

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 for states 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 through 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 the 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*, which holds that states may justly fight wars as retribution for wrongdoing, has been a theme in Western just war theory

I presented earlier drafts of this article 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 Yitzhak Benbaji, Eyal Benvenisti, Gabriella Blum, Joshua Cohen, Marty Lederman, Judith Lichtenberg, Josiah Ober, Jeff Powell, Guy Sela, Nancy Sherman, and Tim Sellers. I am also grateful to four reviewers for *Philosophy & Public Affairs* for their helpful and incisive comments on an earlier draft.

since it began. 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 for the Germans to stop the blitz: “if 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.’ ”¹

Whether or not Churchill was predictively right—Michael Walzer pointedly notes that “the people of London were not in fact asked to vote”²—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 percent of Americans wanted to kill all Japanese; public opinion hardly gets more punitive than that.³

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.”⁴ 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.⁵ I believe the punishment theory remains alive

1. Quoted in Michael Walzer, *Just and Unjust Wars* (New York: Basic, 1977), p. 256. Of course, Britain fought the war itself for collective self-defense, and the morality of the bombing was an *in bello*, rather than an *ad bellum*, question. Although in this article I focus on the punishment theory of just cause—a *jus ad bellum* issue—the punishment theory readily 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.

2. *Ibid.*

3. George Gallup, ed., *The Gallup Poll: Public Opinion, 1935–1971*, Vol. 1 (New York: Random House, 1972), pp. 477–78. See Gary Bass, *Stay the Hand of Vengeance* (Princeton, N.J.: Princeton University Press, 2001), p. 161.

4. George W. Bush, *Decision Points* (New York: Crown, 2010), p. 128.

5. 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

and well in the moral imaginations of modern societies, even if diplomats and lawyers carefully scrub it from official justifications for 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.⁶ The general was unusual in his candor, but the view hardly seems eccentric.

It is worth spelling out why. The punishment theory assumes (1) that states or other armed groups can commit punishable wrongdoing attributable to them as corporate bodies, much in the way that under some countries' domestic law, corporations as legal persons can commit crimes (which does not exclude individual culpability for those same crimes); (2) that in the absence of a world government, individual states can assume the role of punisher; and (3) that military strikes on a wrongdoer or her property will in some cases be the only feasible form international punishment can take. None of these assumptions is uncontroversially true, but more to the point is that none of them is obviously implausible. They represent a straightforward version of the domestic analogy, according to which states are to international society as individuals are to civil society. Even the most metaphysically ambitious of these assumptions—that corporate bodies can commit punishable wrongdoing—comes naturally, even viscerally, to us in wartime. Walzer rightly observes that the “intensive collective and collectivizing experience” of war is one of its most obstinately definitive features.⁷ Together these three assumptions imply that punitive war is, at the very least, morally permissible. On some views, societies have a *prima facie* obligation to inflict deserved punishment on malefactors. Small wonder, then, that the punishment theory persists, at least in a subterranean way.

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 that “never returned to its baseline level . . . and reached a level that was almost 10 times as high as at the start of September 11.” Mitja D. Back, C. P. Küfner, and Boris Egloff, “The Emotional Timeline of September 11, 2001,” *Psychological Science* 20 (2010): 1–3, at p. 2.

6. The talk was not public; it was described to me by an officer who was there.

7. Michael Walzer, “What Is Just War Theory About?” (unpublished article, 2011).

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 nonstate actors. Asymmetric war places traditional *in bello* principles of distinction and proportionality under great stress, because militants operate amid civilian populations that support or shield them. States fighting militants will be tempted to classify the militants' civilian supporters as culpable abettors of terrorist crime.⁸ Civilian sympathizers who cheerlead for the militants lose their mantle of innocence, at least in the moral intuitions of their enemies; when they do, the line between the infliction of unintended civilian casualties and just desert 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: 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 these questions seem attractive to their adherents because of the same moral intuitions about the guilt of civilian supporters that support the punishment theory of just cause.⁹ Because of the supporters' own actions, state militaries are justified in drawing the boundaries of direct participation in hostilities broadly rather than narrowly, and in counting voluntary human shields as direct participants.¹⁰ As for whether "our" soldiers should risk their

8. E.g., the United States has enacted a cluster of draconian and broad-reaching criminal statutes against material support for terrorism, 18 U.S.C. §§2339A-D. Other countries have similar laws, e.g., a French law against "pimping for terrorism," Code Pénal, art. 421-2-3 (the "pimping for terrorism" moniker was used by the French government in a 2004 letter to the Security Council's Counter-Terrorism Committee).

9. For an argument along these lines, see Amos Guiora, "Proportionality 'Re-Configured,'" *ABA National Security Law Report* 31 (January–February 2009): 13–15, which (guardedly) defends the view that Hamas's "passive supporters" could be targeted by the Israeli government in Operation Cast Lead.

