

BETWEEN SELF-DEFENSE AND VENGEANCE/ BETWEEN SOCIAL CONTRACT AND MONOPOLY OF VIOLENCE

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“The political theory we choose,”¹ as George Fletcher has insisted, “will invariably shape our answers to innumerable questions about what should be punished, when nominal violations are justified, and when wrongdoing should be excused.”² Criminal law is not just an exercise in the identification and punishment of bad acts. It is an application of state power. This means that our sense of the proper scope and function of state power will inevitably dictate much of our attitude toward criminal law. It also means that a true criminal law scholar (at least one who aspires to be like George Fletcher) must be prepared to put in some long hours working through the problems of political philosophy.³

Well, few of us can aspire to do work as sage as George’s. Nevertheless, in this essay, doing my best to be like George, I am going to try to connect some of the problems of criminal law to larger problems of political theory. In particular, I want to comment on the part played, in both fields, by the tension between *self-defense* and *vengeance*.

Criminal lawyers are perfectly familiar with the idea that there is some tension between the social norms of vengeance and the legal norms of self-defense. Fletcher has done a better job than anybody else of explaining why. As he observes, the world of criminal law is one in which actors frequently seek vengeance. Yet it is also a world in which they must frequently find some way to claim *self-defense* if they are to escape criminal punishment:

In cases of interpersonal as well as international violence, the outbreak might be neither defensive nor preemptive. It could be simply a passionate retaliation for past wrongs suffered by the person resorting to violence. Retaliatory acts seek to even the score—to inflict harm because harm has been suffered in the past.

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1. George P. Fletcher, *The Nature and Function of Criminal Law*, 88 Cal. L. Rev. 687, 700 (2000).
2. *Id.*
3. *See id.*

Those who defend the use of violence rarely admit that their purpose is retaliation for a past wrong. The argument typically is that the actor feared a recurrence of the past violence, thus the focus shifts from past to future violence, from retaliation to an argument of defending against an imminent attack. This is the standard maneuver in battered-wife cases. In view of her prior abuse, the wife arguably has reason to fear renewed violence. Killing the husband while he is asleep then comes into focus as an arguably legitimate defensive response rather than an illegitimate act of vengeance for past wrongs.⁴

As this passage suggests, the desire for vengeance is often at the root of violent acts. Yet we do not regard that desire as legitimate. Quite the contrary: as Victoria Nourse has recently argued, our doctrines of criminal law grow precisely out of “the need for a liberal polity to control vengeance.”⁵ Since we reject the legitimacy of vengeance, we compel actors who have committed violent acts of vengeance to justify or excuse those acts in the language of “self-defense.” There is thus a kind of mismatch between our criminal law doctrine and the human motivations that give rise to violent crime.

That mismatch is my subject in the first two parts of the essay. In particular, following the lead of Nourse, I am going to focus on our law of justification and excuse.⁶ Those doctrines—doctrines profoundly influenced by the pioneering work of Fletcher in his *Rethinking Criminal Law*⁷—have been the subject of vibrant debate for two decades in American law. Yet our accounts of the law of justification and excuse often seemed forced and unsatisfying. In the first two parts of this essay, I will argue that the unsatisfying state of our law of justification and excuse has something to do with the tension between vengeance and self-defense. Our doctrines are frequently strained because they fail to grapple directly and unembarrassedly with the logic of vengeance that drives much of human behavior.

But the problems of the tension between self-defense and vengeance are by no means confined to the doctrinal world of criminal law. They are also the problems of political theory. In particular, as I want to show in the latter parts of this essay, the contrast between two leading theories of the state—social contract theory and monopoly of violence theory—is intimately related to the tension between self-defense and vengeance that haunts our analyses of criminal law. In fact, it is impossible to think clearly about the political foundations of criminal law unless we recognize how closely our political theories are linked to the problems of criminal law when it comes to vengeance and self-defense.

Criminal law scholars sometimes speak as though these two theories amount to the same thing. This is notably true of Nourse, who, partly inspired by

4. George P. Fletcher, *A Crime of Self Defense: Bernhard Goetz and the Law on Trial* 21-22 (Free Press 1988) [hereinafter Fletcher, *Self-Defense*]; George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. Pitt. L. Rev. 553, 558 (1996) [hereinafter Fletcher, *Domination*].

5. V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. Pa. L. Rev. 1691, 1691 (2003).

6. *See id.* at 1703-20.

7. *See* George P. Fletcher, *Rethinking Criminal Law* 759-875 (Little, Brown & Co. 1978).

Fletcher,⁸ published a shrewd and provocative article on the connections between political theory and criminal law in 2003. To Nourse, the problems of the monopoly of violence are obviously no different from the problems of social contract: Both involve the efforts of the state to quash individual attempts at exacting revenge.⁹ Thus, the appropriate political theory for criminal law, in her eyes, is a kind of mixed social contract/monopoly of violence theory. Such a theory, she argues, allows us to understand the deep issues of governance at work in the criminal law—issues that turn on the question of when the state may forbid individuals to “[take] the law into [their] own hands.”¹⁰

And indeed, it is natural to suppose that social contract and monopoly of violence are variations on the same political theme. In fact, though, as I want to show, the social contract and monopoly of violence theories stand in a real and important contrast. The basic contrast is this: the classic tradition of social contract justifies state coercion on the argument that each person has a *natural right of self-defense*, which he surrenders to the state through the social contract. Thereafter, it is the state that ministers to the collective need for self-defense, through the criminal law. Such are the Lockean¹¹ and Kantian¹² theories with which criminal law scholars are all familiar. The monopoly of violence tradition starts from a provocatively different picture of the world. The starting point for classic monopoly of violence thinking is not the putative natural right of self-defense, but the putative *natural right to do vengeance*. Human beings cannot be denied their right to take vengeance, the theory holds. This has important implications for the role of the state. That role is not precisely to suppress violence. Instead, it is the role of the state to exact vengeance on behalf of its citizens. A monopoly of violence theory, in its most common form, is thus a theory of social vengeance.

I hope to convince my readers that this difference between these two theories has real significance for our thinking and teaching about criminal law. We must maintain a clear distinction in our minds between theories founded in collective self-defense and theories founded in collective vengeance. Appealing and natural though it may seem to think of social contract and monopoly of violence as more or less the same theory, our understanding of criminal law will be far shakier if we do not understand how deeply different they are. So will our understanding of the political order: Without the wisdom of the criminal law, political theory too is a poorer thing.

I should offer one caution at the beginning. This is an essay that will play with disturbing ideas. In particular, I plan to take seriously the claims of people who believe that there is such a thing as a natural right to do vengeance. It is

8. See Nourse, *supra* n. 5, at 1703.

9. See *e.g. id.* at 1704-05, 1736-39.

10. See *id.* at 1704 (quoting Jay Maeder, *The Subway Vigilante*, N.Y. Daily News 79 (Nov. 8, 2001)) (internal quotations omitted).

11. See *infra* text accompanying n. 68.

12. *E.g.* Guyora Binder, *Punishment Theory: Moral or Political?*, 5 *Buff. Crim. L. Rev.* 321, 352 (2002).

perhaps important to insist at the beginning, accordingly, that I mean to *play* with these ideas, and not to endorse them. This essay—in case anyone should think otherwise—is not intended as a plea for the legitimacy of vengeance. It is intended as something different: as an effort to wrestle with what is, sadly enough, the authentic attractiveness of vengeance.

I. ON SEEKING VENGEANCE WHILE CLAIMING SELF-DEFENSE

As we all know, human beings often act as though they had a right to exact vengeance for the wrongs they have suffered. We also all know that contemporary American law is generally reluctant to acknowledge the legitimacy of any such supposed right. The result is a recurrent tension, one that can be seen in many areas of the law.

