

**Liberty University**

---

**From the Selected Works of Jeffrey C. Tuomala**

---

2008

# Chinese and Western Worldviews: Implications for Law, Policy,

Jeffrey C. Tuomala, *Liberty University*



Available at: [https://works.bepress.com/jeffrey\\_tuomala/5/](https://works.bepress.com/jeffrey_tuomala/5/)

## CHINESE AND WESTERN WORLDVIEWS: IMPLICATIONS FOR LAW, POLICY, AND WAR\*

*Jeffrey C. Tuomala<sup>†</sup>*

Chinese and Western worldviews differ significantly, with implications for law and policy, particularly in the context of the use of force in international relations. It is commonly assumed that Chinese and Western worldviews or cultures each has an essential unity, or has at least developed on a continuum, over the millennia. That assumption may be sound with regard to the Chinese, but not to the Western worldview. The Christian West embraces a worldview that differs fundamentally from that of the pre-Christian West and the post-Christian West, which enabled it to develop and sustain the rule of law unique to the Western legal tradition. Certain fundamental characteristics of the Chinese worldview are remarkably similar to those of the pre-Christian and post-Christian West, but strikingly different from those of the Christian West. The true dividing line between philosophical and ethical perspectives does not fall between Chinese and Western worldviews; it falls between non-Christian and Christian worldviews. Only a Christian worldview, with its distinctive cosmology and social order, can birth and sustain the rule of law and its correlative distinction between law and policy.

Cosmology<sup>1</sup> and social order provide the focal points for comparing and contrasting these two fundamentally distinct and competing

---

\* This article is an adaptation of a paper titled "On War and Justice: National Interest, International Law and Cooperation in an Age of Terrorism," which the author presented at a February 2004 conference hosted by the University of Denver's Center for China-United States Cooperation and co-sponsored by the Association for Christian Conferences Teaching and Service. The topic of the conference was "Chinese and Western Values: Is International Cooperation in Fighting Terrorism Possible?"

<sup>†</sup> Professor of Law and Associate Dean for Academic Affairs, Liberty University School of Law. B.S., The Ohio State University, 1973; J.D., Capital University School of Law, 1976; LL.M., George Washington School of Law, 1984. Colonel, United States Marine Corps Reserve (Ret.).

<sup>1</sup> "Cosmology," as used herein, refers to that branch of philosophy dealing with the origin and structure of the universe and the relation of God and man in it.

worldviews. In the Christian West, a basic cosmological dualism sharply distinguishes between the Creator and His creation. The Christian West is also marked by a multiplicity of social-groups with overlapping and competing jurisdictions. These two characteristics gave rise to the ideology of the rule of law along with institutions that could implement it. The Chinese and non-Christian West adhere to a basic cosmological monism with no clear distinction between the Creator and His creation. The resulting tendency is to destroy group pluralism by undermining the multiplicity of political jurisdictions and blurring the distinctions between political, familial, and religious institutions. As a consequence, China and the non-Christian West are incapable of developing or sustaining the particular type of legal order based on the rule of law that is unique to the Western legal tradition.

Part I of this article briefly considers the uses of the terms "West" and "Western" and explains why the Christian culture that prevailed in Western Europe between 400 A.D. and 1800 A.D. must be distinguished from Western societies that preceded and followed that period.

Part II compares and contrasts Chinese and Western worldviews at the points of cosmology and social order, drawing upon two Western writers, Augustine and Unger, and three Chinese writers, Zhang, Yao, and Shi.

Augustine represents the worldview of the Christian West. He broke with Greek and Roman thought in holding that man is a created being, entirely distinct from God the Creator. The Christian view of the church, as a corporate body of believers in Jesus Christ, separate and distinct from family and state, owes much to Augustine and is of fundamental importance for social ordering in the Christian West.<sup>2</sup>

Two articles by contemporary Chinese authors are particularly instructive in setting forth essential elements of the Chinese worldview in the context of the use of force in international relations. General Zhang Junbo and Colonel Yao Yunzhu attribute what they deem to be a sharp contrast between Chinese and Western decision-making to differing cosmologies.<sup>3</sup> Professor Shi Yinhong, while not discounting

<sup>2</sup> "Church," as used herein, is not a generic term signifying religious institutions. Nor does it signify a particular denomination within Christianity. It signifies men and women who have placed their faith in Christ for salvation and thus form the *corpus Christiani*, i.e., the Body of Christ. See, e.g., *Colossians* 1:24; *Ephesians* 5:29; *1 Corinthians* 12:12-31.

<sup>3</sup> Zhang Junbo & Yao Yunzhu, *Differences Between Traditional Chinese and Western Military Thinking and Their Philosophical Roots*, 5 J. CONTEMP. CHINA 209 (1996).

Chinese-Western differences, places considerable emphasis on suggested points of similarity, especially as related to the matter of social ordering.<sup>4</sup>

Roberto Unger contrasts China and the Christian West on the bases of cosmology and social order.<sup>5</sup> Professor Unger's analysis is particularly useful in that it treats the relationship of law and policy generally, rather than in the limited context of the use of force. Unger contends that a legal order based on rule of law developed in the West and not in China because of Western beliefs regarding cosmology and forms of social order. In the Christian West, law came to be viewed as distinct from policy, with its own institutions, values, and methodology.

Part III analyzes the relationship of law and policy in making decisions to go to war as developed in the West. It demonstrates that the distinction, and relationship, between law and policy are based upon a particular Western Christian cosmology and view of social order. Zhang and Yao assert that the main difference between China and the West in this regard is that Chinese decisions are based on "justice" while Western decisions are based on "interest."<sup>6</sup> Their criticism may be accurate regarding the pre-Christian and post-Christian West, but it is not an accurate assessment of the Christian West.

Augustine was perhaps not only the greatest theologian of the church, but his writings were also seminal for the development of just war doctrine. Just war doctrine in the Christian West, because of its foundational worldview, maintains the distinction between law and policy, thus placing "justice" (law) into proper relationship with "interest" (policy).

#### PART I – WHAT DOES IT MEAN TO BE WESTERN?

Use of the terms "West" and "Western" can be ambiguous. Several approaches have been taken in defining "West," each of which is somewhat helpful, but none of which is totally satisfactory. The simplest approach is to define "West" in terms of longitude on a map. This approach, however, is both over-inclusive and under-inclusive of cultures that are commonly identified as Western. An approach from the Cold War era is to identify East and West based on political differ-

<sup>4</sup> See Shi Yinhong, *Chinese and Western Ethical Traditions and International Intervention*, 6 REGENT J. INT'L L. 69 (2007).

<sup>5</sup> ROBERTO MANGABEIRA UNGER, *The Chinese Case: A Comparative Analysis*, in LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 86-109 (1976).

<sup>6</sup> Zhang & Yao, *supra* note 3, at 210.

ences, but this approach has become passé with the fall of the Soviet empire.

The term "Western" is often used to designate cultures originating in ancient Greece and Rome, developing in Christian Europe, and continuing (with inclusion of certain of its colonial offspring) in modern Europe.<sup>7</sup> However, it is difficult to discern the logic that justifies placing such disparate cultures as pagan Greece, seventeenth century England, and present-day France under the common designation "Western."

Another approach to defining Western culture as spanning from ancient Greece to modern Europe is to treat the Christian era as something of an unhappy parenthesis in history, running from the fall of the Western Roman Empire to the Renaissance. Victor Davis Hanson tends toward that approach.<sup>8</sup> At the same time, Hanson identifies certain characteristics common to Western culture, as contrasted with Eastern cultures, which he believes explain the success of Western culture in its military clashes with the non-West.<sup>9</sup>

Harold Berman identifies "Western" with that part of Europe and its colonial progeny in which the Western church, in both its Roman Catholic and Protestant forms, has been dominant during the period of time from the eleventh century to the present.<sup>10</sup> Although Berman's identification of "Western" is arguably too restrictive, he makes two important points for present purposes. First, Western Christian culture is essentially different from Greco-Roman culture and is not an outgrowth of it.<sup>11</sup> Second, the freedom of the Western church from the control of civil government and its vitality as a competitive polity, distinct from state and family, were necessary conditions for the development of the Western legal tradition.<sup>12</sup>

---

<sup>7</sup> See generally CARLE CLARK ZIMMERMAN, *FAMILY AND CIVILIZATION* (1947).

<sup>8</sup> See generally VICTOR DAVIS HANSON, *CARNAGE AND CULTURE: LANDMARK BATTLES IN THE RISE OF WESTERN POWER* (2001).

<sup>9</sup> *Id.*

<sup>10</sup> HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 1-4 (1983).

<sup>11</sup> See *id.* at 148-51 (showing that although Western Europeans received or rediscovered legal texts from the Roman Empire, they transformed the meaning of those texts in large measure through the application of the scholastic method).

<sup>12</sup> See *id.* at 5, 18-19 (explaining that this tradition, though greatly weakened through the destructive influences of the French and Russian Revolutions, still distinguishes the West from the rest of the world).

In this article, the term "Christian West" means the period of time from the fifth to the nineteenth century and covering the territory primarily of Western Europe and certain of its colonial offspring. The period of time from the nineteenth century to the present is referred to as the "post-Christian West."

The Christian West begins with the fifth century because it is the time during which Augustinian theology began its rise to primacy. Augustine's theology was the most comprehensive, consistently orthodox, and influential of the early church. He made a decisive break with Greek philosophy, articulating a cosmology that maintained a distinction between the Creator and His creation, and he laid a foundation for a social order in which the church became a separate institution from the state.<sup>13</sup> Additionally, Augustine first articulated a just war doctrine based on Christian theology that prevailed in the West until the nineteenth century.<sup>14</sup> Just war doctrine provides an exemplar for formulating the relationship between law and policy in the Western legal tradition.

The post-Christian West began during the nineteenth century when the legal positivism of John Austin,<sup>15</sup> built upon the utilitarian philosophy of Jeremy Bentham,<sup>16</sup> began its rise to ascendancy. Law came to be viewed merely as an instrument of social control, separate from any objective morality or higher law. Accordingly, Western nations increasingly viewed the use of force in international relations as based on interest rather than justice.

Classical international law, as summarized in the works of Grotius and Vattel,<sup>17</sup> was premised upon a superintending law of God that governs nations. Once Austin's definition of law as the command of the political sovereign was accepted, the basis for international law was destroyed. In international relations, if there is no political sover-

---

<sup>13</sup> *Id.* at 109-10.

<sup>14</sup> *Id.* at 110.

<sup>15</sup> JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED passim* (Isaiah Berlin et al. eds., Wedenfeld & Nicolson 1968) (1832) (discussing divine laws, positive law, positive morality, and laws metaphorical or figurative).

<sup>16</sup> BHIKHU C. PAREKH, *JEREMY BENTHAM: CRITICAL ASSESSMENTS* 28 (1993) ("Austin was the direct juristic heir of Bentham."); JEREMY BENTHAM, *OF LAWS IN GENERAL* (1970).

<sup>17</sup> HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE passim* (Richard Tuck, ed. Liberty Fund, Inc. 2005) (1625); EMERICH DE VATTTEL, *THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS passim* (Chicago, T. & J. W. Johnson & Co. publ'g 1863) (1775).

eign, logically there can be no law. Without law, the only basis for conducting international relations is national interest. National interest, rather than just cause, provides positivists the only "justification" necessary for the use of force.

The nineteenth century also gave birth to two ideologies—materialism and evolution<sup>18</sup>—completely at odds with the Christian doctrine of creation and its Creator-creature distinction. As a result, the fate of society based on the rule of law, which was distinct from interest-group politics and utilitarian ethics, was further sealed. The state's rapid rise to primacy as the most powerful social institution paralleled the development of non-Christian ideology and legal positivism. The church (as well as the family) became increasingly marginalized, yet it was the church in particular that historically had sustained the Christian worldview and served as a restraint on the state.

## PART II—CONTRASTING WORLDVIEWS: CHRISTIAN WEST AND CHINESE

### *A. Augustine*

Augustine is the most influential theologian in the history of the Christian West. His writings on the doctrine of creation (cosmology) and "the City of God" (social order)<sup>19</sup> are particularly important for laying the groundwork for a Christian worldview distinct from that of non-Christian thought. A particular product of Augustine's worldview was his formulation of just war doctrine, which was seminal for theology and for international law. It was in the development of the just war doctrine that the relationship between law and policy, or as Zhang and Yao write, the difference between "justice" and "interest," was worked out.<sup>20</sup>

Augustine's articulation of the Christian doctrine of God the Creator as distinct from man the creature decisively severed the syncretistic influence that Greek philosophy, especially Platonism, had on Chris-

<sup>18</sup> Jonatas E. M. Machado, *Freedom of Religion: A View from Europe*, 10 ROGER WILLIAMS U.L. REV. 451, 463 (2005).