10. These are matters of intense current controversy. The International Committee of the Red Cross (ICRC) argues that voluntary human shields are direct participants in hostilities (DPH) only if they physically interfere with soldiers. Nils Melzer, *Interpretive*

lives to spare “their” civilians, to many people the answer is self-evidently “no,” because their civilians hate us and support the terrorists. Why risk your life for supporters of enemies who deserve punishment? ‘Innocent civilians’ is a term of art, and it doesn’t imply moral innocence. If we err in fighting our enemies, let us err on the side of our safety and military convenience, not theirs, because they are blameworthy and we are not.¹¹

These, of course, are *in bello* issues, not *ad bellum* issues of just cause. The connection is that the same intuitions of enemy culpability that motivate the punishment theory of just cause support the hawkish answers to the three *in bello* questions. The punishment theory bridges the *ad bellum*–*in bello* divide. If the theory is right, enemy culpability can warrant a punitive war, but it can also warrant punitive actions within a war.

SOURCES OF CONFUSION

I mean these assertions about the moral intuitions of enemy culpability descriptively and psychologically: not that states are right to blur the line between defensive war and punishment, but that in fact they and their citizens sometimes do. If this is so, however, there are reasons behind

Guidance on Direct Participation in Hostilities under International Humanitarian Law (Geneva: International Committee of the Red Cross, 2009), pp. 56–57. Military-oriented lawyers typically reject this view. See, e.g., Michael N. Schmitt, “Human Shields in International Humanitarian Law,” *Columbia Journal of Transnational Law* 47 (2009): 318. ICRC also counts civilian supporters as DPH only if they are at most one causal step removed from damage to the enemy (Melzer, *Interpretive Guidance on Direct Participation*, p. 53). The Israeli Supreme Court, on the other hand, counts voluntary human shields as DPH, and it has nothing like the one-causal-step test. *Public Committee Against Torture v. Government*, HCJ 769/02, December 11, 2006, §§36–37, <http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf>. It is fair to say that there is no settled law on the definition of DPH or the targetability of voluntary human shields.

11. Risk taking to minimize casualties among the enemy’s civilians has come under vigorous recent debate. See, e.g., Avishai Margalit and Michael Walzer, “Israel: Civilians and Combatants,” *New York Review of Books*, May 14, 2009; Asa Kasher and Major General Amos Yadlin, with a reply by Margalit and Walzer, “Israel & the Rules of War: An Exchange,” *New York Review of Books*, June 11, 2009; Jeff McMahan, “The Just Distribution of Harm Between Combatants and Noncombatants,” *Philosophy & Public Affairs* 38 (2010): 342–79. I take on the issue in “Risk Taking and Force Protection,” in *Reading Walzer*, ed. Yitzhak Benbaji and Naomi Sussman (London: Routledge, 2013).

this confusion. In other words, if the punishment theory of just cause is a mistake, it is not a simple mistake.

For one thing, three of the standard justifications for 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.¹² 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 United Nations and international courts cannot. This is assumption (3) that I mentioned above underlying the punishment theory. It was Cajetan's main argument for the punishment theory: wrongdoing demands "vindictive 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.

Another possible source of confusion is nonconsequentialist analyses of individual self-defense. These often justify self-defense by connecting the right to kill the attacker with the attacker's wrongdoing, which forfeits her own immunity to defensive violence. Although the nonconsequentialist argument for self-defense is not a punishment argument, both locate an assailant's liability to force in her own wrongdoing. As Jeff McMahan observes, an enemy 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.¹³ However, while I agree with McMahan that the label is plausible, there is a decisive difference. If an adversary clearly poses no future threat, war for purposes of special

12. The other nonretributive rationales for punishment are implausible when applied to warfare. Waging war as a form of general deterrence—the deterrence of countries other than the adversary—seems blatantly immoral, although some philosophers argue that it can be a contingent just cause, that is, contingent 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): 208–38. I criticize Augustine's version of the moral education theory as a justification for punitive war below.

13. Jeff McMahan, "Aggression and Punishment," in *War: Essays in Political Philosophy*, ed. Larry May (Cambridge: Cambridge University Press, 2008), pp. 67–84, at p. 81.

deterrence or incapacitation is unjustified even in response to wrongdoing, and this lack of justification makes punitive violence in self-defense importantly different from theories of war as punishment, which place no such 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 additional British lives, he was not talking about deterrence or incapacitation. 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 what retribution and revenge have in common: their root is not concern about future safety, but indignation over past wrongdoing.

I provisionally accept retributivism, 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.¹⁴ Regardless of the intuitive pull of the punishment theory, modern international law was right to reject it.

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.¹⁵ At

14. McMahan emphasizes reasons (3) and (4) in arguing against retribution as a just cause of war: *ibid.*, pp. 82–84. I am in full agreement with him on these points.

15. 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): 543–56, at p. 548.

the outset, we ought to distinguish two closely linked phenomena: war-making as punishment and war-making 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.¹⁶ In Genesis 14, Abraham makes war on a hostile alliance that 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 "bring Argive Helen and the treasure with her / and let us give her back to the Atreidai / to take home in the ships."¹⁷ 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 1 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" (1 Samuel 15:2–3, Jewish Publication Society translation). This is a genuinely punitive reason for war, quite different from restitution.

16. This distinction goes back at least to Grotius, as does the observation that most of the time the two causes are joined. Hugo Grotius, *The Rights of War and Peace*, trans. A. C. Campbell (Washington, D. C.: M. Walter Dunne, 1901), bk. 2, ch. 20, §38, p. 245, reprinted in *The Ethics of War: Classic and Contemporary Readings*, ed. Gregory M. Reichberg, Henrik Syse, and Endre Begby (Malden, Mass.: Blackwell, 2006), p. 406. Because so many of the classical sources are conveniently collected in the superb anthology of Reichberg, Syse, and Begby, I will usually cite that book rather than original sources. In some cases, I cite a different edition because the Reichberg, Syse, and Begby anthology does not include the passage cited.