That tension is by no means limited to the criminal law. In civil matters, for example, it is clear enough that parties often litigate in order to get vengeance of some kind. “Ordinary compensatory damages,”¹³ write Marc Galanter and David Luban, “may be pursued for purposes of vengeance, retribution, or vindication. This point underlies the usually facetious folk usage, ‘I’ll sue him for everything he’s got,’ as well as the witticism, ‘The best revenge is suing well.’”¹⁴ It is presumably out of this desire for “vengeance, retribution, or vindication” that parties press on with lawsuits that are losing financial propositions.¹⁵ Yet if parties litigate in order to get vengeance or satisfaction, American law does not generally respond by offering remedies tailored to those desires. In particular, our legal system, unlike some others, does not offer such remedies as the court-ordered apology.¹⁶ Instead, we relegate parties to money damages. There is thus a mismatch between our law of remedies, on the one hand, and the aims of our civil litigants, on the other. This mismatch arguably imposes a considerable social cost in the form of senseless litigation, as parties who might be satisfied with some form of verbal or ritual vindication pursue the imperfect substitute of money damages instead.

The same sort of mismatch can be seen in criminal law as well. Indeed, many of the leading conundra of criminal law involve precisely the problem of vengeance. This is especially true of one class of cases: cases that present problems of excuse and justification. The difference between excuse and justification has been debated voluminously over the last few decades—largely, of course, in the shadow of the influential work of George Fletcher.¹⁷ What is

13. Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am. U. L. Rev. 1393, 1406 (1993).

14. *Id.* (footnote omitted).

15. See David M. Engel, *Legal Pluralism in an American Community: Perspectives on a Civil Trial Court*, 1980 Am. B. Found. Res. J. 425, 452.

16. See Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 Law & Socy. Rev. 461, 478-88 (1986) (contrasting Japanese and American law).

17. See e.g. Fletcher, *supra* n. 7, at 759-875; Russell L. Christopher, *Mistake of Fact in the Objective Theory of Justification: Do Two Rights Make Two Wrongs Make Two Rights . . . ?*, 85 J. Crim. L. &

striking, as we work through this literature, is how frequently it seems to touch on the same great theme of the human urge for vengeance—and how clearly the literature seems to suggest that our doctrines of criminal law are poorly suited to analyzing that urge.

The most familiar examples come from the world of sexually charged homicides. Courts have often been asked to go easy on the husband who kills the spouse who cheats on him,¹⁸ or the abused wife who kills her sleeping husband,¹⁹ or the man who kills in response to a homosexual advance.²⁰ These are cases that provoke ceaseless debate among criminal law scholars, who differ over whether they present questions of justification (especially the justification of self-defense), excuse (such as extreme emotional disturbance), or some intermediate construct like “the excuse of self-defense.”²¹

Yet one often feels that the language of justification and excuse simply fails to capture what is really going on in such cases. These are not, often enough, cases of persons who have suffered direct physical aggression. Nor are they necessarily cases of persons who have lost all self-control under the impact of emotional distress. Instead, they frequently seem to belong, all too clearly, to a world of offended honor and angry (or calculating) vengeance. Some of them seem to belong to the world of sexual honor—a world well understood by anthropologists and sociologists.²² This is of course especially true of cases involving cuckolds and men whose sexual honor has otherwise been challenged.²³ Some of the cases, especially those of battered women, seem to involve honor and vengeance in a somewhat different way: They are cases, like the infamous one of Judy Norman, in which the defendant struck back after years of horrific humiliation.²⁴ Cases involving sex are often indeed cases that touch on honor and vengeance, humiliation and self-assertion.

Not all cases touching on honor and vengeance involve sex, though. The pattern is found all over the landscape of criminal violence. As James Gilligan puts it in explaining the psychological roots of violent crime, “[w]hen individuals and groups feel their ‘honor’ is at stake, and an intolerable degree of humiliation or ‘loss of face’ would result from a failure to fight for that honor, they may act

Criminology 295, 297-99 (1994); George P. Fletcher, *The Right and the Reasonable*, 98 Harv. L. Rev. 949, 954-64 (1985); Symposium, *Justifications, Excuses, and Just Deserts*, 33 Wayne L. Rev. 1155 (1987).

18. See Sanford H. Kadish & Stephen J. Schulhofer, *Criminal Law and Its Processes: Cases and Materials* 405-15 (7th ed., Aspen L. & Bus. 2001).

19. See *State v. Norman*, 378 S.E.2d 8 (N.C. 1989).

20. See Joshua Dressler, *When “Heterosexual” Men Kill “Homosexual” Men: Reflections on Provocation Law, Sexual Advances, and the “Reasonable Man” Standard*, 85 J. Crim. L. & Criminology 726 (1995).

21. For discussion, see for example, Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 Yale L.J. 1331 (1997) (changing application of provocation defense); Dressler, *supra* n. 20; and Symposium, *Self-Defense and Relations of Domination: Moral and Legal Perspectives on Battered Women Who Kill*, 57 U. Pitt. L. Rev. 461 (1996).

22. For a fine discussion, with citations to further literature, see Robert A. Nye, *Masculinity and Male Codes of Honor in Modern France* 3-13 (Oxford U. Press 1993).

23. See e.g. *Girouard v. State*, 583 A.2d 718, 719 (Md. 1991) (noting that defendant was subjected by victim to a “barrage of insults” and called “a lousy fuck”).

24. See *Norman*, 378 S.E.2d at 9-10.

violently.”²⁵ Elijah Anderson makes much the same observation in his *Code of the Street*,²⁶ describing the violent inner city world whose values turn on respect, honor, and vengeance—and on the sense that African-Americans are systematically shown disrespect by the criminal justice system:

The criminal justice system is widely perceived as beset with a double standard: one for blacks and one for whites, resulting in a profound distrust in this institution. In the most socially isolated pockets of the inner city, this situation has given rise to a kind of people’s law based on a peculiar form of social exchange that is perhaps best understood as a perversion of the Golden Rule, whose by-product in this case is respect and whose caveat is vengeance, or payback. Given its value and its practical implications, respect is fought for and held and challenged as much as honor was in the age of chivalry.²⁷

Humiliation and domination, disrespect and respect, honor and vengeance: This is the human stuff of violent crime, just as it is arguably the human stuff of punishment.²⁸

Our first instinct, of course, may be to dismiss the pursuit of vengeance as irrelevant to the policies of the criminal law: The fact that people desire violent vengeance, we might say, hardly implies that the criminal justice system must respect that desire. Yet the problem is tougher than that. In point of fact, there is a reputable body of philosophical thought that argues that vengeance is conceptually inseparable from justice itself. In particular, there is a tradition of Hegelian thought. Hegelians have frequently argued that the desire for vengeance is a desire for a kind of justice: Indeed, they have said, the idea of “justice” itself is incomprehensible unless we recognize, at its root, an attachment to the norms of “eye for eye, tooth for tooth”²⁹—to norms, that is, of vengeance.³⁰ The “urge to avenge wrong,” as a distinguished historian has recently put it, “may indeed be hardwired into the human psyche”; and it is an urge that presupposes a concept of “injustice.”³¹ Vengeance, according to this view, is not just about senseless violence. It reflects widespread human notions about the nature of justice— notions that must, on some level, be embraced if we are to have a truly just criminal law.

25. James Gilligan, *Violence: Our Deadly Epidemic and Its Causes* 97 (G.P. Putnam’s Sons 1996).

26. Elijah Anderson, *Code of the Street: Decency, Violence, and the Moral Life of the Inner City* (W.W. Norton & Co. 1999).

27. *Id.* at 66.

