

COMBATANT IMMUNITY—MUCH ADO ABOUT ... SOMETHING

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I. INTRODUCTION

What is a “war crime”? To say that it is a violation of the laws of war is true, but not very meaningful.

War consists largely of acts that would be criminal if performed in time of peace—killing, wounding, kidnapping, destroying or carrying off other people[’s] property. Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over the warriors.

But the area of immunity is not unlimited, and its boundaries are marked by the laws of war. Unless the conduct in question falls within those boundaries, it does not lose the criminal character it would have should it occur in peaceful circumstances. In a literal sense, therefore, the expression “war crime” is a misnomer, for it means an act that remains criminal even though committed in the course of war, because it lies outside the area of immunity prescribed by the laws of war.¹

What is this “blanket of immunity” that descends to cloak otherwise universal and blatant criminal acts from proscription or punishment during times of war? From whence did it come? Which warriors can claim its protection? What is its juridical basis? And in what type of armed conflict does it apply?

Even today, fifty years after Nuremberg prosecutor Telford Taylor wrote the above, what we mean by the terms “lawful combatant,” “combatant immunity,” or “combatant privilege” is subject to significant debate. Inherently a subject of customary international law with “ancient law-of-war roots,”² no law of war treaty explicitly grants such a privilege or defines what this immunity covers. Although the 1907 Hague Regulations provide that the “laws, rights, and duties of war apply” to armies, to specified categories of militias and volunteers meeting certain criteria,³ and to the population rising

1. TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 19–20 (1970); see also Hans Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CAL. L. REV. 530, 547–48 (1943) (criticizing prevalent view that “acts of legitimate warfare are not punishable by the courts of the [s]tate whose subjects are the victims . . . [because] these acts are in conformity with international law which permits the belliger[e]nts to deprive forcibly the members of the armed forces of the enemy of their lives and freedom, to destroy property of their citizens, and the like. They are ‘legitimate’ acts of war only when they are performed in conformity with international law; ‘. . . otherwise they are murder or theft as the case may be and their authors are liable to punishment as criminals.’ The fact that an act is permitted by international law deprives the act of its criminal character; the fact that an act is forbidden by international law maintains its criminal character according to national law[.]”).

2. Sean Watts, *Present and Future Conceptions of the Status of Government Forces in Non-International Armed Conflict*, 88 INT’L L. STUD. 145, 151 (2012) (citing Waldemar A. Solf, *The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice*, 33 AM. U. L. REV. 53, 57–58 (1983)).

3. See Hague Convention Respecting the Laws and Customs of War and its Annex: Regulations Concerning the Laws and Customs of War on Land annex art. 1, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Regulations]. Under Article 1 of the 1907 Regulations Respecting the Laws and Customs of War

in a *levee en masse* to resist an invasion,⁴ the belligerent rights recognized by the Regulations are implied; their content is supplied by the unwritten laws and customs of war. These incorporated rights of war include both the right for recognized combatants to engage in hostilities and a privilege for these combatants against prosecution for hostile actions that comply with the law of war.⁵ As Francis Lieber articulated in Article 57 of his 1863 *Instructions for the Government of Armies of the United States in the Field*, “[s]o soon as a man is armed by a sovereign government and takes the soldier’s oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses.”⁶

The 1949 Geneva Prisoner of War Convention (GCIII) lacks even the explicit recognition of belligerent rights akin to that in the Hague Regulations. As G.I.A.D. Draper points out, it is a “curious device whereby the Geneva POW Convention of 1949, purporting to deal with no other topic than POW treatment adds to the class of privileged belligerents.”⁷ It does so by incorporating and expanding the categories of persons qualifying for combatant prisoner of war (POW) status, and impliedly bootstrapping that

on Land, “belligerents,” in addition to the requirements that the individual be acting under the authority of a state and as part of an organized military force, must fulfill the following criteria: “1. To be commanded by a person responsible for his subordinates; 2. [t]o have a fixed distinctive emblem recognizable at a distance; 3. [t]o carry arms openly; and 4. [t]o conduct their operations in accordance with the laws and customs of war.” *Id.*; cf. Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GCIII] (describing who qualifies as a prisoner of war); G.I.A.D. Draper, *The Legal Classification of Belligerent Individuals*, in REFLECTIONS ON LAW AND ARMED CONFLICTS, THE SELECTED WORKS ON THE LAWS OF WAR BY THE LATE PROFESSOR COLONEL G.I.A.D. DRAPER, OBE 199 n.1 (Michael A. Meyer & Hilaire McCoubrey eds., 1998) [hereinafter DRAPER’S REFLECTIONS] (discussing personnel and status issues). Article 4A(2) of the 1949 Geneva Convention III effectively added two more prerequisites for belligerent status, those of “organi[z]ation” and “belonging to a [p]arty to the conflict.” *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, Geneva, 12 August 1949, *Commentary of 2025*, Article 4 – Definition of Protected Persons, INT’L COMM. OF THE RED CROSS, <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-4/commentary/2025> [https://perma.cc/H428-D5YM] (last visited Feb. 17, 2026); see also David B. Rivkin & Lee A. Casey, *The Use of Military Commissions in the War on Terror*, 24 B.U. INT’L L.J. 123, 132 (2006) (“[T]hese criteria developed as part of customary international law . . .”).

4. Hague Regulations, *supra* note 3, arts. 1–2.

5. EMILY CRAWFORD, *THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT* 52–53 (2010) (summarizing the development of codified law of armed conflict applicable to combatant qualification).

6. Solf, *supra* note 2, at 58 (quoting U.S. DEP’T OF WAR, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (THE “LIEBER CODE”), GENERAL ORDERS NO. 100 (Apr. 24, 1863), *reprinted in* THE LAWS OF ARMED CONFLICTS 3, 11 (D. Schindler & J. Toman eds., 2d rev. ed. 1981)).

7. See Draper, *supra* note 3, at 199 (“This is a curious device whereby the Geneva POW Convention of 1949, purporting to deal with no other topic than POW treatment adds to the class of privileged belligerents. It seems to have become so usual and accepted to identify POW status with belligerent status that if you had to add to the class of the former you automatically extend the latter. It is a form of *post hoc, propter hoc* argument. Thus: all privileged belligerents have POW status. Therefore, all POWs have belligerent status. This is seen in the fact that one of the conditions for POW status . . . is ‘conducting their operations in accordance with the laws and customs of war.’ Clearly, it is implicit that they may lawfully conduct hostile actions, and have thus a belligerent status . . .”). Draper’s tongue-in-cheek analysis does not apply to those categories of POWs who are non-combatants. See *id.*

status back to the Hague Regulations' acknowledgment that belligerent rights, including the implied right to participate in hostilities, apply to those specified categories of POWs.⁸ Some scholars also see provisions of GCIII as impliedly recognizing a combatant privilege.⁹ Nevertheless, the content of these implied belligerent rights remain a creature of the customary law of war; it defines what rights are applied to legitimate combatants.¹⁰ Despite this curious device, prisoner of war status remains as a separate right accorded a lawful combatant, it does not supplant the separate right of lawfully participating in hostilities as an unstated right of belligerency recognized in the Hague Regulations.¹¹ Article 43 of Additional Protocol I (API) attempts to clarify these ambiguities by explicitly defining "the armed forces of a [p]arty to a conflict" as "combatants" and stating that "they have the right to participate directly in hostilities."¹² Although the text of Article 43(2) does not define a combatant privilege or immunity, early commentators recognized the implicit grant of a privilege within the "right to participate directly in hostilities" language.¹³

8. See GCIII, *supra* note 3. The conflation of prisoner of war status and privileged combatant status is problematic. See *id.* While all privileged/lawful combatants are entitled to POW status, not all those entitled to POW status are lawful combatants. See *id.* For example, persons who traditionally have accompanied the armed forces, protected under art. 4(a)(4), are not combatants but are entitled to POW status. See *id.*

9. See Draper, *supra* note 3, at 199; ROBERT K. GOLDMAN & BRIAN D. TITTEMORE, UNPRIVILEGED COMBATANTS AND THE HOSTILITIES IN AFGHANISTAN: THEIR STATUS AND RIGHTS UNDER INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW 3–4 (2002) (arguing that Article 87 of the GCIII inferentially recognizes the combatant's privilege by prohibiting the sentencing of POWs for "any penalties except those provided for in respect of members of the armed forces of the said power *who have committed the same acts*"); CRAWFORD, *supra* note 5, at 53 n.11 ("Though not specifically mentioned in the Conventions, the notion of combatant immunity can be inferred from provisions in the Conventions themselves, namely Arts 82 and 87–89 of GCIII.").

10. See Jordan J. Paust, *NIAC Nonsense, the Afghan War, and Combatant Immunity*, 44 GA. J. INT'L & COMP. L. 555, 573 n.77 (2016) (collecting cases recognizing a combatant privilege against prosecution for acts in compliance with the laws of war); *id.* at 573 n.78 (collecting learned texts to same point).

11. Steve Nabors, *A Right to Fight: The Belligerent's Privilege*, in RETHINKING INTERNATIONAL LAW AND JUSTICE 23 (Charles Sampford, Spencer Zifcak & Derya Aydin Okur eds., 2015) (explaining that the belligerent's privilege is "two individual rights that emerged separately and remain separable from each other: the protections of combatant immunity and the right to protected status as a prisoner of war upon surrender or capture"); Draper, *supra* note 3, at 197.

12. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 43, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I or API]. It is Article 44 that mandates prisoner of war status for all combatants defined in Article 43. *Id.* art. 44.

13. MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 239 (1982) ("2.4.1 All members of the armed forces (except medical personnel and chaplains) are classified as combatants who have a right to participate directly in hostilities. During an armed conflict, they cannot, therefore, be punished by an adverse [p]arty for combatant acts which do not violate the law of armed conflict."); *id.* at 243 (explaining that in their view, the combatant's privilege "provides immunity from the application of municipal law prohibitions against homicides, wounding and maiming, or capturing persons and destruction of property, so long as these acts are done as acts of war and do not transgress the restraints of the rules of international law applicable in armed conflict").

The nature of the combatant privilege is subject to considerable debate. Some scholars view the immunity/privilege as providing an affirmative license to lawful combatants to kill and destroy in armed conflict, so long as those actions comply with the laws of war.¹⁴ Others deny that a license to kill is provided by the privilege, and view it as only providing protection from criminal prosecution for those acts—either as an immunity or as a “rule of international law forbidding states from engaging in . . . prosecutions” of soldiers for their lawful killing in war.¹⁵

As Jens David Ohlin noted:

Under any view, the privilege of combatancy is key to the basic architecture of the law of war. It stands at the fault line between domestic criminal law and International Humanitarian Law, between impermissible killing and lawful belligerency. Simply put, the privilege of combatancy transforms, almost magically, what would otherwise be an unlawful act of murder into a lawful killing consistent with *jus in bello*. How does this transformation happen? However it happens, it is a powerful legal mechanism, and one whose exact contours demand definition and clarity.¹⁶

Given its existence and origin in customary international law, reference to textual sources or legal labels is often inadequate to provide the definition and clarity necessary to understand the nature of the combatant privilege as a powerful legal mechanism.¹⁷ Theory can assist with this task to some

14. Rogier Bartels, *The Right to Participate in Hostilities: Combatant Privilege vs Criminal Responsibility for Members of Organised Armed Groups During International and Domestic Criminal Trials*, in *ARMED GROUPS AND INTERNATIONAL LAW: IN THE SHADOWLAND OF LEGALITY AND ILLEGALITY* 64, 67 (Katharine Fortin & Ezequiel Heffes eds., 2023) (“Under international humanitarian law (IHL), combatants enjoy important privileges, such as . . . immunity from domestic prosecution for belligerent acts that comply with IHL.” “The Inter-American Commission on Human Rights . . . has described the combatant privilege . . . as ‘in essence a licence to kill or wound enemy combatants and destroy other enemy military objectives.’”); GOLDMAN & TITTEMORE, *supra* note 9, at 2 (“This privilege is in essence a license to kill or wound enemy combatants, destroy other enemy military objectives and cause incidental civilian casualties.”).

15. See CRAWFORD, *supra* note 5, at 52 n.9 (citing Richard Baxter’s argument that “the propriety of statements that international law confers a ‘right’ to resort to war and to exercise ‘belligerent rights’ is highly questionable, and it is probably more accurate to assert that international law has dealt with war as a state of fact which it has hitherto been powerless to prevent”); Jens David Ohlin, *The Combatant’s Privilege in Asymmetric and Covert Conflicts*, 40 *YALE J. INT’L L.* 337, 342 (2015) (“[P]rivilege of combatancy is both a prohibition [forbidding states from prosecuting soldiers from killing in war] and a license [that runs to each individual soldier to engage in wartime killing against legitimate targets] that can be inferred from the prohibition.”); Adil Ahmad Haque, *Law and Morality at War*, 20 *HUM. RTS. REV.* 129, 129–320 (2017) (the combatant privilege is only an immunity from prosecution); MARCELA PRIETO RUDOLPHY, *THE MORALITY OF THE LAWS OF WAR: WAR, LAW, AND MURDER* 27 (2023) (persuasively rebutting Haque’s contention that the combatant privilege is a “mere” immunity).

16. Jens David Ohlin, *When Does the Combatant’s Privilege Apply?*, *OPINIOJURIS* (Aug. 1, 2014), <https://opiniojuris.org/2014/08/01/combatants-privilege-apply/> [<https://perma.cc/W5TS-XWBF>]; see also CRAWFORD, *supra* note 5, at 53 (“Combatant status lies at the heart of one of the fundamental distinctions of the law of armed conflict, that of distinguishing between combatant and civilian.”).

17. See Ohlin, *supra* note 16.

extent, but given the customary law basis of the combatant privilege, history is much more informative.¹⁸

II. JUST WAR THEORY, HISTORY, AND CUSTOM

Despite modern analysis devoted to the conceptualization of the combatant privilege, combatant immunity did not spring forth fully armored from the head of Zeus.¹⁹ Instead it is a product of the long history and evolution of the customs and usages of war that formed the customary international law which is an integral part of modern International Humanitarian Law (IHL).²⁰ The concept of a combatant privilege or a combatant immunity preexisted the efforts to codify the laws of war in the nineteenth century, and its interpretation and scope were the subject of deep divisions during the international conferences held in the later nineteenth century to codify those customary laws.²¹ These conferences, culminating in the Hague Convention of 1907, ultimately adopted a compromise between nations detailing *who* would benefit from the privilege of combatancy.²² The contents—the *what* and *why*—of the combat privilege, however, originated long ago:

The soldier's license to kill is an ancient right. Indeed, it is of such antiquity that it is almost impossible to find an explicit statement of it before Grotius. . . . What in ordinary life was murder for which [the soldier] could be tried and hung was now simply the performance of his soldierly duty—one for which he was immune regardless of whether the war in which he fought was just.²³

Understanding this long arc of history is therefore important to understand the characterization and content of the modern combatant privilege.

The combatant privilege evolved during the centuries-long development of just war theory and the law of arms in the Middle Ages (the fourth to fifteenth centuries) following the fall of the western Roman Empire in 476

18. *Id.*

19. See HOMER, THE ILIAD, HYMN 28 TO ATHENA; HESIOD, HOMERIC HYMNS, EPIC CYCLE, HOMERICA 929A (Evelyn-White trans., H G. Loeb Classical Library Vol. 57, 1914).

20. See G.I.A.D. Draper, *Combatant Status: An Historical Perspective*, 11 MIL. L. & L. WAR REV. 135, 137–39 (1972) [hereinafter *Draper Historical Perspective*]; GARY SOLIS, THE LAW OF ARMED CONFLICT 41–42 (2010).

21. See *Draper Historical Perspective*, *supra* note 20; SOLIS, *supra* note 20.

22. G.I.A.D. Draper, *The Status of Combatants and the Question of Guerrilla Warfare* [hereinafter *Draper's Question of Warfare*], in DRAPER'S REFLECTIONS, *supra* note 3, at 206, 211, 215.

23. Christopher J. Finlay, *Justification and Legitimacy at War: On the Sources of Moral Guidance for Soldiers*, 129 ETHICS 576, 581 (2019) (quoting OONA HATHAWAY & SCOTT SHAPIRO, THE INTERNATIONALISTS AND THEIR PLAN TO OUTLAW WAR 62, 77 (2017)).

C.E.²⁴ As Christianity became the official religion of the Roman Empire after the Edict of Thessalonica in 381 C.E., the Church was required to reconcile its pacifist teachings with the new responsibilities of empire.²⁵ Saint Augustine, whose theory of just war formed the basis of the Roman Catholic Church's efforts to provide a Christian theory of warfare over the next one-thousand years, began this task.²⁶ This effort paralleled the development of a secular authority, originally feudal in nature, in which nobles and mounted knights formed a special privileged military class of hereditary warriors drawn from the nobility and governed by their own rules of behavior, the *jus militaire* or law of arms.²⁷ This *jus militaire* was applicable only to this narrowly defined class of warriors and defined their rights, privileges, and responsibilities.²⁸

Crystallizing during the Age of Chivalry (1100–1500) in the later Middle Ages, the law of arms/*jus militaire* slowly formed from the “fusion of military custom[] . . . with rules of canon and civil law.”²⁹ During the eleventh and twelfth centuries, “the reception of Roman law into the customary laws of Europe,” largely through canon and civil law, also contributed to this fusion.³⁰ By the middle of the fourteenth century, the law of arms was recognized as “a set of rules . . . which were accepted as decisive in the trial of disputes arising out of war, no matter where they were tried, or by whom.”³¹ And, by the end of the Hundred Years War (1337–1453), “the

24. See FREDERICK H. RUSSELL, *THE JUST WAR IN THE MIDDLE AGES* 13 (1975); G.I.A.D. Draper, *The Christian and War*, 2 INT'L RELS. 378, 386–389 (1962) [hereinafter *Christian & War*]. The succession of the Emperor Constantine to power and the Edict of Milan establishing religious toleration for Christians within the Roman Empire in 313 C.E. was the “great dividing line in the history of the Christian faith” and resulted in a transition to a sanction of and acceptance of war by Christianity in the western empire. *Id.*

25. See *Christian & War*, *supra* note 24.

26. See RUSSELL, *supra* note 24, at 16–26; *id.* at 12–15 (explaining that Eusebius and Ambrose preceded Augustine in approving military service against barbarians and heretics on the basis of New and Old Testament authority).

27. See Draper's *Question of Warfare*, *supra* note 22, at 207; G.I.A.D. Draper, *The Law of Ransom During the Hundred Years War*, 7 MIL. L. & L. WAR REV. 263, 267, 274 (1968) [hereinafter *The Law of Ransom*]. This law of arms arose from the customs of these knights and professional men-at-arms. See Draper's *Question of Warfare*, *supra* note 22, at 207; *The Law of Ransom*, *supra*. It was based on a mixture of honor and commercial interests, could be supplemented by concepts of feudal (civil) law and military regulations and ordinances, and was applied and enforced by all military tribunals in Christendom. See Draper's *Question of Warfare*, *supra* note 22, at 207; *The Law of Ransom*, *supra*.

28. See Draper's *Questions of Warfare*, *supra* note 22, at 207.

29. MAURICE H. KEEN, *THE LAWS OF WAR IN THE LATE MIDDLE AGES* 22 (1965); see also G.I.A.D. Draper, *Review of M.H. Keen's The Laws of War in the Late Middle Ages*, 80 HARV. L. REV. 916, 919 (1967) (“The law of arms was seen as an extension of the canon and civil laws, as the latter were extensions of natural law and the law of nations.”).

30. See KEEN, *supra* note 29; see also Robert C. Stacey, *The Age of Chivalry*, in *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* 31 (Michael Howard, George J. Andreopoulos & Mark R. Shulman eds., 1994) (“As an enforceable body of defined military custom, the laws of war . . . emerged . . . out of the interplay of knightly custom with Roman law as this was studied and applied in court from the twelfth century on.”).

31. See KEEN, *supra* note 29, at 23–25.

law of arms had already started its transition to the modern, or Grotian, understanding of the law of war.”³²

During this period, both the role of the soldier and the nature of war changed. The efforts of the Church to reconcile war with its teachings resulted in a just war doctrine that required the rejection of private feudal wars and recognition of the principle that “only sovereigns may make legitimate wars.”³³ And, “[g]radually, and before the close of the Hundred Years War, the soldier came to be seen as a public servant and [no longer] as a private individual, such as a merchant, carrying out his calling under a special body of law.”³⁴ These two changes, “shifted the whole basis of the laws of arms”³⁵ as it emerged from the Middle Ages and formed the foundation of the modern law of war. To understand the development of a combatant privilege during this critical transitional time, it is important to understand both the development of just war theory that provided its basis and its historical evolution during the Middle Ages. Steve Nabors has proposed that the combatant privilege evolved from three different historical privileges that crystallized during the Age of Chivalry (1100–1500 C.E.): (1) what Nabors calls, an ecclesiastical privilege, better termed a penitential privilege, developed by the Church from the eighth to the thirteenth centuries; (2) a domestic privilege against treason or *lèse-majesté*; and, finally, (3) by the development of an international privilege against prosecution for lawful acts of war applicable to all sovereigns.³⁶ After discussing the development of just war theory, this Article will then adopt Nabors’s three categories to analyze the historical development of the combatant privilege, but it will start with Rome because “[e]ven the Age of Chivalry . . . began in Rome.”³⁷

III. JUST WAR THEORY: CICERO TO AUGUSTINE TO GRATIAN TO AQUINAS

The reception of Roman law into the laws of medieval Europe took place through a variety of mechanisms. First, in the early sixth century, the newly dominant Germanic tribes in the lands of the former western Roman Empire adopted the governing *Juris Civilis* and *Codex Theodosianus* in their new kingdoms.³⁸ Originally applied only to their Gallo-Roman subjects, Roman legal principles were gradually incorporated directly into the Germanic legal codes applicable to all subjects, which were then “used as a

32. *Draper’s Review*, *supra* note 29, at 918.

33. *Id.* at 922.

34. *Id.*

35. *Id.*

36. Nabors, *supra* note 11, at 29.

37. Stacey, *supra* note 30, at 27.

38. C.E. BRAND, ROMAN MILITARY LAW 4 (1968); M.H. Hoeflich, *Law, Society, and Reception: The Vision of Alan Watson*, 85 MICH. L. REV. 1083, 1086 (1987); *see generally* PHILIPPE CONTAMINE, WAR IN THE MIDDLE AGES (Michael Jones trans., 1984) (explaining the adoption of *Juris Civilis* and *Codex Theodosianus* during the sixth century).

source for substantive legal rules to supplement and occasionally supplant the Germanic customs.”³⁹ By 506 C.E., “a substantial portion of . . . Roman law, especially the imperial legislation derived from the *Theodosian Code*, emerge[d] in the Visigothic compilation commonly known as the *Breviary of Alaric*,” along with similar adoption in other barbarian codes.⁴⁰ Although this adaptation was not consistent over time or in every location, significant Roman law and legal concepts persisted within barbarian legal codes for later common use in the Middle Ages.⁴¹ It is not until the rediscovery and study of Roman law in the eleventh to twelfth century in Bologna and its interpretation by the glossators and their canonist successors that Roman law was fully received into medieval European law.⁴² Finally, when early Christian theologians attempted to create a Christian theory of war after Emperor Constantine converted to Christianity in 313 C.E., they did so using Roman law—the law applicable to their time—while building on Cicero’s concept of a just war.⁴³

A. The Roman Just and Pious War

The Roman concept of the “just and pious war” would form the foundation of later Christian attempts to reconcile war with the Church’s pacifistic beliefs.⁴⁴ Roman just war required a just cause, a formal and authoritative declaration of war, and that war be waged honorably and justly for it was vouchsafed by the gods, and dishonorable conduct might result in defeat.⁴⁵ Not only did the Roman concept of just war influence later medieval thinking on war, but Roman military law and customs were also assimilated—particularly through reference to Vegetius in medieval treatises on the war.⁴⁶

39. Hoeflich, *supra* note 38 (“The Germans believed law to be personal rather than territorial and thus they adopted the Roman law *in toto* for their Gallo-Roman subjects.”); ALAN WATSON, *THE EVOLUTION OF LAW 77–97* (1985) (providing an excellent history of the reception of Roman law into the Germanic Codes).

40. FLOYD SEYWARD LEAR, *TREASON IN ROMAN AND GERMANIC LAW: COLLECTED PAPERS* 37 (1965); Hoeflich, *supra* note 38 (“[An earlier Germanic code,] the *Codex Euricianus*, . . . incorporat[ed] substantive Roman legal principles . . . [and] [t]his same Romanization occurred in [its] successor code, the great *Leges Visigothorum*.”); see J.G. BELLAMY, *THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES* 3 (1970).

41. WATSON, *supra* note 39, at 95 (“The Hispano-Romans had pre-Justinianic Roman law as their law even if largely drawn from Roman vulgar law; the *Corpus Juris Civilis* contained much of the preceding Roman law. Similarly, the *Visigothic Code*, containing much Roman and Germanic law, had a great deal in common with the law of the *hispani*.”).

42. See BRAND, *supra* note 38.

43. RUSSELL, *supra* note 24, at 12–23; CONTAMINE, *supra* note 38, at 264–65; WATSON, *supra* note 39, at 93.

44. RUSSELL, *supra* note 24, at 3–4.

45. G.I.A.D. Draper, *The Origin of the Just War Tradition* [hereinafter *Origin of Just War*], in *DRAPER’S REFLECTIONS*, *supra* note 3, at 6.