<sup>19</sup> The works of Augustine number more than 100 titles, including SAINT AUGUSTINE, *ON CHRISTIAN DOCTRINE* (D.W. Robertson, Jr., trans. 1958) (the first 3 books were finished in 396-397 and the fourth book was finished in 426) and SAINT AUGUSTINE, *THE CITY OF GOD* (Demetrius B. Zema & Gerald G. Walsh, trans. 1950) (413-426) (consisting of 22 books).

<sup>20</sup> Zhang & Yao, *supra* note 3, at 212-13.

tian theology.<sup>21</sup> Augustine is also attributed in large measure with establishing the concept of a strong institutional church that would serve to counter pagan Greek and Roman notions of an all-inclusive social order under the governance of the state.<sup>22</sup> His views would further serve to counter the unitary social order based on the family that dominated Germanic tribalism and that continued well into the Middle Ages.<sup>23</sup>

A syncretism of pagan Greek philosophy, in its Aristotelian form, and Christian theology emerged in the church during the high Middle Ages, largely through the influence of Thomas Aquinas.<sup>24</sup> That syncretism, which forms the basis for modern Roman Catholic thought,<sup>25</sup> works to undermine the Creator-creature distinction and provides a false understanding of the relationship between faith and reason.<sup>26</sup> The

<sup>21</sup> 2 CORNELIUS VAN TIL, IN DEFENSE OF BIBLICAL CHRISTIANITY: A SURVEY OF CHRISTIAN EPISTEMOLOGY 51 (1977).

According to Plato, man is not created in the image of God because there is no God sufficiently absolute to create man in his own image. In the Platonic story of creation God looks up to Ideas that are next to him and is conditioned by material that is independent of him. Plato's God does not carry within him the ultimate principle of unity and diversity, but he is looking for it. Hence man's knowledge cannot be an impress of God's knowledge. If God did try to impress his knowledge upon man it would naturally be regarded as an imposition by man because he was more or less God's equal. Thus Plato and Augustine stand once more opposed to one another.

*Id.*

<sup>22</sup> B.B. WARFIELD, CALVIN AND AUGUSTINE 313 (Samuel G. Craig ed., 1956).

It was particularly in the doctrine of the Church, which [Augustine] thus took up and transfigured, that he became in a true sense the founder of Roman Catholicism, and thus called into being a new type of Christianity, in which "the idea of the Church became the central power in the religious feeling" and "in ecclesiastical activity" "in a fashion which has remained unknown in the East."

*Id.* (citation omitted).

<sup>23</sup> See BERMAN, *supra* note 10, at 62-68, 226-30 (explaining that tribalism is still a more powerful force in much of the world than religion or nationalism). See also ZIMMERMAN, *supra* note 7, at 470.

<sup>24</sup> BERMAN, *supra* note 10, at 246, 279.

<sup>25</sup> See C. Scott Pryor, *God's Bridle: John Calvin's Application of Natural Law*, 22 J. L. & RELIG. 225, 234-35 n.52 (2006-07).

<sup>26</sup> CORNELIUS VAN TIL, THE REFORMED PASTOR & MODERN THOUGHT 90-91, 96-97 (1974).

Calvin argued that no man can know himself without at the same time knowing himself as a creature of God. No man can observe the facts of nature and history round about him without seeing clearly manifested in them the all-controlling and judging activity of the Creator-Redeemer God. Thomas [Aquinas] starts from the abstract concept of *Being* and introduces the



Protestant Reformation marked a return to the orthodox theology of Augustine and has been appropriately viewed as an Augustinian revival.<sup>27</sup> The Reformation had implications not only for cosmology but also for social ordering. Although Western Europe had long been based on a multiplicity of competing and overlapping jurisdictions, it was in those countries most influenced by Reformed theology that jurisdictional boundaries, now largely eroded, were most clearly drawn between family, church, and state. It was also in those countries most influenced by Reformed theology that the political forms of republicanism and federalism flourished.<sup>28</sup>

### 1. Created Order

One of the fundamental doctrines that distinguishes Christian thought from non-Christian thought is the doctrine of creation. Christians believe in creation *ex nihilo* (out of nothing) by a pre-existing and eternally self-sufficient God; the created order is not merely an

---

Creator-creature distinction *afterwards*. He reduces the Creator-creature distinction to something that is consistent with the idea of God and the cosmos as involved in a chain of being, with varying degrees of intensity. His philosophy and psychology thus make any true Christian theology impossible.

....

If Thomas, the theologian, hears by revelation that God has created the universe out of nothing and he tells this to Thomas, the philosopher, the latter will answer that he cannot know this to be the case, indeed that he *will never be able* to know such a thing to be so. He must add that the nature of reality *does not allow* for any such thing to be so. For surely faith will never teach anything that is out of accord with right reason, and has God not given reason to man? Thomas maintains that faith takes over where reason cannot go. But what will he do when both "reason" and "faith" make contradictory statements about the nature of reality? In other words, the argument with respect to the first mover is an argument about the nature of the whole of reality that is utterly out of accord with the nature of this reality as it is said to be in the Christian religion.

*Id.*

<sup>27</sup> VAN TIL, *supra* note 21, at 100-01.

<sup>28</sup> See generally Herbert D. Foster, *International Calvinism Through Locke and the Revolution of 1688*, 32 THE AM. HIST. REV. 475 (1927) (discussing reformed theology and its impact on political theories of government); DONALD LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 86-87 (1988) (discussing why Americans of the founding era believed they were capable of self-government).

extension of God, nor an emanation from Him, nor is it shaped out of something equally pre-existing or independent of God.<sup>29</sup>

The modern attack on the doctrine of creation, led by those who hold to a monistic cosmology, generally claims to be "scientific" in nature. Actually, this is primarily a philosophical and theological attack on the worldview that produced the Western legal tradition and the Western social order. The destructive impact of the modern state's censorship of "creationism" in public schools is much greater on matters of ethics, law, and social order than it is upon operative biology. Unless God is prior to, distinct from, and independent of the created order, He cannot be the lawgiver. In fact, He would be subject to the same "law" to which man is subject.

The ancient Greeks were presented with the same basic cosmological options as the ancient Chinese philosophers. They had competing conceptions of God as wholly transcendent (like the Chinese *Shang Ti*, lord-on-high) or as wholly immanent (like the Chinese *T'ien*, heaven).<sup>30</sup> The Greeks, like the Chinese, opted by and large for the immanent. Cornelius Van Til points out the distinction between Augustinian Christianity and pagan Greek thought:

[I]t remains to be proved that anyone of the Greeks ever thought of the universe as God's creation. The term creation is used, to be sure, but the connotation of the term creation in Greek philosophy is always determined by the fact that the

<sup>29</sup> 2 FREDERICK COPLESTON, *A HISTORY OF PHILOSOPHY* 74 (1950).

A doctrine which was not developed by pagan thinkers, but which was held by Augustine in common with other Christian writers, was that of the creation of the world out of nothing by God's free act . . . . The doctrine of free creation out of nothing is not to be found in neo-Platonism, if we except one or two pagan thinkers who had most probably been influenced by Christian teaching. Augustine may have thought that Plato had taught creation out of nothing in time, but it is improbable, in spite of Aristotle's interpretation of the *Timaeus*, that Plato really meant to imply this. However, whatever Augustine may have thought about Plato's views on the matter, he himself clearly states the doctrine of free creation out of nothing and it is essential to his insistence on the utter supremacy of God and the world's entire dependence on Him. All things owe their being to God.

*Id.* (citation omitted).

A myriad of Bible passages present God as Creator, from the first book to the last. *Genesis* 1:1 (NIV) ("In the beginning God created the heavens and the earth."); *Revelation* 4:11 (NIV) ("You are worthy, our Lord and God, to receive glory and honor and power, for you created all things, and by your will they were created and have their being.").

<sup>30</sup> UNGER, *supra* note 5, at 101-05.

universe is thought of as having an eternal or semi-eternal existence alongside of the existence of God. And if such is the creation concept of Greek thought, it is impossible that the immanence of God in the universe could mean anything else than a sort of identity with the universe. The God of Greek philosophy is either exclusively deistic or exclusively pantheistic.<sup>31</sup>

One logical implication of a worldview in which man and "God" are one, and equally subject to the laws of the universe, is to assume the "naturalness" of the social order and customary norms of behavior (like *li* of Chinese culture).<sup>32</sup> Although such a worldview might provide some hope for developing universal customs, it does not explain the existing disharmony or offer a satisfactory way of realizing the essential oneness that supposedly inheres in reality. Instead, it calls for reliance upon the wise man or shaman who has more insight into these matters than others and can explain the universe to us.<sup>33</sup> This seems to track with Zhang's and Yao's view of "heavenly laws" (*tiandao*) and "inner life" (*neizai xingming*).<sup>34</sup> The "heavenly laws" and "inner life" have a necessary correspondence because all is one; therefore, the world can be understood by looking inward. In such a universe, law can have legitimacy only insofar as all men concur as to what custom requires.

The other logical implication of a worldview in which man and God are one is that man and God are equally free to impose their will upon the universe. Those who have the most wisdom will use law as a creation of the human will—that is, positive law (like *fa* in Chinese culture)<sup>35</sup>—to impose an order they choose. Still, law will have legitimacy only insofar as all agree as to what order to establish by means of positive law.

<sup>31</sup> VAN TIL, *supra* note 21, at 16.

<sup>32</sup> See UNGER, *supra* note 5, at 93-96.

<sup>33</sup> VAN TIL, *supra* note 21, at 45.

The conclusion of the whole of Greek speculation was that all things are at bottom one. Epistemologically expressed, this amounts to saying that there can be only one type of mind. The human and the divine mind can never differ in any other way than quantitatively . . . . The minds of both God and man are placed within a universe that is larger and more original than, or as original as, themselves.

*Id.*

<sup>34</sup> Zhang & Yao, *supra* note 3, at 216.

<sup>35</sup> See UNGER, *supra* note 5, at 101-05.

Those who find themselves under the sway of the positivists' legal order have no higher law to which they may appeal when they find their necks under the heel of the positivists' boot. Officials who sincerely desire to do what is right have no certainty of what is required unless they have the laws of God to guide them. Western liberal society had an ideological basis for a rule of law, but surrendered it while still claiming allegiance to the rule of law.<sup>36</sup>

The question is whether the West can maintain a legal order based on the rule of law without maintaining the faith that sustained it.<sup>37</sup> The answer is no. Western society has returned to the type of legal system that marks Chinese society. The only appeals are to custom and force. There is no higher law with which to question the legitimacy of custom or stand in judgment of the sovereign's command.

## 2. Kingdom of God

In *The City of God*, Augustine gives the reader a panoramic view of human history and depicts the scene as a battleground between two ethical realms, the City of God and the City of Man.<sup>38</sup> Although the City of God is to extend over the entire earth and many of its citizens are civil rulers, it is not to be equated with a political entity having universal jurisdiction. Some citizens of a particular nation are citizens of the City of God, and some are not; even families have diverse citizenship, some members being citizens in the City of Man and some in the City of God.

The City of God is not to be equated with the Christian church; although, hopefully, most people in the visible church are also citizens of the City of God.<sup>39</sup> The implications for social ordering are mani-

---

<sup>36</sup> See *id.* at 166-81 (stating that "liberal society" is that form of organization characterized by multiple social groups and rule of law based in a religion of transcendence).

<sup>37</sup> *Id.* at 83. Unger asks:

What happens when the positive rules of the state lose all touch with a higher law and come to be seen as nothing more than the outcomes of a power struggle? Can the ideals of autonomy and generality in law survive the demise of the religious beliefs that presided over their birth?

*Id.*

<sup>38</sup> 18 AUGUSTINE, *THE CITY OF GOD* 413-26 (Marcus Dods trans., Great Books ed., Encyclopædia Britannica 1952) (n.d.).

<sup>39</sup> BERMAN, *supra* note 10, at 109 ("Contrary to what is sometimes supposed, St. Augustine did not identify the City of God with the Christian Church as such, nor did he identify the Earthly City with the Roman Empire or with the state in general.").

fold. The church does have a unique mission that is separate and distinct from the family and the state. The church alone has a universal mission in the geographic sense, but its jurisdiction is limited in terms of the governmental powers it exercises. The church has primary responsibility for extending the City of God by making disciples of all nations, baptizing, and teaching people the laws of God,<sup>40</sup> yet it does not stand in a hierarchical relationship of superiority to the state and family.

