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# Stay the Hand of Justice? Evaluating Claims that War Crimes Trials Do More Harm than Good

*Mark S. Martins & Jacob Bronsther*

*Abstract: An enduring dilemma in war is whether and how to punish those responsible for war crimes. In this essay, we analyze the most frequent criticisms made by war crimes trial skeptics, including the claims that such trials endanger prospects for peace by encouraging enemies to continue fighting, that they achieve only “victors’ justice” rather than real justice, and that, in any event, they are unnecessary due to the existence of more effective and less costly alternatives. We conclude, in accordance with a “moderate retributivism,” that when carried out consistently with established law and procedure, and when not dramatically outweighed by concerns that trials will exacerbate ongoing or future conflicts, prosecutions are a legitimate, and sometimes necessary, response to violations of the laws of war and international criminal law more broadly.*

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At St. James’s Palace in London during January of 1942, representatives of the governments whose countries had been occupied or were under assault from Germany met to consider fundamental questions that world war and Hitler’s still waxing aggression had pressed upon them. To the threshold *jus ad bellum* inquiry of whether fighting the war was justified, they responded without equivocation. The Nazis’ advancing columns on three continents and regime of terror against diverse civilian populations left them no choice but to take up arms. To the *jus in bello* question of whether their own modes of fighting should be constrained by morality and law, the response at St. James’s Palace was, again, unequivocal. Although the desperate struggles to come would severely test the Allies’ unilateral commitment to restraints on warfare, the representative from occupied Belgium expressed the common sentiment that “no matter how severe the necessities of war may be,

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civilized nations have, nevertheless, recognized and proclaimed rules which every belligerent ought to obey.”<sup>1</sup>

Perhaps more remarkable at this dire point in the conflict was how the Allies answered the emergent *jus post bellum* question of what should be done with those responsible for the aggression, imprisonments, mass expulsions, hostage executions, and massacres that had brought so many disparate peoples under attack together in solidarity. It was the signature contribution of the Declaration of St. James’s Palace that “in order to avoid the repression of these acts of violence simply by acts of vengeance on the part of the general public,” the assembled nations “would place among their principal war aims the punishment, through the channel of organised justice, of those guilty of or responsible for these crimes, whether they have ordered them, perpetrated them or participated in them.”<sup>2</sup> The war we have waged reluctantly but necessarily is a just war, they declared, and despite the depravity of our enemies, we will aspire to fight it humanely. Moreover, once we have prevailed, we will punish war criminals *through the channel of organized justice*. While there would yet be formidable opponents of such an approach – among them British Prime Minister Winston Churchill, who preferred summary execution of the war’s masterminds upon capture,<sup>3</sup> and United States Supreme Court Chief Justice Harlan Fiske Stone, who derided postwar prosecution as a “lynching party”<sup>4</sup> – the unequivocal and unified early commitment at St. James’s Palace to holding war crimes trials furnished enough momentum to carry the day over doubters of the concept once the conflict had formally ended.

Supreme Court Justice Robert Jackson, chief prosecutor for the United States in the trial of major war criminals before the International Military Tribunal at Nuremberg, would come to echo the Declaration

of St. James’s Palace in his opening statement: “That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.”<sup>5</sup> Whether that trial, and the many thousands of others held following World War II, truly held vengeance at bay and paid tribute to reason is surely one of the essential tests of their worth. But there is no dispute that trials of alleged war criminals were widely supported in the immediate aftermath of the war, even if they had their prominent detractors. Stay the hand of vengeance? Emphatically yes. But not the hand of justice. And failing to hold trials of those responsible for war crimes would offend justice, this response insisted.

Such momentum for war crimes trials is rare. Consider the international response half a century later to atrocities occurring on some of the same European lands once again engulfed in armed conflict. In May 1992, Bosnian Serb President Radovan Karadžić presided over the execution of thousands of civilians near the town of Brčko in Bosnia-Herzegovina,<sup>6</sup> only fifty miles from Sabac in Western Serbia, where in October 1941, German Field Marshal Wilhelm List ordered the execution of thousands of concentration camp prisoners.<sup>7</sup> Brčko and Sabac are fifty miles apart in the former Yugoslavia, sordidly linked by the programs of organized mass murder each hosted, fifty years apart. Yet international alarm over the late twentieth-century Brčko massacre and related war crimes only slowly developed into resolve to hold offenders accountable.

When concerted action finally came, war crimes trials were seen by many as doing more harm than good. In August of 1995, United States diplomat Richard Holbrooke confronted harsh questioning over whether the indictment of Karadžić and other se-

nior figures by the International Criminal Tribunal for the Former Yugoslavia would harm prospects for peace. “Do you think it’s helpful to call [Karadžić] a war criminal?” Holbrooke recalled one aggressive journalist baiting him. “Do you think it’s helpful in the negotiations?” Recalling “the days of [Nazi extermination camp overseer Heinrich] Himmler,” Holbrooke responded that “a crime against humanity of the sort that we have rarely seen in Europe” was “simply a fact and it has to be dealt with. I’m not going to cut a deal that absolves the people responsible for this.”<sup>8</sup>

Even if his private views may have been more pragmatic, Holbrooke’s public response – both uncompromising and righteous – has much to commend it. But without more, the simple and intuitive moral position that we should implement war crimes trials often fails to convince the distracted policy-makers responsible for facilitating such processes, particularly when sophisticated rationales are cited for foregoing the trouble. This essay aims to clarify this dilemma by identifying and responding to some of the most frequent criticisms made by skeptics of war crimes trials, defined here as trials for violations of the law of war or international criminal law more broadly, whether in courts of domestic, international, or hybrid administration. Analysis of these criticisms will suggest a framework for weighing, in a given instance, the challenge to legitimacy that all war crimes courts undergo. While none of the criticisms represents a definitive trump against the general category of war crimes trials, each gives us pause. Through evaluation of their merits, accordingly, we are better poised to determine, on a case-by-case basis, whether the intuitive view favoring trial and punishment of war criminals, shared by those at St. James’s Palace, ought to be implemented in the contemporary world. In the final section, we develop a “moderate retributivism” to help

guide this balancing analysis, concluding that when they are carried out in accordance with established law and procedure, and when not dramatically outweighed by concerns that trials will exacerbate ongoing or future conflicts, war crimes prosecutions are a legitimate response to atrocities.