46. KEEN, *supra* note 29, at 57; see CHRISTINE DE PIZAN, *THE BOOK OF DEEDS OF ARMS AND OF CHIVALRY* 24, 26–28, 30–40, 42–44, 46–51, 53–56, 62–64 (Charity Cannon Willard ed., Sumner Willard

Although the Romans built on the earlier Greek concept of just war, Frederick H. Russell explains “Rome’s fundamental contribution to the just war was the development of the concept of just causes”⁴⁷ which was based on the legal analogy of contractual obligation under Roman law. Under this construct, because a:

[b]reach of contract in private law justified a civil suit by the injured party to recover . . . his damages and injuries . . . [so] in relations between states [an] injured city-state enjoyed rights to seek compensation and redress, acting both as judge and party in its own cause.⁴⁸

War was seen as an extraordinary legal process where states “[were] responsible for redeeming injuries done to foreigners by its citizens.”⁴⁹ If the other state defaulted on this responsibility, the injured state could punish it by war.⁵⁰ “Denial of justice [thus] became the primary cause of a just war”⁵¹ For Cicero, “warfare was not a willful exercise of violence[,] but a just and pious endeavor occasioned by a delict or injustice of the enemy.”⁵² Cicero’s *causa belli*—or justifiable causes for war—were to avenge wrongs, recover goods unjustly removed, and defense of the *patria* or homeland.⁵³ Under Roman law a “war waged without cause was not really war but *latrocinium* or piracy, and the *causa belli* was a necessary precondition for a *justum bellum*.”⁵⁴

Also based on this concept of a prior wrong by the enemy justifying war as sanction, Republican Rome required a “formal and authoritative declaration of war.”⁵⁵ This process began with a demand by the *fetiales* priests to the foreign power for “redress of injuries suffered by Rome or its

trans., 1999).

47. RUSSELL, *supra* note 24, at 3–4 (Russell credits Aristotle with “coin[ing] the term ‘just war,’ applying it to wars waged by the Hellenes against non-Hellenes whom he considered barbarians. [For Aristotle, w]ar was a natural form of acquisition, and since some men by their virtue, equated with justice, deserved to extend their rule over less worthy men, wars by which they enslaved others were naturally just. Men should only resort to war to prevent their own enslavement, that is, in self-defense, or to obtain an empire for the benefit of the governed or to enslave those non-Hellenes deserving of slavery. In Aristotelian terms[,] warfare was thus not an end in itself but a means to such higher goals as peace, glory, and strength.”).

48. *Id.* at 4–5.

49. *Id.* at 5.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*; see also *Origin of Just War*, *supra* note 45, at 5 (“The *jus fetiales*, [divine law] which dates from the [six]th century BC, recognized four causes of war which were properly considered by the Roman people to be ‘just and pious’. [sic] They were: 1 violation of the Roman dominions; 2 violation of ambassadors; 3 violation of treaties; and 4 support to an enemy of Rome by a hitherto friendly [s]tate.”).

54. RUSSELL, *supra* note 24, at 5 (citing LIVY HISTORY OF ROME I 32, 6 (E.H. Warmington ed., B.O. Foster trans., 1919)).

55. *Id.* at 6.

citizens[.]” (*the repetitio rerum*).⁵⁶ The involvement of the *fetiales* was designed to gain the support of the gods in Rome’s wars, with the resulting war representing both a human and divine quest for justice.⁵⁷ If no redress was provided within thirty-three days, the *fetiales* returned to Rome to obtain authorization from the people and the Senate to go to war.⁵⁸ If granted, the *fetiales* returned to the enemy and hurled a spear across the border into enemy land as an overt declaration of war.⁵⁹ “As an extraordinary legal procedure [with religious overtones,] the Roman just war [also] had to be waged justly . . . by virtue and courage rather than by base, infamous or treacherous means.”⁶⁰ Given the importance and sanctity of oaths within the Roman legal system, faith and honor required that even oaths given to the enemy had to be observed.⁶¹ As the Republic gave way to the Empire, the use of *fetiales* disappeared.⁶² Nevertheless, the requirement that war be authorized by the Roman State remained.⁶³ “The emphasis on authoritative declaration was designed to prevent illicit Roman wars, and by the time Christian writers came to discuss the just war[,] the Emperor possessed the sole authority to declare and wage it.”⁶⁴ Complementing this authority, Roman *fetiale* law also limited those who could legitimately engage in battle with the public enemy to those who had taken the military oath and were regularly enrolled in the Roman Army.⁶⁵ As discussed below, those who fought without such formalities and association with the state were “out-law” under Roman law.⁶⁶

Once lawfully begun, Roman war contained harsh legal consequences: it could result in the transfer of sovereignty over conquered territories, execution, enslavement, or ransom of captured soldiers and civilians, and “devastation of land and plundering of cities[,]” where booty “became the

56. *Id.*

57. *Origin of Just War*, *supra* note 45, at 5 (The demand for satisfaction was “supported by an oath of the *fetiales*, a very solemn affair, formally committing the Roman gods to the justness of the Roman cause of complaint. Conversely, and no less important, the execration of the Roman gods was invoked should it transpire that the cause of the Roman people was unjust or that a just cause did not exist.”); *see* ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 10 (rev. ed. 1962).

58. *Origin of Just War*, *supra* note 45, at 5–6.

59. NUSSBAUM, *supra* note 57; Alexei B. Egorov, *The Notion of Justice in Roman Wars and the Fetal Law*, 25 *STUDIA ANTIQUA ET ARCHAEOLOGICA* 49, 55 (2019); *Origin of Just War*, *supra* note 45, at 5.

60. RUSSELL, *supra* note 24, at 6.

61. *Id.* at 6–7; *see* BRAND, *supra* note 38, at 90–100. Roman society operated under the direct moral control imposed by the pledge of sacred honor under an oath to an appropriate deity, with the military oath of allegiance, the *sacramentum*, made to the commanding general and perhaps to the legion standards, considered among the most sacred. *Id.*

62. RUSSELL, *supra* note 24, at 6.

63. *Id.*

64. *Id.*

65. Nabors, *supra* note 11, at 25 n.10 (quoting HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 501 (4th ed. 1904)); *see also* MARCUS TULLIUS CICERO, *DE OFFICIIS* 36–37 (Walter Miller trans., 1913) (describing Roman practice limiting lawful warfare to duly enrolled soldiers).

66. *See infra* text accompanying notes 76–79 (noting that those engaged in unauthorized violence were treated as outlaws).

property of the government . . . [and] was sometimes sold for the common profit of the soldiers.”⁶⁷ Describing Roman law, Ulpian categorized foreign enemies against whom Rome had declared public war or who had declared war against Rome as *hostes*; all others “he termed *latrunculi* [or *latrones* or *latros*] and *praedones*, robbers and brigands who, not enjoying rights accorded to public enemies, were beyond the pale of Roman law.”⁶⁸ These *latrones* were “hanged [or brutally executed] at the scene of their crimes.”⁶⁹ Although including the category of criminal bandits, in Roman law *latrones* or brigands more broadly encompassed all enemies of the state other than those capable of engaging in public warfare with Rome.⁷⁰ Only sovereign states could make a public declaration of war under Roman law to qualify as *hostes*, and therefore “any war that was not preceded by a declaration of war valid under international law was *latrocinium*.”⁷¹ In addition to ordinary criminal banditry “*latrocinium* meant serious banditry amounting to irregular warfare[,]” where “apart from their inability to make a public declaration of war, *latrones* [were] indistinguishable from *hostes*.”⁷² Among the broader categories of *latrocinium* were native resistance movements against Rome and slave revolts, both of which employed guerrilla warfare.⁷³ *Latrocinium* was thus determined “from both the status of the enemy under international law and the guerrilla tactics which they employed.”⁷⁴ On some occasions, *latrocinium* could be temporarily recognized as *bellum* (or public war) when the rebel army reached a certain size and level of military success and when their leaders gained the respect of their Roman opponents.⁷⁵ However, this

67. RUSSELL, *supra* note 24, at 7.

67. *Id.* at 6–7; BRAND, *supra* note 38, at 90–91, 94.

68. RUSSELL, *supra* note 24, at 8; THOMAS GRÜNEWALD, BANDITS IN THE ROMAN EMPIRE MYTH AND REALITY 15–16, 40 (John Drinkwater trans., 2004) (quoting Pomponius and Livy for same).

69. GRÜNEWALD, *supra* note 68, at 15–16; Brent D. Shaw, *Bandits in the Roman Empire*, 105 PAST & PRESENT 3, 20–21 (1984) (quoting Dig. 48.19.16.10 (Ulpian) (“The law sanctioned the most brutal of the death penalties . . . throwing to the beasts, burning alive, and crucifixion as savageries that were necessary ‘to set a public example,’” and “Well-known bandits were to be executed and their bodies impaled on forked stakes in the same place where they had committed their crimes so that the mere sight would deter others from performing similar acts.”)).

70. GRÜNEWALD, *supra* note 68, at 5. Although originally meaning mercenary from the Greek *latreia*, in Rome *latro* came to refer “to any sort of extra-legal man of violence.” See Shaw, *supra* note 69, at 27–28.

71. GRÜNEWALD, *supra* note 68, at 40.

72. *Id.* at 16–17 (“[H]ostes and *latrones* are linked by the common characteristic that they both wage war on the Roman state. But *hostes* are regular, and *latrones* irregular wartime enemies.”).

73. *Id.* at 3, 33, 57, 161–62. Grünewald broadly categorizes *latrones* as “bandits, rebels, rivals and avengers” including not only apolitical robbers but also a wide variety of people acting from political motives. *Id.* at 32.

74. *Id.* at 39.

75. *Id.* at 40–41, 58–59 (explaining that when Spartacus’s slave army became large and strong enough to “operate in the field” his Roman opponents referred to it as *hostis*); see also Shaw, *supra* note 69, at 45 (Herodian reports of Maternus actions against the Roman State show that “[a]t some unspecified point in this rising level of violence . . . the Roman state no longer regarded him and his men as bandits, but declared them to be ‘public enemies’”).

de facto recognition was only temporary and quasi-legal and had no effect of the Roman rules of *postliminium* where a captive in a public war lost his rights of citizenship, while captives in *latrociniums* retained their legal freedom and rights as a citizen during captivity.⁷⁶ Relying on both the Roman army acting as the internal police force of the Empire and local municipalities to capture and hand over *latrones* to the provincial governor, Roman law also imposed a duty on private individuals

to pursue and to betray bandits to local authorities. In the pursuit of this obligation[,] the private individual was authorized to use force, to injure and even to kill such men. And they were also exempted, in doing this, from normal laws on *iniuria* [injury] and homicide. Such a *carte blanche* transfer of the positive use of violent force from the state to private individuals was unusual in Roman law.⁷⁷

Both “this grant of ‘public vengeance’” and the punishment of *latrones* with brutal capital punishment was exceptional, and reflected a

hesitancy or indeed an inability [of Roman criminal law] to cope with acts against society [and the illegitimate use of force] in general within the scope of legal ‘crimes’. [sic] Men committing such violent acts almost immediately became ‘outlaws’ because they had to be dealt with beyond the limits of criminal law and by instruments of collective state power rather than by individual civil action—that is, by provincial governors, military commanders and units of the army, or by the transfer of this power to private individuals and local corporations. . . . The problem was one of state definition, [*latrocinium* fell] between those acts against the state that were ‘out-law’ (that is, against the community but outside the scope of its law) and those which constituted major acts of violence against the whole state as such (that is, wars). . . . [E]ven in the technical-legal view of the state itself *such men were never seen simply as common criminals*. There existed quite separate definitions of them that placed bandits in a penumbral category between persons within the scope of the law (criminal and civil, largely overlapping) and enemies of the state. They were, quite literally, ‘out-law’. . . . [Roman law] denie[d] to bandits all legal rights of citizens, even those normally retained by criminal defendants.⁷⁸

Thus, private persons who engaged in illegitimate violence sufficient to be treated as *latrocinium* or irregular warfare were not *hostes* because of their international status, but were also not mere criminals—they were out-law, and subject to summary brutal punishment as enemies of the state.⁷⁹ The Theodosian Code both preserved and transmitted the Roman “special right

76. Shaw, *supra* note 69, at 22.

77. *Id.* at 19.

78. *Id.* at 19–22.

79. *Id.*

of vengeance” and the extraordinary legal measures against *latrones* into the early Frankish kingdoms.⁸⁰ Assisting this transmission, the Roman distinction between *hostis* and *latrocinium* persisted in the Church’s distinction between public and private war in the Middle Ages, particularly in its treatment of *routiers*⁸¹ and other non-state armed forces.

Roman military codes, to include penal laws, were also transferred to medieval times through the *Code of Justinian*, later Byzantine compilations, which preserved military codes of the western empire, and the writings of Vegetius, from whom Christine de Pizan heavily borrowed in her *The Book of Deeds of Arms and Chivalry*.⁸² From these sources we know that Roman military offenses fell into four categories of Roman criminal law: “(1) disobedience of a magistrate [or the commander in the case of the military]; (2) *nefas*, or violation of divine law (*ius divinum*); (3) violation of a statute (*lex*); and (4) *perduellio*, or constituting oneself a public enemy.”⁸³ Although disobedience in Rome’s military was punished generally, given the pledging of allegiance by soldiers to the commander through the *sacramentum*, much battlefield misconduct, theft, and desertion were also

nefas—the wicked crime of violation of the oath, which was punishable by the magistrates and by the gods alike. . . . *Nefas* was . . . an offense against the gods for which the state was ultimately liable, and therefore an offense—and an unpardonable offense—against the state itself.⁸⁴

Imperial statutes, preserved in the Byzantine *Ecloga* contained an earlier special military penal code, the *Military Laws from Ruffus*, which detail the rigor of the Roman requirement of obedience: “[If a]ny [soldier] who, in time of war, commits an act that is forbidden by his commander, or fails to execute a command, [he] shall be punished with death[,]” even if his mission is successfully accomplished.⁸⁵ As one example, C.E. Brand describes consul Manlius Torquatus’ execution of his son for the offense of engaging in single combat with and killing an enemy chieftain in “violation of orders against

80. Stefan Esders, *Persecuting Latrones, Maintaining Disciplina, Enforcing the Velox Supplicium: The Frankish Centena According to Childebert II’s Decree*, in THE CIVILIAN LEGACY OF THE ROMAN ARMY 212–14 (Luca Loschiavo ed., 2024) [hereinafter *Persecuting Latrones*].

81. RUSSELL, *supra* note 24, at 5–8. *Routiers* derived from *routes* or bands of soldiers and reflected an independent band of soldiers. *Id.* at 161.

82. *Id.* at 123–42 (describing Roman military texts contained in the *Code (Digest) of Justinian*, including Paternus’ *De Re Militari*, Menander’s *De Re Militari*, and the almost identical versions of the *Leges Militares* from Emperor Maurice (*Strategica*) and Leo (*Tactica*), as well as the Byzantine *Ecloga*, which preserves the earlier *Military Laws from Ruffus*.); see also DE PIZAN, *supra* note 46 (discussing military principles in medieval times).

83. BRAND, *supra* note 38, at 99.

84. BRAND, *supra* note 38, at 97 (explaining that the “oath was carefully cultivated and reserved for commitments of the utmost gravity, which extended beyond the effective domain of the *coercitio*, or normal disciplinary control, of the commander.”).

85. *Id.* at 143.

engaging in such [an] affray[.]”⁸⁶ Augustine of Hippo would later focus on this mandate of obedience as a key element in his formulation of just war theory which held a soldier fighting in a just war sinless for his actions in compliance with orders of the Emperor.⁸⁷

Roman customs and laws of war also persisted into the Middle Ages, particularly those dealing with *perduellio* or treason, which formed the basis for the medieval crime of “*lèse-majesté*,” which will be discussed in depth below.⁸⁸ Although barbarian kings in the former western empire “fought their wars in conformity with Germanic custom . . . [in which] [w]ar was considered a sort of judicial process (*judicium belli*) in which the two parties agreed to confront one another on the battlefield to establish who should win[.]”⁸⁹ Roman customs of war continued in Visigothic Spain and Lombard Italy.⁹⁰ Roman military law (*jus militare*) and of the law of races (*jus gentium*) were included in the writings of Isidore of Seville in 1160 C.E., and were widely read by later scholars and rulers,⁹¹ with Roman military law forming the basis for the rules of chivalry in medieval times.⁹² Nevertheless, it was the Church which primarily ensured the continuation of Roman law into the future through its development of canon law on just war and its contributions to civil law.⁹³

B. Christian Just War Theory—From Augustine to Gratian and Beyond

After Constantine’s conversion in 313 C.E., early Christian leaders were forced to reevaluate the Church’s view on war as these theologians sought to reconcile Christian pacifistic teachings with the requirements of empire.⁹⁴ Previously, “churchmen tended to condemn warfare in general and Roman wars in particular.”⁹⁵ Individual Christians had avoided military service, partly because of required pagan practices within the Roman Army, but also because military service seemed incompatible with their religion.⁹⁶ Now, as

86. *Id.* at 59 (citing Livy as the source of this story).

87. RUSSELL, *supra* note 24, at 22.

88. See *infra* Section I.2.3 (explaining the influence Roman customs had in the middle ages).

89. See CONTAMINE, *supra* note 38, at 260.

90. *Id.* at 262 (marking the beginning of hostilities “by sending a herald bearing defiance, [or] by throwing a weapon in the direction of the enemy ranks or at the gate of [a] town which it was planned to besiege[.]”).

91. *Id.* at 262 n.14.

92. KEEN, *supra* note 29, at 57.

93. See generally Charles P. Sherman, *A Brief History of Imperial Roman Canon Law*, 7 CAL. L. REV. 93 (1919) (describing the origins of Canon Law).

94. CONTAMINE, *supra* note 38, at 263 (“Saint Ambrose, bishop of Milan, whose experience as a great administrator helped him to understand the duties incumbent on temporal authority, was the first of the fathers fully to justify war waged in defen[s]e of the fatherland against barbarians and of society against outlaws.”).

95. RUSSELL, *supra* note 24, at 11.

96. See *Origin of Just War*, *supra* note 45, at 6–8. Although “no unanimous prohibition had been laid down by the Church, . . . up to the reign of Marcus Aurelius at least (160–180 AD), no Christian

citizens of an empire ruled by a Christian Emperor, rather than a persecuted minority, Church leaders had to reevaluate their view of military service and war.⁹⁷ As part of the establishment, Church leaders now identified the Roman Empire with the “divine peace-keeping mission,” merging the *pax romana* and the *pax christiana*, and legitimating a role for soldiers in maintaining the peace.⁹⁸ As a result, early western Christian leaders recognized that it was permissible for “[t]he laity . . . to shoulder the burdens of citizenship and wage just wars, while on a higher level the clergy was to remain aloof from society in total dedication to God.”⁹⁹ The connection of the Church with the defense of the Empire from heretical barbarians along the western frontier also strengthened this change in attitude toward war.¹⁰⁰ Despite this nascent acceptance of the licit use of force in the west, eastern Church leaders, such as fourth century Saint Basil the Great, expressed a more conflicted view of killings in war.¹⁰¹ Although they did not view these killings as homicide, they expressed their “aversion to the shedding of blood” by imposing substantial penance on soldiers for those killings, reflecting their view that even wartime killings were sinful.¹⁰² With this view, eastern Church leaders “never adopted the conception of the just war which became so central a part of the thinking of Latin and Western Christendom for many centuries.”¹⁰³ This adherence to a belief in the sinfulness of killings in wartime would persist even in the western Church in the form of the Penitential Books, which will be discussed later in the historical section.¹⁰⁴

It fell to Augustine of Hippo to combine “the evangelical precepts of patience and the pacifistic tendencies of the early Church with Roman legal notions.”¹⁰⁵ Recognizing that complete peace was unachievable, Augustine used the Roman concept of the just and pious war, with its requirement for just cause, open declaration, and legitimate authority, to create a Christian theory of when war was permissible.¹⁰⁶ To do so, Augustine separated the

would become a soldier after his baptism,” we do not know the precise reasons for this rejection. Christian participation in wars included the aversion to killing as well as to “the pagan nature of the Empire and the divinity of the Emperor,” which was incompatible with the divinity of Christ. *Id.*

97. *Id.* at 12–13.

98. CONTAMINE, *supra* note 38, at 263–64; RUSSELL, *supra* note 24, at 12.

99. RUSSELL, *supra* note 24, at 12 (Church law prohibited direct participation in warfare by clergy).

100. *Id.* at 13–14.

101. *Christian & War*, *supra* note 24, at 386–87.

102. *Id.*

103. *Id.*

104. See *infra* Section I.2.2 (discussing penitential book and combat immunity).

105. RUSSELL, *supra* note 24, at 16; see also Sherman, *supra* note 93, at 100, 103 (“[I]t is often overlooked that from the latter part of the [third] century onward the leading bishops possessed a previous training in the Roman Civil law. St. Cyprian, St. Ambrose, St. Augustine, St. Paulinus of Nola, and St. John Chrysostom had practiced law either as teachers or advocates at the Bar. . . . [As part of the temporal jurisdiction of the early Church,] St. Ambrose and St. Augustine spent much time in deciding civil suits.”); James Turner Johnson, *The Idea of Defense in Historical and Contemporary Thinking About Just War*, 36 J. RELIGIOUS ETHICS 543, 544 (2008).

106. RUSSELL, *supra* note 24, at 16.

soldier's external acts in war from his internal disposition.¹⁰⁷ For Augustine, it was not hostile acts that were sinful, but instead it was "the love of violence and cruelty, greed and the *libido dominandi*[,] or lust for rule[,] that so often accompanied" them.¹⁰⁸ Augustine believed that charity, patience, and benevolence justified the "[p]unishment of evil-doers that prevented them from doing further wrong when [that punishment was] administered without being moved by revenge or taking pleasure in suffering."¹⁰⁹ The intention for the hostile act was the normative determinant, not the act, and "any hostile act was justified provided it was motivated by charity."¹¹⁰ Rightfully motivated punishment could therefore be an act of love, and wars that sought the goal of peace or justice were therefore just. Critically, for Augustine "[o]nly rulers and officials acting in the line of duty were able to kill without giving vent to hatred and other sinful passions . . . [and the requirement of benevolent motives] denied the use of physical violence to private persons."¹¹¹ "Soldiers alone were the proper officials for waging war."¹¹² As a result, "[p]rivate pacifism was thus joined to a justification of public warfare that underscored the later medieval emphasis on the legitimate authority necessary to wage just wars."¹¹³

For Augustine, just wars avenge injuries.¹¹⁴ By expanding the concept of injury, Augustine broadened the proper causes and scope of a just war beyond that of the Roman just war. Cicero's just causes "required a clear violation of [the] pre-existing rights of the injured and therefore just party, . . . [with] [t]he goal of this just war . . . a simple return to the *status quo ante bellum*["."¹¹⁵ But Augustine's conception of injury extended beyond the illegal to include immoral and sacrilegious acts, all sins "against righteousness."¹¹⁶ Because of this expanded conception of injury, the permissible response also expanded. Just wars permitted punishment beyond a return to the *status quo ante bellum*, requiring a moral reckoning because:

Augustine did not see war as simply a consequence of sin, but a remedy against sin, a penal sanction of which the belligerents were, in a manner of speaking, [merely] the executants. . . . [T]he prince who wage[d] the just

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 17.

111. *Id.* at 18.

112. *Id.* at 21–22 ("Implicit here is the prohibition on killing not only by clerics but also by any private Christian."). Augustine's requirement that only soldiers could wage war was derivative of the Roman restriction that only those regularly enrolled and having taken the military oath could take part in a public war. See sources cited *supra* note 65 (describing Roman restriction that only duly enrolled soldiers can take part in warfare).

113. RUSSELL, *supra* note 24, at 21–22.

114. *Id.* at 19.

115. *Id.* at 18–19.

116. *Id.* at 19.

war] plays the role of God's scourge and . . . his action, inspired by love, is beneficial even for him against whom it is directed.¹¹⁷

In addition to the requirement of just cause, Augustine required a just war to be declared and waged on legitimate authority.¹¹⁸ Based upon the Emperor's (*princeps*) sole authority to declare war at the time of Augustine's writings, Augustine restricted the authority to wage war to God or the prince.¹¹⁹ Augustine viewed the role of the prince to be "so decisive that if he declared an unjust war, the sin was his alone, not his soldiers', since the duty of obedience rendered them innocent."¹²⁰ These two themes—the requirement for legitimate authority and the conceptualization of the soldier as merely an instrument of the prince subject to a duty of obedience, both legally and morally—would continue in later medieval formulations of the just war theory and into the modern law of war.¹²¹

Finally, Augustine's focus on internal motivations also logically led to restrictions on the means of warfare as well. Because:

[t]he justice of war thus rests on the disposition of the spirit and the motivation of conscience. . . . [O]ne keeps one's word to an enemy, avoids needless violence, profanation of churches, atrocities and reprisals, for behaviour which is too cruel would be a sign of a war waged because of a

117. CONTAMINE, *supra* note 38, at 264–65; RUSSELL, *supra* note 24, at 23.

118. RUSSELL, *supra* note 24, at 22.

119. *Id.*

120. CONTAMINE, *supra* note 38, at 264; RUSSELL, *supra* note 24, at 22 (For Augustine, Christian soldiers were to "obey even a sacrilegious king and to fight even an unjust war unless the prince ordered deeds that clearly contravened divine precepts When an official killed on an order he was not guilty of murder, and if he refused an order to kill[,] he was guilty of treason [T]o allow disobedience to an unjust command would give free vent to the individual passions he so ardently condemned. Rather than incur this risk[,] Augustine absolved the individual soldier of moral responsibility for his official actions.").

