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# War as Punishment

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## WAR AS PUNISHMENT<sup>1</sup>

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Until recently, rulers routinely treated the punishment of affronts as a legitimate reason to make war. Today, warmaking to punish misbehaving princes may seem no better than warmaking to grab land, tribute, or glory. Under the Charter of the United Nations and customary international law, only self-defense counts as a legitimate reason to go to war. To be sure, individual political and military leaders can be punished for war crimes, including the crime of aggression. The International Criminal Court exists for just that purpose. But punishing leaders in a court of law is not the same as using warfare itself as the instrument of punishment. We may think that punishment by the sword, like wars of conquest, represents a lesser stage of civilization than we aspire to. This transformation in thinking about just cause raises two important questions: First, how did we get from there to here—from widespread acceptance of punishment as a just cause for war to widespread rejection of it? Second, and more important, is the question of whether punishment of wrongdoing might actually be a just cause for war despite the modern narrowing of just cause to self-defense.

After all, the notion that states may wage war to punish their enemies is not a peculiar or eccentric one. As I demonstrate below, the *punishment theory of just cause*,

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<sup>1</sup> I presented drafts of this paper at the International Law and Ethics Conference, Belgrade, Serbia, and again at the Georgetown and George Washington law school faculty workshops, the Stanford political theory workshop, and Hebrew University's Institute for Advanced Studies. I am grateful to the participants on those occasions for their comments, and particularly to Itzhak Benbaji, Eyal Benvenisti, Gabriella Blum, Jovan Bobic, Joshua Cohen, Marty Lederman, Judith Lichtenberg, Josiah Ober, Jeff Powell, Nancy Sherman, Tim Sellers, David Super, and Robin West.

which holds that states may justly fight wars as retribution for wrongdoing, has been a theme in western just war theory since it began.<sup>2</sup> Only in the last two centuries have theorists clearly broken with the punishment theory. Arguably, international law did not decisively reject the punishment theory until the end of World War II. During that war, we should recall, Winston Churchill made no apologies for launching the terror bombing of German cities as retaliation for the Nazi blitz, and Churchill emphasized that the aim was retribution, not mere inducement to the Germans to stop the blitz. “[I]f tonight the people of London were asked to cast their votes whether a convention should be entered into to stop the bombing of all cities, the overwhelming majority would cry, ‘No, we will mete out to the Germans the measure, and more than the measure, that they have meted out to us.’”<sup>3</sup>

Whether or not Churchill was predictively right—Michael Walzer pointedly notes that “the people of London were not in fact asked to vote”<sup>4</sup>—he plainly appealed to a moral intuition that he thought would resonate with his public. At the end of World War II, a Gallup poll showed that 13% of Americans wanted to kill all Japanese; public opinion hardly gets more punitive than that.<sup>5</sup>

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<sup>2</sup> For useful discussion of the punishment theory in the early modern writers Vitoria, Gentili, and Grotius, see Alex Blane and Benedict Kingsbury, “Punishment and the *ius post bellum*,” in Benedict Kingsbury and Benjamin Straumann, eds., *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford University Press, 2010), pp. 241-65. Blane and Kingsbury are concerned with the same issues I address in this paper, namely the curious historical disappearance of the punishment theory and the question of what might be said on its behalf.

<sup>3</sup> Quoted in Michael Walzer, *Just and Unjust Wars* (Basic Books, 1977), p. 256. Of course, Britain fought the war itself for self-defense, and the morality of the bombing was an *in bello*, rather than an *ad bellum*, question. Although in this paper I talk about the punishment theory of just cause—a *jus ad bellum* issue—the punishment theory often extends to *jus in bello* issues as well. In effect, the air campaign against German cities was a discrete “subroutine” of the war as a whole, and even if the *casus belli* of the war as a whole was self-defense, that of the subroutine was punishment.

<sup>4</sup> Ibid.

<sup>5</sup> George Gallup, ed., *The Gallup Poll: Public Opinion 1935-1971* (Random House, 1972), vol. 1, p. 477-78. See Gary Bass, *Stay the Hand of Vengeance*, pp. 160-61.

I doubt matters have changed greatly in the last half century. No American who lived through the shock of 9/11 can forget how deeply and powerfully our retributive emotions ran. In his memoirs, President George W. Bush recollects, “My blood was boiling. We were going to find out who did this, and kick their ass.”<sup>6</sup> This is a perfectly natural reaction, and the craving for retribution surely influenced public opinion about the 2001 Afghanistan campaign, the Iraq war, and policies surrounding detention and torture.<sup>7</sup> When U.S. troops killed Osama bin Laden a decade later, an influential newspaper commentator wrote approvingly: “I do not want closure. There is no closure after tragedy. I want memory, justice, and revenge.”<sup>8</sup> This too seems natural. I believe the punishment theory remains alive and well in the moral imaginations of modern societies, even if diplomats and lawyers carefully scrub it from official justifications of armed conflict. As recently as 2009, a U.S. general admonished a group of military cadets never to forget that the reason the United States is in Afghanistan is revenge—no matter what the official view of the United States government is.<sup>9</sup> The general was unusual in his candor, but the view hardly seems eccentric. The contemporary American literature of Islamophobia, in effect blaming all Muslims for jihadi terrorism, is propagandistic and

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<sup>6</sup> George W. Bush, *Decision Points* (New York: Crown, 2010).

<sup>7</sup> Although my basis for asserting the depth of retributive emotion prompted by 9/11 is personal recollection and immersion, not opinion polling, I call readers’ attention to a content analysis of conversations sent on pagers on 9/11, involving 85,000 pagers (6.4 million words, 573,000 lines of text), and tracing the use of emotional words throughout the day in five-minute blocs. The researchers found a rather steady use of words of sadness and anxiety throughout the day, but steadily increasing anger which “never returned to its baseline level...and reached a level that was almost 10 times as high as at the start of September 11.” The steepest upward acceleration in anger was in the final two hours of the period analyzed (10:45 p.m. to 12:45 a.m.). Mitja D. Back, C. P. Küfner, and Boris Egloff, “The Emotional Timeline of September 11, 2001,” *Psychological Science* 20 (10)(2010): 1-3; the quoted language on p. 2.

<sup>8</sup> Maureen Dowd, “Killing Evildoers Does Not Make Us the Same Evil Folk,” *New York Times*, May 10, 2011.

<sup>9</sup> The talk was not public; it was described to me by an officer who was there.

political, but it enjoys a wide audience, and it is clearly a literature of anger and vengeance.<sup>10</sup>

### **The punishment theory and asymmetric war**

Even if the punishment theory remains officially underground, echoes of it affect the way we think about contemporary issues of asymmetric war between states and non-state actors. Asymmetric war places traditional *jus in bello* principles of distinction and proportionality under great stress, because militants operate amidst civilian populations that support or shield them. States fighting militants will be tempted to blame their supporters, and to import criminal-law categories of complicity into how they regard them. Of course the criminality of terrorist tactics reinforces the conflation of state defense against terrorism and state punishment of terrorism's supporters. Civilian sympathizers who cheerlead for the militants lose their mantle of innocence, at least in the moral intuitions of their adversaries; when they do, the line between indiscriminate infliction of civilian casualties and just punishment blurs. *If they get killed*, the thought runs, *they had it coming*.

Such thinking, grounded in intuitions of collective guilt, haunts debates about several of the most contentious issues in contemporary just war theory: the question of

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<sup>10</sup> A gauge of the popularity of the Islamophobia literature is that both Robert R. Reilly's *The Closing of the Muslim Mind: How Intellectual Suicide Created the Modern Islamist* (Intercollegiate Study Series, 2010) and Andrew McCarthy's *The Grand Jihad: How Islam and the Left Sabotage America* (Encounter Books, 2010) rank in Amazon.com's top twenty sellers within the category "Books > History > World > Islamic" (as of December 3, 2010). Sam Harris's *The End of Faith*—which calls for war against Islam (pp. 53, 109, 151), memorably proclaims that Islamic ideas "are so dangerous that it may even be ethical to kill people for believing them," and denies the existence of moderate Islam—tops the Amazon list in three categories, six years after its publication. Sam Harris, *The End of Faith: Religion, Terror, and the Future of Reason* (W. W. Norton, 2005), pp. 52-53, 110-111.

when civilians can be targeted as direct participants in hostilities; how state militaries should treat voluntary human shields; and whether militaries ought to take the same risks to minimize casualties among “enemy” civilians that they would to minimize casualties among their own. These are among the hardest questions about asymmetrical war; and I suspect that hawkish answers to them seem attractive to their adherents because their moral intuitions classify civilian supporters of militants as culpable aiders and abettors on whom retributive justice can rightly be visited. The line of thought runs roughly as follows: (i) defending ourselves requires war on the terrorists, and (ii) the terrorists deserve punishment. (iii) Thus punishment and self-defense converge as motivations for war. (iv) The terrorists’ civilian supporters have made themselves accomplices, so they have no cause to complain if they too suffer from the war—their own actions have brought them within the scope of war against the terrorists they support. (v) We are therefore justified in drawing the boundaries of direct participation in hostilities broadly rather than narrowly, and counting voluntary human shields as direct participants.<sup>11</sup> As

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<sup>11</sup> This is a matter of intense current controversy. The International Committee of the Red Cross argues that voluntary human shields are direct participants in hostilities (DPH) only if they physically interfere with soldiers; if they interfere with combat operations only by instilling reluctance in soldiers to proceed, they are not DPH. ICRC also counts civilian supporters as DPH only if they are at most one causal step removed from damage to the adversary. The Israeli Supreme Court, on the other hand, counts voluntary human shields as DPH, likewise full-time militants, but it has nothing like the one-causal-step test. It is fair to say that there is no settled law on the definition of DPH or the targetability of voluntary human shields.

