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Aggression and Punishment

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I. Two Paradigms of Just War

The themes of this essay are, as the title indicates, aggression and punishment. Contemporary ways of thinking about war might suggest that a more appropriate pair of topics would have been aggression and defense, since a war of defense against aggression is currently thought to be the paradigm of a just war, or indeed the *only* kind of just war. Yet when Michael Walzer set out the framework for his now classic account of the just war, which articulated what has come to be the consensus view, he advanced six propositions that he claimed constitute “our baseline, our model, the fundamental structure for the moral comprehension of war,” and in these propositions the notions of defense and punishment are tightly yoked. The last four of these six propositions, which together constitute what Walzer calls the “legalist paradigm,” are as follows.

- Any use of force or imminent threat of force by one state against the political sovereignty or territorial integrity of another constitutes aggression and is a criminal act.
- Aggression justifies two kinds of violent response: a war of self-defense by the victim and a war of law enforcement by the victim and any other member of international society.
- Nothing but aggression can justify war.
- Once the aggressor state has been militarily repulsed, it can also be punished.¹

These propositions do not express the final form of Walzer’s account of the just war. Before stating them, he acknowledges that “our judgments

¹ Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), pp. 61–62.

about the justice and injustice of particular wars are not entirely determined by the paradigm. The complex realities of international society drive us toward a revisionist perspective, and the revisions will be significant ones."² The most significant revision is Walzer's concession that there are several possible justifications for the resort to war other than defense against and punishment of aggression. "States can be invaded and wars justly begun," he writes, "to assist secessionist movements (once they have demonstrated their representative character), to balance prior interventions of other powers, and to rescue peoples threatened with massacre."³

Walzer's understanding of just war as defense against and punishment of aggression is collectivist in nature. His conception of states is informed by what he calls the "domestic analogy," according to which states are sovereign individuals that have a distinct reality over and above the individuals who compose them and "possess rights more or less as individuals do." Once we embrace the domestic analogy, "the world of states takes on the shape of a political society the character of which is entirely accessible through such notions as crime and punishment, self-defense, law enforcement, and so on."⁴ It is, however, only states that are the agents and victims of aggression and punishment in war, for Walzer follows Rousseau in claiming that war "isn't a relation between persons but between political entities and their human instruments."⁵ Individual combatants, on this view, are not guilty of aggression even if they participate in it and are not liable to punishment unless they violate the rules governing the conduct of war. Where individuals are concerned, Walzer holds that it is a mistake to regard war as a matter of "crime and punishment, [or] evil conspiracies and military law enforcement."⁶ Aggression is a crime that only states – and perhaps a small number of individual decision makers who determine how their state acts – can commit, and for which only they may be punished.

Despite the prominence that punishment has in the propositions that constitute the legalist paradigm, Walzer scarcely mentions it further in his account of the just war. He does not go on to explain, for example, in what ways war might be continued beyond the military defeat of the adversary as a means of inflicting punishment. Punishment as an aim of

² *Ibid.*, p. 61.

³ *Ibid.*, p. 108.

⁴ *Ibid.*, p. 58.

⁵ *Ibid.*, p. 36.

⁶ *Ibid.*, p. 41.

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war appears in Walzer's book mainly in his references to older theories of the just war. Virtually all he says about it is this:

The conception of just war as an act of punishment is very old, though neither the procedures nor the forms of punishment have ever been firmly established in customary or positive international law. Nor are its purposes entirely clear: to exact retribution, to deter other states, to restrain or reform this one? All three figure largely in the literature, though it is probably fair to say that deterrence and restraint are most commonly accepted.⁷

In general, Walzer identifies unjust war with aggression and just war with defense against aggression. In this respect his view is similar to that expressed in the United Nations Charter, which prohibits the use of military force by one state against another in the absence of authorization by the Security Council, except in "individual or collective self-defense if an armed attack occurs."⁸ Walzer is in fact unusual among contemporary just war theorists in mentioning punishment at all. To most contemporary just war theorists, and indeed to the great majority of philosophical and juridical writers on war throughout the nineteenth and twentieth centuries, the idea that war could be justified as a form of punishment has seemed an anachronism, a moralistic relic of an earlier period when war was a less indiscriminately destructive affair than it has subsequently become. Throughout most of the twentieth century, the prevailing view among moral and legal theorists was that the only just cause for war is defense against aggression. That consensus is now beginning to break down, for reasons I will mention shortly. But even those who have begun to doubt the paradigm of just war as defense against aggression (to which I will refer as the "aggression-defense paradigm") have not been tempted to revert to the much older paradigm of just war as punishment of wrongdoing (the "wrongdoing-punishment paradigm").

