

JUST VIOLENCE

Alice Ristroph*

Ethical reflections on war—and the positive laws these reflections have inspired—have framed their undertaking as the effort to limit and regulate state violence. Ethical reflections on punishment have not been framed in the same way, but they should be. Three characteristics of the philosophy (and laws) of war prove especially instructive for the philosophy (and laws) of punishment. First, the ethics of war is an ethics of violence: it acknowledges and addresses the gritty and often brutal realities of actual armed conflict. Punishment theory too often denies the violence of punishment or otherwise neglects the realities of penal practices. Second, philosophers of war tend to keep the usual agent of war’s violence—the state—squarely in view, whereas punishment theory tends to focus on the target of punishment rather than its agent. Third, and most importantly, commentators on the ethics of war have come to realize that the humanitarian project of limiting violence is a different and more difficult task than the project of justifying violence. This insight has produced the jus in bello: a set of principles aimed at limiting the violence of war without adopting a view of the war’s justification. Punishment theory has long been focused on the project of justifying punishment, but this Article sketches the contours of a jus in poena: philosophical and legal principles designed to regulate the conduct of punishment without adopting any particular theoretical justification for punishment.

TABLE OF CONTENTS

INTRODUCTION	1018
I. WAR AND PUNISHMENT AS STATE VIOLENCE	1022
II. DISCIPLINING WAR, DEFENDING PUNISHMENT	1028
A. From Jus ad Bellum to Jus in Bello.....	1029
B. The Disappointments of Punishment Theory	1037
C. Causes for Resistance?	1047
III. TOWARD A <i>JUS IN POENA</i>	1052

* Professor, Seton Hall University School of Law. For helpful comments, the Author is grateful to Kristen Boon, Jonathan Hafetz, Jameel Jaffer, Darrell Miller, Alex Reinert, Robert Tuttle, faculty workshop participants at Cardozo School of Law and George Washington University Law School, and attendees of the November 2013 Hoffinger Criminal Justice Colloquium at NYU School of Law.

CONCLUSION	1062
------------------	------

INTRODUCTION

War and punishment are two of the state's most expansive and expensive enterprises. They are different enterprises, of course, but they share some obvious and striking similarities. They are the two situations in which the state most often and most visibly uses physical force to injure, constrain, or even kill persons. In both contexts, force is adopted as a policy choice and then implemented by trained and authorized specialists. In both contexts, force is likely to be overused—often, the policymakers and the specialists on the ground each have separate incentives to do more violence rather than less.¹ And of course, in both contexts the appropriate kind and degree of force is a matter of continuing debate.

The two activities are occasionally joined rhetorically, as in the familiar discourse of the “War on Crime,” but one should distinguish between rhetoric and meaningful intellectual reflection.² The philosophies of war and punishment are each independently well established: humans have been debating the ethics of war and punishment for about as long as they have been waging war and punishing wrongdoers. But these two fields of ethical inquiry have had limited, and mostly one-directional, influence on one another. Certain concepts and institutions of domestic criminal law have been adapted and applied to military conflicts for decades if not centuries³—hence war crimes, international criminal tribunals, and other efforts to regulate war through criminal law⁴—but the reverse is not true.

1. See *infra* Part I.

2. By some accounts, the “War on Crime” was first declared in 1968, when Lyndon Johnson used the phrase in his State of the Union address, and in promoting the Crime Control and Safe Streets Act. See, e.g., JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 90–101 (2007); see also James Vorenberg, *The War on Crime: The First Five Years*, ATLANTIC, May 1972, at 63. But see V.F. Nourse, *Rethinking Crime Legislation: History and Harshness*, 39 TULSA L. REV. 925, 928–29 (2004) (detailing several examples of war on crime rhetoric by Herbert Hoover, Franklin Roosevelt, and members of the Roosevelt administration in the 1920s and 1930s).

3. The idea that some conduct is impermissible in war, and could constitute an “offense against the law of nations,” is an ancient concept. The specific terminology of “war crimes” came into common usage with the Nuremberg Tribunals after World War II. Thus, coincidentally, “war crimes” may have entered the English lexicon in roughly the same time frame as “the war on crime.” But while the former phrase takes seriously the concepts of both war and crime, the latter has prompted little reflection of what it means to approach crime as if we were fighting a war. See *infra* Part II.B.

4. Of course, domestic criminal law has to be adapted—and its substantive prohibitions modified—in order to serve as a framework to regulate war. See Samuel Issacharoff & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility*, 88 N.Y.U. L. REV. 1521, 1545 (2013) (“[W]ar turns on killing and capture—the heart of the prohibitions of ordinary criminal law. The attempt to impose a legal regime on the conduct of warfare required a disciplinary convention apart from the ordinary criminal code . . .”). But the point is that scholars of war take up this intellectual inquiry. See, e.g., Gabriella Blum, *The Laws of War and the “Lesser Evil,”* 35 YALE J. INT’L L. 1, 31–38 (2010) [hereinafter

Scholars and practitioners of domestic criminal law have, to date, given little consideration to the ways their enterprise might be illuminated by the theories and laws of war. Critics of War on Crime rhetoric have rejected military analogies, fearful that such analogies simply foster a harsher, ever more severe criminal-justice system.⁵ These critics have not asked whether the War on Crime is a just war, or more broadly, whether the conceptual frameworks with which we evaluate military force might actually inform and improve our evaluations of punitive force.

This Article takes up that inquiry. It argues that the philosophy of war is an untapped but valuable resource for the field of criminal justice. For centuries, ethical reflections on war—and the positive laws these reflections have inspired—have framed their undertaking as the effort to limit and regulate state violence. The philosophy and laws of punishment⁶ have not yet been framed in the same way, but this Article argues that they should be. With respect to both war and punishment, my focus here is more on philosophical frameworks than on positive laws. In each field, however, philosophical arguments are not totally dissociated from legal ones, so we have occasion to consider their interaction.

Three characteristics of the philosophy (and law) of war prove especially instructive for the philosophy (and law) of punishment. First, the ethics of war is, quite self-consciously, an ethics of violence. Philosophers of war do not deny war's violence, and they have engaged, rather than ignored, the gritty realities of armed conflict. Even commentators thoroughly and comfortably ensconced in the ivory tower (or in the church, where much reflection on war has taken place) have sought to understand and evaluate war as it exists in the real world. Accordingly, philosophers of war tend to engage with facts. They are likely to address actual historical examples, and they are likely to try to figure out the ethical implications of empirical data of various kinds, be it the number of civilian casualties, or the psychology of soldiers and officers, or the impact of new kinds of weapons. This is true even of work by moral philosophers, thinkers who are not themselves empirical researchers.

Second, philosophers of war keep the state squarely in view. Very often, the state is the agent of war's violence. To be sure, the broad category of war may be understood to include insurrections, civil wars, and other conflicts that involve nonstate actors as agents of violence. Nevertheless, a great deal of warfare is violence waged by states, so theories of war must—and do—address issues regarding the nature of the state: the bounds of state sovereignty, for example, or the appropriate allocation of responsibility among the state itself and the individual

Blum, *Lesser Evil*] (considering ways in which the necessity defense of domestic criminal law might inform a humanitarian necessity principle in international law).

5. See, e.g., Perry L. Moriearty & William Carson, *Cognitive Warfare and Young Black Males in America*, 15 J. GENDER, RACE & JUST. 281 (2012). See *infra* Part II.C (for further discussion of objections to war analogies in the criminal justice context).

6. Punishment is not the only non-military context in which the state uses violence, and it is not the only context in which ethicists and jurists might learn something from the ethics and law of war. Although this Article focuses primarily on punishment, many of its arguments apply to efforts to discipline other types of state violence such as police force, formally civil detention, and coercive interrogation or torture.

persons who act on its behalf. Regulating the state is, in many ways, a different and more difficult task than regulating private individuals or entities.⁷

Third, in focusing on the realities of war, and in considering the state as an agent of war, commentators on the ethics of war have come to recognize that the humanitarian project of limiting violence is a different and more difficult task than justifying it. Early Christian writings on war focused on questions of justification: they tackled the question whether a good Christian could serve as a soldier, and concluded that one could, so long as the war was a just war.⁸ From these writings, and others, developed the notion of the *jus ad bellum*—the justice of war—and specific principles purporting to distinguish justified wars from unjustified ones.⁹ Around the late sixteenth or early seventeenth century, however, commentators became increasingly dissatisfied with the *jus ad bellum* as a mechanism to limit the violence of war.¹⁰ They observed that setting forth the conditions of just war simply led belligerents to frame their actions in those terms. Put simply, everyone who went to war claimed, usually in good faith, to be justified in doing so. Accordingly, many commentators began to emphasize the limitation of war rather than its justification. This led to the development of a separate set of principles known today as the *jus in bello*—the justice *in* war, rather than the justice *of* war. The principles of the *jus in bello* seek to regulate the conduct of war; they ask how war is fought, not whether it is justified. Laws motivated by the *jus in bello* address, for example, the type of weapons that may be used, or the treatment of prisoners of war, or the ever-present problem of foreseeable harm to noncombatant civilians. The *jus in bello* is explicit in its aim to limit the violence of war by restricting the modes of permissible warfare, whether the war is just or unjust.

For each of these characteristics of the philosophy of war—its recognition of the violence and empirical realities of war, its recognition of the importance of the state, and its focus on limitation rather than justification—one can draw a sharp contrast with philosophical work on punishment. Punishment theory does not typically identify punishment as an act of violence; indeed, punishment theory says surprisingly little about types of sanctions and the degree of physical coercion or injury they involve.¹¹ Moreover, philosophies of punishment tend to assume that the state will be the agent of punishment, but beyond that they usually say little about the state. Especially in retributive theory, which has dominated punishment theory

7. See, e.g., Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1792–93 (2009); Alice Ristroph, *Covenants for the Sword*, 61 U. TORONTO L.J. 657, 659–63 (2011); Nicholas Rosenzanz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1210–12 (2010).

8. See *infra* Part II.A.

9. As discussed in Part II, the specific phrases *jus ad bellum* and *jus in bello* came into use only after World War II. I use the phrases, albeit somewhat anachronistically, to refer to the centuries-older principles of just war and limited war that are today commonly associated with these Latin terms.

10. See *infra* Part II.A.

11. Capital punishment is an exception. Many commentators have addressed the death penalty in detail; many condemn its violence. But the tremendous attention given to death sentences makes the relative scholarly indifference to the realities of incarceration all the more notable. See *infra* Part II.B.

for a few decades now, the philosopher's focus tends to be on the target of punishment—the criminal—rather than on the agent of punishment. Retributive theorists tend to work in the passive voice—their question is why the criminal deserves *to be punished* rather than why the state has the power or authority *to punish* him. Finally, both retributive and nonretributive punishment theories have focused overwhelmingly on the question of moral justification. “Why (or how) is punishment justified,” is the question on which each new philosopher of criminal law must cut his teeth, it seems, and a question that occupies many philosophers throughout their careers.¹² These scholars see the project of limiting punishment as derivative of the project of justification; according to this view, the way to limit punishment is to reaffirm its justification and ensure that we punish only when justified. Punishment theory, one could say, remains firmly fixated on the *jus ad poena*.¹³

This Article seeks to inspire a *jus in poena*, a set of philosophical and legal principles designed to regulate the conduct of punishment. Such an approach would identify limiting principles that are independent of theoretical justifications of punishment.¹⁴ It would, for example, lead to a very different interpretive approach to the Eighth Amendment. Current doctrinal standards assess whether a punishment is so disproportionate that it is “cruel and unusual” (and thus, unconstitutional) by asking whether the punishment is unjustified.¹⁵ Constitutional limitations on punishment are thus derivative of theories of justification, and as in the war context, this approach has imposed few meaningful restrictions on the use of force. If we understood the Eighth Amendment as an independent limiting principle, rather than as a rule whose scope is no broader than the small and shrinking space between asserted justifications of punishment, it could serve to discipline the use of punitive

12. Theoretically inclined criminal law scholars often tackle the justification of punishment in their maiden (or near-maiden) publications, usually adopting one variant or another of retributivism. See, e.g., Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307 (2004); Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87 (2010); David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619 (2010); Adil Ahmad Haque, *Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law*, 9 BUFF. CRIM. L. REV. 273 (2005); Dan Markel, *The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States*, 49 U. TORONTO L.J. 389 (1999). For further discussion of works by career retributivists, see *infra* Part II.B.

13. *Jus ad poena* and *jus in poena* are not widely used terms, but they have been used by at least two other scholars. See DONALD X. BURT, FRIENDSHIP AND SOCIETY: AN INTRODUCTION TO AUGUSTINE'S PRACTICAL PHILOSOPHY 186 (1999); David Estlund, *On Following Orders in an Unjust War*, 15 J. POL. PHIL. 213, 229 (2007). Both Burt and Estlund use the terms to capture the distinction between the overall justification of punishment and the permissibility of a particular method (or amount) of punishment.

14. Thus, the argument here is *not* an effort to ensure that the War on Crime is a just war. As discussed in Part II.A, in philosophies of war we find a great deal of disillusionment with the idea of a just war. To identify the conditions for just violence, as does just war theory, fails to limit acts of violence and may even increase them. The ethics of war has largely moved beyond the project of justification, and I will suggest that the ethics of criminal justice should do the same.

15. See *Graham v. Florida*, 560 U.S. 48, 71 (2010) (“A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.”); see also Youngjae Lee, *The Purposes of Punishment Test*, 23 FED. SENT'G REP. 58, 58 (2010).

force far more effectively. This Article develops this and other implications of a *jus in poena*.

More broadly, this Article encourages greater recognition of the continuities across different types of state violence, with the hope that lessons learned in one context may prove useful in another.¹⁶ The project is candidly ambitious and in some senses radical, for it would reorient a well-established philosophical field. But that philosophical field is showing signs of stagnation, and indeed, of irrelevance.¹⁷ Reorientation toward a *jus in poena* will bring new intellectual energy into punishment philosophy, and it should make punishment philosophy more relevant to the practice of punishment.

Part I makes a preliminary case for why it might be helpful to think about war and criminal justice alongside one another. Part II looks in more detail at the philosophy of war and its efforts to discipline the violence of war, focusing in particular on the transition from *jus ad bellum* to *jus in bello*. This Part also draws some contrasts to philosophical work on punishment, and considers objections to, and the limits of, the war–punishment analogy. Finally, Part III offers a few specific examples of how the ethics of criminal justice might be different if inspired by the ethics of war.

I. WAR AND PUNISHMENT AS STATE VIOLENCE

To some readers, the shared characteristics of war and punishment will be obvious. To others, what distinguishes the two activities will seem more important than what they have in common. Readers in either camp, but especially those in the latter, may resist the classification of punishment as violence. This Part explains why it is useful to think of war and punishment as variants of state violence—and why we should pay greater heed to the continuities across different kinds of state violence. Indeed, though this Article focuses on war and punishment, many of its arguments apply to police force, ostensibly nonpunitive detention, and physically coercive interrogation techniques. Without equating these various types of state violence, we can identify some important consistencies and similarities.

At the outset, it is worthwhile to say a little bit about the word “violence.” It is a word often and easily associated with war, but its use is more controversial with respect to the legitimate activities of criminal justice professionals. Obviously,

16. Cf. STATES OF VIOLENCE: WAR, CAPITAL PUNISHMENT, AND LETTING DIE (Austin Sarat & Jennifer L. Culbert eds., 2009); Jonathan Hafetz, *Detention Without End?: Reexamining the Indefinite Confinement of Terrorism Suspects through the Lens of Criminal Sentencing*, 61 U.C.L.A. L. REV. 326, 332–33 (2014); Judith Resnik, *Detention, The War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579, 584–90 (2010) (arguing for an “integrated approach” in which the law of detention is studied across several contexts: counterterrorism, immigration, policing, and prisons).

17. What I call stagnation, more generous commentators call consensus. See, e.g., Michael T. Cahill, *Punishment Pluralism*, in RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY 25, 43 n.5 (Mark D. White ed., 2011). More impatient commentators are just bored. See Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1089 (2010–2011) (“How can we justify having a system that imposes punishment? The moral philosophers have killed many forests answering this question but, to be honest, I’ve always found it a bit boring.”).

punishment—like policing, and like war—involves a wide, diverse array of activities and strategies. Not all of those activities are violent. Some of them are, in the sense that the essential tactic is to use superior physical force to overcome a physically vulnerable human being.

