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## VICARIOUS PUNISHMENT AND WAR CRIMES PROSECUTION: THE CIVIL WAR OR ALICE THROUGH THE LOOKING GLASS

RICHARD ARENS†

### INTRODUCTION

Faced with an international crisis of the first magnitude, the United States is once again confronted with the problem of the invocation of sanctions for violations of the rectitude norm of American or world proportions. The problem may require intensive scrutiny as an outgrowth of the urgent demands of policy developments on a rapidly changing national and international scene.

In five short years mere expectations of the use of violence in international affairs have materialized into the very violence itself. Within few months specters have changed into realities. Aggressive war and violation of the rules of war have become acute problems for statesmen and lawyers. Recent Korean developments, which may well be outdistanced by more serious events by the time of this publication, have presented the policy-makers of the world community with the problem of vindicating rectitude norms not only through the cruder channels of organized violence but also through the legal processes available under existing international law or through such as may yet become available in the form of international criminal tribunals.<sup>1</sup>

Inevitably an operative theory of sanctions is a function of the culture in which it is used at a given stage of its development. A quest for the dominant theory therefore should not confine itself to an examination of official doctrine but should probe further for the leitmotiv. It is submitted that the leitmotiv of American sanction theory, to the extent to which it has been manifested in the present crisis, is not encompassed in a more traditional pattern of modern philosophies of punishment embracing deterrence,<sup>2</sup> the "categorical imperative,"<sup>3</sup> individual re-

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1. A consideration of international criminal tribunals from American constitutional perspectives is available in McDougal and Arens, *The Genocide Convention and the Constitution*, 3 VAND. L. REV. 683 (1950).

2. For a recognition of deterrence as a policy motivation in rational form see *State ex rel. Kelly v. Wolfer*, 119 Minn. 368, 138 N.W. 315 (1912).

3. See KANT, *THE PHILOSOPHY OF LAW* (Edinburgh) 195: "The Penal Law is a Categorical Imperative; and woe to him who creeps through the serpent-windings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment. . . ."

habilitation,<sup>4</sup> or even the more drastic model of "measures of social defence" for "socially dangerous acts" propounded by Enrico Ferri.<sup>5</sup> This leitmotiv, instead, is deemed to be embodied in what is a unique American contribution to the field of sanction theory. It has been variously described as the use of sanctions to maximize a transformation of the social scene, i.e. as an instrument of social change, or alternately, as a therapeutic agent for the "non-criminal" masses, intended, for example, for the purpose of reducing the existing tension levels,<sup>7</sup> or as a "socially controlled catharsis."<sup>8</sup> Existing designations of this phase leave several vital elements out of account. It is these elements which constitute a point of inquiry in this study.

The elements left out are these: the object or target of the punishment may not be so much the delinquent culprit as the vast "law-abiding" group which requires constant reinforcement of its super-ego by the sight of the infliction of punishment or the retribution upon villainy. Modern psychoanalytical knowledge has furnished essential insights into this problem upon a social plane.<sup>9</sup> It may help to specifically explain a claim for punishment in terms of latent or pronounced criminal tendencies on the part of the claimant.<sup>10</sup> The "vindication

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4. See *State ex rel. Kelly v. Wolfer*, note 2 *supra*: "No longer is proportionate punishment to be meted out to the criminal measure for measure; but the unfortunate offender is to be committed to the charge of the officers of the state, as a sort of penitential ward, to be restrained so far as necessary to protect the public from recurrent manifestations of his criminal tendencies . . . but if possible, to be reformed, cured of his criminality, and finally released, a normal man, and a rehabilitated citizen."

5. See FERRI, *PRINCIPII DI DIRITTO CRIMINALE* (1928). For a general summary of modern sanction theory see SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY* 328-352 (1939).

6. See Polier, *Law, Conscience and Society*, 6 *LAW GUILD REV.* 490 (1946). See also DESSON, *CRIMINAL LAW, ADMINISTRATION AND PUBLIC ORDER* 197 (1948).

7. For a good study of the subject of tension levels see WILLIAMS, *THE REDUCTION OF INTERGROUP TENSIONS* (1947).

8. See GLUECK, *WAR CRIMINALS, THEIR PROSECUTION AND PUNISHMENT* 174 (1944).

9. See ALEXANDER AND STAUB, *THE CRIMINAL, THE JUDGE AND THE PUBLIC* (1931).

10. The recognition has gained ground that the demand for the punishment of others may be occasioned by the presence of the severest guilt feelings within oneself. The use of "projection" of such guilt feelings is known as a common device. The insistence upon the punishment of others for purposes of achieving vicarious expiation may thus become an inevitable consequence. See generally, ALEXANDER AND STAUB, *op. cit.* *supra* note 9; ALEXANDER, *FUNDAMENTALS OF PSYCHOANALYSIS* 114-115 (1948); ALEXANDER, *OUR AGE OF UNREASON* (1942); HORNEY, *THE NEUROTIC PERSONALITY OF OUR TIME* (1937); and particularly the character study of individual judges in LASSWELL, *POWER AND PERSONALITY* (1948).

of justice" by the most rigid enforcement of rectitude norms by punishment of individual malefactors, may in such a context, be tantamount to an individual catharsis on the part of the chief advocate for punishment. The latter experiences a form of vicarious expiation and moral atonement for his personal guilt or his guilt feelings. The spectacle which is presented therefore is that of the person or group whose insistence upon the punishment of others is founded upon the compulsive need of the punishment of oneself: one's own identification with the criminal traits of the unutterable foe is so close that one achieves a purging of the guilt incurred by one's own instinctual and non-instinctual drives by the severest punishment of the foe who manifests those traits in one form or in another. Thus, one of the factors making for an upsurge of the popular call for Nemesis to all who have sinned is the presence of the feeling of severest guilt in those who are most vocal in the issuance of such a call.

To the extent to which this tendency is manifest, the intensity of the call for punishment is proportioned to the degree of criminal tendencies which govern those who are behind the call. What has been called "social catharsis" or the "reduction of tension levels" comprises at least in part the projection of guilt and the urge for vicarious atonement.

Symptomatic of the situation described is the high degree of moral indignation of the sanction-invoking response.