Before analyzing and evaluating these two contrasting paradigms of just war, I will offer a very brief account of the history of the displacement of the wrongdoing-punishment paradigm by the aggression-defense paradigm, as well as an account of recent events that have begun to erode support for the latter.⁹

⁷ Ibid., p. 62.

⁸ See Articles 2(4) and 51.

⁹ For a splendid survey of the evolution of moral and juridical thought about war, see Stephen C. Neff, *War and the Law of Nations* (Cambridge: Cambridge University Press, 2005). A briefer but also excellent discussion of the broad contrast between the classical understanding of just war and the later, more pragmatic or "realist" view, can be found in Gregory Reichberg, "Just War and Regular War: Competing Paradigms," in David

II. A Brief Historical Interlude

The challenge faced by the classical just war theorists was to reconcile the idea that war could be just with the teachings of Christianity. Jesus's Sermon on the Mount and the tendency of some rulers to set themselves up as gods, or to demand a degree of allegiance incompatible with the Christian's duty to serve only the Christian god, made this a formidable challenge. During the medieval period, when war was relatively modest in scale and fighting still involved individual combat rather than combat mediated by long-distance weaponry, it was natural to assume that if it could be justifiable to harm or kill people in war, the justification would have to be the same as that which applied to the harming or killing of people in more familiar domestic contexts. And that justification was that a person could permissibly be attacked or killed only if he had engaged in wrongdoing that was sufficiently grave to make him *deserve* to be attacked or killed. Harming or killing that was considered to be deserved was called punishment, though then, as now, it was not held that the only function of punishment was retribution, or the infliction of deserved suffering on the guilty. Rather, as Walzer notes, deserved punishment could be inflicted as a means of defense of self or others, or as a means of deterring either the wrongdoer or others from engaging in wrongdoing in the future.

Still, it was accepted that for punishment to be deserved, the person punished must be guilty of wrongdoing. "There can be no vengeance," Vitoria noted, "where there has not first been a culpable offence."¹⁰ This meant that the occasion for attacking and killing people in war had to be an instance of wrongdoing in which those people were implicated, so that, as Aquinas claimed, "those who are to be warred upon should deserve to be warred upon."¹¹ The use of force in pursuit of an unjust cause is one kind of wrong that these theorists claimed could make a person deserve to be attacked in war.

As political power began to be consolidated in large and powerful states, the way that war was understood began to change. War was

Rodin and Henry Shue, eds., *Just and Unjust Warriors: The Legal and Moral Status of Soldiers* (Oxford: Clarendon Press, 2008).

¹⁰ Francisco de Vitoria, "On the Law of War," in Anthony Pagden and Jeremy Lawrance, eds., *Political Writings* (Cambridge: Cambridge University Press, 1991), p. 303.

¹¹ *Summa Theologiae*, II-IIae, q. 40, art. 1, resp. Quoted in Jonathan Barnes, "The Just War," in Norman Kretzmann, Anthony Kenny, and Jan Pinborg, eds., *The Cambridge History of Later Medieval Philosophy* (Cambridge: Cambridge University Press, 1982), p. 777. Since the only citation is to the Latin text, I assume that the translation is Barnes's own.

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increasingly conceived as it is in Walzer's account, as a condition of conflict among states. States supplanted individual persons as the agents whose conduct was the primary focus of evaluation in moral thinking about war. The principles governing the practice of war might still be similar or identical to those governing relations among individuals outside the context of war, but the agents to whom the principles applied in war were not individual persons but states. Individuals began to be regarded as the instruments of states and as such were absolved of responsibility for their action in war, which lay instead with their sovereign.

According to Hobbes, the principles governing relations among states are not those that govern relations among individuals under the authority of a sovereign within a state. They are instead the natural law principles that had once governed relations among individuals in the state of nature, for states exist in a state of nature vis-à-vis one another. Natural law, as understood by Hobbes, is utterly different from the natural law of the classical just war theorists. It demands the unconstrained pursuit of self-interest – and thus, in war, of the interests of the state.

Hobbes was of course only one figure in the development of moral and legal thought about war, and his view deviated more radically from the classical conception of the just war than perhaps any of the other views in the evolving spectrum of rival theories. But it was representative of the general direction of divergence, which was away from the focus on individual action and responsibility toward a more collectivist and pragmatic understanding of the principles governing the practice of war. Philosophical and juridical theorists began to concentrate less on debating the validity of abstract and universal principles of morality and more on the formulation of principles by which the conduct of war might be regulated and constrained. They sought, in particular, to identify principles that it could be in the interests of all states, including the more powerful, to agree to follow.