121. See, e.g., U.S. DEP'T OF WAR, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (THE "LIEBER CODE"), GENERAL ORDERS NO. 100 (Apr. 24, 1863) (Civil War example); Finlay, *supra* note 23, at 576–84 (explaining the ethics of war). Because states are permitted under international law to recruit soldiers and organize armies, they have authority to legitimize regular soldiers by identifying them as combatants and "exercise[] a Hohfeldian power to equip them with the normative incidents customarily identified with the role: privileges, liberties, claims, and (partly through international law) immunities. This power is what renders their actions as a form of 'legitimate violence.'" *Id.* See Malcolm Thorburn, *Soldiers as Public Officials: A Moral Justification for Combatant Immunity*, 32 *RATIO JURIS* 395, 412–13 (2019). The combination of a proper understanding of the state as public authority, the role of soldiers as public agents acting within their job description as soldiers, and the mutual respect among sovereigns for each other's public authority provides the morality, and hence the legality, for the combatant's privilege. See *id.* It is properly viewed as a product of the role of the soldier as the human agent of the state. Finlay, *supra* note 23, at 580–81 (explaining that the state's ability to maintain an armed force and to legally require combatants to obey orders to fight within the limits of LOAC is the "legal justification for attempting to harm one's enemies[']").

taste for murder and not because of love of justice, and betrays a wicked intention.¹²²

Augustine's theory of just war, based on a Roman foundation, restored it to a moral level while maintaining "its essential Roman legal features" of good cause, legitimate authority, open declaration, and good faith and honor in execution.¹²³ These principles, and Augustine's differentiation between inward disposition and external hostile acts, would remain a baseline for the evolution of just war theory over the next 1,000 years, culminating in Saint Thomas Aquinas' three requirements for a just war: right authority, just cause, and right intention.¹²⁴ The further reception of Roman law, beginning in the early twelfth century, reinforced this baseline and resulted in the incorporation of Roman law into the *jus militare* of the late medieval ages, to include the Roman concept of treason or *perduellio*, which was received into medieval law as the crime of *lèse-majesté*.¹²⁵ The Roman concept of treason, orienting on crimes against the state, helped emerging monarchs to delegitimize private feudal violence and consolidate the sovereign's monopoly of legal violence.¹²⁶

Collapsing the more than 1,000-year history of the development of the Christian just war theory is an impossible task that is beyond the scope of this Article, but the efforts of a succession of scholars, canonists, and theologians—many working concurrently—systematized and further developed Augustine's foundation. The effort began with Gratian's 1140 systemization and compilation of earlier canon law pronouncements into the *Decretum*, a work that included the concept of just war largely in its Causa 23.¹²⁷ Adopting Augustine's differentiation between inward disposition and outward acts as the basis for war as a moral action with its requirement of just authority and just cause,¹²⁸ this collection would form the foundation for further canon law developments of the law of war and just war theory. Writing in the late twelfth century, canonical authors, called the Decretists, offered their own commentaries and interpretations of the *Decretum*; while in the first half of the thirteenth century, a later group called the Decretalists, "focused immediately on various papal rulings called decretals, which themselves built on the *Decretum* and the interpretive work of the

122. CONTAMINE, *supra* note 38, at 265 ("The desire to harm, cruelty in vengeance, an implacable spirit, unquenched ferocity in revolt, the desire to dominate and other similar attitudes, if there are any, that is what the law condemns in warfare.").

123. RUSSELL, *supra* note 24, at 26.

124. Johnson, *supra* note 105, at 544–46.

125. *Id.* at 547–48.

126. *Id.* at 547.

127. RUSSELL, *supra* note 24, at 55.

128. *Id.* at 58, 68. Gratian limited the execution of just war to officials acting under proper authority. *Id.* Just cause included the recovery of lost goods, repelling an attack, and avenging injuries or injustice such as an enemy launching an attack, stealing property and refusing its return, and refusing to punish its subjects for illegal acts. *Id.*

Decretists.”¹²⁹ Overlapping these efforts in the late eleventh to early thirteenth centuries, the Romanists, legists, and Glossators contributed to just war theory by recovering Roman law and related Roman legal concepts and practices after rediscovering Justinian’s *Corpus Iuris Civilis* with its *Codex*, *Digesta* of legal opinions, and *Institutiones*.¹³⁰ These Romanists provided a “solid education in the Roman just war” to the canonists that followed.¹³¹ Finally, these efforts culminated in the late Middle Ages in the writings of scholastic theologians—notably Dominican Thomas Aquinas—who defined three requirements for when war is justified: “[J]ustified resort to armed force requires sovereign authority, a just cause, and a right intention”¹³²

In the process of this long development, all recognized and built on the ancient Roman requirements of just cause, legitimate proper authority, open declaration of war, and honor toward the enemy in the execution of war.¹³³ Also uniformly recognized, the Augustinian distinction between inward disposition and outward hostile acts remained key to the reconciliation of Christianity and governance, and to the limitation of warfare for the ultimate purpose of peace.¹³⁴ At least in theory, only rulers and officials acting in the line of duty were able to kill without giving vent to hatred and other sinful passions, and only soldiers, as public officials acting dispassionately in fulfillment of their lawful orders, could act morally and lawfully in executing war.¹³⁵ When war was conceived of as an extraordinary legal remedy—which the Romans, Augustine, and Gratian did—only the ruler could act as the judge of the necessity of going to war, determining whether injury justifying war as a sanction had occurred.¹³⁶ This theory necessarily prohibited the use of violence by private persons, unless for self-defense from immediate harm, an exception incorporated from Roman law.¹³⁷

The key points of debate in the long evolution of medieval just war theory centered on who could act as the authorizing official for war, the role of the Church and church leaders in war, just causes for war, the legal consequences of war, and in some cases the means of warfare.¹³⁸ The

129. Johnson, *supra* note 105, at 545.

130. *Id.*; see also RUSSELL, *supra* note 24, at 40 (describing how Roman law continued after the medieval ages); Ryan Greenwood, *War and Sovereignty in Medieval Roman Law*, 32 L. & HIST. REV. 31, 40–41 (2014) (discussing how Roman law was recovered in the eleventh century).

131. RUSSELL, *supra* note 24, at 54.

132. Johnson, *supra* note 105, at 546.

133. *Id.*

134. See RUSSELL, *supra* note 24, at 58–65.

135. *Id.* at 68.

136. See *id.* at 65, 178, 297. There was no common superior authority to act as judge of the competing claims of injustice. See *id.* Therefore, the canonists placed the responsibility to determine the injury and appropriate response in the prince. See *id.*

137. *Id.* at 18, 22, 65, 178, 297; Greenwood, *supra* note 130, at 44–45. Private persons could always seek justice in the courts or from the prince. See RUSSELL, *supra* note 24, at 18, 22, 65, 178, 297; Greenwood, *supra* note 130, at 44–45.

138. See RUSSELL, *supra* note 24, at 62–83.

complex and overlapping rights and duties in the medieval feudal system complicated the formation of a coherent just war theory as theorists were forced to accommodate the structures of Roman law and the authority of the Emperor to authorize a just and pious war with the multitude of military forces and political powers in the feudal age.¹³⁹ Recognizing the realities of the endemic violence in feudal society, both the Church and secular governments used just war theory as one way to limit violence and war.¹⁴⁰

C. Right Authority

Although a legacy from Roman law, the requirement for legitimate authority to wage war served several purposes for the medieval scholars. First, just war theorists restricted the authority to wage just war to proper authority as one way to limit the widespread violence in medieval society.¹⁴¹ Second, and related to the first, if war was seen as an extraordinary legal remedy for the achievement of justice—a view shared with Roman law—only a legitimate authority could judge whether the conditions required for a just war existed because only officials acting under legitimate authority had the proper Augustinian inward disposition to decide to punish with war.¹⁴² For Augustine, writing as a citizen of the Roman Empire, only the Emperor had the authority to declare war—a determination the Romanists came to agree with based on their interpretations of the Roman texts.¹⁴³ Gratian adopted Augustine's definition of just war as "commenced by an authoritative edict . . . [and] waged to right a legal wrong," but did not specifically identify those with the right to issue that edict.¹⁴⁴ Perhaps reflecting the complex reality of the diffuse power structure of the twelfth century, Gratian viewed just war more generally than Augustine's rules drawn from the realities of the Roman Empire.¹⁴⁵ As a result Gratian's legitimate authority was limited to "God or some legitimate *imperium*,"¹⁴⁶ which under Roman law, can best be described as sovereign or "supreme authority."¹⁴⁷ Later commentators would interpret this requirement of *imperium* in light of the realities of medieval government and feudal ties.¹⁴⁸ For Gratian, the requirement that just war be executed only by officials acting on legitimate authority was the sole means to ensure that the punishment of

139. See *id.* at 70, 77.

140. See *id.* at 69–70.

141. See, e.g., *id.* at 97 ("Like Gratian, the Decretists were forced to emphasi[z]e authority in an effort to prevent unrestrained private violence.").

142. See *id.*

143. *Id.* at 46.

144. *Id.* at 62.

145. *Id.* at 64.

146. *Id.* at 65.

147. BRAND, *supra* note 38, at 13.

148. RUSSELL, *supra* note 24, at 69.

injuries (*ultio*) did not “degenerat[e] into unrestrained vengeance and brutality.”¹⁴⁹ Because just war was for the purposes of justice, “[only] the prince or sovereign is, by virtue of [his] office, empowered and given the responsibility to act as judge in the matter of whether it would be justified to resort to armed force, and to carry out his judgment against those determined to be in the wrong.”¹⁵⁰

For the Decretists, commenting on Gratian’s *Decretum*, princely authority was “necessary for any violent action save the immediate repulsion of violence as it was being inflicted.”¹⁵¹ Recognizing the complexity of authority in medieval life, to determine who qualified as a legitimate authority they focused on the feudal independence or submission of the parties, and “very early had limited this to persons in the role of ‘prince.’”¹⁵² In limiting this authority to a prince or sovereign who had independent power as opposed to the numerous other dukes, or barons with feudal superiors, the Decretists thus made “the right to take up arms the monopoly of legitimate authority.”¹⁵³ The Decretalists’ views on who could authorize a just war varied, but gradually coalesced, limiting the authority to wage war to princes with no temporal superior.¹⁵⁴ Although immediate self-defense was everyone’s right without a requirement for princely authority,¹⁵⁵ a “full public war could be licitly declared only by a prince who did not have a superior (*princeps non superiorem habet*).”¹⁵⁶

D. Just Cause

As previously discussed, under Roman law, “[d]enial of justice became the primary cause of a just war seen as an extraordinary legal process.”¹⁵⁷ The Romanists saw two kinds of licit wars:

The first were the wars of the Roman emperor, which appeared licit simply by the fact that he declared them. The second were wars fought to repulse injuries, . . . justified by . . . a right of defense [that] was available to all,

149. *Id.*

150. Johnson, *supra* note 105, at 547–48.

151. RUSSELL, *supra* note 24, at 103.

152. Johnson, *supra* note 105, at 547 (“Their point was to distinguish the responsibility and power of those at the top of a political community from others farther down who might claim the right to initiate force—dukes, barons, even individual knights Those who had feudal superiors did not possess the requisite authority for justified war, they reasoned, as they could appeal to their feudal superior for justice. However, those who had no superiors had to see to justice on their own—justice not only for themselves but for the members of the community over which they had the responsibility of care.”).

153. RUSSELL, *supra* note 24, at 146.

154. *Id.* at 177–78; *see also* KEEN, *supra* note 29, at 74–77.

155. *Id.* at 42–43.

156. Greenwood, *supra* note 130, at 36; RUSSELL, *supra* note 24, at 146.

157. RUSSELL, *supra* note 24, at 5.

according to natural law and the law of nations. [Additionally,] fighting for one's country (*patria*) might be a duty [justifying war].¹⁵⁸

For Gratian, adopting Augustine's formula, "[there] were three causes for a just war: to repel invasion; to recover property; and to avenge prior injuries."¹⁵⁹ Gratian left the development of the specifics on what type of injuries were actionable to his successors.¹⁶⁰ Significantly Gratian did not see the resulting execution of punishment (*ultio*) imposed by just wars to "justify unrestrained vengeance or needless cruelty."¹⁶¹ Interpreting the *Decretum*, most Decretists concluded that the "right to repel violence with violence [with the sanction of princely authority] legitimated recourse to a just war according to the principles of *ius gentium*."¹⁶² As a result both defense against violence and of *patria* were just causes for war.¹⁶³ Refining the concept of defense as justification for just war, the Decretalists agreed that "military service was not sinful when [authorized by the prince with no secular superior and] employed in defense of one's person and property, the *patria*[,] or ancestral laws."¹⁶⁴ With the practical difficulties of determining just cause in a particular case, proper authority became the determining factor for just wars in the middle ages.¹⁶⁵ And because of their ability to act dispassionately with the appropriate inward disposition, the prince's determination of the justness of their cause was accepted as determinative.¹⁶⁶ The increasing role of the Church to authorize just wars also expanded the understanding of just causes, which now encompassed defense of the *patria* and the faith against infidels, heretics, and excommunicates.¹⁶⁷

E. Role of the Christian Church

Gratian's *Decretum* included the Augustinian concept that just war could be used as punishment of the Church's enemies: "[W]ars served peace when they coerced evil-doers and sustained the righteous"¹⁶⁸ In the early Middle Ages, "temporal rulers [had] the duty of defending orthodoxy and persecuting here[tics,]" and just as in Augustine's time, when rulings by

158. Greenwood, *supra* note 130, at 41; see RUSSELL, *supra* note 24, at 42–43.

159. RUSSELL, *supra* note 24, at 62, 64.

160. *Id.* at 61.

161. *Id.* at 67–68.

162. *Id.* at 97.

163. *Id.* at 99.

164. *Id.* at 133.

165. KEEN, *supra* note 29, at 72 ("For all practical purposes[,] it was agreed that the test of the justice of a war, and of its public nature, was whether or not it had been declared on the authority of a sovereign prince."); *Draper's Review*, *supra* note 29, at 920; see also RUSSELL, *supra* note 24, at 68, 145 (explaining that humanitarian concerns played little part in determination of the justness of war until modern times).

166. KEEN, *supra* note 29, at 72.

167. *Id.* at 156.

168. RUSSELL, *supra* note 24, at 73.

ecclesiastical courts could be enforced by the Emperor, medieval Church leaders could “seek military aid from lay rulers, when spiritual censures had proved ineffective.”¹⁶⁹ Gratian sharpened this authority: now, as God’s agent in authorizing divine punishment of the wicked, the Church could directly initiate, direct, and supervise “[the] persecution of those guilty of sin or religious heterodoxy, including heretics and infidels[,]”¹⁷⁰ and by issuing binding commands to lay rulers and ordinary Christians, it could authorize a just war based on God’s authority.¹⁷¹ The recognition of the expanded authority of the Church to direct the punishment of infidels or heretics would underpin the juridical basis of the Crusades, and “[b]y their justification of ecclesiastically motivated wars the Decretists were able to overcome any lingering suspicion of the morality of military service.”¹⁷²

In addition to limiting the right authority for just wars, other ecclesiastical efforts attempted to reduce illicit violence in the tenth and eleventh centuries, all of which contributed to the *jus militaire* that emerged later in the Middle Ages. First, the growing peace movements in 975–1025 C.E. led to the Peace of God (*Pax Dei*), beginning in 975 C.E., in which the Church required knights (*milites*) to take oaths to protect church property, clerics, property of the poor, and imposed a sanction of anathema for violators.¹⁷³ To deal with illicit violence, the Church made certain classes, such as “old men taking no part in the war, or women, or innocent children[,]” immune from private war and violence, leading to the idea that these non-combatants deserved protection because they take no part in war.¹⁷⁴ Gratian adopted this restriction in the *Decretum*.¹⁷⁵ First appearing in 1027, and spreading to all of Christendom after 1088, the Truce of God (*Treuga Dei*) prohibited violence during certain holy days, although this prohibition did not apply to authorized large-scale public warfare.¹⁷⁶ It did, however, impose “heavy penances for private forays and fights on forbidden days[,]” reducing private war.¹⁷⁷

From the eighth to eleventh century, the Church sought to influence and shape the conduct of “the hierarchies of armed secular power[,]” by imbuing the ceremonies of knighthood with religious symbolism, contradicting the idea “that the Church was slow and reluctant to give its blessing to the new

169. *Id.* at 74, 76.

170. *Id.* at 74, 80.

171. *Id.* at 80–81, 125.

172. *Id.* at 124.

173. See CONTAMINE, *supra* note 38, at 271; Stacey, *supra* note 30, at 29.

174. CONTAMINE, *supra* note 38, at 269–70, 274 (quoting Honoré Bouve’s *L’arbre des batailles*, arguing in 1386 against harming old men, women, or innocent children because they take no part in battle).

175. See *id.* at 270–74. An anathema was a formal curse by a pope or a council of the Church, excommunicating a person or denouncing a doctrine. See *id.* at 271.

176. CONTAMINE, *supra* note 38, at 272–73.

177. G.I.A.D. Draper, *The Battle of Hastings and the Penitential Canons*, 1070, 7 MIL. L. & L. WAR REV. 287, 297 (1968) [hereinafter *Hastings & Penitential Canons*].

secular values of fighting and the attitudes of the knightly caste.”¹⁷⁸ As early as the eighth century, the Church became involved in the blessing of weapons, which involved prayers to bless the knight as he sought to “defend and protect churches, widows[,] and orphans[.]”¹⁷⁹ By the eleventh century, and continuing through the fourteenth, solemn ceremonies in which the bishop blessed the “sword, banner, lance[,] and shield, of the knight himself and, finally, the delivery of the sword by the bishop[,]” linked the knights transition to the “new hono[r] of chivalry . . . with the word of Scripture” in which God “had willed the chivalric order (*militaris ordo*) to be instituted for the protection of [the] people, . . . [the] repress[ion of] wickedness[,] . . . and [the] protect[ion] of justice[.]”¹⁸⁰ Thus, the girding by the bishop of the knight with the *cingulum militaire* (warrior’s belt) was a central part of the dubbing ceremony, one that merged the values of the Church and of the chivalric order,¹⁸¹ further limiting licit violence to a designated class. In the ninth century, Carolingian ecclesiastical sanction included the deprivation of the *cingulum militaire*, often in conjunction with the deprivation of marriage, as a penalty for infamous crimes.¹⁸² Violations of the knightly code of conduct, or *jus militaire*, during the Age of Chivalry could similarly result in the loss of the belt of knighthood and spurs as a penalty which deprived the knight of his status as a warrior.¹⁸³ By creating this connection between the Church and “the profession of arms without the king as an intermediary[,]” the Church was able to directly influence those charged with the licit use of violence.¹⁸⁴

178. Karl Leyser, *Early Medieval Canon Law and the Beginnings of Knighthood*, in INSTITUTIONEN, KULTUR UND GESELLSCHAFT IM MITTELALTER. FESTSCHRIFT FÜR JOSEF FLECKENSTEIN ZU SEINEM 65. GEBURTSTAG [INSTITUTIONS, CULTURE & SOCIETY IN THE MIDDLE AGES: FESTSCHRIFT FOR JOSEF FLECKENSTEIN ON HIS 65TH BIRTHDAY] 562 (Lutz Fenske, Werner Rösener & Thomas Zotz eds., 1984); MATTHEW STRICKLAND, WAR AND CHIVALRY: THE CONDUCT AND PERCEPTION OF WAR IN ENGLAND AND NORMANDY, 1066–1217, at 57 (1996) (noting that long before the Council of Clermont in 1095, the knightly class had become “deeply imbued with Christian ideology and symbolism” to include the acceptance of “[the] concepts of holy war for the faith and the *patria* against the heathen, the blessing of weapons and banners, the use of relics in battle[,] and the burgeoning cults of the military saints”).

179. CONTAMINE, *supra* note 38, at 277.

180. CONTAMINE, *supra* note 38, at 277–78; STRICKLAND, *supra* note 178.

181. CONTAMINE, *supra* note 38, at 277–78.

182. Leyser, *supra* note 178, at 557.

183. Stacey, *supra* note 30, at 29; M.H. Keen, *Treason Trials Under the Law of Arms: The Alexander Prize Essay*, 12 TRANSACTIONS OF THE ROYAL HIST. SOC. 85, 86, 89, 90–92 (1962) [hereinafter *Keen’s Treason Trials*] (noting that degradation from all honors and knighthood was a penalty for military treason including hewing off of spurs, breaking of sword, ungirding and reversal of coat of arms); KEEN, *supra* note 29, at 57 (quoting JOHANNES DE BADO AUERO, TRACTATUS DE ARMIS [A TREATISE ON ARMS] 44 (London, Edward Bysshe ed., 1654) (“Even the ritual degradation of those who were traitors to the rules of hono[r] . . . was traced back to Roman practice: ‘when one who bears arms is to be dishono[r]ed for treason, or cowardice, or breach of faith, then his arms should be portrayed reversed, for faith is to be kept even with the enemy, according to the *civil law* and the law of arms.’”).

184. See CONTAMINE, *supra* note 38, at 276–77.

F. Legal Consequences of War

The Romanist's study of the Justinian compilations resulted in the direct adoption of Roman rules detailing the legal consequences of war. "Division of booty was the object of fairly strict regulations."¹⁸⁵

Property seized during hostilities immediately became the property of the captor, [occupation of immovable property or captured land] led to acquisition by the Roman people, not the individual soldier, . . . *praeda*, or booty or moveable property, became the property of Rome when it was seized by common military action, but when it was seized by the actions of an individual soldier it became his property.¹⁸⁶

Although not practiced among Christian nations, the enslavement of captives was permitted under Roman law in a public war, and the captives enjoyed a "right of *postliminium*, whereby captives lost their civil rights and saw them restored when they were released or escaped to safety."¹⁸⁷ The later medieval practice of ransom, slowly adopted to replace enslavement in Christian wars, did not displace massacre of captives until the fourteenth and fifteenth centuries "[when] ransom of prisoners came to be the [normal] practice."¹⁸⁸ Requiring the sanction of public authority for hostile acts to "enjoy the status of war[.]" the Romanists emphasized that legal consequences were limited to just wars—"property could be gained or lost only in a licit war."¹⁸⁹ This would become a key component of the later medieval *jus militaire*, where "[s]o close was the nexus between 'public' war and the right to claim ransom and take spoils that it would sometimes be argued, . . . that there was no 'public war' just because the evidence failed to sh[o]w that spoils had been taken or ransom claimed."¹⁹⁰

185. *Id.* at 261.

186. *Id.* The just war tradition's adoption of Roman law on spoils and booty extended back to the time of St. Ambrose. *Id.* at 71; see also RUSSELL, *supra* note 24, at 175, 163 (explaining that to the Decretalists "all spoils belonged to the captor, in practice the prince waging the war was bound to divide the spoils among his warriors according to their merits[.]" and "[b]y contemporary feudal custom the prince granted equal portions to his men" after reserving a portion for himself).

187. Greenwood, *supra* note 130, at 37.

188. Christian & War, *supra* note 24, at 394–95; RUSSELL, *supra* note 24, at 162; see also Greenwood, *supra* note 130, at 37 n.27 (noting that enslavement "was not generally practiced among Christians, but the very prevalent practice of ransom involved a loss of freedom and was thought of as analogous to slavery by some jurists"); *The Law of Ransom*, *supra* note 27, at 263, 265–66 (noting that ransom derived from "an amalgam, composed of Koranic injunctions, Christian morality, and chivalric ideals of hono[r] and good faith, heavily impregnated with a powerful and pervading influence of *commercium*, in the form of vast profit[.]"); STRICKLAND, *supra* note 178, at 133–34 (noting that although the practice of Anglo-Saxon and Viking warriors was to slay opposing warriors or sell them into slavery, the practice of sparing warriors in exchange for "substantial payment in cash, arms or even strategic sites" had its origins in Frankish warfare, which by the eleventh century had "become a well-established, though by no means mandatory[.] practice in France"); CONTAMINE, *supra* note 38, at 255–56, 262.

189. RUSSELL, *supra* note 24, at 53.

190. *The Law of Ransom*, *supra* note 27, at 269.

G. Means

Few overt restrictions on the methods of warfare existed in the early Middle Ages, although the Roman law requirement of moderation in self-defense did impose some limits on the private feudal wars of self-defense or redress of injury.¹⁹¹ The intent of war, for Augustine, was to return to peace, thus mercy should be shown once victory was achieved.¹⁹² Because the benevolent “attitudes that must be maintained in performance of military service naturally carried over to the waging of war itself,” Gratian condemned military actions that stemmed from vice, and praised soldiers for their “obedience to the utility of commonweal and to the commands of a prince or legitimate authority.”¹⁹³ Thus, maintenance of the proper inward disposition was expected to exert some limitations on the violence of warfare.¹⁹⁴ However, even these vague limits were not applied in wars against infidels and heretics.¹⁹⁵ The Roman concept of honor toward the enemy persisted, and most just war canonists insisted that faith with the enemy must be kept, at least so long as the enemy did so.¹⁹⁶ To mitigate the effects of warfare, the Decretists focused on the qualifications of soldiers: those who fought must be laymen (as opposed to clerics), acting on authority with proper motives, and must be obedient to his commanders absent special circumstances.¹⁹⁷ These requirements contemplated only the disciplined use of force.¹⁹⁸

In the *Decretum*, “Gratian [] included several canons that prohibited violent attacks [on] clerics, peasants and other unarmed non-combatants,” restrictions also included in the canons of the Third Lateran Council of 1179 and the Gregorian decretals.¹⁹⁹ Although not explicitly addressed by the Decretalists, these restrictions were understood as valid: “[W]ars were usually waged by persons to whom fighting was licit, that is, soldiers, and all other were *hors de guerre* [out of the war]. For a just war to remain a just war, it had to be conducted properly, which meant that it could only be waged on other soldiers.”²⁰⁰ Because of their practice of unrestricted warfare that preyed on the local population, “[t]he full force of ecclesiastical opprobrium was levied on” the “unemployed mercenary bands or *routiers* that roamed

191. RUSSELL, *supra* note 24, at 96.

192. *Id.* at 61.