Consider the ambivalent way that the United States classifies civilians who engage in or support hostilities against the United States or its allies. In an understanding it attached to a treaty, the United States defines DPHs narrowly. To take direct part in hostilities “(i) means immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy; and (ii) does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions, or other supplies, or forward deployment.” United Nations Treaty Collection, Status of Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (as of Dec. 20, 2009), available at <http://treaties.un.org/doc/Publication/MTDGS/Volume%20I/Chapter%20IV/IV-11-b.en.pdf> /. On the other hand, U.S. law defines an “unprivileged enemy belligerent” as one who “has purposefully and materially supported hostilities against the United States or its coalition partners” and is not a privileged belligerent, i.e., a member of a regular army. 10 U.S.C. §948a(7)(B). The definition of “material support” in U.S. law belongs to the criminal code, and it is staggeringly broad, in order to

for whether “our” soldiers should risk their lives to spare “their” civilians, to many people the answer is self-evidently no, because their civilians hate us and support the militants. Why risk your life for supporters of enemies who deserve punishment? As philosophers have often pointed out, “innocent civilians” is a term of art, and it doesn’t imply moral innocence.<sup>12</sup> The conclusion of this line of thought is clear: if we err in fighting our enemies, let us err on the side of our safety, not theirs, because they are culpable and we are not.

### Sources of confusion

I mean these assertions about moral intuitions of enemy culpability descriptively and psychologically: not that states are right to blur the line between defense and punishment, but that in fact they and their citizens sometimes do. If so, however, there are reasons behind this confusion. In other words, if the punishment theory of just cause is a mistake, it is not a simple mistake.

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facilitate prosecution for participation—however minor—in terrorist schemes. 18 U.S.C. §§2339A-D. The categories of material support defined in §2339A(b) overlap with those of complicity in 18 U.S.C. §2.

This definition of “unprivileged enemy belligerent” appears in the Military Commissions Act (MCA) of 2009, solely to define who falls under the jurisdiction of military commissions. Unfortunately, under the laws of war an “enemy belligerent” can be targeted as well as prosecuted, just as a DPH can. A military lawyer codifying targeting criteria would, under ordinary interpretive methods, use section 948a(7)(B) to define the category of targetable enemy belligerents, simply because it is the only place in the U.S. Code that defines the term. The Obama Administration substituted the term “unprivileged enemy belligerent” for “unlawful enemy combatant,” the terminology used in the 2006 version of the MCA, to respond to widespread criticism that the category “unlawful enemy combatant” appears nowhere in the traditional law of war. The only reason for making the substitution, then, is to bring the MCA’s terminology into alignment with the laws of war, and that reinforces the likelihood that section 948a(7)(B) will eventually be used to define legitimate targets. The legal meaning of the term “enemy belligerent” cannot be cabined by one administration’s intentions. The result is that even though the United States defines DPH narrowly, it defines the closely-related category of unprivileged enemy belligerency broadly, using terms devised for criminal punishment.

<sup>12</sup> G.E.M. Anscombe, “War and Murder,” in Walter Stein, ed., *Nuclear Weapons: A Catholic Response* (London: Merlin, 1961), pp. 43-62; Thomas Nagel, “War and Massacre,” *Philosophy & Public Affairs* 2 (1972): 139-40; Robert K. Fullinwider, “War and Innocence,” *Philosophy & Public Affairs* 5 (1975): 90-97. I discuss the issue of risk taking to protect the enemy’s civilians in “Risk Taking and Force Protection,” forthcoming in Itzhak Benbaji and Naomi Sussman, eds., *Reading Walzer* (Routledge).

For one thing, three of the standard justifications of criminal punishment—special deterrence, incapacitation, and so-called “affirmative prevention” through reassurance that norms really matter—are also recognized justifications for warfare, and all three can be assimilated without much difficulty to military self-defense.<sup>13</sup> Only retribution has no counterpart in national self-defense; but if international institutions are not up to the task of retributive justice, citizens may demand—not unreasonably—that their own states should provide the retribution that the UN or international courts cannot. This was Cajetan’s main argument for the punishment theory: wrongdoing demands “vindicative justice” and sometimes only war can meet the demand. If, as I shall argue, the punishment theory is indefensible, we shall have to accept the possibility of wrongdoing without vindication.

As another possible source of confusion, contemporary philosophers often analyze the self-defense justification for armed conflict on analogy with individual self-defense in civil society and domestic law.<sup>14</sup> Clearly, the liability of an attacker to lethal violence in individual self-defense must be distinguished from the attacker’s liability to criminal punishment. But the two are easily confused, because non-consequentialist analyses of individual self-defense often justify it by connecting the right to kill the

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<sup>13</sup> For typical official lists of the goals of punishment, see, e.g., the U.S. statute 18 U.S.C. §3553 and the statement of the International Criminal Tribunal for Former Yugoslavia, *Prosecutor v. Blaskic*, ICTY Case No. IT-95-14-A, Judgement (July 29, 2004), §678.

The other non-retributive rationales of punishment are implausible applied to warfare. Waging war as a form of general deterrence—deterrence of countries other than the adversary—seems blatantly immoral, although some philosophers argue that it can be a contingent just cause—contingent, that is, on some other just cause that would by itself be sufficient. As for rehabilitation, it seems odd to call it punishment, and in any event we would be hard-pressed to find any actual examples of wars waged to rehabilitate an adversary. Some classical writers, notably Augustine and Grotius, defend punishment as a form of moral education, but the moral education theory of punishment has not gotten traction in legally accepted justifications for punishment. See Jean Hampton, “The Moral Education Theory of Punishment,” *Philosophy & Public Affairs* 13 (1984), pp. 208-38. I criticize Augustine’s use of the moral education theory as a justification for punitive war below.

<sup>14</sup> For a critique of such views, see David Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2003).



attacker with the attacker's wrongdoing, which forfeits her own immunity to defensive violence. Although the non-consequentialist argument for self-defense is not a punishment argument, the fact that both locate an assailant's liability to force in her own wrongdoing makes the categories of self-defense and punishment easy to conflate. It may not even be a conflation: as Jeff McMahan observes, an adversary that unjustly attacks a state makes itself liable to defensive force, and defensive violence in response to a wrongful act can plausibly be labeled punishment.<sup>15</sup> However, while I agree that the label is plausible, there is a decisive difference in the conditions for retribution and defensive violence. If an adversary clearly poses no future threat, war for purposes of deterrence or incapacitation would be unjustified even in the face of wrongdoing, and that makes self-defensive theories of punishment importantly different from classical theories of war as punishment, which place no parallel restriction on a wronged state's right to inflict retribution.

My focus is squarely on retributive punishment, the visitation of violence on enemies as a morally motivated response to their wrongdoing. When Churchill pledged to mete out to the Germans "the measure, and more than the measure, that they meted out to us," even if killing German civilians cost needless British civilian lives, he was not talking about deterrence or incapacitation for safety's sake. He was talking about payback. Payback can mean proportional retribution (meting out "the measure that they meted out to us") or sheer revenge (meting out "more than the measure that they meted out to us"), and the distinction between retribution and revenge will play an important part in my subsequent argument. But for the moment it is more important to focus on

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<sup>15</sup> Jeff McMahan, "Aggression and Punishment," in Larry May, ed., *War: Essays in Political Philosophy* (Cambridge: Cambridge University Press, 2008), p. 81.

what retribution and revenge have in common: their root is not concern about future safety, but indignation over past wrongdoing.

I accept retributivism as a legitimate ground for punishment, and perhaps even as the core ground of punishment, but I shall argue that *even for retributivists* punishment through warmaking is morally unacceptable, for at least five reasons. (1) It places punishment in the hands of a biased judge, namely the aggrieved party, which (2) makes it more likely to be vengeance than retributive justice. (3) Vengeance does not follow the fundamental condition of just retribution, namely proportionality between punishment and offense. (4) Furthermore, punishment through warmaking punishes the wrong people and (5) it employs the wrong methods.<sup>16</sup>

### **The punishment theory of just cause: a brief history**

Wars have always been fought to punish affronts, and the notion that sovereigns can launch wars to punish wrongdoing has ancient roots.<sup>17</sup> However, we ought to distinguish two closely-linked phenomena: warmaking as punishment for wrongdoing and warmaking as self-help to regain people or property wrongfully captured, or to force the wrongdoer to pay compensation. The latter constitutes restitutionary justice, not punishment, and the two are distinct even though both treat warfare as a justice-based response to a prior wrongful act of the adversary.<sup>18</sup> In *Genesis* 14, Abraham makes war

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<sup>16</sup> McMahan emphasizes reasons (3) and (4) in arguing against retribution as a just cause of war: McMahan, "Aggression and Punishment," pp. 82-84. I am in full agreement with him on these points.

<sup>17</sup> The Christian Bible describes princes as "God's agents of punishment, for retribution on the offender." Romans 13:4—a passage influential in medieval just war theory. On this point see James Turner Johnson, "The Idea of Defense in Historical and Contemporary Thinking About Just War," *Journal of Religious Ethics* 36 (2008): 548.

<sup>18</sup> This distinction goes back at least to Grotius, as does the observation that most of the time the two causes are joined. Grotius, *The Rights of War and Peace*, Bk. II, chapter XX, §38, A.C. Campbell (trans.)(Washington and London: M. Walter Dunne, 1901), p. 245, also reprinted in Gregory M. Reichberg et al., eds., *The Ethics of War: Classic and Contemporary Readings* (Blackwell, 2006)[henceforth Reichberg], p. 406. Because so many of the classical sources are conveniently collected in the superb

on a hostile alliance that had seized Lot and Lot's family and possessions. Abraham defeats them, drives them back, and retakes the captured people and goods. At that point he withdraws rather than pursuing his adversaries to punish them; the episode contains no hint that the war was meant as punishment rather than self-help. Similarly, as Homer depicts the Trojan War its original aim was to regain Helen, not to punish the Trojans. Menelaus and Odysseus first try diplomacy, which fails, and only then launch the war; and even in the midst of the war we find the Trojan Antenor counseling his side to "[b]ring Argive Helen and the treasure with her/ and let us give her back to the Atreidai/ to take home in the ships."<sup>19</sup> Antenor apparently assumed that restitution without revenge would satisfy the Greeks. One might plausibly analyze the first Persian Gulf war as restitutionary justice designed to restore Kuwait to its recognized government, rather than to punish Saddam Hussein and his regime. By contrast with Abraham's campaign on Lot's behalf, in I *Samuel* God orders Saul to annihilate the Amalekites as "penalty for what Amalek did to Israel, for the assault he made upon them on the road, on their way up from Egypt" (I *Samuel* 15:2-3, JPS translation). This is a genuinely punitive reason for war, quite different from restitution.

