

America's War for Independence: Just or Unjust?

John Keown

Introduction

An important aspect of Catholic social teaching concerns war, and Catholic thinkers have played a crucial role in shaping the philosophical tradition of the 'just war'. Given the significance of that tradition in both Catholic and secular thought, and given the disagreement provoked among Catholics by the invasion and occupation of Iraq, a paper on the Church's teaching on war may not be thought inappropriate at a contemporary conference on Catholic social thought and citizenship.

It clearly behoves Catholics to be aware of the Church's teaching if we are to discharge our duties as Catholic citizens. As the U.S. Catholic Bishops pointed out in their document *Forming Consciences for Faithful Citizenship*, which sought to guide Catholic voters in the Presidential election:

In the Catholic Tradition, citizenship is a virtue, and participation in political life is a moral obligation. This obligation is rooted in our baptismal commitment to follow Jesus Christ and bear Christian witness in all we do. As the *Catechism of the Catholic Church* reminds us, "It is necessary that all participate, each according to his position and role, in promoting the common good. This obligation is inherent in the dignity of the human person . . . As far as possible citizens should take an active part in public life." (§§ 1913-15).¹

Yet how many Catholics are familiar with the Church's teaching on war? In particular, how many appreciate its strictness?

John Keown, M.A., D.Phil., Ph.D. is Rose F. Kennedy Professor of Christian Ethics at the Kennedy Institute of Ethics, Georgetown University. I should like to thank Professor John Langan SJ for his assistance with this paper from its inception. I am also grateful to Professor Robert Veatch, Professor Nora O'Callaghan, Professor Eugene McCarragher, Fr Basil Cole OP, Edward Grant, and AJ Coates for their helpful comments. I remain solely responsible for the paper's argument and accuracy.

¹ NATIONAL CONF. OF CATHOLIC BISHOPS, FORMING CONSCIENCES FOR FAITHFUL CITIZENSHIP. A CALL TO POLITICAL RESPONSIBILITY FROM THE CATHOLIC BISHOPS OF THE UNITED STATES ¶ 13 (2007), available at <http://www.usccb.org/faithfulcitizenship/FCStatement.pdf> 2008 (last accessed Feb. 11, 2009) (original italics). It adds that Catholics are duty-bound to inform their consciences in accordance with Church teaching (¶ 17), to participate in political life (¶ 57) and to work to avoid war and promote peace. (¶ 67)

This paper considers one war which most if not all Catholics in America (and beyond) would, without much if any hesitation, regard as just: the American War of Independence (1775-1783). The widespread, probably universal, consensus that the American Revolution was just appears never to have been questioned. This paper suggests that, despite the prevailing consensus and despite the substantial role played in the revolution by Catholic Americans (including Father John Carroll, who would become the country's first Catholic bishop), the War of Independence is difficult to reconcile with Church teaching. This conclusion will hopefully provoke Catholic readers who find it surprising (if not shocking) toward a renewed appreciation of the strictness of our Church's teaching on war. Moreover, given the formative contribution Church teaching has made to the secular philosophical tradition of the just war, and the influence that tradition has in turn had upon international law, it is hoped that the paper will be of interest to a much wider readership.

The Church's requirements for a war to be just are laid down in the *Catechism of the Catholic Church*² and were fleshed out by the U.S. Catholic Bishops in their 1983 Pastoral Letter *The Challenge of Peace*.³ Before outlining those requirements and applying them to the Revolutionary War, let us first note the significant extent of Catholic involvement in the revolution.

I. Catholic Revolutionaries

The main entrance to Georgetown University boasts a fine statue of its distinguished founder, Archbishop John Carroll. In 1776, at the invitation of the Second Continental Congress, Father Carroll (as he then was) accompanied Benjamin Franklin and others to Quebec in an attempt to persuade the French Canadians to join the revolution. Their expedition proved unsuccessful.⁴ In 1789 Father Carroll was appointed Bishop of Baltimore by Pope Pius VI, thereby becoming the first Catholic bishop in the U.S.⁵ His contribution to the revolutionary cause is immortalized by the inscription on his statue: 'Priest, Patriot, Prelate'.

² NATIONAL CATHOLIC CONF., CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2302-30 [hereafter CATECHISM]. See also http://www.vatican.va/archive/catechism/ccc_toc.htm (last accessed Feb. 18, 2009).

³ NATIONAL CONF. OF CATHOLIC BISHOPS, THE CHALLENGE OF PEACE: GOD'S PROMISE AND OUR RESPONSE. A PASTORAL LETTER ON WAR AND PEACE (May 1983) available at <http://www.usccb.org/sdwp/international/TheChallengeofPeace.pdf> [hereafter CHALLENGE OF PEACE].

⁴ COLIN BONWICK, THE AMERICAN REVOLUTION 90 (1991).

⁵ 'John Carroll', *Catholic Encyclopedia*, available at <http://www.newadvent.org/cathen/03381b.htm> (last accessed Feb. 17, 2009).

The *Catholic Encyclopedia* gives a further indication of Catholic support for the revolution:

In common with their fellow-citizens, the Catholics of the United States hailed with joy the election of George Washington as first president under the new Constitution. Before the inauguration Bishop Carroll, on behalf of the Catholic clergy, united with representatives of the Catholic laity . . . in an address of congratulation, admirable for its sentiments of exalted patriotism . . .⁶

The *Encyclopedia* records Washington's cordial reply '[t]o the Roman Catholics of the United States':

I presume that your fellow-citizens will not forget the patriotic part which you took in the accomplishment of their Revolution, and the establishment of your Government, or the important assistance which they received from a nation in which the Roman Catholic faith is professed.⁷

It also records Bishop Carroll's spirited defense of Catholic participation in the revolution, when he wrote in reply to a 'maligner of Catholics':

Their blood flowed as freely (in proportion to their numbers) to cement the fabric of independence as that of any of their fellow-citizens. They concurred with perhaps greater unanimity than any other body of men in recommending and promoting that government from whose influence America anticipates all the blessings of justice, peace, plenty, good order, and civil and religious liberty.⁸

Many Catholics conformed, then, to the revolution. But did the revolution conform to Catholic teaching?

Part II of this paper will summarize the moral criteria for resorting to war laid down by the Church and apply those criteria *seriatim* to the War of Independence. It will suggest that, whether or not the British were justified in going to war (a question beyond the scope of the paper), the colonists were not.

II. Catholic Teaching

A. *The Catechism*

The *Catechism* notes that all citizens and all governments are obliged to work for the avoidance of war.⁹ It explains: '*Because of the evils and*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ CATECHISM, *supra* note 2, ¶ 2308.

injustices that all war brings with it, we must do everything reasonably possible to avoid it.¹⁰ It acknowledges that ‘governments cannot be denied the right of lawful self-defence once all peace efforts have failed’¹¹ but adds that the ‘strict conditions for *legitimate defence by military force* require rigorous consideration’ and that the ‘gravity of such a decision makes it subject to rigorous conditions of moral legitimacy’.¹²

B. Pastoral Letter

Similarly, the U.S. Bishops’ 1983 *Pastoral Letter* notes that there is a presumption against war but that in exceptional cases, determined by the moral principles of the just war tradition, some uses of force are permitted. Offensive war is never justifiable but every nation has a right and duty to defend itself against unjust aggression.¹³ It adds that the Church’s teaching has evolved as an effort to prevent war: ‘only if war cannot be rationally avoided, does the teaching then seek to restrict and reduce its horrors’.¹⁴ This the teaching does by establishing a set of ‘rigorous’ conditions which must be met if the decision to go to war is to be morally permissible. Such a decision requires ‘extraordinarily strong’ reasons for overriding the presumption against war.¹⁵ We shall now list those requirements before applying them to the War of Independence.

*C. The Requirements for a Just War*¹⁶

As listed in the Pastoral Letter the requirements for a just war total nine. Of those nine, this paper will be concerned not with the two requirements relating to the proper conduct of war (*ius in bello*) but only with the seven justifying recourse to war (*ius ad bellum*).