Implied in the skepticism that Holbrooke encountered is the claim that war crimes trials encourage leaders to continue fighting. If losing a war means you will be prosecuted – goes the argument – then you will be less likely to accept defeat. Put differently, the first criticism we will consider is the view that war crimes trials create perverse incentives for leaders to commit *further* war crimes, or at least prolong conflict, so as to ward off defeat and avoid prosecution.

This claim is difficult to evaluate, and what little empirical study there has been proves neither that fear of punishment reduces criminal behavior nor that war criminals are fearless of prosecution. The claim involves an unknowable counterfactual: how would things be different if there were no threat of trial? We are not, however, entirely in the dark. While based on a plausible psychological premise – that cornered humans fight more desperately – the claim causes less concern when considered in the context of war criminals’ actual incentive structures. As law professors Julian Ku and Jide Nzelibe explain, the effect of a new formal sanction (such as the threat of war crimes prosecution) depends upon the set of preexisting formal and informal sanctions (like the possibility of death by a vigilante mob).<sup>9</sup> The severity of preexisting sanctions could well overwhelm the new formal one, which will thus only marginally impact decision-making. It is not enough, in other words, to know that war crimes trials might incentivize further fighting. We need to know how strong that incentive is, exactly, and how it compares to preexisting incentives.

For various reasons, war crimes prosecutions in recent decades have generally been directed against individuals engaged in civil conflicts in weak or failing states and perceived to be committing atrocities with impunity.<sup>10</sup> To examine the pre-existing sanctions faced by war criminals, Ku and Nzelibe look at the consequences faced by leaders of African coups and coup plots in such states from 1955 to 2003. Of the 279 leaders of *failed* coups, 35 percent were executed, murdered, or died in prison, 22 percent were imprisoned, 16 percent were arrested without any clear outcomes, and 5 percent were exiled or tried in absentia.<sup>11</sup> There were no such consequences, meanwhile, for successful coup leaders. The point is that the preexisting incentives for war criminals to continue fighting and to win are profound. In addition to avoiding grave personal outcomes, they also include the possibility of achieving the often-desperate political objectives the war criminals set out to attain. It is not as if the threat of prosecution is the only consequence to losing a war. That such a threat provides an additional incentive to continue fighting tells us little about its ultimate significance to a leader's unique cost-benefit analysis.

The incentives claim, furthermore, depends upon the premise that military victory means immunity from prosecution, as a matter of law and/or politics. This premise, though, is not ironclad. The Prosecutor of the International Criminal Court (ICC), for instance, has targeted sitting leaders, indicting Omar al-Bashir, president of Sudan, for alleged war crimes, crimes against humanity, and genocide in Darfur. While al-Bashir has evaded arrest thus far, the case – along with the (failed) prosecution of Uhuru Kenyatta, the current Kenyan president, for alleged crimes against humanity perpetrated during postelection violence in 2007–2008 – creates at least some uncertainty about the victory-

means-immunity premise. Consider as well that, while still influential in Chile as “senator for life,” Augusto Pinochet was arrested in London in 1998 to enforce an indictment for human rights violations issued by a Spanish court in accordance with the principle of universal jurisdiction.

Another uncertain premise to the claim that war crimes trials incentivize further fighting is that perpetrators, when threatened with prosecution, actually have the power to continue the conflict. We might say that the more fragile the peace, or the greater the possibility of a fragile peace, the more salient the worry about incentives. Most notably, leaders of the Lord's Resistance Army have in recent years insisted that the 2005 International Criminal Court warrants for their arrest be lifted before signing a peace deal with Uganda, with the understanding that they retained the capacity to continue fighting. In many conflicts, however, peace is not so fragile. The conflict may be completely over, as it was when the Nuremberg trials were held, and as it is today during the trials of Khmer Rouge leaders in the hybrid national-international Extraordinary Chambers in the Courts of Cambodia. Or the conflict might be ongoing, but with a likely outcome that is not fragile, such that there is no actual concern that war crimes trials might exacerbate the conflict unnaturally. This could be the case in the war with Al Qaeda and associated groups.

More fundamentally, the incentives claim is vulnerable to an internal critique. The claim is based on the counterintuitive incentives created by the threat of prosecution; that is, to continue fighting and to commit further war crimes, *assuming a war crime has already been committed*. Given its deeper assumption about the powerful incentive to avoid prosecution, however, the claim's own logic also implies that war crimes trials tend to effectively deter leaders from committing war crimes in the

first place. As this tendency is itself one of the major justifications for such trials, the claim is, to some extent at least, inherently self-defeating. Though incentives either way are difficult to prove, surely any concern about war crimes trials creating perverse incentives to keep fighting must be at least weighed against the concern that not putting war criminals on trial would signal to future offenders that they can commit atrocities with impunity.

That war crimes trials achieve only “victors’ justice” rather than real justice is, of course, very nearly the same claim made by Chief Justice Stone when he denigrated the Nuremberg Trial of Major War Criminals as “Jackson’s high-grade lynching party.”<sup>12</sup> To assess this claim we need to determine whether war crimes trials meet the two basic requirements of a legitimate prosecution. The first such requirement is that the criminal law applied be legitimate. Following legal philosopher Lon Fuller’s conception of legality, we might ask, at a minimum, whether the law is part of a set of *rules* – rather than *ad hoc* commands – that are clear, public, prospective, consistent, stable, and that do not make impossible demands.<sup>13</sup> The second basic requirement is that the process be adequate: that the law be administered to defendants reasonably and fairly.

While any prosecution could do better by either metric – for example, the law applied could always be clearer, and jurors could always be more impartial – the more a trial meets these twin demands, the safer the conclusion that a defendant has been held to account legitimately through law, rather than through brute force. That said, it is not all a matter of degree, and if a trial fails to meet either requirement conspicuously, we can deem any resulting punishment as manifestly outside the bounds of law.

How do war crimes trials fare on these two metrics? Do they apply well-made, le-

gitimate law, in accordance with Fuller’s theory? And do they administer that law fairly, providing adequate process to defendants? We will examine two common criticisms regarding the former before returning to the latter.