The state has been given the authority to use force, but that power is not able to make nations embrace democracy or some other ideology, change people's lives, or convict individuals of the truth. The territorial jurisdiction of the state is also limited. In the City of God, the family and church have separate jurisdictions from the state.<sup>41</sup> Not only is there a multiplicity of states, there is a multiplicity of groups within society. The church does not rule over family or over the state; the family does not rule over church and state. The state does not absorb family and church as was the case in the pre-Christian West and is the tendency in the modern post-Christian states.

After the Papal Revolution in the eleventh century, the Christian West developed a basic social order distinct from Eastern Christendom. In the great struggle known as the Investiture Controversy, the Western church asserted, and was able to effect, the independence of the church from the state.<sup>42</sup> That fission of church and state, not to be confused with modern notions of the separation of God from state, was the catalyst for a number of other developments that further separated Western and Eastern Christendom.<sup>43</sup> Most importantly, for present purposes, the church in the West provided a model and a catalyst for the development of the rule of law in the civil realm.<sup>44</sup>

---

<sup>40</sup> *Matthew* 28:18-20 (NIV).

Then Jesus came to them and said, "All authority in heaven and on earth has been given to me. Therefore go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to do everything I have commanded you. And surely I am with you always, to the very end of the age."

*Id.*

<sup>41</sup> AUGUSTINE, *supra* note 38, at 515, 519-522.

<sup>42</sup> BERMAN, *supra* note 10, at 87, 97-99.

<sup>43</sup> AUGUSTINE, *supra* note 38, at 520-21.

<sup>44</sup> See BERMAN, *supra* note 10, at 99-119.

### 3. Just War

Augustine's writings on the topic of the law of war are of continuing and particular relevance. Just war doctrine, as developed in the Christian West, also demonstrates how the Christian worldview sustains the proper relationship between "justice" and "interest," or between law and policy. The theological basis for just war doctrine and the resulting relationship between law and policy is developed in Part III, below, comparing the Augustinian or Christian West view of just war and making decisions to use force in international relations, with those of the non-Christian West. As demonstrated in Augustine's view of just war, only a Christian worldview can sustain the rule of law.

#### *B. General Zhang Junbo and Colonel Yao Yunzhu*

In their article, "Differences Between Traditional Chinese and Western Military Thinking and Their Philosophical Roots," Zhang Junbo and Yao Yunzhu identify what they believe are the primary differences between Chinese and Western approaches to the use of force in international relations.<sup>45</sup> In so doing, they have identified the fundamental philosophical differences between China and the West and the two basic approaches to ethics generally.

Zhang and Yao claim that the focus of Chinese decision-making regarding the use of force is "justice," whereas the focus in the West is national "interest."<sup>46</sup> Another way of stating the difference is that for the Chinese it is a question of law and morals, whereas for Westerners it is a question of policy and expediency.

It is true that since the nineteenth century, Western discussions regarding the use of force have focused on national interest. The formulation and promulgation of the Weinberger Doctrine is an excellent example.<sup>47</sup> National interest may also have been the focus of decision-making in the pre-Christian West as the authors claim. However, what the authors term the "justice" approach appears to be roughly equivalent to just war doctrine, which was predominant in the Christian West from the fifth through the eighteenth centuries.

The authors, while exploring differing approaches to the use of force, identify Chinese and Western philosophical and cosmological differences that account for those differing approaches. Although they

<sup>45</sup> Zhang & Yao, *supra* note 3, at 209-10.

<sup>46</sup> *Id.* at 209.

<sup>47</sup> See *infra* Part III.

do not directly address differences in social order, the basic cosmological differences that they do address have direct implications for the type of social order that became dominant in China.

### 1. Justice v. Interest

Zhang and Yao write: "In a very broad sense, Chinese traditional military theories place more emphasis on upholding 'justice' while Western theories focus on the gaining of 'interests.' This may be best demonstrated by the different approaches each takes in thinking and explaining the causes as well as the aims of war."<sup>48</sup> "Justice" corresponds to law and "interest" to policy. Zhang and Yao portray the decision to go to war as being made on one basis or the other.<sup>49</sup> They cite historical examples from Chinese literature in which war is waged to "punish the immoral," "uphold the ethical codes, that is, courtesy, justice, loyalty and commitment," and "for 'the purpose of stopping tyranny and getting rid of a dictator.'"<sup>50</sup>

Most of Zhang and Yao's illustrations of the Western approach to war are drawn from Greek authors. It is unclear whether their definition of "West" includes the Christian era from the fifth through the eighteenth centuries. It was during that period that Augustine formulated and Christendom developed just war doctrine.<sup>51</sup> The classic treatises on international law adopted just war doctrine whole cloth.

If Zhang and Yao mean to include the Christian West in their use of the term "West," their assertion that the West tends to approach war on the basis of interest must be modified. Granted, it may be that even those in the West who profess or claim to act on the basis of "justice" rather than "interest" really act on the basis of interest alone. Zhang and Yao acknowledge the same phenomenon in Chinese history—the claim of justice is often a pretense for interest.<sup>52</sup> Even if the Christian

<sup>48</sup> Zhang & Yao, *supra* note 3, at 210.

<sup>49</sup> *Id.* at 211.

By and large, the ancient Chinese held disputes over moral issues as the most important factor in causing war while ancient Greeks and Romans stuck to interest conflicts when explaining the war ferment. . . . [O]ne can hardly find any assertions in the huge number of Chinese history books stating that material gains were legitimate aims of war. . . . [W]hat one constantly comes across in those books is the condemnation of such assertions.

*Id.*

<sup>50</sup> *Id.* (citation omitted).

<sup>51</sup> JOHN MARK MATTOX, SAINT AUGUSTINE AND THE THEORY OF JUST WAR 1-2 (2006).

<sup>52</sup> Zhang & Yao, *supra* note 3, at 211.

West has acted on the basis of interest in some cases, Zhang and Yao fail to acknowledge that these actions were contrary to the West's moral and legal position.

## 2. Inward Focus on the One v. Outward Focus on the One

Zhang and Yao correctly assert that the modern, non-Christian West focuses on interest rather than justice. However, they fail to recognize the essential unity of Chinese and non-Christian Western cosmology and social order, a unity more fundamental than the points of difference. The differences that do arise between Chinese and post-Christian thought in the West are due in part to the limited success of the modern West in its effort to rid itself of the Christian worldview. Neither Chinese philosophy nor non-Christian Western philosophy can provide the foundation for operating on the basis of justice rather than interest because they reject the belief in a created order distinct from God.

Zhang and Yao describe what they believe are the fundamental philosophical differences between China and the West from which the differing approaches to war rise. But the Chinese and non-Christian Western differences in cosmology are not as essential as the similarities. The authors provide a summary of the basic Chinese view of reality, or "cosmology":

A central task of ancient ethical philosophy in China is to inspire people to cultivate the good in their nature and to discard the evil. It holds that the "heavenly laws" (*tiandao*) which refers to the natural law or even more broadly to the objective universe, is fundamentally in conformity with "inner life" (*nei-zai xingming*) which means human nature . . . . By looking introspectively into his own mind, he can gain a better knowledge of the heavenly laws. And by constantly cultivating and improving himself, he can compromise with nature and reach the ultimate harmony [of the human nature and heavenly laws].<sup>53</sup>

In this basically pantheistic cosmology, there is no essential difference between man and the rest of reality, and man looks inward to discover what is around him. The authors contrast the Chinese ethical philosophy, which inspires people to look inward, with what they be-

---

<sup>53</sup> *Id.* at 216.



lieve is traditional Western philosophy. Westerners, they believe, approach nature in a very objective manner failing to view man and nature as an organic whole.<sup>54</sup>

Even assuming the general validity of the distinctions that Zhang and Yao draw, it is important to ask if there is something much more basic that Chinese philosophy shares with non-Christian Western philosophy than the differences they note. It may be true that Chinese philosophy generally looks inward and views the universe as a whole, but this is not wholly unlike many major schools of Western philosophy and theology that have an inward focus and view all reality as essentially one. The Realist schools of Western philosophy, both ancient and modern, have viewed universals, as opposed to particulars, as ultimate.<sup>55</sup> Like the ancient Greeks, most Western philosophers since Descartes, including Kant and his offspring, have had an inward and subjective focus. Kant also had a major influence on modern theology. That influence includes, most notably, the theology of Schleiermacher (Protestant liberalism), Karl Barth (Protestant neo-orthodoxy), and several modern Roman Catholic theologians who are closer ideologically to Eastern philosophy than to orthodox Christianity.<sup>56</sup>

Both Chinese and non-Christian Western cosmology view all being as one.<sup>57</sup> There is no Creator-creature distinction as there is in

---

<sup>54</sup> *Id.*

Western philosophers have followed a different path studying the relationship between man and nature. Their understanding of nature is more scientific and materialistic . . . . Instead of focusing on the inner world, they seek answers from solid facts in the outer world . . . . Unlike ancient Chinese who have looked upon man and the universe as an organic whole, ancient Westerners treated them as two distinctive systems. They tended to approach nature in a very objective manner, explaining it as it is and using it to their own benefit.

*Id.*

<sup>55</sup> See 9 THE NEW ENCYCLOPÆDIA BRITANNICA 974 (15th ed. 1994).

<sup>56</sup> See VAN TIL, *supra* note 21, for a thorough and incisive treatment of ancient Greek and European philosophers and their legacy, which resides in modern Protestant and Roman Catholic theologians. He summarizes: "Protestantism has in effect returned to the bosom of the mother church even as the theologians of the church have in effect marched forward with the theologians of neo-Protestantism toward an alliance with modern subjective philosophy." *Id.* at 223.

<sup>57</sup> Compare FRANCIS A. SCHAEFFER, A CHRISTIAN MANIFESTO 24 (1981) ("The term humanism . . . means Man beginning with himself, with no knowledge except what he himself can discover and no standards outside of himself. In this view Man is the measure of all things, as the Enlightenment expressed it.") and CHARLES MORRIS, THE PRAGMATIC MOVEMENT IN AMERICAN PHILOSOPHY 7 (1970) ("The major pragmatists all accepted the view that man emerged as one kind of liv-

Christian thought. Both Chinese and non-Christian Western thought presuppose a basic cosmological monism. Whether man starts by studying himself or the world surrounding him, and whether he does so for the purpose of conforming to the world or manipulating it, man ultimately is the only interpreter of the world, and ultimately interprets it only for his own benefit. Man, then, is the interpreter of reality, and his own interest is his only end. He has no ability to transcend his situation and make moral judgments. Nothing exists for him besides nature, with which he is essentially one.

### 3. Ambiguity v. Precision

One of the problems with Chinese philosophy is that its basic cosmological monism carries over into ethics. Chinese ethics are much less rule-oriented than Western ethics. Language need not be precise because ethics are based on relationship, not rules. Such concepts as *ying* and *yang* further break down conceptual and moral distinctions. Although Zhang and Yao do not directly address the issue of social order, they show how Chinese philosophy and its equivocal concepts work to obliterate distinctions between social groups.

[The Chinese] way of thinking tends to be ambiguous and equivocal in defining concepts and establishing categories. However, it is just the ambiguity and equivocality that make philosophical concepts flexible and all-inclusive. . . . For example, *ying* and *yang* (the negative and the positive) are two opposing philosophical concepts which might be contradictory, complementary, interchangeable and so on. . . . Further, *ying* can transform into *yang* and *yang* into *ying*. . . . In short, the all-inclusive *ying* and *yang* may be presented as a series of relationships between orthodox and unorthodox (*qi* and *zheng*), toughness and softness (*gang* and *rou*), superiority and inferiority (*qiang* and *rag*), offensive and defensive (*gong* and *shou*), emptiness and fullness (*xiu* and *shi*) and so on.<sup>58</sup>

---

ing being within a long evolutionary process.") with MINTA C. WANG, THE ESSENTIALS OF CHINESE THOUGHT: PAST AND PRESENT 36 (1983) ("Tao is 'the source of creation' or the source of all beings. It existed before the universe and gave birth to all things that constitute the universe . . . . The goal of the Taoist is 'to be one with the Tao,' to be in harmony with the order of nature.").

<sup>58</sup> Zhang & Yao, *supra* note 3, at 220.

Zhang and Yao argue that, in contrast to the ambiguity that exists in the Chinese way of thinking, Westerners focus on definitions and analysis.<sup>59</sup> Zhang and Yao view Chinese ambiguity or lack of precision as a strength in waging war because it provides flexibility and facilitates deception.<sup>60</sup> In actuality, it creates more problems than it solves. If *ying* and *yang* is the basic dynamic in the universe, it is impossible to make ethical judgments between right and wrong. The authors are thus unable to make any moral judgment about Western values and behavior. The distinction between "justice" and "interest" would become meaningless since even opposites become identical. If true, the *ying-yang* dynamic would remove the ability to carry on any meaningful dialogue since people could never be sure that anything they identified by language would remain the same.