It is interesting to note that the degree of the moral indignation of the sanction-invoking response in the treatment of Nazi war criminals on the part of the American public was infinitely lower than that manifested in the call for the punishment by the supreme sanction of war or by other means of Russians and their satellites.<sup>11</sup> This may well explain in part the abysmal failure of the program of war crimes prosecution in post-war Germany and the disintegration of the last vestiges of a de-nazi-

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11. Note the quiet dignity of Justice Jackson's opening address before the Nuremberg tribunal for the prosecution (2 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg 1947, 98 *et seq.*) in contrast to the neurotic extreme of present attitudes. (See New York Times, Sept. 26 (1950) p. 1: "U.S. Consults Others On Peace Terms. Soviet Is Excluded, Washington Wants UN to Set Course Beyond the 38th Parallel." Or New York Times, December 9 (1950) p. 1ff "President Truman threatened to beat up a critic who had criticized the singing of his daughter Margaret. . . ." For an anthropological study of American character see GORER, *THE AMERICAN PEOPLES* (1948).

fication program.<sup>12</sup> The hypothesis is here advanced that one of the reasons for this difference in response is the fact of lesser similarity in attitude between American and Nazi-German, and a greater similarity and, concomitantly therewith, a greater degree of a shared guilt, between American and Soviet Russian, attitudes.<sup>13</sup> One need only to point to the ever increasing common aspects of Soviet and American behavior in the leveling of human dignity by the impersonal machinations of a monolithic state machinery and the skillful use of science as distinct from pseudo-science as the handmaiden of the garrison prison state, to recognize a common source of guilt and the inherent potentialities of a common drive for vicarious punishment and expiation.<sup>14</sup>

Northern United States or "Union" experience in the manifestation of such a phenomenon in the course of the Civil War

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12. The epitome of the failure of American attempts at denazification is perhaps signified by the American parole of Ilse Koch, a woman charged with the manufacture of lamp-shades out of human skin and her subsequent retrial by German authorities. See New York Herald Tribune, December 11 (1950) p. 1.

13. A thoroughly personal note of vindictive paranoid aggression characterized the Nazi response to the environment. See FROMM, ESCAPE FROM FREEDOM 207-239 (1941). A thoroughly impersonal brutalization has characterized both Soviet and American aggressive tendencies. See AMERICAN FEDERATION OF LABOR, SLAVE LABOR IN RUSSIA (1949); PETROV, SOVIET GOLD (1949) for the Soviet scene. For American predispositions see note 14 *infra*.

14. No opposition worthy of the name is voiced to a "bipartisan" American foreign policy. "Heretics" are hounded out of public employment in short order. For a documented account see MCWILLIAMS, WITCH HUNT (1950). It is significant moreover, that the fact of complete or partial physical extermination of political opponents should even be considered as one of a series of possibilities by serious scientific thinkers in this country under the impact of new turns of policy. See Lasswell, *The Interrelations of World Organization and Society*, 55 YALE L. J. 889, 900 (1946): "Perhaps the leaders of 'Imperial America' would be able to protect themselves from assassins and revolutionists by ruthlessly applying modern scientific and technical methods. . . . The loyalty of every individual could be put under the unremitting surveillance of military and police intelligence. Everyone could be required to undergo a regular medical and psychological examination (quarterly or annually) which would include tests to determine the presence or absence of 'dangerous thoughts.' (Each person could be put under the influence of drugs and questioned). Besides the application of scientific methods to enforce disclosure, other possibilities, long ago foreseen, may be adopted. Quite likely there are ways of incapacitating actual or suspected opponents, without depriving them of some usefulness in production. The technical problem would be to destroy the higher cortical centers, while retaining enough coordination to allow for the performance of repetitive operations. In this way permanent caste difference (permanent disparities in level of culture) could be established inside the garrison-prison state." In contrast to such purposeful scientific practices, the Nazis frittered time and energy away on experimentation with pseudo-eugenics.

provide useful laboratory material in a study of the intensity of the drive for punishment as a function of individual and national guilt.

A page of history may thus be worth an infinity of volumes of logic. The following is adduced as one item, transcending mere historical interest, in the construction of the chain of evidence to prove this point.

In any event, it may be useful to review evidence of earlier American experience as a guide to present action.

It is noteworthy that the psychological climate of Northern theories of war crimes punishment was itself heavily suffused with a deep-seated feeling of guilt as a result of Northern participation in the continued violation of the verbally accepted Christian ethics by the tolerance of slavery, and of constitutional principle by the acceptance of revolutionary, as distinct from constitutional, change. In this connection Lincoln and Taney alike present ideal studies in ambivalence.<sup>15</sup>

It appears almost as though the very fact that revolutionary change had ever been held out as a civilized alternative now demanded the most drastic repudiation in the form of punishment which was to be inflicted upon the rebels by the very people who had once openly flirted with it at least in the field of theoretical espousal. Such repudiation, charged with the highest form of emotional voltage, became, in fact an inexorable path toward self respect.

It was hardly surprising, therefore, that to the zealot thundering for the punishment of the confederate violators of the rules

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15. Lincoln in his first inaugural repeated the specific assurance: "I have no purpose, directly or indirectly, to interfere with the institution of slavery. . . ." He went on to declaim the familiar lines: "This country, with its institutions belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it." In his second inaugural he found occasion to exclaim dolorously: "'Woe unto the world because of offenses! for it must needs be that offenses come; but woe to that man by whom the offense cometh.' If we shall suppose that American slavery is one of those offenses which, in the providence of God, must needs come, but which having continued through his appointed time, he now wills to remove, and that he gives to both North and South this terrible war, as the woe due to those by whom the offense came, shall we discern therein any departure from those divine attributes which the believers in a living God always ascribe to him?"

Taney, to take the other example, defended a man in a prosecution for inciting slaves to servile insurrection (see Trial of the Rev. Jacob Gruber, note 52 *infra*) and found time to write the Dred Scott decision in his later years. (See *Dred Scott v. Sandford*, 19 How. 393 [1857]).

of war, the supreme guilt was encompassed by secession and "disloyalty." All other crimes were deemed to follow from the first. In this view the most blood-curdling atrocity paled in heinousness when compared to the "rebellion" itself.

If rebellion be treason, then, indeed "there is no crime which can more excite and agitate the passions of men."<sup>16</sup> And rebellion had invariably been regarded as treason in the past.<sup>17</sup> Little wonder then that great fall was felt to debase the opponent, to the point where he could be called in Shakespeare's language, if need be:

Worthy to be a rebel, for to that  
The multiplying villainies of nature  
Do swarm upon him.

Every violation of the rules of war could thus be regarded as the mere "work of treason, the legitimate result of that sum of all villainies."<sup>18</sup> And its perpetrators could be dubbed "outlaws and criminals" who had shocked "the moral sentiment of the universe."<sup>19</sup>

#### VIOLATIONS OF THE RULES OF WAR IN COMBAT

"You will observe the rules of battle of course?" the White Knight remarked, putting on his helmet too. "I always do," said the Red Knight, and they began banging away at each other with such fury that Alice got behind a tree to be out of the way of the blows. Lewis Carroll, *Through the Looking Glass*.