### *Augustine and the Augustine Formula*

Within the just war theoretical tradition, the punishment theory begins with Augustine. In fact, Augustine never develops a single consistent theory of just cause; his remarks about war are scattered among several texts written for other purposes, and the remarks invoke at least three distinct theories of just cause, of which the punishment

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Reichberg et al anthology, I will usually cite to it rather than original sources. In some cases I cite to a different edition because Reichberg et al does not include the passage cited.

<sup>19</sup> Bk. 7, 347-53 (Robert Fitzgerald translation, pp. 166-67). On Menelaus's diplomatic mission to regain Helen, bk. 3, 205-06 (Fitzgerald, pp. 68-69), bk. 11, 139 (Fitzgerald p. 249). By the time of the sack of Troy, the motivation had obviously changed from restitution to punishment and plunder.

theory is not the most important for Augustine's own systematic philosophy. It is, however, very influential, as we shall see.

The background to many of Augustine's comments on war lies in his attempt to reconcile warmaking with Jesus's pacifist teachings by arguing that the true sin of war consists not in resort to violence per se, but resort to violence with a vicious heart. In other words, Augustine interiorizes Jesus's pacifism rather than demanding that it be manifested in action.<sup>20</sup>

Thus, in Letter 138 to Marcellinus he writes that "if the earthly city observes Christian principles, even its wars will be waged with the benevolent purpose that better provision might be made for the defeated to live harmoniously together in justice and godliness."<sup>21</sup> This is Augustine's principal theory of just cause: a just war aims to establish a just, harmonious peace. The earthly city "desires a certain earthly peace. This peace it strives to obtain through war."<sup>22</sup> But the theory also locates the morality of launching war in the Christian principles and benevolent purpose of the warrior, in other words in his motivations rather than his actions.

When Augustine first advances the punishment theory, it is likewise in connection with a motive-based account of the evils of war:

The desire for harming, the cruelty of revenge, the restless and implacable mind, the savagery of revolting, the lust for dominating, and similar things—these are what are justly blamed in wars. Often, *so that such things might also be justly*

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<sup>20</sup> See, e.g., Letter 138 to Marcellinus, Bk. II, ch. 13. Augustine was confronting the theological embarrassment that God had ordered Moses to fight wars. For critique of Augustine's interiorization of Christian pacifism, see Robert L. Holmes, *On War and Morality* (Cambridge: Cambridge University Press, 1989), pp. 132-35, 140-45. For a useful analysis and critique of Augustine's punitive conception of war as well as his focus on interior states, see John Langan, S.J., "The Elements of St. Augustine's Just War Theory," *Journal of Religious Ethics* 12 (1984): 19-38.

<sup>21</sup> Letter 138 to Marcellinus, ch. 14, in Reichberg.

<sup>22</sup> *The City of God*, bk. XV, chap. 4, in Reichberg, p. 77.

*punished*, certain wars that must be waged against the violence of those resisting are commanded by God or some other legitimate ruler and are undertaken by the good.<sup>23</sup>

This passage argues that just war punishes acts of violence committed with vicious, un-Christian motives. A few years later, in his *Questions on the Heptateuch*, Augustine drops the motive-based limitation and expands the punishment theory to include retribution for private injuries:

As a rule just wars are defined as those which avenge injuries, if some nation or state against whom one is waging war has neglected to punish a wrong committed by its citizens [lit. 'its own'], or to return something that was wrongfully taken.<sup>24</sup>

As I shall show momentarily, this broader formula is more dogmatic than the earlier, motive-based account, in that Augustine offers no argument to support the formula. Nevertheless, this brief passage was the version of Augustine's punishment theory that major subsequent writers seized upon. I shall refer to it for short as the *Augustine Formula*.

The same passage continues: "But also this kind of war is without doubt just, which God commands."<sup>25</sup> That is Augustine's third theory of just cause: holy war. It is historically important, not to mention catastrophic, because it forms the basis of the Crusades and all subsequent "holy wars."

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<sup>23</sup> Against Faustus the Manichaeon, bk. XXII, chap. 74, Reichberg, p. 73. Emphasis added.

<sup>24</sup> Questions on the Heptateuch, bk. VI, chap. 10, Reichberg, p. 82. "Iusta autem bella ea definiri solent, quae ulciscuntur iniurias, si qua gens vel civitas, quae bello petenda est, vel vindicare neglexerit quod a suis improbe factum est, vel reddere quod per iniurias ablatum est."

<sup>25</sup> Questions on the Heptateuch, bk. VI, chap. 10. "Sed etiam hoc genus belli sine dubitatione iustum est, quod Deus imperat ...." The Reichberg et al anthology does not include this latter passage.

Why would Augustine advance three inconsistent accounts of just cause?

Answering this interpretive question has historical interest, but it also sheds light on the scope and quality of Augustine's argument. I shall suggest that the scope is narrow and the quality doubtful. My conjecture is that Augustine had in mind one specific kind of war, the only one in which the inconsistency disappears: the coercive suppression of heresy within the Christian empire. *Against Faustus*, written in 397-98, was a polemic against Manichaeism. Augustine wrote the *Letter to Marcellinus* in 412, a year after he had succeeded in persuading Marcellinus (a Roman Christian official in the imperial administration of Africa) to suppress the Donatist heresy. Marcellinus had qualms against turning the sword against the Donatists, and the *Letter* is Augustine's response.

A bit of background: Donatism (like the Pelagian heresy that became Augustine's next target) represented an austere perfectionist view within the Church. The Donatists regarded the Church as an island of purity in an impure world, and believed that it should exclude those who had foresworn Christianity during Diocletian's persecution. Donatism was well-suited for maintaining the morale of a devout Christian minority in a mostly pagan environment, but it was inconsistent with Augustine's vision of a steadily expanding universal church that could draw in large numbers of imperfect human beings without losing its own soul.<sup>26</sup> In Peter Brown's judgment, Augustine's ambitious view of

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<sup>26</sup> For historical background on the Letter to Marcellinus, the heresies, and Augustine's role in their suppression, I rely on Peter Brown's magnificent *Augustine of Hippo: A Biography*, rev. ed. (Berkeley: University of California Press, 2000). On the contrast between Augustine's views and the Donatists, see pp. 208-09; between Augustine and Pelagius, pp. 346-50 (emphasizing the similarity Augustine saw between the Donatists and Pelagians on p. 348). Pelagianism, asserting free will and denying the necessity of grace for salvation, wished to reform the Church in a highly perfectionist direction, wanting "every Christian to be a monk." Ibid., p. 348. Augustine, fresh from his victory over the Donatists, first learned of Pelagian ideas from Marcellinus, in 411, and opposed them immediately. Ibid., p. 345.

Church growth “had perched it on the brink of a war of conquest”; the heresies would have thwarted those ambitions by keeping the Church pure but small.<sup>27</sup>

In 411 Marcellinus convened a conference to arbitrate the theological disputes between the Donatist and Catholic bishops, and Augustine prevailed.<sup>28</sup> Donatism was driven underground by force, and it was the following year that Augustine wrote Letter 138 to Marcellinus, reassuring him that using violence against heretics is consistent with Christianity, and indeed is for their own good:

[M]any things must be done in correcting with a certain benevolent severity, even against their own wishes, men whose welfare rather than their wishes it is our duty to consult and the Christian Scriptures have most unambiguously commended this virtue in a magistrate. For in the correction of a son, even with some sternness, there is assuredly no diminution of a father’s love; yet, in the correction, that is done which is received with reluctance and pain by one whom it seems necessary to heal by pain. If the earthly city observes Christian principles, even its wars will be waged with the benevolent purpose that better provision might be made for the defeated to live harmoniously together in justice and godliness.<sup>29</sup>

The final sentence, of course, is the previously-quoted statement of the just peace theory. On Augustine’s overall account in the *Letter to Marcellinus*, then, punishment is a form of “correcting with a certain benevolent severity,” like a father’s loving punishment of his errant son. War to “correct” heretics, aiming to restore peace and unity within the Church

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<sup>27</sup> Ibid., p. 219.

<sup>28</sup> Ibid., pp. 230-39 (on Augustine’s acceptance of coercion in suppressing the Donatists); pp. 330-35 (on Augustine’s triumph before Marcellinus, and the continued suppression of Donatism).

<sup>29</sup> Letter 138 to Marcellinus, Bk. II, ch. 13.

by force, combines all three of Augustine's accounts of just cause: as punishment, as the pursuit of just peace, and as a holy war commanded by God. Given the unique context—not a foreign war but a conflict internal to a Christian empire, and not a secular struggle but a conflict over the doctrine, structure, and control of the Church—the three theories of just cause superficially cohere. Outside that context, however, they fall apart.

If Augustine really had war against heretics in mind, his punishment theory of just cause loses whatever contemporary appeal it might have (or so I hope). Even on his own sectarian and dangerous terms, Augustine hardly offers a convincing case for punitive warfare. His analogy to paternal “correction” is absurd. Fathers do not correct their wayward sons with sword and fire, and if they did we could hardly describe their severity as loving or benevolent.

Turn now to the Augustine Formula. It appears in a brief commentary on Joshua 8:2, in which God orders Joshua to set an ambush. Augustine deduces that when one is fighting a just war, laying ambushes must not be wrong.<sup>30</sup> He then announces the Augustine Formula and declares that any war commanded by God is just. He concludes, “In this war, the leading army or the people itself is to be considered not so much the initiator of the war as God's servant.”<sup>31</sup> That is the entire discussion. Notably, Augustine presents no arguments to justify the Formula.

