: "Tribus modis sit licite homicidium, scilicet cum inspiratur aliquis deo occulte ut aliquem interficiat, uel cum iudex habens potestatem gladii aliquem interficit, uel cum precepto principis miles interficit hostem."

100. See the treatment in the *Quaestiones Bambergenses*; Stickler, "De potestate gladii materialis," pp. 121–24; also Hostiensis, *Summa aurea* lib. 5, tit. De homicidio [X 5.12] no. 2 (Lyon, 1537, fol. 241<sup>va</sup>), and Joannes Andreae, *Novella commentaria in libros Decretalium* to X 5.12.24, no. 2 (Venice: Apud Franciscum Franciscum, 1581; rpt., Torino: Bottega d'Erasmus, 1963), vol. 5, fol. 65<sup>ra-rb</sup>.

101. Hostiensis, *Summa aurea*, lib. 1, tit. De treuga et pace [X 1.34], no. 4 (Lyon, 1537, fol. 59<sup>rb</sup>).

102. Hostiensis, *Lectura super sexto Decretalium*, tit. De homicidio voluntario, c. 1 [VI<sup>o</sup> 5.4.1] (Venice, 1581, fol. 29<sup>va</sup>): "Ergo in Summa in Romano bello iudiciali licito necessario non tenetur quis ad restitutionem, nec peccat is qui ex tali bello aliquid acquirit, dummodo modum non excedat, nam si potest hominem capere viuum non licet perimere, ff. ad 1. Aquil., sed. etsi quemcumque [*Dig.* 9.2.5] et secundum hoc intellige supra eodem c. ii et 3. In praesumptuoso vero temerario et voluntario tenetur ad restitutionem et de tali intellige quod loquamur supra de iureiuran., sicut."

103. Joannes Andreae, *Novella* to X 2.24.29, no. 3 (Venice, 1581, fol. 197<sup>va</sup>): "Potest etiam determinare uerbum 'mouit'; et est sensus, si constiterit, quod mouit bellum, q.d. considerandum, cum quaeritur de restitutione damnorum datorum in bello, inquiri debere quis fuerit bellum mouens, quasi illi sit imputandum totum commissum in illo conflictu, C. de ui pu. uel priua., 1. quoniam multa facinora [*Cod.* 9.12.5], ff. si qua. pauperi, 1.1 § cum arietes [*Dig.* 9.1.1.11], ff. ad 1. Aquil. si ex plagis § 1 [*Dig.* 9.2.52.1], et sciendum hoc asserenti incumbit probatio, ff. ad 1. Aquil. scientiam § cum stramenta [*Dig.* 9.2.45.3]. Ex his collige, quod bellum mouens tenetur ad restitutionem, quod uerum, quando iniuste mouit, quod prima facie praesumitur; si tamen mouens uult probare, quod iuste mouit, in nullo tenetur; sed facit sua, quae occupauit, ut in glo. 2 de quo remittit Hosti. de homici. pro humani [VI<sup>o</sup> 5.4.1], et ad id, quod infra dicam et dicit hoc iudicium ratione pacis et pacti spectare ad ecclesiam, de iudi. nouit [X 2.1.13] et de treu. et pace c. 1 et 2 [X 1.34.1–2],

unde etiam dicit lex, quod si praeses ledat subditum suum, recurritur ad episcopum, ut in aut. ut dif. iudi. § si tamen contingit, coll. 9 [Auth. 9.10.4 = Nov. 86]."

104. Joannes Andreae, *Novella* to X 2.24.9, no. 4 (Venice, 1581, fol. 197<sup>va</sup>): "[Bellum] ut dicit Hosti. bellum sine causa rationabili et auctoritate iuris, uel iudicis moueri non debet, licet tota die fiat contrarium, tenetur ergo tales ad restitutionem, quia censentur hic inde praedones et latrunculi, ff. de captiuis et postli. reuer., 1. hostes [Dig. 49.15.24], ff. de verbo. signi., 1. hostes [Dig. 50.16.118], nisi ubi altera partium dat damnum se defendendo, quod omne ius permittit, ff. de iusti. et iur., ut vim [Dig. 1.1.3], dummodo defendens non excedat modum, quod tunc facit quando violentiam infert, qua ommissa, salua sibi erat defensio ad arbitrium boni iudicis, de quo remittit ad decre. olim i. de resti. spo. et sen. excom. dilecto [X 2.13.12; VI<sup>o</sup> 5.11.6]."