193. *Id.* at 60–61.

194. *See id.*

195. *Id.* at 74.

196. *Id.* at 70 (Gratian), 155–56 (Decretists), 157 (Decretalists).

197. *Id.* at 103.

198. *Id.*

199. *Id.* at 186.

200. *Id.* at 186; *see also* CICERO, *supra* note 65 (explaining that Roman law also limited the ability to participate in combat to those lawfully enrolled in the army who had taken the sacred oath).

throughout Europe.”²⁰¹ And for some Decretalists “wreaking immoderate destruction, [in violation of custom] necessitated compensation for the excessive damages.”²⁰²

H. Summation

The development of the just war theory culminated in Thomas Aquinas’s threefold requirement for a justified use of force in war—sovereign authority, a just cause, and a right intention²⁰³—but its roots extend back to Rome. War was “an extraordinary legal remedy that supplemented ordinary legal procedures in cases of necessity.”²⁰⁴ Only a prince with no temporal superior could act as his own judge to determine if resort to war was necessary.²⁰⁵ Based on Roman and canon law, “[e]very hostile act except immediate self-defense required superior authority.”²⁰⁶ Although just cause for use of military force included the need to repel injuries, defense, and the necessity to inflict punishment, recognition of the difficulty or impossibility of determining the just side resulted in a reliance on the requirement of proper authority.²⁰⁷ For Augustine, “[o]nly rulers and officials acting in the line of duty were able to kill without giving vent to hatred and other sinful passions” and “[s]oldiers alone were the proper officials for waging war.”²⁰⁸ Private violence was condemned.²⁰⁹ From the time of Augustine forward, the requirement of obedience to the commands of the superior authority for soldiers resulted in their absolution from sin for killings and destruction caused by their wartime actions so long as their violence was not excessive—excessive violence indicated in improper inward disposition.²¹⁰ Gradually, the early Christian suspicion of military service as sinful transformed, and with the beginning of the Crusades in 1095, “[m]ilitary activity . . . acquired a spiritual and redemptive value.”²¹¹

201. RUSSELL, *supra* note 24, at 161 n.98, 189 (“[T]he Third Lateran Council of 1179 (canon 27) condemned the *routiers* who were then ravaging many parts of Europe. This rather motley list of persons were likely to find employment as mercenaries and often lapsed into brigandage, especially when unemployed.”); *see also* 1 DECREES OF THE ECUMENICAL COUNCILS, NICAIA I TO LATERAN V 224–25 (Norman P. Tanner, S.J. ed., Georgetown Univ. Press 1990) (1972) (explaining Canon 29 placed various bands of *routiers* under anathema).

202. RUSSELL, *supra* note 24, at 161.

203. Johnson, *supra* note 105, at 546.

204. RUSSELL, *supra* note 24, at 297.

205. *Id.* at 173.

206. *Id.* at 298.

207. *Id.*

208. *Id.* at 18, 21–22.

209. *Id.*

210. *Id.* at 22.

211. CONTAMINE, *supra* note 38, at 275; STRICKLAND, *supra* note 178, at 29. In course of the later eleventh century, clergy “had moved from regarding the knight’s *metier* [job] as intrinsically sinful to directing his aggression to meritorious holy war.” STRICKLAND, *supra* note 178, at 29.

IV. HISTORY AND THE DEVELOPMENT OF THE COMBATANT PRIVILEGE

Examination of the three historic privileges that Steve Nabors identifies as the foundation for the modern combatant privilege provides insight into its development and contours, and underscores that this privilege exists solely due to a soldier's position as the agent of the sovereign in a public war.²¹² Of the three privileges protecting soldiers from sanctions for killings and destruction in public war—a penitential privilege exempting soldiers from ecclesiastical sanction, a domestic privilege immunizing soldiers from charges of *lèse-majesté* (or treason), and an international privilege protecting soldiers from criminal charges for hostile acts in war²¹³—only the first and third are true privileges, or justifications, rendering the acts lawful.²¹⁴ The protection against charges of *lèse-majesté*, however, does not operate as a justification.²¹⁵ Instead, it demonstrates the evolution of the restrictions on licit violence during the Age of Chivalry that increasingly differentiated between the limited violence permitted by feudal law in pursuit of private rights and the full violence only permitted in a public war authorized by the sovereign.²¹⁶ By the fifteenth century, this private feudal right had been extinguished.²¹⁷

A. Roles of the Church and Warrior Elite in Society

To understand the changes that contributed to the development of the combatant privilege, it is important to reiterate the roles of the Church and the warrior aristocracy, or *milites*, in a medieval society which consisted of the clergy, the warrior nobility (the *milites*),²¹⁸ and the peasantry.²¹⁹ Forming the secular leadership, the great nobles of the era were warriors who were expected to lead their armed hosts personally, participate in battle, and expose themselves to risk.²²⁰ Forming in the late eleventh and early twelfth centuries and monopolizing the legitimate use of force, “men of high birth,

212. Nabors, *supra* note 11, at 29.

213. *Id.* Nabors's precise formulation of the third privilege is: “[A]n international privilege that protected knights from the charge of ‘brigandage’ or ‘freebooting’ when fighting in enemy territory.” *Id.* Because brigandage and freebooting were two charges brought against those fighting without state affiliation, and included acts of murder, robbery, and arson among other criminal acts which were not excused as acts of public war, Nabors's definition is correct, but is probably underinclusive because the legal protection extended to more than the crimes of brigandage or freebooting, and included all permissible acts of public war that would otherwise be a crime. *See id.*

214. *See id.*

215. *See id.*; Finlay, *supra* note 23, at 580–81.

216. KEEN, *supra* note 29, at 104, 109, 230.

217. *Id.* at 232–35.

218. Leyser, *supra* note 178, at 551, 554 (illustrating how the position of *milites*, or knight, was imbued with a certain nobility, and the warrior's belt, or *cingulum militare*, signified a “secular dignity”); *see also* STRICKLAND, *supra* note 178, at 142–44 (explaining the *milites* in more depth).

219. Leyser, *supra* note 178, at 554.

220. *Id.* at 551.

great wealth and assured positions” were bound together “with much more modest warriors, often their vassals, [by the sharing of] certain fundamental values and rituals.”²²¹ These shared values gradually formed the chivalric code that incorporated “contemporary religious and cultural ideals, . . . fragments of older Germanic traditions on warfare, manliness, and the ideal of a soldier.”²²² The origin of chivalry was regarded by medieval knights as a Roman institution.²²³ Although the role of the knight would change over the course of the Age of Chivalry, his existence as a member of a professional caste bound by a code of honor and a separate law of arms remained constant until the end of the Hundred Years War when the mounting intensity and technological changes in warfare ultimately led to the formation of national armies.²²⁴ These knights “were not only specialists in fighting but also became the predominant element in [society,] . . . [constituting] a true aristocratic group, [yet] they remained a relatively open order to which all those who were able to demonstrate their military abilities, whatever their birth or wealth, could accede.”²²⁵ In contrast, the peasantry “were more or less systemically and completely excluded from a military role.”²²⁶ The position of knight entailed entry into a brotherhood of arms, sanctified by the Church through its involvement in the dubbing ceremony, and governed by its own code of conduct—the law of arms or *jus militaire* which included the chivalric code.²²⁷ This membership provided a noble status to knights and later captains of free soldiers “for the profession of arms was itself noble,”²²⁸ with the warrior’s belt (or *cingulum militaire*) signifying this “aristocratic military status.”²²⁹ Expulsion from “the society of his princely, noble and knightly companions” was a penalty for conduct that violated honor or the law of arms, with the resulting loss of military status denoted by unbelting

221. *Id.* at 549; see also STRICKLAND, *supra* note 178, at 20, 143–44 (explaining how men of high birth held the role of *milites*).

222. JAMES TURNER JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR: A MORAL AND HISTORICAL INQUIRY 123 (1981); G.I.A.D. Draper, *The Interaction of Christianity and Chivalry in the Historical Development of the Law of War*, 5 INT’L REV. RED CROSS 3, 8 (“(The Germanic “ceremonies for initiating the youths into that select band of the better born who might have the hono[r] of bearing arms, and the oaths taken on that occasion, are the precursors of the status of the mediaeval knighthood, and the initiation ceremonies of vigil, dedication, and girding with sword, shield and helmet. This [creates an] early link between the conception of hono[r], and the right to bear arms and to undergo dedication to the warrior calling.”).

223. KEEN, *supra* note 29, at 57.

224. See Draper’s Review, *supra* note 29, at 922.

225. CONTAMINE, *supra* note 38, at 31–32.

226. *Id.* at 31; see also Leyser, *supra* note 178, at 554 (detailing how the emergence of a profession of arms reflected the division of society into three orders—the clergy, the warrior nobility, and the peasantry).

227. KEEN, *supra* note 29, at 19 (“[T]he law of arms applied in particular matters and to a particular class of persons only.”).

228. *Id.* at 227.

229. Leyser, *supra* note 178, at 553; see also M.H. Keen, *Chivalry, Nobility, and the Man-at-Arms, in WAR, LITERATURE, AND POLITICS IN THE LATE MIDDLE AGES* 40 (C.T. Allmand ed., 1976) (explaining the social status of the military aristocrats).

for infamous conduct.²³⁰ Ecclesiastical sanctions frequently determined “when and why military status and the hono[ur] of arms must be suspended and relinquished. . . . [C]ontributi[ng] to the idea that bearing arms was a dignity which imposed obligations and was therefore incompatible with certain forms of reprehensible, sinful conduct, particularly grave and almost inexpiable crimes.”²³¹

As vassals or retainers,²³² these knights served the hundreds of political units that formed at the beginning of the tenth century, all of which were autonomous and quasi-sovereign and which possessed regalian rights “to declare, pursue, and terminate war.”²³³ This multiplicity of quasi-independent political leaders and the endemic violence present in medieval society created a growing need for trained knights beyond what the nobility could provide, producing opportunity for advancement.²³⁴ In addition to owing military service to their lord if they held land in fief, trained knights could also be hired by a lord under a contract of service, a practice that became more common as the use of mounted cavalry became more effective and the need for knights increased.²³⁵ Similar to vassals, hired knights were required to provide their own horses and equipment for the task.²³⁶ At this point, “[s]oldiering . . . was regarded as a Christian profession, not [yet] a public service. . . . [and the] soldier still fought as an individual, and rights were acquired by and against him personally, and not against the side for which he fought.”²³⁷ As a result, a medieval knight was subject to a web of conflicting allegiances and contractual obligations, the foundation of which was knightly honor, for he owed duties of loyalty to both his feudal lord and his contractual commander.²³⁸ Although some knights were paid for their service, most largely relied on plunder, spoils, ransom, and *appatis* (a ransom peasants paid for immunity from hostilities) for their livelihood.²³⁹ Violation of the law of arms or of his contractual or feudal obligations—which were guaranteed by his personal honor—could result in his loss of status as a knight, and consequently in the loss of the ability to earn a living.²⁴⁰ Only membership in

230. Leyser, *supra* note 178 (detailing how the loss of the honor in arms was often accompanied with loss of the privilege of marriage in conjunction with dishonor as a soldier); see KEEN, *supra* note 29, at 55; Keen's *Treason Trials*, *supra* note 183, at 89–92; STRICKLAND, *supra* note 178, at 124 (“[V]iolation . . . might incur dishono[ur] and stigmatization.”).

231. Leyser, *supra* note 178, at 66, 70.

232. CONTAMINE, *supra* note 38, at 47.

233. *Id.* at 31, 47.

234. *Id.* at 31; Stacey, *supra* note 30, at 29.

235. See KEEN, *supra* note 29, at 20; CONTAMINE, *supra* note 38, at 47, 53; Stacey, *supra* note 30, at 29, 31.

236. Stacey, *supra* note 30.

237. KEEN, *supra* note 29, at 24.

238. *Id.* at 86–92.

239. Nicholas Wright, *Feudalism and the Hundred Years War*, 2 FEUDALISM COMP. STUD. 105, 108 (1985).

240. See KEEN, *supra* note 29, at 20, 58–59; Stacey, *supra* note 30, at 31–32.

this brotherhood of arms entitled a knight to participate in public wars, and only in those wars was property legally transferred and ransom authorized.²⁴¹

Although archers, crossbowmen, and related specialists in siege warfare and later infantrymen would increasingly come to participate in the mass armies assembled by monarchs during the Hundred Years War, licit participation in war was limited to the knightly class.²⁴² The law of arms provided no protection to the infantry, archers, and crossbowmen who were often killed outright on capture; the warfare of knights was ruthless and cruel to the commonality.²⁴³

Although property could only be transferred in public wars, knights were originally entitled to engage in private warfare against their feudal superiors in defense of feudal rights if they declared defiance (*diffidatio*) prior to engaging in hostilities.²⁴⁴ The requirement that public war could only be authorized by a prince with no secular superior “necessarily came into conflict with the old established feudal right which entitled any person of noble status to levy war” if he “had lawful cause and had defied his enemy.”²⁴⁵ Increasingly, the monarchies that emerged during the Hundred Years War used the Roman law of treason (*lèse-majesté*) to discourage this practice and reinforce their own monopoly on military force.²⁴⁶ Although this private right of war was officially supported as late as 1361, by the mid-fifteenth century it had fallen into desuetude with the rise of central monarchical authority.²⁴⁷ Because the sovereign was responsible for the protection of all private rights, private wars were prohibited on the basis that “[w]hoever defies the subject . . . defies the sovereign too.”²⁴⁸ Reinforced by canon law proscriptions against private war, self-help by private war, a long-recognized feudal right, gave way to the responsibility of the monarch as the public authority to resolve disputes involving his subjects.²⁴⁹ Thus,

241. See Stacey, *supra* note 30, at 31–32.

242. See *The Law of Ransom*, *supra* note 27, at 264.

243. *Id.* The practice of ransom depended on the honor of the ransomed knight. *Id.*; Draper, *supra* note 221, at 18; JOHNSON, *supra* note 221, at 140, 180. Prejudice by knights against the common man-at-arms resulted in their being killed rather than captured and ransomed. JOHNSON, *supra* note 221, at 140; CONTAMINE, *supra* note 38, at 31; STRICKLAND, *supra* note 178, at 176–81.

244. KEEN, *supra* note 29, at 72–73, 104, 109. Beaumanoir asserted that under the “established feudal right . . . any person of noble status” had the right to “settle their disputes by arms.” *Id.* at 72. “[H]e could fight and kill in his own name. But he could not burn and ravage or ride about the land with unfurled banners; his war was not open but muted, a *guerre couverte*.” *Id.* at 109, 230 (“[D]efiance only entitled the defier to take revenge on his opponent personally, or on his relatives and direct dependents.”); see also Stacey, *supra* note 30, at 33–34 (explaining that in such a private war, formal defiance (*diffidatio*) “formally broke the bonds of homage and fealty . . . [and] established a [formal] state of . . . war between a lord and his man”). But see STRICKLAND, *supra* note 178, at 41 (“[T]he process of *diffidatio* failed to ameliorate the legal position of insurgents in any . . . way.”).

245. KEEN, *supra* note 29, at 72, 109.

246. *Id.* at 73.

247. *Id.*; see also STRICKLAND, *supra* note 178, at 40–41 (explaining private war in the mid-1300s).

248. KEEN, *supra* note 29, at 72, 235.

249. See Draper’s *Historical Perspective*, *supra* note 20, at 136–37.

under the law of arms, men of honor, engaged in the professional business of war, could only lawfully participate in

public and open wars evidenced by formal and open acts of avowal by the prince for the troops who served him, [with] formal acts to mark the opening of the war, and formal actions on the battlefield or at the start of the siege, to show to all that . . . the Law of Arms had come into operation. All this apparatus of the mediaeval Law of Arms [was] designed to limit very strictly those who had the honour and the right to participate in ‘open and public wars.’ Acts done outside this Law of Arms, and outside public and open wars, were murders and brigandage.²⁵⁰

Although there is no explicit mention of a combatant privilege, killing and destruction during public war by this proper class of warriors were licit.²⁵¹ Military courts across Christendom could, and did, try knights for violations of the laws of arms which was governed by the *jus gentium*, the Roman law of nations that was common to all men.²⁵² Because the *jus gentium* contained elements—such as the authority to enslave captives—that Christian nations found objectionable, the civil and canon law—derived from natural law and the common law of the Roman people—provided additional limits for war among Christians and “[formed] the basis for what was . . . accepted as international law.”²⁵³ The “‘special law’ of knights” was also founded on the canon and civil law but added “particular rules binding only on persons of a particular class,” which were derived from Roman law and customary practice.²⁵⁴ Thus, the law of arms was an amalgam of canon, civil, feudal law, and “a . . . body of customary rules, observed from old times by professional soldiers in the pursuit of their calling. . . . [which] regulat[ed] the conduct of warfare within Christendom. . . . as the law of a certain privileged class, whose hereditary occupation was fighting.”²⁵⁵

As one legal historian “famously observed: ‘In the Middle Ages the Church was not a [s]tate, it was the [s]tate: the [s]tate or rather the civil authority . . . was merely the police department of the Church.’”²⁵⁶ Although this is an exaggeration of the power of the Church, the sentiment does reflect the complementary functioning of state and Church sanctions that governed

250. *Id.* at 137.

251. See KEEN, *supra* note 29, at 72–73, 104, 109. Although killings of the direct opponent were permissible in private war, destruction and burning were not. *Id.* In public war, however, killings, destruction, burning, taking of captives with the right of ransom, and spoils and plunder were permissible. *Id.* at 104.

252. *Id.* at 10.

253. *Id.* at 13–15.

254. *Id.* at 15–16.

255. *Id.* at 17, 19.

256. James Muldoon, *Crusading and Canon Law*, in PALGRAVE ADVANCES IN THE CRUSADES 39 (H. Nicholson, ed., 2005).

all aspects of everyday medieval life, including warfare.²⁵⁷ The all-encompassing nature of the medieval Church resulted in frequent clashes between ecclesiastical and secular officials over the extent of their respective jurisdictions.²⁵⁸ Nonetheless, the Church's definition of a just war—particularly its requirement that a prince authorize it—determined when soldiers could legally take prisoners, claim ransom, conduct sieges, and take spoils, among the other permissible acts of a public war.²⁵⁹ This distinction became integral to the *jus militaire*—for “only a ‘just and public war’ had legal consequences.”²⁶⁰

B. Penitential Privilege

Although Augustine had absolved soldiers from moral responsibility for killings in public and just wars under a prince's authority, earlier Church leaders “had enunciated the sinful character of warfare and of the soldierly calling”²⁶¹ with Basil the Great depriving those who killed in war of communion for three years.²⁶² Despite its acceptance of the just war doctrine in the West, these views persisted within the Church and reflected an ambivalence toward military service and its necessary shedding of blood.²⁶³ Although the early Church required a practice of public penance—involving open confession, repudiation, and the public humiliation of the sinner—by the sixth century a private process of confession to a priest under a seal of secrecy emerged, becoming “universally obligatory” by decision of the Fourth Lateran Council of 1215.²⁶⁴ Additionally, the invasions of the Visigoths and Lombards transformed Western society and increased societal violence and disorder, making ineffective the by-now almost defunct practice

257. G.I.A.D. Draper, *Penitential Discipline and Public Wars in the Middle Ages: A Mediaeval Contribution to the Development of Humanitarian Law*, 1 INT'L REV. RED CROSS 4, 17 (1961) [hereinafter *Penitential Discipline*] (“[T]he king's secular laws punished men for failing to carry out the penance enjoined by the Church. Conversely the penitentials imposed penance for breaking the secular law and extra penance for failing to pay the compensation that law required.”); JOHN T. MCNEILL & HELENA M. GAMER, *MEDIAEVAL HANDBOOKS OF PENANCE: A TRANSLATION OF THE PRINCIPAL LIBRI POENITENTIALES AND SELECTIONS FROM RELATED DOCUMENTS* 37 (2018) (“[T]he secular and ecclesiastical disciplines effectively supplemented each other.”).

258. Muldoon, *supra* note 255.

259. *The Law of Ransom*, *supra* note 27, at 269.

260. *Id.* (“Th[e] intimate tie between the ‘public war’ and the right to take prisoners and claim ransom is the bridge between the ‘just war’ theory and the law of arms.”); *Draper's Review*, *supra* note 29, at 920.

261. *Christian & War*, *supra* note 24, at 389 (noting that “[m]any of the Eastern Fathers had taken up the extreme view of Tertullian, Clement and Origen and others” on the sinfulness of military service); see also *Origin of Just War*, *supra* note 45, at 7 (describing writings of Tertullian and Origen condemning military service).

262. CONTAMINE, *supra* note 38, at 266, 266 n.28 (showing that in contrast, “St Basil stipulated 11 years of penitence for homicide”).

263. *Christian & War*, *supra* note 24, at 287.

264. MCNEILL & GAMER, *supra* note 256, at 4–14, 20–22, 28–29.

of public penance.²⁶⁵ Key to the transition from public to private penance were the penitential books that emerged from Irish and Welsh monasteries in the fifth and sixth centuries and spread throughout Western Europe by the early ninth century.²⁶⁶ The Church did not sanction these penitential books:

[But in the absence of] a solidly established hierarchy of regular [Church] councils, certain men of the Church, contributing to the inheritance of scriptural, conciliar, and monastic tradition, their own opinions, “dicta judic[ia],” or those suggested by eminent people, composed catalogues, more or less complete, of sins indicating therein the penalties that guarantee expiation and which are appropriate to the faults and the personal condition of the sinner.²⁶⁷

The use of these handbooks “[n]ot only . . . indicate a new method of penitential discipline; they also constitute a means hitherto unemployed of guiding confessors in their task.”²⁶⁸ Although contradictory and often in conflict with conciliar authority and early Christian writings, these penitentials “met the needs of a rough age. . . [and] aided the secular legislation in the suppressing of wrongs.”²⁶⁹ “[W]hen law enforcement was weak[,] the penitentials played a great part in controlling the conduct of men and women in their daily lives.”²⁷⁰ Reflecting “a systemic suspicion of warfare and killing” and disregarding Augustine’s view, the penitentials treated killings in war as a “sin requiring expiation,” although one meriting “minor” penance compared to that required for murder or other homicides.²⁷¹ Beginning as early as the seventh century, the Penitential of Theodore required that “[o]ne who slays a man by command of his lord shall keep away from the Church for forty days; and one who slays a man in public war shall do penance for forty days.”²⁷² This is in contrast to much heavier penances for other homicides, which ranged from one to seven years, and up to “a life

265. *Id.* at 22; Draper, *Penitential Discipline*, *supra* note 256, at 7 (“[P]ublic penance was not suitable to the turbulent and warlike Germanic peoples . . .”).

266. MCNEILL & GAMER, *supra* note 256, at 24. The system of penance included the Germanic notion of compensation, where the sinner made restitution to those injured by the sinner. *Penitential Discipline*, *supra* note 256, at 7.

267. *Penitential Discipline*, *supra* note 256, at 7 (quoting Fournier and le Bras’s *Histoire des Collections Canoniques en Occident Depuis les Fausses Décrétales Jusqu’au Décret de Gratien* [*History of Canonical Collections in the West from the False Decretals to Gratian’s Decree*]).

268. MCNEILL & GAMER, *supra* note 256, at 23; Stacey, *supra* note 30, at 28 (“[E]arly medieval penitentials continued to insist that killing, even in war, was murder nonetheless.”).

269. *Penitential Discipline*, *supra* note 256, at 7–9. Parts of the penitentials in accord with Church teachings found their way into influential canonical collections in the eleventh and twelfth centuries. *Id.*

270. *Id.* at 10. The penitentials dealt with “the evils with which the Church was in daily and mortal combat. These were: (1) idolatrous practices, (2) sexual irregularities, and (3) acts of violence under many forms, from homicide to beard-plucking.” *Id.* at 21.

271. *Penitential Discipline*, *supra* note 256, at 11; RUSSELL, *supra* note 24, at 31.

272. *Penitential Discipline*, *supra* note 256, at 12–13; *see also* CONTAMINE, *supra* note 38, at 266–67 (discussing the amount of penance necessary for homicide).

of exile in destitution[.]” unless remitted.²⁷³ Lacking consistency, various penitentials from the ninth to the eleventh centuries imposed varying amounts of penance for killings in a public war.²⁷⁴ These variations depended on the justness or unjustness of the war, or on the motive of the killing—with penalties ranging from twenty-one weeks, if the killing was without cause, to one year, to three periods of forty-days for three years, to three years.²⁷⁵ For example, in 820, Bishop Halitgar

introduced a distinction between killing in warfare generally, which was a sin (and for which a threeweek fast was the penalty), and killing in battle to defend either oneself or one’s close kin, which was not a sin and hence entailed no penance (though a voluntary fast might be undertaken).²⁷⁶

Nevertheless, as Draper explains “[r]ecurring with unfailing regularity in the main groupings of penitential literature, whether the paternity be Celtic, Anglo-Saxon or Visigoth, is the clear penitential rule that he who kills a man in a public war must undertake a penance of forty days duration.”²⁷⁷ Pointedly, however, the imposition of this penance was not uniform, continuing to reflect Churchly ambivalence to wartime killing.²⁷⁸ Illustrating this ambivalence, after the carnage of the Battle of Fontenoy in 841, the bishops assured the combatants

that the battle’s outcome had been a Judgement of God, and that therefore “everyone could be considered guiltless, and a *minister Dei* in this business, whether as counsellor or combatant.” [However, they cautioned] whoever had deliberately acted, through word or deed, out of anger or hatred or vainglory, was secretly to confess his secret sin and be judged according to the scale of his guilt.²⁷⁹

273. CONTAMINE, *supra* note 38, at 266–67; *Penitential Discipline*, *supra* note 256, at 12–13.

274. See generally *Penitential Discipline*, *supra* note 256, at 7 (noting the inconsistencies in penitentiaries).

275. *Id.* at 11–15 (discussing that the penance was often provided as alternatives or equivalents—where “fasting over a long period may be the equivalent of a limited number of nights spent in kneeling and reciting specific psalms”); CONTAMINE, *supra* note 38, at 267.