One criticism is that the law applied by war crimes trials is too unsettled and thus fails to measure up to Fuller’s ideal. For example, war crimes prosecutions from Nuremberg to the present day have been roiled by the dispute over whether joining a conspiracy to commit war crimes is itself an offense distinct from any other completed criminal act. The absence of a settled answer makes a prosecution for mere conspiracy illegitimate, argue the critics, because without a stable definition of the crime, those with the greatest power can simply choose to punish what they want. At the Nuremberg trials, this criticism played out dramatically, as judges rejected charges brought under what they saw to be a new offense, created post-conflict, of conspiracy to commit war crimes. According to the French judge on the International Military Tribunal at Nuremberg in 1945, “the danger of such incriminations is that the door is opened to arbitrariness. The accusation of conspiracy is indeed a weapon preferred by tyrants. When Hitler wanted to strike at his political opponents, he accused them of having conspired against him.”<sup>14</sup> Moreover, because the common law tradition in Britain and the United States of criminalizing conspiracy lacked a clear parallel in either Romano-Germanic or international law, to convict defeated German captives for merely having entered into an agreement – without needing to establish their individual responsibility for some actual completed murder or other offense carried out by the criminal enterprise – would defy the principle of *nullum crimen sine lege*. This Latin maxim, literally translated as “no crime without law,” is

the universal attribute of justice also expressed in the prohibition on *ex post facto* laws in the United States Constitution.

Whether conspiracy to commit war crimes is a violation of the law of war was still a matter of dispute in 2006. That year, the United States Supreme Court considered the charge of conspiracy against Salim Hamdan, accused before a military commission for having agreed to join Al Qaeda and provide security and other services to Osama Bin Laden in Afghanistan. Although he was serving Bin Laden during a period of deadly Al Qaeda attacks in the Arabian Peninsula and the United States, no specific foreknowledge or advance contribution to those attacks was alleged against Hamdan himself.

Ruling on other grounds that the military commission lacked the authority to proceed, the Supreme Court divided on whether conspiracy as charged against Hamdan was a crime under the law of war, with no position supported by a majority of the justices.<sup>15</sup> Hamdan's later trial by a second military commission resulted in his acquittal of not only conspiracy, but also the distinct but related charge of "providing material support for terrorism." A reviewing federal appeals court would eventually declare this an unconstitutional *ex post facto* charge.<sup>16</sup>

While the modern echoes of Nuremberg's conspiracy dispute are cautionary, the "unsettled" criticism itself merits skeptical evaluation. Judges at Nuremberg, for instance, ultimately based joint liability upon war crimes with settled prewar existences. The legal adviser to Attorney General Francis Biddle, appointed by President Truman to sit in judgment at Nuremberg, explained that whereas Anglo-American conspiracy is "not embraced within the ordinary concept of crimes punishable as violations of the laws of war," another available theory of prosecution was well settled: "The theory of multiple liability for criminal acts executed pursuant

to a common plan presents no comparable problem, being common to all developed penal systems and easily included within the scope of the laws of war."<sup>17</sup>

In 124 prosecutions involving major war criminals and lesser German defendants, judges at Nuremberg recognized the concept of group criminality, but they opted to convict only when the defendant in the dock individually participated in a common plan proven to have resulted in actual atrocities.<sup>18</sup>

This approach is in full use today. The doctrines now applied by international criminal courts, "joint criminal enterprise" and "co-perpetration," while different in important ways, both rely on this theory of liability stemming from participation in a common plan. The most recent U.S. court to consider the question has also recognized the settled character of conspiracy as a theory of liability for completed crimes under the law of war.<sup>19</sup> In the seventy years since World War II, then, not a long period of time from the perspective of law, courts have clarified what was before ambiguous, narrowing the debate dramatically, and thereby constraining and guiding conspiracy prosecutions.

Legislatures, too, can ameliorate the criticism by codifying offenses, thus enabling prosecutors to bring charges confidently as the law becomes more firmly settled, so long as legislative enactment postdates the alleged criminal conduct. And should courts feel that a particular conviction was based upon an *ex post facto* law, they can vacate the conviction, as happened with Hamdan, even as they provide guidance in opinions to bring further stability and consistency to the rules. Beyond conspiracy, this narrative applies as well to crimes against "peace" and "humanity," offenses with undoubtedly controversial prewar legal statuses that were also charged at Nuremberg. For a defendant *today* could not reasonably claim that these offenses

represented legal novelties, given their incorporation post-Nuremberg into various domestic statutes and international treaties, and also into customary international law. In sum, if aspects of the law of war are unsettled, the judicial, legislative, and prosecutorial institutions responsible for the law's maintenance can act – and are acting – to resolve the situation.

Another criticism about the law applied in war tribunals is that it traditionally has been military law, elements of which are inherently unbounded and thus pose a threat to civilian-led liberal democracies. Military law, at first blush, fails as a basis for legitimate criminal prosecutions in at least two ways. First, it has historically grown out of the need of military authority to impose some semblance of order upon an inherently unruly battlefield, and such subordination to a single commander's direction seems the antithesis of the impersonal, stable, and transparent structure of rules that Fuller envisions.

Because the military, by necessity, emphasizes “security and order of the group [over] value and integrity of the individual,” Supreme Court Justice Hugo Black maintained that military law thereby also “emphasizes the iron hand of discipline more than it does the even scales of justice.”<sup>20</sup> Furthermore, Black argued, military tribunals are typically ad hoc bodies appointed by a military officer from among his subordinates. They have always been subject to varying degrees of “command influence.”<sup>21</sup>

Such influence, critics in this vein insist, precludes military law from ever truly being law, as it fails to provide an independent and comprehensive constraint upon its administrators. A prosecution for alleged war crimes on the basis of military law is thus merely an extension of the commander's will. It is the “rule of man,” rather than the rule of law.

Second, military law's unbounded nature stems not only from the tradition of command influence and control, say the critics, but also from the limitless character of war itself. Prussian general and military theorist Carl von Clausewitz defined war as “an act of force to compel our enemy to do our will” and reflected that “to introduce the principle of moderation into the theory of war itself would always lead to logical absurdity.”<sup>22</sup> Rather, “there is no logical limit” to the application of force, for in war “a reciprocal action is started” between the opponents “which must lead, in theory, to extremes.”<sup>23</sup>

The brutality of real-world hostilities has validated Clausewitz's theory again and again. Some have noted that war's tendency toward extremes – and the calls for military authority such conditions can bring – poses a dire threat to civil liberties. English jurist William Blackstone warned in 1769 that martial law was “in truth and reality no law, but something to be indulged rather than allowed as a law,” concluding that “therefore it ought not to be permitted in time of peace.”<sup>24</sup> And Justice Jackson, before serving as chief prosecutor at Nuremberg, wrote that “the very essence of the military job is to marshal physical force, to remove every obstacle to its effectiveness,” and that such measures “will not, and often should not, be held within the limits that bind civil authority in peace.”<sup>25</sup> A commander's orders in war, Jackson cautioned, thus “may have a certain authority as military commands, although they may be very bad as...law.”<sup>26</sup>