Lastly, any basis for trust, even among friends or apparent friends, would be lost. With *ying* and *yang* as essential principles, one has no way of differentiating between the treatment due friend and foe, assuming people could distinguish friend from foe. A basic cosmological monism leads to sociological monism, eliminating the distinction between society and the state, the multiplicity of groups, and ultimately, the individual. If people attained harmony with the heavenly principle, they would have no need for social distinctions. If people's interests were perceived as the same, they would have no need for multiple groups or for a distinction between law and policy.

Zhang and Yao are mistaken in their assessment that China and the West have fundamental philosophical differences. At the most basic level, China and the non-Christian West are fundamentally alike. Their worldviews leave no alternative to an ethics of war based on anything other than interest.

### C. Professor Shi Yinhong

Where General Zhang and Colonel Yao focus on differences between Chinese and Western philosophical thought, Professor Shi identifies what he believes are points of similarity in worldview.<sup>61</sup> At the same time, he notes great diversity in particular ethical norms. He il-

<sup>59</sup> *Id.* ("The West adopts the methods of abstract logical analysis and systematic deduction in its philosophical thinking. In their thinking process, Western philosophers try to define every concept, category and proposition precisely and explicitly. Every hypothesis has to be exactly defined, logically analyzed and convincingly proved.").

<sup>60</sup> *Id.*

<sup>61</sup> Shi, *supra* note 4, at 70-71.

illustrates those differences with examples arising in Chinese-Western relations, particularly since 1949.<sup>62</sup> His article focuses on the task of formulating common ethical principles upon which China and the West may agree for purposes of military intervention, and in so doing he raises critical issues regarding social ordering.

Shi believes that a similarity exists in the Chinese principle of "heavenly principles" and the Western notion of "law of nature."<sup>63</sup> He also finds similarity in the Chinese ideal of "universal empire" and the Western medieval belief in the universal church. The first similarity relates to cosmology, while the second similarity relates to social order.

### 1. Heavenly Kingdom and the Law of Nature

The similarity that Professor Shi finds between the Chinese principle of "heavenly kingdom" and the Western notion of "law of nature" is rooted in a universal human nature.<sup>64</sup> But he gives no indication that human nature is fundamentally distinct from God the Creator or anything else in the created order.

Therefore, on the one hand, most or even all nations or civilizations in the world share certain fundamental ethical beliefs, expressed by such terms as the traditional Chinese "tian-li" (heavenly principles) and the Western "law of nature." On the other hand, civilizations have important differences in various, more concrete ethical norms, moral practices, and ways of normative judgments; they indicate a very rich ethical diversity.<sup>65</sup>

---

<sup>62</sup> *Id.* at 71-72, 80-84.

<sup>63</sup> *Id.* at 70.

<sup>64</sup> *Id.* at 70.

Ethical tradition is probably the most characteristic aspect in the cultural tradition of a nation or a civilization. Similarly, moral norms are probably the most meaningful notions regarding social arrangements and human behavior. Those ethical beliefs not only indicate the ideal, passion, rationality, and even the impulse for interests which exist in human nature (and therefore exist as well in the particular nature of any individual as a member of any nation or civilization), but they also reflect the various kinds of basic objective elements which determine their living environment and conditions for thinking.

*Id.* (citations omitted).

<sup>65</sup> *Id.* at 70 (citations omitted).

Professor Shi's identification of "*tian-li*" (heavenly principle) with the West's "law of nature" minimizes essential differences between the two.

It is necessary to distinguish between the use of the term "law of nature" before and after the European Enlightenment. Prior to, and even during the Enlightenment, "law of nature" was a term used in orthodox Christian legal and political theory in the West to denote the sum total of laws imposed by God the Creator on man and the rest of the created order.<sup>66</sup> Christian theology, and corresponding legal and political philosophy, clearly distinguished between Creator and creature, maintaining a fundamental cosmological dualism in the universe.<sup>67</sup>

Although Enlightenment Deism did not jettison God, it began to treat the law of nature as independent of him. With the ascendancy of naturalistic materialism, "natural law" became further divorced from the God of Enlightenment Deism to the point of dispensing with the personal God as known in Christianity.<sup>68</sup> The "law of nature" as used in the Darwinian sense became very similar to the Chinese "heavenly principle," both presupposing a fundamental cosmological monism. Law is thus simply something that inheres in being, and, lacking the Creator-creature distinction, all being is one. The East and non-Christian West meet in their agreement regarding the fundamental nature of the universe.

## 2. Universal Empire and Medieval Church

Shi addresses, although briefly, the issue of social order. In so doing, he suggests that the Chinese ideal of universal kingdom is ani-

---

<sup>66</sup> See WILLIAM BLACKSTONE, 1 COMMENTARIES \*39-40.

<sup>67</sup> CORNELIUS VAN TIL, PAUL AT ATHENS 5 (1978).

Basic to all the thinking of the Greeks was the assumption that all being is at bottom one, that all change comes by way of some form of emanation from that one being and is therefore ultimate as the One, and that somehow all the ultimate multiplicity that exists as due to ultimate change again ultimately returns to the One. . . .

But Paul knew that on the contrary, all men at bottom know God, the Creator. All men know that they are creatures of God, that they are law breakers. At bottom they know that their own systems, according to which God cannot exist, are rationalizations by means of which they seek to suppress the fact of their responsibility as creatures of God.

*Id.*

<sup>68</sup> UNGER, *supra* note 5, at 92.

mated by the same spirit as the ideal of universal Christendom and even Western liberal internationalism.<sup>69</sup>

The nature of the similarity between the Chinese universal empire and medieval Christendom that Shi describes is vague. Shi recognizes that a distinction should be made between the Christian West (the Christendom of medieval Europe) and the non-Christian West (Western liberal internationalism).<sup>70</sup> In fact, the difference is great. The Christian vision of universal kingdom includes a multiplicity of independent nations. Universality does not mean a single centralized political authority, nor should it be equated with the universal church. The church is only one of several institutions within universal Christendom (along with the family and the state), with each institution under God and law.<sup>71</sup> China and the non-Christian West view universal order as an all-encompassing centralized political entity, ruling, of course, with benevolence.<sup>72</sup> The post-Christian West's visions of unity are universal in scope and political in nature, eliminating jurisdictional distinctions. That is a totally different vision of universality from that held in Christian orthodoxy.

### 3. Justice or Interest

Shi recognizes custom (*li*) as deriving from a basic harmony of nature and man, which men realize by looking inward.<sup>73</sup> That was central to the Confucian vision of society. In contrast, the Chinese Legalist School had a different vision of legal order, one based on power, corresponding to the positivist view of law (Shi calls it "liberal") that

<sup>69</sup> Shi, *supra* note 4, at 71.

In the field of international affairs, we see on the Chinese side the traditional ethics of "Hua-xia zhi jiao" (Chinese universal precepts), "wang-dao" (kingly way), and "li-jiao" (indoctrination of proper manners), which are probably the same in spirit as the ethics of medieval European Christendom, and to a certain degree, the Western liberal internationalism of the nineteenth and twentieth centuries.

*Id.*

<sup>70</sup> *Id.* at 71.

<sup>71</sup> See 2 CALVIN: INSTITUTES OF THE CHRISTIAN RELIGION 1211-22 (John T. McNeill ed., Ford Lewis Battles trans., Westminster Press 1960) (1559) (discussing the church's limited jurisdiction); *Id.* at 1485-90 (discussing God's appointment of civil government); see also ALTMAN K. SWIHART, LUTHER AND THE LUTHERAN CHURCH: 1483-1960, at 153-59 (1960) (discussing the high estate of marriage and family).

<sup>72</sup> See ENCYCLOPEDIA OF POLITICAL THOUGHT 54-55 (Garrett Ward Sheldon ed., 2001).

<sup>73</sup> Shi, *supra* note 4, at 70-73.

arose in the West in the nineteenth and twentieth centuries.<sup>74</sup> Legal positivism began its rise to predominance in the West during the nineteenth century.<sup>75</sup> Austin defined law as the command of the political sovereign.<sup>76</sup> Because there is no international political sovereign, there can logically be no such thing as international law. Relations between states will thus be governed purely by politics. Military force is perhaps the ultimate political instrument. Therefore, post-Christian Western nations developed a legal-political worldview that justified imposing their will on less developed nations with no limitations other than national interest. Shi recognizes the role of power politics in China originating in the Legalist School in the Age of the Warring States. At the same time, Shi emphasizes that China has historically suffered at the hands of Western powers pursuing policies based on interest that conflicted with just war ideology. He states that Chinese behavior beginning with Mao's ascendancy to power can be understood only in light of the effects on China and other nations of the lack of legal restraint on Western intervention in the affairs of developing nations.<sup>77</sup> Despite these historical abuses against China, Shi would like to find some justification for limited intervention in the modern world upon which China and other great powers can agree.

Shi recognizes that positivism applied to international relations is a departure from the Christian Western view of law. Classical international law, reflecting the Christian West's legal tradition, did not recognize the right of armed intervention in foreign states and did recog-

---

<sup>74</sup> *Id.* at 71.

<sup>75</sup> ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* 2 (1998).

<sup>76</sup> AUSTIN, *supra* note 15, at 11, 13.

<sup>77</sup> Shi, *supra* note 4, at 71.

At the same time, however, Chinese history also contains an ethics of power politics which originated from the Legalist School in the age of Warring States. These ethics are similar in basic tenets, ways of thinking, and emotional appeals to the realist ethics described or advocated by Thucydides, Machiavelli, and even Hans Morgenthau and Henry Kissinger. In contemporary China, what most strongly influenced, or even dominated, the international behavior of China in the three decades after 1949 was the international ethics of the Chinese Communists in Chairman Mao's generation. Contemporary China, which originated from modern Chinese nationalism, was indignant from endless humiliations suffered in modern times, despite being a great ancient civilization, and from Marxism.

*Id.* (citations omitted).

nize the equality of all states.<sup>78</sup> The principles of non-intervention and equality of states have been adopted in part by international organizations,<sup>79</sup> but the United Nations Charter scheme compromises these principles because certain powerful countries, most notably the permanent members of the Security Council, have potentially expansive powers of military intervention.

On the other hand, Shi notes that Western powers have often operated solely on the basis of national interest while claiming compliance with international law.<sup>80</sup> Shi discusses the West's failure to abide by its own just war tradition based on natural law.<sup>81</sup> He does not note, however, that the West's failure to abide by just war tradition relates to a basic shift in jurisprudence that took place as England and the United States moved from a Blackstonian view of law to the utilitarian view championed by Bentham and Austin. The Blackstonian view of

<sup>78</sup> BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 1146-48 (3rd ed. 1999).

<sup>79</sup> Shi, *supra* note 4, at 76.

[T]he principle of the equality of states, whether powerful or weak (with its related ban on the great power intervention), seem much more in accord with the modern ethical traditions of the West. These principles can be said to originate from the ancient and powerful notion of natural law, which constitutes one of the core norms of modern international law and ethics. These ethics were molded and spread all over the world by the West and were embodied in the Covenant of the League of Nations and the Charter of the United Nations, which were wholly or largely drafted by Westerners (especially the British and Americans).

*Id.*

<sup>80</sup> *Id.* at 76-77.

<sup>81</sup> *Id.* at 76-77.

However, since the Vienna Congress in the early nineteenth century, the great Western powers have also formally and repeatedly set up great power privileges and have made these privileges legitimate through international law. They rely on their superior power and justify their actions by their particular roles in the international society. In international political practices, the Western powers have frequently bullied, humiliated, and intervened against the weak states and nations in the name of loose and ambiguous "great powers' responsibilities." For example, Theodore Roosevelt's responsibilities of "international police" and also "world leadership" have been asserted by every U.S. President since the end of World War II. However, neither the great powers' formal privileges nor those rights derived from their self-granted responsibilities have any legitimacy in the sense of morality. Further, those actions are not in accord with the most fundamental ethical traditions of the West itself unless one unreasonably regards the "might is right" logic declared by the Athenian generals at Melos as such a tradition.

*Id.*



law, in both its domestic and international applications, was based upon the Christian view of law given by God, the Creator, who is distinct from His creation.<sup>82</sup>

In the nineteenth century, Darwinian evolution declared the death of Christian cosmology and its distinction between the Creator and the creature. At the same time, legal positivism spelled the death of the rule of law based upon neutral principles that had their origin outside human political power.<sup>83</sup> The United Nations is not an outgrowth of the medieval notion of a universal church. It is a vision of very different origin arising out of the death of rule of law and the demise of a God distinct from His creation.