276. JANET L. NELSON, *THE FRANKISH WORLD, 750–900*, at 78 (1996); see also *Penitential Discipline*, *supra* note 256, at 8 (noting his Pseudo-Roman Penitential was an attempt to write a penitential based on the orthodoxy of the Church).

277. See *Penitential Discipline*, *supra* note 256, at 11; see also MAURICE KEEN, *CHIVALRY* 46 (1984) (providing more detail on the forty-day penance); Matthew Strickland, *Slaughter, Slavery or Ransom? The Impact of the Conquest on Conduct in Warfare*, in 2 *ENGLAND IN THE ELEVENTH CENTURY, PROCEEDINGS OF THE 1990 HARLAXTON SYMPOSIUM* 54 (Carola Hicks ed., 1992) (noting that in Anglo-Saxon England, prior to the Conquest penance, homicide in a public war or at the command of a legitimate ruler drew a penance of forty days, while a penance of seven, fourteen, or forty days was imposed on anyone who slays someone “if an invasion of pagans overruns the country, lay[s] churches waste, ravages the land and arouses Christian people to war”).

278. See generally *Penitential Discipline*, *supra* note 256, at 7 (discussing inconsistencies).

279. NELSON, *supra* note 275, at 83.

Echoing the distinctions made by Augustine, this judgment showed that some Church officials “thought any penance was unjustified, however light it might be, for homicide committed in a just war[.]”²⁸⁰ Despite this official endorsement of the battle, the Church nevertheless offered penance to those who had acted without the proper inward benevolent disposition.²⁸¹

Although the general penitential rule of forty days penance applied to most wars between Christians, the Church imposed *ad hoc* penitential discipline for participation in a public war at both the Battle of Soissons in 923, and again following the Battle of Hastings in 1070, because of the excessive carnage and brutality of these battles.²⁸² More than half of each army at the Battle of Soissons was killed, amounting to the death of 19,087 soldiers.²⁸³ As a result of this mass slaughter, the Church imposed “severe penitential discipline” on all those who participated in the battle, prohibiting them from “enter[ing] the walls of the [s]acred edifice until canonically reconciled; and during three years were penances to be continued, public testimonies of contrition before God and man.”²⁸⁴ Of note, the penance was imposed on both sides of the battle, regardless of the determination of the justness of the cause, and to “all those who had actually participated or been present at the Battle[.]” not just those who had killed but also those who had wounded or “merely be[en] present as a combatant.”²⁸⁵ The penitentials provided no such penalty for those who had not killed in a public war, and this sanction reflected “the response of the Church to this truly dreadful slaughter.”²⁸⁶ For G.I.A.D. Draper, this imposition of penance showed that “the traditional aversion of the ancient Christian Church to bloodshed, kept alive by the rule of 40-days penance in the long series of Penitential Books could, on singular occasions, be revived by an *ad hoc* penitential decree of a Council.”²⁸⁷

At Hastings in 1066, “[t]he battle was as decisive a victory as the carnage was appalling.”²⁸⁸ In 1070, following the final subjection of the rebellion in England, the Church similarly imposed severe penitential

280. CONTAMINE, *supra* note 38, at 268.

281. *Id.*

282. See, e.g., G.I.A.D. Draper, *Penitential Discipline and Public Wars in the Middle Ages: A Mediaeval Contribution to the Development of Humanitarian Law II. The Penitential Decrees and the Battles of Soissons and Hastings*, 2 INT’L REV. RED CROSS 63, 69 (1961) [hereinafter *Battle of Soissons and Hastings*] (discussing when *ad hoc* may apply); *Hastings & Penitential Canons*, *supra* note 177 (noting the scale of killing and wounding); CONTAMINE, *supra* note 38, at 268.

283. *Battles of Soissons and Hastings*, *supra* note 281, at 64.

284. *Id.* at 65–66. These penances included fasting on bread, water, and salt for three periods of forty days for three years in addition to two additional periods of fourteen days preceding the birth of both John the Baptist and the nativity of Christ, as well as “on every 6th day throughout the whole year unless . . . detained by sickness or by military service.” *Id.* (quoting FRANCIS PALGRAVE, *HISTORY OF NORMANDY AND ENGLAND* (1851)).

285. *Id.* at 67–68.

286. *Id.* at 64–65.

287. *Id.* at 69.

288. *Id.* at 72.

discipline on the Conqueror's army.²⁸⁹ This time, the Church imposed one year penance for each man killed, forty days for each man wounded, and, if it was unknown the number killed or wounded, then penance for one day each week for life.²⁹⁰ Those who fought for gain owed penance as for homicide, while those who fought as in public war were given a penance of three years "out of mercy."²⁹¹ In this case, the Church imposed penance only on the Conqueror's army.²⁹² Draper concludes that the sufferings of the Saxon people obviated the need for penitential discipline for them.²⁹³ The reason for the imposition solely on William's army was

the wholesale bloodshed and slaughtering, during and after the Battle, inflicted by those who [were] fighting under papal blessing in a public and just war. The matter, namely the great scandal to Christendom and the danger to souls, was too serious to be left to the traditional forty days penance . . . for killing a man in a public war. This had been no ordinary slaughter in a public war.²⁹⁴

Clearly, in the eyes of the Church this was a just and public war undertaken by William with papal approval to punish Harold as "a perjured vassal . . . who had broken his oath and seized, wickedly and perversely," the throne belonging to William.²⁹⁵ The Norman Council headed by Cardinal Hildebrand that adjudged this penance was likely the same Council that had earlier that year dealt with the removal of the Saxon bishops and reform of the Saxon Church.²⁹⁶ Draper suggests that Cardinal Hildebrand, later Pope Gregory VII (1073–85), and his brother cardinals had been shocked by the carnage at the Battle and its aftermath, and the Church "had incurred calumny" on account of it.²⁹⁷

The good name of the Church was at stake and scandal to Christendom was at risk. Besides, men had terrible deeds on their souls[, which had to be redeemed by penance.] . . . The moral proximity of the Papal Curia to the invasion venture did not allow the Church to remain indifferent to the

289. *Id.* at 72–73.

290. *Hastings & Penitential Canons*, *supra* note 177, at 295–96 (stating penance was enjoined on clerics who fought or who were armed for fighting, and archers, who did not know how many they had killed, were required to do penance for three Lents).

291. *Id.* at 295–96. Additional penalties were imposed for killing while foraging (one year), killing for plunder (three years for each man killed), among other realistic penalties dependent on the act and the motivation. *Id.* Rape and fornication was punished as normally enjoined. *Id.* Killings after the consecration of William as King resulted in a penance of seven years. *Id.*

292. *Id.* at 294–97.

293. *Id.*

294. *Id.* at 298.

295. *Id.* at 297 (illustrating that William fought under a banner blessed and provided by the Pope for use in his expedition).

296. *Id.* at 293.

297. *Id.* at 300.

excesses that occurred in the course of it. The traditional 40 days penance for killing a man in a public war was both inadequate and inappropriate. Something extraordinary had to be done and it had to be drastic and severe.²⁹⁸

Because of its public support of William's invasion and its resulting barbarity, the Church imposed severe penance "upon the victors in a 'public war' considered to be just."²⁹⁹ Draper describes this result as "rare in the history of the Church, deriving from no clear logical or juridical ideas, but moved by the collective and individual conscience of the Papal Curia."³⁰⁰ Once again, the Church's traditional aversion to bloodshed was revived to respond to excessive carnage that the forty day penance could not absolve.³⁰¹

However, "by the thirteenth century, the canonists had no hesitation about the legitimacy of war. Those who killed in the course of a properly authorized campaign were no longer required to confess their action and do penance."³⁰² What had happened in the interim to so drastically change the Church's view of military service? "By the beginning of the eleventh century, . . . ecclesiastical opinions about war and warriors began to change[.]"³⁰³ In the tenth century, the Church's "efforts . . . to reduce the violence endemic in a society headed by a warrior aristocracy" resulted in the Peace of God and Truce of God movements which limited both the times and targets of armed violence.³⁰⁴ Successful at partially limiting private warfare through these movements, further outlets for the violent activities of the warrior aristocracy became necessary if inter-Christian war was to be further reduced.³⁰⁵ Second, after 1073 in the face of Turkish threats to the Byzantine Empire, reformer Pope Gregory VII (formerly Cardinal Hildebrand) advocated the Pope's role as the leader of a Christian army to defend the Empire, and his actions "bringing war under direct ecclesiastical control [granted] the warrior a positive moral status."³⁰⁶ This expanded role for papal leadership in war soon led Pope Urban II (1088–99) to call for a crusade at the Council of Clermont in 1095 as "a legitimate war of defen[s]e . . . [against] advancing Muslims threatened the security of the Christian world."³⁰⁷ The theory of a crusade was based on a combination of the theories of just war, which "stressed the natural right of a society to defend itself against attack," and holy war, which "encompassed the use of force and violence in serving the goals of the

298. *Id.* at 299–301.

299. *Id.* at 301.

300. *Id.*

301. *See id.*

302. Muldoon, *supra* note 255, at 54.

303. *Id.* at 42.

304. *Id.*

305. *Id.* at 42–43; *Draper's Review*, *supra* note 29, at 920. *But see* STRICKLAND, *supra* note 178, at 31 (describing the minimal success of Peace of God and Truce of God requirements in limiting warfare).

306. Muldoon, *supra* note 255, at 43–44.

307. *Id.* at 44.

Church, such as defending the Church against its enemies.”³⁰⁸ At this time, however, in both just and holy wars, participants fighting for a legitimate authority were still required to do penance for their actions in war—the required forty days of penance in most cases.³⁰⁹ The crusade was similarly legitimate, but for its participant “his task was [seen as] a virtuous one for which he was granted an indulgence for the temporal punishment due for his sins, thus guaranteeing him eternal salvation.”³¹⁰ Providing a morally virtuous function for the warrior aristocracy, the crusades provided an outlet for the martial activities of the medieval warrior elite with salvation as a specific incentive.³¹¹ “The act of killing in the crusade was now not only morally acceptable, it provided a guarantee of eternal salvation as well.”³¹² Adding the concepts of the vow and pilgrimage to that of crusade, crusaders gained a number of temporal privileges in addition to the promise of eternal salvation.³¹³ The Church undertook to protect the family, property, and possessions of the crusader upon pain of excommunication for anyone who violated that protection and crusaders were exempt from lawsuits during their crusade.³¹⁴ Additionally, crusaders, as pilgrims, were entitled to be fed and housed by monasteries and other Christian institutions and were “[exempt] ‘from tolls and immun[e] from taxes[, and] from arrest or seizure.’”³¹⁵ Later expansion of crusaders’ temporal privileges included exemption from interest and, ultimately, reimbursement of interest already paid.³¹⁶

The granting of an indulgence to crusaders, accompanied by the Church-guaranteed temporal privileges, signified the Church’s new unambiguous understanding of a warrior in positive terms, “that is being a warrior was to become not simply a necessary but morally ambiguous act but rather a morally positive one, a means of winning eternal salvation.”³¹⁷ The elimination of the Church’s historic ambivalence toward killing in war brought about by the Crusades resulted in a penitential privilege as soldiers in just and public wars authorized by the prince or the Pope were no longer required to do any penance for killings in public war.³¹⁸

308. *Id.* at 42.

309. *Id.*

310. *Id.* at 42, 44 (“[B]ut the theology of the indulgence had not yet been worked out in detail[.] . . . [the language of Urban II’s call] was understood to mean that participation in the crusade ‘wiped away the blot of sin altogether and that the crusader was automatically restored to a state of spiritual innocence’ [so that] dying in battle [resulted in] being freed of the temporal punishment here on earth or in purgatory due to one’s sins.”).

311. *Id.* at 42–45.

312. *Id.* at 44.

313. *Id.* at 46.

314. *Id.* at 46; James A. Brundage, *Crusaders and Jurists: The Legal Consequences of Crusader Status*, in *LE CONCILE DE CLERMONT DE 1095 ET L’APPEL À LA CROISADE* [THE COUNCIL OF CLERMONT OF 1095 AND THE CALL TO CRUSADE] 141, 142, 146–47 (1997) [Fr.].

315. Muldoon, *supra* note 255, at 46; Brundage, *supra* note 313, at 147–48.

316. Brundage, *supra* note 313, at 147–49.

317. Muldoon, *supra* note 255, at 43.

318. Brundage, *supra* note 313, at 147–49.

However, this transition was not immediate. Even as late as 1305, Edward I issued a proclamation after fighting under the unfurled dragon banner in his Scottish campaigns.³¹⁹ In accordance with a bull issued by Pope Clement, the proclamation stated that

all persons who felt the need could apply [for absolution or dispensation] for offences committed while engaged against the king's enemies and rebels. For in pursuing these enemies and rebels, certain of the king's subjects had slain many of them by the sword and otherwise, had mutilated and beaten others, 'and wasted churches and ecclesiastical places by fire and ruin, and committed spoliation, fire and rapine, in accordance with the custom of enemy against enemy.'³²⁰

Because the English dragon banner and the French oriflamme indicated the intent to engage in unrestricted warfare, it may have been the total nature of the warfare exercised in the Scottish campaigns that led to the proclamation authorizing dispensation and absolution for wartime excesses, excesses similar to those meriting exemplary penance imposed after Soissons and Hastings.³²¹ Alternatively, it may have reflected the availability of penance to those who had acted with the wrong disposition in battle as in Fontenoy.³²² Nonetheless, by the middle to late fourteenth century, the understanding of the normative positive value of warriors and exemption from penance arising from the Crusades contributed to the understanding of a morally-based combatant privilege in modern times.³²³ Limited to public wars, soldiers were granted this exemption from penance for killing only because they fought in a war authorized by the sovereign.³²⁴

C. Treason Law

Nabors identifies the protection against domestic charges of *lèse-majesté* as one component leading to the creation of the modern combatant privilege.³²⁵ However, this protection does not operate as a privilege or justification permitting otherwise illegal acts as normatively positive, nor does it immunize criminal acts from prosecution.³²⁶ Instead, understanding the history of how charges of *lèse-majesté* during the Middle Ages were used to centralize the monopoly of legitimate violence in

319. Matthew Strickland, *A Law of Arms or a Law of Treason? Conduct in War in Edward I's Campaigns in Scotland, 1296–1307*, in *VIOLENCE IN MEDIEVAL SOCIETY* 39 (Richard W. Kaeuper ed., 2000).

320. *Id.* at 57.

321. *Id.* at 56.

322. *Id.*

323. *Id.* at 57.

324. *Id.*

325. Nabors, *supra* note 11, at 29.

326. *See id.* at 23–24.

emerging monarchies provides a deeper understanding of the contours of the modern combatant privilege.³²⁷ This practice is seen most clearly when used to penalize private war within the kingdom or against the king to eliminate the prior feudal right of resistance.³²⁸ Rather than functioning as a privilege, Nabors's domestic privilege against *lèse-majesté* is instead definitional—by the beginning of the Hundred Years War, violent acts occurring outside of a just and public war authorized by the prince were treason, or *lèse-majesté*,³²⁹ the same acts within such a war were not.

As discussed previously, in the feudal system a vassal could engage in private war against his liege if he had just cause and if he defied his lord by formally and publicly renouncing his bonds of allegiance and loyalty.³³⁰ This right of *diffidatio*, or defiance, grew out of this concept of allegiance and formalized in feudal law the prevailing Germanic law of treason in the early Middle Ages in which treason was a breach of a pledged troth (*treubruch*) between a ruler and his people.³³¹ Allegiance under such a system is “pervaded with the idea of a contractual relation which is bilateral. . . . [Where t]he idea of rights is predominant.”³³² In feudal law, it was only an *unwarranted* breach of loyalty that was treasonous.³³³ So long as a vassal was protecting his private rights and defied his liege, which terminated the bonds of allegiance and loyalty, he could engage in war against him on equal footing and the resulting hostilities were not treason.³³⁴ As S.H. Cuttler remarked,

327. *Id.* at 29.

328. *Id.* at 25–26.

329. 16 S.H. CUTTLER, *THE LAW OF TREASON AND TREASON TRIALS IN LATER MEDIEVAL FRANCE* 31 (1981).

330. KEEN, *supra* note 29, at 76, 109, 226–29. Private war was “levied to avenge personal injuries.” *Id.* at 229. In these *guerre couverte*, “a man could . . . fight and kill in his own name[, b]ut he could not burn and ravage or ride about the land with unfurled banners” (a sign of public war), and no ransom or spoils could be taken. *Id.* at 109.

331. LEAR, *supra* note 40, at 86–87; *see also id.* at 80–83 (discussing treason); FRITZ KERN, *KINGSHIP AND LAW IN THE MIDDLE AGES xvii–xviii*, xxi (S.B. Chrimes trans., Greenpoint Books 1956) (1914). Kern views the feudal right of *diffidatio*, based in contract, as arising much later than the pre-feudal right of resistance that “derives . . . from the ancient Germanic customary right to resist the monarch’s breach of the law.” KERN, *supra*. Under the Germanic concept of kingship, “[t]he king and the people did not simply co-exist as partners in a private-law contract. On the contrary, both were bound together in and to the objective legal order; both had duties to perform to God and the Law. The right of resistance, therefore, . . . was a duty . . . which the citizen owed to the objective legal order which has been disturbed by the ruler, and which is now to be restored.” *Id.*; *see also* LEAR, *supra* note 40, at 40 (explaining that the German concept of *Treubruch* is shown by the Visigothic “dictum of limited monarchy . . . which states: ‘Thou shalt be king if thou dost right; but, if thou dost not right, then shalt thou not be king.’ Here is a definite precursor of the feudal *diffidatio* whereby a vassal could withdraw his pledge and allegiance from a faithless lord.”).

332. LEAR, *supra* note 40, at 129–30.

333. CUTTLER, *supra* note 328, at 5 (“Should a vassal feel grieved, he could seek justice through rebellion by offering formal defiance (*diffidatio*, *défi*), which meant literally a withdrawal of loyalty. Thus the vassal who resorted to war in defen[s]e of what he perceived as his rights could not be guilty of treason.”).

334. *Id.*; *see also* STRICKLAND, *supra* note 178, at 231–34 (providing more explanation of treason and divided allegiance by a vassal). Maitland believed that “until the 1352 Statute of Treason, levying

“[c]learly a conception of suzerainty that legitimized rebellion in such a way could not augur well for the future of royal authority.”³³⁵

As the number of independent centers of political power diminished and were consolidated from the eighth century onwards, emerging monarchies turned to Roman law to curtail the feudal right of private war, a right already condemned by the Church, but which was supported by the prevailing concept of treason in the Germanic barbarian kingdoms.³³⁶ Roman law, found in the Visigothic Codes, the writings of Isidore of Seville, and the Theodosian and Justinian Codes, enabled these leaders to use the Roman law of treason and particularly the charge of *lèse-majesté*, which was not dependent on the breach of an oath, to increasingly support the monopolization of legal violence in the State over the next centuries.³³⁷ “The law collections which showed greatest debt to Roman law in general and to Roman treason in particular were . . . the Visigothic *Breviary*, the Burgundian *Papian*, the *Leges Alamannorum*[,] and the *Leges Baiuvariorum*.”³³⁸ The revival of study of Roman law in the twelfth century further reinforced the influence of Roman law in these new emerging States.³³⁹ Under Roman law, *diffidatio*, or renunciation of the bonds of allegiance and loyalty, provided no defense to charges of treason.³⁴⁰

Crimes against the State in Roman law, originally categorized as *perduellio*, and later as *crimen maiestatis*, *laesa maiestatis*, or *lèse-majesté*, were recognized from the beginning of the Republic.³⁴¹ *Perduellis* (literally “bad-warrior”) was used to refer to “an ‘interior enemy’—a traitor—and thus the worst possible enemy of the State,” while the term *hostis* (originally “foreigner”) referred to the exterior enemy.³⁴² *Perduellio*, “an act hostile to the state or country (*patria*), particularly from the military point of view, and involves the idea of treason and desertion[, including] all culpable dealings

arms against the king or lord did not constitute treason because homage was both contractual and revocable by the defiance or *diffidatio*.” STRICKLAND, *supra* note 178, at 231. Other scholars concluded that “rebellion was always treason.” *Id.* Additionally, the sovereign could defy his rebellious vassals to terminate any obligations to them and sanction extreme measures against them; “[b]y revoking his obligations of lordship, a lord could place his rebellious vassals both outside his protection and outside the law.” *Id.* at 234.

335. CUTTLER, *supra* note 328, at 5.

336. KEEN, *supra* note 29, at 73; CUTTLER, *supra* note 328, at 8–15; LEAR, *supra* note 40, at 83. However, “during and shortly after the invasions the Roman conception of *maiestas* attached itself to Germanic law[,]” and German kings acquired “as large an amount of Roman *maiestas* as the Germanic temperament would tolerate.” LEAR, *supra* note 40, at 83.

337. CUTTLER, *supra* note 328, at 8–27; LEAR, *supra* note 40, at 154–55.

338. BELLAMY, *supra* note 40, at 3.

339. *See id.*

340. *But see* STRICKLAND, *supra* note 178, at 40–43 (discussing that although the punishment of rebellious subjects reflected that the process of *diffidatio* did not affect the legal status of the insurgents by the twelfth century in England, it continued to serve as the formal declaration of hostilities under customary law).

341. PANDIAS MICHAEL SCHISAS, OFFENCES AGAINST THE STATE IN ROMAN LAW AND THE COURTS WHICH WERE COMPETENT TO TAKE COGNIZANCE OF THEM 3–5 (1926); LEAR, *supra* note 40, at 15.

342. LEAR, *supra* note 40, at 5–6.

with the enemy and all incriminating acts dealing injury to the state, considered in relation to an external enemy.”³⁴³ As Rome expanded, the term *perduellio* also expanded its scope to “comprehend every act inimical to the State of Rome and [to] include every violation of the bond of allegiance or of alliance.”³⁴⁴ *Perduellio* later was superseded by the term *crimen maiestatis*, which was defined as “an act or plot the goal of which was to diminish the greatness or security of the sovereign power.”³⁴⁵ Thus *maiestas* included “a substantial portion of the republican law of *perduellio* . . . adapted to the peculiar role of the emperor as the symbol and personification of the state.”³⁴⁶ In Book 48 of the *Digest of Justinian*, the following crimes were treason under Roman law:

bearing arms against the state; sedition, armed or otherwise; communicating with the enemy to the detriment of the state; giving material or financial aid to the enemy; desertion or defection; refusing to fight in war; surrendering fortified places; leading an army into an enemy ambush; raising troops or waging war without the authority of the prince; usurping magisterial authority; refusing to leave a province or hand over an army on the appointment of a successor; alienating friendly nations; obstructing the submission of an enemy or a foreign king; killing a magistrate or other person holding *imperium*; executing hostages without the authority of the prince; helping a convicted criminal to escape from prison; and defacing the consecrated statues of the prince.³⁴⁷

Although the Roman *crimen maiestatis* or crime of *lèse-majesté* emerges in the Visigothic *Breviary of Alaric* in 506 C.E., except for “a

343. *Id.* at 6–7. Treasonous acts include: desertion; *proditio* “delivery to the enemy of any city, territory, or military force belonging to Rome [which may include] the handing over of the person of a Roman citizen”; aid and comfort to the enemy, which includes “both vital information and strategic materials”; and breach of the ban of exile. *Id.*

344. SCHISAS, *supra* note 340, at 6, 13, 63. Originally overlapping, in imperial times *maiestas*/*lèse-majesté* completely absorbed *perduellio*. *Id.*; see CUTTLER, *supra* note 328, at 6–8; SCHISAS, *supra* note 340, at 12 (“After the law of Apuleius [103 B.C.E.] which established the crime of *maiestas*, *perduellio* continued to co-exist with *maiestas*, the two crimes differing only in their scope. The sphere of *maiestas* comprehended the sphere of *perduellio*, and hence included it . . .”).

345. CUTTLER, *supra* note 328, at 6 (“*Maiestas*, derived from *maior*, represented the sovereignty and *superioritas* of its bearer, which was the *populus Romanus* in republican Rome and the *princeps* [emperor] in imperial Rome.”); see also LEAR, *supra* note 40, at 15, 63 (explaining that the *Digest* of Justinian affirmed that “according to the *Law of the Twelve Tables*, he shall be punished capitally who arouses an enemy or surrenders a city to an enemy”).

346. LEAR, *supra* note 40. *Perduellio* is the Roman concept of internal treason, later incorporated into the larger category of the crime of *lèse-majesté*, which will be discussed *infra*. *Id.*

347. CUTTLER, *supra* note 328, at 7; BELLAMY, *supra* note 40; see also LEAR, *supra* note 40, at 37, 63, 110–13 (encompassing the acts of providing aid and counsel to the enemy in a war against the emperor or betraying the armies of the emperor, “wag[ing] war without the lawful consent of the emperor, or lev[ying] troops, or stir[ring] up disturbance within the army, or desert[ing] the emperor”). Mommsen includes: “criminal collusion with an enemy, *proditio* or external treason, desertion, and attacks upon the land and people (*Landesverrat*) [and] overthrow of the constitution, personal attacks upon magistrates, and other acts of sedition which are high treason (*Hochverrat*).” LEAR, *supra* note 40, at 63.

fleeting appearance in the capitularies of Charlemagne,” the *term* vanishes in the barbarian kingdoms until its reemergence after the eleventh century.³⁴⁸ In this interim period, however, this Roman concept was included in barbarian law codes using other terms³⁴⁹ and remained available to rulers to complement the traditional Germanic view of treason retained by the barbarian kingdoms.