Over the course of the seventeenth, eighteenth, and nineteenth centuries, concern with the morality of war was gradually overshadowed by a determination to develop a body of law that could actually be effective in controlling the practice of war. Yet the significance of the legal notion of state sovereignty grew so inflated that during the nineteenth century the view that a just cause is necessary for the resort to war to be legal was largely replaced by the Hobbesian view that the resort to war in pursuit of the national interest is a sovereign prerogative of states. Legal doctrines of *jus ad bellum* were almost entirely eclipsed by a concern with the regulation and constraint of the conduct of war.

Yet all the while state territories were becoming more densely populated, armies were growing larger, and weapons were becoming increasingly destructive. If proof were needed, the two world wars of the twentieth century demonstrated that it was intolerable to grant to states an unconstrained legal right to go to war. It had become essential to repudiate what had seemed acceptable in the nineteenth century: that war was a legitimate instrument of state policy, “politics by other means,” in Clausewitz’s chilling phrase. Moral and legal theory therefore began to develop in tandem in response to the necessity of constraining the resort to war. The conception of states as internally unified and sovereign individual agents was preserved, but the Hobbesian vision of international relations as a state of nature was replaced by the view that relations among states are morally governed, and must be legally constrained, by the same liberal egalitarian principles that govern relations among individuals. Foremost among these principles is the “harm principle” of J. S. Mill’s *On Liberty*, which is

that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant.¹²

This principle is the “domestic analogue” of the principle that came to dominate both moral and legal doctrines of *jus ad bellum* – namely, the principle that a state must never attack another except in response to an aggressive attack either against itself or against another sovereign state. At this point we have arrived at the aggression-defense paradigm of the just war.

It is a corollary of this view that the internal or domestic affairs of a state are entirely the prerogative of the state itself. It is a violation of state sovereignty, and of the moral right of national self-determination that the legal doctrine of state sovereignty is supposed to protect, to intervene forcibly in the internal affairs of another state. If states are to be seen as relevantly analogous to individual persons, then a case in which a government persecutes some group of its own citizens must be regarded as analogous to a person’s harming himself. To intervene would be objectionably paternalistic. As Walzer puts it: “As with individuals, so

¹² John Stuart Mill, *On Liberty*, in Marshall Cohen, ed., *The Philosophy of John Stuart Mill: Ethical, Political, and Religious* (New York: Modern Library, 1961), p. 197.

with sovereign states: there are things we cannot do to them, even for their own ostensible good.”¹³

Since the publication of *Just and Unjust Wars*, the world has changed in ways that have begun to undermine the domestic analogy as a heuristic device for thinking about moral relations among states. During the period of the Cold War from the end of the Second World War to the early 1990s, the United States and the Union of Soviet Socialist Republics (USSR) were continuously jockeying for effective control of various countries and regions around the world. The USSR operated partly through covert interventions to stimulate domestic communist insurgencies in other states (though it also conducted direct military interventions in such states as Hungary, Czechoslovakia, and Afghanistan), while the United States used its superiority in nuclear weaponry as a means of deterring Soviet challenges to its numerous military interventions in countries throughout the world. It is unsurprising that, in these conditions, those working in international ethics and international law would argue for the necessity of respect for state sovereignty and the wrongfulness of aggression. With the end of the Cold War, which had also enabled a host of vile and repressive dictatorships to remain in power as puppets of the two major powers, nationalist movements that had been held in check by these dictatorships (usually with the encouragement and support of their superpower ally in the interest of “stability”) inaugurated violent campaigns for secession or for the suppression of secessionist movements, the expulsion or massacre of national or ethnic minorities, and so on. Conflicts *between* states – conflicts of aggression and defense – were replaced by conflicts *within* states as the principal threat to the lives and well-being of individuals. Although nationalist violence and genocide were hardly unknown either before or during the Cold War (witness the Armenian genocide in Turkey, the Holocaust, and the genocide in what was then called Kampuchea), fear and hatred inspired by nationalist sentiment led to a series of slaughters (of Tutsi by Hutu in Rwanda, of Bosnian Muslims by Serbs in former Yugoslavia, of Albanian Kosovars by Serbs in Serbia, of black Sudanese Muslims by Arab Sudanese Muslims in Darfur) that seemed to many to require humanitarian intervention on behalf of the victims.