Like Zhang and Yao, Shi notes quite candidly that China has often acted on the basis of interest in the same manner as the West.<sup>84</sup> The main problem with Shi's analysis is that, although he recognizes that China and the West have numerous particular conflicting ethical norms, he indicates that they share fundamental views about the created order, society, and the nature of law. He realizes that China and the West must come to a consensus on particulars, and has even devised a set of ethical criteria to employ in resolving intervention issues. Unless he establishes a satisfactory ground for deriving particular ethical standards, however, his approach will also dissolve into little more than shared political interests.

*D. Professor Roberto Mangabeira Unger*

In *Law in Modern Society*, Professor Roberto M. Unger compares and contrasts several non-Western legal systems, including the tradi-

---

<sup>82</sup> BLACKSTONE, *supra* note 31, \*39, \*41.

Man, considered as a creature, must necessarily be subject to the laws of his creator, for he is an entirely dependent being.

....  
This law of nature, being co-eval [existing at the same time] with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this: and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

*Id.*

<sup>83</sup> Leslie Green, *Legal Positivism*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2003), available at <http://plato.stanford.edu/entries/legal-positivism/>.

<sup>84</sup> Shi, *supra* note 4, at 71, 73-76.

tional Chinese, with the Western legal order.<sup>85</sup> He believes that a necessary relationship exists between ideology, social order, and particular concepts of law.<sup>86</sup> Ideology includes religious belief and issues addressed above as cosmology. Unger's analysis is particularly compelling, in part, because his book is not an apology for the religion, social order, or concept of law that characterizes what he calls Western "liberal society."<sup>87</sup>

A major purpose of Unger's study analyzing the differences between Western and non-Western legal systems is to explain why "legal order" arose only in the West. Professor Unger uses the term "legal order" in a way that is roughly synonymous with "rule of law" and "Western legal tradition." For Unger, a central characteristic of legal order is the distinction between law and politics.

Unger identifies three distinct types of law: customary, bureaucratic, and legal order.<sup>88</sup> He distinguishes bureaucratic legal systems from customary systems in that bureaucratic law is positive (written and not merely based on practice) as well as public (within the province of the state to make).<sup>89</sup> China experienced a struggle between parties who wanted to maintain a system based on customary law and those who wished to establish a bureaucratic system. In China, the law of the customary order is called *li*, and that of the bureaucratic order is called *fa*.<sup>90</sup>

Legal order has in common with bureaucratic law the features of being positive and public. But legal order is characterized by two additional features that distinguish it from the bureaucratic order—autonomy (law is distinct from politics in terms of substance, institutions, methodologies, and professions) and generality (law applies uniformly and neutrally to all).<sup>91</sup>

Unger believes that legal order arose in the West alone for two reasons. First, a cosmology—a religion of transcendence—developed in the West that recognized a distinction between God as the Creator and His creation. Second, the West's social order has been characterized by multiple groups competing for influence and power.<sup>92</sup> The interplay of its particular ideology (which includes its religion) and social order

<sup>85</sup> See UNGER, *supra* note 5, at 86-126.

<sup>86</sup> *Id.* at 66-86.

<sup>87</sup> *Id.* at 166-81.

<sup>88</sup> *Id.* at 48-52.

<sup>89</sup> *Id.* at 50.

<sup>90</sup> See *id.* at 93, 102.

<sup>91</sup> *Id.* at 52-55.

<sup>92</sup> *Id.* at 66.

resulted in legal order. Unger does not make these connections to show that China, or other cultures, are inferior to the West or that these cultures should attempt to develop legal order. Rather, his aim is to convince the reader that change comes not incrementally but by bounds through the synthesis of concurrent changes in ideology and social order.

Unger believes that the ideology of transcendent religion simply serves to justify the social order.<sup>93</sup> That is, with its deceptive claim of neutrality, legal order becomes a powerful tool that dominant groups use to legitimate their position in society. Belief in the rule of law serves to legitimize the exercise of political power.

### 1. Immanence v. Transcendence

Unger asserts that religion of a transcendent God is a necessary condition for the development of legal order.<sup>94</sup> China never developed a religion of transcendence. China had two competing views of God but preferred immanence over transcendence.

With respect to the image of the supreme deity, the most important trend was the increasing characterization of divinity as T'ien (heaven) rather than Shang Ti (lord-on-high). As a result, the notion of deity became more impersonal and naturalistic. The wavering of early Chinese religion between the quest for transcendence and the commitment to immanence was definitively resolved in favor of the latter. . . . [N]either Confucianism or Taoism, nor the later Buddhist theology, allowed a marked separation of God and world. Consequently, none of the many forms of ancient Chinese religion viewed the world as something made by God according to a design that could be at least partially apprehended by the human mind.<sup>95</sup>

Christianity maintains a clear distinction between the Creator and His creation. The Creator reveals certain truths about the world and imposes obligations on man. As a consequence, moral judgments made in conformity with divine law have a claim to neutrality that binds all men. Law is more than the imposition of one group's inter-

---

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 99-100.

ests on others. Law is justice. Law accords with divine reason and is not simply the triumph of human will.

## 2. State and Society

Another necessary condition, in Unger's mind, for the development of legal order is a social order based upon group pluralism.<sup>96</sup> In China, ecclesiastical and familial institutions, and even the individual, were subordinated to, or subsumed in, civil authority.<sup>97</sup> Unger asserts that religions of immanence tend to justify the given social order and provide no vantage point from which to critique it.<sup>98</sup> Change is therefore unlikely unless a competing vision of social order is introduced from outside. The social order of China exists in marked contrast to that of Europe.

In China, religious learning was put at the service of government and most ritual functions were performed by the rulers themselves or, in the case of ancestor worship, by the household heads.

Whatever the reasons for religious naturalism and for the weakness of ecclesiastical bodies in ancient China, the impact on polity and law was enormous. It became impossible to develop the view that nature and society are governed by universal laws of divine making. Another consequence of the Chinese religious evolution was the absence of a doctrine and of a prophetic or priestly tradition that might have operated as an effective check on governmental power. Lastly, the lack of a conception of the relationship between a personal God and the unique souls made in His image denied theological support to beliefs that could have emphasized the independence of individuals from one another or from the groups and societies to which they belonged.

. . . [I]n Europe science and political philosophy alike started off from the idea of universal principles; government had to contend with the conception of God-given natural laws and with powerful churches; and religious belief emphasized

---

<sup>96</sup> *Id.* at 66.

<sup>97</sup> *See id.*

<sup>98</sup> *Id.* at 95.

the capacity of individuals to transcend their social circumstances just as their Creator transcends His creation.<sup>99</sup>

....  
... Legalists [in their struggle with the Confucianists] on the contrary, wanted nothing more than to extend the powers of government. . . . Consequently, traditional bodies like the extended family, the village, or the guild should be stripped of most of their powers, their tendency to develop centers of authority checked, and all men equalized by the fear of the ruler and his agents. The imposed order of the state would replace an imaginary natural order of society.<sup>100</sup>

The Christian West developed distinct institutions of family, church, and state.<sup>101</sup> It eventually developed a social order in which none of those institutions was preeminent except within its allocated sphere or jurisdiction. In early Germanic Christian culture, the family had certain preeminence over the civil and ecclesiastical order.<sup>102</sup> The church was eventually able to assert its independence from the family and the civil order. Unfortunately, the church attempted to bring the family and state into a subordinate or dependent relationship with the church. In large measure, control over the family was effected through the doctrine of marriage as a sacrament.<sup>103</sup> Through Gregory VII's *Dictatus Papae*, the eleventh century church claimed the power to depose civil rulers.<sup>104</sup> An eventual compromise between church and state ensured the independence of the church. In the post-Christian era, just as in the pre-Christian era and in Chinese society, it is the state that asserts its supremacy over, or even subsumes, all other social groups.

### 3. Justice and Interest

The Confucianists and Legalists fought for dominance in China.<sup>105</sup> Though they offered competing visions of law and society, in some

<sup>99</sup> *Id.* at 100-01.

<sup>100</sup> *Id.* at 107-08.

<sup>101</sup> See BERMAN, *supra* note 10, at 1.

<sup>102</sup> ZIMMERMAN, *supra* note 7, at 422-45, 462-476; BERMAN, *supra* note 10, at 52, 61, 82.

<sup>103</sup> ZIMMERMAN, *supra* note 7, at 476-95; JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 16-41 (Don S. Browning & Ian S. Evison eds., 1997).

<sup>104</sup> BERMAN, *supra* note 10, at 95-99.

<sup>105</sup> UNGER, *supra* note 5, at 106.

sense they faced the same predicament—that of being unable to legitimize their respective visions. Lacking a religion of transcendence, Legalists were never able to justify their bureaucratic laws as something other than the will of the strongest.<sup>106</sup> The Confucianist view of society was based on generally accepted custom. As the Chinese people increasingly came into contact with other cultures they realized that social customs are established in large measure by convention and not the natural order of things. With this growing realization and increasing disintegration of consensus they were quite vulnerable because they had no religion of transcendence to provide a means of ideological legitimization of existing custom.<sup>107</sup>

Unger argues that “Western liberal society’s” distinguishing trait is its coincidence of transcendental religion and group pluralism giving rise to legal order.<sup>108</sup> Unfortunately, he believes that the religion of

<sup>106</sup> *Id.* at 102-03.

Above all, governments struggled to bring an ever broader range of social activities under their control and guidance; to politicize what had previously been accepted as part of the self-regulating order of society.

[T]he *fa* [bureaucratic-type laws] were positive; they were made rules. The tendency to write them down and publicize them calls attention to the more basic premise that the laws arise from the human will rather than from a pattern underlying the reciprocities of social life. The need for positive law was a byproduct of the process described earlier as the disintegration of community. In a setting of rapid dissolution of the established rank system and of the shared values and insights with which that system was bound up, it became increasingly more difficult to rely on custom.

*Id.*  
<sup>107</sup> *Id.* at 108.

Thus, the Confucianists accepted and reinterpreted the *li* [customary standards of conduct] of the feudal age as the way to resolve the conflicts among and within individuals that had become rife during the transformation period. They argued that the *fa*, as coercively imposed positive rules, affected the symptoms rather than the causes of social ills. Because they disregarded the true basis of social harmony, such rules could lead only to greater dissension.

*Id.* Berman notes that it was Christianity as developed in the West that “broke the fiction of the immutability of the [Germanic] folklaw.” He further notes:

Gradually, between the sixth and the eleventh centuries, Germanic law, with its overwhelming biases of sex, class, race, and age, was affected by the Christian doctrine of the fundamental equality of all persons before God: woman and man, slave and free, poor and rich, child and adult. These beliefs had an ameliorating effect on the position of women and slaves and on the protection of the poor and helpless.

BERMAN, *supra* note 10, at 65.

<sup>108</sup> UNGER, *supra* note 5, at 66.

transcendence is a myth used to legitimize a social order based on domination by the most powerful. The solution to social problems, he deduces, does not lie in perfection of the given system of laws, much less in preaching of the gospel with its consequent regeneration of individuals and establishment of Christian institutions.

For Unger, the God of Augustinian Christianity does not exist, or at least has not spoken; thus, a value-neutral legal order is not possible. All "law" is merely the imposition of interest; in fact, law cannot exist. All is politics; therefore, man must quit playing law and play better politics. The difficulty for Unger is that, in order for political decisions to have legitimacy, the decisions must be equally in everyone's best interest. In short, the world must operate on a principle of global unanimity.

### PART III – JUST WAR DOCTRINE<sup>109</sup>

#### *A. Introduction*

The distinction and relationship between law and policy is seldom more consequential than in making decisions to go to war. Just war doctrine identifies two basic types of judgment that must be made before going to war.<sup>110</sup> The first type is legal in nature, and the second type is prudential.<sup>111</sup> To use the terminology of Zhang and Yao, there is a "justice" component and an "interest" component. Classical international law treatises adopted the elements of Christian just war doctrine and maintained the distinction between the legal and the prudential elements.

Even when customary international law became severed from its overtly biblical and theological moorings, it nevertheless maintained the concept of just cause that is the central element of just war doctrine. Because classical, customary international law remained firmly established in the pre-Enlightenment "natural law" school of jurisprudence, lawyers never viewed the law as simply a matter of human convention. Properly understood, customary international law reflects the immutable law of nature, which is the law of God.<sup>112</sup> For that rea-

<sup>109</sup> Jeffrey C. Tuomala, *Just Cause: The Thread That Runs So True*, 13 DICK. J. INT'L L. 1 (1994). Part III of the present article is taken in large measure from that article. However, that article focuses equally on customary international law, the U.N. Charter scheme, and the U.S. Constitution.

<sup>110</sup> WILLIAM V. O'BRIEN, *THE CONDUCT OF JUST AND LIMITED WAR* 27 (1981).