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<sup>30</sup> “In these matters, a just man should consider nothing in a particular way, except that he should undertake a just war, against those on whom it is right to make war; for it is not right to wage war against everyone. But when he undertakes a just war, it is of no concern to justice whether he wins by ambush.” Questions on the Heptateuch, Bk. II, ch. 10. I am using, with thanks, the translation currently under preparation by Father Joseph Lienhard, Fordham University, which he was kind enough to send me. Father Lienhard points out that Aquinas cites this passage in *Summa Theologiae* II-II, q. 40, a. 3, sed c., on the morality of ambushes.

<sup>31</sup> Ibid.



Might he have had his own earlier defense of punitive war in mind as justification for the Formula? If so, it is important to notice that as a defense of punitive war for secular wrongdoing, it fails. A war of secular punishment is neither commanded by God nor calculated to establish a just peace; certainly it is not undertaken in a spirit of benevolence aimed at improving the virtue of the enemy. In the end, the Augustine Formula remains an unsupported assertion, a dogma. Unsupported or not, however, the formula lies at the core of the punishment theory as formulated by Christian thinkers for the next thousand years.

In what follows I will set the holy war theory to one side as irrelevant to secular just war theory. Setting aside the just peace theory as well, let's focus on the punishment theory and trace the subsequent history of the Augustine Formula. Gratian incorporated it into the most influential canon law text, the *Decretum*.<sup>32</sup> Explicitly citing the Augustine Formula as authority, Aquinas also endorses the punishment theory of just cause: "a just cause is required, namely that those who are attacked, should be attacked because they deserve it on account of some fault (*culpa*)."<sup>33</sup> In turn, Vitoria echoes Aquinas: "the cause of the just war is to redress and avenge an offence, as said above in the passage quoted from St Thomas"<sup>34</sup>—referring to the passage just quoted that references the Augustine Formula.

The most detailed exponent of the punishment theory was Thomas Cardinal Cajetan (1468-1534), who wrote in his commentary on the same passage from Aquinas that "[t]he commonwealth ... in defense of its members and itself is allowed not only to repel force with moderate force, but also to exact revenge for injuries to itself or its

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<sup>32</sup> Gratian, *Decretum*, Question II, Canon 1, Reichberg, p. 113.

<sup>33</sup> Summa Theologiae II-II, Question 40, Reichberg, p. 177.

<sup>34</sup> Francisco de Vitoria, *On the American Indian*, Question 3, Article 1, Reichberg, p. 302.

members—not only against its subjects, but also against foreigners.”<sup>35</sup> Thus, like Vitoria, Cajetan derives his theory of just cause from Aquinas, who takes it from the Augustine Formula. Unlike Augustine, Cajetan actually offers a defense of “vindicative justice.” As Cajetan elaborates the view,

the prosecutor of the just war functions as a judge of criminal proceedings. That he functions as a judge of criminal proceedings is clear from the fact that a just combat is an act of vindicative justice (*actus vindicativae iustitiae*)....That it is a criminal matter is clear from the fact that it leads to the killing and enslavement of persons and the destruction of goods....<sup>36</sup>

By itself, this is not much of an argument: indeed, it is transparently circular. But Cajetan offers a reason for regarding just war as vindicative justice. He argues that if a state had no authority to “avenge itself and its citizens by fighting against the [foreign] oppressor, then unpunished evils would naturally remain....,”<sup>37</sup> which would indicate a defect in the power of natural reason. (Cajetan’s argument might today be read as a powerful argument for establishing international criminal law, rather than a justification for war.) And if the state lacked such authority, that would imply that some superior power limits the state’s authority and itself possesses the authority, in which case the state would not be a “perfect commonwealth.”<sup>38</sup> Here Cajetan anticipates contemporary arguments that requiring multinational authorization for wars affronts national sovereignty by subordinating states to a superior.

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<sup>35</sup> Cajetan, *Commentary to Summa theologiae* II-II, q. 40, a. 1, in Reichberg, p. 242.

<sup>36</sup> Cajetan, *Summula*, “When war should be called just or unjust, licit or illicit,” Reichberg, p. 247.

<sup>37</sup> *Commentary to Summa theologiae*, Reichberg, pp. 242-43.

<sup>38</sup> *Summula*, pp. 243-44.

Cajetan adds that a prince can wage punitive war on behalf of allies, or request allies to wage it on his behalf.<sup>39</sup> Not only does warfare aim to punish, it involves collective punishment, “because the sentence pronouncing the justice of the war need not distinguish whether some part of the enemy state is innocent, since it is presumed to be entirely hostile, the whole of it being considered as enemy....”<sup>40</sup>

In short, Cajetan sets out the basic elements of the punitive theory of just cause: he explicitly likens warfare to a judicial proceeding that metes out collective punishment to a criminal state and its people. On this analogy, the sovereign who launches the war functions simultaneously as prosecutor, judge, and executioner of the punishment.

Cajetan was a defender of papal authority and an opponent of Luther, but I note in passing that punitive war is a Protestant as well as a Catholic doctrine. Calvin asserts that “kings and people must sometimes take up arms to execute such public vengeance,” and lawful wars “punish evil deeds.”<sup>41</sup> And Luther asks rhetorically, “What else is war but the punishment of wrong and evil?”<sup>42</sup>

In fact, writers sometimes accepted the punishment theory as a matter of course. Grotius says “that wars are usually begun for the purpose of exacting punishment,” although he cautions “that wars should not be undertaken for any sort of delinquency,” only serious wrongdoing by the adversary. Grotius treats preventive war as “war waged to punish incipient crimes (*delicta inchoata*).”<sup>43</sup> Vattel lists the permissible objectives of war as self-defense, restitution (“to recover what belongs or is due to us”), and “to

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<sup>39</sup> Ibid., p. 245.

<sup>40</sup> Ibid., p. 249.

<sup>41</sup> John Calvin, *Institutes of the Christian Religion*, bk. IV, chap. 20, 11, in Reichberg, p. 276.

<sup>42</sup> Martin Luther, *Whether Soldiers, Too, Can be Saved*, in Reichberg, p. 269.

<sup>43</sup> Grotius, *The Rights of War and Peace*, chapter XX, § 38-39, Reichberg, p. 406.

provide for our future safety by punishing the aggressor or offender”<sup>44</sup>—a version of the punishment theory, although it is a version grounded in incapacitation and deterrence, not vindictive justice.

*The dissolution of the punishment theory*

Yet the punishment theory of just cause eventually disappeared, replaced by the proposition that self-defense is the only just cause for war. Writing in 1785, Martens makes no mention of the punishment theory and implicitly narrows just cause to self-defense.<sup>45</sup> Interestingly, the Preamble to the U.S. Constitution asserts that the constitution exists to “provide for the common defence,” and Article I, section 8—which empowers Congress to create an army and navy—reiterates that Congress has the power to “provide for the common Defence.” Implicitly, then, the Constitution suggests that a legitimate military can be aimed only at self-defense—although, of course, the U.S. government has never taken the literal constitutional language very seriously.

Self-defense as just cause is, of course, the official theory built into the UN Charter. Article 2(4) requires that “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” Those purposes, listed in Article 1(1), focus on maintaining international peace and security by collective, peaceful means, and seem entirely

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<sup>44</sup> Emer de Vattel, *The Law of Nations*, ed. Béla Kaposy & Richard Whatmore (Indianapolis: Liberty Fund, 2008), chap. III, § 28, p. 484; see also §41, p. 490..

<sup>45</sup> Georg Friedrich Martens, *Summary of the Law of Nations Founded on the Treaties and Customs of the Modern Nations of Europe*, William Cobbett trans. (Littleton, CO: Fred B. Rothman & Co., 1986)(1795 American translation of 1785 edition), Bk. VIII, Chap. II, § 2, note ‡ (“In almost every war both parties claim the defensive. This is done in order throw [sic] on the enemy, as the aggressor [sic], all the injuries arising from the war....”), p. 272.

inconsistent with the punishment theory.<sup>46</sup> The notable exception to the ban on threat or use of force is Article 51's "inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations." In practice, states including the United States treat self-defense as an enormously elastic concept, and in any event some observers believe that the Article 2(4) regime is dead.<sup>47</sup> But the fact remains that the closest thing in international law to an official, consensus view of just cause limits it to self-defense. In this respect, Michael Walzer's treatment of *jus ad bellum* in *Just and Unjust Wars* comes close to the core post-World War II conception of just cause: subject to a few exceptions, Walzer limits *jus ad bellum* to self-defense against aggression. Plainly, Walzer's view, like the UN Charter's, is inconsistent with the punishment theory.<sup>48</sup>

### **The sovereignty objection to the punishment theory**

To understand why the punishment theory disappeared, it helps to focus on a weakness early modern theorists identified in the punishment theory, namely that the theory requires one state to judge the guilt of another. This objection to the punishment theory took two forms, one grounded in the requirements of state sovereignty, the other in

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<sup>46</sup> However, Article 1(1) includes "the suppression of acts of aggression or other breaches of the peace" among the UN's purposes. One might describe punitive war in those terms, in which case, arguably, punitive war is not "inconsistent with the purposes of the United Nations" and Article 2(4) does not forbid it. This strikes me as a reading an inventive international lawyer might come up with, and I don't mean that as a compliment.

<sup>47</sup> Anthony Clark Arend, "International Law and the Recourse to Force: A Shift in Paradigms," *Stanford Journal of International Law* 27 (1990): 1-47; Michael Glennon, *Limits of Law, Prerogatives of Power: Interventionism After Kosovo* (Palgrave, 2003).

<sup>48</sup> Walzer does assert that punishment for aggression belongs to the "legalist paradigm" on which he bases the theory of aggression; and at one point he identifies this idea with the "conception of just war as an act of punishment." *Just and Unjust Wars*, p. 62. But Walzer's subsequent discussion makes it clear that he is talking about the *post bellum* legal and political punishment of war crimes, not the use of war itself as an instrument of punishment; although he points out that the disasters of war are themselves "punishment," Walzer conspicuously places the word in scare-quotes. *Ibid.*, p. 296. His more careful formulation of the legalist paradigm is this: "Once the aggressor state has been militarily repulsed, it can also be punished." *Ibid.*, p. 62. This will be through "military occupation, political reconstruction, and the exaction of reparative payments," not through warfare. *Ibid.*, p. 297.

the requirements of justice. I will examine their merits independently. As I shall argue, the sovereignty-based version should be rejected, but the justice-based version provides a powerful objection to the punishment theory—though, ironically, the writers who formulated it did not accept it themselves.