Force, too, can be a contested term. The phrase “use of force” is a term of art both among criminal justice professionals and in the laws of war—one not defined consistently, but often defined more narrowly than common understandings of the word violence.¹⁸ In the criminal justice context, a typical definition would restrict the term “use of force” to the use of weapons, canines, or “significant physical contact.”¹⁹ Such a definition conceives the use of force along the lines of hand-to-hand combat; it would exclude physical confinement that is effected without direct, continuous bodily contact.²⁰ It is not difficult to see why criminal justice professionals would prefer narrow definitions of the concept of force. Certain state activities are subject to specific constitutional regulation—seizures (of which uses of force are a subset) as well as searches and punishment—and, thus, public officials have sought to define each of these terms narrowly to minimize the

18. See John J. Gibbons & Nicholas De B. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons*, 22 WASH. U. J. L. & POL'Y 385, 418, 421 (2006) (noting the lack of uniform definitions for nonlethal force in U.S. prisons and calling for uniform definitions). The laws of war also rely on the phrase “use of force,” usually without precise definitions, to refer generally to the deployment of weapons, some troop movements, and many of the initial acts that are seen to initiate military conflict. See David Weissbrodt, *Cyber-Conflict, Cyber-Crime, and Cyber-Espionage*, 22 MINN. J. INT'L L. 347, 357–59 (2013) (noting the lack of a clear definition of “use of force” in international law, and detailing some acts that have been included, such as armed attacks, training and arming rebel forces, or excluded, such as economic and political coercion, from the category).

19. For example, Rachel Harmon quotes a federal consent order for the following “reasonable definition” of the term “use of force”:

[A]ny physical strike or instrumental contact with a person; any intentional attempted physical strike or instrumental contact that does not take effect, or any significant physical contact that restricts the movement of a person. The term includes the discharge of firearms; the use of chemical spray, choke holds, or hard hands; the taking of a subject to the ground; or the deployment of a canine. The term does not include escorting or handcuffing a person, with no or minimal resistance.

Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1125 n.14 (2008) (quoting Consent Judgment: Conditions of Confinement at 1–2, *United States v. City of Detroit*, No. 03-72258, 2014 WL 4384481 (E.D. Mich. July 18, 2003)).

20. The definition quoted in note 19 specifically excludes the use of handcuffs if the person restrained offers “no or minimal resistance.” This caveat constitutes a “resistance requirement” akin to the resistance requirement that once characterized the legal definition of rape. Under that resistance requirement, many courts found that if the victim did not fight back, a sexual encounter could not have been rape. See generally Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953 (1998). Here the implication is that if a prisoner does not fight back, custody—even with physical restraints—cannot constitute a use of force. *But see* Muehler v. Mena, 544 U.S. 93, 99 (2005) (referring to “[t]he officers’ use of force in the form of handcuffs”); see also *id.* at 103 (Kennedy, J., concurring) (“The use of handcuffs is the use of force . . .”).

constitutional constraints on the criminal justice system.²¹ Given the narrow doctrinal definitions, it is important to emphasize that physical force characterizes the business of criminal justice to a much greater extent than the legal term of art “use of force” suggests. Even if a police officer does not use a billy club or fire a gun, ordinary arrests are predicated on a fairly direct threat of superior physical force, and ordinary police custody is simple physical confinement. Similarly, even if a corrections officer does not rough up a prisoner, an ordinary prison sentence is characterized by the exercise of superior physical power. The point is that the exercise of physical force is not exceptional in the criminal justice context; rather, it is part and parcel of many run-of-the-mill criminal justice activities.

Violence, as understood here and in ordinary speech, is a concern of human beings because they are physically embodied, vulnerable, and mortal creatures. This understanding will not prove especially controversial once stated clearly, I hope, but it is not often stated clearly. Western political thought has long pondered and celebrated the mental faculties of the human species—our capacities for reason, discourse, deliberation, and volition.²² In other words, thinkers have prioritized the capacity for thinking. This focus on the cerebral has occasionally obscured or deemphasized the corporeal dimensions of human existence.²³ Philosophers and theologians alike have said much about what separates man from beasts, and we forget sometimes that the human person is an animal too, in need of nourishment and shelter, susceptible to pain and injury, and inevitably mortal. Violence takes advantage of the human body’s physical limitations; in various forms, violence may restrain, immobilize, maim, or kill. That is the conception of violence that best explains most common sense understandings of “violent crime,” though in formal law that term, too, is inconsistently defined and strategically redefined.²⁴ H.L.A. Hart once argued that if “men were to become invulnerable to attack by each other, were clad perhaps like giant land crabs with an impenetrable carapace,” then “rules forbidding the free use of violence” would no longer be necessary.²⁵ Importantly, the criminal justice system relies on human embodiment and humans’ physical vulnerability to achieve its basic goals. Prisons constrain us because we cannot beam ourselves out of them; the police officer has authority because we are vulnerable to

21. See, e.g., *Illinois v. Caballes*, 543 U.S. 405, 408–09 (2005) (holding that a canine sniff generally is not a “search” within the meaning of the Fourth Amendment); *County of Sacramento v. Lewis*, 523 U.S. 833, 843–44 (1998) (holding that a police chase that ended with a fatal car crash was not a “seizure” within the meaning of the Fourth Amendment); *Wilson v. Seiter*, 501 U.S. 294, 299–301 (1991) (holding that prison conditions not traceable to an official’s culpable state of mind are not “punishment” within the meaning of the Eighth Amendment).

22. See, e.g., ARISTOTLE, *POLITICS* bk. I (C.D.C. Reeve trans., Hackett Publ’g Co. 1998) (c. 384 B.C.E.); JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 10 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690).

23. Feminist thinkers have drawn particular attention to this phenomenon. See, e.g., ELIZABETH GROSZ, *VOLATILE BODIES: TOWARD A CORPOREAL FEMINISM* (1994); DONNA HARAWAY, *SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE* (1991).

24. See Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 602–10 (2011).

25. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 623 (1958).

the force he is authorized to use. Were humans as invulnerable as Hart imagined, substantive criminal law and the practices of policing and punishment would look very different.

To be sure, violence is a charged word, and its usage here may provoke resistance from persons who want to defend the basic legitimacy of criminal law and punishment. But just as we can recognize that war is violent without adopting a position of strict pacifism or condemning the integrity of soldiers, we can acknowledge the considerable role that violence plays in our criminal justice system without seeking to abolish punishment and without casting aspersions on criminal justice professionals. The philosopher C.A.J. Coady has used the term “legitivist” to describe those conceptions of violence that view it as necessarily illegitimate.²⁶ Legitivist conceptions (“illegitivist” might be a better descriptor) have not gained much traction in the philosophy of war, where the recognition of violence precedes the normative evaluation of it. Even in domestic affairs, we see a similar rejection of the view that violence is necessarily illegitimate in Max Weber’s oft-quoted definition of the state as an entity with a monopoly of legitimate violence in a given territory.²⁷ In short, to call actions violent is not necessarily to condemn them.

And there are good reasons to use the word. To identify certain government activities as “state violence” helps us to notice several shared characteristics of those activities, and it may help focus our ethical attention, so to speak. First, the simple fact that the state is pursuing its ends through the use of superior force raises concerns in our political system—one in which government power is presumably based on deliberative consensus, on actual or tacit or hypothesized consent, on agreement rather than armament. We imagine our society as one in which “right” is not defined solely in terms of “might.” As noted above, this self-conception generates some ideological discomfort with the word violence, but such ideological discomfort is itself a reason to use the word violence. Rather than take for granted the legitimacy of the state’s uses of force, we should continually articulate, examine, and evaluate the purported distinctions between the state’s violence and the violence we condemn.

In addition, several other attributes are common to various types of state violence and relevant to our ethical and legal assessments. Consider the importance, or purported importance, of expertise. It is often said that decisions about using force require special knowledge, experience, and expertise.²⁸ In war and other armed conflicts, the selection of military targets, the choice of weapons, and other questions of military strategy are the province of experts. In the criminal justice system, the decision to handcuff a suspect, or the choice to use deadly force, is similarly viewed as a matter for a professional’s expert judgment. According to one extensive

26. C.A.J. COADY, *MORALITY AND POLITICAL VIOLENCE* 23 (2008) (“The third type of definition—that called ‘legitivist’ . . . incorporates a reference to an illegal or illegitimate use of force.”).

27. Max Weber, *Politics as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 78 (H.H. Gerth & C. Wright Mills eds., 2001).

28. See, e.g., SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE* 11–12 (1958); ERIC POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 29–31 (2007).

empirical study, the presence of trained and competent “violence specialists” is critical to the success of stable democratic societies.²⁹ Of course, specialists and experts are prevalent throughout government bureaucracy, but calls for deference to executive expertise are especially pronounced with respect to state violence.³⁰

Relatedly, consider the importance of discretion. Often, experts’ decisions to use force involve fact-specific, highly contextual judgments, and thus there is a perceived need for discretion on the ground. Discretion has long been protected in the military context, but it has been vigorously reaffirmed and expanded in post-9/11 national security policy.³¹ We often see a similar emphasis on the need for discretion in discussions of police officers’ and prison officials’ decisions.³² Arguably, we can cabin the judgments of violence specialists only so much, and we have to leave the final decisions to those with boots on the ground.

Some decisions about the use of force are made at a higher level, not on the ground in the moment, but by military brass, executive officials, or legislatures. Think, for example, of the choice to use drone strikes abroad, or, in the domestic context, the choice to punish a given type of offense with prison time rather than a noncustodial sentence. These decisions may sometimes require special expertise, but even when they do not, they involve highly contentious moral and political judgments. Controversial judgment calls, like expertise, are hardly unique to state violence, but violence policy stirs passions and protests with particular intensity. Importantly, those with the authority to choose violence—whether as policy or as a strategic, on-the-ground choice in a given encounter—have incentives to err on the side of more violence rather than less. The most immediate and direct costs of excess violence are usually borne by the politically powerless: civilians or soldiers of a foreign nation, or convicted criminals at home.³³ To use too little violence—or to be

29. DOUGLASS C. NORTH ET AL., *VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY* 17–20 (2009).

30. See Kathryn E. Kovacs, *Leveling the Deference Playing Field*, 90 OR. L. REV. 583, 591–610 (2011) (detailing and critiquing the “super-deference” given by courts to the military); Deborah N. Pearlstein, *The Soldier, the State, and the Separation of Powers*, 90 TEX. L. REV. 797, 799–801 (2012) (suggesting that, counter to models of civilian control of the military, military expertise sometimes constrains civilian political judgments).

31. See, e.g., Aziz Rana, *Who Decides on Security?*, 44 CONN. L. REV. 1417, 1480–83 (2012).

32. See, e.g., Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1154 (1998) (calling for the development of new doctrinal rules that recognize “the legitimate function of discretionary policing techniques”); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 652 (1997) (“[T]he accountability of police both to the communities they serve and to the rule of law is best assured by recognizing explicitly the inevitability—and even, properly managed, the desirability—of police discretion.”); see generally DISCRETION, COMMUNITY, AND CORRECTIONAL ETHICS (John Kleinig & Margaret Leland Smith eds., 2001) (discussing prison administrators’ discretion).

33. As Bill Stuntz observed and as many other criminal law scholars have reiterated, the politics of criminal justice in the United States creates a “one-way ratchet” producing ever broader prohibitions and ever more severe sentences. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001); see also Miriam

perceived as having used too little violence—is, in American politics, often a fast track to electoral defeat or other negative repercussions.³⁴ Similarly, for the police officer or the soldier on the ground, using more violence often means less personal risk: shoot first and ask questions later.³⁵

Given that decisions about use of force often require expertise, individual discretion, and contentious moral judgments, there is considerable judicial aversion to second-guess those decisions.³⁶ In American courts, questions about the use of state violence are often framed either as questions for experts in the executive branch, or as political questions to be decided by legislatures—not as questions that lend themselves well to judicial review.³⁷ Thus, there is a tension between the legitimating discourses around the state's uses of force, which portray official force as subject to the rule of law, and the actual legal standards applied to official force, which tend to emphasize discretion and minimize the appropriate scope of judicial review.

In the context of war, however, the fact that decisions about the use of force involve expertise, discretion, and contentious moral and political choices has not deterred the pursuit of legal constraints. Academics and practitioners alike have plunged ahead, sensitive to the difficulties of regulating the state's use of violence, but determined to find ways to address those difficulties. And with respect to war, philosophers and ethicists have had considerable influence on positive law. Just how much influence is a matter of dispute, and I do not wish to exaggerate the role of philosophers. At the very minimum, it is clear that political leaders attempt to

H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 586–99 (2012) (arguing that it is politically easier to punish than to regulate by nonpunitive measures).

34. “[T]he ghost of Willie Horton haunts every public official.” Jennifer Daskal, *Pre-Crime Restraints: The Explosion of Targeted, Noncustodial Prevention*, 99 CORNELL L. REV. 327, 368 (2014) (referring to a Massachusetts criminal who committed rape and assault while released on a prison furlough program, and whose case was used to portray presidential candidate and former governor Michael Dukakis as unduly soft on crime). One may point also to Rose Bird, the former Chief Justice of the California Supreme Court, ousted by voters angered by her opposition to the death penalty. See Maura Dolan, *Bird's Legacy More Political Than Legal*, L.A. TIMES, Dec. 6, 1999, at A1.

35. Cf. MARK J. OSIEL, *OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE, AND THE LAW OF WAR* 161–62 (1999) (discussing soldiers' behavior and incentives in the “frenzy of combat”).

36. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 797 (2008) (“Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.”); *Bell v. Wolfish*, 441 U.S. 520, 547–48 (1979) (endorsing a general approach of judicial deference to the judgments of prison administrators). See also Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1380 (2009) (noting that courts are often “loath to question the judgment of executive officials when push comes to shove”).

37. See, e.g., POSNER & VERMEULE, *supra* note 28; Kovacs, *supra* note 30. Outside of the United States, courts are often less deferential to executive or legislative judgments about the use of force, in part because other nations have adopted more robust proportionality doctrines. See Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 113–19 (2008).

explain and justify their military decisions in the language of just war.³⁸ Even beyond the rhetoric, though, there are meaningful restrictions on the conduct of war that have grown out of work by philosophers and ethicists. The next Part explores that work and its effects.

II. DISCIPLINING WAR, DEFENDING PUNISHMENT

Commentators have different views about how to evaluate and when to condemn war's violence, but there is little disagreement over the proposition that war *is* violent, and thus those who study the ethics of war study an ethics of violence. At the extremes, war's violence could serve as a reason to condemn war in all circumstances, or as an indication that ethical argument has no bearing on the battlefield.³⁹ Though some have voiced each of these views, a far more common approach seeks to discipline war rather than to prohibit it altogether or leave it unregulated. The concept of ethical violence is probably most easily identified in the just war tradition, which sets forth conditions under which it is permissible or even mandatory for humans to kill, injure, and confine one another.⁴⁰ But the pursuit of ethical standards for violence is not limited to those who study just war in particular. A great deal of post-World War II commentary questions or even rejects the specific concept of just war, but it is no less concerned—it may be even *more* concerned—with regulating and constraining war's violence, and making violence ethical.

Like just war theorists, philosophers of punishment set forth conditions for permissible or mandatory killing, injury, and confinement. But punishment theorists are unlikely to frame their work as an inquiry into the ethics of violence. Incarceration—the prototypical punishment imagined or assumed by many contemporary philosophers—is certainly less bloody and destructive than combat. Perhaps as a result, punishment theorists have sought to defend punishment rather than to discipline it. Tremendous intellectual energy has been spent developing justifications for the institution of punishment.

This Part juxtaposes the philosophy of war with the philosophy of punishment, and examines the interaction of each with positive law and actual state

38. For example, President Obama has repeatedly framed his decisions as Commander in Chief in the language of just war. Whether the decisions actually satisfy the requirements of just war theory is contested. See STEPHEN L. CARTER, *THE VIOLENCE OF PEACE: AMERICA'S WARS IN THE AGE OF OBAMA* 22 (2011).

39. The radical pacifist position is that war is never ethically permissible. See, e.g., STANLEY HAUERWAS, *WAR AND THE AMERICAN DIFFERENCE* (2011). The most stringent realist (or sometimes, *realpolitik*) view is that war necessarily takes place in a sphere outside of ethics and morality. It is a testament to the success of the just war tradition that among contemporary commentators, the strong realist view is much more often described and critiqued than it is directly advanced. See, e.g., JONATHAN HASLAM, *NO VIRTUE LIKE NECESSITY: REALIST THOUGHT IN INTERNATIONAL RELATIONS SINCE MACHIAVELLI* 183–247 (2002); RICHARD NED LEBOW, *THE TRAGIC VISION OF POLITICS: ETHICS, INTERESTS AND ORDERS* 15 (2003).

40. See Jens David Ohlin, *Targeting and the Concept of Intent*, 35 MICH. J. INT'L L. 79, 81 n.3 (2013) (“Just War Theory is the branch of ethics dealing with the permissibility of the use of force, both in the decision to go to war (*jus ad bellum*) and in the conduct of war (*jus in bello*).”).

practices. Three points of contrast are of particular interest: the extent to which each field acknowledges and addresses the empirical realities of violence; the extent to which each field focuses on the state as the agent of violence; and the relative emphasis placed on justifying violence as opposed to limiting it. At the end of this Part, the Article considers objections to the war–punishment analogy.