28. In this respect, the psychology of violent crime has a kinship with the psychology of punishment, as it has been analyzed by philosophers like Jean Hampton. Hampton insists that the practice of punishment is closely connected to our sense of humiliation and domination: We punish people who have treated themselves as our superiors. To the extent Hampton has it right, we can see a deep similarity between crime and punishment. Both, often enough, belong to the psychic world of humiliation and domination, honor and vengeance. Jean Hampton, *An Expressive Theory of Retribution*, in *Retributivism and Its Critics* 1 (Wesley Cragg ed., Franz Steiner Verlag Stuttgart 1992).

29. *Deuteronomy* 19:21 (King James).

30. See the material surveyed in James Q. Whitman, *At the Origins of Law and the State: Supervision of Violence, Mutilation of Bodies, or Setting of Prices?*, 71 *Chi.-Kent L. Rev.* 41, 58-69 (1995).

31. Paul R. Hyams, *Rancor & Reconciliation in Medieval England* ix (Cornell U. Press 2003).

The difficulty, if we accept this way of thinking about things, is that our criminal law is not designed to permit us to analyze these widespread notions of the justice of honor and vengeance on their own terms. When we speak of justification, we do not speak of justified *vengeance*. We are unwilling to acknowledge any conceptual link between vengeance and justice.

Our inability to analyze vengeance on its own terms is particularly noticeable in our doctrines of excuse. Those are generally doctrines of uncontrolled emotionality or irrationality of some kind.³² Yet the practice of vengeance can be different: As the French saying goes, vengeance, to those who really understand how to get satisfaction, “is a delicacy to be eaten cold.”³³ Vengeance is frequently a phenomenon of calculation. Vengeance has a *logic*, a logic governed by rules, not by the sorts of disordered emotions that prevent us from engaging in rule-bound behavior. Indeed, the logic of vengeance is familiar in most human societies.³⁴ It even appears in quasi-codified forms, such as the Code Duello which governed the practices of dueling in bygone centuries.³⁵

Yet our criminal law, like our civil law, has few ways of addressing the logic of vengeance frankly and analytically. Instead it speaks the language of justification and excuse. Just as our civil law offers money damages to parties who often seem to want something else, our criminal law proposes to go easy on defendants who can claim “extreme emotional disturbance” or “self-defense”—when what those defendants really want to claim is “justified vengeance.” Our law simply does not offer an analytic vocabulary that would allow us to frame questions of criminal responsibility in terms of the logic of vengeance as such.

In this respect, our contemporary analytic vocabulary differs strikingly from the analytic vocabulary of earlier generations. Our ancestors took claims of honor seriously—seriously enough to develop a jurisprudence of vengeance that distinguished between rightful and non-rightful vengeful acts. Thus many pre-modern systems distinguished between honorable homicides—those committed through open aggression, on fair terms—and dishonorable homicides—those committed through poisoning, lying in wait, and the like.³⁶ Even in the nineteenth century, juries in countries like France applied the Code Duello as a de facto

32. For a skeptical analysis of this feature of our law of excuse, see Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 Colum. L. Rev. 269, 358 (1996).

33. “La Vengeance est un plat qui se mange froid.” This is often attributed to Choderlos de Laclos, *Les Liaisons Dangereuses*. The earliest reference I find attributes the quote to Talleyrand: André Theuriot, *La Maison des deux Barbeaux* 48 (Ollendorff 1879) (“son amour-propre froissé lui mit au coeur une âcre rancune doublée d’un violent désir de vengeance. Il n’en fit rien voir, estimant, comme M de Talleyrand, que la vengeance est un mets qui se mange froid . . .”).

34. See the comparative studies collected in *La Vengeance: Etudes d’ethnologie, d’histoire et de philosophie*, vols. 1 & 4 (Raymond Verdier & Gérard Courtois eds., Cujas 1980-1984).

35. For discussion of these norms, see James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 Yale L.J. 1279, 1317-22, 1361-63 (2000).

36. “Lying in wait” hangs on in many of our statutes, of course, but it has lost its earlier connotations. For a survey of its use today, see D.A. Cox, *Homicide: What Constitutes “Lying in Wait,”* 89 A.L.R.2d 1140 (1963). Early Roman homicide law also targeted the dishonorable killings by knifemen and poisoners. For a discussion of the Lex Cornelia de Sicariis et Veneficiis, see O.F. Robinson, *The Criminal Law of Ancient Rome* 41-46 (Johns Hopkins U. Press 1995).

species of law.³⁷ Or to take another example, well into the twentieth century, Brazilian law continued to display a kind of obsession with female sexual honor in cases of criminal “deflowering.”³⁸ We do not take vengeance and honor seriously enough to do that sort of thing. Vengeance, in our eyes, makes no legally cognizable sense.

Yet human beings continue to seek vengeance—which means that our law is often poorly fitted to the underlying patterns of human behavior it aims to regulate. This has arguably contributed to the making of a criminal law that seems, to many commentators, to be plagued by disingenuous doctrines. This is most famously true of our law of excuses. Our resistance to frank talk about vengeance has contributed to the making of a criminal law marked by “abuse excuses”³⁹ and multiplying “syndromes.”⁴⁰ But it is also true of our law of justification. Indeed, it is in the law of justification that our doctrines have taken some of their oddest and most misshapen forms—especially when it comes to self-defense. There is, for example, the strange American rule granting a right of self-defense to persons who feel sexually threatened,⁴¹ and the sometimes distressingly loose American doctrine of “imperfect” self-defense.⁴² Fletcher’s topic in the passage I quoted at the beginning of this essay, the battered woman defense, presents the most frequently discussed example of the doctrinal pressures our law has put on the concept of self-defense. The battered woman, we will say, may not in fact have been imminently threatened by her sleeping husband. Nevertheless, years of abuse had put her in such a state of fear that she reasonably believed her personal safety was in danger. So her act was justified. This is a very forced argument, but it is typical of the forced arguments we find throughout American law. We refuse to accord any legitimacy to the desire for vengeance; and as a result we have a criminal law that ties itself into ungainly doctrinal knots.⁴³ Indeed, our theories of justification and excuse sometimes resemble the epicycles of Ptolemaic astronomy. Just as the ancient astronomers strained to fit their geocentric theories to the observed data of the sky, so we strain to fit our criminal law doctrines to the observed patterns of human behavior.

The examples from criminal law are familiar to all of us who teach the subject; but we should not imagine that criminal law is the only realm where the pattern can be found. As Fletcher rightly says, the pattern exists in particularly revealing form in the law of war as well. There too we often claim self-defense

37. Whitman, *supra* n. 35, at 1362.

38. Sueann Caulfield, *In Defense of Honor: Sexual Morality, Modernity, and Nation in Early-Twentieth-Century Brazil* 1-47 (Duke U. Press 2000).

39. See Alan M. Dershowitz, *The Abuse Excuse: And Other Cop-Outs, Sob Stories, and Evasions of Responsibility* 3 (Little, Brown & Co. 1994).

40. See Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 *Duke L.J.* 461 (1996).

41. See e.g. N.Y. Penal Law § 35.15(2)(b) (McKinney Supp. 2004).

42. See e.g. *Dykes v. State*, 571 A.2d 1251, 1254-56 (Md. 1990) (failing to focus on apparent gay-bashing angle in an “imperfect self-defense” case).

43. See generally Symposium, *supra* n. 21 (attempting to analyze “relations of domination” in battered wife cases using technical vocabulary of criminal law).

while in fact pursuing vengeance. In describing this pattern, Fletcher focuses on doctrines of preemption of the kind found in recent war-making.⁴⁴ States often justify their wars through strained appeals to the doctrines of self-defense. Fletcher offers a number of telling examples of this pattern. I would like to add one more example, dating to August 1939. It was in that terrible month that Hitler's SS dressed up some of its troops in Polish uniforms and had them stage an attack on a German radio post. In an act typical of a regime wedded to the "Big Lie" strategy of propaganda, the SS even put German uniforms on the corpses of a few concentration camp victims in order to claim that "Polish" invaders had killed German defenders.⁴⁵ The purpose of all this, of course, was to create a (utterly implausible) pretext for a war of self-defense.