The argument against the punishment theory that states must not judge the guilt of other states was principally an objection based on the sovereign equality of states. *Par in parem non habet imperium*—“equals have no dominion over equals”—is an old Latin legal maxim, still cited in contemporary judicial opinions for the proposition that no state’s courts have jurisdiction over acts or officials of other states; *par in parem non habet imperium* is the basis of sovereign immunity.<sup>49</sup> If equals have no dominion over equals, they lack the authority to punish them, including through warfare.<sup>50</sup> Call this the *sovereignty objection* to the punishment theory. Cajetan raises the sovereignty objection against himself, and worries that “since an equal has no empire (*imperium*) over his equal, all wars would be unjust, with the exception of defensive ones.”<sup>51</sup> Cajetan rejects this worry, but only via a question-begging argument that “he who has a just war embodies a judge of proceedings in vindicative justice against foreign disturbers of the

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<sup>49</sup> See, e.g., *Al-Adsani v. Kingdom*, [2001] ECHR 35763/97, ¶61 (upholding UK decision that it lacks jurisdiction over a lawsuit against Kuwait based on the torture of a British national in which Kuwaiti officials colluded, because of Kuwaiti sovereign immunity in British courts based on *par in parem*).

<sup>50</sup> Or so those who advance the sovereignty objection believe. One might reject the idea that an aggrieved party in the state of nature needs any authority to punish wrongdoers: the right to self-defense includes the right of reprisal. I will consider this objection shortly, and argue that reprisal is not the same thing as retribution.

<sup>51</sup> *Summula*, Reichberg, p. 248. As the saying goes, one person’s *modus ponens* is another’s *modus tollens*. The conclusion that Cajetan seems to think is ridiculous enough to be a *reductio ad absurdum*—that the only legitimate wars are wars of self-defense—is precisely the conclusion that contemporary theorists draw from the *par in parem* principle.

commonwealth...<sup>52</sup>—which is, of course, precisely the assumption that *par in parem non habet imperium* calls into question.

As the Westphalian order of sovereign nation-states solidified, the sovereignty objection seemed increasingly powerful, and in *Perpetual Peace*, Kant asserts flatly that a “war of punishment (*bellum punitivum*) between states is inconceivable, since there can be no relationship of superior to inferior among them.”<sup>53</sup> In the *Rechtslehre*, Kant advances the even stronger proposition that if a state launches a punitive war, it itself commits an offense.<sup>54</sup> Vattel, as we saw earlier, does admit punitive war as a just cause, but there is a wrinkle in his view that brings it into close practical alignment with Kant’s. Under the “voluntary” law of nations—Vattel’s term for the principle of equal sovereignty<sup>55</sup>—states cannot sit in judgment of each other, and that means they must treat every war as if it is “just on both sides.” Hence both sides enjoy legal impunity.<sup>56</sup> This is true even though under the “necessary law of nations” (Vattel’s term for natural law) at

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<sup>52</sup> Ibid.

<sup>53</sup> Kant, *Perpetual Peace*, Ak. 8:347.

<sup>54</sup> Kant, *The Metaphysics of Morals: The Doctrine of Right*, trans. Mary Gregor (Cambridge University Press, 1991)(1797), p. 154 [pt. I, §58, Ak. 6:348]. For Kant, the key reason that sovereign equality implies the impossibility of one state punishing another is that he adhered to a conception of punishment that ties the right to punish to an authority’s dominion over a subject: “The *right to punish* is the right a ruler has against a subject to inflict pain upon him because of his having committed a crime. The head of a state can therefore not be punished.” Ibid., p. 140, Ak. 331. Like Hobbes (*Leviathan*, part II, ch. 28), and unlike Locke (*Second Treatise*, ch. 2, §7) and Grotius, Kant believed that equals can never punish equals. It might therefore be that Kant’s rejection of the punishment theory is an equality objection, not a sovereignty objection. But it is hard to pry the two apart, given that Kant’s reason for concluding that states are equal is precisely that they are sovereign. In any case, I reject the Hobbes-Kant idea that punishment conceptually implies hierarchical superior authority of the punisher over the punished, “unless,” as Grotius puts it, “the word superior be taken in a sense implying, that the commission of a crime makes the offender inferior to every one of his own species....” Grotius, *The Rights of War and Peace*, Bk. II, chapter XX, §3, p. 223. Blane and Kingsbury, in the article cited in note 2 above, emphasize that early modern writers differed significantly among themselves on who has the jurisdiction to punish, and offer illuminating discussion.

<sup>55</sup> Vattel, introduction, §21, p. 76. In Vattel’s words, “nations should suffer certain things to be done, though in their own nature unjust and condemnable; because they cannot oppose them by open force, without violating the liberty of some particular state, and destroying the foundations of their natural society....The rules that are deduced from it [i.e., this principle], constitute what Monsieur Wolf calls ‘the voluntary law of nations’...” Ibid.

<sup>56</sup> Vattel, *The Law of Nations*, Bk. III, Ch. XII, §§188-192, pp. 589-93; the quoted phrase is from §190, p. 591.

most one side can truly be just,<sup>57</sup> and every act of violence committed in the war can be charged against the sovereign who wages it unjustly.<sup>58</sup> The necessary law of nations is binding on conscience only, however;<sup>59</sup> positive law must treat wars symmetrically. For both Kant and Vattel, then, punitive wars are unlawful because states have no authority to judge other states.

Evidently, the punishment theory of just cause declined with the consolidation of the nation-state system, because it seems inconsistent with the theory of sovereignty and sovereign equality. One corollary of this point of view is that the sovereignty objection to the punishment theory of just cause does not apply when the adversary is a non-state actor. Thus, the sovereignty objection leaves open the possibility of resurrecting the punishment theory in the War on Terror or other asymmetrical wars against militants and non-state organizations.<sup>60</sup>

Where does that leave us, though, in an era where the moral center of gravity has shifted from unrestricted state sovereignty to international human rights? This shift began when the Nuremberg Charter stripped away the act-of-state defense and penalized crimes against humanity “whether or not in violation of the domestic law of the country where perpetrated”; it was famously articulated in Kofi Annan’s speeches and writings of the late 1990s, where he argued that human rights violations are never within states’

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<sup>57</sup> Ibid., Bk. III, Ch. III, §39, p. 489.

<sup>58</sup> Ibid., Bk. III, Ch. XI, §§183-184, p. 586.

<sup>59</sup> Ibid., Bk. I, introduction, §26, p. 78.

<sup>60</sup> In fact, nothing in international humanitarian law forbids states from criminalizing entire rebel armies, although Additional Protocol II to the Geneva Conventions calls on states to “endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict.” Additional Protocol II (1977), Article 6(5). This is a weak requirement—in a sense, it is not a requirement at all—and in fact every modern state reserves the right to treat rebels as criminals.



domestic jurisdictions.<sup>61</sup> If sovereignty has limits, then so should *par in parem non habet imperium*.<sup>62</sup> Significantly, while *par in parem* continues to be cited by courts to uphold the immunity of sovereigns in each others' domestic legal systems, none of the international criminal tribunals grants sovereign immunity. The demand for international criminal justice grows out of the human-rights-based demand for punishment of leaders who instigate genocide, crimes against humanity, and war crimes. It answers to Cajetan's concern that leaving notorious evils unpunished would violate natural reason.

This is not to say that human rights proponents advocate a return to the punishment theory of just cause. Although some *do* support humanitarian military interventions, and many favor international criminal justice for war criminals, neither of these is the same as punishment through war itself. The war may be necessary to halt the crimes and capture the national leaders who directed them; it is not itself the form that punishment takes, any more than criminal punishment consists of police shooting suspects during their capture.<sup>63</sup> Nevertheless, by undermining the strong conception of unaccountable state sovereignty in Kant and Vattel, the human rights revolution

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<sup>61</sup> See the writings collected in Reichberg, pp. 683-93, and Annan's 1999 General Assembly address, "Secretary General Presents His Annual Report to the General Assembly, Sept. 20, 1999," accessed from <http://www.un.org/News/press/docs/1999/sgsm5826.sgsm.htm> on April 8, 2011.

<sup>62</sup> This was the point of view of the dissenting judges in the European Court of Human Rights's *Al Adsani* decision cited above. *Al Adsani*, a dual national of the UK and Kuwait, sued the Kuwaiti government in British court, alleging torture. When the court dismissed his suit on sovereign immunity grounds, he went to the European Court, claiming that the lack of a judicial remedy for torture violates his human rights. While the majority concluded that *par in parem non habet imperium* has no exception for torture cases, the dissenters vigorously protested that a *jus cogens* violation is different: the protection against torture outweighs Kuwaiti sovereignty.

<sup>63</sup> For that matter, it is hard to find examples of modern wars launched to arrest a criminal national leader and bring him to trial. Conceivably, this was the purpose of Operation Just Cause, the 1989 U.S. invasion of Panama, which culminated in arresting Panamanian leader Manuel Noriega and bringing him to the United States for trial as a drug smuggler. Even here, the official U.S. justification focused not on capturing a criminal, but on safeguarding the lives of U.S. citizens in Panama and defending Panamanian democracy and human rights. *New York Times*, December 21, 1989, "A Transcript of President Bush's Address on the Decision to Use Force."

unintentionally and indirectly undermines the sovereignty objection to the punishment theory of just cause.

### **The biased judgment objection to the punishment theory**

But *par in parem* is not the only objection to the punishment theory. The early modern theorists recognized another variant of the argument that states cannot pass judgment on other states, a variant based on worries about bias rather than state sovereignty. When a state launches a punitive war, in Suárez's words, "the same party in one and the same case is both plaintiff and judge, a situation which is contrary to natural law."<sup>64</sup> Suárez's objection to warring parties making themselves judges and executioners of punishment remains powerful. As the classic commentators repeatedly emphasize, it is impossible to expect states to judge the justice of their own wars impartially. All states believe that justice lies on their side, and their adversary has committed abominable injustice. And therefore the punishment theory of just cause is an open invitation to self-serving, unfair, overly harsh, and excessive punishment. Call this the *biased judgment objection*.