105. Innocent IV, *Apparatus* to X 2.24.9 (Frankfurt, 1570, fol. 288<sup>r</sup>): "Et nota, quod nunquam vocati ad iniustum bellum, habent actionem mandati, vel aliam contra vocantem ad impendia, vel damna contingentia sibi occasione vocationis, vel mandati, quia in re turpi obligatio non contrahitur, insti. mandati. § illud quoque [Inst. 1.3.26.7], ff. mand. si remunerandi § rei turpis. et l. si manda. § qui eodem [Dig. 17.1.63; 17.1.27.7]. Vocati autem ad iustum bellum, actionem mandati habent contra vocantem, nisi ex debito teneantur, vel nisi causa pietatis, vel humanitatis, vel parentelae faciant, 23 quaestio tertia non in inferenda et in aliis c. eiusdem quaestio [c. 7], 11 quaestio 3 si domino et c. Iulia [c. 23, 94]; et videtur, quod illi qui ex debito faciunt excusantur, nisi bellum esset malum manifeste, 11 quaestio tertia, quid ergo [c. 99], 23 quaestio 1 quid culpatur [c. 4]."

106. Thus Joannes Andreae, *Novella* to X 2.24.29, no. 5 (Venice, 1581, fol. 197<sup>va</sup>); Giovanni da Legnano, *Tractatus de bello, de represaliis et de duello*, c. 42, ed. and trans. Thomas E. Holland, *Classics of International Law* (1917; partial rpt., New York: Oceania Publications, 1964, pp. 259–60).

107. *Summa 'Elegantius'* 1 § 4 (ed. Fransen-Kuttner, p. 2).

108. See Hartmut Hoffmann, *Gottesfriede und Treuga Dei*, *Monumenta Germaniae Historica*, *Schriften* 20 (Stuttgart: A. Hiersemann, 1964); for additional bibliography on the peace movement, see Brundage, *Medieval Canon Law and the Crusader*, pp. 12–14.

109. Third Lateran Council c. 21–22 in *Conciliorum oecumenicorum decreta*, 2d ed. by Giuseppe Alberigo et al. (Basel: Herder, 1962; hereafter cited as *COD*), p. 198 [= X 1.34.1–2].

110. First Council of Lyon (1245) c. 18 (*COD*, pp. 266–67) [= VI<sup>o</sup> 5.4.1].

111. *Glos. ord.* to X 1.34.1 ad v. *frangere*: "Sed quod dicit his hodie non tenet; et episcopi qui non seruant hanc constitutionem, non dicuntur transgressores, quia non fuit moribus utentium approbata huiusmodi treuga, 4 dist. cap. in isti § leges [D. 4 d.p.c. 3]."

112. Second Lateran Council (1139) c. 29 (*COD*, p. 179) = X 5.15.1.

113. Thus Raymond of Peñafort, *Summa de poenitentia et matrimonio cum glossis Ioannis de Friburgo* 2.4.1 (Rome: Sumptibus Ioannis Tallini, 1603; rpt., Farnborough: Gregg Press, 1967), p. 165: "Possunt Christiani exercere hoc officium contra paganos, et nostrae fidei persecutores; contra Christianos autem, et Catholicos nequaquam, extra eodem: 'artem illam mortiferam et odibilem balistariorum et sagittariorum aduersus Christianos et Catholicos exerceri de caetero sub anathemate prohibemus' [X 5.15.1]. Item dicunt quidam, quod in bello iusto possunt officium hoc exercere contra Christianos, quia in tali bello dicit Augustinus, 'cum quis iustum bellum suscepit, utrum aperte pugnet, an ex insidiis nihil ad iustitiam interest' [C. 23 q. 2 c. 2]. Dominus etiam iussit ad Iesum naue, ut constitueret sibi retrorsum insidias, id est, insidiantes bellatores, 23 q. 2 Dominus [c. 2], idem dicit Gregorius 23 q. 8 ut pridem [c. 17]." But cf. Goffredus de Trano, *Summa super titulis Decretalium* to X 5.15.1 (Lyon: Roman Morin, 1519; rpt., Aalen: Scientia Verlag, 1968), fol. 214<sup>vb</sup>: "Christiani aduersus christianos non possunt hoc officium exercere, ut

infra eodem c. uno. Quid verum est si bellum fuerit iniustum, nam si iustum quolibet genere armorum est utendum immo ut vincatur dolis est et insidiis insistendum, ut xxiii q. ii dominus [c. 2] et questio viii ut pridem [c. 17], iuxta illud, 'Nihil refert armis contingat palmo dolisue.' Et alibi, 'Dolus virtus quis in honeste requirat [cf. *Aeneid* 2.390: Dolus an virtus quis in hoste requirat?]' Sed contra paganos et persecutores fidei christiane potest hoc officium exerceri." See also the remarks on this topic in the *Summa* of Peter the Chanter, quoted in John W. Baldwin, *Masters, Princes and Merchants: The Social Views of Peter the Chanter and His Circle*, 2 vols. (Princeton: Princeton University Press, 1970), 2:160, n. 128.

114. Paul Fournier, "La Prohibition par le II<sup>e</sup> Concile de Latran d'armes jugées trop meurtrières (1139)," *Revue générale du droit international publique* 23 (1916): 471-79.

115. C. 23 q. 1 c. 5.

116. *Dig.* 49.16.9.