The law applied in war crimes trials, however, has developed so as to incorporate constraints upon these otherwise unbounded influences. Tribunals created out of commanders' inherent authority have been replaced by war crimes forums established pursuant to international treaties and domestic statutes, thus surmounting military law with law made by the peoples' civilian



representatives. The threshold of necessity for resorting to such forums, at least for the prosecution of true war crimes, as opposed to crimes against humanity and genocide, is that the crimes will have been committed during genuine hostilities, a context characterized by more than mere sporadic attacks and consisting of protracted armed violence of a nature, scope, and intensity that a state is compelled to employ its military forces in order to protect its people.<sup>27</sup>

Substantial protections against unbridled military authority are now expressly contained in law. Under the Geneva Conventions, punishment may be meted out for war crimes only if there has been a trial by “a regularly constituted court affording all of the judicial guarantees recognized as indispensable by civilized peoples.”<sup>28</sup> In addition to the safeguards against *ex post facto* laws and group criminal liability already mentioned, these guarantees include the presumption of innocence, the right to be tried in one’s presence, the right to notice of particular charges, and the prohibition against compelling an accused to testify against himself.<sup>29</sup> Furthermore, under the Military Commissions Act of 2009, defendants in the U.S. military commissions have the right to appeal any final judgment in federal civilian court.<sup>30</sup>

Conceding truth in prior ages to the axiom *inter arma silent legis* (“in times of war, the law falls silent”), the late Chief Justice William H. Rehnquist found reason to doubt the axiom’s veracity today: “There is every reason to think that the historic trend against the least justified of the curtailments of civil liberty in wartime will continue in the future.... The laws will thus not be silent in time of war, but they will speak with a somewhat different voice.”<sup>31</sup> Without disdaining the recurrent criticisms of war crimes trials grounded in their martial tradition – for vigilance regarding “military necessity” remains ever-prudent, especially in contexts where the

application of domestic and international law is absent or insincere – it is wise to remember Rehnquist’s longer perspective when evaluating such criticisms.

One might accept the legitimacy of the substantive law applied in war crimes trials but nonetheless reject the adequacy of the process provided to defendants in particular prosecutions. Consider the 2015 trial in Libya of Saif al-Islam Gadaffi, the son of deposed leader Muammar Gadaffi, and eight other members of the former regime for war crimes linked to the 2011 revolution. The procedural failings, according to the United Nations, included witness intimidation, lack of access to lawyers, and failure to present witnesses and documents in open court. At its most skeptical, though, this procedural criticism applies to trials less overtly unfair. It acknowledges the various fairness guarantees contained in law and even concedes that certain procedural protections may be both legally required and formally complied with, while nevertheless maintaining that the resulting trials fail to achieve impartial justice because of flaws or corruption in how the law is administered.

Before his captors could impose the death penalty announced for him in 1946, Nazi leader and Gestapo founder Herman Goering committed suicide by ingesting cyanide. Prior to taking his own life, Goering had repeatedly objected that his Nuremberg trial was nothing more than *siegerjustiz* (“victors’ justice”). The objection was not that he was deprived of legal process, for he had prominently received an attorney and an elaborate public hearing; rather, he claimed that the trial was a show intended to disseminate the victors’ propaganda while disguising his foreordained execution, a sentence compelled merely by his being a defeated German leader.<sup>32</sup>

We hear echoes of Goering’s objection in claims made today that detainees of the

United States in its war against Al Qaeda cannot receive truly fair trials because they are mostly Arabs, Muslims, or both, and in any event have been predetermined to be enemies. Moreover, just as Nuremberg critics scoffed at the prospect of war crimes prosecutions by the Soviets, whose own unpunished transgressions included the mass execution of Polish nationals during 1940 in the Katyn Forest, critics of military commission trials at Guantanamo complain that they punish the “enemy” while conveniently overlooking allegations of torture and evidence of mistreatment by persons acting on behalf of the United States.

While such criticisms are fundamental, there is little to be gained in evaluating the extreme claim that *no* victor is capable of administering a war crimes trial fairly. To insist that, as an analytical truth, any such process is dominated by prejudice or partiality is to leave no room for further appraisal. A more tempered skepticism is warranted, one capable of distinguishing between separate prosecutive efforts.

William Shawcross, the son of Britain’s chief prosecutor at Nuremberg and author of a book inspired by his father’s work, points to the zealous advocacy of Goering’s attorney, to the prosecution’s burden of proof, and to the acquittals of three out of twenty-three codefendants in arguing that the Nazi leader’s trial was conducted fairly. Shawcross further argues that defendants at Nuremberg were accorded fewer rights, privileges, and entitlements than an accused receives before a United States military commission today, particularly in light of Congress strengthening the process therein with the Military Commissions Acts of 2006 and 2009. Whereas at Nuremberg, defendants “could be tried in absentia, had no right against self-incrimination, and had no right to challenge the judges,” each of these protections is present at Guantanamo.<sup>33</sup> The procedural pro-

tections at the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and the ICC are similarly robust by comparison with Nuremberg.

But as important as the legal rights that are formally required by statute, Shawcross and others note, is the legitimacy that comes from their dynamic and determined application. Modern trials have benefited from well-qualified and fully resourced defense teams and from extensive government pretrial disclosures of the evidence in the case. These practices have enabled the accused and their counsel to prepare to confront the charges. Moreover, the delays in reaching trial, both at the U.S. military commissions and at the international tribunals, with each prosecutorial move met with vigorous and not infrequently effective defense tactics, undercut any notion that the captors are rushing to judgment over their vanquished enemies, however frustrating such delays are to family members of the victims.