Unlike the sovereignty objection, the biased judgment objection to the punishment theory holds regardless of whether the adversary is a state or non-state actor. In either case, it is the state that concludes it has been injured and its injurer must be punished; and an injured party can never be trusted to draw this conclusion impartially. Furthermore, the biased judgment objection does not rest on dubious assumptions about

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<sup>64</sup> Francisco Suárez, *Disputation XIII (On War)*, section IV, §6, Reichberg, p. 350. Suárez himself rejects this objection because "the act of vindicative justice has been indispensable to mankind, and ... no more fitting method for its performance could, in the order of nature and humanly speaking, be found." Ibid., §7, Reichberg, p. 350. But this response is weaker than the argument it responds to: it begs the question of how indispensable wars of vindicative justice have indeed been to mankind. It is worth noting that Cajetan had earlier considered but rejected Suárez's analogy: "It is also clear that he who has a just war is not a party [to a legal proceeding], but becomes, by the very reason that impelled him to make war, the judge of his enemies...." *Summula*, in Reichberg, p. 247.

unbridled state sovereignty. It rests solely on appreciating the impossibility of impartial judgment by belligerents, coupled with an understanding that the institution of punishment demands impartial judgment.

It might be objected that biased judgment infects judgments about self-defense just as much as about wrongdoing. That is true if we understand self-defense in an overly capacious way that includes the unrestricted right to unilateral preventive warfare; as I argue elsewhere, the inevitable burdens and infirmities of judgment provide a powerful reason to reject a broad doctrine of preventive war.<sup>65</sup> The UN Charter does acknowledge that states have an inherent right of self-defense “if an armed attack occurs,” but only “until the Security Council has taken measures necessary to maintain international peace and security.”<sup>66</sup> In effect, the Charter scheme acknowledges the biased judgment objection, and allows states to exercise self-defense rights only until a (presumably unbiased) third party can step in.

### **Revenge, retribution, restitution, reprisal**

Why does institutionalized punishment demand impartial judgment? Implicit in this argument against the punishment theory is a crucial distinction between *retribution* undertaken for moral reasons as a practice of justice, and *revenge* undertaken out of rage and hatred. Only the former is a genuine moral basis for punishment. Significantly, Vitoria, Cajetan, and Calvin are careless about this distinction; all speak as though punishment and vengeance are interchangeable. Confusingly, Augustine asserts both that the “cruelty of revenge” is an evil calling for punishment through war *and* that a just war avenges (*ulciscuntur*) injuries. Of the writers I have examined, only Grotius clearly

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<sup>65</sup> David Luban, “Preventive War,” *Philosophy & Public Affairs* 32 (2004): 227.

<sup>66</sup> UN Charter, art. 51.

distinguishes revenge from just punishment (and condemns revenge).<sup>67</sup> The others ignore the distinction between revenge, a non-moral gut response to grievance, and retribution, a moral response to wrongdoing. Let me elaborate the distinction.<sup>68</sup>

In its primary personal form, vengefulness is an emotional response of hatred toward the author of injury or perceived injury. Jean Hampton calls it “a kind of primitive defensive anger... [or] attacking rage—a kind of ‘bite back’ response—towards one who has ‘bitten’ her when he has mistreated her.”<sup>69</sup> So understood, vengefulness is a non-moral or, more accurately, a pre-moral response—“you hurt me, I hate you, I’ll get you!”—that surges up in us out of our own pain. What makes vengefulness non-moral is not that it can never be morally justified (in some cases it surely can), but rather that it surges up in us whether it is justified or not. For that reason, I think Hampton may be misleading when she limits bite-back to cases when one party “mistreats” another. If “mistreatment” means merely hurt or injury, I have no problem with her formulation; but if “mistreatment” implies the avenger’s belief that the offender has wronged the avenger, the formulation narrows the bite-back phenomenon too far. For example, people justly convicted of crimes can and do feel vengeful rage even though they know they deserve the guilty verdict—in fact, their sense of shame and humiliation at their own conduct can make their rage even greater.

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<sup>67</sup> Grotius, *The Rights of War and Peace*, Bk. II, chapter XX, §5, pp. 224-25. Grotius also distinguishes between ancient and modern wars on the ground that the ancients launched wars out of personal animosity, while the moderns do so for impersonal reasons of state “of which the feelings of the individuals appointed to conduct them are not the only springs of action.” Ibid., p. 225 note.

<sup>68</sup> For an alternative view of vengefulness in war, see Nancy Sherman, “Revenge and Demonization,” in May, *War: Essays in Political Philosophy*, pp. 289-306.

<sup>69</sup> Jean Hampton, “Forgiveness, resentment and hatred,” in Jeffrie G. Murphy & Jean Hampton, *Forgiveness and Mercy* (Cambridge UP, 1988), p. 54.

I emphasize this point because many philosophers defend the rationality of the emotions, and argue that emotions are forms of value judgment rather than sheer brute energies; and, more specifically, that as a conceptual matter vengeful anger implies our belief that we have been wronged, not merely harmed. While I agree that the emotions can embody rational value judgments, I deny that they always do, and in particular I deny that vengeful anger implies our belief that we have been wronged.

Aristotle articulates the view I am criticizing when he defines anger as “an impulse, accompanied by pain, to a conspicuous revenge for a conspicuous slight directed *without justification* towards what concerns oneself or towards what concerns one’s friends.”<sup>70</sup> The italicized words indicate that anger necessarily includes a moral judgment by the angry person that the target of the anger was unjustified in slighting her. Presumably, Aristotle did not mean to imply that the moral judgment is correct, only that the angry person believes it correct. Even so, this definition overlooks the vengeful rage that bubbles up even when we understand perfectly well that the person who caused us pain was justified in doing so. Achilles’s vengeful rage against Hector for killing Patroclus grew from his pain, not from any belief that Hector was unjustified in killing Patroclus; the same might be said about modern warriors who seek revenge for their fallen comrades even though they know that the enemy has a right to fight them. In such cases, vengefulness is a manifestation of hurt, not a moral judgment that the hurt was unjustified.

Hampton’s “bite back” characterization is misleading in one other way, namely that it suggests an instantaneous fury that may recede as quickly as it arises.

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<sup>70</sup> *Rhetoric*, 2.2, 1378a31-32 (emphasis added). “Without justification” translates *mé prosékontos*.

Vengefulness can just as easily take the form of slow, simmering hatred that the aggrieved person nurtures and even savors—as Aristotle observes, anger gives us “a certain pleasure because the thoughts dwell upon the act of vengeance, and the images then called up cause pleasure, like the images called up in dreams.”<sup>71</sup> Homer famously says that vengeful anger is “sweeter than slow-dripping honey,”<sup>72</sup> an image in which the slow dripping is as important as the sweetness. And tying vengefulness to the passion of anger in no way denies that it can be strategically delayed and as cunningly calculated as Iago’s destruction of Othello.<sup>73</sup> But, keeping these qualifications in mind, Hampton’s basic point that vengefulness is a non- or pre-moral “bite back” response to hurt, which erupts in us regardless of justification, seems right.

One more important complication: Revenge can take institutionalized form within cultures of honor and vendetta. The defining feature of an honor culture is that a man who fails to avenge an injury to himself or his family becomes an object of scorn and moral disapprobation. (Although the same obligation of vengeance might bind women, let’s not pretend that honor cultures are less male-oriented than they are.) The honor culture morally condemns the man who refuses to kill in revenge, not the man who kills. Modern societies view vendetta culture as atavistic, and the law declines to draw a distinction between a revenge murder and other murder; but vendetta cultures persist, in urban street gangs as well as tribal or clan societies, and a man who refuses to avenge a dishonor counts within those subcultures as no man at all.

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<sup>71</sup> *Rhetoric*, 2.2, 1378b9.

<sup>72</sup> *Iliad*, Bk. 18, line 109, Fitzgerald trans. p. 433. “Slow-dripping” translates *kataleibomenoio*.

<sup>73</sup> At the play’s opening, Iago announces that he wants to destroy Othello because Othello has promoted Antonio instead of him. Judith Walzer has reminded me that many interpreters of the play think that revenge was merely Iago’s pretext for hatred that, ultimately, has no explanation.

Vendetta culture complicates the initial picture of vengeance as an emotional reaction born of hate and anger. In societies where vendetta is an established social norm, we can readily imagine some clan members who carry out their murderous duties without feeling any personal hatred of their enemies, impelled by the rules of familial honor rather than vengeful rage. In those cultures, it will be hard even in theory to distinguish revenge from retributive justice, and in practice vendetta cultures often have well-established rules, including proportionality standards, that bring them close to systems of retributive justice.<sup>74</sup>

Even so, it would be fanciful to imagine a culture where blood feuds aren't larded through and through with vengeful hate as the body count mounts. The most peace-loving Romeo will eventually kill in rage after Mercutio dies in his arms. Even if individual avengers sometimes slay their enemies *sine ira*, the *ira* will be real and rampant somewhere in each warring side. So the existence of vendetta cultures does not significantly weaken the proposition that ties vengefulness to rage.

Warrior cultures are closely connected with honor cultures. As in the Achilles-Patroclus example, it is easy to see how vengefulness and hatred can become persistent temptations to soldiers in combat. Intellectually, soldiers understand that their enemies have the right—the belligerent's privilege—to shoot at them. Soldiers may go into combat with no personal sense of grievance against the enemy. But when the soldier's friends get bombed, maimed, and killed, more so when the enemy seems to exult in it,

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<sup>74</sup> See, e.g., Joseph Ginat, *Blood Revenge: Family Honor, Mediation, and Outcasting*, rev. ed. (Sussex Academic Press, 1997) and Clinton Bailey, *Bedouin Law from Sinai and the Negev* (Yale UP, 2010) on Bedouin practice; William Ian Miller, *Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland* (University of Chicago Press, 1997), as well as Miller's *Eye for an Eye* (Cambridge UP, 2005). Miller is rather scornful of contemporary efforts to distinguish retribution from revenge—see, e.g., *Eye for an Eye*, p. 206.

hatred and vengefulness are inevitable, and only the most exacting discipline can hold it in check. Even a war undertaken for reasons that have nothing to do with vengeance can transform into a war of revenge, as both soldiers and civilians absorb the pain of casualties and body bags.