"Union" views of Confederate violations of the rules of war, from the inception of the Civil War, however distorted and affected by the heat of conflict, are vital for an understanding of the developing theory of war crimes punishment. Sanction theory within "Union" lines in its classic phase was predicated upon the assumption of the existence of a generic conspiracy between the Confederate government and military leadership and the further assumption that every violation of the rules of

16. Chief Justice Marshall in *Ex Parte Bollman*, 4 Cranch 75, 125.

17. *Id.* at 126: "If war be actually levied . . . all those who perform any part, however minute, or however remote from the scene of the action, and who are actually leagued in the general conspiracy, are to be considered as traitors."

18. See the Judge Advocate's closing argument in the TRIAL OF CAPTAIN HENRY WIRZ, 8 AMERICAN STATE TRIALS 657, 785 (1865).

19. *Ibid.*

war was in pursuance of a common criminal design.<sup>20</sup> Every violation, therefore, took on added meaning. Northern war crimes allegations are most readily divisible into the following categories:

1. Technical violations of the rules of war.
2. Atrocities.
3. General terror tactics and a "total" war.

Of the first, the number of offences committed by any army in any armed clash is legion. The violations generally fall into the field which is the twilight zone between the so-called allowable surprises, deceptions and stratagems, on the one hand, and the proscribed military treachery and perfidy on the other.<sup>21</sup> An outstanding example of such a charge is one of the allegations contained in the report of a joint Congressional committee on the conduct of the war:

The operations of the enemy . . . were characterized by the same bad faith and treachery that seems to have become the settled policy of Forrest and his command. The flag of truce was taken advantage of there as elsewhere, to secure desirable positions which the rebels were unable to obtain by fair and honorable means.<sup>22</sup>

Or again:

The rebels having thus far failed in their attack now resorted to their customary use of flags of truce . . . During the time these flags of truce were flying, the rebels were moving down the ravine and taking positions from which the more readily to charge upon the fort.<sup>23</sup>

Except insofar as violations of this type furnished additional support for the theory of a common conspiracy of which these acts were deemed surface manifestations, they presented no particular problem in the realm of immediate punishment. Without much difficulty they were all amenable to sanctions invoked under the generally accepted articles of war under field conditions.

Of the second category, the offences, at least until the advent of the second World War have been infinitely smaller. The an-

20. See the Congressional debates on the punishment of Jefferson Davis, *infra*.

21. HALLECK, LAWS OF WAR, 158-184 (1875).

22. See Report of the Committee on the Conduct of the War, reproduced in WILSON, A HISTORY OF THE CRUELITIES AND ATROCITIES OF THE REBELLION, 66 (1865). MOORE, REBELL. REC. (Doc.) Rebel Barbarities (U.S. Congress. Joint Committee on the conduct of the war).

23. MOORE, *op. cit. supra* note 22, at 3.



nals of the Civil War, however, are replete with charges of their constant commission.

Beginning with the Battle of Bull Run, the list of charges grows in geometrical progression with the passage of the war years. In brief, the first charges were that "barbarities of a hideous nature were perpetrated by the rebels upon the "Union" soldiers who fell into their hands at the battle of Bull Run, that prisoners of war were shot and bayoneted; that the wounded and dying were treated with neglect and inhumanity; that the dead were outraged, and the very grave was desecrated and despoiled, in a manner supposed to be characteristic only of savages."<sup>24</sup> And the eye-witnesses to these alleged outrages ranged from privates in the "Union" army to Senator Sprague of Rhode Island and General James B. Ricketts.<sup>25</sup>

Investigating the alleged massacre of the "Union" garrison of Fort Pillow, the joint Congressional Committee received testimony by eye-witnesses which bids fair to equal that of some of the worst battle-field outrages of much later years. Seemingly in concert with a policy set from above, Confederate troops, according to these reports, after inviting the surrender of the "Union" garrison, refused all quarter to surrendering troops and engaged in deliberate extermination of survivors with particular vehemence and brutality against Negroes. In the words of one of the survivors:

When the Confederates rushed into the fort . . . the Federals threw down their arms in token of surrender and many exclaimed: 'We surrender.' Immediately an indiscriminate massacre commenced on both black and white soldiers . . . I saw the Confederates shoot and kill and wound both white and black federal prisoners . . . I saw officers as well as privates kill and wound prisoners, and heard them say, while held a prisoner with them in the

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24. WILSON, *op. cit. supra* note 22, at 14, embodying excerpts from Congressional hearings.

25. *Id.* at 15-26. See the testimony of General Ricketts: "There were a number of our men shot. On one occasion there were two shot, one was killed and the other wounded. . . . I have heard of a great many of our prisoners who had been bayoneted and shot. I saw three of them, two of them had been bayoneted, and one of them had been shot. . . ." *Cf.* testimony of Senator Sprague: "While we were digging there, some negro women came up and asked whom we were looking for; and at the same time said that 'Colonel Slogan' had been dug up by the rebels—some men of a Georgia regiment—his head cut off, and his body taken to a ravine some thirty or forty yards below, and there burned."

country, that they intended taking the prisoners still further into the country, and make an example of them . . . I heard officers say they would never recognize negroes as prisoners of war, but would kill them whenever taken . . . Officers of negro troops were treated and murdered the same as negroes themselves . . . On my return to the Fort, I saw and recognized the remains of Lieutenant Akerstrom; he had been nailed to a house, and supposed burned alive. There were the remains of two negroes lying where the house burned. I was told they were nailed to the floor. I also found a negro partially buried, with his head out of the ground, alive . . . I can recount but a small part of the barbarities I saw on that fatal day . . .<sup>26</sup>

As the war progressed reports of atrocities by the Confederate troops multiplied. The picture drawn by survivors took on a sickeningly familiar pattern:

The rebel soldiers came out of the fort and bayoneted all the colored soldiers who were so badly wounded that they could not walk.<sup>27</sup>

Ingenuity was added to brutality according to further reports. Thus in February 1862, "Union" Major General Curtis, stated flatly that "Union" officers and men had been poisoned by eating provisions at Mud Town in Arkansas which the retreating Confederate forces had specifically left behind to achieve such ends.<sup>28</sup>

Systematic "Union" plans for war crimes punishment first began to assume shape under the impact of such reports. It is impossible to obtain objective verification of these reports at this stage but it is possible to state that their deliberately widespread dissemination was specifically intended to lay the groundwork for public acceptance of a major step toward the intensification of punishment. General orders were issued requiring that persons "guilty of such acts" should, when captured, not be treated as ordinary prisoners of war "but should suffer the ignominious punishment of being hung as felons."<sup>29</sup> While no evidence exists that this included overt orders to dispense with ordinary or military trial procedure in the disposition of alleged offenders, one

26. MOORE, *op. cit. supra* note 22, at 68, 69.

27. Report of the Commanding officer of the Thirty-sixth U.S. Colored Troops to Army Headquarters on October 12, 1864, reproduced in WILSON, *op. cit. supra* note 22, at 286.