A. *From Jus ad Bellum to Jus in Bello*

“The strong do what they can, and the weak suffer what they must.”⁴¹ From one of the earliest written reflections on war—Thucydides’s *History of the Peloponnesian Wars*—comes this apparent rejection of any ethical restriction on war.⁴² And yet, the reality is more complex, and was so even in ancient Greece. Notwithstanding the Athenian generals’ assertion of raw power, Thucydides’s history is full of other examples in which the Greeks adopted rules for warfare, most related to religious observance: priests and religious sites were immune from attack, the bodies of the enemy dead were returned to the enemy for proper burial, and, once every four years, any ongoing wars were temporarily suspended so that the Olympic Games could take place in peace.⁴³

In the centuries—the millennia—that have passed since Thucydides’s writing; the enduring temptation of the Athenian generals’ view has been countered repeatedly with efforts to constrain the actions of the strong and limit the suffering of the weak. (To be clear, the Athenian generals’ view does and will remain a temptation. Ethical restriction of war is an ongoing project, not a *fait accompli*.) Among these efforts, the just war tradition offers some of the most sustained and developed attempts to distinguish permissible from impermissible war. The specific phrase “just war” is usually traced to early Christian thinkers who tackled the question whether good Christians could engage in warfare, which of course involved doing harm to the enemy and, quite often, killing people. Some of these thinkers, most famously Augustine in the fourth and fifth centuries and Thomas Aquinas in the thirteenth century, answered in the affirmative: a good Christian could serve as a soldier, provided that he fought in a just war.⁴⁴ A just war was one fought for a

41. THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WARS* 269 (Richard Crawley trans., 2004) (1910).

42. The context is the Melian dialogue, in which Athenian generals threatened to destroy the residents of the island of Melos if they did not agree to be ruled by the Athenian empire. The Melians protested, invoking claims of fairness and justice. The Athenian generals were unmoved, and replied with their now infamous invocation of might over right. *See id.* at 268–72.

43. *See, e.g., id.* at 253; *see also* Adrian Laani, *The Laws of War in Ancient Greece*, 26 L. & HIST. REV. 469, 470 (2006) (arguing that ancient Greek city-states observed various legal restrictions on war).

44. AUGUSTINE, *THE CITY OF GOD AGAINST THE PAGANS*, bk. I, at 39 (R.W. Dyson ed. & trans., Cambridge Univ. Press 1998) (430); THOMAS AQUINAS, *Summa Theologiae*, in *POLITICAL WRITINGS* 240–47 (R.W. Dyson ed., Cambridge Univ. Press 2002) (1274).

“just cause.”⁴⁵ Self-defense counted as a just cause, as did the punishment of wrongdoers, and the preservation of the Christian faith.⁴⁶

These principles developed into what is now known as the *jus ad bellum*: the justice of war, or the rules governing the resort to armed force.⁴⁷ Indeed, sometimes the phrases “*jus ad bellum*” and “just war” are treated as interchangeable. *Jus ad bellum* refers to the inquiry whether a nation is right to go to war in a given situation. Just cause is one criterion—perhaps the most important—but this criterion is interpreted much more narrowly today than it was in the past. Most contemporary theorists agree that a nation may wage war only in self-defense or in the defense of others; wars to promote religion or punish wrongdoers are no longer endorsed.⁴⁸ Sometimes other requirements are included within the *jus ad bellum*, such as a sufficient likelihood of success or a last resort condition.⁴⁹ Importantly, the inquiry is framed as one into the war’s justification. The *jus ad bellum* offers a way to evaluate whether a war is justified, all relevant things considered.

The ethics of war devoted much attention to just war for centuries. But a separate, distinct inquiry appeared from time to time, even as early as Thucydides, and then took greater and greater prominence beginning around the sixteenth and seventeenth centuries.⁵⁰ This separate inquiry did not ask whether a country was justified in entering into war, but whether the conduct of the war respected certain limitations. Today, the set of principles that have developed in response to that inquiry is known as the *jus in bello*, a term usually translated as the “justice in war.”⁵¹ The distinction is worth emphasizing, for it will be especially instructive for the issues of criminal justice that motivate this Article. Again, the *jus ad bellum*, or the justice of war, focuses on the question of whether a state is right or justified to go to war in a given instance. The *jus in bello*, or the justice in war, in contrast, focuses on whether the war is fought in an ethically permissible way. It considers, among other things, the kinds of weapons used, the selection of targets, the treatment of

45. See AQUINAS, *supra* note 44.

46. See, e.g., AUGUSTINE, POLITICAL WRITINGS 222–23 (Michael W. Tkacz & Douglas Kries trans., Hackett Publ’g Co. 1994) (430).

47. Although it is very common for scholars to trace the *jus ad bellum* to Augustine’s fifth century writings or even earlier works, the specific phrases *jus ad bellum* and *jus in bello* were apparently coined only in the twentieth century. See Robert Kolb, *Origin of the Twin Terms Jus ad Bellum/Jus in Bello*, 320 INT’L REV. RED CROSS 553, 553–54 (1997).

48. See David Luban, *War as Punishment*, 39 PHIL. & PUB. AFF. 299, 299 (2011) [hereinafter Luban, *War as Punishment*]; Gregory M. Reichberg, *Jus ad Bellum*, in WAR: ESSAYS IN POLITICAL PHILOSOPHY 21–29 (Larry May ed., 2008).

49. See Thomas Hurka, *Proportionality and Necessity*, in WAR: ESSAYS IN POLITICAL PHILOSOPHY 127–44 (Larry May ed., 2008).

50. See Nicholas Rengger, *The Jus in Bello in Historical and Philosophical Perspective*, in WAR: ESSAYS IN POLITICAL PHILOSOPHY (Larry May ed., 2008).

51. As with the *jus ad bellum*, many of the ideas now associated with the *jus in bello* are much older than the specific Latin phrase, which came into regular use only after World War II. See Kolb, *supra* note 47. But see JAMES Q. WHITMAN, THE VERDICT OF BATTLE: THE LAW OF VICTORY AND THE MAKING OF MODERN WAR 101–03 (2012) (questioning the link between contemporary understandings of *jus in bello* and Medieval/Renaissance theories of war).

captured fighters, and the scale of the damage inflicted.⁵² The *jus in bello* is explicitly concerned with minimizing the suffering generated by war, as suggested by the term used to describe the legal rules associated with the *jus in bello*: international humanitarian law.⁵³

Three points regarding the relationship of the *jus ad bellum* and the *jus in bello* bear emphasis. First, it is nearly axiomatic that the *jus ad bellum* and the *jus in bello* are independent of one another.⁵⁴ They operate autonomously. That means that the rules of the *jus in bello*—the restrictions on the conduct of war—apply equally to all participants in war, whether or not the war is just.⁵⁵ A country that had just cause to go to war may nonetheless be faulted for violations of the rules of the *jus in bello* in the conduct of that originally justified war.⁵⁶ A country that is wrong to wage war in the first place is nonetheless both obligated and protected by the ethical rules governing the conduct of war.⁵⁷ The aim of the *jus in bello* is to limit violence—a project that is independent of the *jus ad bellum*'s analysis of the justification of violence.

Second, of the two sets of principles, the *jus in bello* is undoubtedly more influential today.⁵⁸ To be sure, philosophers of war did not entirely abandon the *jus ad bellum* once they began to focus more on the *jus in bello*. Some commentators maintain that a war must comply with both *ad bellum* and *in bello* principles, both as a matter of normative theory and as a matter of positive law.⁵⁹ Nonetheless, there is little dispute that greater attention is given to *in bello* principles, and that these principles have been developed more extensively and incorporated into international

52. See Rengger, *supra* note 50, at 41.

53. “[T]he terms ‘laws of war’ and ‘international humanitarian law’ are widely considered interchangeable in translating the original Latin term of *jus in bello* . . .” Blum, *Lesser Evil*, *supra* note 4, at 8.

54. See, e.g., Jenny Martinez, Introductory Remarks, *The Relationship Between Jus ad Bellum and Jus in Bello: Past, Present, Future*, 100 AM. SOC. INT’L L. PROC. 109, 109 (2006); Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT’L L. 47, 49–50 (2009) (noting the “axiomatic” independence of the *jus ad bellum* and the *jus in bello*).

55. See, e.g., Adam Roberts, *The Equal Application of the Laws of War: A Principle Under Pressure*, 90 INT’L REV. RED CROSS 931, 932 (2008).

56. See MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 21 (1977).

57. Cf. Jens David Ohlin, *The Duty to Capture*, 97 MINN. L. REV. 1268, 1286 (2013) (noting that even if the United States has violated the *jus ad bellum* principles in its attacks on al Qaeda, principles of international humanitarian law or the *jus in bello* continue to govern the conflict).

58. “[W]hile the *jus ad bellum* withered on the bough, the *jus in bello* flourished like the Green Bay Tree.” GEOFFREY BEST, *WAR AND LAW SINCE 1945* 20 (1994), quoted in Rengger, *supra* note 50; Robert J. Delahunty & John Yoo, *From Just War to False Peace*, 13 CHI. J. INT’L L. 1, 21 (2012) (“[T]he period of the Reformation and afterward saw a decided turn away from *jus ad bellum* and towards the development, and eventual codification, of *jus in bello*.”).

59. See Laurie R. Blank, *A New Twist on an Old Story: Lawfare and the Mixing of Proportionalities*, 43 CASE W. RES. J. INT’L L. 707, 708 (2011).

law more effectively. Indeed, phrases such as “the law of war,” “international humanitarian law,” and the “*jus in bello*” are often used interchangeably.⁶⁰

Perhaps the greater influence of the *jus in bello* is unsurprising, given a third important attribute of the relationship between *ad bellum* and *in bello* principles: part of the impetus for the latter was the growing realization that the former was ineffective and inadequate. Over the centuries, thanks in part to technological advancements in weaponry, wars have exacted greater tolls on humans.⁶¹ Importantly, armed conflicts are no longer confined to “set-piece battles on discrete battlefields,” but now involve the use of force in contexts where civilians are more likely to be harmed.⁶² These changes have generated ever more pressure to contain the violence of war. For a long time the effort to discipline wars was, as we have seen, an inquiry into whether the war was just, or whether it was fought for a just cause. But philosophers and others noticed that states often went to war with the belief that their causes were just, or at least purported to do so.⁶³ It was not always clear at the time of fighting, or at least, not always possible to establish, who was in fact in the right. Even if it seemed obvious to third parties who was right and who was wrong, the nations fighting one another typically each maintained that they fought for a just cause. The focus on the initiation of war did little to minimize its frequency and damage.

The work of Francisco de Vitoria, a sixteenth century philosopher and theologian who criticized the Spanish conquest of the Americas on several grounds,

60. Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the “War on Terror,”* 27 FLETCHER F. WORLD AFF. 55, 55 n.1 (2003). Where the *jus ad bellum* fits in is often unclear—some see its codification in the United Nations Charter.

61. It is estimated that between 3.5 and 6.5 million combatants were killed in the Napoleonic wars of 1803–1815. See Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEG. ANALYSIS 115, 141 (2010). A century later, World War I involved an estimated 20 million military casualties, and then World War II produced at least 40 million. See M. Cherif Bassouini, *Perspectives on International Criminal Justice*, 50 VA. J. INT’L L. 269, 279–80 (2010). Unfortunately, accurate death tolls are not available for ancient wars, and even in modern conflicts the numbers of casualties can be difficult to determine. But even Steven Pinker, who argued in a recent bestselling book that “we may be living in the most peaceable era in our species’ existence,” acknowledged that the twentieth century produced more violent deaths than any previous one. STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* xxi, 193 (2011). Pinker presents detailed data on war casualties, but scales the numbers to adjust for population growth and concludes that the rate of violent deaths relative to overall human population has decreased. See *id.* at 194–95.

62. David Luban, *War Crimes: The Law of Hell*, in *WAR: ESSAYS IN POLITICAL PHILOSOPHY* 267 (Larry May ed., 2008) [hereinafter Luban, *War Crimes*]. Luban notes that in World War I, civilians made up fewer than 10% of the total casualties. By World War II, civilian casualties were 50% of the total, and in contemporary conflicts, civilian casualties make up 90% of the total. *Id.*; see also WHITMAN, *supra* note 51, at 235–37; Valerie Epps, *Civilian Casualties in Modern Warfare: The Death of the Collateral Damage Rule*, 41 GA. J. INT’L & COMP. L. 307, 319–26 (2013).

63. An excellent survey of these arguments, and more broadly of the early modern theories of war that motivated the *jus in bello*, is JAMES TURNER JOHNSON, *IDEOLOGY, REASON, AND THE LIMITATION OF WAR: RELIGIOUS AND SECULAR CONCEPTS 1200–1740* (1975).

was particularly influential.⁶⁴ Vitoria did not think this conquest was justified by Spain's aspiration to convert new world "heathens" to Christianity; nor did he believe that enforcement of the laws of nature, another purported rationale, could generally serve as a just cause for war.⁶⁵ In exploring these limitations on the *jus ad bellum*, Vitoria considered the possibility that both sides in a war might be justified. Earlier thinkers had rejected such a possibility altogether, but Vitoria suggested the possibility of what later scholars have called "simultaneous ostensible justice."⁶⁶ Each side may believe, in good faith, that its cause is just. Only one is truly right, but the participants in the war—and even third party observers—are ill equipped to determine which side that is. Those who wrongly believed themselves to be acting justly may suffer from what Vitoria called "invincible ignorance."⁶⁷ These epistemic limitations—the ignorance of those who fight wrongfully, and the inability to identify such people or nations—led Vitoria to argue for principles of restraint in the conduct of war, principles independent of the justice of the initial decision to fight.⁶⁸ As one scholar summarizes Vitoria's position:

[W]hile in truth (i.e., in the sight of God) there is no such thing as a war just on both sides, human knowledge is not up to judging this with any degree of accuracy. The natural implication is that in fighting a war, one should develop as many restraints as possible, given that those who oppose you may not be guilty of genuine fault, but merely of invincible ignorance.⁶⁹

Other thinkers, some of them motivated by religious belief and some staking their claims on secular principles, joined Vitoria in this argument for independent principles of restraint, separate from just war claims.⁷⁰ Of particular interest is the "regular war" doctrine, which emphasized the equality of sovereign nations and rejected the suggestion that resort to war should be evaluated by an inquiry into just cause.⁷¹ A central theme of regular war theorists is that "just cause will be indeterminable in concrete cases."⁷² Because just cause is indeterminable, each side has equal bilateral rights to engage in war, but each side should also observe certain restraints in the conduct of war. The phrase "regular war" is meant to suggest *regulated war*, or war subject to prescribed rules. The regular war doctrine sees war as litigation by other means, but in the absence of a judge:

As in a legal process in which litigants are presumed to have entered the proceedings in good faith, [belligerents] were likewise entitled to exercise the same legal prerogatives . . . vis-à-vis each

64. Vitoria's most important works on the laws of war are collected in FRANCISCO DE VITORIA, *POLITICAL WRITINGS* (Anthony Pagden & Jeremy Lawrance eds., 1991).

65. *See id.* at 350.

66. *See* JOHNSON, *supra* note 63, at 186–87.

67. *See, e.g.,* VITORIA, *supra* note 64, at 313.

68. *See id.* at 314–26.

69. Rengger, *supra* note 50, at 38.

70. *See, e.g.,* Francisco Suarez, *On War*, in *SELECTIONS FROM THREE WORKS* 800, 836–54 (James Brown Scott ed., Clarendon Press 1944) (1621).

71. *See* Reichberg, *supra* note 48, at 16–18.

72. *Id.* at 17.

other. By the same token, once the war was under way, they were expected to abide by a uniform code of conduct.⁷³

As put by Alberico Gentili, a leading thinker in the regular war school of thought:

[I]t is the nature of wars for both sides to maintain that they are supporting a just cause. [Though] the purest and truest form of justice . . . cannot conceive of both parties to a dispute being in the right . . . we for the most part are unacquainted with that truth. Therefore we aim at justice as it appears from man's standpoint.⁷⁴

In short, scholars and commentators began to see that the *jus ad bellum* was an ineffective way to restrain the conduct of war, and they began to look for alternatives. Perhaps it should not surprise us that to articulate justifications for war, and then to tell states, “don’t go to war unless you’re justified in doing so,” is a poor strategy to limit warfare. Justifying violence is a good way to win support for it. It’s a good way to motivate soldiers and officers. It’s a good way to overcome natural or learned inhibitions to do violence. It’s a good way to add self-righteous energy to the conduct of war. But it’s not a good way to *limit* war.

After Vitoria and his contemporaries, the philosophy of war began to place increasing emphasis on rules for the ethical conduct of war that were independent of the principles of “just cause.” This is how the modern *jus in bello* developed. And as I have already emphasized, the *jus in bello* has produced not just philosophical writings, but also the field of law known as international humanitarian law, which includes, among other things: proportionality restrictions on military attacks; the principle of discrimination that distinguishes soldiers from civilians and seeks to protect the latter from injury; categorical bans on certain types of weapons; and categorical bans of torture and cruel, inhumane, degrading treatment.⁷⁵

Two other general characteristics of philosophical work on war are worth emphasizing. First is the field’s close engagement with the facts and realities of war—with historical experience and empirical data. Philosophies of war tend to engage with the real consequences and real experiences of real wars. They discuss

73. *Id.* at 16.

74. RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE* 31 (1999) (quoting ALBERICO GENTILI, *DE IURE BELLI* 31 (1589)).