Retribution differs from revenge. Its basis is not aggrieved anger, but rather the moral judgment that a wrongdoer has done something that deserves punishment. In effect, the wrongdoer has through her actions falsely asserted that she is the kind of “high” person who gets to do this to others, or that the victim is the kind of lowly person who others get to treat like dirt, or both. Through her action, the wrongdoer has upset a moral balance and performatively asserted a moral falsehood; she has illicitly devalued her victim or overvalued herself.<sup>75</sup> The aim of retribution is, simply, to reassert moral truth. Retribution does so by administering an *expressive defeat* to the wrongdoer, and—as Hampton puts it—it annuls the evidence of the victim’s diminished worth that the wrongdoing creates. The process of retribution is through-and-through cognitive: it requires an impartial moral judgment of the nature and magnitude of the wrongful act, an assessment of the damage it has inflicted on the victim—including damage to the victim’s self-respect—and a careful calibration of how much punishment must be administered to plant the flag of moral truth.

The distinction between retribution and revenge comes out vividly in prosecutor Robert Jackson’s celebrated opening statement to the Nuremberg Tribunal: “That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most

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<sup>75</sup> My discussion here closely follows Jean Hampton, “The Retributive Idea,” in Murphy & Hampton, which in my view provides the most compelling explanation of retributivism.



significant tributes that Power has ever paid to reason.”<sup>76</sup> Retribution need not be passionless and unemotional; but as a moral account-settling it rests on reasoned judgments, not rage—judgments that the punisher can defend both to the person undergoing punishment and to disinterested third parties.<sup>77</sup> Jackson’s speech marks the turn from warfare to criminal justice as the instrument of international punishment, and he rightly grounds this turn in a turn from vengeance to rational retribution.

The retributive ideal imposes a strong requirement on the punishment theory of just cause: the punishment must fit the crime. Discussing the punishment theory of just cause a generation after Vitoria, Luis de Molina warned that “the amount of punishment and vengeance to be inflicted upon the enemy...ought to be proportionate to the amount of guilt which they incurred in committing the injury, for punishment, if it is to be just and legitimate, should always correspond only to the crime.”<sup>78</sup>

Avengers, however, have a problem with proportionality. Vengeful rage has no logical stopping point internal to itself—it never relents until the passion has discharged itself on its target. The avenger may undergo a change of heart, or for some other reason decide to show mercy, but the decision for mercy remains as ungoverned by standards of impartial judgment and proportionality as the vengefulness itself.

The problem with allowing the harmed party to act as judge and enforcer of retribution is simply that retribution demands proportionality, and vengeful rage cannot provide it. Vengefulness distorts judgment in two ways: first, rage provides a poor measure of how much hurt the avenger has actually experienced, and second, the

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<sup>76</sup> Proceedings of the International Military Tribunal at Nuremberg, vol. 2, p. 98.

<sup>77</sup> On the difference between revenge and retribution, see Hampton, “The Retributive Idea,” p. 137.

<sup>78</sup> Luis de Molina, *De iustitia et jure*, tract II, disputation 102: A common just cause of war, comprising all of the others, in Reichberg, p. 336.

subjective experience of hurt provides a poor measure of how badly the wrongdoer has acted. This double distortion makes vengefulness inherently unreasonable: the level of punishment should be proportional to the offender's level of objective wrongdoing, not to the avenger's level of rage. Ultimately, the double distortion explains why collapsing the role of plaintiff and judge is so dangerous: the aggrieved plaintiff can hardly see around her own rage to judge impartially.

And so Jackson argues in his Nuremberg address: he admits that it is “hard to distinguish between the demand for a just and measured retribution, and the unthinking cry for vengeance which arises from the anguish of war. It is our task, so far as humanly possible, to draw the line between the two.”<sup>79</sup> That is why a fair trial with unbiased judging is crucial; in this sense, the move from punitive war to international criminal law follows from the nature of retribution.

Actually, the problem of proportionality is even more serious than this discussion suggests. Pufendorf observed an awkward fact about retributive wars: to administer retribution you have to win the war, and what it takes to win bears no necessary connection with proportionate punishment.<sup>80</sup> This is not a humanitarian point: winning even a self-defensive war can inflict far more damage than proportional punishment for the aggressive attack calls for; and Pufendorf rejected the punishment theory of just cause only in order to argue that it is not unjust “to return a greater evil for a less.”<sup>81</sup>

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<sup>79</sup> Proceedings of the International Military Tribunal at Nuremberg, vol. 2, p. 100.

<sup>80</sup> “But the evils inflicted by right of war have properly no relation to punishments, ... nor have as their direct object the reform of the guilty party or others, but the defence and assertion of my safety, my property, and my rights.” Samuel von Pufendorf, *The Law of Nature and Nations*, bk. VIII, chap. 4, Reichberg, p. 461.

<sup>81</sup> Ibid.

Pufendorf may be right that wars of self-defense can be bloodier and more catastrophic than wars of retribution, provided that the retributive acts of war to proportional punishment rather than whatever slakes the public appetite for vengeance. A campaign of vengeance, on the other hand, like the Allied bombing attacks on German cities that continued long after victory was certain, is likely to be far more devastating than a war that confines itself to the minimum required for self-defense.

To round out this part of the discussion, I want to say a few words about two others kinds of punitive military response in addition to vengeance and retribution, namely restitution and reprisal. Restitution, as described earlier, means regaining captured persons or property—or, frequently, disputed land—or else obtaining compensation. As I indicated earlier, restitution is not the same as punishment, although they are easy to confuse.<sup>82</sup> Using force to recover property—as the UK did in the Falklands war—need not involve any punishment of the adversary, and conversely punishing war crimes need not include reparation payments or other forms of compensation.

Reprisals are otherwise-wrongful military attacks to enforce compliance with the rules of war when the adversary violates them.<sup>83</sup> Their aim is narrowly instrumental and forward-looking; as the UK Ministry of Defence cautions, reprisals “are not retaliatory acts or simple acts of vengeance.”<sup>84</sup> In particular, if it becomes clear that the adversary has no intention of repeating the wrongdoing, reprisal is unjustified even though

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<sup>82</sup> Thus, in the eighteenth century Christian von Wolf argued that wars of restitution (he uses the word “vindication”) are also punitive because they are undertaken against an offender because of the offender’s violation of right. *The Law of Nations Treated according to a Scientific Method*, §639, Reichberg, p. 472.

<sup>83</sup> See the ICRC definition in Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, *Rules* (Cambridge UP, 2005), Rule 145, p. 513, and the definition in the widely-respected UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford UP, 2004), §16.16, p. 420.

<sup>84</sup> UK Ministry of Defence, *Manual*, §16.16, p. 420.

retribution through criminal trial and punishment might be. Furthermore, reprisals “may not significantly exceed the adverse party’s violation either in degree or effect”—they “must be in proportion to the original violation.”<sup>85</sup> Reprisals have only one purpose: deterring future wrongdoing by the adversary. The Geneva Conventions forbid reprisals against prisoners and civilians under the state's control, and Additional Protocol I goes further, forbidding reprisals against all civilians, civilian objects, cultural objects, the means of civilian subsistence, the natural environment, and “works and installations containing dangerous forces” (Articles 20, 51-56). A few states reject the wider prohibition—these include the United States, the UK, Egypt, and Italy—but the movement in contemporary law of war is toward ever-greater protection against reprisals, and ever more stringent conditions on legitimate reprisals.<sup>86</sup>

The reason for construing legitimate reprisals narrowly, to exclude illegal targets, is obvious: otherwise, reprisals might respond to wrongful acts with further wrongful acts. A practice designed to limit the barbarism of war cannot be permitted to redouble it.<sup>87</sup>

### **Collective guilt and collective punishment**

What if we could take the biased judgment objection to punitive war off the table, by turning the matter over to a neutral and fair adjudicator—say, the International Criminal Court? Would there be anything wrong with empowering the ICC to judge

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<sup>85</sup> Ibid., p. 421.

<sup>86</sup> The ICRC identifies five customary restrictions on reprisals. Reprisals must be solely reactions to violations by the enemy for purposes of enforcing compliance (anticipatory reprisals and counter-reprisals are prohibited); they must be the last resort; they must be proportional to the violation; they must be decided on by the highest level of government; and they “must cease as soon as the adversary complies with the law.” Henckerts & Doswald-Beck, pp. 515-18.

<sup>87</sup> See the useful discussion of reprisals in Walzer, *Just and Unjust Wars*, chap. 13. See also Stephen C. Neff, *War and the Law of Nation: A General History* (Cambridge UP: 2005), pp. 122-26, 225-39; Mark Osiel, *The End of Reciprocity* (Cambridge UP: 2009), in numerous passages indexed under “reprisals.”

states and sentence them to punishment by war?<sup>88</sup> Set to one side how politically unthinkable such a development would be, as well as justified skepticism that an ICC with such awesome authority would remain neutral and fair.<sup>89</sup> Is fair retributive punishment inflicted through warfare permissible? I argue that it is not.

War is a blunt instrument. Despite easy talk about “surgical” strikes and “precision” attacks, the fact is that warmaking wreaks damage across entire towns, cities, and territories. Wars are the equivalent of natural disasters like floods and hurricanes, and even the most discriminate war breaks whatever it touches. Thus, if war is retributive punishment, we must acknowledge that it is *collective* punishment, indeed collective corporal punishment.