The two concepts differed in their contrasting views of allegiance. In the traditional Germanic view of treason, the concept of allegiance focuses on the breach of a pledged troth (*infidelis*) between a ruler and his people.³⁵⁰ This allegiance “is regarded as contractual in the sense of involving bilateral rights and obligations” which rest on this mutually pledged troth,³⁵¹ a breach of which supports a right of resistance (later defiance in feudal law). In contrast, “the Roman concept of majesty involves a deferential allegiance to and the veneration of the divine monarch, or in Christian terms a monarch who is the appointed vicar of God to rule mankind.”³⁵² Under this theory, the king was no longer “but one of the folk though *primus inter pares*,” (first among equals) subject to a right of resistance, but was instead “either outside the state or a symbol of the state, and . . . repose[d] above the law.”³⁵³ These differing views on allegiance and kingship reflected their corresponding views on treason: “in the imperial law of Rome treason is a supreme violation of majesty but among the Germanic invaders it is a breach of troth, *infidelitas*, not *maiestas*.”³⁵⁴ “From the sixth to the eleventh centuries in Europe, as in England, the Roman theory of *maiestas* influenced codes which were basically Germanic but it never succeeded in supplanting the more primitive ideas of treason” under customary law.³⁵⁵ Nevertheless, as discussed below, early barbarian codes directly included the concept of *maiestas* in its provisions governing the *dux*.³⁵⁶

348. LEAR, *supra* note 40, at 37–42, 154–55 (discussing that the Isidore of Seville also included the law of *maiestas* in his references to Roman law); CUTTLER, *supra* note 328, at 8 (“[T]he Roman concept of treason had negligible influence in France from the sixth to the eleventh centuries; and it seem[ed] to have disappeared altogether after that until the reign of Louis IX [from 1226–1270].”). *But see* Stefan Esders, *Late Roman Military Law in the Bavarian Code*, CLIO@THEMIS (2016), <http://journals.openedition.org/cliothemis/1168> [<https://perma.cc/NEJ3-5JFZ>] (discussing that the *Lex Baiuvariorum* contained significant concepts of the Roman law of *lèse-majesté* in its criminal prohibitions on attacks on the Dux which were “quite evocative of the *Lex ‘Quisquis’* from 397.”); BELLAMY, *supra* note 40.

349. *See* LEAR, *supra* note 40, at 38–40; Ian Wood, *Transformation of the Military in the Late Antique West*, in *THE CIVILIAN LEGACY OF THE ROMAN ARMY* 19 (Luca Loschiavo ed., 2024).

350. *See* LEAR, *supra* note 40, at 38–40.

351. *Id.*

352. *Id.* at 37, 39, 59 (“[M]ajesty is a peculiar and original conception which bestows upon its possessor reverence (*reverentia*), respect (*honor*), and obedience or deference (*obsequium*) from all men collectively and individually.”).

353. *Id.* at 37–39.

354. *Id.* at 39.

355. BELLAMY, *supra* note 40.

356. *See* CUTTLER, *supra* note 328, at 5–6; *see also* LEAR, *supra* note 40, at 132–34 (explaining how many of the Germanic laws came from the Roman Law).

As emerging kings consolidated their power, the concept of *maiestas* became more attractive; under this theory of a divinely inspired monarch, a citizen with rights becomes a subject owing obedience to the prince, and a subject “can commit treason by his disobedience.”³⁵⁷ Although the concept of treason retained a hybrid quality, the crime of *lèse-majesté* provided a potent tool for the consolidation of central power as it emerged after 1250.³⁵⁸ Treason thus “bec[ame] bound up with the interrelated notions of sovereignty, obedience and war that, having evolved from the vigorous study and exegesis of the texts of Roman law, were the underpinnings of the later medieval French law of treason.”³⁵⁹ Similarly, the English law of treason drew on Roman law for its prohibitions on betrayal of the realm or of the army; however because the 1352 statute limited it, it was never as robust in application as its continental cousin.³⁶⁰ Enhancing its appeal, the penalty for *lèse-majesté* was the forfeiture of any property of the traitor to the king, rather than to the feudal liege for felony.³⁶¹ Confiscation to the public fisc was a sign of *imperium*, further supporting the assertion of imperial rights by emerging monarchs.³⁶² Later cases prosecuting *lèse-majesté* and its extension, *cas royaux* (royal cases), by the Parlement of Paris, would further limit the legitimacy of the feudal right of private war, particularly when judged in conjunction with other violations of the *jus militaire*.³⁶³

By the late thirteenth century, out of the study of Roman law emerges the concept of sovereignty which conceptually combines “the two notions of supreme authority and refusal to recognize a superior” (*plenitudo potestatis* and *superiorem non recognescens*).³⁶⁴ As the Pope acknowledged in 1202, because of “his independent status and plenitude of power,” the king of France was equivalent to the *princeps* (or Emperor) in Roman law, and as such, “the *crimen laesae maiestatis* could be committed against him.”³⁶⁵ Used to establish the independence of the monarch from the papacy and the Holy Roman Emperor, the phrase *rex in regno suo princeps est* (the king is the

357. CUTTLER, *supra* note 328, at 5–6; LEAR, *supra* note 40, at 132–34.

358. See CUTTLER, *supra* note 328, at 5–6; see also LEAR, *supra* note 40, at 132–34 (explaining the development of allegiance to a divine monarch).

359. CUTTLER, *supra* note 328, at 9.

360. BELLAMY, *supra* note 40, at 9 (discussing the English Great Statute of Treason of 1352); see generally ALAN BOYER & MARK NICHOLLS, *THE RISE AND FALL OF TREASON IN ENGLISH HISTORY* (1st ed. 2024) (providing more information about treason in England from 1066–1800).

361. See CUTTLER, *supra* note 328, at 120–22. But see *Keen's Treason Trials*, *supra* note 183, at 93 (explaining that in England, confiscation of lands for persons tried for military treason by the Courts of Chivalry was authorized by posthumous acts of attainder because “military courts could . . . only distraint goods and persons”).

362. KEEN, *supra* note 29, at 76.

363. CUTTLER, *supra* note 328, at 18–19; Jolantan N. Komornicka, *The Parlement of Paris and Crimes of Lese Majesty in France 1328–1350*, at 206 (2013) (Ph.D. dissertation, Boston University) (ProQuest). But see KEEN, *supra* note 29, at 81 (explaining how the King of France was the only person who could start a war in France).

364. CUTTLER, *supra* note 328, at 9.

365. *Id.* at 9–10 (quoting the decretal *Per Venerabillem*, Classo, I *glossatori*, 44, 123).

emperor in his own kingdom) also served to support a claim to sovereignty in the modern sense, by drawing on the concept of Roman *imperium* to transform “all the inhabitants of the kingdom, without exception, [to] the status of [a] subject.”³⁶⁶ Mirroring the discussion of what princes could authorize a just war, the application of the crime of *lèse-majesté*, furthered the view of monarchs as the equivalent of Roman emperors against whom rebellion was prohibited.³⁶⁷ As a result, rebellion against the king was no longer licit, even with a just cause.³⁶⁸

In France, the turning point for characterizing the levying of war against the king as treason “came in the second decade of the fourteenth century . . . [and] *diffidatio* [no] longer [afforded] legal protection.”³⁶⁹ By 1487, taking up arms against the king was considered patent treason.³⁷⁰ The consolidation of power and transition of monarchs to a state of majesty from one of a *primus inter pares* was supported by both the assertion that the crime of *lèse-majesté* could be committed against them and the practical benefits arising from the penalties of execution and forfeiture of estates to the sovereign.³⁷¹ The potential for loss of life and property as a penalty for treason, when combined with the possible martial loss to private enemies, made private warfare less attractive to competing nobles.³⁷² As the king became “a symbol of authority and continuity” representing the crown, the kingdom, and the idea of the public good, the prosecution of treason became depersonalized (and less a function of a breach of troth) and provided a necessary measure to maintain public order and to curtail the power of lesser lords to levy private war.³⁷³ This conceptualization of the king, now as a public authority focused on public good, further undermined the justification of private war in defense of private rights allowed by feudal law.³⁷⁴ Because the king as *princeps* was responsible for the maintenance of the public peace, not only was levying war against the king patent treason, “[a]ny infraction of the peace” such as private war among lesser nobles, was an indirect injury to the king “and could be assimilated to treason.”³⁷⁵

366. *Id.* at 14.

367. *See id.* at 10.

368. KEEN, *supra* note 29, at 73, 233.

369. CUTTLER, *supra* note 328.

370. *Id.* at 32; Keen’s *Treason Trials*, *supra* note 183, at 95 (discussing how banners against king with his banners unfurled is patent treason); BELLAMY, *supra* note 40, at 201.

371. *See* Keen, *supra* note 183, at 96–98; LEAR, *supra* note 40, at 39.

372. KEEN, *supra* note 29, at 74.

373. CUTTLER, *supra* note 328, at 10–11, 15.

374. KEEN, *supra* note 29, at 73 (discussing how the growth of public authority accompanied claims to precedence of the public weal over all private rights).

375. CUTTLER, *supra* note 328, at 19, 32; KEEN, *supra* note 29, at 73–74 (“[T]he growth and centralization of the power of the secular monarchies. . . . [C]ut at the classic excuse for feudal war, ‘*déni de justice*’. Denial of justice worked very well as an excuse for war, as long as all rights were regarded as private rights, but the concept of a public authority introduced a third party into the dispute.”).

By the outbreak of the Hundred Years War at the beginning of the fourteenth century, the right to private war was increasingly questioned, but continued into the fifteenth century under specific circumstances even as emerging monarchies used the law of treason to proscribe its use.³⁷⁶ “[A]lthough private war was formally proscribed as treasonable, particularly during time of general war, it could in fact be tolerated provided” the dispute was lawful, there had been a denial of justice, and the conflict was limited to physical combat between the parties in conflict.³⁷⁷ Significantly limiting this lingering right was the restriction that the disputants could not commit acts of public war; that would be treasonable because it was an arrogation of sovereignty as only the king could authorize a public war.³⁷⁸ These acts of public war included the display of banners, firing a cannon at a siege, taking spoil, holding prisoners to ransom, and the wasting of land.³⁷⁹ Increasingly, monarchs added specific prohibitions concerning the dying right of private war. During the Hundred Year War, “a long series of ordinances of the French Kings [not entirely successfully] forbade all private defiance while the kingdom was at war.”³⁸⁰

Prior to the fourteenth century, monarchs in both England and France had little success in restricting or prohibiting private feudal or seigniorial warfare. Nobles—princes and barons—continued to assert their traditional customary rights to wage war to remedy a denial of justice or violation of private right; and in some cases great secular princes with secular superiors engaged in “*guerre de prince*.”³⁸¹ By taking advantage of the theoretical uncertainty that existed from the twelfth to the fourteenth centuries over what princes could authorize a public war, these *guerre de prince* could be treated as “public wars in which all rights allowed under the law of arms would apply, because they were ‘open wars’, disrupting time of peace in a way which the ‘covered wars’ of the feudality did not.”³⁸² With the advent of the Hundred Years War, “the reality of a full-scale royal war may have encouraged a renewed effort to limit noble feuding” by treating private war as treasonous.³⁸³ As a result, by the beginning of the fourteenth century, charges of *lèse-majesté* were being used in France and England to not only prohibit private warfare but also to characterize the crime of levying war

376. See *supra* note 32 (discussing the law of war’s transition during the Hundred Years War).

377. CUTTLER, *supra* note 328, at 32.

378. *Id.*

379. *Id.* at 31.

380. KEEN, *supra* note 29, at 74; see generally Justine Firnhaber-Baker, *From God’s Peace to the King’s Order: Late Medieval Limitations on Non-Royal Warfare*, in 23 *ESSAYS IN MEDIEVAL STUDIES* 19 (2006) (exploring ordinances French kings issued prohibiting non-sovereign warfare).

381. KEEN, *supra* note 29, at 81.

382. *Id.* (discussing the uncertainty on what princes could authorize a public war during the twelfth to fourteenth centuries “[i]n disputes arising out of such wars only persons with military jurisdiction could judge” whether the rules of public war applied.).

383. Komornicka, *supra* note 362, at 231.

against the king as high treason.³⁸⁴ Prior to the fourteenth century, levying war against the king was not necessarily treasonous if done in accordance with the rules of feudal defiance, and in some cases if done in the absence of the king's person on the battlefield.³⁸⁵

"In fourteenth-century French society, seigniorial war was still regarded by many to be a customary right that the monarchy could not or should not abridge."³⁸⁶ This began to change with the reign of Charles IV (1322–1328). As part of his efforts to enlarge royal power, Charles IV tasked royal officials to investigate and arbitrate all seigniorial wars, reporting to the Parlement on their results.³⁸⁷ These efforts were seen by the nobility as an encroachment of their rights, often leading to revolt.³⁸⁸ Nonetheless, through the involvement of the Parlement, these efforts began to curtail the rights of private warfare through the use of charges of *lèse majesté*.³⁸⁹ Although the Parlement of Paris noted "that engaging in seigniorial war was prohibited and infringed on the king's majesty," in most cases it attacked the right of private warfare obliquely.³⁹⁰ "[T]o enforce the idea that seigniorial war was a crime of lese majesty, . . . [the Parlement] avoid[ed] the terminology of war and focus[ed] on the attendant actions and their existence as crimes," by avoiding the phrase "to make war" for all but the highest nobles, and instead charging "the carrying of arms, acts of pillage, and [violating] the royal injunction" on private war.³⁹¹ Additionally it used charges of a violation of an *asseurement*—where "the king stood as guarantor of a [truce] between two" warring parties—as a form of *lèse-majesté* to punish those engaging in private war even when authorized by custom.³⁹² As a result, the Parlement successfully imposed royal power in the face of deeply entrenched customary rights, significantly limiting the legitimacy of private warfare.³⁹³ Nevertheless, the division of opinion over the validity of private or seigniorial war in France continued to the end of the fourteenth century, with noted writers coming to diametrically opposed positions.³⁹⁴

384. KEEN, *supra* note 29, at 73, 233; CUTTLER, *supra* note 328.

385. KEEN, *supra* note 29, at 89–90.

386. Komornicka, *supra* note 362, at 216.

387. See *id.* at 228–29, 231 (describing how the arbitration was designed to create a mutual truce guaranteed by the king (an *asseurement*), thus imposing royal control over customary seigniorial violence).

388. *Id.*

389. See *id.*

390. *Id.* at 213.

391. *Id.* at 215, 217.

392. *Id.* at 229–32.

393. *Id.*

394. *Id.* at 228 ("Jean Gerson (1363–1429) wrote that 'he who wages war without the prince's permission is guilty of treason,' whereas his contemporary, Count Gérard de Pardiac (fl. 1390–1420), wrote that 'it is allowed to the nobles of the land to wage war with each other, without asking the king's permission.'").

Levying war against the king, however, was treason because it

compassed at least implicitly the destruction of the king or the kingdom[,] . . . was a violation of the allegiance that a subject owed to his king[,] [a]nd . . . was an arrogation of sovereignty, for the display of banners, the firing of cannon at a siege, the taking of spoil, the holding of prisoners to ransom, the wasting of land, were all part of public war.³⁹⁵

Although “[t]he levying of war does not seem to have been a treason during the reign of Philippe III [1270–1285], nor during the first twenty years of Philippe IV’s rule” (1285–1314), after 1305, the French King, referring to Robert de Bethune, Count of Flangers, saw those “who ‘have gone into rebellion against us and are waging war’, [as] committing treason.”³⁹⁶ Numerous examples in the late fourteenth and fifteenth century demonstrate that warfare against the king or kingdom was treason and that *diffidatio* no longer provided legal protection.³⁹⁷ Thus, rebellion and direct war against the king were treasonous, as was private war which was “an indirect affront to him, for his authority could be undermined by unchecked disruptions of public order.”³⁹⁸

As stated before, during this transition period, private war was tolerated only if based on a denial of justice, “limited to physical combat between the parties in conflict” and did not involve public acts of war.³⁹⁹ Because their commission was an arrogation of sovereignty by the private party, any acts of public war committed during a private war were treasonous, and confiscation of property proved useful in punishing those flouting the crown’s authority.⁴⁰⁰ In France, charges of *lèse-majesté* also applied to free-booters and *routiers* on roughly the same grounds because of their “cumulation of crimes *ad modum hostilitatis*.”⁴⁰¹ Thus, in both private war and free-bootery committing acts of public war without the sovereign’s authority was an arrogation of sovereignty and *lèse majesté*.⁴⁰² As a result, “[i]llicit public and private war and the activities of the free-booters were encompassed by the laws of war.”⁴⁰³ In France, “[t]reason under the law of

395. CUTTLER, *supra* note 328.

396. *Id.*

397. *Id.* (detailing that charges of *lèse majesté*/treason were levied against adherents of Charles the Bad after 1356, against Jean de Monfort, Duke of Brittany in the late 1370s, against Charles the Bold in 1465, and against the Prince of Orange in 1487).

398. *Id.* at 32.

399. *Id.*

400. *Id.* at 32–33 (providing examples of cases before the Parlement of Paris for taking spoil and prisoners during private war and riding “*cum armis et vexillis patentibus ad modum guerre*” (with arms and open (unfurled) banners in the manner of war)).

401. *Id.* at 33–34.

402. See Keen’s *Treason Trials*, *supra* note 183, at 97 (“Pillaging and taking prisoners in a war other than that of a prince was therefore not only public robbery but also *lèse majesté*, since the commander of the troops in question was arrogating to himself royal power.”).

403. CUTTLER, *supra* note 328, at 34.

war was understood as either deliberately hindering the war effort or accroaching the king's authority and power. Fundamentally, it concerned betraying the king and perpetrating an act of illegitimate violence."⁴⁰⁴ Echoing Roman law, military crimes, such as consorting in arms with the enemy, "desertion, particularly during the heat of battle," encouraging desertion, being absent without leave, or failing to "respond to the *ban* and *arrière-ban*," could also be considered treason.⁴⁰⁵ Those who waged war against the king committed treason because they breached their allegiance, implicitly imaged the king's death, and "compass[ed] the destruction of both the kingdom and the king."⁴⁰⁶ Acts harmful to the State (*perduellio*) or harming the king's majesty (*lèse majesté*), and "bear[ing] arms against the king himself w[ere] patent treason."⁴⁰⁷ S.H. Cuttler provides the example of "twenty-five defenders of the castle of Saint-Maixent [who] were executed in April 1440 after it fell to the royal forces that were led by Charles VII in person."⁴⁰⁸ Although this concept of treason involved both the Roman and Germanic concepts of treason, increasingly it was the Roman concept of treason with its focus on the impersonal attack on or insult to sovereignty that was used to reinforce monarchical power.⁴⁰⁹

Similar developments in England by the late fourteenth century resulted in the conclusion that while it was not "treason to defy a private person, to levy war against the king in his realm was so regarded, for the king was not a private person, but public majesty."⁴¹⁰ The transition of private war as a legitimate feudal right to being considered treason or *lèse-majesté* followed the same trajectory in England as it did in France.⁴¹¹ "It was Edward I who first defined the crime of levying war against the king and who first classified it as high treason."⁴¹² Prior to his reign (1272–1307), levying war against the king had been treated with significant clemency, due to the combined effect of *diffidatio* under feudal law, which severed the bonds of fealty and allegiance between lord and vassal, and of "the position of the kings of England as payers of homage to the kings of France."⁴¹³ J.G. Bellamy credits the Scottish war as having "crystallized Edward's theories and practices in

404. Komornicka, *supra* note 362, at 243.

405. CUTTLER, *supra* note 328, at 35. The *arrière-ban* was a proclamation of the king of duke summoning his vassals (and their vassals) to war, while the *ban* was a broader proclamation issued to call vassals and subjects to arms in times of war or conflict, compelling those who held feudal obligations to provide military service. *arrière-ban*, MERRIAM-WEBSTER DICTIONARY (12th ed., 2006).

406. CUTTLER, *supra* note 328, at 34.

407. *Id.*

408. *Id.*

409. *See id.*

410. KEEN, *supra* note 29, at 233 (also citing the 1352 English Statute of Treason).

411. BELLAMY, *supra* note 40, at 56–57.

412. *Id.*; KEEN, *supra* note 29, at 73 n.1 ("[S]ignificantly, levying war, even against the King, was seldom construed as High Treason before the reign of Edward I.").

413. BELLAMY, *supra* note 40, at 23.

dealing with rebellion.”⁴¹⁴ In a 1301 letter to Pope Boniface, Edward charged that the Scottish king John Balliol “had gone against [his] homage and fealty [which] was common form,” but then described the rebellion using “the term lese-majesty . . . [which] was a distinct novelty.”⁴¹⁵ In the letter Edward I omitted the fact that Balliol had formally renounced his fealty in April 1296 prior to the war.⁴¹⁶ In the trial of William Wallace in 1305, Edward determined that Wallace had feloniously plotted the king’s death, attempted the annulment and weakening of his crown and royal dignity, and bore the banner against his lawful lord in mortal war, riding with banners displayed.⁴¹⁷ As “a liegeman appearing against his king in arms under banners displayed [Wallace] was clearly levying war upon him, and could be taken as a traitor.”⁴¹⁸ “The display of banners . . . had thus considerable legal significance, because deeds done in these circumstances were performed ‘*in actu belli*.’ It could therefore be used . . . to prove that public war had been levied by unauthorized persons.”⁴¹⁹ Because Wallace had not offered homage to Edward he was not accused of having broken or withdrawn from his fealty, but was instead accused of being unmindful of it.⁴²⁰ Despite earlier contrary practice on the continent, “England was different from most other European states [in that f]ormal defiance of the king on the part of the rebels was rarely held to excuse some form of judicial penalty if the insurrection failed.”⁴²¹ Several other trials in the reigns of Edward II (1307–1327) and Henry IV (1399–1413) reinforce the English practice of trying those who levy war against the king as traitors before military tribunals often on the king’s record, including the trials of Thomas, Earl of Lancaster in 1322, Andrew de Hareclay, Earl of Carlisle in 1323, Henry de Boynton in 1405, and of Sir Ralph

414. *Id.* at 31.

415. *Id.* at 31–32. Edward also “added that the Scottish king and his supporters were considered by the English magnates to have committed war under the customs of the kingdom and that he felt justified in using his might to crush the rebellion of these notorious traitors,” continuing the practice of reputing or declaring treason on notoriety. *Id.*

416. *Id.* at 32.

417. *Id.* at 35 (translated from Latin to English).

418. *Keen’s Treason Trials*, *supra* note 183, at 95–96 (explaining that the King’s reputing of treason was an emerging procedure authorizing a finding of treason on the King’s record for open and notorious battlefield treason such as levying war against the King in his realm; this procedure became routine and situated in the Courts of Chivalry by the fifteenth century).

419. KEEN, *supra* note 29, at 106–107 (explaining that the usual sign of a public or open “war was the display of the banner of the prince in whose name it was fought. Once his banner was unfurled, he had given a challenge to combat and a state of war legally existed. . . . [I]f the royal banner was displayed there would be a state of open war in the realm and the subjects’ protection through the common law in part suspended, . . . [a]fter banners were displayed, any opponent (provided he was not a subject) was free to act as in public war”).

420. BELLAMY, *supra* note 40 at 36. Edward argued that “Scotland had been conquered because Balliol had forfeited it by rebellion and that the king had established his peace, installed his ministers and taken the homage and fealty of the leaders of the community.” *Id.* Thus, Edward considered Wallace his subject when he committed his warlike acts. *Id.*

421. *Id.* at 11.

Grey in 1464.⁴²² Their sentences to gruesome deaths were typical for traitors but also included the degradation of knightly honors because “degradation or dishonour was a regular military penalty for treason” harkening back to the loss of the *cingulum militare* in earlier times as a penalty for infamous behavior.⁴²³

Commanders of free companies were similarly executed for *lèse-majesté* for having pillaged and taken “prisoners in a war other than that of a prince . . . [and that as a result the commander] was arrogating to himself royal power.”⁴²⁴ These free companies, although necessary for a sovereign’s waging of war prior to the establishment of standing armies, became a menace to the kingdom when not employed during periods of public war.⁴²⁵ As one example of royal condemnation of these *routiers* in January 1442:

Charles VII issued a proclamation that reiterated the principle of the *ordonnance* of 2 November 1439[, that “n]o one . . . can or ought to assemble men and take to arms, nor maintain men-at-arms . . . without our authority . . . and if anyone does the contrary, he becomes a traitor . . . and an enemy of the public weal.”⁴²⁶

Reinforcing the Church’s condemnation of the *routiers* and free companies, states began to “impose[] the full penalties on those who had waged illicit war.”⁴²⁷ Thus, *lèse-majesté* was increasingly used to punish those who fought in wars unauthorized by a sovereign prince or those who had acted against or levied war against the king in his realm.⁴²⁸

Charges of *lèse majesté*, as both a domestic and an international crime (discussed below), thus allowed centralizing monarchies to monopolize the legitimate use of violence, gradually extinguishing the traditional right of feudal defiance and requiring those using violence be agents of the king as members of new standing armies.⁴²⁹ Reinforcing the monopolization of legitimate violence by the state, “Charles VII’s ordinance of 1439 virtually founded the French royal army,” and “[b]y the 1420s the English in France were becoming anxious to ensure that every man-at-arms appeared on some official muster roll.”⁴³⁰ “[B]y the sixteenth century[,] wars were only deemed just [if] waged by a legitimate government,” and by its end those “who went

422. Keen’s *Treason Trials*, *supra* note 183, at 85, 88–89, 102.

423. *Id.* at 89–92.