75. For just a few of the international instruments that codify the *jus in bello* principles, see PROTOCOL II ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF MINES, BOOBY-TRAPS AND OTHER DEVICES, Oct. 10, 1980, S. Treaty Doc. No. 105-1(A) (1997), 1342 U.N.T.S. 168 (codifying principles of discrimination and restricting types of weapons); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, S. Treaty Doc. No. 103-25 (1994), 1342 U.N.T.S. 137 (codifying principles of discrimination and restricting types of weapons); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (June 26, 1987); Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 57(2)(a)(iii), June 8, 1977, 1125 U.N.T.S. 3 (codifying proportionality restrictions on military attacks). For a more thorough survey of the relevant codifications and legal instruments, see *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* (Dieter Fleck ed., 2d ed. 2008).

historical examples and address empirical data.⁷⁶ This is true even of work by moral philosophers, thinkers who are not themselves empirical researchers. I have already noted that philosophies of war tend to be acutely aware of violence of war. In this field, there is little of the resistance to the language of violence found in conversations about punishment or policing. Even the thinkers most adamant that wars can be justified are usually candid about the fact that they are justifying violent, destructive, harmful conduct.⁷⁷ This is not to suggest that the ethics of war is entirely free of euphemism. Civilian deaths are often labeled “collateral damage,” a phrase that can obfuscate the violence of war.⁷⁸ But even when that phrase is used, on most accounts collateral damage is in fact central, not collateral, to the ethical evaluation of war. Under the principle of the *jus in bello*, proportionality may render a strike unlawful—for example, because the given strike will cause significant collateral damage to civilians.⁷⁹ Political realities matter, too; even “idealist” theorists of war emphasize the need for “a solid and realistic appreciation of the operation of international politics.”⁸⁰ Finally, even factual or moral uncertainties—of which there are many in the fog of war—are themselves a fact taken seriously by philosophers of war. Philosophies of war tend to address humans’ epistemic and psychological limitations, and they seek to develop an ethics of violence that can govern our conduct even under conditions of imperfect knowledge.⁸¹

Second, ethical and philosophical reflections on war pay close attention to the state. With some exceptions, war is something that states wage. So the ethics of war must confront the state as a complex entity; it must struggle with the challenges of regulating that entity and the various individuals who act on behalf of it.⁸² Relatedly, philosophers of war are concerned with questions of responsibility—with

76. See generally MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (4th ed., 2006) (as the subtitle of the book, suggests, Walzer’s work makes extensive use of empirical data and examples).

77. See, e.g., Hurka, *supra* note 49, at 127 (“[J]ust war theory does not ignore the consequences of war and would not be credible if it did: a morally crucial fact about war is that it causes death and destruction.”).

78. See David Lefkowitz, *Collateral Damage*, in *WAR: ESSAYS IN POLITICAL PHILOSOPHY* 145 (Larry May ed., 2008) (“Collateral damage . . . refers to harm done to illegitimate targets of war as a side effect of attacks on legitimate targets of war.”).

79. See JUDITH GARDAM, *NECESSITY, PROPORTIONALITY, AND THE USE OF FORCE BY STATES* 93–94 (2004). Nor is collateral damage a constraint on attackers alone; defending forces are obligated to minimize collateral damage as well. See Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 *COLUM. L. REV.* 1365, 1391–92 (2008).

80. DAVID RODIN, *WAR & SELF-DEFENSE* xii (2002); see also Luban, *War Crimes*, *supra* note 62, at 271 (characterizing efforts to develop rules for war as a project in “practical humanitarianism”); Jeff McMahan, *The Morality of War and the Law of War*, in *JUST AND UNJUST WARRIORS: THE LEGAL AND MORAL STATUS OF SOLDIERS* (David Rodin & Henry Shue eds., 2008).

81. See, e.g., Michael J. Davidson, *War and the Doubtful Soldier*, 19 *NOTRE DAME J. L. ETH. & PUB. POL.* 91 (2005).

82. Even commentators skeptical about the degree to which international law *can* effectively constrain states are focused on the state, and the ways in which laws of war do, indirectly, shape states’ behavior. See, e.g., Eric A. Posner, *A Theory of the Laws of War*, 70 *U. CHI. L. REV.* 297, 308–09, 314–15 (2003).

the question of what can and should be done when the conditions of the *jus ad bellum* or the *jus in bello* are not met. It is not enough to say, “here is the ethical way to fight a war”; the philosophy of war also struggles with the question of what to do when its proscriptive rules are violated, as they inevitably will be. So, for example, theorists of war explore state responsibility versus individual responsibility—when is the state itself responsible for a violation of the laws of war, and when is responsibility more properly attributed to an individual military officer or soldier?⁸³ And finally, though state responsibility has most often referred to state responsibility for wrongdoing,⁸⁴ in recent years theorists have increasingly emphasized the question of state responsibility for even *legitimate* violence.⁸⁵ Even if a war adheres to all relevant ethical requirements, it is bound to cause damage beyond the direct harm to military targets. Is the state that wages war then responsible for mitigating or repairing that damage? This inquiry is sometimes framed as part of the *jus post bellum*—the ethical rules applicable in the immediate aftermath of a war.⁸⁶ As observed by the poet and Nobel laureate Wislawa Szymborska, born in Poland in the 1920s and no stranger to wars and their aftermath, “After every war, someone has to clean up . . . Someone has to push the rubble to the side of the road, so the corpse-filled wagons can pass.”⁸⁷ Clearing rubble and removing corpses or otherwise rebuilding damaged societies is the subject of the *jus post bellum*, and it may be the responsibility of a state that was entirely justified in going to war and wreaking destruction in the first place.

In short, philosophies of war are concerned about real war; they seek to be relevant to the actual military practices that take place in the world. This philosophical field has undoubtedly shaped positive law, even if the degree to which the law has altered actual practices remains a matter of dispute.⁸⁸ The *jus in bello* is the foundation for international humanitarian law. Among its many attempts to limit the violence of war are: categorical bans on certain types of weapons, a general principle of noncombatant immunity, and rules for the treatment of prisoners of

83. See, e.g., BEATRICE I. BONAFE, *THE RELATIONSHIP BETWEEN STATE AND INDIVIDUAL RESPONSIBILITY FOR INTERNATIONAL CRIMES* (2009); GEORGE P. FLETCHER, *ROMANTICS AT WAR: GLORY AND GUILT IN THE AGE OF TERRORISM* (2002); NINA H.B. JØRGENSEN, *THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES* (2003); Kristen E. Boon, *Regime Conflicts and the U.N. Security Council: Applying the Law of Responsibility*, 42 GEO. WASH. INT’L L. REV. 787 (2010).

84. See Gabriella Blum, *The Crime and Punishment of States*, 38 YALE J. INT’L L. 57, 58 (2013) [hereinafter Blum, *The Crime and Punishment of States*] (noting that contemporary international law uses the language of responsibility to discuss state wrongdoing, rather than the language of guilt or punishment).

85. See, e.g., DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM passim* (2005).

86. See, e.g., *JUS POST BELLUM: MAPPING THE NORMATIVE FOUNDATIONS* (Carsten Stahn et al eds., 2014); Kristen E. Boon, *Obligations of the New Occupier: The Contours of a Jus Post Bellum*, 31 LOY. L.A. INT’L & COMP. L. REV. 57 (2009).

87. Wislawa Szymborska, *The End and the Beginning*, in *MIRACLE FAIR: SELECTED POEMS OF WISLAWA SZYMBORSKA* 48, 48 (Joanna Trzeciak trans., 2001).

88. See *infra* Part II.C (further discussing the effects of international humanitarian law).

war.⁸⁹ All of these rules are breached at times, of course; some recent violations have been remarkable. But to most of the world, even if not to the countries breaking the rules, violations of the laws of war are seen as violations and condemned as such.⁹⁰ This is an achievement, albeit not yet an adequate one.

B. The Disappointments of Punishment Theory

For each of the features of philosophies of war emphasized in the previous Subpart, one can draw a sharp contrast to philosophies of punishment. Most importantly, perhaps, punishment theory is overwhelmingly focused on the question: “what justifies punishment?” Like the *jus ad bellum* that once dominated philosophies of war, the *jus ad poena* occupies the attention of criminal law philosophers. As we shall see, this focus on justifying punishment has served no better to limit punishment than the focus on justifying war served to limit war, but philosophers of punishment do not typically frame their projects or measure their own success in terms of limiting state violence. Moreover, while philosophies of war have engaged with the facts of real armed conflicts, philosophies of punishment tend toward ideal theory, imagining hypothetical criminals who bear little resemblance to real-world offenders, and sometimes specifically eschewing any obligation to grapple with actual punishment practices. And the state is all but absent in punishment theory—taken for granted as the source of criminal law and the enforcer of punishment, but otherwise left unexamined and, consequently, unrestrained.

The primary aim of punishment theory, and indeed of criminal law theory, has been to articulate general justifications for the institution of punishment.⁹¹ Usually, the arguments offered are explicitly or implicitly moral rather than political, in that they rely on moral intuition or moral principles rather than claims of political

89. See Reichberg, *supra* note 48, at 16.

90. It is reasonably clear, for example, that waterboarding and other “coercive interrogation” techniques used by the United States against suspected terrorists breached the Convention Against Torture. It is likely that neither the officials who adopted the coercive interrogation policy nor the individuals who implemented it will be held formally accountable for that breach. But most international observers do view the coercive interrogations as a breach, and that recognition demonstrates the moral authority, if not the practical force, of the rules limiting state violence.

91. One can hardly cite examples here without making arbitrary selections from a cluttered field. But some of the best-known and most cited works from the past half-century include R.A. DUFF, *TRIALS AND PUNISHMENTS* (1986); NICOLA LACEY, *STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES* (1988); MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF CRIMINAL LAW* (1997); ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976); Joel Feinberg, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* (1970); Jean Hampton, *The Retributive Idea*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS & MERCY* 111 (1990); Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475 (1968), *reprinted in* *SENTENCING* 93 (Hyman Gross & Andrew von Hirsch eds., 1981); *see also* Mitchell N. Berman, *Punishment and Justification*, 118 *ETHICS* 258, 258 (2008) (noting that the need to justify punishment is the “first premise” of most theorists writing on the subject).

theory.⁹² The focus on justification is so central to punishment theory that scholars have struggled to even define punishment without already entangling themselves in the issue of justification.⁹³ Punishment is, of course, a very common real-world practice, like war, but the real world is not the departure point for punishment theory. This leaves the philosopher in need of a definition, and in defining punishment, philosophers are always already justifying it. Furthermore, criminal law theorists frequently claim that one cannot answer many other questions of criminal law theory—what to criminalize, how to define specific offenses or defenses, how to make enforcement choices, how much to punish—without first adopting a general theory of the justification of punishment.⁹⁴ The last of these questions—how much to punish—becomes particularly important if we recognize punishment as a form of state violence in need of regulation. As discussed in more detail below, to the extent that theorists have sought to articulate limiting principles for punishment, these limiting principles have turned out to be mere reassertions of justifying principles.

If the question is the justification of punishment, the scholarly reply is nearly always one or more of four usual suspects: retribution, deterrence, incapacitation, and rehabilitation. They are by far the four most commonly invoked rationales for punishment in contemporary Anglo-American scholarship. Almost all contemporary punishment theorists defend punishment with reference to one or more of these rationales. For the past three or four decades, retributivism has been especially prevalent among academic philosophers,⁹⁵ though some commentators

92. See, e.g., Michael Moore, *The Moral Worth of Retribution*, in PRINCIPLED SENTENCING 188 (Andrew von Hirsch & Andrew Ashworth eds., 1998). *But see* Doug Husak, *Why Punish the Deserving*, in THE PHILOSOPHY OF CRIMINAL LAW: SELECTED ESSAYS 393 (2010) (“[A] political theory is required in addition to a moral theory if we hope to identify the conditions in addition to desert that must be satisfied in order to justify state punishment.”).

93. See, e.g., John Griffiths, *The Limits of Criminal Law Scholarship*, 79 YALE L.J. 1388, 1406–19 (1970) (reviewing HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968), and criticizing it for entangling questions of definition with questions of justification).

94. See Darryl K. Brown, *Criminal Law Theory and Criminal Justice Practice*, 49 AM. CRIM. L. REV. 73, 74–76 (2012) (noting that criminal law theory encompasses questions of criminalization and enforcement as well as punishment, but finding all three inquiries to be dominated by the discourse of retributive and consequentialist justifications for punishment). *But see* Nicola Lacey, *Philosophy, History, and Criminal Law Theory*, 1 BUFF. CRIM. L. REV. 295, 300–01 (1998) (cataloging a range of inquiries that comprise criminal law theory, of which the justification of punishment is only one). Even a scholar who claims to find the justification of punishment a “boring” subject nevertheless characterizes it as “the most fundamental question for criminal law.” See also Robinson, *supra* note 17, at 1089. Robinson frames his own inquiry as one concerning the proper distribution of punishment, but answers that inquiry by adopting a desert-based justification of punishment. *Id.* at 1090, 1104–10.

95. The prevalence of retributivism is noted often, and ruefully, by its few critics. See, e.g., Russell L. Christopher, *Deterring Retributivism: The Injustice of ‘Just’ Punishment*, 96 NW. U. L. REV. 843, 844–45 (2002) (“Retributivism is all the rage. . . . [R]etributivism’s rapid rise since the early 1970s has been remarkable.”); David Dolinko, *Three Mistakes of Retributivism*, 39 U.C.L.A. L. REV. 1623, 1623 (1992) (“[R]etributivism . . . has in recent years enjoyed so vigorous a revival that it can fairly be regarded today as the leading

prefer the term “desert” to “retribution.”⁹⁶ The basic retributive idea is that punishment is justified because the offender deserves it; on most accounts, the criminal’s desert is a matter of moral culpability or blameworthiness.⁹⁷ As the front runner among punishment theories, retributivism attracts a sharp minority critique, and scholars frequently revisit the contest between desert-based retributive theories and consequentialist theories that justify punishment with reference to deterrence or other social goods.⁹⁸ I will not attempt to rehearse and rebut each major philosophical approach.⁹⁹ Instead, the remainder of this Part identifies a few characteristics that are common to most accounts of the normative legitimacy of punishment, and that are especially pronounced in now-dominant retributive theories. Briefly, punishment theory tends to ignore the state, to pay little attention to actual sanctions, and to generalize so broadly about crimes and criminals that the theory loses connection with real practices. (Again, the contrast to philosophies of

philosophical justification of the institution of criminal punishment.”). The rhetoric of retribution is also quite prevalent outside the academy, but the popular discourse of retribution varies from academic retributivism in significant ways. See Alice Ristroph, *Desert, Democracy and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1313–27 (2006) [hereinafter Ristroph, *Sentencing Reform*]. Relatedly, Kyron Huigens has identified (and criticized) what he calls “commonplace punishment theory,” defined as “a more or less well defined set of truisms that serve on an ad hoc basis whenever a bit of theory seems to be called for in ordinary criminal law practice, criminal justice policymaking, or scholarly articles on criminal law doctrine.” Kyron Huigens, *Commonplace Punishment Theory*, 2005 U. CHI. LEGAL F. 437, 437.

96. See Ristroph, *Sentencing Reform*, *supra* note 95, at 1298–1301 (noting the shift in terminology from retribution to desert).

97. See, e.g., Moore, *supra* note 92. So dominant is this way of thinking about punishment that a recent work identifies as “criminal theory’s cardinal question” Henry Hart’s inquiry, “[W]hat are the ingredients of moral blameworthiness which warrant a judgment of community condemnation?” See Joshua Kleinfeld, *A Theory of Victimization*, 65 STAN. L. REV. 1087, 1089–90 (2013) (quoting Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 412 (1958)). Notice how much is taken for granted in this “cardinal question” of the field: it assumes that blameworthiness is a sufficiently determinate concept to serve as a legal standard, that it is *moral* blameworthiness that matters, and that moral blameworthiness can justify punishment (but note also the squeamishness about the term punishment and the substitution of “community condemnation”). Each of these assumptions is highly contestable, but not actually contested by mainstream criminal law theorists. The debate, as Kleinfeld says, is limited to the narrow question of the ingredients of moral blameworthiness. *Id.* For further discussion of punishment theorists’ squeamishness about actual punishment, see *infra* note 118 and accompanying text.

98. As colorfully described by Erik Luna:

Punishment theories brutalize one another, staking out turf on principle and refusing to budge from their respective positions. As a result, the various theoretical camps spend most of their time on three endeavors: demonstrating the superiority of their approach to criminal sanctioning, subjecting all other theories to harsh criticism, and repairing the damage done to their own theory from equally severe attacks.

Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 205 (2003).

99. See generally DAVID BOONIN, *THE PROBLEM OF PUNISHMENT* (2008) (taking this more comprehensive approach); DEIRDRE GOLASH, *THE CASE AGAINST PUNISHMENT* (2006) (same).

war should quickly become clear.) Amid its immersion in justifications for punishment and abstractions of crime, criminal (and sanction) punishment theory has not been framed as an effort to limit actual state violence, and (unsurprisingly) it has not served that end well.