17. Homer, *Iliad*, trans. Robert Fitzgerald (New York: Anchor, 1989), bk. 7, lines 347–53, pp. 166–67. On Menelaus's diplomatic mission to regain Helen, see bk. 3, lines 205–6, pp. 68–69, and bk. 11, line 139, p. 249. By the time of the sack of Troy, the motivation had evidently changed from restitution to punishment and plunder.

Augustine and the Augustine Formula

In the just war tradition, the punishment theory goes back as far as Cicero, who maintained that a just war may be waged for revenge as well as for defense.¹⁸ In Christian just war doctrine, the punishment theory originates with Augustine. Augustine never develops a single theory of just cause; his remarks about war are scattered among several texts written for other purposes, and the remarks invoke several theories of just cause. His most influential statement of the punishment theory comes in his *Questions on the Heptateuch*:

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.¹⁹

This brief passage is the version of Augustine's punishment theory that major subsequent writers seized upon. I shall refer to it as the *Augustine Formula*. It focuses on punishment for private wrongs that an enemy state tolerates, but we will see that subsequent theorists read it more broadly to include any wrongs done by another state.

Unfortunately, Augustine presents the formula in a discussion of a different topic without supporting argument. What might the argument have been? In Letter 138 to Marcellinus, he offers the following:

Many things must be done in correcting with a certain benevolent severity, even against their own wishes, men whose welfare rather

18. Cicero, *On the Republic*, trans. Clinton W. Keyes (Cambridge, Mass.: Loeb Classical Library, 1928), 3.35, p. 212. However, Cicero permits only special and general deterrence as reasons for punitive war; and in his view, revenge (*ulciscendi*), just as much as punishment (*puniendi*), is strictly limited to what is necessary for deterrent purposes. Cicero, *On Duties*, trans. Walter Miller (Cambridge, Mass.: Loeb Classical Library), 1.33, pp. 35–36.

19. Augustine, "Questions on the Heptateuch," bk. 6, ch. 10, in Reichberg, Syse, and Begby, *The Ethics of War*, p. 82. The same passage continues: "But also this kind of war is without doubt just, which God commands." (The anthology of Reichberg, Syse, and Begby does not include this latter passage.) It is an alternative theory of just cause: holy war. It is historically important, not to mention catastrophic, but in what follows I set the holy war theory to one side as irrelevant to secular just war theory. In any case, Augustine sees wars of secular punishment in parallel to holy war: in "Against Faustus the Manichaeon," Augustine says that punitive wars "are commanded by God or some other legitimate ruler." Augustine, "Against Faustus the Manichaeon," bk. 22, ch. 74, in Reichberg, Syse, and Begby, *The Ethics of War*, p. 73.

than their wishes it is our duty to consult. . . . 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. And on this principle, if the commonwealth observe the precepts of the Christian religion, even its wars themselves will not be carried on without the benevolent design that, after the resisting nations have been conquered, provision may be more easily made for enjoying in peace the mutual bond of piety and justice.²⁰

A war of punishment, then, is a form of "correcting with a certain benevolent severity," like a father's loving punishment of his errant son. If this is Augustine's argument for punishment through warfare, however, it fails rather spectacularly, because his analogy of warfare 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. In the end, the Augustine Formula remains an unsupported assertion, a dogma.²¹

Unsupported or not, the formula was at the core of the punishment theory as formulated by Christian thinkers for a thousand years after Augustine. Gratian incorporated it into the most influential canon law text, the *Decretum*.²² Citing the Augustine Formula as authority, Aquinas also endorses the punishment theory: "a just cause is required, namely that those who are attacked . . . should be attacked because they deserve it on account of some fault [*culpa*]."²³ His broad version drops

20. Augustine, Letter 138 to Marcellinus, bk. 2, ch. 13, in *Nicene and Post-Nicene Fathers First Series*, ed. Philip Schaff (New York: Cosimo, 2007), 1:485.

21. For a more sympathetic restatement of Augustine, and of Christian just war theory more generally, see Oliver O'Donovan, *The Just War Revisited* (Cambridge: Cambridge University Press, 2003), pp. 1–9. For O'Donovan, the classical Christian view was grounded in the conviction that peace is the natural state of humanity and that the crime of war is a disruption of that state; a Christian just war uses the means of armed conflict "to convert them to the service of . . . law-bound and obedient judgment" (p. 7); and Augustine, like Aquinas, "treats the obligation of military action as an obligation of love to the neighbour" (p. 9). For useful analysis and critique of Augustine's punitive conception of war, see John Langan, S. J., "The Elements of St. Augustine's Just War Theory," *Journal of Religious Ethics* 12 (1984): 19–38.