We can all see that this was a contemptible way to behave on the international stage. But there is more to say about it than that. Why did the Nazis feel any obligation to engage in this risible bit of theater at all? It would have made perfect sense, in the eyes of the German public, and perhaps in the eyes of much of the rest of the world, to offer a justification sounding in vengeance. After all, there was still a widespread belief that Germany required vindication after the humiliation of the Treaty of Versailles. Indeed, Hitler's very political power in Germany had much to do with the belief that only he was capable of avenging the geopolitical insult of Versailles. Nevertheless, even Hitler felt the pressure to insist that he was acting in self-defense. In the law of war, as in criminal law, westerners prefer to pretend that they embrace only the most limited right to do violence—even when they are quite deeply convinced of their more far-reaching right to do vengeance. The logic of vengeance has a human reality, but it has no juridical legitimacy.

The pattern of criminal law belongs, indeed, to a general cultural pattern of western argument: We regularly claim to submit to the limits of the logic of self-defense, while in fact transgressing them—in Fletcher's words, we regularly claim to have engaged in a "legitimate defensive response rather than an illegitimate act of vengeance for past wrongs."⁴⁶ We recurrently engage in a kind of hypocrisy when it comes to our use of violence: Let us call it the self-defense hypocrisy.

II. IN DEFENSE OF OPEN VENGEANCE?

How should we respond to this cultural pattern? What should we say about a cultural tradition in which people seek vengeance while trying to claim that they are acting in self-defense? What can we say about a legal system that takes those claims seriously, at least some of the time? Doesn't all this amount to a deeply troubling form of collective legal hypocrisy?

44. Fletcher, *Self-Defense*, *supra* n. 4, at 20-22. Fletcher focuses on preemption in modern warfare, in ways that have an obvious application to American efforts to construct a doctrine of preemptive self-defense to justify the war against Iraq.

45. See Ian Kershaw, *Hitler: 1936-1945: Nemesis* 221 (W.W. Norton & Co. 2000).

46. Fletcher, *Domination*, *supra* n. 4, at 558.

Of course, there is more than one possible answer to these questions. One important response is to deny that there is anything wrong with the situation at all. Our law may indeed be systematically hypocritical in its invocations of self-defense. But the systematic hypocrisy of our law, we could argue, has beneficial effects. This sort of hypocrisy contributes to a "civilizing process," by which the law gradually trains citizens to abandon their attachment to vengeful feelings.⁴⁷

While I find that argument attractive, though, I will leave it for another occasion. Here, I want instead to highlight two other possible responses we might offer. Both involve forceful rejection of the sort of hypocritical invocations of self-defense we find in western law; and both, as I want to show, have played important roles in the history of western political theory:

- (1) First, we could insist that it is simply mistaken to accord any legitimacy to the desire for vengeance. It is always wrong to seek vengeance, we could say, and the criminal law should not allow the perpetrators of vengeance violence to escape punishment by twisting our doctrines of excuse and justification.
- (2) Second, we could try to eliminate the mismatch between our doctrine and the motivations of criminal offenders by according greater legitimacy to the desire for vengeance. Instead of having a law that leaves no room for vengeance, we could have a law that frankly endorsed the right to vengeance.

Both of these tacks have been taken, from time to time, within the western legal tradition. For the first, we can cite George Fletcher himself. Fletcher is a model of intellectual probity when it comes to hypocritical invocations of self-defense. Thus, when he addresses the question of battered women, he invokes the late Joel Feinberg. While it may be in some sense *just* that an abuser should suffer, says Fletcher, his abused spouse is not *justified* in administering the suffering herself. The impulse toward vengeance is simply not one that we regard as a legitimate ground for violence in the modern world.⁴⁸ An intellectually honest criminal law thus ought to reject the self-defense hypocrisy out of hand. This is surely right, as far as it goes. If it is true that criminal law must reject the impulse toward vengeance as a legitimate ground for violence, then a criminal law committed to clear thinking can never endorse specious invocations of a "justification" of self-defense.

Fletcher's objection is not the only possible one, though. We could also take the second of the tacks that I have described, attacking the self-defense hypocrisy by denying that criminal law should reject the legitimacy of acts of vengeance. If human beings have a natural tendency to seek vengeance, we might say, why should the criminal law not frankly acknowledge, and accept, that fact?

47. See Norbert Elias, *The Civilizing Process: Sociogenetic and Psychogenetic Investigations* (Eric Dunning et al. eds., Edmund Jephcott trans., rev. ed., Blackwell 1994).

48. Fletcher, *Domination*, *supra* n. 4, at 556.

Fletcher would probably regard this as a wholly sinister or barbaric position, as a throwback to pre-modern views that we have thankfully outgrown, and many Americans would probably agree with him. Nevertheless, we will not be able to take the full measure of the political theory of criminal law unless we give this position its due. Indeed, we must acknowledge that there are provocative philosophical reasons for taking the open embrace of vengeance seriously. Let me review three of them.

First, in defending the open embrace of vengeance, we might offer a version of the legal realist argument that Karl Llewellyn made familiar in his discussions of contract law. “Covert tools,”⁴⁹ as Llewellyn famously said, “are never reliable tools.”⁵⁰ His target was the abuse of contract doctrines in order to favor sympathetic parties. In the practice of contract law, as he saw it, courts regularly engaged in absurd distortions of standard doctrine. They did so because their sense of justice told them that a technically correct application of the doctrine would disfavor parties whose cause seemed intuitively just—most especially weaker parties. Llewellyn condemned this: If we want to favor weaker parties, he held, we should do it openly and frankly, engaging in candid and disciplined reflection on the intuitions about social justice that motivate us.

The same, it could be argued, is true of our criminal justice. We are arguably distorting the criminal law doctrines of excuse and justification in absurd ways, simply in order to favor parties whose desire for vengeance or vindication seems to us intuitively just. The result is not justice. The result is a spotty and inequitable practice of unsystematic acquittal and mitigation. Some offenders get off; some are punished harshly. This violates basic norms of horizontal equity, and it cries out for reform. In particular, the situation demands that we do what our pre-modern ancestors did, reflecting in a candid and disciplined way on the justice of vengeance. This certainly does not imply that we should necessarily acquit every vengeance seeker, or allow the desire for vengeance to mitigate responsibility in every case. It means only that we would explore our intuitions about the need for vengeance openly and systematically, finding intellectually honest ways to distinguish between those offenders we forgive—like, perhaps, Judy Norman—and those we do not forgive. It means only that we should return to the sort of law that dominated in the nineteenth century, when courts accepted the logic of vengeance as embodied in the Code Duello, and applied it as law.⁵¹

Second, alongside this legal realist argument, we might offer what could be called the argument from *moral* realism. Morality, we might say, imposes upon us an obligation of truthfulness. Don't we have some kind of duty to analyze the world as it really is? Isn't it better, not only to admit our own motives, but also to describe the motives of human beings in general frankly and honestly? That was

49. K.N. Llewellyn, *Book Reviews*, 52 Harv. L. Rev. 700, 703 (1939) (reviewing O. Prausnitz, *The Standardization of Commercial Contracts in English and Continental Law* (Sweet & Maxwell 1937)).