While no practice can assure legitimacy, some skeptics may be mollified by the openness of the proceedings. The U.S. military commissions, for instance, are watched by an international corps of news reporters as well as by members of the public in Guantanamo and at closed-circuit television sites in the continental United States. And still other modern-day checks and balances assist in holding the U.S. government itself accountable to law, even as it prosecutes alleged Al Qaeda members. These include congressional oversight committees, executive branch inspectors general and judge advocates, and powerful human rights organizations.<sup>34</sup>

Measures promoting transparency and government accountability may or may not be sufficient to surmount the “victors’ justice” criticism in a given trial, particularly one involving a defendant claiming national or sectarian bias by those judging him. Writing of domestic criminal trials,

the Supreme Court has discerned that “the people of an open society do not demand infallibility of their institutions, but it is difficult for them to accept what they are prohibited from observing.”<sup>35</sup> With war crimes prosecutions facing even greater barriers to acceptance among foreign and international audiences, transparent and accountable processes are surely *necessary* for widespread confidence in trials to be achieved, even if such processes are not *sufficient* in themselves to satisfy all observers that real justice is being done.

Risks that war crimes trials will do harm seem less acceptable the less necessary they are to achieve some worthy end. It is thus a critical claim against such trials that “restorative justice” mechanisms, civilian prosecutions, or other alternatives have rendered them unnecessary by providing better methods of healing society’s wounds, holding offenders accountable, and preventing future offenses.

Concerns that prosecuting the likes of Radovan Karadžić might spoil efforts to end a war are compounded if, as legal scholar Kent Greenawalt has written, the “time, expense, and procedural safeguards” of war crimes trials also result in relatively few offenders actually being identified.<sup>36</sup> Proponents of truth and reconciliation commissions claim that they are an attractive alternative to traditional prosecutions because, as Greenawalt continues, “each [instance of] testimony by a victim and each identification of an offender achieves some portion of the justice of a criminal trial and conviction.”<sup>37</sup> In the aggregate, these small portions of justice collectively outweigh that achieved by a few war crimes prosecutions, enabling the parties to a conflict to acknowledge what happened, become reconciled to it and to each other, and move forward within a restored peace. Furthermore, such critics often argue, war crimes trials tend to mischaracterize the collective,

possibly even bureaucratic nature of mass atrocities by placing blame solely upon particular individuals, and thereby absolving the wider community or organization.

The claim by proponents of exclusively civilian prosecutions of offenders, meanwhile, is that war crimes trials are unnecessary because well-established domestic charges and judicial forums can convict and punish with little of the cost, legal uncertainty, and delay attendant to pressing law of war charges before ad hoc tribunals. To advocate ending military commissions, one group cites the hundreds of civilian prosecutions for terrorism offenses in U.S. federal courts since the 9/11 attacks.<sup>38</sup> Another argues that civilian prosecutions are both fairer and more effective at holding offenders accountable.<sup>39</sup> We thus need not offer amnesty to offenders – the perceived cost of truth and reconciliation commissions – in order to heal society and restore the peace. And we can do without war crimes trials altogether.

Still other alternatives to war crimes trials emphasize the supposedly superior incapacitation that comes from *targeting* or simply *detaining* threats, rather than *prosecuting* them. Whereas conducting a trial provides a platform for the spewing of odious beliefs by accused persons or their attorneys and risks acquittal and even subsequent release, say the proponents of this approach, the attacking of one’s enemies in war is a long-standing and justified alternative. Law of war detention, too, serves the purpose of taking detainees off the battlefield while also making detainees available to be interviewed, thus furnishing intelligence that can guide further operations to disrupt attacks and dismantle enemy networks. So long as the targeting and detention are lawful, say the advocates for targeting and detention, why bother with war crimes trials?

Each of these proposed alternatives is a strange ally of the others. Each also merits

critical evaluation as to whether it actually provides a full alternative, rendering war crimes trials unnecessary. Truth commissions and related processes that stress reconciliation over accountability have helped certain societies, in particular South Africa, move beyond civil conflicts. As a general matter, though, they are subject to doubts about whether they can achieve their ambitious stated aims, including whether victims' narratives and perpetrators' confessions will actually document and provide catharsis in the aftermath of widespread crime, and whether seeking to move forward without punishment of offenders may actually undermine rather than bolster public trust in government. Even with the South African Truth and Reconciliation Commission, given its limited mandate to examine "gross human rights violations," the tactical and negotiated nature of much testimony, and the lack of funds available to pay reparations, its success at healing the wounds of apartheid was surely a matter of degree.<sup>40</sup> The logic of such commissions, furthermore, applies more straightforwardly to civil conflicts, where parties must learn to live and govern together after the conflict's end; their role as a response to war crimes in noncivil conflicts, by comparison, is less assured. As a moral matter, finally, restorative justice often will offend even the moderate retributivism described in the following section by failing to censure even the most egregious offenders. Restorative justice, in other words, is at best an incomplete solution when pursued independent of some component of punishment, and a system that lacks any possibility for retribution is no true candidate for displacing war crimes trials altogether. To anticipate a reply, even with "collective" war crimes, retributive justice, with its focus on punishing individual wrongdoing, would at a minimum license prosecuting commanders and senior officials who ordered subordinates to commit atrocities. More generally – and

nonexclusively – it would also license prosecuting individuals who freely volunteered into organizations or units dedicated to, or known for, war crimes.

Advocates for using only civilian prosecutions cite diverse rationales, but in defending a deservedly proud tradition of law enforcement and nonmilitary criminal justice, they fail to make the case that war crimes trials are unneeded. In the experience of the United States, for example, federal civilian agents and prosecutors can and do disrupt and punish a wide variety of terrorist and other organized threats – including through the charging of precursor crimes such as identity fraud or immigration violations – and the legitimacy of a federal court conviction is usually unquestioned. But federal civilian courts' exclusion of reliable and lawfully collected hearsay statements seems unwise when witnesses inhabit the same ungoverned regions where war crimes were hatched and are thus unavailable for trial. The requirement that statements by an accused be preceded by warnings of the rights to remain silent and to have an attorney also makes little sense in a situation of genuine overseas hostilities. And of the twenty federal court prosecutions since 9/11 of Al Qaeda members who were captured overseas and were also triable for war crimes – a more pertinent data point than the hundreds of purely domestic prosecutions – all but one came into our custody through law enforcement cooperation with foreign governments who declined to prosecute.<sup>41</sup> This is hardly a convincing record for banning trials that feature sensible and fair evidentiary rules suited to punishing members of irregular hostile groups, who plan attacks from difficult-to-reach sanctuaries in increasing numbers.