22. Gratian, *Decretum*, question 2, canon 1, in Reichberg, Syse, and Begby, *The Ethics of War*, p. 113.

23. Thomas Aquinas, *Summa Theologiae*, 2.2, question 40, in Reichberg, Syse, and Begby, *The Ethics of War*, p. 177.

Augustine's restriction of punitive war to cases of state-tolerated private wrongdoing. 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," referring to the passage just quoted that references the Augustine Formula.²⁴

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 "the 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 members—not only against its subjects, but also against foreigners."²⁵ Like Vitoria, Cajetan derives his theory of just cause from Aquinas, who rests it on the Augustine Formula. However, Cajetan adds an important twist, which I shall call the *judicial analogy*:

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. . . . 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.²⁶

This is circular, but Cajetan's judicial analogy is neither silly nor marginal. On the contrary, it lies at the heart of the case for punitive war.²⁷ It suggests that the retribution responds not merely to an injury, but to a violation of law or a moral norm of lawlike character. Furthermore, the judicial analogy implies that the war is based on reasoned assessment of wrongdoing, not anger, hatred, or the amoral calculus of intimidation.

24. Francisco de Vitoria, *On the American Indian*, question 3, art. 1, in *Political Writings*, ed. Anthony Pagden and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), p. 282; in Reichberg, Syse, and Begby, *The Ethics of War*, p. 302.

25. Cajetan, *Commentary to "Summa Theologiae,"* 2.2, question 40, art. 1, in Reichberg, Syse, and Begby, *The Ethics of War*, p. 242.

26. Cajetan, "When War Should Be Called Just or Unjust, Licit or Illicit," in Reichberg, Syse, and Begby, *The Ethics of War*, p. 247.

27. Augustine and Gratian also accepted the analogy. Richard Tuck, *The Rights of War and Peace* (New York: Oxford University Press, 1991), p. 57. A sophisticated contemporary defense of the judicial analogy in Christian terms is O'Donovan, *The Just War Revisited*, pp. 18–26. Notably, O'Donovan finds the punishment theory with its judicial analogy more credible than the self-defense rationale. See pp. 55–57. In his view, punishment is not something over and above the restoration of rights, but rather is a form of the restoration of rights "with regard to the guilt of the offender rather than the injury of the offended" (p. 57). I believe this view is subject to the criticisms of punitive war I offer in this article.

Cajetan argues that if a state has no authority to “avenge itself and its citizens by fighting against the [foreign] oppressor, then unpunished evils would naturally remain,” which would indicate a defect in the power of natural reason.²⁸ (Cajetan’s argument might today be read as a powerful argument for establishing international tribunals, rather than as a justification for war.) And the state’s lack of such authority 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.”²⁹ Here Cajetan anticipates the contemporary argument that requiring multilateral authorization for wars affronts national sovereignty by subordinating states to a superior.

Cajetan adds that a prince can wage punitive war on behalf of allies or request allies to wage it on his behalf.³⁰ 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.”³¹

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 punishment to a criminal state and its people. In the judicial analogy, the sovereign who launches the war functions simultaneously as judge and executioner of the punishment.

Cajetan offers the most thorough defense of retributive war in scholastic just war theory. Grotius, representing humanism and the beginning of social contract theory, develops parallel ideas on different grounds. Grotius maintains “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,” but only for serious wrongdoing by the adversary. He views even preventive war as the punishment of “inchoate crimes.”³²

28. Cajetan, *Commentary to “Summa Theologiae,”* in Reichberg, Syse, and Begby, *The Ethics of War*, pp. 242–43.

29. Cajetan, *Summula*, in Reichberg, Syse, and Begby, *The Ethics of War*, pp. 243–44.

30. *Ibid.*, p. 245.

31. *Ibid.*, p. 249.

32. Hugo Grotius, *The Rights of War and Peace*, ch. 20, §§38–39, pp. 245–47; in Reichberg, Syse, and Begby, *The Ethics of War*, p. 406. The phrase “inchoate crimes” (*delicta inchoata*) is omitted from the Campbell translation, but appears in the original as a caption to §39. Hugonis Grotii, *De Jure Belli ac Pacis Libri Tres, in quibus Jus Naturae & Gentium*,

The punishment theory of just cause is a corollary of one of Grotius's most important doctrines: the universal right of individuals to punish violations of natural law, which is a doctrine still cited today by proponents of humanitarian military intervention as well as of universal criminal jurisdiction.³³ Grotius argues that the state's right to punish derives from individuals' rights delegated to the state.³⁴ This is the same argument later made famous by Locke: "if by the Law of Nature, every Man hath not a Power to punish Offences against it, . . . I see not how the Magistrates of any Community, can *punish an Alien* of another Country, since in reference to him, they can have no more Power, than what every Man naturally may have over another."³⁵

I believe that the moral priority of individuals' right to punish provides a strong argument for universal jurisdiction and international criminal courts: these can plausibly be thought of as surrogates for the moral interest of humanity in ending impunity for the most horrific crimes.³⁶ However, the individual right to punish in the state of nature offers a far shakier basis for punitive war. Apparently Grotius and Locke assumed that the individual right to punish by death (the *jus gladii*) in the state of nature automatically implies the state's delegated right to punish by warfare. But this is a conceptual leap, because the wholesale devastation of persons and property in warfare arguably exceeds any retail right to

item Juris Publicae praecipua explicantur (Washington, D.C.: Carnegie Endowment, 1913), 1:314. (This is a reprint of the 1646 edition.) Grotius himself invokes the Augustine Formula (ch. 20, §8, p. 229), although only incidentally as one of several authorities.