¹⁰ *Id.* ¶ 2327 (original emphasis).

¹¹ *Id.* ¶ 2308.

¹² *Id.* ¶ 2309 (original emphasis).

¹³ CHALLENGE OF PEACE, *supra* note 3, I A.

¹⁴ *Id.* ¶ 83.

¹⁵ *Id.*

¹⁶ For a clear outline of the secular just war tradition, see CHARLES GUTHRIE AND MICHAEL QUINLAN, *JUST WAR. THE JUST WAR TRADITION: ETHICS IN MODERN WARFARE* 11 (2007). For a masterly, comprehensive analysis, see *generally*, AJ COATES, *THE ETHICS OF WAR* (1997).

1. Just Cause

War is permissible only to confront a ‘real and certain danger’, that is, ‘to protect innocent life, to preserve conditions necessary for decent human existence, and basic human rights’.¹⁷ As the *Catechism* phrases this requirement, ‘the damage inflicted by the aggressor on the nation or community of nations must be lasting, grave and certain . . .’¹⁸

2. Proportionate Cause

The damage to be inflicted and the costs incurred by the war must, explains the Pastoral Letter, be proportionate to the good expected by taking up arms.¹⁹ In today’s interdependent world, it adds, even a local conflict can affect people everywhere.²⁰

3. Right Intention

War can be legitimately intended only for a just cause and, during the conflict, right intention requires the pursuit of peace and reconciliation, including the avoidance of unnecessarily destructive acts and the imposition of unreasonable conditions, such as unconditional surrender.²¹

4. Competent Authority

The requirement of right or competent authority means that war must be declared by those with responsibility for public order, not by private groups or individuals.²² In their recent book on the just war tradition, Guthrie and Quinlan point out that this has historically meant that war must be declared by the ruler or government of a sovereign state and add that there are difficult questions ‘about whether,

¹⁷ CHALLENGE OF PEACE, *supra* note 3, ¶ 86. In this paper the ordering of the seven conditions has been changed from that in the Pastoral Letter for ease of exposition.

¹⁸ CATECHISM, *supra* note 2, ¶ 2309.

¹⁹ CHALLENGE OF PEACE, *supra* note 3, ¶ 99. See also CATECHISM, *supra* note 2, ¶ 2309: ‘the use of arms must not produce evils and disorders graver than the evil to be eliminated’.

²⁰ CHALLENGE OF PEACE, *supra* note 3, ¶ 99.

²¹ *Id.* ¶ 95. Is the intention, as Guthrie and Quinlan put it, ‘to create a better, more just and more lasting subsequent peace than there would have been’ without war? op cit n16, 12.

²² CHALLENGE OF PEACE, *supra* note 3, ¶ 87. The *Catechism* states that the application of the moral requirements ‘belongs to the prudential judgement of those who have responsibility for the common good’. CATECHISM, *supra* note 2, ¶ 2309.

when and in what ways oppressed peoples may legitimately resort to arms in internal uprisings against gravely unjust governments'.²³

5. Probability of Success

The *Catechism* states that there must be 'serious prospects of success'.²⁴ The Pastoral Letter explains that the purpose of this requirement is 'to prevent irrational resort to force or hopeless resistance when the outcome of war will clearly be disproportionate or futile'.²⁵

6. Last Resort

All peaceful alternatives must, notes the Pastoral Letter, have been exhausted.²⁶

7. Comparative Justice

This requirement emphasizes both the presumption against war and that, in a world of sovereign states recognizing neither a common moral nor political authority, no state should act on the basis that it has absolute justice on its side. Every party to a conflict should acknowledge the limits of its 'just cause' and the consequent requirement to use only limited means in pursuit of its objective. The basic question is whether the rights and values involved are sufficient to rebut the presumption against war and to justify killing.²⁷

As we noted in relation to the condition of competent authority, there are questions about the extent to which these criteria, which undoubtedly govern wars between states, apply to wars within states, to wars of revolution. This paper does not propose to resolve those questions. It is content to adopt the view of a leading authority on the just war tradition, the late Professor William O'Brien, who wrote:

[R]evolutionary war remains war, with material characteristics essentially identical to international conflict. All war is subject to the conditions of just war doctrine . . .²⁸

²³ GUTHRIE, *supra* note 16, at 13.

²⁴ CATECHISM, *supra* note 2, ¶ 2309.

²⁵ CHALLENGE OF PEACE, *supra* note 3, ¶ 98.

²⁶ *Id.* ¶ 96. See also CATECHISM, *supra* note 2, ¶ 2309 ('all other means' of putting an end to the unjust aggression 'must have been shown to be impractical or ineffective').

²⁷ CHALLENGE OF PEACE, *supra* note 3, ¶¶ 92-93.

²⁸ WILLIAM V. O'BRIEN, *THE CONDUCT OF JUST AND LIMITED WAR* 163 (1983). See also CHALLENGE OF PEACE, *supra* note 3, ¶ 90.

III. Was the American Revolution a Just War?

A. *The Prevailing Consensus*

There are few Americans, or even Britons, who would deny the moral legitimacy of the War of Independence. Speaking in Philadelphia on the 6th of July 1976 at the Bicentennial of the Declaration of Independence, Her Majesty Queen Elizabeth II said:

We lost the American colonies because we lacked the statesmanship to know the time and the manner of yielding what it is impossible to keep . . . But the lesson was learned . . . We learned to respect the right of others to govern themselves in their own way. This was the outcome of the experience learned the hard way in 1776. Without that great act in the cause of liberty performed in Independence Hall two hundred years ago, we could never have transformed our Empire into a Commonwealth.²⁹

Moreover, in the voluminous literature on the War, both popular and scholarly, no-one appears to have argued that it was unjust. This paper will conclude, however, that it is at least doubtful whether the War satisfied all seven requirements of the just war tradition. Let us now apply each requirement in turn.

B. *Questioning the Consensus: Applying the Seven Requirements*

1. Just Cause

The colonists' grievances were listed in the Declaration of Independence.³⁰ The Declaration stated that 'governments long established' should not be changed for light and transient causes' but that 'when a long train of abuses and usurpations, pursuing invariably the same object evinces a design to reduce them under absolute despotism' it was the right and duty of people to 'throw off such government. . .'. It continued that the history of the King of Great Britain had been one of 'repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these States'. In support of this claim, the Declaration cited more than a score of specific complaints, including:

- '[I]mposing taxes on us without our consent. . .'
- '[Q]uartering large bodies of armed troops among us. . .'

²⁹ Quoted after title page in DON COOK, *THE LONG FUSE: HOW ENGLAND LOST THE AMERICAN COLONIES, 1760-1785* (1995).

³⁰ *SOURCES AND DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION 1764-1788 AND THE FORMATION OF THE FEDERAL CONSTITUTION* 157 (Samuel Eliot Morison ed., 1965).

- '[P]rotecting them, by a mock trial, from punishment for any murders which they should commit. . .'
- '[A]bolishing the free system of English laws in a neighbouring Province [Quebec]. . .';
- '[S]uspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.'
- '[T]ransporting large armies of foreign mercenaries to compleat the works of death, desolation, and tyranny, already begun with circumstances of cruelty and perfidy scarcely paralleled in the most barbarous ages. . .'.³¹

Had the colonists been right that the British were bent on imposing 'absolute despotism' and were seeking by force to complete works of 'death, desolation and tyranny,' using cruelty 'scarcely paralleled in the most barbarous ages,' they would surely have had a just cause for war. But did the rhetoric reflect the reality?