One might deny this conclusion. Perhaps the punitive war is directed only at the individual leaders who deserve punishment, and the other damage is “collateral,” that is, unintended even if it is foreseeable, in just the way that damage to the innocent in a war of self-defense is foreseeable but unintended (when it *is* unintended). Few non-pacifists would argue that foreseeable but unintended damage to the innocent makes wars of self-defense unjustifiable.<sup>90</sup> Why would the same not be true in a war of punishment?

The answer is that if war is a mode of retribution, damage infliction is not collateral to the war’s purpose, the way it is collateral to the purpose of self-defense. In

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<sup>88</sup> Elsewhere I have argued that the ICC should have the power to convict states of crimes, departing from its current jurisdiction, which includes only natural persons. David Luban, “State Criminality and the Ambition of International Criminal Law,” in Tracy Isaacs and Richard Vernon, *Accountability for Collective Wrongdoing* (Cambridge UP: 2011), pp. 61-91. The present paper grew from the question of how a criminal state can be punished. At present, states responsible for international breaches can, if jurisdictional requirements are met, be held liable for monetary damages.

<sup>89</sup> A supra-national military authority was not always politically unthinkable. The UN Charter empowers the Security Council to authorize military force against breaches of international peace and security, and requires states to contribute troops to such efforts. Articles 39-49. However, no state ever actually complied with Article 43’s requirement to place troops at the call of the Security Council. In practice, a UN military force really did prove politically unthinkable to the member states.

<sup>90</sup> The noteworthy exception is David Rodin, *War and Self-Defense* (Oxford UP: 2002).

retribution, inflicting harm *is* the purpose. To partition the violence punitive war inflicts on the enemy state into the part that intentionally punishes the guilty (which part is that?) and the “collateral” part seems sophistical and artificial. When Portia insists that the law entitles Shylock to a pound of Antonio’s flesh but not a drop of his blood, we understand that she has tricked Shylock by turning his own legalism against him. It would be a reverse trick if Shylock replied that spilling Antonio’s blood is merely the foreseen but unintended consequence of harvesting his flesh. Even though blood can be distinguished from flesh, spilling Antonio’s blood was never merely collateral to taking his flesh; and ruining an evil leader’s realm—as if the leader is the flesh and his realm is the blood—is not merely an incidental side effect of punishing him through war against his country. Flesh and blood are more tightly connected than that.

More concretely, using war to visit retribution on another state seldom means punishing guilty elements within a state through carefully targeted violence against them as individuals. It means punishing them by attacking their military forces and their “dual use” civilian facilities. The harm this violence inflicts is, by hypothesis, intentional. To call intentional violence with harm as its goal collateral is disingenuous if not downright contradictory.

The critic may not be convinced. Suppose that the moment the international community “sentences” a miscreant state to punishment through war, the state surrenders without a fight. Has the punitive war succeeded in its retributive aim? Or does retributive justice require that the international community ignore the surrender and inflict some violence, which will inevitably harm the innocent as well as the guilty? The latter

hypothesis seems morally outrageous—outrageous enough that it would be wrong to attribute that view to exponents of war as punishment.

On the former hypothesis, however, the punitive war has succeeded in its retributive task, and it has done so by bringing about the wrongdoer's surrender *nonviolently*. That suggests that the punishment consists of inflicting defeat on the wrongdoers (i.e., bringing about their surrender), not necessarily inflicting physical harm on their armies or people. The only reason for inflicting the harm is to overcome the wrongdoers' military resistance to the real punishment, namely the defeat. If so, then the harm truly does seem collateral.

The problem with this argument is that it is unclear why surrender as such counts as undergoing punishment. Surrender by itself is nothing but a ceremony. The punishment must lie in the consequences that follow from surrender: reparations payments, disarmament or demobilization of military forces, territorial readjustment (if the wrongdoer's crime was the illegal seizure of territory), turning over culpable leaders for criminal trials, or in extreme cases regime change.

If that is right, we have the following situation: an international adjudicative body like the ICC has "tried" a miscreant state, and punished it through the measures just described: reparations, disarmament, territorial readjustment, war crimes trials, or regime change. These punishments have been enforced through military action. But this is no longer a picture of war as retributive punishment. This is a picture of war as policing, not punishing. It is an essentially legal model of adjudication resulting in a mix of civil reparations and individual criminal trials. Even those who reject war as punishment can accept that this essentially legal process may require military muscle to enforce it. That

makes this model essentially different from viewing war itself as a form of punishment. For Cajetan, war as punishment was a radical alternative to a world legal system; the model just described simply *is* a world legal system.

The question about the exact nature of the punishment retributive war seeks to inflict—is it physical harm to a miscreant state’s armed forces or realm, or is it defeat in the sense of making the wrongdoer cry “uncle”, or is it non-violent legal remedies combining restitution and individual criminal punishment?—is not one that the classical sources of punishment theory systematically addressed. They may not even have thought about hypothetical cases of military victory without plentiful bloodshed. At least one, Christian Wolff, clearly distinguished between the restitutionary (in Wolff’s language “vindicative”) and punitive goals of war, pointing out that a robbery victim has the right not only to regain the stolen property by force but also to punish the robber.<sup>91</sup> For Wolff, at any rate, war as punishment meant more than remediation. Likewise, for Wolff the aim of war was not the legal punishment of bad actors on the other side after they surrendered—on the contrary, in Wolff’s view generalized amnesty “is contained in every treaty of peace as such, even if there should be no agreement for it.”<sup>92</sup> It was war’s violence itself that inflicted punishment.<sup>93</sup> Cajetan, as we saw earlier, did not flinch from the fact that war inflicts collective punishment, “because the sentence pronouncing the justice of the war need not distinguish whether some part of the enemy state is innocent,

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<sup>91</sup> Christian Wolff, *The Law of Nations Treated according to a Scientific Method* (1749), §639, “When a War is at the Same Time Vindicative and Punitive,” in Reichberg, p. 472.

<sup>92</sup> Ibid., §990. Reichberg et al do not include this paragraph. It is in Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, vol. 2, Joseph H. Drake, trans. (Oxford: Clarendon Press, 1934), p. 502.

<sup>93</sup> Ibid., §616, p. 314: “Thus he begins a punitive war who punishes by arms...”



since it is presumed to be entirely hostile, the whole of it being considered as enemy....”<sup>94</sup>

Modern law rightly recoils at the idea of collective punishment. Thus, at Nuremberg, even though the Charter allowed entire organizations to be criminalized, the judges who convicted the S.S. and other organs of the Nazi apparatus insisted that criminal liability is personal, and pared down the criminal groups to “exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of [crimes].”<sup>95</sup> The idea that individuals could face severe penalties for mere membership in a criminal group was more than the judges could stomach.

This is not to deny that people other than the physical perpetrators of crimes and leaders who order them can share guilt in the crime. Even innocent bystanders may not be so innocent: the very fact that citizens go about their daily business as though nothing is wrong while the state commits crimes in their name creates the moral and psychological climate in which the perpetrators lose their moral compass, because those around them treat deviance as normal. By now, after nearly half a century of social psychological research, we understand that the conduct of bystanders constructs situations that—in Hannah Arendt’s words—“make it well-nigh impossible for [the perpetrator] to know or to feel that he is doing wrong”<sup>96</sup>—which of course does not excuse the wrongdoing, but does help us understand why people engage in it. Bystanders are even more guilty if they

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<sup>94</sup> On the acceptance of collective punishment post bellum by early modern theorists—limited by moral and pragmatic obligations of mercy but not limited in principle—see Blane and Kingsbury, pp. 259-62.

<sup>95</sup> Judgement of the International Military Tribunal: The Accused Organizations, available at <http://avalon.law.yale.edu/imt/judorg.asp#general> (visited Dec. 4, 2009).

<sup>96</sup> Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, p. 276. This is a major theme as well in Mark Drumbl’s *Atrocity, Punishment, and International Law* (Cambridge UP: 2006).

cheerlead the wrongful war effort and rally behind the regime that launches wrongful wars. In such cases, we may rightly speak of collective guilt involving most of a population as well as the regime that governs it. Democratic states may be even more collectively guilty of international crimes than undemocratic ones, precisely because their regimes rely more heavily on popular support.

But just as the Nuremberg Tribunal rejected a conception of collective guilt that could, in theory, have permitted every member of the S.S. to be executed, we should reject a conception of collective guilt that can, in practice, lead to the death or maiming or loss of possessions of anyone in a guilty population. That is what punishment by war inevitably involves. The disasters of war are distributed among the enemy population without regard to their individual guilt; any proportionality between punishment and culpability is sheer coincidence.

So too, punishment by warfare, visited on the bodies of its victims, uses modes of punishment that civilized societies have abandoned: mutilation, destruction of homes and property, brain damage, the slaughter of kinfolk. Most countries have abolished the death penalty, and many have abolished life without parole as inconsistent with human dignity. Although there may be no logical argument for restricting the modalities of punishment to temporary loss of liberty, fines, and possibly losses of rights, the move to milder punishment has come to define progress in civilization in much of the world.<sup>97</sup>

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<sup>97</sup> My view here is strongly influenced by Hampton as well as Jeffrey Reiman, "Justice, Civilization, and the Death Penalty: Answering van den Haag," *Philosophy & Public Affairs* 14 (1985), pp. 115-48. Hampton argues that the same concern for human dignity that justifies retributive punishment limits it to modalities that do not themselves demolish human dignity. Reiman argues that although the *lex talionis* sets the theoretical limit of legitimate retribution, the move to milder punishments is part of the growth of civilization.

In the end, then, the punishment theory, understood as either revenge or retribution, is unacceptable. Some non-retributive arguments for punishment may be accepted if we recast them as arguments grounded in self-defense; and, as I pointed out in connection with Pufendorf, wars of self-defense may prove more destructive and violent than legitimate retribution.<sup>98</sup> The demise of the punishment theory might not, therefore, diminish the disasters of war. It will, however, decrease the occasions in which war can rightly be launched.

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<sup>98</sup> This is one of the chief points in Gabriella Blum, “The Questionable Case Against Punishing States” (unpublished)—a comprehensive study in the way that the punishment theory has morphed into theories of self-defense and prevention.