<sup>111</sup> *Id.*

<sup>112</sup> VATTEL, *supra* note 17, at lviii.

son, the Western notion of customary international law must be distinguished from the Chinese notion of customary law (*li*). Similarly, the relationship that policy bears to law in the Christian West distinguishes policy judgments from Chinese bureaucratic law (*fa*).

The fact that a nation has just cause, however, does not mean that it should wage war. The decision to wage war entails both a legal judgment that just cause exists, and a prudential or policy judgment that war is in the national interest. A prudential judgment is founded largely on utility. Not only must the state have a legal right, it must be advisable and expedient to exercise that right. It would be contrary to just war doctrine and, therefore, immoral to wage a war contrary to national interest even if just cause exists. Emerich de Vattel, the premier eighteenth century international law jurist, described the distinction between law and policy:

The reasons which may [cause] [states] to [wage war] are of two classes. Those of the one class shew [*sic*] that [a state] has a right to make war,—that [a state] has just grounds for undertaking it: —these are called *justificatory reasons* [legal judgments]. The others, founded on fitness and utility, determine whether it be expedient for the sovereign to undertake a war, —these are called *motives* [prudential judgments].<sup>113</sup>

Classic just war doctrine developed over the course of a thousand years, beginning with Augustine and culminating with the Spanish theologian and lawyer, Franciscus De Victoria.<sup>114</sup> Augustine addressed all of the basic issues and set the framework for discussion that continues to this day. Theologians, knights, canon lawyers, and civil lawyers worked within that framework developing details and making applications.<sup>115</sup> Occasionally, they made significant departures from it, most notably in the practice of holy war. The elements of just war are just cause, right authority, right intention, proportionality of ends, last resort, reasonable hope of success, and the aim of peace.<sup>116</sup>

<sup>113</sup> *Id.* at 301 (emphasis in original).

<sup>114</sup> Tuomala, *supra* note 109, at 48.

<sup>115</sup> See generally FREDERICK H. RUSSELL, *THE JUST WAR IN THE MIDDLE AGES* (1975) (outlining the development of early just war theory); JAMES TURNER JOHNSON, *IDEOLOGY, REASON, AND THE LIMITATION OF WAR: RELIGIOUS AND SECULAR CONCEPTS 1200-1740*, at 26-80 (1975) (explaining late medieval just war theory).

<sup>116</sup> James Turner Johnson, *Just War Thinking and its Contemporary Application: The Moral Significance of the Weinberger Doctrine*, in *THE RECOURSE TO*



Some scholars have asserted that former Secretary of Defense Caspar Weinberger's criteria<sup>117</sup> for the employment of U.S. combat forces overseas are basically those of just war doctrine.<sup>118</sup> They claim that the Weinberger criteria correspond directly to the just war criteria as follows:

<u>Just War</u>	<u>Weinberger Doctrine</u>
1. Just cause	1. Vital to national interests
2. Right authority	2. Support of American people and their elected representatives
3. Proportionality of ends	3. Continual assessment of objectives and forces committed
4. Reasonable hope of success	4. Clear intention of winning
5. Last resort	5. Last resort
6. Right intention	6. Clearly defined political and military objectives
7. End of peace	7. (Implied in 1 and 5) <sup>119</sup>

While elements of just war doctrine and the Weinberger Doctrine appear to be similar, there is a fundamental dissimilarity between the two doctrines that looms far larger than any similarities. The Weinberger Doctrine is a compendium of only prudential or policy considerations.

From the U.S. Department of Defense's perspective, the Weinberger criteria provide some very important prudential guidelines for the use of force, and, in that sense, they are limiting factors.<sup>120</sup> However, if the Weinberger Doctrine was meant to be a comprehensive list of criteria for the national decision to use force, it is severely wanting. The central role that the Weinberger Doctrine has played in U.S. foreign policy certainly bolsters General Zhang's and Colonel Yao's as-

---

WAR: AN APPRAISAL OF THE WEINBERGER DOCTRINE 81, 87 (Alan Ned Sabrosky & Robert L. Sloane eds., 1988) [hereinafter *Just War Thinking*].

<sup>117</sup> Caspar W. Weinberger, Secretary of Defense, Remarks to the National Press Club: The Uses of Military Power (November 28, 1984), in CASPAR W. WEINBERGER, *FIGHTING FOR PEACE: SEVEN CRITICAL YEARS IN THE PENTAGON* 433, 441-43 (1990). The six criteria listed in his remarks have become known as the Weinberger Doctrine.

<sup>118</sup> *Just War Thinking*, *supra* note 116, at 86.

<sup>119</sup> *Id.* at 100-01.

<sup>120</sup> Weinberger, *supra* note 117, at 441-43.

sertion that decisions to use force in the West are based on "interest" rather than "justice."

### *B. Elements of Just War*

#### 1. Just Cause

*The Classic Formulation of Just Cause.* Augustine is considered the foremost expositor of just war doctrine, although he did not describe it systematically at any one place in his writings. He wrote that wars to avenge injuries are just.<sup>121</sup> Later writers described with more specificity what it means to avenge injuries. Gratian's *A Concordance of Discordant Canons* (1140),<sup>122</sup> the first and perhaps greatest systematic compilation and treatment of canon law, held that nations may use force to defend themselves, to exact compensation, and to punish.<sup>123</sup>

These same bases were accepted by the civil lawyers of Medieval Europe.<sup>124</sup> In fact, civil authority's very reason for being is to serve as God's agent of justice, punishing criminals and exacting compensation for injuries.<sup>125</sup> Sanctions are based on the existence of fault, and war is seen as an extraordinary form of lawsuit to vindicate justice.<sup>126</sup> The underlying wrongs and remedies available are closely analogous to those in a domestic legal system. This threefold purpose for the use of force is perfectly reflected in the international law treatises of Vattel and Grotius.

<sup>121</sup> AUGUSTINE, *supra* note 38, at 515. See also RUSSELL, *supra* note 115, at 18.

<sup>122</sup> BERMAN, *supra* note 10, at 143-47.

<sup>123</sup> See RUSSELL, *supra* note 115, at 60-68. Thomas Aquinas quotes Augustine as authority for defining just cause: "A just war is usually described as one that avenges wrongs, when a nation or state has to be punished, for refusing to make amends for the wrongs inflicted by its subjects, or to restore what it has seized unjustly." THOMAS AQUINAS, II THE SUMMA THEOLOGICA 578 (Fathers of the English Dominican Province trans., Encyclopædia Britannica, Inc. ed., 1952).

<sup>124</sup> See RUSSELL, *supra* note 115, at 137-38. In medieval times, civil authority's very existence was to serve as God's agent of justice punishing criminals and exacting compensation for injuries. Thus, canon lawyers, theologians, and civil lawyers all shared the same perspective, namely that their authority was derived from God and the Bible. See, e.g., *Romans* 13:4 (NIV) ("For he [the civil ruler] is God's servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God's servant, an agent of wrath to bring punishment on the wrongdoer.").

<sup>125</sup> *Romans* 13:1-4.

<sup>126</sup> MATTOX, *supra* note 51, at 46.

In assessing just causes for going to war, the classic legal scholars determined that the legal cause of every just war is an injury done to one nation by another. Because injuries include any unlawful attacks or other violations of rights identified by international law, the kinds of injury giving rise to just cause are extremely numerous.<sup>127</sup> As a result, three just and lawful objectives exist for which nations wage war: (1) obtaining compensation or reparations for losses; (2) punishing offenders by reprisal for wrongs done; and (3) defending against unlawful attacks.<sup>128</sup> Nations attain the first two objectives by resorting to offensive war and the third by waging defensive war. Following a finding of just cause, nations may lawfully wage offensive war as a sanction to exact compensation for injuries and to punish for wrongs.<sup>129</sup> On the other hand, nations may wage just defensive war without such findings in the event of an unlawful attack.<sup>130</sup> Because there is no superior tribunal before which nations may bring charges or complaints, they must necessarily be the judges of their own cases.<sup>131</sup>

*Holy War Distortion of Just Cause.* During the medieval period, some nations attempted to expand the bases of just cause to include waging holy war. They justified holy war on the sole basis that others did not share the same religious beliefs. Religious differences, even in the absence of other wrongs, were treated as just cause for war.<sup>132</sup> The goals of conquest and conversion thus became lawful. This theory was used in part to justify the Carolingian conquest of Europe and the medieval Crusades in the Middle East.<sup>133</sup> However, Pope Innocent IV and the canon lawyer, Hostiensis, denied the right to make war on Muslims or other pagans merely because they were unbelievers.<sup>134</sup>

Holy war doctrine in Christian theology seems to have been laid to rest by Franciscus De Victoria in the sixteenth century. His treatise, *De Indis et de Jure Belli Relectiones*, the first modern treatise on international law, rejected the justification of religious differences for

<sup>127</sup> Vattel, *supra* note 17, at 302.

<sup>128</sup> *Id.* Hugo Grotius listed the same three objectives of just wars: "Justifiable causes include defense, the obtaining of that which belongs to us or is our due, and the inflicting of punishment." HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 171 (Francis W. Kelsey trans., 1925) (1646).

<sup>129</sup> MATTOX, *supra* note 51, at 45-47.

<sup>130</sup> Vattel, *supra* note 17, at 302.

<sup>131</sup> *Id.* at 301.

<sup>132</sup> RUSSELL, *supra* note 115, at 195.

<sup>133</sup> *Id.*

<sup>134</sup> *See id.* at 195-212.

war against the American Indians.<sup>135</sup> In fact, Victoria argued for the Indians' right to fight against Christian nations in self-defense.<sup>136</sup>

*The Secular Holy War Distortion.* Holy war notions are not unique to religious thought. Cicero approved of wars waged to impose the ideals of Rome.<sup>137</sup> In the last two centuries, the "secular" counterpart to holy war has been war based on ideology. A common theme in most of these wars is that conquest is for the good of those who suffer under an inferior religious, social, or political order.

The assumption that law and force can make people good, or free, or responsible, or whatever else they are lacking, is false. The same rationale that would justify the use of force for establishing democracy would justify using force for establishing the whole panoply of human rights. If world peace and, therefore, national interest depend on universal adherence to democracy and practice of human rights, there are no just-cause limits left on the decision to make war.<sup>138</sup> The purpose of war limited to just cause is to return the wronged party to the *status quo ante bellum* and not to use war as an occasion to establish some new social order. Therefore, under traditional international law, the right of humanitarian intervention is extremely limited. It allows for the rescue of one's own citizens, or perhaps others, from a foreign state without its permission.

<sup>135</sup> See generally FRANCISCUS DE VICTORIA, DE INDIS ET DE JURE BELLI REFLECTIONES 163-78 (Ernest Nys, ed., John Pawley Bate trans., Carnegie Institute of Washington 1917).

<sup>136</sup> *Id.* at 129-49, 171.

<sup>137</sup> BERNARD T. ADENEY, JUST WAR, POLITICAL REALISM, AND FAITH 24-27 (1988).

<sup>138</sup> President George H.W. Bush's Ambassador to the Organization for American States defended Operation Just Cause (1989 invasion of Panama), designed to topple Manuel Noriega, with a display of that kind of optimism and fervor for warfare usually associated with religious ideology:

There are times in the life of men and of nations when history seems to take charge of events and to sweep all obstacles from its chosen path. At such moments, history appears to incarnate some great and irresistible principle, such as the nation-state in the 17th century, nationalism in the 19th century, and decolonization in the middle part of this century.

Today, we are once again living in historic times, a time when a great principle is spreading across the world like wild fire. That principle is the essence of the democratic form of government. It is an idea which has, in this decade, and especially in the historic year-1989-acquired the force of historical necessity.

Luigi R. Einaudi, U.S. Permanent Representative to the O.A.S.H.R., 2d Sess. at 2, Doc. No. 127 (1990).

President George W. Bush increasingly appealed to a version of secular holy war over the course of the war in Iraq.<sup>139</sup> The justification offered for the initial invasion and occupation of Iraq—to stop the threat of a collusive alliance between al-Qaeda and Saddam Hussein launching a nuclear attack on the United States—was stated in just war terms. Once it became clear that the existence of nuclear weapons and an Al-Qaeda-Saddam alliance could probably not be established, the justification changed. President Bush began to proclaim that the war is about exporting democracy and liberty, the promise being that Baghdad would become something of a Middle Eastern “City Built Upon a Hill,” inspiring surrounding Islamist nations to become free and democratic.<sup>140</sup>

The unjust-regime basis of justification for invading Iraq should be unhesitatingly rejected. The belief that the hearts and minds of Middle Eastern peoples will be won through force of arms and implementation of a variety of state sanctioned socio-economic programs and the tragedy it portends has a recent historical analogue—Vietnam.<sup>141</sup> In essence, President Bush’s justification is the promotion of a messianic

<sup>139</sup> See Joe Klein, *The Courage Primary*, TIME, June 25, 2007, at 39, 39; Kenneth T. Walsh, *History’s Verdict*, U.S. NEW & WORLD REP., Jan. 29, 2007, at 28, 29-30 (noting that Bush has characterized the opposition as “evildoers” and spoke of an “ideological conflict” in the 2006 State of the Union address).