50. *Id.*

51. See Whitman, *supra* n. 35, at 1362.

the attitude of Friedrich Nietzsche.⁵² It is more recently the attitude explored with characteristic subtlety by the late Bernard Williams,⁵³ and arguably, it ought to be the attitude of all of us who believe in serious scholarship. Truthfulness is the right value for scholars to embrace. This suggests, when it comes to the justifications for violence, that we should approach the world in a spirit of frankness, unburdened by excessive moralizing: We should just admit that people are in fact out to do vengeance, and structure our analysis of the law accordingly. As we shall see shortly, this argument from moral realism has played a large role in the making of the monopoly of violence tradition.

Lastly, there is a third argument, one that is particularly disturbing. What is it, we might ask, that justifies a criminal law that is at war with human nature? If human beings believe in the legitimacy of vengeance, by what authority can the criminal justice system deny the legitimacy of their pursuit of vengeance? The criminal justice system is a human institution, and criminal law ought to be law for human beings as they are actually constituted. In effect, our existing law imposes a different standard: It requires humans to act in almost angelically “rational” and “moral” ways. Imposing such superhuman standards may be appropriate for churches; indeed, it is easy to discern that our criminal law, with its strong condemnations of violence and its focus on individual intent, is Christian in spirit. Our hostility to vengeance is, after all, not unrelated to the maxims announced in the Sermon on the Mount:

You have heard that it was said, ‘Eye for eye, and tooth for tooth.’

But I tell you, Do not resist an evil person.: If someone strikes you on the right cheek, turn to him the other also. And if someone wants to sue you and take your tunic, let him have your cloak as well. If someone forces you to go one mile, go with him two miles. Give to the one who asks you, and do not turn away from the one who wants to borrow from you.⁵⁴

In ways that are perfectly recognizable to any cultural historian, our criminal law is the product of centuries of Christian efforts to tame and discipline human nature. But is that appropriate? Efforts to transform human nature may be fine for the Church, we might say. The law, though, has no business engaging in any such project. It has no business requiring its human subjects to be anything other than human subjects. This disturbing third argument too, as we shall see, lies at the heart of the monopoly of violence tradition.

III. BETWEEN SOCIAL CONTRACT AND MONOPOLY OF VIOLENCE

These fundamental problems of criminal law are also fundamental problems of political philosophy. The same tensions between self-defense and vengeance that we find in sexually-charged homicides are found in the contrast between two

52. See Bernard Williams, *Truth & Truthfulness: An Essay in Genealogy* 12-19 (Princeton U. Press 2002).

53. See *id.*

54. *Matthew* 5:38-42 (New Intl.).

leading theories of the state, which are too often confused: social contract theory and monopoly of violence.

Both of these theories are at least somewhat familiar to any American criminal lawyer. Social contract theory has dominated American legal thinking since John Rawls's epoch-making *A Theory of Justice*.⁵⁵ As for the idea that the state claims a "monopoly of violence": That too has obvious connections with the intellectual world of criminal law, as Nourse has recently insisted. Any criminal law scholar hunting for wisdom in the literature of political sociology is likely to settle on the "monopoly of violence" as the formula most likely to shed light on the problems of criminal law.⁵⁶

Nevertheless, there is often real confusion surrounding these theories. This is not surprising: It is easy to leap to the erroneous conclusion that the two really amount to more or less the same thing. This is particularly true if we start from a careless reading of Hobbes's seminal version of the social contract idea. Hobbes, as we all know, began by postulating a state of nature in which there was a "warre . . . of every man, against every man."⁵⁷ It is very obvious that Hobbes believed that the state of nature was intolerable because it was too violent. Is it not right to describe his social contract theory as a theory of the "monopoly of violence"?

Well, yes and no; but for purposes of the analysis of criminal law, primarily no. To see why, we must dig more deeply into the natural rights theories that stand in the background of our theories of the state. In particular, we must carefully contrast two classic ideas in political theory: first, the idea that we have a natural right of self-defense, and second, that we have a natural right to do vengeance.

Let us begin with the idea that we have a *natural right of self-defense* or *self-preservation* when attacked. This is an argument with a long history, and a very reputable juristic pedigree. It is an argument that has relied heavily, over the centuries, on the texts of Roman law.⁵⁸ It is an inherently pacifistic argument, which by its logic limits the right to do violence fairly severely. To be sure, the argument from self-defense can certainly be said to justify some measure of violence. It has even been said, from time to time, to justify large-scale violent rebellion, notably in the Monarchomach literature of the sixteenth century.⁵⁹ Nevertheless, our right of self-defense has not typically been understood to license any violence beyond what is strictly necessary to preserve our physical well-being.

The argument from the *natural right to do vengeance*, by contrast, is considerably less pacifistic in tenor, and considerably less orthodox. It also has a

55. John Rawls, *A Theory of Justice* (rev. ed., Harv. U. Press 1999).

56. See Nourse, *supra* n. 5, at 1705.

57. Thomas Hobbes, *Leviathan* 88 (Richard Tuck ed., rev. student ed., Cambridge U. Press 1996).

58. E.g. *The Digest of Justinian* vol. 1, 278 (Theodor Mommsen & Paul Krueger eds., Alan Watson trans. & ed., U. Pa. Press 1985) ("[A]duersus periculum naturalis ratio permittit se defendere.").

59. See e.g. Stephanus Junius Brutus, *Vindiciae, Contra Tyrannos: Or, Concerning the Legitimate Power of a Prince over the People, and of the People over a Prince* xxxiv, 149 (George Garnett ed. & trans., Cambridge U. Press 1994).

less distinguished juristic pedigree. Western advocates of the putative right to do vengeance have not typically relied on Roman legal texts, or indeed on any narrowly legal texts. Instead, they have generally invoked one famous scriptural passage: the talionic injunction of the Covenant Code: “eye for eye, tooth for tooth.”⁶⁰ Indeed, it is helpful to think of the *right to do vengeance* literature as a literature that advocates Old Testament values against the New Testament values of the Sermon on the Mount.⁶¹ Unlike Christ, the advocates of the right to do vengeance have actively embraced and preached the rule of “eye for eye, tooth for tooth.” To be sure, that rule could possibly be interpreted as nothing more than an endorsement of the right of self-defense. But in the western tradition it has usually been read more broadly.⁶² The talionic rule has usually been read to confer a right of just violence that goes beyond limited self-defense rights—to require, not merely that we preserve ourselves, but that we harm others.

In defending this unsettling claim, advocates of the right to do vengeance have generally presupposed a certain picture of human nature. Unsurprisingly, it is the same picture of human nature we find in such texts as the Code Duello: It is a picture according to which *personal honor* is important, and indeed supremely important. Vengeance, as advocates of the right to do vengeance have understood it, is a response to insults, whether those insults are delivered to ourselves or to members of our families. The desire to avenge such insults, they insist, is universal in human nature: We all feel a need to demand compensatory vengeance “for insults we have suffered.” Indeed, the desire for vengeance is the original form of the human sense of justice, the original “urge to exact retribution for a violation of what is right.”⁶³

The right of self-defense, according to this view, is far too tame a juristic creation. After all, the norm of self-defense demands merely that we protect our *physical well-being*. Yet physical well-being is a thing of relatively slight importance to a person with a strong sense of honor. Vengeance demands more. Why, after all, must we gouge out the eye of the person who has gouged out our eye? For that matter, why must we avenge the death of our kinsman by slaying his killer? It is not to preserve our physical safety, which could be protected by fleeing. Instead, it is to preserve our self-worth. As a classic German statement put it, the spirit of vengeance requires “a constant readiness to do battle, to pay back every insult with the sword.”⁶⁴ According to this view of the world, the preservation of our self-worth—of our personal honor—may require considerable

60. *Deuteronomy* 19:21 (King James). For the centrality of talion, and its connection to supposed primitive norms of vengeance, see L. Günther, *Die Idee der Wiedervergeltung*, in *der Geschichte und Philosophie des Strafrechts* 1, 5-9 (Perier 1889).