33. The key passage is *The Rights of War and Peace*, ch. 20, §40, p. 247. Israel invoked Grotius to defend its exercise of universal jurisdiction over Adolf Eichmann. Prosecutor v. Eichmann, Criminal Case No. 40/61 (1961), §14, <<http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Judgment/Judgment-002.html.gz>>. Accessed January 10, 2012. Lauterpacht thought that Grotius provided "the first authoritative statement of the principle of humanitarian intervention." Hersch Lauterpacht, "The Grotian Tradition in International Law," *British Yearbook of International Law* 23 (1946): 1–53, at p. 46.

34. Hugo Grotius, *De Iure Praedae Commentarius*, trans. Gwladys L. Williams with Walter H. Zeidel (Oxford: Clarendon Press, 1950), 1:91–92. For important discussion, see Tuck, *The Rights of War and Peace*, p. 82.

35. John Locke, *Two Treatises of Government*, Second Treatise, ed. Peter Laslett (Cambridge: Cambridge University Press, 1960), §§8–9, p. 312. Tuck calls attention to the near-identity of Grotius's and Locke's delegation arguments. Locke allowed punishment only for reparations or restraint. Grotius's theory includes these but contains retributive elements as well. Grotius, *The Rights of War and Peace*, ch. 20, §§1–2, 6–9, pp. 221–22, 225–30.

36. So I have argued in David Luban, "A Theory of Crimes Against Humanity," *Yale Journal of International Law* 29 (2004): 137–46.

punish that individuals could be supposed to possess in the state of nature. Trained armies possess force multipliers that have no individual counterpart. As a defense of the punishment theory of just cause, Grotius's and Locke's analogy of war to individuals punishing individuals fares no better than Augustine's analogy of war to benevolent paternal correction. The fact is that warfare has no obvious domestic analogy.

The Dissolution of the Punishment Theory

Strikingly, the punishment theory of just cause eventually disappeared and was 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.³⁷ 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 a 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 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 inconsistent with the punishment theory.³⁸ The notable exception to the ban on the threat or use of force is Article 51's "inherent right of individual or

37. "In almost every war both parties claim the defensive. This is done in order throw [sic] on the enemy, as the agressor [sic], all the injuries arising from the war." Georg Friedrich Martens, *Summary of the Law of Nations Founded on the Treaties and Customs of the Modern Nations of Europe*, trans. William Cobbett (Littleton, Colo.: Fred B. Rothman, 1986), bk. 8, chap. 2, §2n, p. 272. (This is a reprint of the 1795 American translation of the 1785 edition.)

38. 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.

collective self-defense 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 moribund. 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, 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 that of the UN Charter, is inconsistent with the punishment theory.³⁹

THE SOVEREIGNTY OBJECTION TO THE PUNISHMENT THEORY

Even in the early modern period the punishment theory had its critics, notably Erasmus, who offered objections against it very similar to those I raise in this article:

“But,” it is said, “it is legitimate to sentence a criminal to punishment; therefore it is legitimate to take revenge on a state by war.” . . . In the first case, only the one who did wrong suffers and the example is visible for everyone. In the second case the greatest part of the suffering falls on those who least deserve to suffer, namely on farmers, old people, wives, orphans, and young girls. . . . If anyone cries that it is unjust not to punish a sinner, my answer is that it is much more unjust to call down absolute disaster on so many thousands of innocents who have not deserved it.⁴⁰

39. Walzer does assert that punishment for aggression belongs to the “legalist paradigm” on which he bases the theory of just cause; and at one point he identifies this idea with the “conception of just war as an act of punishment.” Walzer, *Just and Unjust Wars*, p. 62. But Walzer’s subsequent discussion makes it clear that he is talking about the 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 as such. *Ibid.*, p. 297.

40. “Dulce bellum inexpertis” (War is sweet for those who have not tried it): Erasmus, *The Adages of Erasmus*, ed. William Baker, trans. Dennis Drysdal (Toronto: University of

It is fair to say that this was a minority view, and the puzzle remains why the punishment theory disappeared. To understand why, it helps to focus on a different 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 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 which says that states must not judge the guilt of other states is 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 decisions 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.⁴¹ If equals have no dominion over equals, they lack the authority to punish them, including through warfare.⁴² 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.”⁴³ Cajetan rejects

Toronto Press, 2001), p. 343, adage 4.1.1. I am grateful to an anonymous reviewer for *Philosophy & Public Affairs* for calling this passage to my attention.

41. See, e.g., *Al-Adsani v. United Kingdom*, [2001] ECHR 35763/97, ¶61, which upheld the UK decision that it lacks jurisdiction over a lawsuit against Kuwait concerning the torture of a British national in which Kuwaiti officials colluded, because of Kuwaiti sovereign immunity in British courts, which is based on *par in parem*. A particularly clear explanation of the doctrine appears in Lord Millett’s speech in the well-known Pinochet case: *Regina v. Bartle and Others ex parte Pinochet*, 38 I.L.M. 581, 644 (UK House of Lords, 1999).

42. 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 launch reprisals against 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.

43. Cajetan, *Summula*, in Reichberg, Syse, and Begby, *The Ethics of War*, p. 248. As the saying goes, one person’s *modus ponens* is another’s *modus tollens*. The conclusion that Cajetan seems to think 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.