117. Thus, Paucapalea, *Summa* to C. 23 q. 1 (ed. Schulte, p. 99); Rufinus, *Summa* to D. 1 c. 10 ad v. *item modus stipendiorum* (ed. Singer, p. 11).

118. *Glos. ord.* to X 2.24.29 ad v. *restituat*: "Quia iniusta erat bellum; sed si iustum fuisset bellum, statim res sic occupatae essent suae, 23 q. 5 dicat [c. 25]." And cf. the *glos. ord.* to C. 23 q. 7 pr. ad v. *nunc autem*.

119. Innocent IV, *Apparatus* to X 2.24.29 (Frankfurt, 1570, fol. 288<sup>v</sup>); Joannes Andreae, *Novella* to X 2.13.12 and 2.24.29 (Venice, 1581, vol. 2, fol. 82<sup>ra-rb</sup>, 198<sup>ra</sup>). The practical consequences of these considerations are described by Keen, *Laws of War*, pp. 70-71, 82-100. On the application of these doctrines by the Spanish conquistadores in the New World, see Silvio Zavala, *New Viewpoints on the Spanish Colonization of the New World* (Philadelphia: University of Pennsylvania Press, 1943), p. 50.

120. For other, and somewhat broader, definitions of the holy war, see Erdmann, *Die Entstehung*, p. 1; Villey, *La Croisade*, pp. 21-22; also Russell, *Medieval Theories of the Just War*, pp. 3-4.

121. Though not, apparently, in the Eastern Empire; see Conrad, "La Guerre sainte," pp. 615-22; Sir Steven Runciman, *A History of the Crusades*, 3 vols. (Cambridge: At the University Press, 1951-54), 1:83-84.

122. Examples are numerous; for the period of the First Crusade, see Paul Rousset, *Les Origines et les caractères de la première croisade* (Neuchâtel: La Baconnière, 1945), pp. 81-83; for earlier examples, see Erdmann, *Die Entstehung*, pp. 22-24, 111-13, 128-29, and Noth, *Heiliger Krieg und heiliger Kampf*, pp. 96-109.

123. *Inst.* 1.25 pr.

124. *Dig.* 3.2.25; 9.2.7.4; 11.7.35.

125. For a brief sketch of the literary evidence, see Ernst H. Kantorowicz, "Pro patria mori in Medieval Political Thought," *American Historical Review* 56 (1951): 472-75.

126. Villey, *La Croisade*, p. 27; Canard, "La Guerre sainte," p. 620.

127. Kantorowicz, "Pro patria mori," pp. 475-77.

128. C. 23 q. 8 c. 9, 46. On the attribution of this latter canon, see Hubrecht, "La 'Guerre juste,'" p. 173, n. 40.

129. Hostiensis, *Summa aurea*, lib. 1, tit. De Treuga et pace [X 1.34] no. 4 (Lyon, 1537, fol. 59<sup>rb</sup>): "Ut autem in summa predicta recolligamus aliud potest dici bellum romanum puta quod est inter fideles et infideles et hoc iustum: ut nota supra eodem § ver. unum. § Hoc autem voco romanum: quia roma est caput fidei et mater, xxv q. i. i. ita [d. p. c. 16 § 1], C. de summa tri., 1. fi. [Cod. 1.1.8], xxiii q. i. hec est fides et c. quoniam [c. 14, 25], infra de here., ad abolendam [X 5.7.9]. § Secundum quod est inter fideles impugnantes

autoritate iudicis: et hoc iudiciale potest dici: et est iustum secundum ea quae notavi supra eodem ver. si fiat, et ver. ergo qui autoritate iudicis. § Tertium quod faciunt fideles iudici contumaces, et potest vocari, presumptuosum, et est iniustum, ut notavi supra eodem ver. ergo qui autoritate. § Quartum quod faciunt fideles autoritate iuris, et hoc potest dici licitum et est iustum. § Quintum quod faciunt fideles contra autoritatem iuris, et hoc potest dici temerarium et est iniustum, ut de his duobus notavi supra eodem ver. idem est. § Sextum quod faciunt fideles propria autoritate alios impugnantes et hoc potest dici voluntarium et est iniustum. § Septimum quod fideles faciunt defendendo se autoritate iuris contra voluntatem impugnatores, et hoc potest dici necessarium et est iustum et de his proximis duobus notavi supra eodem ver. sed si non interueniat, ergo in. § Romano. § Iudiciali. § Licitio. § Necessario non tenetur quis ad restitutionem." See also Hostiensis, *Lectura super sexto Decretalium*, tit. De homicidio voluntario, c. 1 [= VI<sup>o</sup> 5.4.1] (Venice, 1581, fol. 29<sup>rb-vb</sup>). Regout, *La Doctrine de la guerre juste*, p. 55, thinks that Hostiensis's doctrine was based on an idealized image of the *imperium romanum*; cf. Russell, *Medieval Theories of the Just War*, p. 259. I am not convinced. Hostiensis was trying to create an analytical scheme for classifying wars. Those public wars in which the enemy were *hostes* in the rigor of the term were dealt with by his Roman law sources. Hence the term "Roman war" had a neat logic of its own within the legal context, without any need to refer to an idealized Roman Empire. When Hostiensis goes further to identify this "Roman war" with war against the infidel, the Rome he is referring to is papal, not imperial, Rome, as even a cursory glance at his legal citations quickly makes plain. Hostiensis's analysis is copied almost verbatim by Giovanni da Legnano, *Tractatus de bello* c. 76 (Holland ed., p. 276).