28. See the statement by the Union's International Law expert Major General Halleck, reproduced posthumously in 6 AM. J. INT. L. 109 (1912).

29. *Ibid.*: Quotation from order of Major General Curtis.

would be naive indeed in thinking the military mind capable of executing such orders in any but the most direct military way.

Looming large in importance is the third category of war crimes charges concerning general terror tactics and a "total" war. It should be recalled that at this stage of history, the totality of the war effort was severely circumscribed at least in theory, by the then prevailing rules of international law. For example, bacteriological warfare such as use of poisoned weapons and the poisoning of wells and food supplies was regarded with universal revulsion and was proscribed.<sup>30</sup> Protection of the "inoffensive" non-combatant citizen of hostile territory was the rule and had been officially incorporated as such in the Instructions for the Government of the Armies of the United States in the field, known as Lieber's Code.<sup>31</sup> Partisan and guerrilla troops were regarded as outlaws.<sup>32</sup> The principle of retaliation was viewed with some suspicion and distrust.<sup>33</sup> A generally chivalric code prescribed the equal and adequate treatment of the captured enemy.<sup>34</sup> It was against this background that the charges of terror tactics by Confederate forces were first aired.

The Confederacy was accused of the employment of new and diabolical weapons. It was charged that Confederate disregard for orthodox weapons of warfare was responsible for the introduction of "torpedoes... (which were planted) in the paths of our soldiers,"<sup>35</sup> a device which subsequently became known as the use of land mines. It was claimed that poisons had been employed against "Union" troops<sup>36</sup> and that a bacteriological attack had been planned against the federal capital.<sup>37</sup> It was said that "inoffensive" non-combatants became the targets of Confederate attack, that, e.g., whole towns were indiscriminately burned,<sup>38</sup> and civilians serving on hospital ships were mistreated.<sup>39</sup> Confederate authorities were credited with the support

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30. See HALLECK, LAWS OF WAR, 179 (1874).

31. General Orders No. 100 (1863) reproduced in 7 MOORE, DIGEST OF INTERNATIONAL LAW 172, 173.

32. HALLECK, LAWS OF WAR, 175 (1874).

33. See the general works of Vattel.

34. HALLECK, *op. cit. supra* note 32, at 197.

35. *The Trial of Captain Henry Wirz, supra* note 18.

36. *Ibid.*

37. *Ibid.*

38. See WILSON, *op. cit. supra* note 22, "Burning of Chambersburg, Pa." 242.

39. HOWARD, THE BARBARITIES OF THE REBELS, 29 (1863) quoting the

and encouragement of guerrilla forces who were alleged to be responsible for pillage and murder.<sup>40</sup>

It is immaterial from the standpoint of the sanction specialist whether these reports were substantiated or not. It is highly material that these reports were widely believed and that they engendered a high degree of moral indignation. It is doubly material that this moral indignation entailed a widening target area for the contemplated infliction of sanctions.

The specter of retribution was invoked against both perpetrators and accomplices. A new theory was hastily developed to cope with the largest group of possible defendants. For the first time in American history and for the only time until the Yamashita trial,<sup>41</sup> it was authoritatively declared that "all officers are in a measure responsible for the acts of the troops under their command,"<sup>42</sup> that an officer is in fact *prima facie* guilty of the crimes committed by his subordinates, and that it inexorably "rests upon him to prove his innocence."<sup>43</sup>

It is clear that the underlying rationale of these measures was retaliation as a tool of deterrence. Hallowed or infamous precedent had been made available for this early in the war in the handling of alleged pirates or privateers.<sup>44</sup> The enemy had pro-

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New York Illustrated News, Feb. 7 (1863): "These unarmed and defenseless men were stripped of their clothing, tied to trees, and cowed."

40. See WILSON, *op. cit. supra* note 22, at 138, 139 reproducing report of Commanding officer of the Fifth Cavalry of the Missouri State Militia on the alleged outrages of Missouri guerrillas. Cf. HALLECK, *op. cit. supra* note 32, at 174: "Some of the worst kinds of guerrilla bands have been authorized and organized by their own governments, as in Spain, Mexico, and the Rebel States of America."

41. Application of Yamashita, 327 U.S. 1 (1945).

42. See Major General Curtis' statement, *supra* note 29.

43. See the statement of HALLECK, *supra* note 28.

44. The first crime to be inextricably linked to the "sum of all villainies" was piracy. Indeed if not linked to treason at all it will be seen to have been no crime to begin with.

Smarting under the stranglehold of the federal blockade, the Confederate government resorted to the use of privateers to make up, however scantily, for its naval inferiority. A flotilla of privateers, operating under letters of marque issued by the Confederate government ravaged Union coastal waters and as described by Jefferson Davis, "filled the enemy with consternation." (JEFFERSON DAVIS, A SHORT HISTORY OF THE CONFEDERATE STATES OF AMERICA, 128 (1890).) The consternation was speedily reversed when the tables were turned by the capture of Confederate privateers by federal vessels and the threat of federal prosecution of the captives for the crime of piracy was invoked. Piracy has been traditionally defined as "robbery, or forcible depredation upon the sea, *animo furandi*," (United States v. Smith, 5 Wheat. 153, 161), with the vital proviso, however, that it be perpetrated without the authority of a state behind it. (*The Ambrose Light*, 25 Fed. 408 (185). Cf. PHILLMORE, 1 INTERNATIONAL LAW 488 (3d ed.

vided several excuses for a competition in barbarity. One such excuse was in the form of official Southern acts of outlawry or attainder against specific Northern commanders. Explicit standards of collective guilt, moreover, were evolved by the North in the handling of the problem posed by the guerrillas. "Union" officers became convinced that ten of them, "armed as they are, with their wives and children to act as spies . . . (were) equal to twenty-five . . . (Union soldiers)."<sup>45</sup> Accordingly they arrested