61. See *Matthew* 5:38-40 (New Intl.).

62. See e.g. St. Thomas Aquinas, *Summa Theologiae* vol. 38, 49-53 (Marcus Lefebure trans., Blackfriars 1975).

63. Günther, *supra* n. 60, at 5 (“[D]er erste Antrieb, begangenes Unrecht zu ahnden, liegt in der Eigentümlichkeit der menschlichen Natur, für das erlittene Leid, für die zugefügte Kränkung vergeltende Rache zu üben.”).

64. Wilhelm Eduard Wilda, *Das Strafrecht der Germanen* 171 (Scientia Aalen 1960) (“stete[] Kampffertigkeit, welche dazu trieb, jede Beleidigung mit dem Schwert zu vergelten”).

violence. Indeed, advocates of the right to do vengeance will sometimes maintain that *only* violence can assuage an offense to personal honor. There is a very common attitude indeed, one that we will all recognize from our anecdotal knowledge of history and ethnography. It is, for example, the attitude of the Prussian officer corps, and more broadly the attitude behind the manifest link between traditions of military honor and traditions of military violence and dueling.⁶⁵ It is precisely such ideas that lie at the foundation of the Hegelian theories of justice I described above: These are precisely theories that aim to show the deep unity between concepts of honor and self-worth, on the one hand, and the logic of justice on the other.⁶⁶

These are, it will be obvious, two very different views of the underlying structure of rights in the world of human justice. It is a critical fact that classic social contract theory, even in Hobbes's sanguinary rendering, assumed only the first of these two: It assumed only a natural right of self-defense. This is not the place for a full-dress scholarly account of Hobbes, of course. I simply quote the account of Hobbes's state of nature given by our leading Hobbes scholar, Richard Tuck. Hobbes drew, writes Tuck, on the juristic arguments of Grotius, who emphasized, as the Roman jurists had done, the natural right of self-preservation. It was following Grotius that Hobbes posited his "state of nature." The "state of nature" was an order, Hobbes held:

in which each individual made his own judgements about everything, including the desirable means to his own preservation, and in which he would be recognised by everyone else as having a 'right' to do so. This mutual recognition of the right to self-preservation stemmed (on Hobbes's account) from each person understanding the salience in his own conduct of the desire for self-preservation

On the one hand, Hobbes accepted Grotius' argument that, in such a state, everyone would recognise that each individual was justified in preserving himself, so that there would be a basic agreement in the state of nature about the foundations of a moral theory; but on the other hand, he was quite unlike Grotius in observing that such a basic agreement was not enough in itself to generate a settled moral order, since there would still be radical disagreement about everything else, including most importantly the actual circumstances in which people might be justified in preserving themselves. As a consequence of this disagreement among people, the state of nature would inevitably be a state of war⁶⁷

Not a word here, let us note, about vengeance. Hobbes's emphasis on the right of self-preservation persisted in later classic social contract theory, as well. Again, this is not the place for a detailed examination. I simply quote from Locke:

The *State of Nature* has a Law of Nature to govern it, which obliges every one
Every one as he is *bound to preserve himself*, and not to quit his Station wilfully; so

65. See Ute Frevert, *Men of Honour: A Social and Cultural History of the Duel* (Anthony Williams trans., Polity Press 1995).

66. See Whitman, *supra* n. 30, at 58-69.

67. Hobbes, *supra* n. 57, at xxviii-xxix (footnote omitted).

by the like reason when his own Preservation comes not in competition, ought he, as much as he can, *to preserve the rest of Mankind* . . .⁶⁸

Other examples could be quoted *ad libidum*. I forbear to do so. Let me simply observe what is obvious enough: These classic social contract theories presupposed that the “moral foundations” of the state lay in self-preservation—or as we would call it, self-defense.

This is also the tradition, we should finally note, to which George Fletcher has made some of his most striking contributions. Fletcher too is a social contractarian. Thus, he has tried to show that the problems of self-defense require us to reckon with the contrast between Lockean and Kantian concepts of individual autonomy, on the one hand, and “social” concepts that emphasize the humanity of aggressors, on the other.⁶⁹ He has also insisted that the problems of self-defense are ultimately problems involving the governmental responsibilities of the state: Before we can say whether the defendant has exercised a legitimate right of self-defense, we must determine, at least some of the time, whether the state has “fail[ed] to exercise its protective function.”⁷⁰ The state may certainly deny us the right to use violence in our own defense—but it also has a correlative obligation (though one of uncertain scope) to provide defense for us. In this sense, Fletcher effectively suggests, the problems of criminal law are ultimately no different from inveterate problems of social contract theory. We must interpret criminal law in light of the background bargain between the state and its citizens, and in light of the concepts of individualism and autonomy upon which the state is founded.

IV. VENGEANCE AND THE MONOPOLY OF VIOLENCE

Classic monopoly of violence theory, founded not in the right of self-defense but in the right to do vengeance, is inevitably different. I will not try to present the monopoly of violence tradition in its full detail here. Instead, I will focus on the original statement of the theory as we find it in the German writings of the eighteenth century. I will only sketch the later history, which I have explored more fully elsewhere.⁷¹

What is the monopoly of violence theory, and how does it differ from social contract theories? As I suggested earlier, it is a theory whose roots lie, not in Roman law, but in the biblical rule of talion, “eye for eye, tooth for tooth.” In particular, it lies in the efforts of an eighteenth-century German theologian, Johann David Michaelis, to explain the rule of talion using the evidence of Arab society. Michaelis’s ambition was to get away from the unreality of social contract theory. Seventeenth-century social contractarians postulated a purely imaginary

68. John Locke, *Two Treatises of Government* 271 (Peter Laslett ed., student ed., Cambridge U. Press 1988).

69. Fletcher, *Self-Defense*, *supra* n. 4, at 32-34.

70. Fletcher, *Domination*, *supra* n. 4, at 571.

71. James Q. Whitman, *Aux Origines du “Monopole de la Violence,”* in *De la Société à la Sociologie* 71 (Catherine Colliot-Thélène & Jean-François Kervégan eds., ENS Éditions 2002).

“state of nature.” Michaelis, who was a much more modern sort of scholar, proposed instead to base his theory on the works of a real existing society. In particular, he believed that the original meanings of biblical law could be ascertained through close anthropological study of the societies of the Middle East. To that end, Michaelis induced the King of Denmark to sponsor one of the most famous exploratory expeditions of the age: the Niebuhr expedition to Arabia, which departed in 1761, led by Carsten Niebuhr.⁷² It was on the basis of Niebuhr’s account of the Middle East that Michaelis created the first version of the monopoly of violence theory; and it is Niebuhr’s account of the Middle East with which we must begin.

Indeed, the monopoly of violence theory began in studies of Arab society, one of the world societies most famously attached to personal honor.⁷³ Niebuhr’s account focused on the Bedouins. What he thought he discovered among these peoples was the supreme importance of vengeance. I quote a few critical passages from Niebuhr’s once-famous chapter on “The Vengeance of the Arabs,” which introduced, among other things, the topic of honor killings into western literature. (I should perhaps emphasize that I quote this material, not as an accurate account of life in Arab society, but for its place in the intellectual history of the West):

A lively, animated people, of quick and violent passions, are naturally led to carry the desire of vengeance for injuries to its highest excess.

The inhabitants of the East in general strive to master their anger. . . .

[T]he Arabs shew great sensibility to every thing that can be construed into an injury. If one man should happen to spit beside another, the latter will not fail to avenge himself of the imaginary insult. In a caravan I once saw an Arab highly offended at a man, who, in spitting, had accidentally bespattered his beard with some small part of the spittle. It was with difficulty that he could be appeased by him, who, he imagined, had offended him, even although he humbly asked pardon, and kissed his beard in token of submission. . . .