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 commonwealth,” which is, of course, precisely the judicial analogy that *par in parem non habet imperium* calls into question.⁴⁴

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.”⁴⁵ In the *Rechtslehre*, Kant advances the even stronger proposition that if a state launches a punitive war, it itself commits an offense.⁴⁶ Vattel 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 sovereignty⁴⁷—states cannot sit in judgment of one another, and that means they must treat every war as if it is “just on both sides.” Hence both sides enjoy legal impunity.⁴⁸ This is true even though under the “necessary law of nations” (Vattel’s term for natural law) at most one side can truly be just,⁴⁹ and even though every act of violence committed in the war can be charged

44. *Ibid.*

45. Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, in *Political Writings*, ed. H. S. Reiss, trans. H. B. Nisbet, rev. ed. (Cambridge: Cambridge University Press, 1991), p. 96 (Ak. 8:347).

46. Immanuel Kant, *The Metaphysics of Morals: The Doctrine of Right*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1991), part 1, §58, p. 154 (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. 6:331). Like Thomas Hobbes (*Leviathan*, part 2, ch. 28), and unlike Locke (*Second Treatise*, ch. 2, §7) and Grotius, Kant believed that equals may 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 the 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. 2, ch. 20, §3, p. 223.

47. Emer de Vattel, *The Law of Nations*, ed. Béla Kapossy and Richard Whatmore (Indianapolis: Liberty Fund, 2008), introduction, §21, p. 76.

48. *Ibid.*, bk. 3, ch. 12, §§188–92, pp. 589–93, at §190, p. 591.

49. *Ibid.*, bk. 3, ch. 3, §39, p. 489.

against the sovereign who wages it unjustly.⁵⁰ The necessary law of nations is binding on conscience only, however;⁵¹ positive law must treat wars symmetrically. (Contemporary philosophers will see a parallel to McMahan's coupling of an asymmetrical deep morality of war with symmetrical legal rules.)⁵² 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 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 nonstate 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 nonstate organizations, at least if the states of these militants and nonstate organizations consent to outsiders using force on their territory, as Pakistan and Yemen have reportedly consented to U.S. drone strikes.⁵³

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

50. *Ibid.*, bk. 3, ch. 11, §§183–84, p. 586.

51. *Ibid.*, bk. 1, introduction, §26, p. 78.

52. Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114 (2004): 693–733, at pp. 730–31.

53. Of course, the United States justifies the strikes on grounds of self-defense, not the punishment theory. It also asserts the right to use force in other states in self-defense even without their consent if they are unwilling or unable to suppress militants with whom the United States is in armed conflict. John O. Brennan, "Strengthening Our Security by Adhering to Our Values and Laws," Harvard Law School speech, September 16, 2011. This would be the rationale for the U.S. raid that killed Osama bin Laden, where Pakistani consent was not obtained. The punitive motive of the raid was at best thinly veiled. As for a state's right to punish domestic insurrectionists, 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.

are never within states' domestic jurisdictions.⁵⁴ If sovereignty has limits, then so should sovereign immunity.⁵⁵ Significantly, while *par in parem* continues to be cited by courts to uphold the immunity of sovereigns in one another's domestic legal systems, none of the international criminal tribunals grants sovereign immunity. The demand for international criminal tribunals grows out of the demand based on human rights for the punishment of leaders who instigate genocide, crimes against humanity, and war crimes.

This is not to say that human rights proponents advocate a return to the punishment theory of just cause, merely that the human rights revolution makes the sovereignty objection to it less plausible. 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 stop 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.⁵⁶

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

54. See Annan's writings collected in Reichberg, Syse, and Begby, *The Ethics of War*, pp. 683–93, and Annan's noteworthy 1999 General Assembly address, UN Press Release SG/SM/7136, GA/9596, <<http://www.un.org/News/Press/docs/1999/19990920.sgsm7136.html>>. Accessed January 24, 2012.

55. This was the point of view of the dissenting judges in the European Court of Human Rights' *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.

56. 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. "A Transcript of President Bush's Address on the Decision to Use Force," *New York Times*, December 21, 1989.

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."⁵⁷ 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 that 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 nonstate actor. In either case, the state concludes that it has been injured and that 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 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.

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*, which is undertaken for moral reasons as a practice of justice, and *revenge*, which is undertaken out of rage and

57. Francisco Suárez, *Disputation XIII (On War)*, section 4, §6, in Reichberg, Syse, and Begby, *The Ethics of War*, 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, 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." Cajetan, *Summula*, in Reichberg, Syse, and Begby, *The Ethics of War*, p. 247.

hatred. Only the former is a genuine moral basis for punishment. I have said that Cajetan's judicial analogy suggests this distinction, but of the writers examined here, only Grotius clearly distinguishes revenge from just punishment (and condemns revenge).⁵⁸ The others frequently blur the distinction between revenge, a nonmoral gut response to grievance, and retribution, a moral response to wrongdoing. Let me elaborate the distinction.

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."⁵⁹ So understood, vengefulness is a nonmoral or, more accurately, a premoral response that surges up in us out of our own pain—"you hurt me, I hate you, I'll get you!" What makes vengefulness nonmoral 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.