Let us take, for example, a cardinal complaint of the colonists: 'taxation without representation'. A recent volume on taxation in the colonies by Alvin Rabushka observes that the Revolution was a 'tax revolt, first and foremost'.³² The colonists claimed that it was tyrannical of the British to levy taxes even though the colonists had no right to elect members of the British Parliament. This complaint lay behind the famous 'Boston Tea Party' of 1773 in which hundreds of crates of imported tea were dumped into Boston harbor in protest at a duty on imported tea.³³ But was the imposition of such a duty tyrannical? Let us consider, first, colonial taxation and, secondly, colonial representation.

a. Taxation

Far from suffering heavy imperial taxation, the colonists were more lightly taxed and enjoyed a higher standard of living than the inhabitants of the mother country. The taxes levied on the colonists by the British, such as the duty on tea, were infrequent and far from oppressive. Moreover, a main purpose of such taxes was to help offset the massive cost the British had incurred in protecting the colonies in the French and Indian War (1754-1763) and of garrisoning the colonies to protect them from renewed French and Indian aggression.

³¹ *Id.*

³² ALVIN RABUSHKA, *TAXATION IN COLONIAL AMERICA* 868 (2008).

³³ Bonwick, *supra* note 4, at 77-78.

Commenting on the enviable financial position of the colonies, Rabushka writes:

[T]he economy of the thirteen colonies grew at the fastest rate of all known contemporary economies and afforded its citizens on average the highest standard of living in the world on the eve of the Revolution. The long-term rate of growth of colonial America . . . exceeded, perhaps doubled, that of Great Britain. Even the poorest colonists enjoyed a steady rise in their standard of living.³⁴

He quotes a Swedish visitor to the colonies in 1750 who reported that there was so much good land available that a man could without difficulty find a place to subsist comfortably with his family. The visitor added: *'The taxes are very low, and he need not be under any concern on their account. The liberties he enjoys are so great that he considers himself a prince in his possessions'*.³⁵ Moreover, between 1770 and April 1775 every colony reduced its tax levies, some to the point of introducing no new taxes at all.³⁶ The British were, by contrast, far more heavily taxed. The tax burden of the nearly two million colonists was *per capita* only one twenty-fifth of the roughly 8.5 million residents of Britain.³⁷ And whereas the colonists had largely cleared their public debts, British national debt reached record levels, meaning heavy taxes for years ahead.³⁸ The British had spent no less than eighty million pounds prosecuting the French and Indian War and in suppressing an uprising by the Indian Chief Pontiac in 1763. By contrast, 'colonial war outlays amounted to 1.8% of those of Britain'.³⁹ To the British, Pontiac's uprising demonstrated the need for a larger military presence in the colonies and they considered it only fair that the colonists should help defray the cost of their own defense. Why should the already overburdened British taxpayer be saddled with even higher taxes, taxes which might produce economic ills and riots? 'At the top of the government's agenda,' comments Rabushka, 'was lightening the burden on British taxpayers'.⁴⁰ The government also considered the colonists rich enough to help pay for their own defense: they were, after all, able to afford a quarter of all British exports plus an estimated half a million pounds of smuggled goods.⁴¹ The British also believed that because of

³⁴ Rabushka, *supra* note 32 at 865 (footnote omitted).

³⁵ *Id.* at 866 (Rabushka's emphasis).

³⁶ *Id.*

³⁷ Even ignoring the colonists' higher average income and consumption. *Id.* at 729. For an even greater estimated disparity see CHRISTOPHER HIBBERT, *REDCOATS AND REBELS* xviii (1990).

³⁸ Rabushka, *supra* note 32, at 867.

³⁹ *Id.* at 728.

⁴⁰ *Id.* at 730.

⁴¹ *Id.* See also *id.* at 724 Table 24.1.

intercolonial rivalries the colonists could not or would not freely assume the burden of defending their western frontier: in 1762, the assemblies in Pennsylvania and North Carolina had refused to raise troops for the French and Indian War.⁴² And even when the British did impose taxes the burden those taxes imposed was as limited as the revenue they generated. Rabushka notes that although the Sugar Act of 1764, ‘which lowered duty to the customary rate of bribery,’ had produced considerable revenue in the decade preceding the revolution, the stamp tax of 1765 and Townsend taxes of 1767 had failed miserably, costing more to implement than they had produced in revenue.⁴³ The colonists, however, remained deeply suspicious. Rabushka points out that they feared that even a small tax would be the thin end of a wedge leading inexorably to heavier taxes which would destroy their property and estates. He adds that this fear was justified ‘by British expectations of an annual American revenue more than double the annual provincial taxes of the thirteen colonies combined’.⁴⁴ So, although the colonists had been taxed lightly in the past, they evidently had good reason to fear tax hikes in the future. Ironically, after the War of Independence taxes rose in any event, perhaps by 300%.⁴⁵

b. Representation

Taken as a whole, the colonies enjoyed considerable political autonomy. Maryland, Pennsylvania and Delaware were proprietary colonies in which the Crown gave political authority to the Calvert family (in Maryland) and the Penn family (in the other two), though the Crown supervised the colonies’ administration.⁴⁶ At the other extreme, Connecticut and Rhode Island had charters granting them extensive autonomy, including the right to elect their own governor: ‘in practice, they were virtually republics long before the Revolution...’⁴⁷ The remaining colonies were royal colonies in which legal authority flowed from the Crown, in Massachusetts through its charter and in others

⁴² *Id.* at 731.

⁴³ Rabushka, *supra* note 32 at 867. The Stamp Act (1765) sought to raise revenue by requiring the purchase of stamps which were to be affixed to all public documents from property deeds to newspapers and playing cards. *Id.* at 742. The three Townsend Acts (1767) imposed import duties on seventy-two items (including glass, paint, paper and tea); permitted the supreme court of justice in each colony to issue ‘writs of assistance’ to search for violations (writs which the colonists viewed as blank search warrants); and established a colonial customs board. *Id.* at 745-46.

⁴⁴ *Id.* at 734.

⁴⁵ *Id.* at 868-69.

⁴⁶ Bonwick, *supra* note 4, at 44.

⁴⁷ *Id.*

through the governor by virtue of his royal commission.⁴⁸ The structure of colonial government followed the British model, with a governor, upper house (except in Pennsylvania and Georgia) and lower house. Governors, being able to veto legislation and dissolve the assembly, nominally possessed greater power than the King possessed in Britain, but in reality their powers were constrained. They were dependent for 'political support, revenue and even their own salaries' on the lower houses and most governors 'were obliged to cooperate with their assembly if they wished to achieve anything'.⁴⁹ Indeed, the lower houses 'were in some respects more powerful within their own sphere than was the House of Commons in England, even though most could be summoned, prorogued and dissolved at the governor's will and their legislation could be vetoed by the governor or disallowed by the Privy Council in London'.⁵⁰ Their political power varied from colony to colony but was 'considerable in all cases'.⁵¹ In particular, the lower houses asserted complete control over money bills.⁵² The core of their influence lay in the fact that they represented their provincial communities.⁵³ Further, the right to vote 'was far less restricted than in England'.⁵⁴ In short, the government of the colonies was remarkably democratic for the time. Moreover, when an assembly was suspended or its power curtailed, this was not necessarily unjust. For example, as we shall see,⁵⁵ the Massachusetts Government Act 1774, which substituted a royally appointed council in place of one elected by the lower house, was a direct response to the criminality of the Boston Tea Party.

Not only did the colonies have their own colonial assemblies but they were represented in London: they appointed agents to represent their interests to Parliament and the King. As one historian has observed: 'Agents had no authority in the British government, but they were heard when they spoke on behalf of their colonial clients'.⁵⁶ Benjamin Franklin, for one, established powerful connections and a formidable reputation.⁵⁷ Moreover, several influential members of Parliament, not least Pitt the Elder and Edmund Burke, articulated the colonists' concerns with eloquence and force. Indeed, '[m]any members of Parliament

⁴⁸ *Id.*

⁴⁹ *Id.* at 45.

⁵⁰ *Id.* at 46.

⁵¹ Bonwick, *supra* note 4, at 46.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See *infra* note 73 and accompanying text.

⁵⁶ STUART AP MURRAY, *THE AMERICAN REVOLUTION* 23 (2006).