130. Thus see the *glos. ord.* to *Dig.* 1.1.5 ad v. *ex hoc*: "[B]ella, ergo insurgentium iniquum est, cum iniquum inducat, sed dic quod dicit de bello licito, ut indicto a populo Romano, vel Imperatore, nam hostes sunt quibus populus etc., ut infra, de captivis, 1. hostes [*Dig.* 49.15.24]. Item dicit de bello indicto ad iniuriam propulsandam, quod licet, ut supra eodem, 1. ut vim [*Dig.* 1.1.3], non autem de alio, ne inde iniuriae nascatur occasio, etc., ut C. unde vi, 1. meminerint [*Cod.* 8.4.6]." The *glossa ordinaria* to the Roman law is cited from the *Corpus iuris civilis una cum glossis* 5 vols. (Venice: Apud Iuntas, 1592).

131. Cino da Pistoia, *Commentaria* to *Cod.* 6.50.1, no. 7 (Frankfurt, 1578, fol. 423<sup>rb</sup>).

132. Kantorowicz, "Pro patria mori," pp. 477-92 and *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton: Princeton University Press, 1957), pp. 244, 256-57; also Gaines Post, *Studies in Medieval Legal Thought: Public Law and the State, 1100-1322* (Princeton: Princeton University Press, 1964), pp. 438, 452-53.

133. *Glos. ord.* to *Dig.* 3.2.25 ad v. *si quis*; to *Dig.* 9.2.7.4 ad v. *gloriae causa*.

134. I have dealt with this question earlier, in *Medieval Canon Law and the Crusader*, pp. 145-53. My interpretation has not commanded universal agreement; see the reservations expressed by Hans Eberhard Mayer, *The Crusades*, trans. John Gillingham (London: Oxford University Press, 1972), p. 292 n. 13. Mayer's interpretation still does not resolve the problem pointed out in my study, namely, that the texts of the Crusade proclamations and conciliar degrees concerning the Crusade at least up to 1215 describe a commutation of penance and not an indulgence, as that term has been understood since the late thirteenth century. How the earlier "indulgences" were popularly understood and how they were represented by Crusade preachers is, of course, another question entirely.

135. The relevant letters are: Pope Leo IV, December 853, to the Frankish army (*PL*, 115:655-57 = *JL* 2,642 = C. 23 q. 8 c. 9 and C. 23 q. 5 c. 46); John VIII, September 878 (*PL*, 126: 816 = *JL* 3,195).

136. *Epistolae pontificum Romanorum ineditae*, ed. S. Löwenfeld (1885; rpt. Graz: Akademische Druck- und Verlagsanstalt, 1959), no. 82; *JL* 4,540.

137. Council of Clermont, c. 3, in Schafer Williams, "Concilium Claromontanum, 1095:

A New Text," *Studia Gratiana* 13 (1967): 39: "Quicumque pro sola deuotione, non pro honoris uel pecunie adeptione, ad liberandam ecclesiam dei Ierusalem profectus fuerit, iter illud pro omni penitentia reputetur." This version is the oldest text of the Clermont canons and can be dated to ca. 1100. See also Robert Somerville, ed., *The Councils of Urban II*, vol. 1, *Decreta Claromontensia*, *Annuario historiae conciliorum*, Supp. 1 (Amsterdam: Adolf M. Hakkert, 1972), p. 74.

138. Urban II, letter to the Flemings (late December 1095): "Cui calamitati pio contuitu condolentes Gallicanas partes uistauminus eiusque terrae principes et subditos ad liberationem Orientalium ecclesiarum ex magna parte sollicitauimus et huiusmodi pro-cinctum pro remissione omnium peccatorum suorum in Aruernensi concilio celebriter eis iniunximus. . . ." Heinrich Hagenmeyer, ed., *Epistulae et chartae ad historiam primi belli sacri spectantes* (Innsbruck: Wagner, 1901), p. 136, no. 2.

139. Urban II, letter to the Bolognese, 19 September 1096: "Sciatis autem eis omnibus, qui illuc non terreni commodi cupiditate sed pro sola animae suae salute et ecclesiae liberatione profecti fuerint, paenitentiam totam peccatorum, de quibus ueram et perfectam confessionem fecerint, per omnipotentis Dei misericordiam et ecclesiae catholicae preces tam nostra quam omnium paene archiepiscoporum et episcoporum qui in Galliis sunt auctoritate dimittimus. . . ." Hagenmeyer, *Epistulae et chartae*, p. 137, no. 3.