But the most irritable of all men are the noble Bedouins, who, in their martial spirit, seem to carry those same prejudices farther than even the barbarous warriors who issued from the North and overran Europe. . . .

At Barra I heard the story . . . which may afford an idea of the excess to which the spirit of revenge often rises among this nation. A man of eminence, belonging to the tribe of *Montefidsi*, had given his daughter in marriage to an Arab of the tribe of *Korne*. Shortly after the marriage, a Schiech of an inferior tribe asked him, in a coffee-house, Whether he were father to the handsome young wife of such a one, whom he named? The father, supposing his daughter’s honour ruined, immediately

72. See Ulrich Hübner, *Johann David Michaelis und die Arabien-Expedition 1761-1767*, in *Carsten Niebuhr (1733-1815) und seine Zeit* 363 (Josef Wieshöfer & Stephan Conermann eds., Franz Steiner Verlag 2002); Whitman, *supra* n. 30, at 54-57.

73. This is not the place to explore this common assertion. For a learned discussion of honor in Bedouin society, see Lila Abu-Lughod, *Veiled Sentiments: Honor and Poetry in a Bedouin Society* 78-167 (U. Cal. Press 1986).

left the company to stab her. At his return from the execution of this inhuman deed, he who had so indiscreetly put the question was gone. Breathing nothing now but vengeance, he sought him every where; and not finding him, killed in the mean time several of his relations, without sparing even his cattle or servants. The offender offered the governor of Korne a great sum if he would rid him of so furious an adversary. The governor sent for him who had been offended, and endeavoured by threats, and a shew of the apparatus of punishment, to force him to a reconciliation ; but the vengeful Arab would rather meet death than forego his revenge. Then the governor, to preserve a man of such high honour, soothed him to an agreement, by which the first aggressor gave his daughter, with a handsome portion, in marriage to him whom he had offended. But the father-in-law durst never after appear before his son-in-law.

The thirst for vengeance discovers itself likewise in the peculiar manner in which murder is prosecuted here. In the high country of Yemen, the supreme court of Sana commonly prosecutes murders in the mode usual in other countries ; but, in several districts in Arabia, the relations of the deceased have leave either to accept a composition in money, or to require the murderer to surrender himself to justice, or even to wreak their vengeance upon his whole family. In many places, it is reckoned unlawful to take money for the shedding of blood, which, by the laws of Arabian honour, can be expiated only by blood.⁷⁴

The world that Niebuhr described was thus a world of a keen sense of personal honor, and an obsessive attachment to norms of vengeance.

When Niebuhr's account was published back in Germany, Johann David Michaelis took it as both a revelation and a vindication. Here, he believed, was the true picture of human character as it had existed before God had entered history in order to institute new forms of government. For, Michaelis thought, Niebuhr's investigations had uncovered the true "state of nature" out of which the society of the Old Testament had grown.

As we have seen, figures like Hobbes and Locke, following the lead of Grotius, and indeed of a Roman juristic tradition extending back for centuries, had insisted on the primacy of the right of self-defense. Self-defense, or self-preservation, was what laid the moral foundations of the state. On the basis of Niebuhr's reports, Michaelis felt able to reject these familiar social contractarian concepts. Hobbes and Locke had contented themselves with a purely notional concept of the "state of nature"—with an intellectual construct uninformed by knowledge of the real world. Arabia, by contrast, represented the living modern form of the state of nature. And the Arabian evidence showed that men of the state of nature were not primarily committed to self-preservation. Instead, they were something like the Bedouin—proud, vengeful, and disposed to do violence in response to any slight. A Hobbesian account could not possibly do justice to their world, because it was wrong to describe their world as one in which violence was intolerable.

74. M. Niebuhr, *Travels through Arabia, and Other Countries in the East* vol. 2, 197-200 (Robert Heron trans., R. Morrison & Son 1792).

Indeed, far from being intolerable, violence in their world was an indispensable condition for the maintenance of an honorable life. As Michaelis explained in his commentary on Niebuhr:

That in the state of nature every man has a right to take revenge at his own hand for any deliberate personal injury, such as the loss of an eye, &c. is perhaps undeniable. In fact, by the law of nature such revenge might be carried still farther : but if it be confined within the limits of strict retaliation, the law of nature, at any rate (for of morality I do not now speak) can certainly have nothing to object against it.⁷⁵

This had important implications for the proper role of the modern state. If the state of nature was like the society of eighteenth-century Arabia, then the modern state did not have the role that social contractarians ascribed to it. Instead, the role of the state was best captured by what would eventually come to be called the “monopoly of violence” theory: It was the role of the state to exercise vengeance on behalf of its citizens. I continue quoting from the same passage:

Now, in the state of civil society, every man divests himself of the right in question ; but then he justly expects in return, that society will, after proper inquiry, duly exercise revenge in his room. Morality may say what it will to our revenge, (and certainly it does not absolutely condemn it,) but we are all naturally vindictive, and that to such a degree, that when we are grossly injured we feel a most irksome sort of disquietude and feverish heat, until we have gratified our revenge. Now, when creatures, thus constituted, are the citizens of any government, can we imagine, that they will ever give up the prerogative of revenge, without looking for some equivalent in return ? If the state means to withhold that equivalent, and yet prohibit the exercise of revenge, it must begin by regenerating human nature : or, if it be said, that God and his grace can alone effect such a change, and that whoever lays open his heart to grace, will never desire revenge, I can only say, that we must then figure to ourselves a state consisting of none but people all truly regenerated ; but such a state the world has never yet seen.⁷⁶

Men in the state of nature were not best characterized by their natural right of self-defense. Instead, they were best characterized by their natural propensity, and thus their natural right, to take violent vengeance for insults to their honor. Correspondingly, it was not the role of state simply to suppress violence. On the contrary, it was frequently the role of state to *do* violence—to exercise vengeance in the place of individuals who had been denied the right to avenge themselves. The state was founded not, as it were, on social contract theory, but on social tort theory: It was a state whose object was to control, but also to endorse, our natural right to do violence when we have been wronged.

Michaelis’s account was thus based on the most forthright sort of moral realism—on an unshakeable analytical refusal to consider the demands of New-Testament-style “laws of morality.” It represented, as far as I know, the most

75. Sir John David Michaelis, *Commentaries on the Laws of Moses* vol. 3, 460 (Alexander Smith trans., Rivington 1814).

76. *Id.* (emphasis omitted).

thorough rejection of Enlightenment social contract theory of the day. And in the dawning age of Romanticism, in which all aspects of Enlightenment thought fell steadily out of favor, Michaelis's interpretation had an immense appeal.

Indeed, Michaelis's solution to the problem was embraced by many subsequent scholars, establishing itself as something like the normal post-Enlightenment view, at least in Germany. It became routine to suppose that human beings, far from being Lockean gentlemen, were "naturally vindictive" creatures, who, when "grossly injured" felt "a most irksome sort of disquietude and feverish heat," until they had "gratified their revenge." As I have tried to show, the influence of this idea had to do, more than anything else, with the power of Hegelian philosophy: Hegelians believed that the desire for vengeance, primitive though it was, lay at the root of the concept of justice itself. Justice, to Hegelians, was unthinkable except as the product of spiritual evolution that began in the kind of vengeance logic Michaelis had described.⁷⁷ Under the influence of such thinking, it gradually became routine to insist that the state must honor, and if necessary carry out, such natural rights to do vengeance. By the twentieth century, this deeply affected German thinking about criminal law in particular: It became widely accepted that the core function of the criminal law was, not precisely to punish violence, but to facilitate individual and social vengeance. In this way, a spirit of moral realism entered into German law of a kind mostly absent in the Anglo-American world.⁷⁸

The same spirit of moral realism, as I have tried to show, also entered the world of German political and social theory. This is particularly true of one thinker who is generally read in a more anodyne way than he should be: Max Weber. Weber, the most important inheritor of this moral realist tradition, famously defined the state, in terms borrowed from economics, as having the monopoly of legitimate violence.⁷⁹ The image of society behind this, as Weber and his followers well understood, was one of competing associations—unions, paramilitary organizations, army, the state police force, and others—all pretending to possess the right to do violence.⁸⁰ It was an image that, as it were, projected the norms of clan vengeance onto the stage of modern social relations. Society was a place of feuding associations; and the state, for Weber and his followers, was simply the one among these many associations that succeeded in outcompeting the others in the marketplace of violence.