⁵⁷ See Cook, *supra* note 29, at chapter 3.

objected futilely to squeezing cash from the American colonies, whose estimated sixty thousand pounds sterling in annual revenues would do nothing to pay down the immense British national debt of 130 million pounds'.⁵⁸ As Don Cook (a stern critic of the British handling of the colonial crisis) acknowledges: 'In general, the American cause got a surprisingly full and sympathetic airing'.⁵⁹

Rabushka claims, it will be recalled, that the American Revolution was 'a tax revolt, first and foremost'.⁶⁰ Did the imposition of a few, limited taxes on the wealthy colonies to help pay for their security constitute a just cause for armed insurrection? Only, perhaps, if colonists who cannot elect members of an imperial legislature have a basic human right not to be taxed by that legislature. But what is the basis of such a right? And, if there were such a right, would it not have applied *a fortiori* to the inhabitants of the mother country where many taxpayers had no right to vote? Indeed, in which contemporary nation would it *not* have furnished a just cause for rebellion?⁶¹

The observations of two leading contemporary thinkers – Samuel Johnson and John Wesley – provide an interesting British perspective on the crisis. In 1775 Dr. Johnson penned *Taxation No Tyranny*,⁶² a tract excoriating the rebels' grievances. He started by noting that it had long been accepted by all mankind, as the primary and essential condition of all political society, that the supreme power of every community had the right of requiring, from all its subjects, such contributions as were necessary to the public safety or prosperity. He added: 'Of every empire all the subordinate communities are liable to taxation, because they all share the benefits of government, and, therefore, ought all to furnish their proportion of the expense'.⁶³ He continued:

⁵⁸ Murray, *supra* note 56, at 22.

⁵⁹ Cook, *supra* note 29, at 43.

⁶⁰ See *supra* note 32 and accompanying text.

⁶¹ Even the American colonies did not allow all taxpayers to vote: 'The franchise was limited to white, free, adult males, qualified to vote on the basis of property or the amount of taxes they paid'. Rabushka, *supra* note 32, at 866. To this day, residents of the District of Columbia (like the author) are taxed without having the right to elect voting members of Congress.

⁶² SAMUEL JOHNSON, *TAXATION NO TYRANNY; AN ANSWER TO THE RESOLUTIONS AND ADDRESS OF THE AMERICAN CONGRESS* in *THE WORKS OF SAMUEL JOHNSON, LL.D.* vol VI, 224 (1825). The tract was a response to the resolutions of the First Continental Congress, which met in Philadelphia in 1774. The Congress was prompted to convene by the Coercive Acts (or 'Intolerable Acts' to the colonists), passed by Parliament in response to the Boston Tea Party. See *infra*, notes 73-74 and accompanying text.

⁶³ Johnson, *supra* note 62 at 230.

Our colonies . . . , however distant, have been, hitherto, treated as constituent parts of the British empire. The inhabitants incorporated by English charters are entitled to all the rights of Englishmen. They are governed by English laws, entitled to English dignities, regulated by English counsels, and protected by English arms; and it seems to follow, by consequence not easily avoided, that they are subject to English government, and chargeable by English taxation.⁶⁴

Whoever denied the English Parliament the right of taxation denied it the right of making any other laws, civil or criminal. Yet the colonists had never denied its power to legislate on these other matters and the reception of any laws drew after it, by a chain which could not be broken, the necessity of submitting to taxation.⁶⁵ To the argument that the colonists' ancestors were entitled to all the rights of natural-born Englishmen, Johnson replied that if their ancestors were subjects they acknowledged a sovereign, and if they had a right to English privileges they were accountable to English laws. The burden lay on the colonists to show that Parliament ever ceded to them a dispensation from the obedience owed by all other English subjects. He wrote:

The colonists are the descendants of men, who either had no vote in elections, or who voluntarily resigned them for something, in their opinion, of more estimation; they have, therefore, exactly what their ancestors left them, not a vote in making laws, or in constituting legislatures, but the happiness of being protected by law, and the duty of obeying it.⁶⁶

He added:

What their ancestors did not carry with them, neither they nor their descendants have since acquired. They have not, by abandoning their part in one legislature, obtained the power of constituting another, exclusive and independent, any more than the multitudes, who are now debarred from voting, have a right to erect a separate parliament for themselves.⁶⁷

The colonists had, he continued, freely exercised a choice between a vote at home and riches at a distance.⁶⁸ To the complaint that Parliament had never taxed them before, Johnson retorted: 'the longer they have been spared, the better they can pay'.⁶⁹ The essence of the colonists' argument was, he said, that liberty was the birthright of man and that where obedience was compelled, there was no liberty;

⁶⁴ *Id.* at 236.

⁶⁵ *Id.* at 238.

⁶⁶ *Id.* at 242.

⁶⁷ *Id.*

⁶⁸ *Id.* 246.

⁶⁹ *Id.* 251.

to which the answer was that government is necessary to man and that where obedience was not compelled there was no government.⁷⁰

Johnson was echoed the same year by John Wesley. To the argument that he who was taxed without representation was a slave, Wesley replied:

I answer, No; I have no representative in Parliament; but I am taxed; yet I am no slave. Yea, nine in ten throughout England have no representative, no vote; yet they are no slaves; they enjoy both civil and religious liberty to the utmost extent.⁷¹

c. Other Complaints

Let us prescind from taxation without representation to some of the other complaints listed in the Declaration of Independence.⁷² The First Continental Congress (to whose demands Johnson was replying) convened in 1774 to criticize what the British called the ‘Coercive Acts’ and the colonists the ‘Intolerable Acts’. These Acts, passed in response to the Boston Tea Party, closed the port of Boston; amended the Massachusetts charter by substituting a royally-appointed council in place of one elected by the lower house; permitted trials of revenue officials for capital offences to be held outside the colony; and allowed the billeting of troops throughout the colonies.⁷³ A fifth Act permitted an executive government in Quebec and recognized Catholicism as its established religion.⁷⁴ Were colonial complaints about the Coercive Acts any weightier than the complaint about ‘taxation without representation’? Dr. Johnson observed, not unreasonably, that the colonists had brought the Coercive Acts on themselves by their rebellious conduct.⁷⁵ The Boston Port Act was, for example, passed to leverage compensation for the cost of the tea and other riot damage resulting from the Tea Party. Nor was the Tea Party the first instance of Bostonian criminality:

Throughout the 1760s Boston saw increasing violence against government officers, revenue collectors, and customs officials – even the Massachusetts governor’s home was torched by an angry mob.⁷⁶

⁷⁰ *Id.* 257.

⁷¹ *A Calm Address to Our American Colonies*, in *THE WORKS OF JOHN WESLEY* (Zondervan Publishing House, Grand Rapids, Michigan, 1958; reprint of the London 1872 edition) vol XI, 80 at 81.

⁷² *See supra* note 31 and accompanying text.

⁷³ Bonwick, *supra* note 4, at 78-79.

⁷⁴ *Id.* 79.

⁷⁵ JOHNSON, *supra* note 62, at 251-52.

⁷⁶ Murray, *supra* note 56, at 26. Shortly after the Tea Party the English Attorney-General (Thurlow) and Solicitor-General (Wedderburn) delivered their opinion to the

Again, the purpose of the Administration of Justice Act, which allowed the trials of revenue officials for capital offences committed in the course of their duty to be held outside the colony if the governor thought it desirable, was 'to circumvent the notorious bias of local juries against royal officials in customs and government cases'.⁷⁷ And as for the complaint that the Quartering Act allowed the billeting of troops, which many to this day think allowed billeting in private homes, the Act merely provided that the governor or commander-in-chief could billet troops in unoccupied buildings.⁷⁸

An additional complaint (one which was in fact the most underlined clause in Jefferson's first manuscript draft of the Declaration of Independence⁷⁹) accused the King of promoting an 'execrable commerce': slavery. Given that at the time of the Declaration around half a million slaves⁸⁰ were owned by the colonists (including Jefferson and Washington), it is less surprising that this charge did not survive the first draft than that it ever found its way into it. Jefferson wrote that the clause was deleted 'in complaisance to South Carolina and Georgia, who had never attempted to restrain the importation of slaves, and who on the contrary wished to continue it'.⁸¹ He added: 'Our Northern brethren also I believe felt a little tender under those censures, for tho' their people have very few slaves themselves yet they had been pretty considerable carriers of them to others'.⁸² The colonists' hypocrisy did not escape Dr Johnson, a fierce opponent of slavery, who asked witheringly

government that the colonial infractions of insulting Parliament and interfering with lawful commerce amounted to 'the crime of high treason, namely to the levying of war against His Majesty'. THEODORE DRAPER, *A STRUGGLE FOR POWER: THE AMERICAN REVOLUTION* 415 (1997). See also HUGH BICHENO, *REBELS & REDCOATS* xxvii-xxviii (2003).