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1879.) An attempted prosecution against this background raises several questions. Was the Declaration of Paris of 1856 (See KUNZ, *KRIEGSRECHT UND NEUTRALITÄTSRECHT*, 112 (1935).) which barred the use of privateers and removed any obstacles in the way of their punishment as pirates binding in the instant situation in the light of the United States' failure to adhere to it? Could Confederate privateers, therefore, be regarded as acting without some legitimate state authority? Did the confederacy represent a belligerent or a state or both? The answers to the first two questions are at best uncertain from the standpoint of the "Union" protagonist. The answer to the last is clearly an affirmative. Doubtless the position of the Confederates was one of claiming "to be in arms to establish their liberty and independence, in order to become a sovereign state, while the sovereign party . . . (treated) them as insurgents and rebels who . . . (owed) allegiance and who should be punished with death for their treason." (*The Prize Cases*, 2 Black 635 (1862).) None the less, the "sovereign party" was engaged in more than a mere police operation. The world "acknowledges . . . (both parties to a civil war) as belligerents . . ." (*Ibid.*) and both parties in turn "adopt the . . . courtesies and rules common to public or national wars." (*Ibid.*) In other words the status of a state in such a situation is mutually recognized. The status of Confederate belligerency had been implicitly recognized by the federal government in its proclamation of the blockade. The British Government did not hesitate to point to it as ample justification for its recognition of the Confederate status as belligerents in its proclamation of neutrality on May 13, 1861, and for its denial of a subsequent United States claim for indemnity. (BRIGGS *THE LAW OF THE NATIONS* 729 (1944.)) It is interesting to note that it has since become the official United States position that "a blockade can be enforced against ships flying foreign flags only through the exercise of belligerent rights. . . . By asserting belligerent rights on the high seas, the North thereby recognized the belligerency of the Confederates." (See P. C. Jessup, "*The Spanish Rebellion and International Law*," 15 *FOREIGN AFFAIRS* 260, 273 (1937). Cf. U.S. Department of State Press Release, No. 361, August 29, 1936, p. 192.) The conclusion is inescapable that the basis of a piracy prosecution would have been highly tenuous indeed. Yet at least one such prosecution was launched and carried to a conviction. (See *Full Report of the Trial of William Smith for Piracy*, Philadelphia (1861).) No record of any further prosecution exists. Jefferson Davis had threatened in an earlier case of an attempted prosecution for piracy that "painful as will be the necessity" complete retaliation would be ordered. (JEFFERSON DAVIS, *A SHORT HISTORY OF THE CONFEDERATE STATES OF AMERICA* 120 (1870).) He now "instructed General Winder, at Richmond to select one federal prisoner of the highest rank, to be confined in a cell appropriate to convicted felons, and treated in all respects as if convicted, and to be held for execution in the same manner as might be adopted for the execution of the prisoner of war," (*Ibid.*) awaiting execution by the federal authorities. The execution for piracy was not carried out. A precedent was set for a new pattern of retaliatory action that was to form an integral part of war crimes prosecution theory in the future.

45. WILSON, *op. cit. supra* note 22, at 139.

“the wives and sisters of some of the most notorious ones, to prevent them from carrying their threats into execution.”<sup>46</sup>

In 1862, Jefferson Davis announced that for the crime of using slaves in armed service against the Confederacy, “Union” Generals Phelps and Hunter were to be treated as outlaws and were to be executed by hanging upon their apprehension.<sup>47</sup> In the same year, for the “crime” of confirming the death penalty imposed after trial by a military commission upon a citizen of Louisiana for tearing down a “Union” flag, “Union” General Butler, by proclamation of Jefferson Davis, was declared a felon, deserving of capital punishment, . . . an outlaw and common enemy of mankind.<sup>48</sup> Confederate forces were ordered that “in the event of his capture, the officer in command of the capturing force do cause him to be immediately executed by hanging.”<sup>49</sup> Infinitely more significant were the following provisions of the proclamation:

That all commissioned officers in the command of said Benjamin F. Butler be declared not entitled to be considered as soldiers engaged in honorable warfare, but as robbers and criminals deserving death, and that they and each of them, whenever captured, be reserved for execution.

That all negro slaves captured in arms be at once delivered over to the executive authorities of the respective states, to be dealt with according to the laws of said states.

That the like orders be executed in all cases with respect to all commissioned officers of the United States when found serving in company with said slaves in insurrection against the authorities of the different states of this Confederacy.<sup>50</sup>

To the negro apprehended in an act of servile insurrection, being dealt with according to the laws of the Southern states meant death.<sup>51</sup> To the white officer commanding Negro troops

46. *Ibid.*

47. MOORE, REBELL REC. (Diary) v. 62.

48. Proclamation by Jefferson Davis, reproduced in WILSON, *op. cit. supra* note 22, at 282, 283.

49. *Ibid.* Cf. JEFFERSON DAVIS, *op. cit. supra* note 44, at 445: “I therefore pronounced and declared that said Butler a felon, deserving capital punishment, and ordered that he be no longer considered as a public enemy of the Confederate states, but as an outlaw and common enemy of mankind, and that in the event of his capture, the officer in command should cause him to be immediately executed by hanging.”

50. See note 48 *supra* at 283.

51. See 5 S.C. STATUTES AT LARGE 503.

conviction for incitement to servile insurrection could mean a long term of imprisonment<sup>52</sup> or death itself.<sup>53</sup>

The competition in barbarism did not find the federal government lagging far behind. Rationalization for the forthcoming retaliatory action was couched in terms of deterrence and national protection. Thus retaliation was labelled not as "a measure of mere revenge, but only as a means of protective retribution, and, moreover, cautiously and unavoidably."<sup>54</sup> An order of "counter-retaliation" was issued by President Lincoln on July 30, 1863. For every "Union" soldier killed in violation of the laws of war "a rebel soldier . . . (was to) be executed and for every one enslaved, a rebel soldier . . . (was to) be placed at hard labor . . . and (so) continued . . . until the other . . . (should) receive the treatment due a prisoner of war."<sup>55</sup> When in retaliation for the execution of two Confederate officers for espionage, the Confederate forces picked by lot two "Union" prisoners for summary execution, President Lincoln ordered the immediate seizure of General Lee's son and another Confederate prisoner and their execution by hanging the moment authentic information was received of the execution of the "Union" officers.<sup>56</sup>

Yet while retaliation or counter-retaliation became the accepted federal policy in this field, the matter of war crimes punishment was very much a matter of improvisation and experimentation. It was only in the field of the general treatment of prisoners that a concrete theory of war crimes punishment began to take shape. Once again, however, it must be borne in mind that emerging theories were the mere rationalizations to basic emotional drives among which was the drive for vicarious atonement and that rational articulation of the theory had little relationship to reality.