140. First Lateran Council (1123) c. 10 (*COD*, pp. 167–68); Erich Caspar, "Die Kreuzzugsbullen Eugens III.," *Neues Archiv* 45 (1924): 303–5.

141. This development begins already with the crusading canon, *Ad liberandam*, of the fourth Lateran Council (1215) c. 71 (*COD*, pp. 246–47), which the first Council of Lyon (1245) c. 5 (*COD*, p. 277) repeats verbatim.

142. His very certainty may, of course, arise from a wish to banish doubts, both his own and those of others, and to stifle criticism of the indulgence. Cf. the remarks of David Daube, "The Self-understood in Legal History," *The Juridical Review*, n.s. 18 (1973): 134.

143. Innocent IV, *Apparatus* to X 3.34.8, no. 1, 7 (Frankfurt, 1570, fol. 429<sup>v</sup>–430<sup>v</sup>): "Pro defensione: hoc non est dubium, quod licet Papae fidelibus suadere, et indulgentias dare, ut terram sanctam et fideles habitantes in ea defendant, 23 q. 8 omni timore et c. igitur [c. 9, 7]; sed nunquid est licitum inuadere terram, quam infideles possident, vel quae est sua? Et nos ad hoc respondemus, quod in veritate domini est terra, et plenitudo eius orbis terrarum, et universi qui habitant in eo. Ipse enim est creator omnium, idem etiam ipse Deus haec universa subiecit dominio rationalis creaturae, propter quam haec omnia fecerat, ut habemus in 1 c. Genes. et haec a principio seculi fuit communis, quousque usibus priorum parentum introductum est, quod aliqui aliqua, et alii alia sibi appropriant, nec fuit hoc malum, imo bonum, quia naturale est, res communes negligi, et etiam communio discordiam parit, et fuerunt a principio cuiuscunque qui occupauit, quae in nullius bonis erant, nisi Dei. Et ideo licebat cuilibet occupare, quod occupatum non erat, sed ab aliis occupatum, occupare non licebat, quia fiebat contra legem naturae, qua cuilibet indutum est, ut alii non faciat, quid sibi non vult fieri. . . . Quod autem Papa facit indulgentias illis, qui vadunt ad recuperandam terram sanctam, licet eam possideant Sarraceni, et etiam indicare bellum et dare indulgentias illis, qui occupant terram sanctam, quam infideles illicite possident, hoc totum est ex causa, nam iuste motus est Papa, si intendit terram sanctam, quae consecrata est natiuitate, habitatione, et morte Iesu Christi, et in qua non colitur Christus, sed Machometus reuocare, ut incolatur a Christianis." Joannes Andreae, *Novellae* to X 3.34.8, no. 6, 11 (Venice, 1581, vol. 3, fol. 172<sup>ra</sup>–173<sup>ra</sup>), follows Innocent IV closely, at times verbatim, in his treatment of these themes. See also the discussion of this facet of Innocent IV's thought by James Muldoon, "Extra ecclesiam non est imperium: The Canonists and the Legitimacy of Secular Power," *Studia Gratiana* 9 (1966): 570–80, and by John A. Kemp, "A New Concept of the Christian Commonwealth in Innocent IV," *Proceedings of the Second International Congress of Medieval Canon Law*, ed. Stephan Kuttner and J.

J. Ryan, *Monumenta iuris canonici*, Subsidia 1 (Città del Vaticano: S. Congregatio de Seminariis et Studiorum Universitatibus, 1965), p. 158.

144. Hostiensis, *Lectura* to X 3.34.8, no. 17–18 (Venice, 1581, vol. 3, fol. 128<sup>va</sup>): “Quod autem papa illis qui vadunt ad defendendum et recuperandam Terram Sanctam dat indulgentias et infidelibus Terram possidentibus bellum indicit, licite facit papa et iustam causam habet, cum illa consecrata sit natiuitate, conuersatione, et morte Iesu Christi, et in qua non colitur Christus, sed Machometus: unde et quamuis infideles ipsam possideant iuste tamen exinde expelluntur, ut incolatur a christianis et ad ipsorum dominium reuocetur. . . .”

145. Hostiensis, *Lectura* to X 5.6.17, no. 20 (Venice, 1581, vol. 5, fol. 34<sup>rb</sup>): “Unde et ex causa plenam indulget veniam peccatorum, prout sequitur, quod nulli alii licitum est, immo limitatur potestas, infra de pen., cum ex eo [X 5.38.14]. Et est ratio, quia ipse Papa vocatus est in plenitudinem potestatis. Ideoque plenam indulgentiam potest facere. Alii vero in partem sollicitudinis, ideoque ad ipsos particularis tantum pertinet et semiplena, ad hoc ii q. vi decreto [c. 11] et supra de usu. pal. ad honorem [X 1.8.4].” See also *Lectura* to X 5.7.13, no. 16 (Venice, 1581, vol. 5, fol. 39<sup>rb</sup>).