⁷⁷ Bonwick, *supra* note 4, at 78-79.

⁷⁸ *Id.* at 79. Ammerman writes that the Act 'stipulated that when the colony offered quarters which were unacceptable, the governor could take over unoccupied public buildings for the use of the troops. It did not, as generations of American school children were taught, permit the housing of troops in private homes.' David Ammerman, 'The Tea Crisis and its Consequences, through 1775', in Jack P Greene and JR Pole (eds), *THE BLACKWELL ENCYCLOPEDIA OF THE AMERICAN REVOLUTION* (1999) 198, 202. Of the Quebec Act, Ammerman comments that the colonists were mistaken in regarding it as punitive: 'In fact the Act was an enlightened effort on the part of the British to organize the recently acquired colony of Quebec'. *Id.* He also notes that in 1774 'The British Government faced a situation which virtually demanded vigorous action. Massachusetts Bay was clearly in rebellion...'. *Id.* at 206.

⁷⁹ Bicheno, *supra* note 76, at 9.

⁸⁰ Bonwick, *supra* note 4, at 19.

⁸¹ Bicheno, *supra* note 76, at 11.

⁸² *Id.* Bicheno writes that Jefferson 'was a life-long economic and sexual exploiter of slaves, who kept his own children by Sally Hemmings in bondage until his death'. *Id.* at xxxv.

how it was that the ‘the loudest yelps for liberty’ were to be heard from ‘the drivers of negroes?’⁸³ Similarly John Wesley, having denied that he was a slave because he was taxed without representation, went on to ask who *was* a slave, and answered:

Look into America, and you may easily see. See that Negro, fainting under the load, bleeding under the lash! He is a slave. And is there ‘no difference’ between him and his master? Yes; the one is screaming ‘Murder! Slavery!’ the other silently bleeds and dies!

‘But wherein then consists the difference between liberty and slavery?’ Herein: You and I, and the English in general, go where we will, and enjoy the fruits of our labours: This is liberty. The Negro does not: This is slavery. Is not then all this outcry about liberty and slavery mere rant, and playing upon words?⁸⁴

Indeed, it has been plausibly argued by Professors Alfred and Ruth Blumrosen that a factor motivating the rebellion was not, as the initial draft of the Declaration might have suggested, a desire to free the slaves but, on the contrary, a fear that the slaves might be freed by the British. In a landmark case decided only four years before the Declaration of Independence, Lord Mansfield, Chief Justice of the Court of King’s Bench, had held that slavery was ‘odious’ to English common law and that a slave who had escaped from his American master on a visit to England was, therefore, free. This case was, the Blumrosens claim, ‘the spark that helped start the American Revolution...’⁸⁵ In her introduction to their book, Eleanor Holmes Norton observes:

They show that England had accommodated tax grievances in the past and might have compromised that issue further. However, for the South, compromise on slavery was unthinkable. Independence was the only solution.⁸⁶

d. Misplaced Fears

The central allegation in the Declaration of Independence that the British were bent on imposing tyranny was, as our consideration of a number of the colonists’ specific complaints has indicated, groundless. As Colin Bonwick writes:

With the possible exception of Charles Townshend, Chancellor of the Exchequer from 1766 until his death the following year, no British minister had any deliberate

⁸³ JOHNSON, *supra* note 62, at 262.

⁸⁴ Wesley, *supra* note 71, at 81.

⁸⁵ ALFRED W. BLUMROSEN AND RUTH G. BLUMROSEN, *SLAVE NATION: HOW SLAVERY UNITED THE COLONIES & SPARKED THE AMERICAN REVOLUTION* 14 (2005).

⁸⁶ *Id.* xiv.

wish to restrict or diminish American domestic liberty or impose authoritarian administration on the colonies.⁸⁷

He adds:

But each was obliged to take careful account of British opinion inside and outside of parliament, notably the common belief that Americans were neither contributing sufficiently toward the cost of their own defence nor carrying their fair share of the burden of imperial affairs. Widespread horror at the increase of the national debt to £130 million, much of which was due in British eyes to recent campaigns in America, also had to be reckoned with.⁸⁸

Although the Declaration's allegation of a plot to impose tyranny is unsustainable, it does seem that many colonists believed the allegation to be true. Bonwick again:

Government intentions . . . were increasingly misunderstood by the colonists. As time passed, Americans of all shades of opinion except those most clearly identified with British authority became persuaded that ministerial intentions threatened their personal liberty, political autonomy and economic development.⁸⁹

Similarly Rabushka, referring to one of the five Acts of 1774 which gave rise to concern in the colonies,⁹⁰ writes:

In June 1774, the Quebec Act was passed, vastly expanding the boundaries of the province and providing for its government by a governor and council appointed by the Crown, without any elected assembly. It was partial to the Catholic Church. The colonists feared that Britain would apply its provisions to the thirteen colonies, dissolve its representative assemblies, establish rule by royally appointed officials, and tax without consent.⁹¹

The fears of some colonists about such possibilities were, then, real. Nevertheless, their fears would appear to fall short of establishing a just cause for rebellion, for two reasons. First, those fears were, as we have seen, misplaced: the British had no plan to restrict colonial

⁸⁷ Bonwick, *supra* note 4, at 70.

⁸⁸ *Id.* Bicheno writes: 'What British politicians did not do was provoke a peaceful people to revolt. Unless we are to suppose that they were suffering from ennui and thought a little trouble in the colonies would liven things up, there is no reason to believe they would knowingly have embarked upon a course of action that would spark a rebellion they had no immediate means of combating and which must weaken them in the confrontation with Bourbon France and Spain at a time when Britain was without allies'. Bicheno, *supra* note 76, at 18.

⁸⁹ Bonwick, *supra* note 4, at 78-79.

⁹⁰ See *supra* note 74 and accompanying text.

⁹¹ Rabushka, *supra* note 32, at 748.

liberties or impose authoritarian administration. Ironically, the ‘Intolerable Acts’, whose enactment the colonists pointed to as evidence of such a plan, were a direct response to colonial recalcitrance. It seems that, wittingly or not, the colonists precipitated precisely what they feared. Secondly, even had these Acts been part of a preconceived British plan to increase parliamentary power over the colonies, it is far from clear that such a plan would have been unjust, let alone would have amounted to an imposition of ‘absolute tyranny’.⁹² What would have been unjust about a colonial power legislating for, and taxing, its colonies, particularly colonies that were very well able to pay and whose very own defense helped to provide the rationale for the taxation?

Winding up our consideration of the requirement of just cause, we may note that Professor O’Brien has observed that the indispensable starting point for satisfying this requirement is to posit ‘an end that is convincingly just’.⁹³ He notes that the scholastic natural-law tradition is ‘grudging in its acceptance of the right of armed resistance’⁹⁴ though it does concede that revolutionary war may be justified ‘in extreme cases’.⁹⁵ Was the War of Independence an ‘extreme case’? Was it

⁹² See *supra* note 31 and accompanying text.

⁹³ O’Brien, *supra* note 28, at 21.

⁹⁴ *Id.* at 163.