In these altered conditions, moral and legal thought has begun to shift away from the strict aggression-defense paradigm of just war. In general, moral and legal theorists continue to regard defense as the principal or

¹³ Walzer, p. 89.

even the only aim of a just war – again, Walzer’s reference to punishment is anomalous – but the state is no longer universally regarded as the only appropriate object of defense in war. Many people have come to regard the defense of individuals – in particular the defense of individuals against violations of their basic human rights – as a just cause for war, even if this may require intervention in, or invasion of, a sovereign state that has not committed any act of aggression. The state-centered, collectivist conception of international relations has begun to yield to a more individualist view, and the rights of state sovereignty are thought by many to be overridable when a state engages in the systematic violation of the human rights of some sector of its citizenry.

III. Can Aggressive War Be Permissible?

Are the reformists right or is aggression the sole occasion for just war? That is, can a war be just that is not a response to aggression? Can aggression be just? To answer these questions, we must determine what exactly aggression is. Walzer, one may recall, claims that “any use of force or imminent threat of force by one state against the political sovereignty or territorial integrity of another constitutes aggression.” *Just and Unjust Wars*, from which this definition is quoted, was published in 1977 and shows the influence of the definition of aggression adopted by the UN General Assembly in 1974. According to Article 1 of that definition, “aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State.”¹⁴ The problem with these ways of understanding aggression, however, is that they imply that any war that is a defensive response to the unjust first use of military force by another state, but that threatens the sovereignty of the initial attacker, counts as aggression. Some wars of defense may not threaten the sovereignty of the state against which they are directed, but some do. Both the Allied war against Nazi Germany and the war against imperial Japan threatened the sovereignty of the state against which they were directed. The Nazi government was overthrown and the German state divided, while Japan was occupied and its government restructured in accordance with a new constitution. Yet the Allies in the Second World War were not guilty of aggression.

¹⁴ Report of the Special Committee on the Question of Defining Aggression, 11 March–12 April 1974. Quoted in Yehuda Melzer, *Concepts of Just War* (Leiden: A. W. Sijthoff, 1975), p. 29.

What is missing from these definitions is, of course, any reference to the first use of force, or “priority,” as it is called in legal discussions of the UN definition. The “first use” condition does appear in Article 2 of the UN definition, which says that “the first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances including the fact that the acts concerned or their consequences are not of sufficient gravity.”¹⁵ Yet this reference to first use is so heavily qualified that it has little determinate content at all. First use is only *evidence* of aggression, and then only *prima facie* evidence. This element of the definition leaves it open that the first use of military force by one state against another might not be aggression. One way it might not constitute aggression would be for the Security Council to judge that it is not – perhaps on the ground that the use of force is not sufficiently serious, perhaps on other grounds unspecified by the definition. So the first use of military force is explicitly not sufficient for aggression, and there is no indication anywhere in the definition that it is necessary either.

But as the notion is commonly used, the first use of significant military force by one state against another seems to be a necessary condition of aggression and is in general sufficient. I say “in general sufficient” because there is one type of case in which the actual first use of force may not be aggression – namely, cases in which one state initiates the use of force in response to an imminent threat of attack, or perhaps a nonimminent but nevertheless highly probable threat of attack, by another state. The preemptive or perhaps even preventive use of force that is a response to a genuine and serious threat of attack seems to count as defense rather than aggression. So I suggest that we understand aggression as any use of significant military force by one state against another that is not defensive – that is, military action that is not a response to a prior first use of force, or to a high probability of an initial use of force, by the target state against another state.

With this as background, we can now return to the substantive question whether a just war must be a response to aggression or whether there can be a just cause for war in the absence of prior aggression. Writing in 1961, Elizabeth Anscombe, who understands aggression in the way that I have suggested, gives what I think is the right answer: “The present-day

¹⁵ *Ibid.*, p. 30.

conception of 'aggression,' like so many strongly influential conceptions, is a bad one. Why *must* it be wrong to strike the first blow in a struggle? The only question is, who is in the right, if anyone is."¹⁶

When put this way, Anscombe's claim may seem so obviously right that one may wonder how people could, for so long, have thought otherwise. There have, I think, been several obstacles to the appreciation of the truth of her claim, some theoretical, some practical. One theoretical obstacle is the pervasive influence of the domestic analogy in the way that people have thought about international relations. If we think about the possibility of justified aggression by exploring parallel cases in which the agent and the victim are individual persons rather than states, our thinking will be distorted by the fact that there simply is no "domestic analogue" of a state's persecuting some sector of its citizenry. As I noted earlier, the closest analogy is a person's harming himself, but that is utterly disanalogous, in moral terms, to a state's harming or killing some of its own citizens. Suppose we thought that in relations among individuals, it is always wrong to strike the first blow – that is, always wrong to be the first to use physical violence against another individual. With Anscombe, I think this is implausible, but it is less implausible than the analogous view at the level of states that it is always wrong for one state to strike the first blow against another, for one state may strike another, not because the other has struck the first blow against another state, but because it is in the process of striking unjust blows against its own citizens.