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52. For a pre-Civil War example of a prosecution for servile insurrection see *The Trial of the Rev. Jacob Gruber*, 1 *AMERICAN STATE TRIALS* 69 (1819).

53. The Confederate Congress provided that white officers in charge of colored troops be presumed to be "inciting servile insurrection" and should if captured be sentenced to death or otherwise punished at the discretion of a court. *JOURNAL, CONFED. CONG.*, III, 386, 387.

54. *LIEBER'S CODE*; see note 31 *supra*.

55. Quotation from *RANDALL, THE CIVIL WAR & RECONSTRUCTION*, 506 (1937).

56. See *MORAN, BASTILES OF THE CONFEDERACY*, 1-17 (1890).

### VIOLATIONS OF THE RULES OF WAR OUTSIDE OF COMBAT

Charges of Confederate violations of the rules of war outside of combat are in turn divisible into two major categories:

1. Racial discrimination against federal prisoners in matters of prisoner exchange and "cartels."

2. Indiscriminate infliction of "inhuman" conditions upon federal prisoners either by culpable neglect or by design or both.

The first charge was readily substantiated and more readily admitted. Reports had circulated from the first days of the Civil War that captured Negro troops were segregated by Confederate forces and refused the right of exchange under existing agreements with the federal government. Thus, e.g., the New York Tribune reported early during the war that:

One hundred and eight of our wounded are still at Charleston and Columbia. The officers and men of the 54th Massachusetts (colored) will not be given up, nor has it yet been positively ascertained what has become of them. Unofficial reports say the negroes have been sold into slavery, and that the officers are treated with unmeasured abuses.<sup>57</sup>

A senate resolution proceeded to allege that the Confederate authorities "hold in barbarous captivity many officers and soldiers of the United States, and refuse to exchange them except upon condition that they be allowed to retain such of our soldiers as they call Negroes, and such of our officers as have commanded Negro troops."<sup>58</sup>

Jefferson Davis himself blithely admitted at least a part of the allegations. The Confederate government, he explained, did not discriminate against Negroes qua Negroes but against Negroes qua slaves and the property of Southern slaveholders. As summed up by the Confederate President:

The government of the United States contended that the slaves in their ranks were such no longer; that it was bound to accord to them, when made prisoners the same protection that it gave all other soldiers. We asserted the slaves to be property, under the Constitution of the United States and that of the Confederate States, and that property recaptured from the enemy in war reverts to its owner, if he can be found, or it may be disposed of by its captor.<sup>59</sup>

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57. Reproduction of news dispatch in HOWARD, *op. cit. supra* note 39.

58. 44 CONG. GLOBE 118 (1864). Cf. HIGGINSON, *ARMY LIFE IN A BLACK REGIMENT* (1868).

59. 2 JEFFERSON DAVIS, *THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT*, 507.



In line with the developing notions of the justice of protective as distinct from vindictive retaliation, the federal command ordered the cessation of all prisoner exchanges until such time as the Confederate government should cease discrimination against colored "Union" prisoners.<sup>60</sup>

Specifications of charges in the second category were more numerous. Confederate action was believed to be motivated by "a determination . . . to subject those of our soldiers who were so unfortunate as to fall into their hands to a system of treatment which has resulted in reducing many of those who have survived and been permitted to return to us to a condition, both physically and mentally, which no language can adequately describe."<sup>61</sup> Specifically, the surviving prisoners returning from Confederate captivity, were said to present, in Buchenwald fashion, "literally the appearance of living skeletons."<sup>62</sup> Moreover, the crimes of starvation and neglect were said to have been the companions of brutality. Shooting and torture were claimed to be integral parts of Confederate prison camp routine.<sup>63</sup> In reply to these charges Confederate protagonists countercharged with similar allegations, denied the stopping of rations or explained it as brought on by necessity of scarcity.<sup>64</sup> They denied the general charge of cruelty but admitted the use of such terror devices as an arbitrary "deadline" in Fort Andersonville, for example, beyond which straying prisoners could be used for target practice by the sentries.<sup>65</sup>

The call for retaliation was again raised in response to the reports of Confederate cruelty. It was couched in terms of a modern and more enlightened theory of *lex talionis* in its stress upon the protection inherent in such action for federal soldiers. It provided a safety valve for the moral indignation of rising tensions. But it included a more sinister note in the bargain. Apprehensive of the poor physical condition of returning fed-

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60. OFFIC. REC., 2 Ser., VII, 62, 63.

61. See MOORE, REBEL REC. (Doc.) Rebel Barbarities (U.S. Congress, Joint Committee on the conduct of the War) 81.

62. *Ibid.*

63. See MORAN, *op. cit. supra* Note 56. Cf. *Trial of Major Henry Wirz*, note 18 *supra* and MOORE, REBEL REC., note 61 *supra*.

64. See the Confederate apologetics, in JEFFERSON DAVIS, *op. cit. supra* note 59, at 513.

65. See further Confederate apologetics in BRAUN, ANDERSONVILLE (1892). For a balanced contemporary appraisal of charges and countercharges, see HESSELTINE, CIVIL WAR PRISONS (1930).

eral prisoners who were frequently unfit for further combat, federal protagonists of retaliatory action were consciously striving to even the score by rendering a proportionate number of Confederate prisoners *hors de combat*.

The major available source for sanction theory is in the pages of the congressional record. The emerging mood is frequently one of clear-cut and pronounced hysteria.

Thus Senator Lane, speaking in support of a Senate resolution recommending retaliation, declared:

Now, sir, if this is to be a war of extermination let not the extermination be all upon one side. Mercy to felons and traitors is cruelty to our own soldiers in southern prisons . . . They now indulge in a system of warfare the most barbarous and atrocious known to the history of modern civilization, and they can do no worse if we resolve, in justice to our own soldiers to mete out to those we have captured from the rebel army their own measure; at least until they shall reform their conduct in reference to our men. Will any act of ours further exasperate those felons, and traitors, and demons, in human shape?<sup>66</sup>

An overtly vindictive as distinct from a protective mood became apparent with the introduction of a resolution for retaliation which took cognizance of a petition by citizens of Indiana praying for the passage of a law "to place all rebel prisoners now in our hands under the control of those officers and men who have been in rebel hands."<sup>67</sup>

While resistance to the acceptance of the principle of indiscriminate prisoner retaliation was registered from time to time,<sup>68</sup> this resistance was generally brushed aside. Since the confederacy was deemed engaged in the deliberate design of reducing "Union" manpower by the starvation of prisoners, military necessity was invoked to justify an identical procedure. This was stated with remarkable candor by Congressman Wade:

Sir, I have no doubt . . . that it is a deliberate purpose of theirs to destroy every prisoner that comes into their

66. 45 CONG. GLOBE 268 (1865).