V. THE PROBLEMS OF CRIMINAL LAW

Before turning back to the applications of all this to the problems of criminal law, I cannot forbear to observe that the eighteenth-century debate that I have just sketched is still alive. Particularly when it comes to the war in Iraq, we are

77. Whitman, *supra* n. 30, at 54-69.

78. Whitman, *supra* n. 71.

79. *Max Weber on Law in Economy and Society* 346-47 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., Cambridge U. Press 1969).

80. *Id.* at 18.

manifestly still fighting over the relative merits of Locke and Michaelis. The Bush administration's program for Iraq has, I take it, always assumed the truth of Locke: Individual humans, freed from coercive authority, will naturally join together to form a government that will preserve their personal safety and protect them in their pursuit and possession of goods. Critics of the Bush program commonly counter by insisting on the truth of Michaelis: We are, they say, not dealing with Lockean gentlemen. We are dealing with proud, touchy, and violent Iraqis.⁸¹ Indeed, the image of Iraqi society offered by Mr. Bush's critics is often little different from Niebuhr's eighteenth-century portrayal of Arabia. Personal safety and the pursuit of wealth, according to this view, are not the primary concern of the Iraqi social world. Instead, it is the primary concern of Iraqis to vindicate their independence and honor. Since honor matters more to them than either bodily integrity or wealth, they will inevitably prove to be ungovernable by standard American means.

It is not my purpose to endorse either of these views, both of which undoubtedly caricature the truth. I want only to observe that the fact that the debate is still alive makes it all the more pressing to address the basic question posed by this essay: Is Michaelis's solution to the problem of the right to do vengeance the right one? If it is true that the denizens of many non-western societies feel, in any measure, some ungovernable desire for vengeance, should our theories of the state look more like Michaelis's than like Locke's?

This is too hard a question to answer here; I hope it is enough simply to pose it. Let me just offer a few observations as I move toward the close of this essay.

First, let me insist upon the obvious: The monopoly of violence idea, with its celebration of the norms of vengeance, is authentically disturbing. This is particularly clear if we see it in the context in which it came to maturity: the context of German history. Indeed, to my mind, the monopoly of violence theory is symptomatic of something that went disastrously wrong in the German world of the 1920s and 1930s. As I suggested before, this was a world in which the norms of clan violence were projected onto the modern social and political stage. There were in fact, in this Germany, many groups and associations competing for the right to use violence. Unions are the most familiar example: In Germany, as elsewhere, striking workers successfully claimed a right to do violence that could not be preempted by the state. But in Germany the unions were by no means alone. There were also paramilitary organizations, on both the left and the right. These organizations, be they communist or fascist, claimed not only a right to do violence, but the right to do *legitimate* violence: They presented themselves as the authentic representatives of (in the communist case) the voice of history or (in the fascist case) the voice of the people. Fascist paramilitary organizations, in particular, claimed to represent the just demand of the people for vengeance after the Peace of Versailles.

81. E.g. Bertram Wyatt-Brown, *Honor and Two Reconstructions: Iraq and the American South* <<http://www.napa.ufl.edu/2003news/honoriraq-oped-aug03.htm>> (Aug. 27, 2003).

In this atmosphere, the monopoly of violence theory did no good whatsoever. Quite the contrary. It was distinctly harmful, because it offered no ultimate way to understand the role of the state *except* in terms of its exercise of violence. The resulting situation was described by the constitutional scholar Hermann Heller in 1934—a year when Heller, like many other liberals, found himself in exile:

The agnosticism that declares even justifiable questions about the “goal” of the state to be unanswerable, ends up offering only the comfortless view that the “political association” is to be defined entirely by its means: namely, violence. This doctrine, and the numerous doctrines that describe “power” as the conceptually necessary “goal” of the state, are not so much false as empty. All human institutions develop power, and unless we can give some peculiar meaning to *state* power, we will not be able to distinguish the state from a band of robbers, a coal cartel, or a bowling team.⁸²

What had happened in Heller’s Germany, of course, was that a band of robbers *did* become the state. And they became the state in a political atmosphere in which the stink of vengeance was strong. Not least, their practices as rulers started from nothing other than the moral realist assumption that violence is natural and normal.

German history offers indeed an ugly example. Heller was surely right: Any monopoly of violence theory is inherently dangerous if we have not first found a way to attribute some function to the state that goes beyond the doing of violence. No monopoly of violence theory is acceptable unless we have first answered the famous challenge posed by St. Augustine: the challenge of distinguishing the state from a band of robbers.⁸³ We must regard the state as having *some* primary goal beyond doing (or controlling) violence. Yet in societies in which the drive for vengeance is overpowering, it can be very difficult for the state to disavow violence as a primary goal. This is especially true where the state finds itself—as the Weimar state did—in effective competition with paramilitary organizations. Exactly that sort of competition may be underway in many parts of the Middle East, and in those circumstances the monopoly of violence idea is peculiarly disquieting.

Nevertheless, however disquieting the monopoly of violence theory may be, we must give its due as an account of the purposes of criminal law. Social contract theory, whether it emanates from Thomas Hobbes or George Fletcher, does not offer the only way to think about the relationship of the state to private violence. Indeed, social contract theory arguably does violence of its own to human nature when it refuses to take seriously the claims of honor made by figures like Judy Norman. There is, for better or worse, more to the human sense of justice than the desire for self-preservation. People want vengeance too. We can construct our criminal law as though that were not the case; and by doing so, we may be able

82. Quoted and discussed in Whitman, *supra* note 71, at 86.

83. Saint Augustine, *The City of God against the Pagans* bk. IV, ch. 4. (William M. Green trans., Harv. U. Press 1963) (“And so if justice is left out, what are kingdoms except great robber bands?”).

to bridle some of the impulses toward violence that afflict our societies. But the bridle is badly fitted to the body of human society, and it cuts into the flesh.

That is far less true of a monopoly of violence theory, founded on the belief in the inevitability of the impulse toward vengeance. That does not mean that the monopoly of violence approach is not also committed to bridling violence. The very phrase “monopoly of violence” suggests otherwise. The difference lies elsewhere. Unlike social contract theories, monopoly of violence theories are not committed to denying the reality, and legitimacy, of the desire for vengeance. Rather than offering a model of collective self-defense, they offer models of social vengeance. Of course, the idea of social vengeance *is* disturbing; I do not mean to endorse it. Quite the contrary. But these theories must nevertheless be discussed seriously.

This is true above all because of their moral realism. Obnoxious as it may seem to think of criminal law as institutionalized social vengeance, there is a long Durkheimian tradition suggesting that is exactly the case.⁸⁴ We may not like the idea that criminal justice is a way of channeling vengeful impulses; certainly I do not. But in practice, it may be so, and we must maintain an analytic vocabulary capable of saying as much. If vengeance is what it is all about, maybe we should say so frankly—not only when adjudicating homicides, but also when talking about the ultimate questions of political legitimacy.

84. See especially the exposition in David Garland, *Punishment and Modern Society: A Study in Social Theory* 69-81 (U. Chi. Press 1990).