Aristotle, for example, errs 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."⁶⁰ 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

58. Grotius, *The Rights of War and Peace*, bk. 2, ch. 20, §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. 225n.

59. Jean Hampton, "Forgiveness, Resentment and Hatred," in *Forgiveness and Mercy*, ed. Jeffrie G. Murphy and Jean Hampton (Cambridge: Cambridge University Press, 1988), pp. 35–87, at p. 54.

60. Aristotle, *Rhetoric*, trans. W. Rhys Roberts, ed. W. D. Ross (New York: Cosimo, 2010), 2.2, 1378a31–32 (emphasis added).

angry person believes it correct. Even so, his 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' 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. 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."⁶¹ Homer famously says that vengeful anger is "sweeter than slow-dripping honey," an image in which the slow dripping is as important as the sweetness.⁶² And tying vengefulness to anger in no way denies that it can be strategically delayed or as cunningly calculated as Iago's destruction of Othello. But, keeping these qualifications in mind, Hampton's basic point that vengefulness is a non- or premoral "bite-back" response to hurt, which erupts in us regardless of justification, seems right.

One more important complication: revenge can take an institutionalized form within cultures of honor and vendetta. The defining feature of honor cultures is that a man (and it *is* a man) who fails to avenge an injury to himself or his family becomes an object of scorn and moral disapprobation. 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, but vendetta cultures persist in urban street gangs as well as tribal or clan societies in which a man who refuses to avenge a dishonor counts as no man at all.

Vendetta culture complicates the initial picture of vengeance as an emotional reaction born of hate and anger. In societies where vendettas are an established social norm, we can readily imagine clan members who carry out their murderous duties without feeling any personal

61. *Ibid.*, 2.2, 1378b9.

62. Homer, *Iliad*, trans. Fitzgerald, bk. 18, line 109, p. 433.

hatred of their enemies, and who are 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.⁶³

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. This matters because warrior cultures are closely connected with honor cultures. As in the example of Achilles and Patroclus, it is easy to see how vengefulness and hatred can become persistent temptations to soldiers in combat. After a recent incident in which U.S. Marines were videoed urinating on enemy corpses, an ex-Marine commented, "I've never spat on a dead body or urinated on one, but I've certainly screamed at a dead body because they've taken a friend's life."⁶⁴ Intellectually, soldiers understand that their enemies have 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 maimed or killed, and especially when the enemy exults in the injury, vengefulness becomes 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. Through her action, the wrongdoer has upset a moral balance and has performatively asserted a moral falsehood; she

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

64. James Dao, "Reprehensible Behavior Is a Risk of Combat, Experts Say," *New York Times*, January 13, 2012. See Nancy Sherman, "Revenge and Demonization," in May, *War: Essays in Political Philosophy*, pp. 289–306.

has implicitly devalued her victim or overvalued herself (or both).⁶⁵ Retribution reasserts moral truth 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 cognitive through and through: 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 significant tributes that Power has ever paid to reason.”⁶⁶ Retribution need not be passionless and unemotional; but as a moral account-settling, it rests on reasoned judgments and not rage, on judgments that the punisher can defend both to the person undergoing punishment and to disinterested third parties.⁶⁷ Jackson’s speech marks the turn from warfare to criminal justice as the instrument of international punishment, and he rightly grounds this 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.”⁶⁸

65. My discussion here closely follows Jean Hampton, “The Retributive Idea,” in Murphy and Hampton, *Forgiveness and Mercy*, which in my view provides the most compelling explanation of retributivism.

66. Proceedings of the International Military Tribunal at Nuremberg (1946), 2:98.

67. On the difference between revenge and retribution, see Hampton, “The Retributive Idea,” p. 137.

68. Luis de Molina, “A Common Just Cause of War, Comprising All of the Others,” in *De iustitia et jure*, tract 2, disputation 102, in Reichberg, Syse, and Begby, *The Ethics of War*, p. 336.

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 the 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; second, the 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."⁶⁹ 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 observes 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.⁷⁰ 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

69. Proceedings of the International Military Tribunal at Nuremberg, 2:100.

70. Samuel von Pufendorf, *The Law of Nature and Nations*, bk. 8, ch. 4, in Reichberg, Syse, and Begby, *The Ethics of War*, p. 461.

of just cause only in order to argue that it is not unjust “to return a greater evil for a less.”⁷¹

Pufendorf may be right that wars of self-defense can be bloodier and more catastrophic than wars of retribution, as long as the retributive acts confine themselves to proportional retribution rather than whatever slakes the public appetite for vengeance. On the other hand, a campaign of vengeance like Churchill’s bombing attacks on German cities, which continued even 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 other kinds of punitive military response in addition to vengeance and retribution, namely restitution and reprisal. Restitution, as described above, means regaining captured persons or property—or, frequently, disputed land—or else obtaining compensation. As I indicated, restitution is not the same as punishment, although they are easy to confuse.⁷² Using force to recover property—as the United Kingdom claimed it was doing in the Falklands War—need not involve any punishment of the adversary; conversely, punishing war crimes need not include reparation payments or other forms of compensation.