67. *Id.*, 307.

68. See expression of views by Congressman Hendricks, *id.*, 364: "I am free to say I do not feel that the condition of my friends in the southern prisons will be made any better, and they be made any happier, by seeing some men in our prisons here in the north starved to death." Or again, *id.* 382 in the words of Senator Sumner: "I believe that the Senate will not undertake in this age of Christian light, under any inducement, under any provocation, to counsel the Executive Government to enter into any such competition with barbarism."

hands. They do not intend that he shall be returned to us in such a condition that he can ever again take the field. Their inhuman treatment is probably owing more to this consideration than mere feelings of malice. It is a system of savage policy, and it has had a most powerful effect on our army. Of the thousands of prisoners we have had in their hands scarcely one of them is ever returned to us in such a condition that he can take the field again; while on the other side the prisoners that come into our possession are treated precisely the same as our own soldiers are, and they go back refreshed, recuperated, and ready to take the field against us, every man of them. I have no doubt that a prompt and stern resort to retaliation will have . . . beneficial effect.<sup>69</sup>

On January 31, 1865, the Senate passed a resolution stipulating that "the executive and military authorities of the United States are hereby directed to retaliate upon the prisoners of the enemy in such manner, in conformity with the laws and usages of war among civilized nations, as shall be effective in deterring him from the perpetration in future of cruel and barbarous treatment of our soldiers."<sup>70</sup> The hope was expressed that Confederate atrocities would now cease.<sup>71</sup> The stage was set for the trial and punishment of both the authors and the perpetrators of this "sum of . . . villainies."<sup>72</sup>

#### THE POST-WAR THEORY OF CRIME AND PUNISHMENT

"That justice should not fail of its purpose" war crimes trials were insisted on with vigor and consistency. They were conceived as fulfilling only secondarily the function of punishment for the great conspiracy of the "rebellion" of which the war crimes were but minor parts. The conspiracy theory therefore became predominant. It is interesting to note that in the only major war crimes prosecution in post-war days for atrocities and prison brutalities, Jefferson Davis and other Confederate leaders were, prior to the amendment of the indictment,<sup>73</sup> named as co-conspirators whose alleged intent was "maliciously, willfully and traitorously . . . to injure the health and destroy the lives of soldiers in the military service of the United States . . .

69. *Id.* at 364.

70. *Id.* at 520, 522.

71. *Id.* at 522.

72. See note 18 *supra*.

73. The Trial of Captain Henry Wirz, 8 AMERICAN STATE TRIALS 657, 873.

(confined) in the military prisons" of the Confederacy<sup>74</sup> The case is known as *The Trial of Henry Wirz*. The enumeration of the specific acts charged included a series of purely wanton cruelties toward prisoners, the stopping of rations, the establishment of a "dead-line" beyond which prisoners not bent on escape were shot at will, punishment by stocks and chain-gangs, the use of blood-hounds for the recapture of fugitives<sup>75</sup> as well as direct and unprovoked killing, coupled with general neglect and overcrowding.

That one of the major motivations of the prosecution was to link the whole Confederate government to the war crimes became more apparent as the trial progressed. It began with the introduction of evidence that the Confederate military superiors of the defendant both condoned and encouraged the commission of all those acts,<sup>76</sup> and went on to implicate the Confederate government by statements of alleged co-conspirators to the effect that "President Davis had some knowledge of it."<sup>77</sup>

The defendant, who emerges in a thoroughly unsympathetic light, even when portrayed by his friends,<sup>78</sup> admitted intolerable camp conditions, but disclaimed responsibility, denied the commission of specific murders, and relied on the defense of superior orders as his shield against the charges of a cruel and perverted discipline. The prosecution demanded the rejection of the defense of superior orders<sup>79</sup> and was sustained by the military commission almost a century before the Nuremberg proceedings.<sup>80</sup>

Since deterrence was no longer a vital factor after the conclusion of hostilities, no pretence was made to be actuated by it in the prosecution. If a specific theory of punishment was formulated at all it was analogous to the Kantian concept of "absolute justice." But no specific theory was explicitly stated.

74. *Id.* at 671. See also *Trial of Henry Wirz*, Executive Documents No. 23, 40TH CONG., 2d SESS. THE DEMON OF ANDERSONVILLE OR THE TRIAL OF WIRZ (1865).

75. An interesting case relied upon by prosecution and defense alike is *Moran v. Davis*, 18 Ga. 722 (1855) where the trial court finding for the plaintiff, held that an overseer had no right to chase slaves with such dogs as might lacerate them, and the appellate court reversed.

76. *The Trial of Captain Henry Wirz*, note 73 *supra*, 792, 793.

77. *Id.* at 796.

78. See BRAUN, *ANDERSONVILLE* (1892).

79. *The Trial of Captain Henry Wirz*, note 73 *supra* at 871.

80. *Proceedings of International War Crimes Tribunal*, London (1945).

Solely pronounced was the moral indignation of the sanction invoking response. An inflammatory prosecution address dubbed the defendant as not "entitled to the human name"<sup>81</sup> and likened him to a monster to whom "to shed human blood was . . . the only important business and the only exhilarating pastime of life."<sup>82</sup> The reduction of popular tension levels by the sight of villainy brought to bay and justice triumphant became an avowed objective. It was given official approval by a verdict of guilty and the confirmation of the sentence of death by President Johnson.<sup>83</sup> It was not unnatural, therefore, that execution of this minor member of the Confederate conspiracy should be followed by a call for the punishment of the author of the "sum of villainies," Davis himself.

Clamors for the speedy prosecution of the Confederate leader were raised in Congress almost from the time of his capture by "Union" forces.<sup>84</sup> The urgency of his punishment was underscored by the belief that over and above his acts of treason he had "put to death by the slow torture of starvation in rebel prisons sixty thousand brave men who went forth to peril their lives in saving the country from his devilish crusade against it. (that) he . . . (had) deliberately sought to introduce into the United States and to nationalize among us pestilence, in the form of yellow fever . . . (that) he . . . (had) instigated the burning of our hotels . . . planted infernal machines in the track of his armies . . . , poisoned our wells . . . (and) . . . made drinking cups of (enemy) skulls and jewelry of their bones."<sup>85</sup> The descriptive extravagance, to use no stronger expression, speaks for itself, as far as its factual reliability is concerned.