424. *Id.* at 97 (using examples such as Mérigot Marchés and William Boulemer); *see also* CUTTLER, *supra* note 328, at 33–34 (using the example of Mérigot Marchés).

425. KEEN, *supra* note 29, at 95–100; CUTTLER, *supra* note 328, at 197–201.

426. CUTTLER, *supra* note 328, at 197–98. Roman law forbade the raising of troops or waging war without the authority of the prince. *Id.* at 7.

427. KEEN, *supra* note 29, at 96–98 (listing Pierre De Saquainville, Enguerrand de Bournonville, Sir Henry Boynton, the Bastard of Bourbon, and Mérigot Marchés).

428. *See id.*

429. *See id.*

430. *See id.* at 96.

to war without government warrant faced condemnation as rebels, traitors, or enemies of the public peace and, when defeated, suffered draconian penalties.”⁴³¹ Although Nabors characterizes the protections against charges of *lèse-majesté* as a domestic privilege, it is more useful to understand these protections as definitional and reflecting the gradual extension of centralized monarchical power and legitimation of violence under the state’s authority.⁴³² Its use to curtail and then eliminate private feudal/seigniorial or illicit private warfare reinforced the Church’s view that wars were only just (and therefore legal) when authorized by a sovereign prince, and only those authorized to fight by that sovereign authority were legitimate combatants.⁴³³ All others could be charged with treason or *lèse-majesté* not only under domestic law but under the universal law of arms.⁴³⁴

D. The “International” Privilege

Nabors’s third privilege is the international privilege “that protected knights from the charge of ‘brigandage’ or ‘freebooting’ when fighting in enemy territory,” but which in light of existing custom also included protection against enemy charges of murder and other war-related crimes.⁴³⁵ Two sides of the same coin, the international law of arms delineated both the permissible and the prohibited. For example, not only was treason or *lèse-majesté* a crime under the domestic law of the realm, but it was also a violation of the international law of arms:

The display of banners, or the firing of cannon at a siege, was a recognized sign of open war, and therefore constituted evidence that a traitor had levied war against the king in his realm, which was defined as a treason by the [English] statute of 1352. The law of arms, however, was not governed by statute; it was an international law, observed ‘entre gens de guerre’, and was founded in the canon and civil laws. Within the realm, of course, statute also applied, but it is important to note that the action in question was a treason under international military law as well. According to the canon and civil laws, the right to levy open war was the preserve of the sovereign prince, who was ‘empereur en son roialme’ [emperor in his realm], and for a subject or any other without advowal to infringe this right constituted the crime of *lèse majesté*, because it was an [encroachment] on royal power.⁴³⁶

431. Geoffrey Parker, *Early Modern Europe*, in *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* 40, 42 (Michael Howard et al. eds., 1994).

432. KEEN, *supra* note 29, at 96–98.

433. *See id.*

434. *Keen’s Treason Trials*, *supra* note 183, at 97.

435. Nabors, *supra* note 11, at 29.

436. *Keen’s Treason Trials*, *supra* note 183, at 96 (citations omitted).

The laws of treason/*lèse-majesté*, which we would think of as domestic crimes, were important violations of the international law of arms, covering treason against the king in his realm (*lèse-majesté*).⁴³⁷ More broadly, treason against a knight's faith and his knighthood was viewed as universal in nature and incorporated much of the *jus militaire*.⁴³⁸ Military tribunals adjudicated two types of cases in the late Middle Ages as violations of the law of arms, both of which included the penalty of "degradation from all knightly honours."⁴³⁹ First were cases in which a knight committed *lèse-majesté* against the king (either by fighting against the king in his realm or by fighting without the avowal of a prince) as discussed above; and second were cases, hewing back to the older form of Germanic treason, in which "the breach of any solemn personal oath could be regarded as treason of a sort; hence the breach of any promise made on a soldier's honour could be a treason to his knighthood."⁴⁴⁰ Both variants demonstrate the international nature of the law of arms enforceable by all sovereigns, albeit in a time when the modern division between national and international laws did not exist.⁴⁴¹

Addressing the trial of *lèse-majesté* by military tribunals, M. H. Keen provides multiple examples where the opposing army's court of chivalry tried those committing treason against their sovereign for their crimes, because "[w]ar was fought by knights, and in war the rules of hono[r] applied universally, binding princes and men at arms equally. Offences against these rules could therefore be tried by anyone who had a right to try the offences of soldiers, whatever the offender's allegiance."⁴⁴² The most iconic was Henry V's trial of Jean d'Angennes for treason for taking money for the surrender of the town of Cherbourg to Henry himself.⁴⁴³ These trials of enemy knights for treason against their own king illustrate the universal and supranational nature of the law of arms in the late Middle Ages and the importance of knightly honor within the profession of arms.⁴⁴⁴

The second type of fidelity-based treason to knighthood further demonstrates the universal nature of the law of arms, which applied to all knights across Christendom during the Middle Ages; it can be seen as extending back to the Roman concept of a violation of the *sacramentum*, or military oath.⁴⁴⁵ In the twelfth century, "it was honour rather than any binding power of law which proved the overriding factor in adherence to custom between warriors[.]" and only in the fourteenth and fifteenth centuries did the

437. *Id.* at 96–97.

438. See KEEN, *supra* note 29, at 45–59.

439. *Id.* at 54.

440. *Id.* at 54.

441. See *id.* at 23, 58.

442. *Id.* at 53 (discussing the cases of de Crèveœur, Barbasan, De Selby, and d'Angennes).

443. *Id.* at 46–47.

444. STRICKLAND, *supra* note 178, at 48–49.

445. See Wood, *supra* note 348, at 11.

courts of chivalry emerge as an enforcement mechanism.⁴⁴⁶ The law of arms, or *jus militaire*, arose from the *jus gentium* of Roman law, which tribunals interpreted in the Middle Ages to apply to the political situation after the fall of the Roman Empire.⁴⁴⁷ Tribunals interpreted *jus gentium* in two different ways: first, as the common law of the Roman peoples (all who lived under the jurisdiction of the Roman Church), and second, as a product of the Roman law of nations that applied to all men based on natural law and reason.⁴⁴⁸ To form the *jus militaire*, this *jus gentium* fused in the thirteenth century with canon law and Roman civil law, which included feudal law and customs, and “a powerful body of custom relating to behaviour in war” that predated the eleventh century.⁴⁴⁹ By the fourteenth century this martial custom applied across cultural and political boundaries,⁴⁵⁰ with certain common customs deriving from the West’s interaction with Muslim adversaries⁴⁵¹ and others from common prior Carolingian custom.⁴⁵² And by the thirteenth century, custom, particularly these customs, had the force of law.⁴⁵³ Universal within

446. STRICKLAND, *supra* note 178, at 48–49.

447. See *Draper’s Review*, *supra* note 29, at 919–20.

448. See *id.*; KEEN, *supra* note 29, at 10–22.

449. STRICKLAND, *supra* note 178, at 40. Additionally, “[t]he ‘special law’ of knights was the law of arms, and it was founded in the canon and civil laws.” KEEN, *supra* note 29, at 15. Matters were “decided by reference to customary practice.” *Id.* at 16. This customary law included feudal law and the customs and usages observed by men-at-arms, which formed the *jus armorum* as a branch of *jus gentium* that “regulat[ed] the conduct of warfare within Christendom.” *Id.* at 17. “[F]eudal law was included in the civil law.” *Draper’s Review*, *supra* note 29, at 919.

450. Keen, *supra* note 183, at 103. The origin of long-standing usages regulating the conduct of war was obscure, but rules “governing truce, ransom[,] and the prosecution of siege . . . were hardly innovations in the eleventh century when they emerge[d] from the more plentiful and detailed sources.” STRICKLAND, *supra* note 178, at 44. “[B]y the end of the twelfth century[,] there was as yet no ‘law of arms’ that had the character of international law. This could only come into being once customary, canon[,] and civil law had achieved greater fusion.” *Id.* at 47. “The regional and customary nature of the law of war prior to the fourteenth century meant that few courts exercised jurisdiction over disputes between members of rival armies.” Jasonne Grabher O’Brien, *The Ius Commune Law of War: Giovanni Da Legnano’s ‘De bello’ and the Medieval Origins of International Public Law* 128–29 (2001) (Ph.D. dissertation, University of Kansas) (ProQuest). By 1360 “the period when Giovanni wrote *De bello*[,] we see the creation of new courts and the regularization of existing courts that dealt with military cases concerning litigants from the same army and litigants from opposing sides. Most of these courts were established and controlled by a territorial monarch, although other powers had them as well.” *Id.* at 129.

451. STRICKLAND, *supra* note 178, at 43–45. “[These customs] enjoyed a wide currency both within and between the territorial principalities of eleventh- and twelfth-century France, and in the Anglo-Norman *regnum*. Aspects of such customs might cross cultural as well as political barriers.” *Id.* For example, William the Conqueror applied it “to his Anglo-Saxon subjects . . . [and] in Frankish-Muslim relations in Outremer.” *Id.* at 45; see also *The Law of Ransom*, *supra* note 27, at 265–66 (discussing the medieval origins of ransom practices).

452. Mark Hagger, *Secular Law and Custom in Ducal Normandy, c. 1000-1144*, 85 *SPECULUM* 827, 851–52 (2010). In Normandy in the 1090s, “[m]any of these customs appear to be based on Carolingian laws, which, like the offense of lèse-majesté, had subsequently become customs in [later times].” *Id.* at 851. “The right to pardon was another custom that the dukes had inherited from their Carolingian predecessors.” *Id.* at 851–52.

453. STRICKLAND, *supra* note 178, at 43–45, 54. Warriors “were conscious of a number of usages regulating the conduct of war and believed many of them to be of long standing[,]” predating the eleventh century. *Id.* at 44; Hagger, *supra* note 451, at 832, 849. According to Isidore of Seville’s *Etymologies*,

Christendom, the law of arms/*jus armorum* was not international in the modern sense.⁴⁵⁴ Nonetheless Western military tribunals applied it universally (and, on occasion, between Christian armies and their Muslim opponents).⁴⁵⁵ This customary law became increasingly formalized in the thirteenth and fourteenth centuries as custom fused more fully with canon and civil law.⁴⁵⁶

As Keen explains:

The law of arms was an international law, but it was not universal international law, for it applied only to wars between 'nations' which were part of the 'Roman people'. Its foundations were in the canon law of the Roman Church, and the civil law of the Roman Empire. But by the fourteenth century the secular authority of the Roman Empire was no longer regarded as vested in a single authority: kings and princes had parted it between them, and ruled each as 'emperor in the realm'. Anyone who had no secular sovereign, could claim imperial authority. . . . A *magister militum*, in order to act judicially under Roman law, had to be appointed on imperial authority. The Constable of any sovereign prince, therefore, was a *magister militum*, with public authority among the Roman people, for the Roman people remained one, even though secular authority was divided. As such, he could do justice wherever Roman military law ran, that is throughout Christendom. . . . [A]ny soldier serving any sovereign was a soldier of the Roman army, and this at once gave him a certain social dignity, and bound him to certain rules of honour. He could be held responsible for upholding this dignity, and observing these rules, by any officer with Roman authority. Thus a constable, who derived his power from the commission of a prince exercising imperial rights, could consider any matter arising out of war, wheresoever it was done and by whomsoever, because war was governed in Christian society by universal rules, the Roman 'discipline of chivalry.' Just as a prince's patent of nobility made a man 'chivalrous' and entitled him to the privileges of a noble not only in his own land but throughout Christendom, so a prince's commission to judge matters of 'knights and war' gave his *magister militum* power to judge soldiers of any allegiance for dishonorable actions which offended against the code of knights.⁴⁵⁷

which was known in the Middle Ages, "all jurisprudence (*ius*) consists of laws and customs. A law is a written statute. A custom is usage tested by age, or unwritten law, for law is named from reading because it is written. . . . '[A] law is a rule for a people' and . . . 'every law either allows something . . . or it forbids . . . or it prescribes a punishment.'" *Id.* at 832. "[C]ustom (*mos*) is a longstanding usage drawn . . . from moral habits. Customary law (*consuetudo*) is a certain system of justice established by moral habits, which is taken as law when a law is lacking." *Id.* at 849.

454. See KEEN, *supra* note 29, 57–58.

455. See STRICKLAND, *supra* note 178, at 44–45 (describing how the laws of war often governed relations between Christian and Muslim adversaries).

456. *Id.* at 47.

457. KEEN, *supra* note 29, at 57–59 (citations omitted) The *magister militum* is seen in Bonet's *Tree of Battles* and John of Legnano's *Tractatus*, but its ultimate source is Vegetius. See *id.* at 57 n.1. "[The] constables and marshals . . . were the lineal descendants of the Roman *magistri militum*." *Id.* at 56–57.

Reflecting the medieval view of a soldier “as a member of a Christian profession[,]” rather than a “member of a specific military force,” medieval knights viewed “the chief function of military courts to be . . . the enforcement of the ‘discipline of chivalry,’” rather than “the enforcement of discipline internally in armies.”⁴⁵⁸ The “ascription of the customs of chivalry in general to Roman origins” and their belief that “‘the valour and warlike skill of the votaries of chivalry’ . . . had won the Romans the *imperium* of the world” contributed to the concept of military constables and tribunals as responsible for “ensur[ing] that these rules [of chivalry and honor] were observed by all.”⁴⁵⁹

This conceptualization explains the universal jurisdiction of medieval military courts to judge violations of the law of arms that included not only violations of the customs and usages of war, but also *lèse-majesté* and the cases involving violations of a knight’s treason to his honor or his knighthood.⁴⁶⁰ Thus, by the fourteenth and fifteenth centuries it becomes possible to “speak of ‘laws of war’ or of a ‘law of arms’ in a precise juridical sense” after “[t]he formative influences of Roman law . . . fused with custom to produce an international *ius armorum*.”⁴⁶¹ Thus, military courts had universal jurisdiction to judge the alleged treason of the opponent based on a breach of honor and fidelity, as well *lèse-majesté* (even when committed against their enemy), and other violations of the laws and customs of war which operated as a universal law applicable across Christendom.⁴⁶² Conversely, the international law of war also delineated which combatant actions were licit and protected.⁴⁶³

Writing in 1283, Philippe de Beaumanoir attempted to articulate the customs of the Beauvais region of France and included several relating to the *jus militaire* that would emerge more fully in the fourteenth and fifteenth centuries as international law. Significant to the question of the combatant privilege, Beaumanoir described the consequences should he be injured or killed after having joined in a war: “[I]n such a case I would join the war by my act, so that if harm came to me afterwards from the adverse party, . . . he

458. *Id.* at 56. However, the Constable and Marshal, as representatives of the prince, did enforce discipline within the hosts, through courts that they assembled. *See id.* at 26–27. However, because these Constable courts lost jurisdiction when the campaign ended and the host disbanded, Courts of Chivalry arose to provide a permanent jurisdiction for martial matters. *See id.* at 27–28.

459. *Id.* at 57, 59; *see Persecuting Latrones*, *supra* note 80, at 198, 213 (explaining that the Franks apparently took over a military hierarchy from the Roman Army to organize Bavaria, which included subordinate to the Merovingian king, the duke/*dux*, the count/*comes*, the hundredman/*centurio*, and the ten-man/*decanus*, and the office of the *magister militum* to judge violations).

460. KEEN, *supra* note 29, at 50–53 (noting an example of Marshal d’Audreham and the Black Prince in which fidelity to an oath given in exchange for ransom was the central issue tried by a court chosen from the prince’s host).

461. STRICKLAND, *supra* note 178, at 47, 53 (noting that this fusion included civil, canon, and customary law).

462. KEEN, *supra* note 29, at 54–55.

463. *Id.* at 57–58.

could raise as a defense the right of war.”⁴⁶⁴ For Beaumanoir, killing someone else was a serious offense meriting a harsh and cruel punishment, “such as drawing . . . and hanging,” but it could not be punished if committed in self-defense or when someone kills his enemy “i[n] a state of private war between gentlemen.”⁴⁶⁵ Implicit in Beaumanoir’s recognition of a gentleman’s customary right to kill in a private war was the existence of greater rights in a public war, which were so fundamental to the state of war that Beaumanoir did not consider their explicit discussion necessary.⁴⁶⁶ Beaumanoir viewed these rights not as a mere immunity from prosecution but as controlled by a special law (the *droit de guerre*) which covered any killing or other harm committed during war.⁴⁶⁷ In this compilation of law/custom you already see the existence of a special law of arms governing a restricted class of warriors—for Beaumanoir gentlemen who have the right of private war—that included a right to kill the enemy in war, free from any proscription as murder.⁴⁶⁸

Where did this custom/law, that came to be an integral part of the law of war/*jus militaire* come from? The accretion of custom again begins in Rome. From the fifth to the ninth centuries we see a far earlier emergence of an aristocratic warrior class governed by a shared martial culture and code of conduct, coupled with barbarian law codes that retain Roman concepts of public crimes against the State in their sections concerning offenses against the *dux*.⁴⁶⁹ In fact, many of these codes provide the first written immunity for killings done at the order of the *dux*, reflecting earlier Roman customary practice.⁴⁷⁰ As a significant example largely paralleled in the less extensive *Lex Alemannorum*, Stefan Esders traces the role of an emerging military aristocracy and the development of the *Lex Baiuvariorum* during the transition from Roman rule following the fall of the Western Empire in Duchy of Bavaria under the Merovingian Kingdom.⁴⁷¹ Esders views the provisions of the *Lex Baiuvariorum* protecting the *dux* as importing the

464. PHILIPPE DE BEAUMANOIR, THE COUTUMES DE BEAUVAISIS OF PHILIPPE DE BEAUMANOIR 610 (F.R.P. Akehurst trans., 1992); see also KEEN, *supra* note 29, at 72 (noting Beaumanoir had a different theory about waging war).

465. *Id.* at 316. Notwithstanding in a private war, the killing of the enemy must not occur during a time of truce or guaranteed peace—if so, it remained murder subject to harsh penalty. *Id.*

466. *Id.* at 610–18.

467. KEEN, *supra* note 29, at 72. Beaumanoir “speaks of actions which would be civil crimes being covered by the ‘*droit de guerre*’, of truces being merely interludes in the war and of the right of those excluded from them to continue hostilities.” *Id.*

468. *Id.* at 73–74.

469. See generally Esders, *supra* note 347 at 10 (detailing the various crimes against the *dux*); see also *Persecuting Latrones*, *supra* note 80, at 197 (“The Merovingian hierarchy of *dux*, *comes*, *tribunus*, and *centenarius* was a system of ranks and offices adopted as a whole from the Roman military by the Franks and adapted to the conditions of the Merovingian kingdom in Gaul.”).

470. See Esders, *supra* note 347, at 7–14.

471. *Id.* at 6–8 (agreeing with and supporting the hypothesis that the *Lex Alemannorum*, *Lex Baiuvariorum* and *Pactus legis Salicae*, all originated from earlier seventh century Merovingian legislation and reflected a continuation of the Roman military law and law of *lèse-majesté*).

Roman military and treason law into this Code as offenses against the public authority, with the *dux* acting as a deputy of the king.⁴⁷² Formed from the Roman provinces of *Raetia secunda* and *Noricum ripense*, the new Duchy of Bavaria was created by the Frankish Kingdom in approximately 538 as “part of a much larger Merovingian attempt to induce a new political order of its eastern territory of the Frankish kingdom, in agreement with East Rome.”⁴⁷³ This reorganization established a military administration of the new border region under the control of a *dux* (or duke), in whom was merged civic and military responsibilities,⁴⁷⁴ with the rulers and aristocracies of these regions “derived in no small part from the former Roman army” which included large numbers from barbarian tribes and from “groups of Romans [who] continued to persist in the region exercising important military functions.”⁴⁷⁵ After the fall of the Western Empire, “[p]aid regular armies . . . ceased to exist. They were replaced first of all by armies generally raised from people who could claim a particular ethnic identity, usually barbarian . . . [which was later] . . . moderated by wealth or ties of dependence.”⁴⁷⁶

In the fifth and sixth centuries the “military role of the aristocracy grew significantly . . . [as] [c]ivic and military roles came to be merged in the same office” combining the civil jurisdiction over a territory with responsibility for its defense.⁴⁷⁷ Early medieval kings were expected to be war leaders and “[c]onstant and successful campaigning was also vitally important in binding powerful and potentially rival aristocratic families and factions to the . . . régime.”⁴⁷⁸ Appointment to merged civic/military offices depended on service within the households of the aristocracy or the king involving “military and other violent activity.”⁴⁷⁹ “To take part in warfare, to join the army, meant to participate in politics.”⁴⁸⁰ Although “the obligation of these landed free to perform military service remained in force and was . . . taken very seriously,” by the end of the sixth century, the aristocracy and their dependents and retainers became

the principal building block of armed forces throughout the west . . . [with] warriors . . . linked to their leaders by a mixture of formal and informal rewards, and the leaders’ position established on the basis of both local social and economic pre-eminence and the tenure of titles.⁴⁸¹

472. *Id.* at 9–12.

473. *Id.* at 7.

474. *Id.* at 8. Similar arrangements were made for the adjoining new Alemannic Duchy. *Id.*; GARY HALSALL, *WARFARE AND SOCIETY IN THE BARBARIAN WEST*, 450–900, at 31 (2003).

475. HALSALL, *supra* note 473; *see also* Esders, *supra* note 347, at 10; Wood, *supra* note 348, at 4–7.

476. HALSALL, *supra* note 473, at 69.

477. *Id.* at 31.

478. *Id.* at 29.

479. *Id.* at 31.

480. *Id.*

481. *Id.* at 69–70.

By 900 C.E., “landowning ha[d] become the basis of military service” in most of western Europe, with the aristocracy composing “a warrior elite from at least the time[] of the Merovingians [481–751].”⁴⁸² The monopolization of warfare by this warrior elite reflected the “shared concepts of behavio[r] in combat and of custom and usage on the battlefield . . . and a common martial culture” between lords and their men.⁴⁸³ This consolidation of the business of warfare arose from the need for extensive martial training, which was critical for effective use of weapons in the densely packed battle formations of medieval warfare and the use of techniques that required trust among comrades-in-arms.⁴⁸⁴ Such training was provided by apprenticeships in the household of princes and aristocratic lords, which provided young warriors with “an important mechanism [for] social mobility,” created bonds between the lords and their retainers, and contributed to “warfare . . . increasingly [becoming] the business of more clearly defined upper social echelons.”⁴⁸⁵ These bonds were reinforced by the “nature of hand-to-hand combat . . . [which] ensured that fighting retained an . . . element of personal contact between members of the military elite.”⁴⁸⁶

By this early time, one also sees fully developed “the classic central medieval tripartite concept of the division of society . . . : *oratores*, *laboratores*[,] and *bellatores*, those who pray, those who work[,], and those who wage war.”⁴⁸⁷ So deeply ingrained is this division and its exclusivity of function that in the early 830s one sees a “chilling comment about Frankish magnates killing a crowd of peasants who had presumed to form a sworn band for mutual defen[s]e against the Vikings: ‘they were easily slain by our more powerful people.’”⁴⁸⁸ Reflecting Keen’s “privileged class, whose hereditary occupation was fighting,” this comment also demonstrates their view of the exclusivity of legitimate warfare and the later disdainful attitude of knights toward bowmen discussed earlier.⁴⁸⁹

It is clear this warrior elite was the hereditary class to which the *jus militare* applied, but from where did the concept of combatant immunity come? Returning to the *Lex Baiuvariorum* and similar barbarian law codes can provide some answers.⁴⁹⁰ Stefan Esders convincingly argues that the provisions on the protection of the *dux* as a royal deputy within the *Lex* reflect the Merovingian kings’ “absorption, adoption, as well as the regeneration of

482. *Id.* at 109; STRICKLAND, *supra* note 178, at 22.

483. STRICKLAND, *supra* note 178, at 22.

484. *Id.* at 22–23.

485. HALSALL, *supra* note 473, at 161.

486. STRICKLAND, *supra* note 178, at 27–28.

487. HALSALL, *supra* note 473, at 32.

488. *Id.* at 117 (quoting THE ANNALS OF ST. BERTIN: NINTH-CENTURY HISTORIES, VOL. 1 89 (Janet L. Nelson ed., 1991)).

489. KEEN, *supra* note 29, at 19.

490. Esders, *supra* note 347, at 7–8, 10–11 (illustrating how analysis of the *Lex Baiuvariorum* helps explain the adaptation of Roman Legal Doctrines).

existing Roman structures” through Roman military law and the law of *lèse-majesté* adapted to new local conditions.⁴⁹¹ In Title II, the “Bavarian *lex* addresses the legal standing and responsibilities of the *dux*.”⁴⁹² Postulating that the *Lex* contains layers of an older text reaching back to the seventh century, particularly as to Titles I through III, Esders sees a strong “role of Roman military law in the organizational arrangement of the Frankish duchies.”⁴⁹³ These provisions, applicable to the *dux* as military and civil leader of the Duchy, albeit subordinate to the king, contain “a comprehensive codex of military penal law, which was to have determined the conduct of soldiers both fundamentally and at times of war.”⁴⁹⁴ Echoing Roman law,

[t]he text addresses, among other things, sedition against the duke (*seditio*), inciting discord (*scandalum*) within the army or within the duke’s court, pillage and arson during military campaigns in the province (*praedatio*), and the theft of military equipment. In addition, regulations for the protection and special peace of the ducal court (*curtis ducis*), fines in case of contempt of the ducal ban [authority to call up military forces], dates for army and court assemblies (*placita*), as well as fines for failed appearances to such assemblies.⁴⁹⁵

Significantly, traitorous activities against the *dux* are treated as *crimen capitalia* permitting the death penalty and confiscation of property, whereas “[f]or all other offenses, the usual compensation system was to be employed, in which fines were paid first and foremost to the opposing party.”⁴⁹⁶ As opposed to the traditional Germanic compensatory system, designation as *crimen capitulia* was in the nature of a public crime “assigning the form of punishment to the ‘public’ legal sphere.”⁴⁹⁷ Esders argues that “the double-sanction of the death penalty and confiscation of property appears to be directly related to Roman *laesa maiestas*.”⁴⁹⁸ Similarly adopted from Roman law, the *Lex* also required a specific form of procedure and proof, and punished the planning and conspiracy to kill the *dux*, which Germanic law

491. *Id.* at 11 (Roman military law, for Esders, includes the Roman law of treason or *laesa maiestas*).