<sup>140</sup> See George W. Bush, President, U.S., Second Inaugural Address (Jan. 20, 2005), available at <http://www.whitehouse.gov/news/releases/2005/01/20050120-1.html> (stating that the U.S. encourages democratic reform in other countries and “America will walk at your side”).

<sup>141</sup> Two U.S. Senators who are veterans of the Vietnam War have different recollections of the reasons for U.S. involvement in that war. Senator James Webb, former Secretary of Navy during the Reagan administration, believes that the war in Iraq, not the war in Vietnam, is the first war the U.S. has fought to advance an ideology. Senator Webb stated concerning the war in Iraq, “The foreign policy of this administration [that of President George W. Bush] has been taken over by people who would do something we’ve never done in our history, and that is to attempt to export our ideology at the point of a gun.” Chris Jenkins, *Reagan Navy Secretary Enters Race to Challenge Sen. Allen*, WASH. POST, Mar. 8, 2005, at B04. Senator John Kerry, former Presidential candidate, believes the Vietnam War was also fought to promote an ideology. Senator Kerry has said,

I believe very deeply that it was a noble effort [American involvement in the Vietnam War] to begin with. I signed up. I volunteered. I wanted to go over there and I wanted to win. It was a noble effort to try to make a country democratic; to try to carry our principles and values to another part of the world.

Interview by Tim Russert with John Kerry, Senator, U.S., on *Meet the Press: Interview with Senator John Kerry* (NBC television broadcast May 6, 2001), available at <http://hnn.us/articles/3552.html>.

vision in which America has universal jurisdiction to bring down kingdoms and raise up others. In his second inaugural address, President Bush stated,

Advancing these ideals [human rights and self-government] is the mission that created our nation. It is the honorable achievement of our fathers. Now it is the urgent requirement of our nation's security, and the calling of our time.

So it is the policy of the United States to seek and support the growth of democratic movements and institutions in every nation and culture, with the ultimate goal of ending tyranny in the world.

...

Today, America speaks anew to the peoples of the world:

All who live in tyranny and hopelessness can know: the United States will not ignore your oppression, or excuse your oppressors. When you stand for your liberty, we will stand with you.

...

When the Declaration of Independence was first read in public and the Liberty Bell was sounded in celebration, a witness said, "It rang as if it meant something." In our time it means something still. America, in this young century, proclaims liberty throughout all the world, and to all the inhabitants thereof. Renewed in our strength—tested but not weary—we are ready for the greatest achievements in the history of freedom.<sup>142</sup>

The last paragraph of the second inaugural address contains an allusion to the inscription that appears on the Liberty Bell, "Proclaim liberty throughout all the land unto all the inhabitants thereof."<sup>143</sup> It is a quote from *Leviticus* which refers to the Year of Jubilee, a time when captives were to be set free.<sup>144</sup> President Bush is mistaken: Christ, not

---

<sup>142</sup> Bush, *supra* note 140.

<sup>143</sup> USHistory.org, The Liberty Bell, <http://www.ushistory.org/libertybell/index.html> (last visited Sept. 30, 2007).

<sup>144</sup> *Leviticus* 25:10 (NIV) ("Consecrate the fiftieth year and proclaim liberty throughout the land to all its inhabitants. It shall be a jubilee for you; each one of you is to return to his family property and each to his own clan."). Jesus commenced his public ministry by reading the prophecy from *Isaiah* 61:1-2 regarding the Year of Jubilee. He then claimed that he had that day fulfilled that scripture.

Caesar, sets people free. The triune God acts through His people, the church, giving them jurisdiction to tear down and raise up kingdoms, not through force of arms but through the proclamation of the Gospel.<sup>145</sup> When placed on trial before Pontius Pilate, Jesus made it very clear that the kingdom He established would not be established by military force.<sup>146</sup> The root problem of conflict in the Middle East, as it is in every other place in the world, is not political bondage but spiritual bondage.<sup>147</sup> Because it is not a conflict fought against flesh and blood, it can be won only by spiritual means entrusted to the church.<sup>148</sup> The state is neither commissioned nor equipped to deal with that kind of enemy. The state's jurisdiction and power are limited.

---

The spirit of the Lord is on me, because he has anointed me to preach good news to the poor.

He has sent me to proclaim freedom for the prisoners and recovery for the blind,

To release the oppressed, to proclaim the year of the Lord's favor.

*Luke 4:18-19 (NIV).*

<sup>145</sup> *Luke 1:51-53 (NIV).* Mary prophesied regarding Jesus while he still in the womb:

He has performed mighty deeds with his arm;

he has scattered those who are proud in their inmost thoughts.

He has brought down rulers from their thrones

but has lifted up the humble.

He has filled the hungry with good things

but has sent the rich away empty.

*Id.*

<sup>146</sup> *John 18:36 (NIV)* ("Jesus said, 'My kingdom is not of this world. If it were, my servants would fight to prevent my arrest by the Jews. But now my kingdom is from another place.'").

<sup>147</sup> *John 8:31-36 (NIV).*

To the Jews who believed him, Jesus said, "If you hold to my teaching, you are really my disciples. Then you will know the truth and the truth will set you free."

They answered him, "We are Abraham's descendants and have never been slaves of anyone. How can you say that we will be set free?"

Jesus replied, "I tell you the truth, everyone who sins is a slave to sin. Now a slave has no permanent place in the family, but a son belongs to it forever. So if the son sets you free, you will be free indeed."

*Id.*

<sup>148</sup> *Ephesians 6:12 (NIV)* ("For our struggle is not against flesh and blood, but against the rulers, against the authorities, against the powers of this dark world and against the spiritual forces of evil in the heavenly realms.").

## 2. Right Authority

Most classic scholars based international law on the sovereignty of nation-states.<sup>149</sup> That basis has been seriously questioned beginning in the past century. Vattel took a strong stand that international law included preexisting and immutable laws of nature.<sup>150</sup> Although he did not argue that the law of nature required multiple nation-states, he certainly implied it in the title of his treatise: *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*.<sup>151</sup> Thus, under a legal framework as revealed in Scripture, it is arguable that the delegation to the United Nations of the right to use force is not only unworkable and imprudent, it is unlawful as a violation of *jus cogen*.<sup>152</sup>

The United Nations Charter (U.N. Charter) scheme assumes that nations are free to delegate the authority to wage offensive war to an international organization.<sup>153</sup> It is arguable that the attempted delegation of authority to the United Nations is itself a violation of classic just war doctrine.

Since at least 1945, with the creation of the United Nations, there has been a radical departure from customary international law. The provisions of the U.N. Charter governing the use of force differ from customary law in two ways. First, the U.N. Charter attempts to monopolize the offensive use of force, thereby denying states that right.<sup>154</sup> Second, the U.N. Charter permits United Nations-sanctioned force on grounds that are far more expansive than states are permitted under customary law.<sup>155</sup> The U.N. Charter does not limit the United Nations to defending states and enforcing judgments for legal wrongs. Rather,

<sup>149</sup> David Held, *The Changing Structure of International Law: Sovereignty Transformed?* in THE GLOBAL TRANSFORMATIONS READER 162 (2003) available at <http://www.polity.co.uk/global/pdf/GTReader2eHeld.pdf>.

<sup>150</sup> VATTEL, *supra* note 17, at lviii.

<sup>151</sup> *Id.*

<sup>152</sup> The term *jus cogen* is found in Article 53 of the Vienna Convention on Treaties. It means "peremptory norm" or fundamental norm. Some interpret it to be a natural law principle because it may not be altered by treaty or custom. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

<sup>153</sup> U.N. Charter art. 39 & 43.

<sup>154</sup> *Id.*, art. 2, para. 4 (prohibiting threats, and therefore, declarations of war); *id.*, art. 51 (recognizing individual nations' right to resort to use of force only in self defense against armed attack).

<sup>155</sup> *Id.*, art. 39 & 42 (establishing Security Council privilege to use force); *id.*, art. 55 (declaring that observance of human rights is a necessary condition for peace).



it allows the United Nations to secure peace by imposing a particular vision of social, political, economic, and ideological order that it perceives to be in the global interest. These two facts place the U.N. Charter outside the pale of both customary international law and the just war doctrine.

Although Professor Shi acknowledges that the U.N. Charter scheme gives special privileges to the great powers (*i.e.*, members of the Security Council) and justifies armed intervention, he approves of it but wants to protect against abuses.<sup>156</sup> Apparently, he thinks there is common ground between East and West because he analogizes the mission of the United Nations to the ancient Chinese principle of heavenly kingdom and the Western vision of universal Christendom. But the U.N. Charter scheme is not of the same lineage as Augustine's vision of the universal church. At best it is mimicry.

Medieval writers did not specifically address the question of whether a nation may delegate its sovereign right to exact justice by engaging in offensive war to an international organization. However, the issue is not totally novel. The medieval writers had a host of biblical and historical materials to draw upon if they were to directly address the matter. For example, Augustine's *The City of God* is replete with appeals to Scripture and history. In that work, Augustine gave a theological explanation for man's sin and resulting wars. He dealt specifically with the biblical account of the Tower of Babel, in which God created a multiplicity of nations and spread them over the earth as a limitation on man's attempt to create a single political order to replace the Kingdom of God.<sup>157</sup> Augustine depicted Christ's earthly kingdom as comprised of a multitude of peoples, families, and languages. The church under the headship of Jesus Christ and His law provided the overarching basis for unity amongst a plurality of nations and families.<sup>158</sup> As seen through Augustine's examples, biblical Christianity holds that a multiplicity of nations with limited jurisdiction is a necessary limitation on political, social, and economic evil.

<sup>156</sup> Shi, *supra* note 4, at 82-88.

<sup>157</sup> AUGUSTINE, *supra* note 38, at 425. See also *Genesis* 10; *Genesis* 11:1-9; *Deuteronomy* 32:8 (NIV) ("When the Most High gave the nations their inheritance, when he divided all mankind, he set up boundaries for the peoples according to the number of the sons of Israel."); *Acts* 17:26-27a (NIV) ("From one man he made every nation of men, that they should inhabit the whole earth; and he determined the times set for them and the exact places they should live. God did this so men would seek him.").

<sup>158</sup> AUGUSTINE, *supra* note 38, at 491.

Augustine also contrasted the Kingdom of God, which has universal jurisdiction, with several other ancient empires, which made illegitimate claims to universal jurisdiction. The Christian worldview holds that a multiplicity of nations with limited jurisdiction was instituted by God as a limitation on political, social, and economic evil.<sup>159</sup> Augustine's view is a direct contradiction to the new-world-order assumptions embodied in the vision of the United Nations.<sup>160</sup> The underlying premise of one-world government schemes is that a multiplicity of nations is the cause of evil rather than a limitation upon it.

The medieval writers further debated whether, among Christian rulers, the Holy Roman Emperor alone had the authority to wage offensive war. Eventually, a consensus arose that lesser officials did have that right, but it remained difficult to determine at what level the right resided in the civil hierarchy.<sup>161</sup> In any event, the Emperor was unable to monopolize force then, just as the Security Council is unable to monopolize force today.

### 3. Proportionality of Ends

It is difficult to determine whether the requirement that the ends of a war be proportionate to the means is a legal requirement or a prudential one. Both options are probable. In either case, the requirement serves as a limiting factor on the use of force. If a decision is made to use force, it must be proportionate to the wrong done. Under the view that force is used to vindicate justice, punishment should be based on just desert<sup>162</sup> and compensation for injury suffered. Proportionality is a

---

<sup>159</sup> Acts 17:6.

<sup>160</sup> Augustine based his view on the biblical passages from the prophet Daniel. *Daniel* 2:44 (NIV) ("In the time of those kings, the God of heaven will set up a kingdom that will never be destroyed, nor will it be left to another people. It will crush all those kingdoms and bring them to an end, but it will itself endure forever.") From chapters 7-11 of *Daniel*, it becomes clear that the four kingdoms mentioned in the second chapter of *Daniel* were Babylon, Medo-Persia, Greece, and ancient Rome.

<sup>161</sup> See RUSSELL, *supra* note 115, at 138-55.