Given that philosophers are interested in state-imposed sanctions, rather than punishments within the family or other institutions, it is surprising how little attention punishment theory has typically given to the state.¹⁰⁰ The focus, especially in retributive theory, is on the target of punishment—the offender—rather than the agent of punishment. Of course, most discussions of punishment assume the existence of some entity that will impose the punishment, and that entity is frequently labeled “the state.” But the nature of that punishing entity—who or what constitutes the state, and how its various subsidiary institutions work together—was simply overlooked by many leading accounts of just punishment for several decades.¹⁰¹ It should be noted, though, that these core questions of *political* theory are slowly making their way into punishment theory, and with good reason.¹⁰² A theory of punishment, or any other form of violence, should include an account of the agents that impose it.¹⁰³ And a clear account of the identity and structure of the state is especially important if we seek to *regulate* policing and punishment. We need to be able to explain what counts as state action, and to understand the impacts of restraints or sanctions on state actors. We need an account of the state as both agent of punishment and object of legal regulation. To be sure, the punishment theorist need not himself tackle all the big questions of political theory.¹⁰⁴ One could rely on a philosophical division of labor; one could simply adopt or amend some

100. “If the state appears in discussions of punishment theory at all, it’s often as an afterthought, a political epilogue to a moral treatise.” Markus D. Dubber, *Legitimizing Penal Law*, 28 CARDOZO L. REV. 2597, 2597 (2007).

101. The oversight was noted by several scholars. *See, e.g.*, 1 GEORGE FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL* 153 (2007); LACEY, *supra* note 91; Guyora Binder, *Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. REV. 321 (2002).

102. *See, e.g., Symposium, Political Theory and Criminal Punishment*, 8 OHIO ST. J. CRIM. L. 281 (2011); *see also* R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* (2001); *PUNISHMENT AND POLITICAL THEORY* (Matt Matavers ed., 1999); Dolovich, *supra* note 12; Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421 (2004).

103. Guyora Binder, *Authority to Proscribe and Punish International Crimes*, 63 U. TORONTO L.J. 278, 285 (2013) (“[J]ustifying punishment is always a problem of justifying the jurisdiction of a particular punishing authority.”).

104. Alan Brudner describes penal law theory as a branch, but only a branch, of political theory: “[p]enal law theory is not coextensive with political theory.” ALAN BRUDNER, *PUNISHMENT AND FREEDOM: A LIBERAL THEORY OF THE PENAL LAW*, at ix, 16 (2009). Brudner distinguishes a theory of punishment from “a broad theory of the legitimate state authority to coerce,” and disclaims any obligation to address “larger questions concerning the grounds and limits of political obligation.” *Id.* at 16. It is not clear exactly which questions are the “larger” ones that Brudner disavows. But of course a theory of punishment should account for the state’s ability to coerce in this particular way, and a theory of punishment should explain the grounds and limits of political obligation insofar as a breach of obligation is cited to justify punishment. *See* Alice Ristroph, *When Freedom Isn’t Free*, 14 NEW CRIM. L. REV. 468 (2011) [hereinafter Ristroph, *When Freedom Isn’t Free*] (developing a lengthier critique of Brudner’s book).

preexisting account of the state and proceed from there. But a theory of state punishment needs a theory of the state, whether original or borrowed.¹⁰⁵

The failure to describe the agent of punishment in any detail leads to a further weakness: punishment theory tends to operate in the passive voice, meaning that it has more to say about why a criminal should *be punished* than it does about why the state should *do the punishing*.¹⁰⁶ This weakness is especially prevalent in retributive theories that focus on the concept of desert. As noted by George Fletcher, “Just because the offender might deserve punishment, it does not follow—without an appropriate theory of state power—that the state should assess the degree of deserved punishment and use its power to impose it on the offender.”¹⁰⁷ Indeed, the assumption that the state is entitled to assess desert and impose punishment on that basis turns out to be especially hard to defend if one adopts a fairly standard liberal account of the state. That account, roughly based on the theory of John Rawls, who was in turn inspired by earlier social-contract theorists, argues that the normative legitimacy of the state is based on the hypothetical consent of individual citizens.¹⁰⁸ Because punishment theorists have so often neglected political theory, there is a sharp disjuncture between accounts of normative political legitimacy, where consent

105. Most punishment theorists simply say nothing of substance about the state; a few, as noted above, have recently sought to devise specifically political justifications for punishment. See DUFF, *supra* note 102; Dolovich, *supra* note 12. A very different response comes from Michael Davis, who explicitly denies that punishment theorists should offer an account of the state or a theory of political legitimacy. Michael Davis, *The Relative Independence of Punishment Theory*, in *TO MAKE THE PUNISHMENT FIT THE CRIME: ESSAYS IN THE THEORY OF CRIMINAL JUSTICE* 18 (1992). Davis accuses his critics of unfairly “build[ing] political theory into the very concept of criminal punishment” and suggests ominously that those who refer to “the state” may harbor a “Hegelian or Marxist agenda.” *Id.* at 18–19, 37 n.5. Curiously, Davis identifies a detailed list of necessary assumptions for any plausible theory of punishment or any plausible political theory. These necessary “preconditions” for political theory and punishment theory include “moral principles permitting institution of a system of criminal punishment.” *Id.* at 22–23. In other words, we must assume the moral permissibility of punishment before we even begin to tackle political or punishment theory. Once we have made that assumption and the others that Davis asserts are necessary, one wonders why we should take up punishment theory at all. On Davis’s account, punishment theory is not merely independent of political theory, but entirely superfluous.

106. See Davis, *supra* note 105, at 22–23. One illustration comes from the Michael Davis essay discussed in the previous footnote. Among the necessary assumptions of any punishment theory, according to Davis, are the fact of rational agents who can exercise self-control; the fact that these agents sometimes act in ways that should be prohibited; “a set of moral constraints on what may be prohibited or allowed”; “a set of moral constraints on when agents may be held responsible for what they have done”; and “a set of moral constraints on what may be done to a rational agent.” *Id.* at 22–23. Note that after characterizing criminals as agents, Davis switches to the passive voice to describe punishment: acts should be prohibited; agents may be held responsible; and agents should be treated in accordance with their desert. On Davis’s account, moral agents commit crimes, but punishment just happens. The punishing agent (as opposed to the law-breaking agent) disappears.

107. FLETCHER, *supra* note 101, at 153 (“The quick assumption that the state is entitled to punish offenders who ‘deserve’ it is one of the unfortunate banalities of criminal law in our time.”).

108. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

is the “gold standard,” and accounts of justified punishment, where relatively few scholars suggest that punishment is justified by the consent of the condemned.¹⁰⁹ Instead of consent, punishment theorists rely on desert—and on most accounts, one need not have consented to punishment in order to deserve it. Importantly, though, Rawls himself argued that if individuals were to select basic principles of justice while ignorant of their own particular attributes, they would avoid any system in which social goods were distributed on the basis of desert, since desert is in turn a product of “morally arbitrary” characteristics.¹¹⁰ Although Rawls denied that his own critique of desert as a distributive principle could extend to criminal punishment, he offered little support for this claim.¹¹¹ As a few commentators have noted, a Rawlsian view of the state may not be compatible with a normative theory of punishment as the “just deserts” of the offender.¹¹²

More generally, liberal political theorists, including but not limited to Rawls, have argued that the state should be neutral with respect to conceptions of the good and should avoid promoting any particular moral theory.¹¹³ This view of the state seems to raise particular difficulties for expressive theories of punishment, or those retributive theories in which punishment is justified as a kind of moral condemnation of objectionable conduct. If punishment is indeed an expression of moral disapproval, then it is not clear that a liberal state should be involved in punishment at all.¹¹⁴ Some scholars see in this conflict a reason to reject liberal neutrality, or otherwise amend liberalism, rather than a reason not to punish.¹¹⁵ Whatever one’s stance on the principle of state neutrality, the key point is that a theory of punishment should explain and defend the state’s role as the agent of punishment. This is certainly true if we are concerned about devising limiting

109. *But see* Dolovich, *supra* note 12, at 315–16 (developing a justification of punishment based on hypothetical consent). *See also infra* notes 133–36 and accompanying text.

110. RAWLS, *supra* note 108, at 103–04.

111. *Id.* at 314–15. For a more detailed explanation of Rawls’s position, and a critique of it, see Ristroph, *Sentencing Reform*, *supra* note 95, at 1340–41. Notably, in his well-known discussion of punishment written prior to *A THEORY OF JUSTICE*, Rawls allowed only a very limited role for retribution. He argued that retribution could explain why a specific individual criminal received punishment, but it could not justify the institution of punishment. *See generally* John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3 (1955), reprinted in *THE PHILOSOPHY OF PUNISHMENT: A COLLECTION OF PAPERS* 109 (H.B. Acton ed., 1969).

112. *See* BONNIE HONIG, *POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS* 138–39 (1993); *see also* Dolovich, *supra* note 12 (for an attempt to reconcile a desert-based punishment theory with Rawlsian political theory).

113. *See e.g.*, Peter Jones, *The Ideal of the Neutral State*, in *LIBERAL NEUTRALITY* 9 (Robert E. Goodin & Andrew Reeve eds., 1989).

114. Several scholars have noted the conflict. *See, e.g.*, Stanley C. Brubaker, *Can Liberals Punish?*, 82 *AM. POL. SCI. REV.* 821 (1988); Jeffrie G. Murphy, *Retributivism, Moral Education, and the Liberal State*, 4 *CRIM. JUST. ETHICS* 3 (1985).

115. *See* Brubaker, *supra* note 114, at 831–33; *see also* Christopher Bennett, *Expressive Punishment and Political Authority*, 8 *OHIO ST. J. CRIM. L.* 285, 311–18 (2011); Thaddeus Metz, *How to Reconcile Liberal Politics with Retributive Punishment*, 27 *OXFORD J. LEG. STUD.* 683, 697–705 (2007).

principles for punishment, but it is true even for those focused solely on questions of justification.¹¹⁶

Without a direct focus on the agent of punishment, theorists will have little to say about what should happen if that agent makes a mistake or otherwise fails to perform as it should. And in fact, philosophies of punishment set forth the conditions of just punishment, but they have little to say about what happens when those conditions are not met. The field of punishment theory offers no inquiry into state responsibility, correctional officers' responsibility, or police officers' responsibility, that is parallel to the inquiries into state responsibility in the ethics of war.¹¹⁷

The failure to address the agent of punishment is not the only shortcoming frequently found in theories of punishment. Punishment theory too often neglects the state, but perhaps even more egregiously (and surprisingly), it neglects the sanction. That is, punishment theories say surprisingly little about the exact way in which offenders are to be punished.¹¹⁸ An important exception may prove the rule: there is considerable scholarly attention given to the death penalty as a specific choice of sanction.¹¹⁹ Otherwise, however, theorists of punishment rarely explain why incarceration, fines, or any other specific sanction is permissible or

116. In other words, when we focus only on the recipient of punishment, the allegedly deserving wrongdoer, we fail to offer a complete justification of punishment:

A complete theory of punishment must concern itself not merely with the moral desirability of the goals sought by punishment (for example, deterrence, retribution, incapacitation, moral education) but also with the equally important question whether the pursuit of these goals is part of the legitimate business of the state—whether these goals are properly realized through the mechanism of state coercion.

Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509, 510–11 (1987).

117. See Alice Ristroph, *Responsibility for the Criminal Law*, in PHILOSOPHICAL FOUNDATIONS OF THE CRIMINAL LAW 107 (R.A. Duff & Stuart Green eds., 2011) (offering preliminary observations on state responsibility in the criminal justice context).

118. A similar, but distinct, flaw of mainstream punishment theories is their failure to engage fully with actual punishment practices (except occasionally to despair at them). See Robert Weisberg, *Reality-Challenged Philosophies of Punishment*, 95 MARQ. L. REV. 1203 (2012).

119. See, e.g., MATTHEW H. KRAMER, *THE ETHICS OF CAPITAL PUNISHMENT: A PHILOSOPHICAL INVESTIGATION OF EVIL AND ITS CONSEQUENCES* (2012); AUSTIN SARAT, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION* (2002); Claire Finkelstein, *A Contractarian Argument Against the Death Penalty*, 81 N.Y.U. L. REV. 1283 (2006); Chad Flanders, *The Case Against the Case Against the Death Penalty*, 16 NEW CRIM. L. REV. 595 (2013); Dan Markel, *State Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. REV. 407 (2005); Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005). There is also a growing scholarly literature that addresses and critiques the specific sanction of solitary confinement, but the critiques are usually based on a claim that solitary confinement constitutes torture rather than an appeal to punishment theory. See, e.g., Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115 (2008).

appropriate.¹²⁰ Instead, punishment is defined in fairly abstract terms, as “hard treatment” or “unpleasant consequences” or “legal deprivation,” imposed by public authority pursuant to specified procedures.¹²¹ For example, H.L.A. Hart defined punishment as: (1) “pain or other consequences normally considered unpleasant”; (2) imposed for an offense; (3) imposed on an actual or supposed offender; (4) “intentionally administered by human beings other than the offender”; and (5) “imposed and administered by an authority constituted by a legal system against which the offense is committed.”¹²² In this five-part definition, much greater emphasis is placed on the rule-of-law apparatus surrounding the sanction than on the sanction itself. And Hart is not unusual—his own definition of punishment is widely followed, and other oft-cited definitions take a similar approach.¹²³ Note the contrast to the philosophies of war discussed in Part II.A: the violent realities of war are openly acknowledged by theorists of war—indeed, the violence of war is part of what claims the theorists’ intellectual attention. In punishment theory, abstractions such as hard treatment or unpleasant consequences allow the philosopher to avoid any direct discussion of the precise sanction, and thus the philosopher need never acknowledge or address the violence inherent in familiar sanctions, such as incarceration or execution. Rather, as noted above, philosophical definitions of punishment often seemed custom-made for the task of normative justification, insofar as they refer only obliquely to the gritty details of the penalty and build normatively desirable constraints into the definition.

Related to this claim that punishment theory says too little about the sanction itself, one could say that punishment theory has focused on the ends at the expense of the means. Theories of punishment usually aspire to fulfill either or both of the following goals: an ethical or moral justification for punishment, and a description of the political or sociological function of punishment. Retributive theories typically focus on the former goal; utilitarian or consequentialist theories pay more attention to the second (but usually share the first goal as well, assuming or arguing that the function of punishment provides an ethical justification for it). Unfortunately, in too much of the punishment theory literature, these two goals are conflated into a single broad claim about “the purpose of punishment,” or to use H.L.A. Hart’s famous phrase, its “general justifying aim.”¹²⁴ Theorists then spill a

120. *But see* Adam J. Kolber, *Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009).

121. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 4 (1968) (“unpleasant consequences”); Feinberg, *supra* note 91, at 98 (“hard treatment” and “authoritative deprivations”); Rawls, *supra* note 1118, at 111–12 (“legal deprivation”).

122. HART, *supra* note 121, at 4–5.

123. *See, e.g.*, GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 409–12 (2000) (adapting Hart’s definition of punishment); Leo Zaibert, *Uprootedness as (Cruel and Unusual) Punishment*, 11 NEW CRIM. L. REV. 384, 391 (2008) (referring to Hart’s definition as “the orthodox account of punishment in the literature”).

124. HART, *supra* note 121, at 4. *See, e.g.*, Richard Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 69 (2005) (“Punishment purposes are positive, justifying principles . . .”); Markel, *supra* note 102, at 1444 (providing an additional example of the equation of purpose with justification); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1890–91 (1991) (same). Recently, several scholars have emphasized the need

great deal of ink arguing over the identified purpose—whether retribution is worth pursuing, for example, or whether a purpose of general deterrence impermissibly treats the punished individual as a mere instrument. But even if we could agree on these questions of purpose, on the desired results of state punishment, it would still be an open question of whether the use of superior physical force was an appropriate way to pursue those results. Some thinkers might claim to avoid this difficulty by eschewing all consequentialist rationales and adopting a truly deontological retributivism, one that values retribution as an end in itself.¹²⁵ However, even deontological retributivism can be faulted for its failure to address specific methods of punishment. To say retribution is an end in itself does not yet establish that *imprisonment* is an end in itself, and indeed it is difficult to see how the varied experiences of incarceration could all be shown to be ends in themselves.¹²⁶ And if imprisonment is not an end in itself, the theorist must explain why imprisonment—or a fine, or some other sanction—is the appropriate way to exact retribution. In short, simply identifying the ends of punishment does not establish that the ends justify the means.

A final reason to be dissatisfied with mainstream philosophical work on punishment lies in its characterizations of crimes and criminals. Too often, a normative theory of punishment is based on an account of crime, or an account of the wrongdoer, that bears little relationship to actual offenses and offenders. For example, an influential strand of retributivist theory characterizes a criminal act as a benefit unjustly seized by the criminal.¹²⁷ The criminal exempts himself from the obligation to follow the law, and punishment must be imposed in order to restore the equal distribution of the law's burdens. As put by Herbert Morris, "A person who violates the rules has something others have—the benefits of the system—but by renouncing what others have assumed, he has acquired an unfair advantage."¹²⁸ This "fair-play" or "benefits-and-burdens" account of punishment is widely adopted by contemporary scholars.¹²⁹ Others, such as Jean Hampton, questioned whether crime could be accurately understood as a benefit; nevertheless, Hampton based her account of punishment on a portrait of the offender as an insolent, prideful individual

to distinguish function from justification. See Marc O. DeGirolami, *Culpability in Creating the Choice of Evils*, 60 ALA. L. REV. 597, 621 n.140 (2009); Huigens, *supra* note 95, at 439–41; John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 962 (2011). At the doctrinal level, the conflation of purpose with justification is embedded in Eighth Amendment law, as discussed in Part III below.