Furthermore, it matters why we punish offenders. War crimes trials can more fully express a war criminal's wrongdoing by punishing him not only for, say, killing in-

nocent people, as a civilian court might, but also for committing the distinct legal and moral wrong of killing innocent people *as a means of war*. In addition to wronging his immediate victims, he also acts to make war in general more brutal and horrible. A war crimes tribunal, established for its distinct purpose, with a charge sheet specifying war crimes rather than civilian crimes, and with members of the military possibly taking part as judges, prosecutors, and jurors, can assist in expressing this conviction, even as civilian condemnation also finds an appropriate voice.

Proponents of simply targeting and detaining such threats fare no better in rendering war crimes trials unnecessary.<sup>42</sup> Although targeted and proportional attacks on enemies during hostilities are permitted under the law of war, and although humane detention of combatants is also lawful for the duration of an armed conflict, these modes of incapacitating terrorist threats are only legitimate insofar as they can be established to be *necessary*. Military and intelligence operations in the sovereign territory of foreign states are unjustified except in the narrow and urgent circumstance where a host nation is truly unwilling or unable to eliminate the threat. And detention until the end of the war becomes, in reality, punishment without trial when the war extends indefinitely for many years and even decades.

**A**nalysis of these and other skeptical claims suggests that the legitimacy of war crimes trials must be evaluated case by case. None of the claims is a clear trump. While each criticism gives us pause, their relevance will vary, as we have seen. But how do we assess their ultimate impact, and determine the legitimacy of a given tribunal, or the wisdom of instituting war crimes trials in a particular *ad bellum*, *in bello*, or *post bellum* context?

Reflection upon the claims and criticisms highlighted in the foregoing pages suggests that a purposive analysis may prove useful. That means inquiring into the purposes of war crimes trials, and then assessing whether a particular tribunal realizes them, or would realize them, sufficiently. Upon such inquiry, it becomes apparent that war crimes trials have both backward- and forward-looking purposes. They have the backward-looking aim of delivering retribution “through the channel of organized justice,” in addition to various forward-looking aims such as deterring future war crimes – in a particular conflict or more generally – and promoting the rule of law.

We can recast the claims and criticisms in these terms. The claims that war crimes trials apply arbitrary, unsettled, or unbounded law, that they deliver sham process, that they punish individuals for communal crimes, and that alternatives can deliver punishment more swiftly or reliably are all claims that war crimes trials fail to realize their backward-looking purpose of holding offenders accountable for their past wrongdoing in accordance with law. Meanwhile, the claims that war crimes trials incentivize further fighting, imperil peace agreements, and prevent communal reconciliation are claims that they fail to realize their forward-looking purposes.

The two types of aims can dovetail, as Robert Jackson expressed in his opening statement at the Nuremberg trials. By “stay[ing] the hand of vengeance” and delivering “a just and measured retribution” to Nazi leaders through law, Jackson argued, the Tribunal could advance the forward-looking aim of preventing future war crimes as it “put the forces of international law, its precepts, its prohibitions and, most of all, its sanctions, on the side of peace.”<sup>43</sup> Assessment of prosecutions that advance both aims simultaneously – as many now view the Nuremberg trials to have done – will generally be positive.

The two types of aims, however, are incommensurable, meaning that there is no deeper concern or value that can cash out conflicts between the two, and they will not always harmonize.<sup>44</sup> Their relationship, indeed, is notoriously complex and contentious. Some argue that the central aim of punishment is, and must be, forward-looking deterrence, but that, for reasons of efficiency and fairness, we should only punish the morally culpable.<sup>45</sup> Others start in the other direction, arguing that an offender's retributive guilt makes him *liable* for punishment, which should then be delivered if and only if justified by consequentialist considerations.<sup>46</sup> Some retributivists, though, take a much harder line in accordance with Kant, arguing that punishment – like, say, people's right to equal treatment – is justified “because, and only because” it is deserved, irrespective of any consequentialist benefits that may result.<sup>47</sup> While lacking the space to fully engage with this debate, we posit a “moderate retributivism,” whereby *some* positive value accrues in delivering proportionate censure and hard treatment to an offender, regardless of the consequences.<sup>48</sup> While this value will not always be sufficiently high, in and of itself, to justify punishment, the scale of wrongdoing involved with many international criminal violations is so profound that the retributive imperative to punish will be substantial even on this moderate view. But how substantial? How does it measure up to our forward-looking concerns, which remain independently relevant on this theory, when they push hard in the other direction?<sup>49</sup> In particular, what if prosecuting alleged war criminals would make peace less likely?

When presented with this dilemma, Holbrooke – in the example of whether Karadžić should have been prosecuted – can be said to have publicly taken a rigid, even Kantian line in support of retributive justice. Holbrooke's view was that the atrocities in the Balkans were so extreme

that worrying about whether prosecutions would jeopardize peace was inappropriate. Kant wrote famously in *Philosophy of Law*:

Even if a civil society resolved to dissolve itself with the consent of all its members – as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves throughout the whole world – the last murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that blood-guiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of justice.<sup>50</sup>

Kant explains here that the justification of retributive justice does not depend upon its good, forward-looking consequences. In his hypothetical, since the island society is disbanding, no good consequences will follow from the execution; in particular, it will deter no future murderer. And yet, on his view, as a matter of justice, the execution must still take place.

The “hypothetical” that Holbrooke confronted exposes, no less starkly, the irrelevance of consequences to retributive justice. Indeed, the issue was not that prosecuting Karadžić and others might fail to generate positive consequences, but rather that such prosecution risked hugely negative consequences, namely, the continuance of a nasty war. Holbrooke's “hypothetical” was this: should the community of nations prosecute a guilty murderer – indeed, a guilty mass murderer – if, by doing so, it risks dissolution of a fragile emerging peace settlement and the death of many of its members' citizens? By answering in the affirmative, Holbrooke championed, in the strongest possible terms, a moral duty to hold individuals legally accountable for their wrongdoing.

The appraisal of war crimes trials with inherent forward-looking risks, howev-

er, cannot end so neatly for at least two reasons. First, keeping in mind for an instant just the backward-looking criticisms, only a tribunal that applies well-made legal rules with due process could ever carry out a duty to prosecute, and these challenges alone are so formidable that resulting trials will evade neat assessments even without the possibility of dire future consequences. Second, keeping in mind also the forward-looking criticisms, even if we assume what a moderate retributivism denies – that delivering retributive justice is always a full-blown duty – we must understand that duties can sometimes be overridden, possibly by other duties – maybe the duty to maintain social order – and that the decision to set up institutions capable of prosecuting war crimes is ultimately a matter of political judgment by leaders with the power to do so.