⁹⁵ *Id.* Pope Paul VI, commenting on the temptation to engage in a revolutionary uprising, wrote:

The injustice of certain situations cries out for God’s attention. *Lacking the bare necessities of life, whole nations are under the thumb of others; they cannot act on their own initiative; they cannot exercise personal responsibility; they cannot work toward a higher degree of cultural refinement or a greater participation in social and public life.* They are sorely tempted to redress these insults to their human nature by violent means.

He continued:

Everyone knows, however, that revolutionary uprisings—*except where there is manifest, longstanding tyranny which would do great damage to fundamental personal rights and dangerous harm to the common good of the country*—engender new injustices, introduce new inequities and bring new disasters. The evil situation that exists, and it surely is evil, may not be dealt with in such a way that an even worse situation results.

POPULORUM PROGRESSIO (1967) ¶¶ 30-31 (emphases added). It is, moreover, relevant to contrast the grievances of the American colonists with those of the inhabitants of Ireland. Compared to the centuries of genuine oppression visited on the Irish by the occupying British, the fears of the American colonists pale into insignificance. Yet in the 1880s Pope Leo XIII urged the Irish to seek legal rather than violent means to redress their grievances. O’Brien, *supra* note 28, at 367 n.11. Nor should we forget Jesus’s reply when asked whether it was right to pay taxes to Caesar. *Matthew 22*:

launched ‘to protect innocent life, to preserve conditions necessary for decent human existence, and basic human rights’?⁹⁶ In the light of the colonists’ considerable autonomy, prosperity and security, it is not easy to give an affirmative answer. The charge in the Declaration of Independence that the British were bent on imposing ‘absolute tyranny’ over the colonies, and were seeking by force to complete works of ‘death, desolation and tyranny’ using cruelty ‘scarcely paralleled in the most barbarous ages’⁹⁷ clearly bore little relation to reality. In sum, even allowing for the misplaced fears of those colonists who rebelled, it is far from obvious that they had a just cause for war.⁹⁸

2. Proportionate Cause

Even if the cause of the colonists in seeking independence *were* just, was it proportionate to the good expected?⁹⁹ As O’Brien has noted, ‘many extremely grave and important threats and injustices may not constitute sufficient just cause’.¹⁰⁰

Defenders of the colonial insurrection would no doubt place on the credit side the gaining of political independence, the establishment of a more democratic form of government and the remarkable success story of subsequent development of the United States. On the other hand, it could reasonably be argued that independence would have come sooner or later anyway and that the United States would have enjoyed comparable liberty and prosperity had it remained, like its northern colonial neighbor, within the Empire. Bonwick has noted that on the eve of the Revolution the colonies’ ‘long-term prospects were highly favourable – whether they remained members of the British empire or became an

15-22. Not only were the Judeans taxed without representation in the Imperial Senate but their land was occupied by a ruthless, exploitative foreign power. Jesus did not, however, condone the withholding of taxes, let alone armed insurrection.

⁹⁶ See *supra* note 17 and accompanying text.

⁹⁷ See *supra* note 31 and accompanying text.

⁹⁸ One could argue that the just war tradition should be developed to incorporate the notion of a right of self-determination of peoples, as can be found in the United Nations Charter. Article 1.2 of the Charter states that one of the purposes of the United Nations is to promote friendly relations between nations based on the principle of equal rights and respect for the self-determination of peoples. U.N. Charter art.2.1, *available at* <http://www.un.org/aboutun/charter/chapter1.shtml> (last visited Feb. 20, 2009). If this right were to be incorporated, questions about its nature and scope would of course have to be addressed. What is the nature of this right, who enjoys it and when?

⁹⁹ See *supra* note 19 and accompanying text. Was it, as Guthrie and Quinlan put it, ‘weighty enough to warrant the massive step of engaging in war, with all its certain or likely evils?’. GUTHRIE, *supra* note 16, at 12.

¹⁰⁰ O’Brien, *supra* note 28, at 28.

independent nation'.¹⁰¹ It would, moreover, be wrong to exaggerate the liberties the War of Independence helped bring about. That it paved the way for benefits such as the new nation's impressive democratic system of government is beyond question but, as Bonwick has again noted, the benefits of liberty were not equally distributed:

Rich supporters of independence retained their property and much of their power. Many white men made substantial gains, but many others remained poor and were still excluded from participation in politics and government; white women scarcely benefitted at all. Much discriminatory legislation remained in place, especially on religious grounds. Above all, the logic of the Revolution extended human rights to blacks only to a very limited degree. Most continued to be enslaved, and those who were freed were not granted the customary rights of citizenship; in white eyes they were still inferior.¹⁰²

Of those African-Americans who participated in the war, it appears that a majority sided with the British, who offered freedom in return.¹⁰³ Moreover, as slavery was abolished throughout the British Empire by an Act of 1833,¹⁰⁴ the War of Independence surely served to prolong slavery in the United States. It would take another 30 years, and a war whose carnage would dwarf that of the War of Independence,¹⁰⁵ to end the evil of slavery in America.¹⁰⁶

Further, although the costs of the War of Independence paled alongside those of the later Civil War, they were nevertheless considerable. One estimate is that the colonial forces alone sustained 24,000 fatal-

¹⁰¹ Bonwick, *supra* note 4, at 30.

¹⁰² *Id.* at 10.

¹⁰³ '[I]ronically, in view of Revolutionary rhetoric, more blacks fought for the British in return for promises of freedom than supported the American cause'. Bonwick, *supra* note 4, at 99. Accurate statistics are, however, difficult to come by. McCullough observes that 'Like most southerners, Washington did not want blacks in the army...' but that necessity forced him to rescind his order barring their enlistment. DAVID McCULLOUGH, 1776 36-37 (2005). Bicheno comments that the pro-British African-Americans worked mainly as scouts and foragers 'who if captured by the Rebels were hanged out of hand' and as laborers. He adds 'Too often disregarded, African American women also provided invaluable domestic support services to the British, whose lack was always apparent in the ragged and dirty Continental Army'. Bicheno, *supra* note 76, at 16.

¹⁰⁴ The Slavery Abolition Act.

¹⁰⁵ Over 600,000 Americans died in the Civil War, more than all of those killed in all of America's wars from the War of Independence to Vietnam: <http://www.civilwarhome.com/casualties.htm> (last accessed 22 December 2008).

¹⁰⁶ Bonwick notes that 'substantial but incomplete progress towards emancipation began during the Revolution'. Bonwick, *supra* note 4, at 168.

ities and an equal number seriously injured¹⁰⁷ and that the War cost some \$160 million.¹⁰⁸ The economic strain was so severe that even a prosperous colony like Connecticut, which experienced little fighting, was virtually bankrupt by 1780.¹⁰⁹ And (as we noted above¹¹⁰) taxes, which had been a main cause of the War, rose steeply in its wake.

Yet another cost of the War was its rupture of communities and families. William Franklin, Benjamin Franklin's son and the last royal governor of New Jersey, remained loyal to the Crown and went into exile in England.¹¹¹ By 1783, when the Treaty of Paris formally ended the War, some 60,000 – 100,000 loyalists had gone into exile.¹¹² As John Alden puts it, if the revolution contained an element of Genesis for the rebels, it was Exodus for many of the loyalists and 'the new nation lost tens of thousands of worthy and talented persons'.¹¹³ The Treaty required that Congress 'earnestly recommend' to the states that they rescind all laws punishing the loyalists but Alden notes that 'the states would not comply immediately, fully, or unanimously'.¹¹⁴ Another group to suffer at the hands of the victors were the Native Americans, whose lands had been protected from westward colonial expansion by a Royal Proclamation of 1763.¹¹⁵ With that protection gone, their fate was sealed.¹¹⁶ It is not surprising that the British enjoyed greater success than the rebels in recruiting Native American auxiliaries.¹¹⁷ The War, then, not only opened the door to the decimation of the Native Americans but also pitted colonist against Parliament, white American against African-American, neighbor against neighbor, and father against son.

On the world stage too, the revolution had grave consequences, drawing in France, Spain and Holland on the colonial side.¹¹⁸ The

¹⁰⁷ *Id.* at 113. 'In percentage of lives lost, it was the most costly war in American history, except for the Civil War'. McCullough, *supra* note 103, at 294.