Reprisals are otherwise-wrongful military attacks intended to enforce compliance with the rules of war when the adversary violates them.⁷³ 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.”⁷⁴ In particular, if it becomes clear that the adversary has no intention of repeating the wrongdoing, reprisal is unjustified even though retribution through criminal trial and punishment might be. The

71. Ibid.

72. Thus, in the eighteenth century Christian von Wolff argued that wars of restitution (he uses the word “vindication”) are also punitive because they are undertaken against an offender for the offender’s violation of right. Wolff, *The Law of Nations Treated According to a Scientific Method*, §639, in Reichberg, Syse, and Begby, *The Ethics of War*, p. 472.

73. See the ICRC definition in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, *Rules* (Cambridge: Cambridge University Press, 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: Oxford University Press, 2004), §16.16, p. 420.

74. UK Ministry of Defence, *Manual*, §16.16, p. 420.

Geneva Conventions forbid reprisals against prisoners and civilians under the state's control, and Additional Protocol I (in Articles 20 and 51–56) 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.” A few states reject the wider prohibition (including the United States, the United Kingdom, 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.⁷⁵

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.

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 states and sentence them to punishment by war?⁷⁶ 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. 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

75. 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.” Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, 1:515–18.

76. 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 *Accountability for Collective Wrongdoing*, ed. Tracy Isaacs and Richard Vernon (Cambridge: Cambridge University Press, 2011), pp. 61–91. The present article 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.

natural disasters such as 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 nonpacifists would argue that foreseeable but unintended damage to the innocent makes wars of self-defense unjustifiable.⁷⁷ 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 in the way that it is collateral to the purpose of self-defense. In 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 another 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. Operations such as the killing of Osama bin Laden by the United States are the rare exceptions. Normally, retributive war punishes guilty regimes by attacking their military forces and their “dual-use” civilian facilities. The harm this violence inflicts is, by hypothesis, intentional. To call intentional

77. The noteworthy exception is David Rodin, *War and Self-Defense* (New York: Oxford University Press, 2002).

violence that has 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, enough so that it would be wrong to attribute that view to exponents of war as punishment.

In the former hypothesis, the punitive war has succeeded in its retributive task, and it has done so by bringing about the wrongdoer’s surrender *nonviolently*. This suggests that the punishment consists of inflicting defeat on the wrongdoers (i.e., bringing about their surrender), not necessarily of 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 this is 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 such as the ICC “tries” a miscreant state and punishes it through the measures just described—reparations, disarmament, territorial readjustment, war crimes trials, regime change. These punishments are 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 classical sources of punishment theory do not systematically address 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 nonviolent legal remedies combining restitution and individual criminal punishment? These sources may not even have thought about hypothetical cases of military victory without plentiful bloodshed. At least one, Christian Wolff, clearly distinguishes 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.⁷⁸ For Wolff, at any rate, war as punishment means more than remediation. Similarly, for Wolff the aim of war is not the legal punishment of bad actors on the other side after they surrender; 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."⁷⁹ It is war's violence itself that inflicts punishment.⁸⁰ There is no reason to suppose that other proponents of punitive war thought differently. Their worldview treats subjects as vehicles who can be killed or ruined to punish their sovereign. Cajetan, as we saw above, 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, since it is presumed to be entirely hostile, the whole of it being considered as enemy."

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 SS 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

78. Christian von Wolff, "When a War Is at the Same Time Vindicative and Punitive," in *The Law of Nations Treated According to a Scientific Method*, §639, in Reichberg, Syse, and Begby, *The Ethics of War*, p. 472.

79. *Ibid.*, §990. Reichberg, Syse, and Begby do not include this paragraph. It is in Christian von Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, trans. Joseph H. Drake (Oxford: Clarendon Press, 1934), 2:502.

80. *Ibid.*, §616, in Reichberg, Syse, and Begby, *The Ethics of War*, p. 314: "Thus he begins a punitive war who punishes by arms."

drafted by the State for membership, unless they were personally implicated in the commission of [crimes].”⁸¹ 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 the leaders who command 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 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,”⁸² 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 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 SS 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; in many cases, proportionality between wartime suffering and culpability is sheer coincidence.

Punishment by warfare, visited on the bodies of its victims, also uses modes of punishment that civilized societies have abandoned:

81. Judgement of the International Military Tribunal, *The Accused Organizations*, Proceedings of the International Military Tribunal at Nuremberg, 22:67.

82. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, rev. ed. (Boston: Penguin Classics, 2006), p. 276. This is a major theme as well in Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2006).

mutilation, destruction of homes and property, brain damage, the slaughter of kinfolk. Most countries have abolished the death penalty, and some have abolished life sentences without parole as inconsistent with human dignity. Although there may be no logical argument for restricting the modalities of punishment to the temporary loss of liberty, fines, and possibly the loss of rights, the move to milder punishment has come to define progress in civilization in much of the world.⁸³

In the end, then, the punishment theory, understood as either revenge or retribution, is unacceptable. Some nonretributive 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.⁸⁴ The demise of the punishment theory need not therefore diminish the disasters of war, although it might do so if it tempers the bitterness and hatred with which the war is fought. It will, however, decrease the occasions in which war can rightly be launched.

83. 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): 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.

84. This is one of the chief points in Gabriella Blum, "States' Crimes and Punishment" (unpublished)—a comprehensive study of the way that the punishment theory has morphed into theories of self-defense and prevention that justify a great deal of violence.