146. Hostiensis, *Lectura* to X 5.7.13, no. 17 (Venice, 1581, vol. 5, fol. 39<sup>rb</sup>): “[Indulgentia] quae est remissio omnium peccatorum, ut patet supra de iudaeis, ad liberandam [X 5.6.17] in textu decisionis. . . .”

147. Ralph Niger, *De re militari et triplici via peregrinationis* c. 12, ed. George B. Flahiff, “*Deus non vult: A Critic of the Third Crusade*,” *Mediaeval Studies* 9 (1947): 182. Niger was not, however, critical of the just war concept and conceded that under some circumstances a war might be spiritually beneficial.

148. This whole matter has been well treated by Palmer A. Throop, *Criticism of the Crusade: A Study of Public Opinion and Crusade Propaganda* (Amsterdam: N. V. Swets & Zeitlinger, 1940).

149. Jean Leclercq, “Gratien, Pierre de Troyes et la seconde croisade,” *Studia Gratiana* 2 (1954): 585–93.

150. *Glos. ord.* to D. 2 de pen. c. 5 ad v. *participes*: “Ergo Iudei et Sarraceni proximi nostri sunt et diligendi a nobis ut nos et verum est: verum tamen omnia opera dilectionis impendere debemus secundum uniuscuiusque conditionem, 86 dis. pasce [c. 21].” See also C. 23 q. 4 d.p.c. 16; C. 23 q. 8 c. 11. The *Glossa Palatina* to C. 24 q. 3 c. 1 presents an intriguing discussion of the question whether it is a greater wrong to kill a pagan or a good Christian: Cambridge, Trinity College, MS. 0.10.2, fol. 32<sup>rb</sup>.

151. Innocent IV, *Apparatus* to X 3.34.8, no. 3 (Frankfurt, 1570, fol. 430<sup>r</sup>): “Item per electionem poterunt habere principes, sicut habuerunt Saul, et multos alios, 8 q. 1 licet [c. 15]; sic ergo audacter, et in pluribus aliis c. predicta in quam scilicet dominia, possessiones, et iurisdictiones licite sine peccato possunt esse apud infideles, haec enim non tantum pro fidei, sed pro omni rationabili creatura facta sunt, ut est predictum. Ipse enim solem suum oriri facit super bonos et malos, ipse et volatilia pascit, Matt. c. 5 circa finem et 6; et propter hoc dicimus, non licet Papae vel fidelibus auferre sua, siue dominia, siue iurisdictiones infidelibus, quia sine peccato ea possident, sed bene tamen credimus, quod papa qui est vicarius Iesu Christi, potestatem habet non tantum super Christianos, sed etiam super omnes infideles, cum enim Christus habuerit super omnes potestatem, unde in psal. Deus iudicium regi da [Ps. 71], non videtur diligens paterfamilias nisi vicario suo, quem in terra dimittebat, plenam potestatem super omnes dimisisset.”

152. Innocent IV, *Apparatus* to X 3.34.8, no. 4 (Frankfurt, 1570, fol. 430<sup>r</sup>): “Item ipse [Deus] Petro et successoribus eius dedit clauces regni coelorum, et ei dixit: ‘quodcunque ligaveris’ etc. [Matt. 16:19]. Item alibi: ‘Pasce oues meas’ etc. [John 21:17] supra de elec. significasti [X 1.6.4]. Omnes autem tam fideles quam infideles oues sunt Christi per

creationem, licet non sint et ouili ecclesiae, et sic per praedicta apparet, quod papa super omnes habet iurisdictionem et potestatem de iure, licet non de facto, unde per hanc potestatem, quam habet papa, credo quod si gentilis, qui non habet legem, nisi naturae, si contra legem naturae facit, potest licite puniri per papam, ar. Genes. 19, ubi habes, quod Sodomitae qui contra legem naturae peccabant puniti sunt a Deo, cum autem Dei iudicia sint nobis exemplaria, non video quare papa, qui est vicarius Christi hoc non possit, et etiam dummodo facultas adsit, et idem dico si colant Idola."

153. Innocent IV, *Apparatus* to X 3.34.8, no. 5 (Frankfurt, 1570, fol. 430<sup>r</sup>): "Item Iudaeos potest iudicare papa, si contra legem euangelii faciunt in moralibus, si eorum praelati eos non puniant, et eodem modo, si haereses circa suam legem inueniant, et hac ratione motus Papa Gregorius et Innocentius mandauerunt comburi libros talium, in quos multae continebantur haereses, et mandauerunt puniri illos, qui praedictas haereses sequerentur, vel docerent."