125. See MOORE, *supra* note 91, at 90 (distinguishing retributivism from a theory that recognizes psychological satisfaction as a social benefit of punishment). More recently, however, Moore has suggested that the only plausible justification for punishment as a social institution is consequentialist. "[A]t the level of justifying our general institutions of criminal, tort, property, contract, and constitutional law, I take us all to be consequentialists." Michael S. Moore, *Four Reflections on Law and Morality*, 48 WM. & MARY L. REV. 1523, 1552 (2007).

126. See Kolber, *supra* note 120, at 183–86.

127. See, e.g., Morris, *supra* note 91, at 95.

128. *Id.*

129. E.g., Richard Dagger, *Social Contracts, Fair Play, and the Justification of Punishment*, 8 OHIO ST. J. CRIM. L. 341 (2011).

who needs to be taken down a notch.¹³⁰ As should be obvious to anyone acquainted with real criminals, neither description captures more than a small subset of wrongdoers. The conceptualization of a crime as a benefit and the vision of the offender as hubristic do not describe the many impoverished and/or substance-abusing criminals whose offending is a product of weakness and desperation.¹³¹ More generally, as Jeffrie Murphy has noted, the fair-play, or benefits-and-burdens theory of punishment, is based on unsupported assumptions about the social, economic, and legal conditions that precede a criminal act.¹³² Most criminals, Murphy has argued, “would be hard-pressed to name the benefits for which they are supposed to owe obedience. If justice . . . is based on reciprocity, it is hard to see what these persons are supposed to reciprocate for.”¹³³ One need not go so far as to argue that economic or social inequality are exclusive determinants of criminal conduct, or that such inequalities should constitute full or partial excuses for criminal liability, to see that any normative theory of punishment predicated on the assumption of equality is unconvincing.

As a second example of punishment theory’s mischaracterization of crimes and criminals, consider neo-Hegelian claims that wrongdoers “will” their own punishments—claims that could be called, in more colloquial terms, the “you-asked-for-it” theory of punishment.¹³⁴ This approach does not quite claim that the actual criminal consents to his own punishment, but it substitutes for the actual criminal an imagined being who does give such consent. In one recent excursion into neo-Hegelian punishment theory, Alan Brudner imagines a fictitious entity he calls the “thinking Agent.”¹³⁵ The thinking Agent can do little other than think. It has no body and hence no physical needs, and it lacks any interest in self-preservation. It also lacks impulses and desires. It is difficult to imagine a being more different from actual criminals than Brudner’s thinking Agent—indeed, the thinking Agent is apparently incapable of wrongdoing by definition.¹³⁶ And yet Brudner argues that this disembodied but still rational being is the ideal representative of actual criminals, and then proceeds to show that if the (hypothetical) thinking Agent were to consider its own (hypothetical) wrongdoing, it would consent to be punished for such wrongdoing.¹³⁷

In some instances, punishment theorists’ misrepresentations of crime and criminals are simply overgeneralizations, possibly an unavoidable result of the

130. Jean Hampton, *An Expressive Theory of Retribution*, in *RETRIBUTIVISM AND ITS CRITICS* 4, 12 (Wesley Cragg ed., 1992).

131. It is widely recognized that poverty and drug abuse are risk factors closely associated with criminal offending. See, e.g., Nkechi Taifa & Catherine Beane, *Integrative Solutions to Integrated Issues: A Multidisciplinary Look Behind the Cycle of Incarceration*, 3 *HARV. L. & POL’Y REV.* 283, 299 (2009).

132. Jeffrie G. Murphy, *Marxism and Retribution*, 2 *PHIL. & PUB. AFF.* 217, 229–43 (1973).

133. *Id.* at 240.

134. See generally BRUDNER, *supra* note 104; MARK TUNICK, *HEGEL’S POLITICAL PHILOSOPHY: INTERPRETING THE PRACTICE OF LEGAL PUNISHMENT* (1992).

135. BRUDNER, *supra* note 104, at 3–5.

136. See *id.* at 45.

137. *Id.* at 37–45; see also Ristroph, *When Freedom Isn’t Free*, *supra* note 104 (critiquing Brudner’s argument).

attempt to theorize an extremely diverse array of persons and their misconduct.¹³⁸ Abstractions and generalizations are integral to any theory, and they are not themselves reasons to reject a normative theory of real events or practices. But when the philosopher's account diverges so greatly from actual experience, we must begin to doubt whether the philosopher is theorizing and justifying the same events and practices that we typically call crime and punishment.

The methodological and substantive differences between philosophies of war and philosophies of punishment should be clear. Where theories of war take seriously the facts of actual conflicts, acknowledging war's violence and grappling with historical and empirical realities, theories of punishment operate in abstractions, defining punishment and describing criminals in terms that often bear little relation to real penal practices and real people. Where theories of war acknowledge the state as an agent of war's violence and undertake difficult questions concerning the responsibilities and regulation of states, theories of punishment say little about the state and even less about how to regulate it. Most importantly, perhaps, where theories of war seek explicitly to limit the violence and destruction of war, theories of punishment have remained focused on the issue of justification, and have contributed almost nothing to efforts to contain the considerable and expanding exercise of penal authority.¹³⁹ Reorientation of punishment theory is in order, and Part III develops some suggestions.

C. Causes for Resistance?

Before we see how criminal law theory might be transformed by the war–punishment analogy, we should consider two sets of objections to the very inquiry. The first set comes from those who study international law and the laws of war, but who view this field from a more critical perspective than the mainstream account offered above. These critics might question whether the relationship of law to war is indeed one of limitation, arguing that the laws of war, and the philosophies underlying them, do more to construct and legitimize war's violence than to restrain it.¹⁴⁰ A second set of objections is likely to be raised by punishment theorists, and centers around the claim that the relation of punisher to punished is nothing like relations among soldiers or between soldiers and civilians. The restraints on war, the argument might go, are based on either the moral equality of soldiers or on the

138. A distinct but related criticism of retributive punishment theory has been developed by scholars who emphasize that individuals experience sanctions in very different ways that normative justifications of punishment must take into account. *E.g.*, John Bronsteen et al., *Happiness and Punishment*, 76 U. CHI. L. REV. 1037 (2009); Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009).

139. Some punishment theorists have sought to articulate “limiting principles” for sentences, but these limiting principles are nearly invariably simply restatements of the theorist's favored justifying principle. As a consequence, the limiting principles have had little effect. *See infra* Part III.

140. *See, e.g.*, Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 5 (2004) (“Rather than opposing violence, the legal construction of war serves to channel violence into certain forms of activity engaged in by certain kinds of people, while excluding other forms engaged in by other people.”) (emphasis in original) (internal citation omitted).

innocence of civilians. A condemned criminal is easily distinguished from a combatant, and also from a noncombatant civilian whose country is at war. Neither of these sets of objections should lead us to abandon the effort to see what theories and laws of war may teach theories and laws of punishment, but the objections merit some consideration here.

The first set of objections relies on historical claims and legal analysis; it is not strictly philosophical. The unifying suggestion is that the laws of war fail to constrain the violence of war, but scholars vary in their explanations of this failure. One centuries-old refrain emphasizes that the laws of war are just not effective in practice; some scholars note that the rise of the modern laws of war in the mid-twentieth century coincided with some of the most destructive wars in human history.¹⁴¹ This is an empirical claim, but there is a related normative critique: pacifists have long argued that there is something unseemly in regulating war—which entails the explicit licensing of some forms of warfare—rather than simply prohibiting it altogether.¹⁴² And indeed, essential to contemporary laws of war is the combatant’s privilege—a license to kill (albeit a limited one).¹⁴³ Thus, some commentators see a little too much self-congratulation in the claim that the laws of war limit violence, and a little too much euphemism in the phrase “international humanitarian law.”¹⁴⁴ In a recent and illuminating book, James Whitman argues that the modern laws of war, with their grand humanitarian principles, actually license wars far more destructive than the eighteenth century pitched battles waged by European monarchs—battles that began at sunrise and ended at dusk, and confined the bloodshed to the space of the battlefield, the bodies of designated soldiers, and the span of a single day.¹⁴⁵

Frankly, there is much truth in this set of objections, especially in its claims of law’s failures. Assessing overall rates of compliance with the laws of war is itself a difficult task, but it is certainly true that the laws of war are often ignored or ineffective.¹⁴⁶ That fact, however, has more to do with the implementation of laws

141. See, e.g., PAUL W. KAHN, *THE CULTURAL STUDY OF LAW* 110 (1999).

142. E.g., CHARLES SUMNER, *THE TRUE GRANDEUR OF NATIONS* 13–14 (1893).

143. See Berman, *supra* note 140, at 9–10.

144. See *id.* at 3; see also Jan Klabbers, *Off Limits? International Law and the Excessive Use of Force*, 7 *THEORETICAL INQ. L.* 59, 73–74 (2006) (arguing that the laws of war endorse righteous violence and thus defeat their own efforts to limit violence).

145. JAMES Q. WHITMAN, *THE VERDICT OF BATTLE: THE LAW OF VICTORY AND THE MAKING OF MODERN WAR* 250–53 (2012). Notably, Whitman sees contemporary laws of war as much more concerned with questions of justification—with *jus ad bellum* claims based on humanitarian concerns—than I do. I think Whitman is correct that a law of war based on “the dictates of high morality” and “a highly developed *jus ad bellum*, informed by a strong commitment to the struggle against criminality and evil,” is likely to produce more violence rather than less. See *id.* at 252. Separately, it is worth noting that the era of pitched battles was one in which violence was closely contained because *political power* was closely contained. It was the concentrated power of European monarchies, and their successful monopolization of violence, that limited the time and space of war. See *id.* at 19; see also *id.* at 248–49. When republics replaced monarchies and political power was more widely dispersed, the scale and effects of war spread more broadly.

146. See generally William Bradford, *In the Minds of Men: A General Theory of Compliance with the Laws of War*, 36 *ARIZ. ST. L.J.* 1243 (2004).

of war than their conceptual underpinnings. Regulating states is a difficult business; states will often ignore or manipulate inconvenient legal standards.¹⁴⁷ Indeed, theorists of war are often sensitive to the difficulties of implementation; but, this is a strength, not a weakness, of the field. Perhaps one should say that at least philosophers of war are identifying the right questions, even if they still search for answers. It is also important to note that the laws of war have had some meaningful and documented effects in discrete areas—in banning certain types of weapons, for example, and in reducing deliberate attacks on civilians.¹⁴⁸

The critical theorist's charge that the laws of war legitimate violence has some truth as well.¹⁴⁹ To regulate war without prohibiting it altogether is, necessarily, to license some violence. Bracketing the moral question whether some acts of war *should* be licensed, one who seeks to minimize violence must ask whether violence is better constrained by an abolitionist strategy or a *jus in bello* framework. I do not think abolition bears much promise for critics of war—or for critics of punishment, for that matter. Indeed, in a world where large majorities take for granted that war and punishment are often morally appropriate and necessary, the abolitionist position may just marginalize the speaker. It does seem to be the case, though, that some strategies of limitation fare better than others. As argued in Part II.A, the *jus ad bellum*'s effort to limit war by justifying it was a failure. Efforts to limit war's violence are more successful when they acknowledge violence directly, discuss its destructiveness candidly, and seek principles of limitation that are independent of any claims of moral justification.¹⁵⁰

Philosophers of punishment—and retributivists in particular—are likely to resist the war–punishment analogy on different grounds. They might argue that the limitations of war's violence rely on two core premises about the humans subjected to that particular kind of violence. First, all combatants are presumed to be morally equal and importantly, equally *blameless* for their conduct, so long as it complies with the laws of war. This moral equality holds whether the initiation of the war was justified or not, independent of the ethical or moral standing of the countries involved in the war.¹⁵¹ Restrictions on the way combatants may be treated are

147. See John Fabian Witt, *The Dismal History of the Laws of War*, 1 U.C. IRVINE L. REV. 895 (2011).

148. See Benjamin Valentino et al, *Covenants Without the Sword: International Law and the Protection of Civilians in Times of War*, 58 WORLD POL. 339 (2006).

149. See Chris Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 50 (1994) (“[T]he laws of war have been formulated deliberately to privilege military necessity at the cost of humanitarian values. As a result, the laws of war have facilitated rather than restrained wartime violence. Through law, violence has been legitimated.”).

150. A separate objection to the arguments of this Article contests the very *jus ad bellum–jus in bello* distinction, arguing that the scope of permitted conduct in war should turn on whether the war is just or not. Jeff McMahan has argued for this position as a matter of moral principle, but importantly, McMahan seems to concede that as a practical and legal matter, the *ad bellum–in bello* distinction must be retained. See, e.g., McMahan, *supra* note 80, at 34–36.

151. This principle is codified in positive law, widely defended in philosophical writing, and as Michael Walzer explains, reflected in many letters or memoirs of soldiers themselves:

arguably dependent on the combatants' equal moral blamelessness. Second, noncombatants are also presumed to be blameless and therefore worthy of protection from violence—"innocent civilians," we say, though as just noted, the official view of soldiers does not cast them as "guilty."

Punishment, retributivists and other philosophers might argue, presents a completely different situation. The criminal is subjected to violence (or "hard treatment" or "unpleasant consequences") precisely because he is guilty and blameworthy. The moral equality that characterizes relations between soldiers and the moral innocence that cloaks civilians who may be injured by war are simply inapposite in the context of punishment. This is not to suggest, however, that philosophers of punishment would deny all restraints on the power to punish. Indeed, they might suggest that the very different context of punishment can actually generate *more* restrictions on the state's power than exist in armed international conflicts. The violence of war is waged against political strangers—soldiers and civilians of a foreign nation without the binds of a shared community. In contrast, the punisher and the punished share a political community and bear distinctive obligations to each other for that reason.¹⁵²

In my view, this latter set of objections simply fails to see beyond the philosophical status quo with respect to both war and punishment. That is, this view takes for granted the mainstream conclusions of philosophies of war, without understanding how those conclusions were reached. It also takes for granted the mainstream conclusions of retributivism, treating those conclusions as facts about the world without actually addressing the objections to those conclusions raised in this Part and elsewhere. First, soldiers (and civilians) have not always been understood to be morally blameless. Indeed, now-abandoned versions of the *jus ad bellum* counted punishment of a deserving nation, including its citizens, as a just cause for war.¹⁵³ And the erstwhile view of war as justified punishment led to some

It is the sense that the enemy soldier, though his war may well be criminal, is nevertheless as blameless as oneself. Armed, he is an enemy; but he isn't my enemy in any specific sense; the war itself isn't a relation between persons but between political entities and their human instruments. . . . [Enemy soldiers] are "poor sods, just like me," trapped in a war they didn't make. I find in them my moral equals.

WALZER, *supra* note 56, at 36 (emphasis omitted).

152. For the most part, I have to imagine these counterarguments rather than draw them from published literature. As noted in the Introduction, there has been almost no attempt to apply the ethics of war to the ethics of punishment, and so punishment theorists have not had to explain their reactions to such a project. But arguments along these lines have been raised to me in person by Doug Husak, as thoughtful a representative of criminal law theorists as anyone could hope to find. Moreover, the war-punishment analogy is raised by Thomas Hobbes's theory of punishment, which I have previously tried to draw to the attention of punishment theorists. See Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CALIF. L. REV. 601 (2009) [hereinafter Ristroph, *Respect and Resistance*]. Chad Flanders responds to my reading of Hobbes from a retributivist perspective, and raises objections to the war-punishment analogy similar to those sketched in the text above. See Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87, 134-37 (2010).

153. See Luban, *War as Punishment*, *supra* note 48, at 307-18.

particularly brutal conflicts.¹⁵⁴ The modern commitments to basic equality in war and to respect for both foreign soldiers and civilians are the hard-won achievements of philosophers and ethicists, not statements of the obvious or the inevitable. In this context, it may be helpful to remember Hannah Arendt's critique of human rights rhetoric. Arendt—a Jewish philosopher who fled the Third Reich and a person in need of the protection of human rights law as much as anyone—worried that the rhetoric of human rights would lead humans to view equality or other political goods as naturally occurring objects in the world, extant things just waiting to be picked up, rather than as human creations.¹⁵⁵ Arendt was all too aware that political equality and respect for human dignity are fragile, contingent achievements, and she wanted us to stay cognizant of their fragility in order to protect them more effectively.