While, in the moderate retributivist view, there ought to be a strong presumption in favor of prosecution in the case of mass international crimes, there are thus no clean answers. As political scientist Gary Bass has written, “It is important to remember that legal justice is one political good among many – like peace, stability, democracy, and distributive justice.”<sup>51</sup> Bass here echoes Alexander Hamilton, who writes in *The Federalist Papers: No. 47*, “In seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth.”<sup>52</sup> The

pragmatism of this perspective dilutes Holbrooke’s certitude appropriately, yet in examining alternatives to prosecutions with forward-looking costs, it is crucial to critically evaluate the details of, and the costs inherent to, the alternatives themselves. We must seek to consider the preferred course of action described or implied by each critic, making reasonable assumptions to fill often prevalent gaps. Precisely what kind of substitute response is envisioned? To whom are those championing such a response accountable? And does the cost-benefit analysis proposed or suggested really incorporate all relevant costs and benefits that will be borne by the entire population?

For the question, ultimately, cannot be whether to stay the hand of *justice*. That hand carries scales, and the scales of justice must always be permitted to do their work, here by weighing the prosecution of mass murderers against the pursuit of other goods. The decision to prosecute is not always straightforward and is never without price. But when carried out consistently with established law and procedure, and when not dramatically outweighed by forward-looking concerns, war crimes prosecutions are a legitimate, and sometimes necessary, response to egregious and widespread violations of the laws of war. This is so because all nations rely upon enforcement of these laws for their security, even as enforcement also confirms our individual and collective humanity.

#### ENDNOTES

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- <sup>1</sup> Hubert Pierlot, “The Inter-Allied Conference, January 13, 1942,” *Bulletin of International News* 19 (2) (January 1942): 52, <http://www.jstor.org/stable/25643188>. Hubert Pierlot, the prime minister of Belgium, made this statement upon signing the Declaration of St. James’s Palace, in London, January 13, 1942.
- <sup>2</sup> Inter-Allied Information Committee, *Punishment for War Crimes: The Declaration and Related Documents* (London: Her Majesty’s Stationary Office, 1942).
- <sup>3</sup> Hartley Shawcross, *Life Sentence: The Memoirs of Hartley Shawcross* (London: Constable, 1995), 87. Shawcross reflects upon Churchill’s preference for summary justice.
- <sup>4</sup> Harlan Fiske Stone quoted in Alpheus Thomas Mason, *Harlan Fiske Stone: Pillar of the Law* (New York: The Viking Press, 1956), 716.
- <sup>5</sup> Robert H. Jackson, Chief Prosecutor for the United States of America, “Opening Statement Before the International Military Tribunal (November 21, 1945),” in *Trial of the Major War Criminals Before the International Military Tribunal*, vol. 2 (Nuremberg: Secretariat of the Tribunal, 1947), 98 – 99.
- <sup>6</sup> United Nations Security Council, *Bosnia and Herzegovina* (S/RES/798), December 18, 1992, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N92/828/82/img/N9282882.pdf>.
- <sup>7</sup> *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 11 (Washington, D.C.: U.S. Government Printing Office, 1950), 757, 971 – 72, 1264 – 1274, [http://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_war-criminals\\_Vol-XI.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XI.pdf).
- <sup>8</sup> Richard Holbrooke, *To End a War* (New York: Modern Library, 1999), 90.
- <sup>9</sup> Julian Ku and Jide Nzeli, “Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?” *Washington University Law Review* 84 (2006): 777 – 833.
- <sup>10</sup> *Ibid.*, 785 – 786.
- <sup>11</sup> *Ibid.*, 804.
- <sup>12</sup> Mason, *Harlan Fiske Stone: Pillar of the Law*, 716.
- <sup>13</sup> Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), 33 – 38.
- <sup>14</sup> Donnedieu de Vabres quoted in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 15 (Washington D.C.: U.S. Government Printing Office, 1949), 1077, [http://www.loc.gov/rr/frd/Military\\_Law/NTs\\_war-criminals.html](http://www.loc.gov/rr/frd/Military_Law/NTs_war-criminals.html).
- <sup>15</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 595 – 613 (2006).
- <sup>16</sup> *Al Bahlul v. United States*, 767 F.3d 1, 27 – 29 (D.C. Cir. 2014).
- <sup>17</sup> Memorandum from Herbert Wechsler, Assistant Attorney General, War Division, United States Department of Justice, to the Attorney General, December 29, 1944, located in the National Archives at College Park, Maryland. Wechsler comments on the “Bernays Plan” to try Nazi war criminals.
- <sup>18</sup> *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 11.
- <sup>19</sup> *Al Bahlul v. United States*, 767 F.3d 1, 27 – 29 (D.C. Cir. 2014).
- <sup>20</sup> *Reid v. Covert*, 354 U.S. 1, 38 – 41 (1957).
- <sup>21</sup> *Ibid.*
- <sup>22</sup> Carl von Clausewitz, *On War*, ed. and trans. Michael Howard and Peter Paret (Princeton, N.J.: Princeton University Press, 1976), 76.
- <sup>23</sup> *Ibid.*
- <sup>24</sup> William Blackstone, “Of the Military and Maritime States,” in *Commentaries on the Laws of England: The Rights of Persons* (Oxford: Clarendon Press, 1765), book I, chap. 13.
- <sup>25</sup> *Korematsu v. United States*, 323 U.S. 214, 244 (1944) (Justice Jackson dissenting).
- <sup>26</sup> *Ibid.*