Another theoretical obstacle has been the view that coercive external intervention in the affairs of a state necessarily violates the right to collective self-determination of the people of that state. Again the classic statement of this view is by John Stuart Mill, this time in his "A Few Words on Non-Intervention," which is quoted and discussed with approval by Walzer.¹⁷ But the flaw in this view, which became painfully apparent in the nationalist civil wars of the 1990s, is that states often contain two or more national groups that have so little in common that there is no single collective "self" whose self-determination would be violated by military intervention. Intervention that might thwart the self-determination of one group might advance the self-determination of another. In a case in which the institutions of the state are controlled by one group and are being exploited for the wrongful oppression or persecution of another,

¹⁶ Elizabeth Anscombe, "War and Murder," in *Ethics, Religion, and Politics, Collected Philosophical Papers*, vol. 3 (Minneapolis: University of Minnesota Press, 1981), p. 52.

¹⁷ See Walzer, pp. 87–91, and accompanying quotations from and citation of Mill's essay.

intervention against the state at the request of the victims might not violate any right of collective self-determination at all. The rights of the beneficiaries would not be violated because they would have requested and welcomed the intervention, and the rights of the group that controls the institutions of the state would not be violated either, since their right to collective self-determination does not include a right of noninterference with their violations of the rights of others.¹⁸

A practical obstacle to appreciating the force of Anscombe's claim is that, as I noted in the previous section, the prime imperative throughout most of the twentieth century was to constrain the resort to war. To acknowledge the permissibility of the unilateral initiation of war, even in defense of people's human rights against violation by their own government, is dangerous because it offers a rationale, or cover, for the initiation of war for reasons of national self-interest. And states tend to seize any pretext that is available. Throughout the Cold War, for example, the United States sought to justify its various aggressive interventions by claiming that it was defending people from insidious communist subversion and aggression.

This practical concern, while extremely important, is irrelevant to whether there can, in principle, be a just war that is aggressive in the ordinary sense that it involves the first use of significant military force by one state against another. The practical need to constrain the resort to war at most requires that if aggressive war can be morally justified, it would be best not to publicize that fact, and a mistake to grant states any permission under international law to initiate war against another state without authorization by the UN Security Council or, perhaps, some other, more impartial judicial body that might be established under international law.

It may also no longer be true that the most important practical imperative is the prevention of war between states. It may now be equally urgent, or perhaps even more urgent, to prevent systematic violations of human rights when conflicts arise within states.

The most important questions that are relevant to the permissibility of aggressive war are these. Are people who wrongfully and culpably imprison, torture, and kill their fellow citizens morally liable to potentially lethal attack if that is the only, or even just the most effective, means of stopping them? And are those who use force to shield the wrongdoers from interference in these activities also liable? If the answer to both

¹⁸For a more detailed discussion, see Jeff McMahan, "Intervention and Collective Self-Determination," *Ethics and International Affairs* 10 (1996): 1-24.

these questions is yes, and I think it clearly is, then in principle aggressive humanitarian intervention can be morally justified, for we are granting that there is a moral justification, grounded in familiar moral principles of self- and other-defense, for attacking these people. And there is no reason to alter this conclusion if the agent that acts in defense of the victims is a state, or a group of individuals acting under the authority of a state, or if those who are committing the wrongs against their fellow citizens are agents or officials of a different state. It is, of course, not irrelevant if those who are the agents of a defensive attack are representatives of one state while those who are the victims of the attack are representatives of a different state, but there is no reason to suppose that the permissibility of third-party defense of the innocent is invariably canceled when both these conditions obtain.

According to the definition I have given, unilateral humanitarian intervention counts as aggression. If I am right that unilateral humanitarian intervention can be morally permissible, it follows that aggression can be permissible. Indeed, in cases in which humanitarian aggression is permissible, it is also generally true that defense is impermissible. Insofar as the aim of the aggression is only to stop the violation of human rights, those responsible for the violations have no right to attack the rescuers in self-defense; their only permissible option is to stop the wrongful action that has provided their attackers with a just cause for war. In short, in cases of justified humanitarian intervention, the traditionally accepted claims are reversed: aggression is permissible, while defense is wrong.