As far as its essential motivation is concerned it presents a classic illustration of a projection of guilt coupled with the projection of the demand for punishment, expressed in the more traditional vengeance motif, recurring in the portrayal of the Confederate leader as nothing more nor less than "an incarnate demon . . . (who unleashed) the whole contagion of hell,"<sup>86</sup> a "human monster" who should be hanged "in the name of the

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81. *The Trial of Captain Henry Wirz*, note 73 *supra* at 754.

82. *Id.* at 825.

83. *The Trial of Captain Henry Wirz*, note 73 *supra* at 873, 874.

84. See Senate Resolution in 46 CONG. GLOBE 108 (1865).

85. Congressman Julian in 46 CONG. GLOBE 2283 (1866).

86. *Id.* at 2284.

most high."<sup>87</sup> His "transcendent and unutterable guilt"<sup>88</sup> was deemed axiomatic and his execution demanded in a House resolution clamoring for his speedy trial as an inexorable result—"when," not "if" found guilty.<sup>89</sup> An "if" for the "when" was not substituted for several weeks in an amendment.<sup>90</sup>

The call for condign punishment of the malefactor was moreover grounded in three rationally articulated theories, at least two of which were drawn from the traditional framework of sanction theories.

The theory of absolute justice expounded by Kant in terms of the "categorical imperative"<sup>91</sup> was first. This is generally formulated as an abstract demand for the assertion or reassertion of principle and was so viewed by its proponents in Congress. Punishment was thus demanded "in order that the constitution and the laws may be fully vindicated, the truth clearly established and affirmed that treason is a crime and that the offense may be made infamous."<sup>92</sup> While this theory contained elements of deterrence, it was claimed to be strictly divorced from the quasi-religious overtones of its sister-theory of atonement or moral expiation for crime.<sup>93</sup> The government, it was said, "has nothing to do with degrees of moral guilt or blameworthiness."<sup>94</sup> It was concerned largely with the prevention of crime.<sup>95</sup>

The classical theory that punishment be nicely proportioned to the act, discarded by some,<sup>96</sup> was invoked by others. Beccaria, quoted by proponents and opponents alike<sup>97</sup> became authority for the attempt at making the punishment fit the crime and the resolution demanding that "*just and adequate* penalties be annexed to the violation of law."<sup>98</sup>

By far the most fascinating theory of punishment was that

87. *Ibid.*

88. *Id.* at 2283.

89. *Id.* at 138.

90. *Id.* at 482.

91. See KANT, *PHILOSOPHY OF LAW*, 195.

92. See 46 CONG. GLOBE 100.

93. *Id.* at 2283.

94. *Ibid.*

95. *Ibid.*

96. *Ibid.*: "(The Government) have nothing to do with that retributive justice which graduates the punishment of each transgressor by the exact measure of his guilt."

97. *Id.* at 2284.

98. *Id.* at 2724. Cf. BECCARIA, *CRIMES AND PUNISHMENT* (1809).

which was based upon the assumption that criminal sanctions should be used as instruments of social change and that the severity or mildness of the sanction be made contingent upon the social objectives and circumstances of the moment without regard to either the personal "depravity" or "nobility" of the offender. Thus punishment was demanded for the explicitly utilitarian reason that, "without it, the rebellion itself, instead of being effectually crushed, must find a fresh incentive to renew its life in its impunity from the just consequences of its guilt."<sup>99</sup> In this view, Jefferson Davis was not necessarily a personal monster, but rather "a representative man of the rebellion."<sup>100</sup> And to crush the spirit of the rebellion it became necessary to crush its "representative man." Only thus could "the majesty of the law" be vindicated, "the confidence of loyal people" sustained, and "the refractory" warned for all time to come.<sup>101</sup> Linked to this theory was the further argument that the punishment of Davis would fulfill the further function of securing authoritative judicial settlement of the question whether any state "of its own will has the right to renounce its place in the Union."<sup>102</sup>

It is wrong, however, to think of these theories as neatly compartmentalized or mutually exclusive. The reverse is true. Throughout the protracted congressional discussion on punishment, all of these theories were hopelessly intermingled, sometimes even in a single speech.<sup>103</sup> It is the intermingling of the theories in mutually contradictory ways which establishes beyond reasonable doubt their use as mere rationalizations for basic drives of an irrational nature, including the drive for vicarious punishment.

The final prosecution of Jefferson Davis, as approved by the government, was one for treason with the avowed hope of securing an adjudication that secession was a crime.<sup>104</sup> It was preceded by Congressional debate over venue requirements of the case and the statement of the theory over the objection of

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99. 46 CONG. GLOBE 2283.

100. *Id.* at 100.

101. *Id.* at 2724.

102. *Id.* at 100.

103. See Congressman Julian's discourse, *Id.* at 2282 *et seq.*

104. For a good account of the mechanics of the attempted prosecution of Jefferson Davis see R. F. Nichols' "United States v. Jefferson Davis," 31 AMERICAN HISTORICAL REVIEW 266.

the Attorney General,<sup>105</sup> that in view of Davis' position of command and the universality of the effect of his actions, no venue requirements were applicable and he could be deemed to have been "constructively present" in any Northern state, for purposes of trial.<sup>106</sup>

The political machinations surrounding the prosecution are not within the scope of a study of sanction theory.

The trial of the Confederate leader was abandoned. Pleas of *nolle prosequi* were entered for the government. The President declared an unconditional pardon.<sup>107</sup> The first major American experiment with war crimes punishment had come to an end.

### CONCLUSION

A review of the completed experiment permits the drawing of several conclusions.

Abundant evidence is available to justify the statement that the disregard of democratic values and particularly the respect for human dignity was consistently manifested by the military cliques of both sides. Regardless of the underlying Northern motivations, the "Union" engaged in a competition of barbaric extremes with efficiency and gusto.

Abundant evidence, too, is available to justify the statement that Congressional hysteria was not an impotent factor in this field and that the dominance of the mob spirit in Congress became patent.

Some evidence, at least, is available to justify the belief that Northern action was explainable in terms of a projection of guilt and the compulsive urge for vicarious atonement by the punishment of Southern offenders.

One concludes regretfully that the lesson to be drawn from this study is not likely to be taken to heart in the present situation. One may add, in all charity, that an age of mental and emotional instability may present the policy makers of both East and West with a possibility of the pleas of mental and emotional defects and abnormalities which, however, are short of the standard of complete exoneration, in extenuation of their high offense before a higher judgment.

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105. See 46 CONG. GLOBE 567.

106. *Ibid.*

107. 15 U.S. STAT. AT LARGE 711.



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