492. *Id.* at 7–8. Title I addresses the church matters, title III the aristocratic families, while “titles IV through XXII are composed first and foremost of long lists of forms of compensation and wergilds, familiar from other *leges barbarorum*.” *Id.*

493. *Id.* at 9. The *Lex Alemannorum* contains almost identical provisions to the Bavarian code. *Id.*; see also LEAR, *supra* note 40, at 220 (describing the incorporation of Roman Law concepts to address offenses not specifically covered by Germanic law).

494. Esders, *supra* note 347, at 9.

495. *Id.*; see also LAWS OF THE ALAMANS AND BAVARIANS 124–27 (Bavarian), 74–77 (Alamann) (Theodore Rivers, trans., 1977) (documenting the Bavarian laws concerning the duke and related cases such as attempting to kill the duke).

496. Esders, *supra* note 347, at 10.

497. *Id.*

498. *Id.*

did not reach.⁴⁹⁹ As Floyd Lear explains, “a few actions based on Roman law were added to the duke’s causes to provide for matters not specifically treated in Germanic law, such as the plotting of the duke’s death or the marauding activit[ies] of soldiers in the province.”⁵⁰⁰

Critically for Esders, the Roman crime of “*laesae maiestatis* [is] at or near the interface of public law and military law.”⁵⁰¹ For this reason, not only attacks on the ruler’s person are included but also numerous offenses related [directly] to military law, such as the failure to follow orders, mutiny, desertion, absent without leave, and treason, respectively. It thus seems conceivable that the notion of the Roman law of treason was transferred to the early medieval *regna* as part of regulations pertaining to military law.⁵⁰²

Not only do the treasonous offenses within the *Lex Baiuvariorum* provide much harsher punishments than for ordinary homicide, the *Lex* also directly incorporates “treason of country (*proditio patriae*)[.] . . . found in late Roman military law, as well.”⁵⁰³ As discussed earlier, *proditio* and *perduellio* were often seen in military contexts and punished as military crimes in Rome.⁵⁰⁴ The offenses in the *Lex Baiuvariorum* contain both treasonous and non-treasonous offenses against the *dux*, applying in peacetime, with specific prohibitions applicable in war, such as its prohibitions on plunder and arson by soldiers.⁵⁰⁵ For Esders, “the extensive lack of an allegiance or loyalty category in the Bavarian *lex* is striking” as the populace was required only to take an oath of allegiance to the Frankish king, not to the *dux*.⁵⁰⁶ The Merovingian King’s delegation of legal powers to subordinate officeholders such as the *dux*, and the prohibition of treason or *laesa maiestatis* against the *dux*, which did not sound in *infidelitas*, was “inclusive of different military offenses, as well as protective of the highest officials.”⁵⁰⁷ Esders argues that this shows a melding of the concept of Roman *laesa maiestas* with the Germanic *infidelitas*.

[Thus,] treasonable actions of great public significance [including violations of military law] were gradually attracted into the ducal causes. . . . Legal protection for the duke’s person as a symbol of public authority had to rest on such an innovation from the Roman Law . . . [because] now the army

499. *Id.* The criminalization of the planning and conspiring for the death of the *dux* comes directly from Roman law and does not appear in traditional Germanic law which punished only its commission. *Id.*

500. LEAR, *supra* note 40, at 220.

501. Esders, *supra* note 347, at 11.

502. *Id.* at 3, 11 (quoting directly from *De re militari* of the Theodosian Code or Emperor Maurice’s *Strategikon*).

503. *Id.* at 11.

504. See *supra* notes 342–44 and accompanying text (discussing the terms and their meanings and treatment).

505. Esders, *supra* note 347, at 12.

506. *Id.* at 15.

507. *Id.*

was the duke's army, and breaches of the special peace of the army became causes pertaining to the duke.⁵⁰⁸

Similarly, both the Burgundian and Lombard Laws appear to contain clauses pertaining to the *dux* with the same basis in the Roman law of treason.⁵⁰⁹

Significantly for the issue of combatant immunity, the *Lex Baiuviorum* contains a provision stating:

If anyone kills a man at the order of the king or the duke who has that province in his power, let him not be questioned . . . or be involved in a feud, since it was at the order of his duke and he cannot disobey the order; rather, let the duke defend him and his sons. And if that duke dies, let the other duke who follows in his place defend him.⁵¹⁰

Given the preoccupation of the *dux*'s activities in war, such an immunity operates as a justification for wartime killing—the person who killed at the order of the duke is not to be questioned nor involved in a feud, and the duke and any successor must defend that man.⁵¹¹ This exoneration bars the normal legal compensation schemes in operation at this time, as well as precluding a feud arising from a failure to compensate.⁵¹² And the entire scheme operates because “he cannot disobey” the order of his king or duke.⁵¹³ The Lombard Law similarly protected those who “kill[] a man by the king’s order.”⁵¹⁴ This protection echoes Augustine’s distinction that because of a soldier’s duty to obey the orders of the prince, any sin from war-time activities was that of the sovereign, not the soldier.⁵¹⁵ Also significant, plunder and arson when committed without the explicit order of the *dux* are also crimes in the Bavarian *lex*, presaging their later restriction to public wars.⁵¹⁶ Clearly, in this explicit legal protection, you see the seeds of the combatant privilege that

508. LEAR, *supra* note 40, at 220.

509. See Wood, *supra* note 348 (noting that the Burgundian law was also known as the *Burgundionum* or as the *Forma et Expositio Legum*); THE LOMBARD LAWS 53–55 (Katherine Fischer Drew trans., 1973).

510. LAWS OF THE ALAMANS AND BAVARIANS, *supra* note 494, at 126; see also LEAR, *supra* note 40, at 218–19. Although Lear states that “the Bavarian law of treason coincides very closely with its counterpart in the Alamannic Code . . . [and t]he resemblances between the two sets of laws are marked, . . . the *Lex Baiuviorum* is the more complete and applies to a wider variety of offenses.” *Id.* at 216–17. Despite the extensive coincidence, I have been unable to locate an exact counterpart to the above section of the Bavarian Code in the Alamannic Code. See *id.* at 216.

511. LAWS OF THE ALAMANS AND BAVARIANS, *supra* note 494, at 126.

512. See *id.*

513. *Id.*

514. THE LOMBARD LAWS, *supra* note 508, at 53. Rothair’s Edict stated that “[h]e who . . . kills a man by the king’s order, shall be entirely without blame. Neither he nor his heirs shall suffer any payment or trouble at any time from that one . . . or his heirs.” *Id.*

515. See *supra* note 120 and accompanying text (discussing where blame nested under Augustine’s just war theory).

516. THE LOMBARD LAWS, *supra* note 508, at 26–28. Thus, the restriction on plunder and arson as acts of public war go back to at least the early eighth century if Esders’s estimates of the age of the Bavarian Code are accurate and likely reflect earlier custom. *Id.*

was to protect those fighting for the sovereign in a public war in the law of arms (*jus militaire*) of the late Middle Ages, extending directly from the Merovingian and Carolingian eras.⁵¹⁷ The lack of any reports of prosecutions for killings in a public war from Roman or early medieval times may also indicate the probable existence of earlier customary law on this point as well.⁵¹⁸ The lack of wrongfulness of these killings is similarly seen in their lenient treatment in the Penitential books of the seventh to ninth centuries.⁵¹⁹

All of these elements are likely the basis for the thirteenth century custom that informed Beaumanoir's assertion that the *droit de guerre* governed any wartime killing of an enemy in 1283.⁵²⁰ The continuity of a combatant privilege is also seen in the early twelfth century where Orderic describes King Henry I's passing judgment on those rebelling against him in 1123–1124:

Henry determined that Luke of La Barre, a knight who had fought with his enemies but who was not his own vassal, should be blinded for his crimes (which, as noted above, amounted to *lèse-majesté*). But before Henry made his point about Luke's scurrilous songs, those present seem to have assumed that Henry was basing his prosecution on feudal grounds. Count Charles of Flanders thus spoke up and argued that what the king was doing was "contrary to our customs in punishing by mutilation knights captured in war in the service of their lord."⁵²¹

However, Henry "showed how this custom did not apply" because La Barre "deserved death because he had composed 'scurrilous songs' about him and had 'insulted me by singing them in public, and often raised mocking laughter against me from the enemies who sought my undoing.'"⁵²² Although not termed *laesa maiestas* Henry's charge clearly amounts to the Roman crime of *lèse-majesté* for which the laws and customs of war provided no protection, for ridiculing the Emperor (attacking his majesty) amounted to treason under the Roman law of *laesa maiestas*.⁵²³ A strong:

conclusion to be drawn once again is that the dukes of Normandy had inherited a body of law or custom from their Carolingian predecessors. This law or custom protected the dukes' rulership and perhaps gave their

517. See *id.* The rule reflected in this provision of the *Lex* was likely transferred from the Frankish monarchy to the Carolingian to the later medieval period.

518. See Esders, *supra* note 347, at 11.

519. See *Battle of Soissons and Hastings*, *supra* note 281, at 11.

520. See BEAUMANOIR, *supra* note 463.

521. Hagger, *supra* note 451, at 852.

522. *Id.* at 836, 852.

523. See *id.* at 836–37.

commands a quasi-religious nature, but it was no longer generally known by its Roman name.⁵²⁴

Two things are striking about this story. First, that the substance of the crime of *lèse majesté*, attacking the majesty of the leader, is known in the tenth century in Normandy.⁵²⁵ And these laws and customs are not “notably different from the laws and customs of England or of the neighboring French counties despite the words of [the] sources.”⁵²⁶ For Mark Hagger, “the reason for this similarity in the laws and customs of Normandy and those found elsewhere lies in the adoption, at an early stage in the duchy’s history, of the laws and customs of the Carolingian empire,”⁵²⁷ which succeeded the earlier Merovingian empire in Europe. Second, this tale explicitly recognizes a combatant privilege in the Count’s challenge to King Henry’s intent to punish La Barre as “contrary to our customs in punishing by mutilation knights captured *in war in the service of their lord*.”⁵²⁸ The common custom seen from the time of the *Lex Baiuvariorum* of holding someone who kills at the order of their lord innocent because of their duty of obedience to their leader in war becomes the custom Beaumanoir noted, and ultimately, the *bonnes coutumes* (good customs) Honoré Bouvet/Bonet endorsed, writing his *The Tree of Battles/L’Arbre des Batailles* in 1387.⁵²⁹ This book, based on John of Legnano’s *De Bello*, provided practical guidance to knights in the prosecution of their profession, and also served as the basis for Christine de Pizan’s later treatise, *The Book of Deeds of Arms and Chivalry* (1410).⁵³⁰

Bouvet’s interpretation of the laws and customs of war became a law of war which implied that “any man engaged in the profession of arms, be he knight or commoner, was a paid servant of the state who does all that he ‘does as a deputy of the of the king or of the lord in whose pay he is.’”⁵³¹ For Bouvet, “[t]he customary law [of 1387] . . . [was] not coterminous with the law of arms” of the fourteenth and fifteenth century, which included significant rules of *commercium*.⁵³² Narrowing the *droit de guerre* after the significant monopolization of violence by monarchies occurring during the

524. *Id.* at 836 (citations omitted), 836 n.49 (“The *Royal Frankish Annals*, in contrast to the Norman narrative sources, makes it clear that the crime of *lèse-majesté* was known, and known by its Roman name, in the ninth century.”).

525. *See id.*

526. *Id.* at 864.

527. *Id.* at 865.

528. *See Hagger, supra* note 451, at 852 (emphasis added); *supra* notes 462–66 and accompanying text (explaining the right to kill in a private war includes the right to kill the enemy, free from proscription as murder).

529. HONORÉ DE BOUVET, *L’ARBRE DES BATAILLES* (1387).

530. *Id.*

531. N.A.R. Wright, *The Tree of Battles of Honoré Bouvet and the Laws of War*, in *WAR, LITERATURE, AND POLITICS IN THE LATE MIDDLE AGES* 12, 18 (C.T. Allmand ed., 1976).

532. *Id.* at 26; *Draper’s Historical Perspective, supra* note 20, at 137 (“The Law of Arms is an amalgam of hono[r] and *commercium*.”).

Hundred Years War, “[t]he customs and usages which were considered by Bouvet to have legal force [by 1387] were those which had been sanctioned by the civil authority and over which such an authority could maintain effective control.”⁵³³ Bouvet’s focus on the ‘public good’ as the discriminating factor for which customs were “*bonne*” demonstrates both his rejection of the law of arms as a guild law focused on *commercium*⁵³⁴ and his disapproval of the contemporary reliance on plunder and booty as corrosive of military discipline.⁵³⁵ Because the principles of a just war for Bouvet required the protection of non-combatants as enunciated by canon law, princely discipline depended on whether soldiers were well paid, for only well paid soldiers would prioritize the public interest over his own.⁵³⁶ Thus began:

a new synthesis, a new concept of the . . . man-at-arms and indeed of nobility, and that was something that could only come very slowly, as it did, with the growth of the idea of the soldier not as a knight errant, but as the state’s servant, not called to seek wars by birth and vocation, but licensed to fight them by his sovereign.⁵³⁷

This new synthesis similarly paralleled the development of national standing armies after 1437.⁵³⁸ As a result, the law of arms which originally largely governed relations among the warrior elite made its first step toward a modern public law of war.⁵³⁹ Because of the role of the soldier as the agent of the sovereign, the combatant privilege, extending back to the barbarian law codes and the practice of Rome, was part of the *bonnes coutumes*, or good customs of war, which, after further fusing with Roman civil and canon law, continues to today.⁵⁴⁰ Bouvet’s theory meant that “[t]he representative of the ‘public good’, and its guardian, was the prince, the soldier merely his agent.”⁵⁴¹ This was the paradigm that emerged from the Middle Ages to form the basis of the modern law of war—a paradigm that inherently brought with it the associated combatant privilege.

533. Wright, *supra* note 530, at 26.

534. *Id.* at 26, 29–30.

535. *Id.* at 18.

536. *Id.*

537. M.H. Keen, *Chivalry, Nobility, and the Man-at-Arms*, in *WAR, LITERATURE, AND POLITICS IN THE LATE MIDDLE AGES* 32, 45 (C.T. Allmand ed., 1976).

538. See STRICKLAND, *supra* note 178, at 72.

539. See *id.* at 31.

540. See *id.* at 53.

541. Wright, *supra* note 530, at 29–30.

V. CONCLUSION

Despite modern theories concerning the nature of the combatant privilege and the lack of its precise definition in any conventions governing the law of armed conflict, the nature of the privilege becomes clear when one views its centuries-long development in the laws and usages of war. Recognized by Grotius in 1625 as the *jus militaire* began to emerge as the modern law of war, this privilege is rooted and defined in this long history:

Therefore, in this Sense it is lawful for one Enemy to hurt another, both in Person and Goods, not only for him that makes War on a just Account, and does it within those Bounds which are prescribed by the Law of Nature, as we have said in the beginning of this Book, but on both Sides, and without Distinction; so that he cannot be punished as a Murderer, or a Thief, tho' he be taken in another Prince's Dominion, neither can any other make War upon him barely upon this Account. And in this Sense we are to take Sallust, *By the Laws of War all Things are lawful to the Conqueror*.⁵⁴²

Grotius extends this practice back to the Greeks and Romans:

Therefore[,] the Custom of the old *Greeks* was, not to wash, drink, much less to perform any Acts of a religious Worship with him that was a Homicide (*that is, had killed a Man out of War*) but it was lawful to do it with him that in War had slain his Enemy; and frequently to kill is called the Right of War. And[,] *Marcellus* declares in *Livy*, *What so ever I did among the Enemies, the Right of War defends*.⁵⁴³

One can see in the gradual elimination of a requirement to do penance for killings in a public war, particularly when viewed through the medieval association of sin with criminal guilt, an acceptance by the Roman Church that, not only were these actions not sinful, they were morally permissible.⁵⁴⁴ The century-long practice of minor religious sanction for war-time homicides, demonstrated by the Penitential books, resulted after the twelfth century in a privilege eliminating any requirement to do penance for killings in public war.⁵⁴⁵ This privilege was recognized by the Roman Church because it no longer saw those killings as sinful or meriting ecclesiastical punishment.⁵⁴⁶ When conjoined with the Church's long-standing and

542. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE BOOK III 35–36 (Jean Barbeyrac & Richard Tuck eds., 2005), <https://oll.libertyfund.org/titles/grotius-the-rights-of-war-and-peace-2005-ed-vol-3-book-iii> [<https://perma.cc/3WTK-4NEN>].

543. *Id.* at 36.

544. *See Penitential Discipline*, *supra* note 256, at 77.

545. *Id.* at 77–78.

546. *Id.*

continued condemnation of private warfare and *routiers*, the contours of the privilege become clearer.⁵⁴⁷

Although not representing a privilege or legal justification per se, the long history of military treason law—*lèse-majesté* or *laison-majestas*—used by emerging monarchies to monopolize the legitimate use of force in the state demonstrates a similar view of the illegality of levying war against the king in his realm or levying war unauthorized by the sovereign prince.⁵⁴⁸ Only in public wars authorized by the sovereign state were public acts of war—wide-spread killing, arson/burning, pillage, ransom, and siege—allowed, and only for knights and warriors who were part of a recognized hereditary class.⁵⁴⁹ Otherwise, these same acts were prosecuted as crimes.⁵⁵⁰

Similarly, provisions of the *Lex Baiuvariorum* and Lombard Laws authorized and protected those acting under order of a military/civil leader, the *dux*, from criminal punishment for murder.⁵⁵¹ Located in the title governing ducal causes, this provision adopted principles of Roman law designed to protect the state under the Roman law of *laison majestas* and, given its association with many similar provisions governing the *dux*'s wartime causes, is likely a continuation of the war-time practice Grotius attributes to the Greeks and Romans (but also seen in the Merovingian and Carolingian kingdoms).⁵⁵²

History thus demonstrates that “the privilege of combatancy [that] transforms, almost magically, what would otherwise be an unlawful act of murder into a lawful killing consistent with *jus in bello*” occurs solely because the soldier is recognized as the agent of the sovereign state.⁵⁵³ This is the “powerful legal mechanism” whose history provides the “exact contours” of the combatant privilege.⁵⁵⁴ The understanding of these contours clarifies that the combatant privilege is not “mere immunity” but instead operates as a legal justification recognizing that killings and other destructive acts in war are not criminal or wrongful so long as they comply with the laws of armed conflict.⁵⁵⁵ Because soldiers operate as agents of the sovereign state,

547. See RUSSELL, *supra* note 24, at 189.

548. Esders, *supra* note 347, at 16.

549. *Id.* at 22.

550. *Id.* at 26.

551. *Id.* at 20, 25.

552. See *id.* at 15–18.

553. See Ohlin, *supra* note 16; see also Hans Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CAL. L. REV. 530, 551 (1943) (explaining that when writing in the aftermath of World War II, Hans Kelsen similarly viewed lawful combatant immunity—which was an application of state immunity and a special IHL rule—as “a necessary protection of the individuals who by national law are obliged, as organs of their [s]tate, to perform this act [of warfare]”); Christopher Kutz, *The Difference Uniforms Make: Collective Violence in Criminal Law and War*, 33 PHIL. & PUB. AFF. 148, 159–66 (2005) (discussing Bodin and Rousseau’s views on the combatant privilege as being based on the soldier acting as the agent of the state).

554. See Ohlin, *supra* note 16.

555. Eric C. Schneider, *Justifications and Excuses*, in TOWARD A FEASIBLE INTERNATIONAL CRIMINAL COURT 233, 233 (J. Stone and R. Woetzel eds., 1970), <https://ssrn.com/abstract=1939410>

these acts are lawful, not merely excused.⁵⁵⁶ Thus, actions in war that would be crimes in other contexts are rendered lawful because of this critical association with the state.⁵⁵⁷

The use of history to explain the why and what of the combatant privilege has important ramifications for the modern law of war. If the critical element in the applicability of the privilege is the soldier's association with the state (a matter further supported by the restriction of POW status in the Geneva Conventions and their Additional Protocols to those fighting for a state or those assimilated to a sovereign state by the operation of the Protocol),⁵⁵⁸ then such a state-affiliated privilege likely exists in non-international armed conflicts (NIACs) as well. Although this proposition contradicts the prevailing accepted opinion that the combatant privilege simply does not operate in NIACs, it is well supported by the millennia-long history of the privilege.⁵⁵⁹ Although beyond the scope of this Article, modern practice appears to support this possibility: even in the post-9/11 wars in Afghanistan, involving more than fifty countries, there appear to be no prosecutions of soldiers for killings that complied with the laws of war, even

[<https://perma.cc/83K2-V2HH>] (“[U]nder certain circumstances[,] something which is normally deemed unlawful is deemed lawful, the act is said to be justified. In other words, the code may define a certain use of force as being unlawful, but under certain circumstances, such as self-defense, the act is not unlawful and it may even be highly desirable from a social point of view. Since conduct which is justified is considered lawful, the actor may not be punished.”). In the American military legal system, the combatant privilege operates as a justification, negating the required element of murder that the intentional killing of another person be unlawful. *Id.* at 233, 235 (“Justifiable homicide is homicide committed in the execution of the law or in self-defense . . . on the premise that justification applies where we have circumstances of an external nature the presence of which makes that act not criminal at all . . .”); U.S. DEP’T OF THE ARMY, MILITARY JUDGES’ BENCHBOOK PAMPHLET 27–9, at 1698 (2025), https://www.jagcnet.army.mil/Home/assets/pdf/trial-judiciary/ARN44424-PAM_27-9-000-WEB-1.pdf [<https://perma.cc/TJA7-26TH>] (“(A) . . . death . . . caused . . . in the proper performance of a legal duty is justified and not unlawful. The duty may be imposed by statute, regulation, or order . . . For example, the use of force or violence by a [s]oldier against an enemy combatant in the proper execution of military duties is justified and not unlawful.”). Similar justifications apply to the destruction of property, rendering them lawful if done in accordance with the law of armed conflict. *See id.*

556. *See* MILITARY JUDGES’ BENCHBOOK PAMPHLET 27–9, *supra* note 554.

557. *Id.*

558. *See* Richard Baxter, *The Duties of Combatants and the Conduct of Hostilities (The Law of the Hague)*, in *INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW* 93, 99 (1988). Although Additional Protocol I is seen to expand the category of combatants to include those fighting in armed conflicts in which people are fighting against colonial domination, alien occupation, and racist régimes in the exercise of their right of self-determination, this argument was based on the equivalence of these groups to nation states. *Id.*; KEITH SUTER, *INTERNATIONAL LAW OF GUERRILLA WARFARE, THE GLOBAL POLITICS OF LAW-MAKING* 142–55, 159 (1984).

559. *See* Sean Watts, *Present and Future Conceptions of the Status of Government Forces in Non-International Armed Conflict*, 88 INT’L L. STUD. 145, 148 (2012) (“The traditional response to the question whether international law regulates status in NIAC has been a confident no.”); Archibald King, *Jurisdiction Over Friendly Foreign Armed Forces*, 36 AM. J. INT’L L. 539, 539–47 (1942); *cf.* G. P. Barton, *Foreign Armed Forces: Immunity from Supervisory Jurisdiction*, 26 BRIT. Y.B. INT’L L. 380, 407, 411–13 (1949) (discussing the principle of jurisdictional immunity for visiting forces). The traditional law of the flag doctrine, which recognized the exclusive jurisdiction of a transiting state across the territory of another state in peacetime, was similarly based on the concept of the role of the soldier as the agent of the state and its exclusive interest in disciplining its agents. *See* King, *supra*.

when that conflict had transitioned to a NIAC.⁵⁶⁰ The convergence of the law of IAC and NIAC, seen in modern IHL and modern international criminal law, further supports this interpretation.⁵⁶¹ History strongly demonstrates that the combatant privilege is dependent on the soldier's status as the agent of a sovereign state, a status that applies in all armed conflicts.⁵⁶² Additionally, the history of prosecuting those engaging in hostilities without the authorization of a sovereign, demonstrated by the prosecution of such actions as the international crime of *lèse-majesté* in the Middle Ages when the privilege crystallized from custom, may also call into question the asserted lawfulness of those fighting in armed conflicts without qualifying as privileged combatants.

560. See Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy*, HCPR OCCASIONAL PAPER SERIES, Winter 2005, at 65, <https://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper2.pdf> [<https://perma.cc/V8SE-VXQP>].

561. See *id.* (“However, as the principles of customary international law have been recognized as applicable to non-international armed conflict, it is logical to conclude that the concept of combatant immunity would apply to the armed forces of the state tasked with using force in a non-international armed conflict. Those fighting against the state in an internal conflict remain criminals subject to detention, arrest and prosecution.”).

562. See *supra* notes 545–55 and accompanying text (discussing the history of *lèse-majesté* and combatant privilege).