IV. Punishment as a Just Cause for War

Even if aggression can be permissible, it may still be true that the sole just cause for war is defense. Defense against unjust aggression might be one just cause, while defense of human rights, which might involve aggression, could be another. The first of these could be either national self-defense by one state against another or third-party defense of one state by another. The second could involve third-party defense of individuals.

But is it true that just war must be purely defensive? Or can there be just causes for war other than defense? Many people believe that deterrence of unjust aggression can be a just cause for war. But many of these same people also believe that the status of deterrence as a just cause is conditional – that is, they believe that it can become a just cause only in conjunction with defense. On this view, deterrence, either of the country attacked or of other countries generally, cannot constitute a just cause for war on its

own. It can never be just to go to war solely to deter unjust aggression or some other serious wrong. Rather, there must be some offense, such as unjust aggression, that justifies a defensive response. Then, once war is in progress for the purpose of defense, it can become permissible to take further action in the war that is not justified entirely by considerations of defense, or to prolong the war after the defensive goals have been attained, in order to deter the aggressor or others from engaging in similar action in the future. My view is that deterrence can be an independent just cause for war and thus may in principle be permissibly pursued even in the absence of defensive aims, though cases in which this might be true are so rare that in practice it is safe to assume that it is permissible to pursue deterrence only as a corollary of the pursuit of defense.¹⁹ I will not, however, discuss this issue further here. Our question in this essay is whether punishment can be a just cause for war.

As before, to answer this question we must first address a prior question: namely, is there a sharp distinction between defense and punishment, and if so what exactly is it? The prevailing view, as George Fletcher puts it in one of a pair of essays that discuss this question, is "that self-defense is one sort of thing and punishment, quite another."²⁰ That they are entirely distinct is also presupposed by the common view that while defense can be a just cause for war, punishment cannot.

According to most accounts, the main difference between defense and punishment is that defense is *ex ante*, punishment *ex post* – that is, defense aims to stop or to prevent an offense, whereas punishment responds to an offense that has already occurred. In criminal law, for example, self-defense is understood as action that occurs once an attack has begun, or is just about to begin, but has not been completed. Punishment, by contrast, occurs only after an offense, such as an attack, has been completed, and indeed only after trial (even if the completed act was an uncompleted crime, as in the case of criminal attempts). Another commonly noted contrast is that while self- and other-defense are permitted to individual agents and require no authorization from others,

¹⁹For an argument that deterrence can be an independent just cause, see Jeff McMahan, "Just Cause for War," *Ethics and International Affairs* 19, no. 3 (2005): 1–21. For criticism and a defense of the more common view that deterrence is only a conditional just cause, see Thomas Hurka, "Liability and Just Cause," *Ethics and International Affairs* 21, no. 2 (2007): 199–218.

²⁰George P. Fletcher, "Punishment and Self-Defense," *Law and Philosophy* 8 (1989): 201–15, p. 201. Also see his "Self-Defense as a Justification for Punishment," *Cardozo Law Review* 12 (1990–1991): 859–66.

punishment is exclusively the prerogative of the state. Some argue that a further difference is that defense seeks to avert one harm through the infliction of another, while punishment adds to the net sum of harm. It inflicts an additional harm after the unavoidable harms have occurred.²¹ Finally, most people assume that desert is a necessary condition of justified punishment but not of justified defense – that is, that while a person must deserve to be harmed in order to be a legitimate subject of punishment, this need not be true in order for a person to be a legitimate target of defensive action.

Despite these contrasts, defense and punishment are not so different as to be mutually exclusive. Although in the end Fletcher defends the received view that defense and punishment are “radically different,” his two essays are nonetheless devoted to considering “whether harm inflicted in legitimate self-defense constitute[s] punishment.”²² This way of putting the question is, however, misleading. It would be better to ask whether harm inflicted as legitimate punishment can also constitute defense. Phrasing the question this way makes it clear that the categories of defense and punishment are overlapping, for defense is among the accepted aims of punishment.

In most people’s minds, the notion of punishment is associated with guilt, desert, and retribution. Yet retribution – the infliction on wrongdoers of whatever penalties they deserve – is only one of the aims of punishment. Punishment is widely recognized as legitimately serving various other aims, such as defending or protecting innocent people from further harm at the hands of the criminal, deterring both the criminal himself and other potential offenders from committing similar crimes in the future, reforming the criminal’s morals, and expressing society’s disapproval of the criminal’s action.