154. Innocent IV, *Apparatus* to X 3.34.8, no. 8 (Frankfurt, 1570, fol. 430<sup>v</sup>): "Item licet non debeant infideles cogi ad fidem, quia omnes libero arbitrio relinquendi sunt, et sola Dei gratia in hac vocatione valeat, 45 dist. de Iudaeis [c. 5]; tamen mandare potest papa infidelibus quod admittant praedicatores Euangelii, in terris suae iurisdictionis, nam cum omnis creatura rationalis facta sit ad Deum laudandum, senten. 2 di. si queritur [fortasse: Petrus Lombardus, *Sententiae* 2.40.2 (*PL*, 192:747-48)]; si ipsi prohibent praedicatores praedicare peccant, et ideo puniendi sunt."

155. Innocent IV, *Apparatus* to X 3.34.8, no. 9 (Frankfurt, 1570, fol. 430<sup>v</sup>): "In omnibus autem praedictis casibus et in aliis, ubi licet Papae eis aliquid mandare, si non obediant compellendi sunt brachio seculari, et indicendum est bellum contra eos per Papam, et non per alios, ubi quis de iure suo contendit, nec est contra 2 quaestio 1 multi [c. 18] ubi dicitur, quod non pertinet ad nos iudicare de his qui foris sunt, quia intelligitur quod non debemus eos iudicare excommunicando, vel compellendo ad fidem, ad quam sola Dei gratia vocantur, 45 dist. de Iudaeis [c. 5]."

156. Hostiensis, *Lectura* to X 3.34.8, no. 26 (Venice, 1581, vol. 3, fol. 128<sup>vb</sup>): "Mihi tamen videtur quod in adventu Christi omnis honor et omnis principatus et omne dominium et iurisdicatio de iure et ex causa iusta et per illum qui supremam manum habet, nec arrare potest, omni infideli subtracta fuerit et ad fideles translata; quod hoc iusta causa fuerit probata Eccle. x, Regnum a gente in gentem transfertur propter iniustitias et iniurias et contumelias et diuersos dolos, quod hoc factum sit comprobatur supra de consti., translatio [X 1.2.3] et hoc in persona Christi filii Dei vivi, qui non solum sacerdos fuit, sed et Rex: Luce i."

157. Hostiensis, *Lectura* to X 3.34.8, no. 27 (Venice, 1581, vol. 3, fol. 128<sup>vb</sup>): "[U]nde constanter asserimus quod de iure infideles debent subici fidelibus, non econtra, ut patet in eo quod legi et notavi infra de iudeis, c. i in fi. et c. multorum et c. etsi iudeos § in hibemus [X 5.6.1, 2, 13]. Concedimus tamen quod infideles, qui dominium ecclesiae recognoscunt, sunt ab ecclesia tolerandi, quia nec ad fidem precise cogendi sunt, ut dictum est supra. Tales etiam possunt habere possessiones et colonos christianos et etiam iurisdictionem ex tolerantia ecclesiae. Etsi de eis contenti non sunt, vel abutuntur, sibi imputent, quia priuelegium meretur amittere etc., super quo vide quod legi et notavi de iudeis, multorum [X 5.6.13]."

158. Hostiensis, *Summa aurea*, lib. 1, tit. De treuga et pace [X 1.34] (Lyon, 1537, fol. 59<sup>ra</sup>).

159. See, among others, Kenneth J. Pennington, Jr., "Bartolomé de las Casas and the Tradition of Medieval Law," *Church History* 39 (1970): 1-13; James Muldoon, "A Canonistic Contribution to the Formation of International Law," *The Jurist* 28 (1968): 265-79; D. Carro Venancio, *La teología y los teólogos-juristas españoles ante la conquista de América*, 2 vols. (Madrid: Centro de Estudios Históricos, 1935).