¹⁰⁸ Bonwick, *supra* note 4, at 103.

¹⁰⁹ *Id.* at 115.

¹¹⁰ See *supra* note 45 and accompanying text.

¹¹¹ *Id.* Bonwick, *supra* note 4, at 96.

¹¹² *Id.* at 97; Bicheno, *supra* note 76, at 15-16.

¹¹³ JOHN R ALDEN, A HISTORY OF THE AMERICAN REVOLUTION 493 (1969).

¹¹⁴ *Id.*

¹¹⁵ Bonwick, *supra* note 4, at 71.

¹¹⁶ Whether the Native Americans would ultimately have fared better under British rule must be an open question, but they could hardly have fared worse.

¹¹⁷ Bicheno, *supra* note 76, at 41.

¹¹⁸ Bonwick, *supra* note 4, at 110. John Adams presciently predicted that the war against Britain would be a long and painful struggle and would also 'light up a general war' in Europe. DAVID McCULLOUGH, JOHN ADAMS 97 (2001).

revolution therefore spawned three wars: a war of independence, a civil war, and an international war. The colonial victory may also have been a cause of the bloodbath that was the French Revolution by draining the coffers of the *ancien regime*.¹¹⁹ Was securing complete independence from the mother country a proportionate reason for the death, destruction and expense it entailed?

3. Right Intention

Was it the intention of the rebels to promote a just cause and, during the conflict, to pursue peace and reconciliation, avoiding the imposition of unreasonable conditions such as unconditional surrender?¹²⁰ We have of course already questioned whether the rebels had a just cause.¹²¹ It is also questionable whether, once the war had begun, they sought peace and reconciliation and avoided the imposition of unreasonable conditions. Before hostilities broke out there had been attempts on both sides to reach a negotiated settlement but they had reached an impasse: the sticking point was the ultimate right of Britain to legislate for the colonies. Although in response to colonial protests the British had repealed the Stamp Act in 1766, only a year after its enactment, they had simultaneously enacted a Declaratory Act which reaffirmed their ultimate right to legislate for the colonies.¹²² The colonies were no less forthright in rejecting such a right than the British were in asserting it: the irresistible force of British sovereignty met the immovable object of colonial resistance.¹²³ Although the British have been criticized for a lack of statecraft in peacefully resolving the colonial crisis,¹²⁴ a criticism which is not without merit, it is not obvious how they could have reached a negotiated settlement without surrendering or at least severely compromising their claim to sovereignty. Even members of Parliament who were sympathetic to the colonists and who opposed the imposition of the imperial taxes, such as Edmund Burke, nevertheless defended the right of Parliament to impose them.¹²⁵ And in the run-up to Lexington and Concord the

¹¹⁹ Bicheno, *supra* note 76, at xli.

¹²⁰ See *supra* note 21 and accompanying text.

¹²¹ See *supra*, Part III, B, 1.

¹²² Bonwick, *supra* note 4, at 73.

¹²³ The delegates to the First Continental Congress (1774) rejected Parliamentary sovereignty over the colonies. *Id.* at 82.

¹²⁴ See e.g., Cook, *supra* note 29, at xii-xiii.

¹²⁵ “To be sure, Burke urged that the duty on tea should be lifted, but on grounds of expediency not of constitutional right. The Declaratory Act had stated what Parliament might do – “bind the colonies in all cases whatsoever” – and from that line not

orders from London to the governor of Boston, General Gage, were not to crush the rebels but to 'use every endeavour to quiet the minds of the people' and 'by mild and gentle persuasion to induce submission'. While Gage's troops must be ready to meet any opposition, the King hoped that such necessity would not occur.¹²⁶

Further, once the conflict had begun, the British made peace overtures to the colonists. The commanders of the British forces were, oddly, also peace envoys (a fact which may well have compromised their military effectiveness¹²⁷) though their efforts were rebuffed as they were not authorized to concede sovereignty.¹²⁸ Further, after the disastrous British defeat at Saratoga in 1777, and with the prospect of a Franco-American treaty the following year, the British sent a peace envoy to offer every concession Congress had demanded in 1775 plus an Act of Parliament withdrawing any claim to tax the colonies. Congress, however, refused to negotiate except on condition of an immediate British military withdrawal.¹²⁹ Did the imposition of this condition exhibit right intention, not least when the alternative, an alliance with France, would escalate the conflict (as it did) into an international war? Hugh Bicheno has commented that, even though the British would have yielded sovereignty in 1778:

the Rebel leaders condemned their country to five more years of increasingly destructive war in the expectation that their alliance with France would enable them to gain Canada cheaply.¹³⁰

even the friends of America deviated'. ROBERT MIDDLEKAUFF, *THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION 1763-1789* 237 (2005). Similarly, Draper notes that in 1774 the Act closing the port of Boston 'encountered no resistance' in the House of Commons and was 'even supported by such staunch defenders of the colonies as Colonel Barré who had contributed the name to the Sons of Liberty'. Draper, *op cit* n76, 416.

¹²⁶ Hibbert, *supra* note 37, at 25.

¹²⁷ Cook points out that when in July 1776 Admiral Richard Howe arrived in American waters to take command of the Royal Navy's forces, his orders from the Admiralty called for a vigorous naval blockade but that he was also instructed, with his brother General William Howe (commander of the land forces) as deputy, to negotiate with the rebels, and that it soon became difficult to determine which had the brothers' priority. Cook, *supra* note 29, at 240-41. Cook comments: 'They undertook to wage war and seek peace at the same time, a contradictory mission that could only fail'. *Id.* at 241. Cook asks whether General Howe's failure to capitalize on his rout of Washington at the Battle of Brooklyn in 1776 was a result of his brother's desire to start peace talks. *Id.* at 254.

¹²⁸ Cook, *supra* note 29, at 256-57.

¹²⁹ Bonwick, *supra* note 4, at 107; Bicheno, *supra* note 76, at xxxix-xl.

¹³⁰ Bicheno, *supra* note 76, at xl. He adds: 'It is thought-provoking that some of those who claimed to be the champions of English liberties and Protestant purity were in

Finally, did the treatment of the American loyalists after the War demonstrate right intention? Much of their property was confiscated.¹³¹ We may recall¹³² that laws discriminating against loyalists were not immediately and universally repealed and tens of thousands went into exile.¹³³ Was their treatment consistent with an intention to seek peace and reconciliation?

4. Competent Authority

Was the decision to resort to arms made not by ‘private groups or individuals’ but by ‘those with responsibility for public order’?¹³⁴ Was it made, as Guthrie and Quinlan put it, by someone with proper authority to undertake so grave a step, typically ‘the ruler or government of a sovereign state’?¹³⁵ It could be argued that the First and Second Continental Congresses, which met in 1774 and 1775 respectively,¹³⁶ were a competent authority for the purpose of declaring war. Of the fifty-six members of the First Congress only Pennsylvania and Rhode Island were represented by delegates chosen by their full legislatures, whereas other delegates were nominated by extra-legal bodies such as mass meetings. Georgia failed to send any delegates. However, most of the delegates were moderates¹³⁷ and of the sixty-five members of the Second Congress, fifty had served in the First.¹³⁸ There is, though, the counter-argument that the delegates may not have been representative of the people as a whole, and that the decision of the Second Congress to declare Independence may not have enjoyed majority support. As we have already noted, many colonists remained loyal to the Crown and the War of Independence was America’s first civil war.¹³⁹ Estimates vary as to the proportion of the population who supported rebellion, but it may well have been a minority. David McCullough has written:

[O]nly about one-third of the country supported the Revolution. Another third was opposed - the Loyalists or Tories, who saw themselves as the true patriots because

treasonous contact with absolutist, Roman Catholic France many years before the guns began to shoot’. *Id.* at 8.

¹³¹ Bonwick, *supra* note 4, at 162-64; Bicheno, *supra* note 76, at xl.

¹³² See *supra* note 114 and accompanying text.