Human rights law has, of course, sought to do the very thing that Arendt rightly identified as so difficult: generate protections for individual human beings that are independent of their membership in a particular political community. The fact that human rights law has had some successes—though of course, here too the achievements are fragile and inconsistent—shows that we need not reject the war-punishment analogy on the grounds that one form of violence takes place between political communities and one takes place within a single community. Restrictions on state violence need not depend upon the state's particular relationship to the targets of violence. It is worth noting here that many of the principles of contemporary laws of war were originally collected in the Lieber Code, a document prepared in the American Civil War to govern the internecine violence of that conflict, and later adapted and promulgated across the globe to govern all armed conflicts.¹⁵⁶

The prevailing conceptions of a deserving offender and a justified punisher are indeed different from the prevailing conceptions of soldiers as morally equal or of civilians as innocent. That is not so much an objection to my argument as a restatement of it—at least, a restatement of the contrasts drawn in Parts II.A and II.B. It is not surprising that desert theorists would resist the ethics of war and its premises of equality: desert is the language of those who resist equality, or put differently, appeals to desert are quite often efforts to justify inequality.¹⁵⁷ But the offender's desert is no more a natural fact about the world than is the moral equality of combatants. Both conceptions are human constructs, the products of ethical argument and ethical education. Both conceptions are contingent constructs: it is possible to view enemy soldiers as blameworthy targets of punishment, and it is

154. See *id.* at 330–32; see also Blum, *The Crime and Punishment of States*, *supra* note 84, at 93–98.

155. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 291–99 (1951).

156. See JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 1–4 (2012).

157. Louis Pojman, *Equality and Desert*, 72 *PHIL.* 549, 553–54 (1997) (conceding this point, albeit in defense of desert); see also Shelly Kagan, *Equality and Desert*, in *WHAT DO WE DESERVE? A READER ON JUSTICE AND DESERT* 298 (Louis P. Pojman & Owen McLeod eds., 1998); Louis P. Pojman, *Does Equality Trump Desert?*, in *WHAT DO WE DESERVE? A READER ON JUSTICE AND DESERT* 283 (Louis P. Pojman & Owen McLeod eds., 1998).

possible to view criminals as our equals in at least some important respects.¹⁵⁸ One must acknowledge, though, that the moral equality of soldiers is a far more fragile construct than the deservingness of criminal offenders. Desert is widely accepted as a moral, political, and legal principle, in part because the concept is elastic and easily manipulated.¹⁵⁹ It is easy to secure agreement that wrongdoers deserve punishment, because each person can assess desert using his or her preferred criteria—the seriousness of the offense, the characteristics of the offender, the danger posed to society, the need for deterrence, hatred of the offender, or nearly anything else at all—and still call for punishment in a language that others with different criteria will understand.¹⁶⁰ Even those who deploy desert recognize that it often serves as a proxy for something else.¹⁶¹ In brief, the very shortcomings of the concept of desert may render the *rhetoric* of desert nearly intractable. So I do not propose to reorient punishment philosophies or punishment practices by persuading anyone to renounce desert. Rather, I propose to focus on a somewhat different question. Whatever one believes about whether or how much punishment is deserved, what external limitations should be placed on this form of state violence?

III. TOWARD A *JUS IN POENA*

Criminal law in America is a growth industry, and has been for decades. Substantive criminal law has steadily expanded; more conduct is criminalized each year, and decriminalizations are few in comparison.¹⁶² And as is often noted, and often lamented, the United States has the highest per capita rate of incarceration in the world.¹⁶³ The nation's overall prison population increased steadily for most of

158. See Blum, *The Crime and Punishment of States*, *supra* note 84; see also Luban, *War as Punishment*, *supra* note 48 (on soldiers as blameworthy); Ristroph, *Respect and Resistance in Punishment Theory*, *supra* note 152 (on criminals as the equals of noncriminals in some respects).

159. Ristroph, *Sentencing Reform*, *supra* note 95, at 1308–13.

160. See *id.* at 1310–13. The philosopher Julian Lamont makes a very similar point, though he is speaking of distributive justice rather than retributive punishment:

When people make desert-claims they are not simply telling us what desert itself requires. They unwittingly introduce external values, and make their desert-judgments in light of those values. The reason why so many writers have been able to affirm so confidently such a diverse and conflicting set of desert-claims in debates over distributive justice is not because the true conceptual and moral core of desert is so complex and difficult to discern. It is because the true conceptual and moral core of desert allows the introduction of external values and goals.

Julian Lamont, *The Concept of Desert in Distributive Justice*, 44 PHIL. Q. 45, 49 (1994).

161. See, e.g., MICHAEL TONRY, SENTENCING MATTERS 184 (1996) (“[D]esert often serves as a proxy concept for fairness.”); Markel, *supra* note 102, at 1445 (characterizing desert as a “placeholder” for other principles).

162. See generally DOUG HUSAK, OVERCRIMINALIZATION (2007). But see Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 233 (2007) (acknowledging that “[t]he growth in raw numbers of offenses on the books is undeniable,” but arguing that overcriminalization is a problem primarily of the federal criminal justice system, and showing that state criminal justice systems have actually “contracted in important respects”).

163. See ROY WALMSLEY, INT’L CENTRE FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 1 (10th ed. 2013), *available*

the last half-century, introducing the term “mass incarceration” to our vocabulary.¹⁶⁴ Though the growth has now slowed or stopped, there is little chance of any significant reduction in the rate of incarceration or in the overall prison population in the near future. Strikingly, almost no one seems to want this vast criminal justice system; political leaders and commentators across the ideological spectrum have criticized both the reach of the substantive criminal law and the severity of American sentencing policies.¹⁶⁵ There is support for the concept of a more rational, disciplined criminal justice system, but few concrete ideas about how to get there.

One promising, previously uncharted, path would be a *jus in poena*: principles to limit the violence of punishment that, like the *jus in bello*, are independent of efforts to justify violence. This concluding Part sketches the details of such an approach. To launch this discussion of what could be, and to see how far we have to go, it is helpful first to observe just how deeply the project of justification has structured ethical reflections on punishment, including efforts to identify and implement ethical limitations on punishment. Limiting punishment is not, in those basic terms, a new suggestion; scholars and commentators have often argued for limiting principles for punishment. Nearly without exception, the proposed limiting principles have been restatements of reasons to punish, accompanied by admonitions to punish only when those reasons can be satisfied. The best-known and most widely followed example of this approach is Norval Morris’s call for “desert as a limiting principle.”¹⁶⁶ Morris noted that intuitions concerning how much punishment a given offender deserves are often imprecise, and suggested that the concept of “just desert” was thus ill-suited to serve as a “defining principle,” dictating the specific appropriate punishment.¹⁶⁷ Instead, desert should serve as a limiting principle, “a principle that, though it would rarely tell us the exact sanction to be imposed . . . would nevertheless give us the outer limits of leniency and severity which should not be exceeded.”¹⁶⁸ This suggestion has been widely endorsed by scholars and practitioners alike, so much so that limiting retributivism is characterized as the “consensus model” of criminal sentencing.¹⁶⁹ The idea is

at http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl_10.pdf.

164. The increase and its impact are the subject of several scholarly studies. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006); FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* (1991).

165. See Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 610–11 (2011) (elaborating further on this point).

166. Norval Morris, *Desert as a Limiting Principle*, in *PRINCIPLED SENTENCING*, 201 (Andrew Von Hirsch ed., 1992); see also Richard Frase, *Limiting Retributivism*, in *THE FUTURE OF IMPRISONMENT* 83, 111–12 (Michael Tonry ed., 2004); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 700–45 (2005).

167. NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 73 (1974).

168. Norval Morris, *Punishment, Desert, and Rehabilitation*, in *SENTENCING* 257, 259 (Hyman Gross & Andrew von Hirsch eds., 1981).

169. Frase, *supra* note 166, at 84.

simple: the same principle that tells us why to punish—the offender’s desert—tells us why *not* to punish.

Limiting retributivism is not simply popular among theorists; practitioners and law reformers have also endorsed it. Some commentators have suggested that it is an implicit principle of the Eighth Amendment’s prohibition of cruel and unusual punishments.¹⁷⁰ In fact, the Supreme Court does sometimes seem to apply principles of limiting retributivism—whether because of philosophers’ persuasiveness, or just by coincidence, it is difficult to say. The Court has frequently stated that a punishment is cruel and unusual if it fails to serve any legitimate purpose of punishment, and the recognized purposes of punishment are retribution, deterrence, incapacitation, and rehabilitation—the four horsemen of justification so frequently embraced by criminal law theorists.¹⁷¹ Champions of limiting retributivism have found the concept vindicated, albeit incompletely, by Eighth Amendment decisions limiting the imposition of the death penalty or life without parole (“LWOP”) sentences on the grounds that certain offenders do not deserve the sentences in question.¹⁷²

In the broad context of American punishment practices, though, limiting retributivism has not limited much. The recent Eighth Amendment decisions in capital and LWOP cases garner much attention and free nobody.¹⁷³ These cases do

170. See, e.g., Scott W. Howe, *The Eighth Amendment as a Warrant Against Undeserved Punishment*, 22 WM. & MARY BILL RTS. J. 91 (2013); Lee, *supra* note 166.

171. See *Graham v. Florida*, 560 U.S. 48, 71 (2010) (noting that “[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense,” and identifying retribution, deterrence, incapacitation, and rehabilitation as “the goals of penal sanctions that have been recognized as legitimate”). The Court, like some commentators discussed in Part II.B, apparently equates “purpose” with “justification,” so that merely by showing (or even asserting) that punishment serves some purpose, we justify it. A more rigorous approach to justification would require analysis not only of the purposes punishment serves, but the costs it imposes. See *supra* Part II.B.

172. See *Graham*, 560 U.S. at 71–72 (holding that retribution cannot justify life without parole sentences for juvenile nonhomicide offenders); *Kennedy v. Louisiana*, 554 U.S. 407, 441–42 (2008) (holding that retribution cannot justify death sentence for the offense of child rape); *Roper v. Simmons*, 543 U.S. 551, 569–71 (2005) (holding that retribution cannot justify the death penalty for juvenile offenders, given their diminished culpability); *Atkins v. Virginia*, 536 U.S. 304, 318–20 (2002) (holding that retribution cannot justify a death sentence for a mentally retarded offender); see also Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: Proportionality Relative to What?*, 89 MINN. L. REV. 571, 592 (2005) (“[L]imiting retributivism appears to be the approach that the Supreme Court has applied when it has invoked retributive principles.”). It is a bit strange to see these cases as a victory for retribution, in my view; in each case the Court concluded that retribution could not justify the sentence in question. That, in itself, is not a retributive decision; it is a recognition of the inadequacy of retributive claims. Cf. Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 268–69 (2005) [hereinafter Ristroph, *Limited Government*] (explaining that proportionality restrictions need not be motivated by a particular account of punishment’s justification, and indeed are often motivated by political concerns independent of penological theory).

173. When a given prisoner’s death sentence is found to violate the Eighth Amendment, the prisoner is eventually resentenced, usually to life in prison. See, e.g., *State ex. rel. Simmons v. Roper*, 112 S.W.3d 397, 413 (Mo. 2003) (finding that Eighth Amendment

reduce sentences for a select few prisoners—a very select few, a tiny fraction of those held in penal custody—but they do not necessarily even reduce the sentences of the particular defendants who seemingly win in the Supreme Court.¹⁷⁴ Since the vast majority of persons punished in the United States are sentenced to something other than death or LWOP, the headline-grabbing Eighth Amendment decisions are simply irrelevant to most American prisoners.¹⁷⁵ For these prisoners, it is quite clear from the numbers (of inmates in the United States, and of years to which these inmates are sentenced) that limiting retributivism has not limited American penal practices in any significant sense.¹⁷⁶ I do not know whether retributivism has actually contributed to the explosion in the prison population, as some commentators have intimated.¹⁷⁷ Proponents of retributive and consequentialist punishment theories have tended to blame each other for harsher sentencing policies, which may only illustrate that neither type of theory dictates actual penal practices.¹⁷⁸ In any event, neither retributivism nor any other proposed limiting principle has actually constrained American punishment.

To a student of the history and philosophy of war, the failure of justifying principles to serve as limiting principles should not be surprising. Just as warring states always make a case, usually in good faith, that they are justified in going to war, punishing states always make a case, usually in good faith, that they are

bars imposition of death penalty on an offender who committed his crime at age 17, and resentencing Christopher Simmons to life without parole). Similarly, when an LWOP sentence is struck down, the prisoner may be resentenced to a term of years or even to another life sentence so long as it includes the possibility of parole.

174. For example, Daryl Atkins won a seeming victory before the Court in 2002, when the Court found that the Eighth Amendment did not permit “mentally retarded” offenders to be executed. *Atkins*, 536 U.S. at 321. But the Court left it to states to define mental retardation and to decide whether individual defendants fell within that classification, and in 2005, a Virginia jury found Daryl Atkins not mentally retarded and resentenced him to death. See Maria Glod, *Va. Killer Isn’t Retarded, Jury Says; Execution Set; Case Prompted Supreme Court Ruling; [Final Edition]*, WASH. POST, Aug. 6, 2005, at A.01. Atkins’s sentence was later commuted to life in prison for independent reasons related to prosecutorial misconduct.

175. One scholar has estimated that *Kennedy*, *Atkins*, *Roper*, and *Graham*, collectively, are likely to protect fewer than seven defendants per year—of the approximately 1.15 million offenders convicted of federal and state felonies each year. Stinneford, *supra* note 124, at 901–03.

176. See, e.g., E. ANN CARSON & DANIELA GOLINELLI, U.S. DEP’T OF JUSTICE, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991–2012, at 1 (rev. 2014); JENIFER WARREN ET AL., PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 5, 19 (2008).

177. See Nicola Lacey, *Humanizing the Criminal Justice Machine: Re-Animated Justice or Frankenstein’s Monster?*, 126 HARV. L. REV. 1299, 1316 (2013) (book review) (characterizing “retributivism, repackaged as ‘just deserts’” as “the dominant public philosophy of American punishment”); Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17, 18 (2003).

178. E.g., Francis A. Allen, *Legal Values and the Rehabilitative Ideal*, in SENTENCING 110, 114 (Hyman Gross & Andrew von Hirsch eds., 1981) (blaming rehabilitative policies for lengthy sentences); Christopher, *supra* note 95 (blaming retributive theories for long sentences).

justified in imposing punishment.¹⁷⁹ One difficulty with these claims of justification is that they are usually impossible to disprove. They often rely on nonfalsifiable moral judgments, or on predictive assertions that cannot be verified. The non-falsifiability of a claim of justification would not necessarily thwart efforts to limit punishment, were appellate courts more willing to exercise their own judgments in opposition to legislatures or others who select severe punishments. As discussed in Part I, however, courts tend to defer to other institutions on questions of how much violence is appropriate. Only in the narrow contexts of capital punishment and LWOP sentences has the Supreme Court rejected legislative determinations and made an independent judgment about whether a given punishment is justified.¹⁸⁰ Desert claims are particularly difficult to dislodge since, as noted above, the ingredients of desert are poorly and inconsistently specified. But other purported justifications of punishment are likely to fare no better as limiting principles.¹⁸¹

To be sure, other constraints on violence (such as the principles of the *jus in bello*) also sometimes rely on moral judgments or predictive assertions, but justificatory principles suffer an additional weakness that truly independent limiting principles do not. Justifications of violence focus on the reasons to use violence. They help overcome inhibitions against the use of violence; they can motivate the agents of violence with self-righteous energy. They are a good way to convince soldiers to risk their lives, or to convince legislators to devote more money to prisons, or to convince the executioner that his is a noble calling. But justifications of violence do not focus upon reasons *not* to use violence; they do not study the costs of violence, or elaborate its harms, or call upon our humanitarian principles. Given this structure of justificatory arguments, they should not be expected to serve well as devices to limit violence.

So let us imagine a different approach to limiting punishment: a *jus in poena*. Like the *jus in bello* and international humanitarian law, this effort to limit violence would remain independent of any claim about the justification of that violence. This project would radically reorient criminal law theory, since, as noted above, theorists presently tend to view the justification of punishment as the primary question of criminal law theory and as a question that determines the appropriate approach to almost all other questions in the field. A *jus in poena* would transform legal doctrine, too, sometimes by suggesting new legal rules and sometimes by providing a better foundation for existing principles. The development of a *jus in poena* is a project too large for one article—or indeed, for one scholar or one lifetime—but in the remainder of this Part, I will elaborate some of the possible components of this approach. I begin with relatively modest implications and proceed to more radical ones.

179. See, e.g., cases cited *supra* note 173.

180. Compare *Graham v. Florida*, 560 U.S. 48 (2010), and *Atkins v. Virginia*, 536 U.S. 304 (2002), with *Ewing v. California*, 538 U.S. 11 (2003).

181. See Ristroph, *Sentencing Reform*, *supra* note 95, at 1350–51 (arguing that all standard justifications of punishment are poor strategies for limiting punishment, because “theories quickly become translated into broad, vague rhetoric that is invoked to justify more or less anything”).