<sup>162</sup> The theory of just desert combines the ideas that criminal punishments must be something that the criminal deserved and that the punishment is more fair if it is of a determinate rather than indeterminate duration. "[T]he goals of incapacitation and retribution came to dominate, and in some quarters completely supersede, the goals of rehabilitation and deterrence in the minds of politicians and social theorists." Hugo Adam Bedau, *Punishment*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2005) available at <http://plato.stanford.edu/entries/punishment/>.

necessary corollary of the just cause element and is probably implied. These same principles are applicable to sanctions in a civil court proceeding.

Proportionality is used, in another sense, as a prudential consideration that focuses on the impact of war on a state's own citizens. It asks whether the costs of exacting justice exceed the benefits to be gained by waging war.<sup>163</sup> The cost in life and resources of prosecuting a war may be so great, or an injury so small, that it is better to forego the wrong. Pursuing a matter by force is often unjust, not to the wrongdoer, but to the nation's own citizens.

#### 4. Reasonable Hope of Success

The element of reasonable hope of success is clearly prudential in nature.<sup>164</sup> In fact, it seems to be a restatement of proportionality in the prudential sense as outlined above.

#### 5. Last Resort

Last resort is primarily prudential and relates closely to proportionality and reasonable hope of success. War is always costly and full of uncertainty. Therefore, nations are morally bound to pursue all peaceful means of settlement. This also ensures fairness to the other party. There is one legal component of this element which is a requirement of both international and U.S. domestic law: a declaration of war.<sup>165</sup> Because declarations of war identify the just causes and are issued by lawful authority, they relate to elements one and two, above, as well.

<sup>163</sup> AUGUSTINE, *supra* note 38, at 169. According to O'Brien:

To begin with, the ends held out as the just cause must be sufficiently good and important to warrant the extreme means of war, the arbitrament of arms. Beyond that, a projection of the outcome of the war is required in which the probable good expected to result from success is weighed against the probable evil that the war will cause.

O'BRIEN, *supra* note 110, at 27. There seems to have been little development or even recognition of this issue through most of the medieval period. However, the Bible counsels kings to make sound judgments concerning war. See, e.g., *Luke* 14:31; *Proverbs* 24:6.

<sup>164</sup> O'BRIEN, *supra* note 110, at 27-28; AQUINAS, *supra* note 123, at 316-18.

<sup>165</sup> AQUINAS, *supra* note 123, at 316-18. Citing *Deuteronomy* 20:10, Aquinas argued that declarations of war are a fundamental requirement of God's law binding all nations. *Id.* In the medieval period the context of discussion of declarations of war focused more on the issue of who had authority to initiate war. See RUSSELL, *supra* note 115, at 63, 64, 89.

## 6. Right Intention

Even if all the above criteria were met, Augustine believed that one wages war unjustly if he does so out of hatred or other improper motives.<sup>166</sup> It is also important to check the nation's motives; wrong motives often lead to a breach of the external requirements.

## 7. End of Peace

The end of peace is another prudential concern. Peace is the supreme purpose for which war is waged.<sup>167</sup> By doing justice, the magistrate sets conditions for peaceful relationships. It is one of the measures of success and also an important component of intention; therefore, it might be included under either of those elements. Peace is not a mere cessation of fighting. Theologically speaking, peace is reconciliation between enemies.<sup>168</sup> While satisfaction of justice does not necessarily bring about reconciliation, it is a necessary objective condition for reconciliation.<sup>169</sup>

### C. The Weinberger Doctrine

The main difference between just war doctrine and the Weinberger Doctrine is that the latter is a list of prudential criteria only. In fact, the whole Weinberger list can probably be subsumed under the element of "national interest." All of the other elements are particular considerations that guide decision-makers in promoting the national interest.

Weinberger's approach is very much like that of the nineteenth century German military theorist, Carl von Clausewitz, whose writings on war have enjoyed a modern resurgence of popularity within the

<sup>166</sup> See AUGUSTINE, *supra* note 38, at 175-76; AQUINAS, *supra* note 123, at 578. Aquinas wrote that there are three elements of just war: (1) lawful authority; (2) just cause; and (3) right intention. The element of right intention entails several of the elements listed in this article. Aquinas, quoting from Augustine, states, "[t]rue religion does not look upon as sinful those wars that are waged not for motives of aggrandizement, or cruelty, but with the object of securing peace, of punishing evil-doers, and of uplifting the good." *Id.* Properly waged, a just war is in the best interest of the offender as well. *Id.*

<sup>167</sup> AUGUSTINE, *supra* note 38, at 517.

<sup>168</sup> See *id.* at 519.

<sup>169</sup> Jeffrey C. Tuomala, *Christ's Atonement as the Model for Civil Justice*, 38 AM. J. JURIS. 223 (1993).

Department of Defense.<sup>170</sup> Clausewitz asserted: "We see, therefore, that war is not merely an act of policy but a true political instrument, a continuation of political intercourse carried on with other means. What remains peculiar to war is simply the peculiar nature of its means."<sup>171</sup>

Under modern theory, war is simply a prudential or political instrument whose distinguishing trait is violence.<sup>172</sup> Such a theory purports that war is used first and foremost to serve the national interest, regardless of how that political interest is defined.<sup>173</sup>

That view compliments the "national interest" approach to decision making. Under that view, one only need ask whether it is in the national interest that democracy will be promoted, terrorists deterred, human rights protected, prices on oil lowered, or political stability established. If the answer is affirmative, and the objectives cannot be achieved by peaceful political intercourse, the use of force is "legitimized." This view does not ask whether a legal wrong has been committed. The only limitation on an action is whether the political costs outweigh the expected benefits. At this juncture, Zhang's and Yao's criticism of the West as based on interest is well-founded. The application of this view, Shi writes, caused the humiliation of China and resulting distrust of the West.<sup>174</sup> It would hardly be surprising to find that many other countries harbor similar fear, distrust, and resentment.

#### *D. Law in Support of Policy*

A critical issue that underlies an analysis of just war doctrine is the relationship between law and policy. Great powers are perceived by others, and perhaps themselves, as acting solely on the basis of national interest with bare deference paid to legality. This is the view that China has of the West and under which Shi states that China has repeatedly received such humiliating treatment.<sup>175</sup> This highlights a fundamental problem—the perception that law and sound foreign policy are incompatible. Compliance with law is seen as an impediment

<sup>170</sup> See Anthony F. Sidoti, Abstract, *The Relevance of Carl Von Clausewitz in Operation Iraqi Freedom*, AIR & SPACE POWER J., Jan. 21, 2004, <http://www.airpower.maxwell.af.mil/airchronicles/cc/sidoti.html>.

<sup>171</sup> CARL VON CLAUSEWITZ, ON WAR 87 (Michael Howard & Peter Paret trans., 1976) (1832).

<sup>172</sup> *Id.*

<sup>173</sup> Weinberger, *supra* note 117, at 440-43.

<sup>174</sup> Shi, *supra* note 4, at 70-73.

<sup>175</sup> *Id.* at 70-73, 76-77.

to policy implementation and as a severe handicap when dealing with other nations not similarly encumbered.

The proper relationship between law and policy can be demonstrated in considering the familiar adage that "honesty is the best policy." This adage entails several assumptions. The first is that immutable standards of conduct exist, which are based on something other than expediency. The second is that doing what is right is not simply compatible with policy; it is the first step in sound policy decision-making. Finally, this adage assumes a view of reality in which compliance with the dictates of right conduct guarantees the attainment of true self-interest. The same should be said about law—"legality is the best policy." Of course, this analysis assumes that there are immutable and knowable standards of right and wrong and that they form the basis of the legal system.

The medieval just war writers and the great commentators on customary international law did not have the theoretical problem of the incompatibility of law and policy. As God is the Creator of all men and the author of law, law applies to all people for all of time. These writers believed that there are immutable principles of divine or natural law revealed to men and nations. Consequently, justice is inseparable from sound policy, and a breach of justice is never expedient or sound policy. That belief presupposes that positive law and policy decisions are made in the context of, and in conformity to, a law order and superintending will that rules over nations and the affairs of men. It is the Christian's—including the Christian statesman's—assurance that compliance with law is always the best policy.

The extreme tension between the demands of law and policy is a product of legal positivism. Law, for the positivist, is nothing but one more political instrument to achieve policy objectives or to engineer a particular social or world order. When the legal instrument proves ineffective, nations resort to more expedient means. What begins as an implementation of policy by positive law becomes, as Clausewitz argued, an extension of policy by military force.<sup>176</sup>

The legal positivist lives in a world of his own making in which nothing is a given. He chooses both the ends of the social order, and, through political and social experimentation, the best means of achieving those ends. Law is not right or wrong; it is simply effective or ineffective as an instrument of political and social control. That strikes the

<sup>176</sup> CLAUSEWITZ, *supra* note 171, at 87.

very heart of the Western legal tradition and the blessings of freedom which it birthed.

#### PART IV – CONCLUSION

A sharp contrast exists between Chinese and non-Christian Western worldviews on one hand and the Christian worldview as articulated in this article on the other. This contrast is vividly illustrated in the Apostle Paul's confrontation with the non-Christian Western philosophers in Athens.<sup>177</sup> They told Paul that he had brought strange teachings to their ears.<sup>178</sup> Paul proclaimed to them that all men and all nations are created by God and subject to judgment according to laws which govern all men and nations.<sup>179</sup>

Although peoples of the geographic West may have been among the first to embrace these truths, men everywhere will find a basis for unity amongst their diversity of families and nations, not in their common humanity, but in their union with Christ Jesus.<sup>180</sup> He promised that "[p]eople will come from east and west and north and south and will take their places at the feast in the kingdom of God."<sup>181</sup> Because God is the Creator of all men and nations, even the smallest and most scattered of nations can place their hope in His law, which is

<sup>177</sup> Acts 17:16-34.

<sup>178</sup> Acts 17:6-8.

<sup>179</sup> Acts 17:24-31; See also BERMAN, *supra* note 10, at 63 (showing that the Germanic tribes, though geographically western, had a similar difficulty in grasping the implications of a cosmology of creation, even after their "conversion" to Christianity).

In general, Christian beliefs and practices had a great appeal to Germanic man. They brought him, for the first time, a positive attitude toward life and toward death, a larger purpose into which to fit the tragedies and mysteries of his existence. Beside Christianity the old pagan myths seemed harsh and bleak. One can sense the passion in King Alfred's words, in the famous "Addition" to his translation of Boethius, "I say, as do all Christian men, that it is a divine purpose that rules, and not fate." At the same time, the Christian cosmology and the Christian ethic were not easy for Germanic man to grasp. If taken seriously, they threatened to undermine not only his former system of beliefs but also his entire social order.

*Id.* Berman believes that Eastern Orthodoxy is closer to first millennium Germanic Christianity than it is to second millennium Roman Catholic and Protestant theology in terms of impact on social institutions, which perhaps explains the weak development of rule of law and constitutionalism the further east one travels in Europe.

<sup>180</sup> See Galatians 3:26-29.

<sup>181</sup> Luke 13:29 (NIV).

common to all,<sup>182</sup> and which provides the standard of justice for judging disputes between nations.<sup>183</sup>

Additionally, God has established a plurality of social groups including the family, the church, and the state, each with its separate jurisdiction, but each operating under God's law. To families, He has given jurisdiction to raise and educate children, engage in economic activities, and provide for the needs of their members.<sup>184</sup> To the church, He has given the keys of the kingdom of heaven that men everywhere might hear and receive the message that salvation is through faith in Christ alone and that they might be taught the truths of Scripture and its application to every area of life.<sup>185</sup> To the state, He has given the power to establish civil government.<sup>186</sup> God had a purpose for establishing a plurality of civil jurisdictions. He did this "so that men would seek him and perhaps reach out for him and find him though he is not far from each one of us."<sup>187</sup>

---

<sup>182</sup> *Isaiah* 42:4.

<sup>183</sup> *Isaiah* 2:4 (NIV) ("He [God] will judge between the nations and will settle disputes for many peoples. They will beat their swords into plowshares and their spears into pruning hooks. Nation will not take up sword against nation, nor will they train for war anymore."). This near-universal hope for international peace is expressed in the statue titled, "Let Us Beat Swords into Plowshares." Ironically, that statue sits in a park adjacent to the United Nations complex in New York City. Perhaps more ironic still is the fact that the statue was a gift of the Soviet Union in 1959.

<sup>184</sup> See, e.g., *Genesis* 1:28; *Deuteronomy* 6:4-8; *Ephesians* 5:22-6:4; *1 Timothy* 5:3-4.

<sup>185</sup> See, e.g., *Matthew* 16:13-20; *Romans* 10:13-15; *2 Timothy* 3:16-17.

<sup>186</sup> See, e.g., *Genesis* 9:6; *Romans* 13:1-7.

<sup>187</sup> *Acts* 17:27 (NIV).