- <sup>27</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (International Criminal Tribunal for the Former Yugoslavia, October 2, 1995); and *United States v. Hamdan* (Military Commission, 2008) (panel instruction).
- <sup>28</sup> *Geneva Convention Relative to the Treatment of Prisoners of War*, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 3.
- <sup>29</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, Article 6, December 7, 1978, 1125 U.N.T.S. 609.
- <sup>30</sup> 10 U.S.C. § 950g.
- <sup>31</sup> William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (New York: Alfred A. Knopf, 1998), 224 – 225.
- <sup>32</sup> Gustave M. Gilbert, *Nuremberg Diary* (Boston: Da Capo Press, 1995), 12 – 13, 32, 419.
- <sup>33</sup> William Shawcross, *Justice and the Enemy: Nuremberg, 9/11, and the Trial of Khalid Sheikh Mohammed* (New York: Public Affairs, 2011), 101.
- <sup>34</sup> Jack Goldsmith, *Power and Constraint* (New York: W.W. Norton and Company, 2012).
- <sup>35</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980).
- <sup>36</sup> Kent Greenawalt, “Amnesty’s Justice,” in *Truth v. Justice: The Morality of Truth Commissions*, ed. Robert I. Rotberg and Dennis Thompson (Princeton, N.J.: Princeton University Press, 2010), 202.
- <sup>37</sup> *Ibid.*, 197.
- <sup>38</sup> “Facts and Figures: Military Commissions v. Federal Courts,” Human Rights Watch, <http://www.hrw.org/features/guantanamo-facts-figures> (last modified December 23, 2011).
- <sup>39</sup> “Terrorism Cases Should Be Tried in Federal Court,” American Civil Liberties Union, <https://www.aclu.org/terrorism-cases-should-be-tried-federal-court>.
- <sup>40</sup> See Elizabeth Stanley, “Evaluating the Truth and Reconciliation Commission,” *Journal of Modern African Studies* 39 (2001): 525 – 546.
- <sup>41</sup> The twenty cases are as follows: 1. *The United States v. Mohammed Mansour Jabarah* (S.D.N.Y. 2002); 2. *Nalfi* (S.D.N.Y. 2003); 3. *Afridi* (S.D. Ca. 2004); 4. *Zayed* (E.D.N.Y. 2005); 5. *Moayed* (E.D.N.Y. 2005); 6. *Syed* (S.D. Ca. 2006); 7. *Kassir* (S.D.N.Y. 2009); 8. *Delaema* (D.D.C. 2009); 9. *Siddiqui* (S.D.N.Y. 2010); 10. *Ghailani* (S.D.N.Y. 2010); 11. *Warsame* (S.D.N.Y. 2011); 12. *Issa* (S.D.N.Y. 2011); 13. *Ghath* (S.D.N.Y. 2014); 14. *Hamza* (S.D.N.Y. 2014); 15. *Babar* (D.Conn. 2014); 16. *Bary* (S.D.N.Y. 2014); 17. *Fawwaz* (S.D.N.Y. 2014); 18. *Naseer* (E.D.N.Y. 2015); 19. *Hamidullin* (E.D. Va. 2015); 20. *Saddiq* (E.D.N.Y. 2015). The United States gained custody of four of these persons from the United Kingdom (14 – 18), two from Hong Kong (3, 6), two from Germany (5, 6), one from Canada (1), one from The Netherlands (8), one from the Czech Republic (7), one from Ghana (12), one from Kenya (2), one from Jordan (13), and one from Saudi Arabia (20). Only three came from portions of Southwest Asia containing large regions of ungoverned space (Afghanistan: 9, 19; Pakistan: 10; and international waters near the Arabian Peninsula: 11); and these required close coordination with U.S. military forces and nonstandard law enforcement detention. A comparison of these prosecutions with the fifteen thus far tried or arraigned by military commission is instructive, though beyond the scope of this essay. The fifteen military commissions prosecutions: 1. *The United States v. David Matthew Hicks* (2007); 2. *Hamdan* (2008); 3. *Bahlul* (2008); 4. *Qosi* (2010); 5. *Khadr* (2010); 6. *Noor* (2011); 7. *Khan* (2012); 8. *Darbi* (2014); 9. *Nashiri* (ongoing); 10. *K. S. Mohammed* (ongoing); 11. *Khallad* (ongoing); 12. *Ramzi* (ongoing); 13. *Hawsawi* (ongoing); 14. *Ammar* (ongoing); 15. *Hadi* (ongoing).
- <sup>42</sup> Goldsmith, *Power and Constraint*, 144.
- <sup>43</sup> *Trials of the Major War Criminals Before the International Military Tribunal*, vol. 2, 99 – 101.
- <sup>44</sup> See Nicola Lacey, *State Punishment: Political Principles and Community Values* (London: Routledge, 1988), 49, 55 – 56.

- <sup>45</sup> See H. L. A. Hart, "Prolegomenon to the Principles of Punishment," in *Punishment and Responsibility* (Oxford: Clarendon Press, 1968); and John Rawls, "Two Concepts of Rules," *The Philosophical Review* 64 (1955): 3–32. Mark S.  
Martins  
& Jacob  
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- <sup>46</sup> See, for example, Andrew von Hirsch, *Censure and Sanctions* (Oxford: Clarendon Press, 1993).
- <sup>47</sup> Michael S. Moore, "The Moral Worth of Retribution," in *New Essays in Moral Psychology*, ed. Ferdinand Shoeman (Cambridge: Cambridge University Press 1987), 179.
- <sup>48</sup> See Jeffrie G. Murphy, "Retributivism and the State's Interest in Punishment," in *Criminal Justice: Nomos XXVII*, ed. J. Roland Pennock and John W. Chapman (New York: New York University Press, 1985); Ramon M. Lemos, "A Defense of Retributivism," *The Southern Journal of Philosophy* 15 (1977): 62–63; Michael Philips, "The Justification of Punishment and the Justification of Political Authority," *Law and Philosophy* 5 (1986): 401–410; Larry Alexander, Kimberly Kessler Ferzan, and Stephen Morse, *Crime and Culpability: A Theory of Criminal Law* (New York: Cambridge University Press, 2009), 7–10; and Alec Whalen, "Retributive Justice," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Stanford, Calif.: Stanford University Center for the Study of Language and Information, 2015), <http://plato.stanford.edu/archives/sum2015/entries/justice-retributive/>.
- <sup>49</sup> While maybe inelegant, it is not necessarily objectionable that a political practice has independent justificatory principles, which can conflict in certain circumstances. The principles underlying free speech, for instance – like the value of personal expression and the contribution free speech makes to a healthy democracy – will sometimes clash. Consider the cases of antidemocratic speech, such as hate speech or demagoguery. Where a practice has multiple justificatory principles, it is enough that each provides independent reasons in support of that practice, and that, as a general matter, they are not contradictory.
- <sup>50</sup> Immanuel Kant, *The Philosophy of Law*, trans. William Hastie (Edinburgh: T. T. Clark, 1887), 198.
- <sup>51</sup> Gary Bass, "Jus Post Bellum," *Philosophy and Public Affairs* 32 (2004): 405.
- <sup>52</sup> Alexander Hamilton, "The Command of the Military and Naval Forces, and the Pardoning Power of the Executive," in James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, ed. Isaac Kramnick (New York: Penguin, 1987), 423.