Categorical rules are one of the most reliable ways to restrict behavior since they leave little room for discretion and interpretation. The categorical rules of the *jus in bello*, such as absolute bans on certain types of weapons, are among its greatest successes.¹⁸² A *jus in poena* could provide a much stronger intellectual defense of certain categorical rules in criminal justice. For example, there is fairly widespread support for the principle that we should not punish people who are actually innocent, but the rationale for that principle is sometimes mysterious. One common explanation for the rule unsurprisingly focuses on retribution and just deserts: according to this view, we should not punish the innocent because they do not deserve to be punished.¹⁸³ A problem with this view, one that has arisen in many wrongful convictions cases, is that desert is an elastic and ill-specified concept, and quite often prosecutors and others resisting a wrongful-conviction claim seem to be motivated by a view that this defendant, whether or not he is guilty of this particular crime, is a bad person who deserves to be in jail.¹⁸⁴ Additionally, to link a rule against punishing the innocent to retribution renders the rule vulnerable once we recognize that retribution is surely not the only social goal we pursue. For example, some scholars have pushed back against the wrongful-convictions movement and suggested that if we think of the overall aims of punishment—the justifications of the system as a whole—some wrongful convictions might just be a necessary price for an effective crime-control system.¹⁸⁵

A better way to understand the ban on punishing the innocent is to compare it to the *jus in bello* prohibition of intentional attacks on civilians. The prohibition of attacks on civilians has nothing to do with their desert. We may indeed believe today that civilians do not deserve to be attacked, but this was not always the predominant way of thinking about war.¹⁸⁶ Rather, it is a humanitarian principle that seeks to contain the destructiveness of war. Similarly, the prohibition on punishing the innocent should be framed as a humanitarian principle motivated by the recognition that punishment is harmful and needs to be contained. According to this view, it is no longer necessary to argue about whether a factually guilty but legally innocent defendant deserves punishment, or whether punishing some innocent scapegoats could function as an effective deterrent. Instead, we simply recognize that punishment, like war, is a kind of violence that we must contain with certain

182. Michael N. Schmitt, *Bellum Americanum: The U.S. View of Twenty-first Century War and Its Possible Implications for the Law of Armed Conflict*, 19 MICH. J. INT'L L. 1051, 1084 (1998) (discussing “a clear trend in the direction of prohibiting weapons on the basis of humanity, most recently evidenced by the Chemical Weapons, Biological Weapons, Conventional Weapons, and Anti-Personnel Mines Conventions”) (footnotes omitted).

183. Indeed, theorists frequently assert that one of retributivism’s advantages over consequentialism is that the latter will sometimes allow punishment of the innocent. See Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 18 n.11 (2006) (“The accusation that utilitarians must be prepared, if true to their principles, to punish innocent but apparently guilty people is a classic retributivist objection to utilitarianism.”).

184. See DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA’S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 127–35 (2012) (discussing prosecutorial resistance to exoneration efforts even in the face of strong exculpatory evidence).

185. See, e.g., Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH. L. REV. 65, 79–80 (2008).

186. See Luban, *War as Punishment*, *supra* note 48, at 313.

bright-line rules. Just as there are sensible reasons to draw a bright line between soldiers and civilians—even though some civilians may be “blameworthy,” and some soldiers may not be—there are sensible reasons to draw a bright line between those adjudicated guilty and those who are not.¹⁸⁷

Or consider categorical bans on certain types of punishment. To the extent that current law recognizes some narrow categorical bans—the Eighth Amendment prohibitions of capital punishment for some offenders and some offenses, and its restrictions on LWOP sentences for juveniles—it does so on the unstable proposition that the given penalty is never justified in those specific circumstances. But to almost half the Supreme Court, and a sizable portion of the population at large, those claims of justification or nonjustification are simply wrong. According to these critics, retribution (or another punishment theory) could justify, and may even demand, the punishments in question.¹⁸⁸ In *Roper v. Simmons*, the Supreme Court decision banning capital punishment for juvenile offenders, the dispute between the five Justices in the majority and the four Justices in the minority is not one easily settled by argument or evidence. It turns on a fundamentally subjective conclusion about what is deserved—a conclusion subject to all the imprecision and manipulability inherent in the concept of desert. Moreover, the existing rationale for these categorical Eighth-Amendment rules sits uneasily with a core principle of sentencing doctrine: commitment to individualized sentencing.¹⁸⁹ Individualized sentencing requires a particularized judgment of the appropriate penalty in each case. To retributivists, individualized sentencing reflects the premise that desert must be assessed on a case-by-case basis; one cannot assess what is “deserved” for entire classes of offenders at once. The prohibition of the death penalty for all juvenile offenders, or all nonhomicide offenders, seems to be the very kind of categorical desert assessment that individualized sentencing seeks to avoid.

Existing categorical bans, as well as the long-term eradication of other severe penal practices, would be better secured without relying on arguments about the justification of punishment. Again, the argument would be a humanitarian claim about the limitation of violence, much like the humanitarian bans on the use of certain types of weapons in the laws of war. This humanitarian approach to punishment need not be grounded in the Eighth Amendment, but it is a logical interpretation of that constitutional provision. The Amendment, by its terms, bans cruelty. That prohibition is a fundamentally humanitarian principle, as reflected by

187. See Ristroph, *Respect and Resistance*, *supra* note 152, at 612 (discussing Thomas Hobbes’s nonretributive arguments for limiting punishment to those adjudicated guilty).

188. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 600–01 (2005) (O’Connor, J., dissenting) (arguing that retribution and deterrence could justify the death penalty for some juvenile offenders, including the particular defendant whose case was before the Court); *id.* at 621 (Scalia, J., dissenting) (“The Court’s contention that the goals of retribution and deterrence are not served by executing murderers under 18 is . . . transparently false.”).

189. Individualized sentencing is constitutionally required in capital cases. See *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976). It is not an absolute constitutional requirement outside of the death-penalty context, but the Court has suggested individualized sentencing is the preferred approach. See, e.g., *United States v. Booker*, 543 U.S. 220, 264–65 (2005).

the Supreme Court's occasional citations to humanitarian and human rights judgments from around the world in its decisions interpreting the Eighth Amendment.¹⁹⁰ To impose capital punishment on minors is cruel, and we do not mitigate the cruelty by keeping the minor in prison until he comes of age and then perform the execution. To impose capital punishment on someone with severe mental impairments is cruel, and it is cruel no matter how terrible the crimes committed by the impaired defendant. Though American courts have not yet recognized it, to keep a prisoner in prolonged solitary confinement may also be cruel, and a categorical ban on this practice is best grounded on humanitarian principles rather than claims of (non)justification.¹⁹¹

Importantly, the bans in international humanitarian law on certain types of weapons—or on torture, or cruel, inhumane, and degrading treatment, for that matter—reflect judgments not only about the human dignity of the targets of violence, but also the human dignity of the *agents* of violence. It is inhumane to inflict certain types of violence, no matter how reprehensible the actions of the target of the violence may be. The recent U.S. experiment with “coercive interrogation techniques” should illustrate clearly that a prohibition on torture or other violence is inherently unstable if it is contingent on judgments about the targets of violence, or indeed on judgments about the efficacy of the violence.¹⁹² Those who would justify extreme violence will inevitably find targets deserving enough, or necessities pressing enough. Experience has shown that it is far more effective to ground categorical prohibitions of violence on humanitarian arguments about what the violence does to all of us—targets, agents, observers, and even the alleged beneficiaries of it.

I suspect, also, that if American criminal law is ever to implement an effective proportionality restriction on prison sentences, whether through the Eighth Amendment or through other channels, such a proportionality rule will not rest on claims of justification. The proportionality rule we have now is essentially an exhortation to punish only as much as is justified, and as noted above, it is almost completely ineffective. Like states going to war, states imposing punishment always claim (likely in good faith) that they are justified. To devise a new approach to proportionality, one might look to the *jus in bello* principle of proportionality, which is not dependent on claims of justification for military force. Rather, it provides that a given military strike is prohibited if it is likely to cause harm to civilians disproportionate to the claimed military necessity.¹⁹³ Now, this particular principle

190. See *Roper*, 543 U.S. at 575–76 (noting that the Court has long “referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments’” and citing examples).

191. See generally Lobel, *supra* note 119.

192. See *supra* note 90 and accompanying text.

193. Additional Protocol I to the Geneva Conventions prohibits indiscriminate attacks, including any attack “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 51(5)(b); see also *id.* at 57(2)(a)(iii).

of the laws of war is not easily or directly translated to the punishment context, because it is focused on harms to third parties—civilians—and not on harms to the direct targets of violence—the foreign military. A proportionality restriction on punishment must consider the harm to the offender (though perhaps it should also consider the indirect harms to third parties, as elaborated below). Still, consideration of the *jus in bello* principle of proportionality is helpful insofar as it illustrates that proportionality limitations need not be based on claims of justification. Elsewhere, I have elaborated on a theory of penal proportionality that offers courts a way to limit the severity of punishment without adopting one or more penological theories.¹⁹⁴

An additional implication of a *jus in poena* for both doctrine and philosophy concerns the interpretation of the word “punishment.” Current constitutional doctrine evaluates whether a given state action is punishment by applying a multifactor test that focuses heavily on the state’s purposes.¹⁹⁵ Notably, mainstream punishment theory tends also to define punishment largely in terms of intent, and often, in terms that build the normative justification of punishment into the definition of the word.¹⁹⁶ These approaches give states considerable leeway to avoid constitutional restrictions on punishment by arguing that a given instance of violence was not intended as punishment.¹⁹⁷ Here again, the history, philosophy, and laws of war provide helpful comparisons. At one time, the question whether a state was at war, and thus subject to the laws of war, was largely determined by the state

194. Ristroph, *Limited Government*, *supra* note 172, at 317–27.

195. To distinguish between a civil sanction and criminal punishment, “we must initially ascertain whether the legislature meant to establish ‘civil’ proceedings. If so, we ordinarily defer to the legislature’s stated intent.” *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). The Court “will reject the legislature’s manifest intent only where a party challenging the statute provides ‘the clearest proof’ that ‘the statutory scheme [is] so punitive either in purpose or effect as to negate [the State’s] intention’ to deem it ‘civil.’” *Id.* In evaluating a claim that a state action is punishment notwithstanding the state’s formal classification, the Court considers several factors. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963) (“Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry [of whether a given action constitutes] punishment”).

196. *See supra* notes 91–94 and accompanying text. If normative definitions of punishment are adopted as a matter of legal doctrine, there are important consequences for the regulation of punitive violence. When courts define punishment in normative terms, the constitutional provisions that regulate “punishment” seem to become inapplicable to acts of violence that do not satisfy the prescribed normative constraints. Perversely, the worst abuses are the ones least restricted by constitutional doctrine. *See Alice Ristroph, Sexual Punishments*, 15 *COLUM. J. GENDER & L.* 139, 163–66 (2006) (discussing Justice Thomas’s proposed definition of punishment and its implications, including its exclusion of assaults in prison from constitutional regulation).

197. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346, 368–69 (1997) (finding indefinite commitment of sexual offenders not to constitute punishment, noting among other factors that “the State has disavowed any punitive intent”).

itself and its choice whether to make a formal declaration of war. A key development of the *jus in bello* was a shift toward a definition of “armed conflict” in positive, objective terms that could be assessed by third-party observers.¹⁹⁸ A more objective definition of punishment that relied less on the state’s purpose would be more difficult to manipulate. State practices that, to date, have been construed as nonpunitive, such as the indefinite detention of sex offenders, might then be brought within the purview of the Constitution’s regulations of punishment.¹⁹⁹

There are good reasons for a doctrinal definition of punishment that focuses more on substantive, objective factors rather than state intentions. It is not doctrine alone, however, that could benefit from a reconceptualization of what counts as punishment. Philosophies of punishment have become increasingly divorced from real penal practices, and this disconnect is partly due to the tendency of philosophers to build normative justifications into the very definition of punishment. If we define punishment narrowly, then some of the terrible things that actually occur in prisons are clearly not part of “punishment,” and so a justification of punishment need not address them. For example, physical assaults between prisoners do not fall within most philosophers’ definitions of punishment; under such an approach, a high incidence of prisoner-on-prisoner attacks may be regrettable but it does not impact the justification of punishment.²⁰⁰ Punishment theorists have thus excused themselves from addressing the full dimensions of the practices and experiences that are commonly known outside the academy as punishment.²⁰¹ A more interesting and honest approach to punishment theory—and one more likely to be relevant to real-world policy and practice—would define punishment objectively, and only then tackle the difficult normative evaluations of various dimensions of punishment.

Ultimately, a *jus in poena* could force both philosophers and lawyers to grapple with issues such as prisoner-on-prisoner assaults even if those assaults are not classified as punishment. One of the most radical implications of a *jus in poena* would be the principle, drawn from the *jus in bello*, that collateral damage matters to ethical and legal assessments. As discussed in Part II, facts about the actual impact

198. See Mary Ellen O’Connell, *The Choice of Law Against Terrorism*, 4 J. NAT’L SEC. L. & POL’Y 343, 354–55 (2010).

199. See Ristorph, *Sexual Punishments*, *supra* note 196, at 167–70 (articulating an objective approach to the definition of punishment). Not surprisingly, critics of penal practices are more likely to define punishment with reference to substantive, non-intent-based factors. See, e.g., TED HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS REVISITED 15 (1969); NIGEL WALKER, WHY PUNISH? THEORIES OF PUNISHMENT REASSESSED 1–3 (1991).

200. See, e.g., Gray, *supra* note 12, at 1653; Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 968 (2010). A related weakness of punishment theory is its tendency to frame the question of justification as a question of individual punishments for individual offenders. Systemic outputs, such as the pronounced race and class disparities among U.S. prisoners, are treated as irrelevant to the justification of punishment. See, e.g., Dolovich, *supra* note 12, at 311 (“[V]iewed in isolation, the race and class position of America’s inmate population tells us nothing regarding the legitimacy of the sentences being served.”). Dolovich is troubled by the racial and socioeconomic disparities, but she views them as demonstrating the need to justify punishment—not calling into question whether American punishment can be justified.

201. See Adam Kolber, *Unintentional Punishment*, 18 LEGAL THEORY 1 (2012) (noting and criticizing this phenomenon).

of a war are centrally important to the ethical evaluation of the war. If the ethics of criminal justice were inspired by the ethics of war, we might adopt the view that collateral damage matters to the ethical analysis of the criminal justice system. The collateral damage of the war on crime is immense. Consider the impact on the families of prisoners; consider the broader social impact on communities when one in three black men, or even higher rates in some areas, will serve time in prison at some point in his life.²⁰² Consider the conditions within prisons; consider so-called collateral consequences, or the restrictions on job opportunities, education, and social services for those who exit prison. All of this may be collateral to the imposition of punishment. But what comes of the label “collateral”? In war, collateral damage is not prohibited—it is hard to see how it could be—nor is it merely regretted with shrugged shoulders. Collateral damage may be labeled as collateral, but it is ethically central. The proportionality requirement of the *jus in bello* holds that an attack is impermissible if it will cause collateral damage disproportionate to the expected military advantage. The fact that a given military strategy triggers secondary consequences is relevant to the ethical evaluation of the strategy. As we saw in Part II, in general philosophies of war have been engaged with facts, and responsive to facts, in ways that philosophies of punishment have not. War is too real and too painful for the abstractions of ideal theory. So too, I suggest, is punishment. In criminal justice, we are overdue for an analysis of the collateral damage wreaked by our current policies.

A final implication of a *jus in poena* is worth noting, though I cannot explore its full scope here. If the ethics of criminal justice were inspired by the ethics of war, we would have to confront head-on the difficulty of regulating the state and holding it responsible. We could not justify punishment in the passive voice, speaking of criminals who deserve to be punished by an invisible agent. Instead criminal law theorists would have to tackle a host of difficult questions about the individual and institutional actors that are the agents of punishment. We would have to consider ways to hold these actors responsible for excessive punishment, of course, but we would also have to contemplate state responsibility for the consequences of even legitimate punishment. As part of this project of regulating the state, punishment theorists and punishing judges would have to move past their reluctance to second-guess the experts who use force, or who make decisions about its use. It has been said that war is too important to be left to the generals. Similarly, the use of force on our own turf, against our own citizens, is too important to be left to the specialists who make a profession out of criminal justice.

CONCLUSION

It is important not to overstate the successes of efforts to discipline, and limit, warfare. The War on Terror has tested the principles—and exposed weaknesses—in the *jus in bello*. By some cynical accounts, the *jus in bello*, or international humanitarian law, is something that strong nations enforce against weak ones. When a relatively strong nation like the United States sees international humanitarian law as an obstacle to its own use of violence, international

202. See SENTENCING PROJECT, REPORT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1, 12–13 (2013).

humanitarian law is fast discarded, nothing more than rubble to be cleared aside.²⁰³ On this view, the Athenian generals were right: the strong do what they can and the weak suffer what they must.

I am not quite that cynical, but I do acknowledge that the *jus in bello* has not yet achieved nearly as much as it hopes. The limits on warfare are still far weaker than any humanitarian would hope. The *jus in bello* is still a work in progress—but it is progress. It is a noble and sometimes successful effort to constrain violence. Our criminal justice system needs the same. Most importantly, we need to acknowledge the difference between justifying violence and limiting it, and shift our efforts to the latter project.

203. See, e.g., Mark A. Drumbl, *Guantanamo, Rasul, and the Twilight of Law*, 53 *DRAKE L. REV.* 897, 909–10 (2005).