Of these aims of punishment, only retribution requires desert on the part of the criminal. Yet we might altogether reject the ideas of desert and retribution and still retain a practice that would be clearly recognizable as punishment. Suppose, for example, that philosophers were to persuade us that there is no such thing as desert. We would then have to abandon the idea that punishment can be justified as retribution. But we could still have laws and impose penalties on those who violated them in order to protect ourselves from the offenders and to deter both them and other potential offenders from violating the laws in the future. And it would

²¹ See Jules Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992), p. 223.

²² Fletcher, “Punishment and Self-Defense,” pp. 214 and 202.

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be uncontroversial that in enforcing the laws we would be punishing the violators.

We could still insist, moreover, that only those who had violated the laws could legitimately be punished. Even if we rejected the idea that violators could deserve to be punished, we could still insist that only those who had violated the law could legitimately be punished because only they would be morally *liable* to punishment. The notions of desert and liability are importantly different. If a person deserves to be harmed, there is a reason for harming him that is independent of the further consequences of harming him. Giving him what he deserves – retribution – is an end in itself. But a person is liable to be harmed only if harming him will serve some further purpose – for example, if it will prevent him from unjustly harming someone, deter him from further wrongdoing, or compensate a victim of his prior wrongdoing.

This shows, I think, that we could have a practice of punishment that would have as its sole aim the defense of innocent people against those who, by violating the laws, had shown themselves to be presumptively dangerous and simultaneously made themselves liable to preventive action.²³ But if punishment and defense are so obviously overlapping, why have they been thought to be “radically different” and wholly distinct? I suspect the explanation is that people tend to focus on paradigmatic cases, associating defense with stopping an attack or offense that is in progress, and punishment with retribution inflicted after an attack or offense has been completed. Because justified defense against an attack in progress does not require that the aggressor *deserve* to be harmed, and because retribution is inflicted only for offenses that have already occurred and cannot be prevented, it has seemed natural to suppose that defense and punishment are distinct and not overlapping.

But there is a large area of overlap between “pure defense” (violent action intended only to stop an attack in progress) and “pure retribution” (the infliction of harm on a person for the sole purpose of causing him to suffer what he deserves to suffer as a result of having committed a completed offense). The area of overlap between these pure forms of defense and punishment is occupied by certain cases of “preventive defense,” or defense against attacks or other offenses that have not yet begun.

²³ For efforts to develop a justification for punishment on the basis of principles governing individual self-defense, see Thomas Hurka, “Rights and Capital Punishment,” *Dialogue* 21 (1982): 647–60; Daniel Farrell, “The Justification of Deterrent Violence,” *Ethics* 100 (1990): 301–17; Philip Montague, *Punishment as Societal Defense* (Lanham, MD: Rowman & Littlefield, 1995).

There are two forms of preventive defense that would not normally be considered punitive – that is, would not normally count as punishment. One is preventive action taken to avert a future threat in the absence of any present attack or offense. The other is preemptive action taken in the absence of an actual attack but when planning and preparation have made an attack either imminent or otherwise highly probable. In both these cases, preventive action is likely to be regarded as defensive, whether legitimate or not, rather than punitive.

But there are two other types of case that are simultaneously defensive and punitive. In one, an offense has been completed but the offender is subjected *ex post* to action intended to prevent him from repeating the offense or committing another offense of a different sort. This is the kind of case to which I referred earlier when I suggested that we might cease to believe in desert and retribution but still have a practice of punishment intended only for social defense. The imposition of restraints on an offender in such a case would clearly count as punishment since the act that would have established liability would lie in the past, but the aim of the punitive action would nevertheless be wholly defensive. In the other kind of case in which action is simultaneously defensive and punitive, an attack or offense is in progress and action is taken both to stop the ongoing action and to prevent further attacks or offenses in the future. The ongoing offense justifies purely defensive action and also provides the basis of liability to preventive action that is punitive in nature, whatever form it may take. In domestic contexts preventive action typically takes the form of detention. In war, it generally takes the form of forcible disarmament. This is in fact a familiar course for war to take: aggression by one side prompts an initially purely defensive response by the victim that is then followed by further action to disarm the aggressor as a means of preventing further aggression in the future. In these cases there are two just causes: (1) defense and (2) punishment that has no retributive element but is instead entirely preventive.