¹³³ ALDEN, *supra* note 113, at 493.

¹³⁴ See *supra* note 22 and accompanying text.

¹³⁵ GUTHRIE, *supra* note 16, at 13.

¹³⁶ Bonwick, *supra* note 4, at 80.

¹³⁷ *Id.*

¹³⁸ *Id.* at 87.

¹³⁹ See *supra* notes 111-13 and accompanying text.

they were standing by their King. The remaining third, in the human way, were waiting to see who won.¹⁴⁰

Discussing the question of competent authority in relation to revolutionary wars, Professor O'Brien has observed:

[T]he ultimate answer lies in the character, magnitude and degree of success of the revolutionaries. If they can organize a government that carries on their war in a controlled fashion . . . and if the conflict continues for an appreciable time, the revolutionaries may have won their right to be considered a competent authority for the purposes of a just war.¹⁴¹

On this approach, the requirement of right authority could reasonably be said, at some point, to have been satisfied.

5. Probability of Success

Did the rebellion enjoy 'serious prospects' of success?¹⁴² From one perspective, it did not: thirteen individual colonies were taking on a mighty empire. As one historian notes:

On several occasions Britain appeared on the verge of success, notably as early as 1776 and again in 1779-80. American forces were weak and British military and naval power were enormous by comparison.¹⁴³

On the other hand, the British faced the daunting prospect of fighting a major war over three thousand miles away while simultaneously having to guard their own doorstep against a powerful, hostile French neighbor. The British also faced the challenge of subjugating a sprawlingly vast continent in the face of determined opposition from a substantial army led by able officers like George Washington who had gained valuable experience fighting alongside the British in the French and Indian War. From this perspective, the prospects of colonial suc-

¹⁴⁰ David McCullough, *John Adams and the Pursuit of Happiness*, USA TODAY, July 1, 2007, available at www.usatoday.com. Bicheno writes that 'the great and largely silent majority of the colonists was resolutely uncommitted. . .' Bicheno, *supra* note 76, at xxxvi. Hibbert comments that 'many who were loyalist in sentiment were soon deterred from supporting the redcoats by the threat of rebel reprisals'. Hibbert, *supra* note 37, at 79.

¹⁴¹ O'Brien, *supra* note 28, at 19.

¹⁴² See *supra* note 24.

¹⁴³ Bonwick, *supra* note 4, at 86. 'Especially for those who had been with Washington and who knew what a close call it was at the beginning. . . the outcome seemed little short of a miracle'. McCullough, *supra* note 103, at 294. See also *id.* at 24, 28, 31, 40, 49, 64, 77, 79, 86, 131-32, 135, 148, 163, 167, 193, 207, 225-27, 243, 249, 263, 270.

cess, at least if the French could be persuaded to enter the fray, were far from hopeless; and so it proved. Then again, had there been no Saratoga, there would probably have been no French alliance, and it remains doubtful whether the rebels had a reasonable prospect of success when hostilities broke out.

6. Last Resort

Was armed insurrection a last resort of settling the colonial grievances? Had all peaceful alternatives been exhausted?¹⁴⁴ What of non-co-operation with the British taxes, or of an attempt to secure representation in the British Parliament? In light of the fact that the colonies accounted for a full quarter of British exports, what of a trade embargo?¹⁴⁵ One of the most effective colonial responses to the stamp tax of 1765 had been an embargo.¹⁴⁶ In the wake of a ‘massive wave of resistance’ to the tax which included the non-importation of British goods, British merchants chafed at the loss of their North American market.¹⁴⁷ Their protests led to the resignation of the Prime Minister and the first act of his successor was to repeal the tax.¹⁴⁸ Similarly, the Townsend taxes of 1767 were repealed in 1770 (with the exception of the tax on tea) as a result of economic disruption caused by another colonial trade embargo.¹⁴⁹ In 1774, the First Continental Congress did propose a boycott of British goods, a boycott which in time ceased to be consensual and became compulsory.¹⁵⁰ However, the following April, when the British tried to take control of militia stores at Concord, they were confronted by armed militia at Lexington, and ‘the shot that was heard around the world’ rang out.

It is surely questionable whether the colonists had exhausted all reasonable alternatives to war. Had the Congress’s trade boycott, a measure which had proved so successful twice before, been given a fair chance? And even if economic measures looked unlikely to be effective, did civil disobedience not offer a further option? The experience of other British colonies confirms that violence is by no means the only means of securing independence. India secured independence through non-

¹⁴⁴ See *supra* note 26 and accompanying text.

¹⁴⁵ See *supra* note 41.

¹⁴⁶ Hibbert, *supra* note 37, at 10.

¹⁴⁷ Rabushka, *supra* note 32, at 743. As Johnson observed: ‘Nothing dejects a trader like the interruption of his profits,’ see *supra* note 62, at 227.

¹⁴⁸ Rabushka, *supra* note 32, at 743-44.

¹⁴⁹ *Id.* at 746. See also Bonwick, *supra* note 4, at 74-75.

¹⁵⁰ Bonwick, *supra* note 4, at 84.

violent civil disobedience. Canada, Australia and New Zealand achieved it without even that. In short, whether or not the American colonists had a just and proportionate cause, their insurrection seems to have been precipitate. The same might, of course, be said of the British decision to try to seize the militia supplies at Concord. But Britain was the sovereign power responsible for maintaining law and order and, if it feared armed rebellion, was surely entitled to neutralize arms which would otherwise be used against them.¹⁵¹ The hostile reception awaiting the British at Lexington shows that the fear was not fanciful. In his tract, Dr Johnson noted that the colonists had been far from quiescent:

They have armed the militia of their provinces, and seized the publick stores of ammunition. They are, therefore, no longer subjects since they refuse the laws of their sovereign, and, in defence of that refusal, are making open preparations for war.¹⁵²

Lexington was not in any event the first military confrontation: as early as December 1774 rebels seized munitions from Fort William and Mary in New Hampshire.¹⁵³

7. Comparative Justice

Were the values at stake critical enough to override the presumption against war and to justify killing?¹⁵⁴ We have noted in our consideration of just cause the weakness of the colonists' allegation that imperial initiatives such as taxation without representation evidenced the impending use of force to complete works of 'death, desolation and tyranny' using cruelty 'scarcely paralleled in the most barbarous ages'.¹⁵⁵ Even *if* the British Parliament acted imprudently in imposing taxes, closing the port of Boston, and suspending colonial assemblies, it is not obvious that it acted unjustly, far less that Britain sought thereby to impose 'tyranny' on the colonies. And even if the British Parliament *did* act unjustly, was any injustice sufficiently critical to override

¹⁵¹ Some colonists had already gone beyond enforcing the trade boycott: 'New Englanders... hunted 'tories' and began to collect arms and train their militia for action'. *Id.* at 84.

¹⁵² See *supra* note 62, at 248.

¹⁵³ ALAN AXELROD, *THE REAL HISTORY OF THE AMERICAN REVOLUTION. A NEW LOOK AT THE PAST* 78 (2007).

¹⁵⁴ See *supra* note 27 and accompanying text.

¹⁵⁵ See *supra* note 31 and accompanying text.

the presumption against war and to justify killing? It is, yet again, difficult to give an affirmative answer.

Conclusions

This paper has set out the seven criteria laid down by the just war tradition for the waging of a just war and has applied those criteria to the American War of Independence. It has noted that while many of the colonists may well have feared that the British intended to impose tyranny, those fears were misplaced. Professor O'Brien has written that, for a war to be just, all the criteria of the just war tradition must be 'convincingly' met.¹⁵⁶ This paper suggests that, despite the widespread if not universal consensus that the colonial insurrection was just, it is far from obvious that it satisfied all (or indeed any) of the criteria, convincingly or otherwise. It is hoped that this conclusion, which may well surprise many, will provoke a renewed appreciation of the strictness of the just war tradition, not least as articulated in Catholic social teaching.

¹⁵⁶ O'Brien, *supra* note 28, at 27.