160. C. 23 q. 3 c. 3; C. 23 q. 4 c. 48.
161. C. 15 q. 6 c. 2.
162. C. 23 q. 5 d.p.c. 48; C. 23 q. 6 pr. and d.p.c. 4.
163. Rolandus, *Summa* to C. 23 q. 7 (ed. Thaner, p. 7); see also the *glos. ord.* to C. 23 q. 7 pr. ad v. *nunc autem*.
164. Stickler, "Der Schwerterbegriff bei Huguccio," p. 217, n. 4.
165. Third Lateran Council c. 27 (*COD*, pp. 200–201); Pissard, *La Guerre sainte*, pp. 27, 31; G. Sicard, "Paix et guerre dans le droit canon du XII<sup>e</sup> siècle," *Cahiers de Fanjeaux* 4 (Toulouse, 1969), 89–90, n. 37; Austin P. Evans, "The Albigensian Crusade" in *A History of the Crusades*, ed. Kenneth M. Setton et al., 2d ed. (Madison: University of Wisconsin Press, 1969), 2:282. Similar provisions were made by the fourth Lateran Council (1215) c. 3 (*COD*, pp. 209–11); see also *Comp. V* 1.17.1 (X—).
166. Evans, "The Albigensian Crusade," pp. 284–85.
167. *Glos. ord.* to C. 23 q. 5 c. 32 ad v. *omnes*: "Si argo aliqui heretici sunt in una ciuitate, tota ciuitas potest exuri: et sic ecclesia uel ciuitas punitur pro delicto personarum, ut 25 q. 2 ita nos [c. 25] et C. de sacrosanct. eccl., iubemus nullam (*Cod.* 1.2.10); Quid iuris sit de hoc, notatur in illo borcardo, an delictum persone etc. Item habes hic, quod heretici occidi potest, ut supra eadem q. 4 quando [c. 19]. Joan."
168. Evans, "Albigensian Crusade," pp. 288–89.
169. Raymond de Peñafort, *Summa* 2.1.10 (Roma, 1603, pp. 157–58): "Idem dico in Episcopo, vel iudice ecclesiastico, qui ob defensionem rerum ecclesiasticarum, vel fidei inuocat, et hortatur contra violentos brachium seculare; et etiam potest eos sequi hortando eos, non ut eos occidant, vel mutilent ipsos violentos, haereticos, vel paganos, sed ut ecclesiasticam fidem et patriam liberent, et defendant, et terram ab infidelibus occupatam redigant ad cultum fidei Christianae: et super hoc facit ecclesia quotidie remissiones magnas: et licet ibi, hinc inde aliqui occidantur, non est hoc praelato, vel ecclesiae imputandum, immo peccaret, nisi se opponeret contra tales: posset enim dici, mercenarius est, qui non est pastor, etc. [John 10:12] et esset merito deponendus, ut supra de haereticis puniuntur, ver. archiepiscopi. Probatur hoc per iura supradicta, et 23 q. 3 Maximianus [c. 2] et q. 8 igitur et scire et omni et hortatu et ut pridem [c. 7–10, 17]. De illis autem, qui mouent arma contra tales propter obedientiam, iustitiam, et zelum fidei, certum est, quod merentur. Immo peccarent alias; et possent cogi principes per censuras ecclesiasticas ad purgandas suas prouincias ab haeretica prauitate, necnon et matrem suam ecclesiam defendendam; cum propter hoc contulerit eis Dominus principatus, et regna, 23 q. 5 principes et Regum et administratores et si audieris et omnium [c. 20, 23, 26, 32, 46] et q. 1 quid culpatur in bello [c. 4]."
170. Hostiensis, *Summa aurea*, lib. 3, tit. De voto et voti redemptione [X 3.34], no. 19 (Lyon, 1537, fol. 178<sup>va</sup>): "In quo casu et a quo crux debeat predicare. Et quidem contra sarracenos et hereticos predicari potest et debet, infra eodem quod super his [X 3.34.8] et c. se. et c. fi. [X 3.34.9–10] et infra de here. excommunicamus [X 5.7.13]. § Sed nunquid contra schismaticos et inobedientes et rebellen predicari potest? Hoc non est expressum in iure et ideo vidi in alemania aliquos super hoc dubitare, asserentes quod contra christianos non videbatur equum et honestum quod crux assumeretur maxime quia non inuenitur in iure expressum, arg. pro ipsis supra de transla. episcopi vel electi, inter corporalia [X 1.7.2] § sed denique, li q. v consuluisti [c. 20], supra ne sede, vacan., illa [C. 3.9.2], sed certe non semper debet requiri ius expressum, quia plura sunt negotia quam vocabula, ff. de prescri. ver. 1. iiii [Dig. 19.5.4]; ideo iure deficiente est de similibus ad similia procedendum, ff. de legi., non possunt [Dig. 1.3.12], supra de rescrip., inter cetera [X 1.3.4] et naturalibus utendum est rationibus, nam et lex ratio commendat, dist. i consuetudo [c. 5], et quod naturalis ratio et c. insti. de iure naturali § quod vero naturalis ratio [*Inst.* 1.1.2.1]. Dicas

ergo quod si crux transmarina que pro acquisitione seu recuperatione terre sancte tantummodo predicat videtur merito predicanda, multo fortius pro unitate ecclesie conseruanda predicanda est crux contra schismaticos cismarinam, arg. xxiiii q. i loquitur et c. seq. et c. schisma [c. 18, 34], xvi q. fi., sicut domini vestimentum [C. 16 q. 7 c. 19]; nec enim filius dei in mundum venit, nec crucem subiit ut acquireret terram, sed ut captiuos redimeret et peccatores ad penitentiam reuocaret, nec aridam imo catholicam ecclesiam desponsauit, cum ergo maius periculum immineat in hac ultima quam in prima, quia pretiosior est anima quam res, C. de sacrosan. eccl., sancimus [Cod. 1.2.21], id est magis subueniendum est, xlii di. quiescamus [c. 2].”

171. Cf. Russell, *Medieval Theories of the Just War*, p. 194.