The claim that punishment can be a just cause for war when the aim is preventive leaves open the question that many people have in mind when they ask whether punishment can be a just cause – namely, can *retribution* be a just cause for war? Can it be a just cause for war to inflict on wrongdoers what they deserve to suffer? There are several reasons why in practice it cannot, each of which is individually contingent. To say that a reason is contingent is to say that circumstances could in principle be such that it would not apply. This means that *in principle* retribution could be a just cause for war. But the probability in practice that any one

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of the various reasons could be overcome is exceedingly remote; thus the probability that they could all be overcome in a single instance is negligible.

The first question to ask here is who or what is the proper object of retributive punishment in war. One answer – perhaps the one that would be most commonly given – is that it is *the state* that has acted wrongly, for example by engaging in unjust aggression, that deserves to be punished. This presupposes that states can be the nonderivative subjects of belief, desire, intention, action, responsibility, guilt, liability, and so on. I believe that they cannot be, though I cannot argue for that here. States are compound entities composed of individuals, territory, institutions, and so on. Even if such entities could be subjects of guilt that is not reducible to the guilt of individual citizens, it is not possible to punish a state without harming at least some of its citizens.²⁴ Unless the guilt of a state is necessarily transmitted or distributed to *all* of its citizens simply by virtue of their citizenship – a morally grotesque assumption – punishment of a state is virtually certain to be indiscriminate, and therefore unjust, in that it would be directed against some individuals who bore no responsibility for the wrongs attributed to the state.

It seems, therefore, that if retributive punishment is to be a just cause for war, the punishment must be of only those individuals who are themselves responsible for, or guilty of, wrongs that are derivatively attributable to the state (perhaps because the relevant individuals acted wrongly in their capacity as authorized agents of the state). But there are three objections to the idea that war could be a just means of inflicting on these individuals whatever harms they might deserve.

Two of these objections derive from the fact that retributive punishment presupposes guilt and has to be proportionate to the degree of the wrongdoer's guilt. But the determination of guilt and the apportionment of punishment to desert are matters that in general require epistemically reliable procedures such as a fair trial. The first objection to war as an instrument of punishment is that in war the necessary information about what individuals have done and why – matters pertaining to the *actus reus* and *mens rea* – is in general entirely unavailable. As an instrument of retribution, war is the worst sort of vigilante action. Second, even if we could be certain in advance of going to war exactly what the guilty people on the other side were guilty of and how much punishment they deserved, the

²⁴ For a recent and powerful defense of the notion of irreducible collective responsibility, see Philip Pettit, "Responsibility Incorporated," *Ethics* 117, no. 2 (2007): 171–201.

harms inflicted by war could not possibly be calibrated to give each person no more and no less than what he or she deserves. War is too blunt an instrument for the administration of retributive punishment. (It is worth noting that determination of liability and satisfaction of the proportionality constraint are also necessary conditions of just defense, but the standards of evidence are necessarily lower in the conditions in which people must engage in defense than they are for carrying out retribution.)

The third reason why retribution cannot in practice be a just cause for war is that it is an aim that cannot be pursued by means of war within the bounds of proportionality. War in the contemporary world inevitably causes harm to the innocent, even if unintentionally, that is vastly disproportionate to the importance of inflicting on wrongdoers whatever harms they deserve. This is, strictly speaking, not a reason why retribution cannot be a just cause, but it is a reason why it is not an aim that can ever be legitimately pursued by means of war.

It is, perhaps, tempting to suppose that once war is in progress, it may be permissible to prolong it beyond the point at which the defensive aims have been achieved in order to capture individuals believed to be guilty of the wrongs that have been stopped or prevented and make them available for trial. I think this is true, but it does not show that the continuation of the war would be justified as a means of facilitating retribution. I doubt that the aim of exacting retribution can justify the risks to which just combatants would be exposed in continuing to fight. What could justify the continuation of the war, however, is the enhancement of deterrence that might be achieved by capturing suspected war criminals, especially those charged with *ad bellum* offenses, in order to bring them to trial. Those found guilty could certainly be punished for retributive as well as deterrent purposes, but it would be the deterrent aims that would justify the continuation of the war.

The conclusions I have reached in this essay are unorthodox by the standards of contemporary just war theory. They are that aggressive war can be just and that punishment can be a just cause for war. But the divergence between these claims and the familiar claims of orthodox just war theory is not as great as it may seem, for aggressive war is just only when its aims are defensive – for example, the defense of individual human rights against violation by the victims' own government. And just war can be punitive only when the aim of punishment is defense or deterrence. Just war is never retributive.