The Metamorphosis of Punishment in the Law of Nations

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The Metamorphosis of Punishment in the Law of Nations

A dissertation presented
by
Bradley Alan Hinshelwood
to
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The Metamorphosis of Punishment in the Law of Nations

Abstract

This dissertation examines the disappearance of punishment as a justification for interstate war in European political theory, and its rise as an individualized process applicable to what modern-day scholars call “war crimes.” This metamorphosis occurred over the course of roughly a century and a half of debate in natural law theory, initiated by the publication of Hugo Grotius’s *De jure belli* in 1625. This work touched off two parallel and often closely related debates about the precise scope of natural law in wartime and the relationship of individual subjects to the acts taken by their states or sovereigns. Grotius’s arguments about sovereignty initiated a gradual decline of the notion of collective responsibility for state acts which made the precise content on punitive war and state punishment difficult to define, despite strong theoretical hurdles presented by social contract theories of the state which stressed the ways in which the sovereign’s judgment stood in for—and thus could be interpreted as—the subject’s judgment. While this undermined the prospects for collective punishment through war, it was not until the late 17th and early 18th centuries that scholars began to argue that individualized punishment of enemies who violated certain standards of conduct could be a legitimate feature of war, based on a new conception of natural law which stressed the priority of obligations over rights. The culmination of the tradition came in the work of Emer Vattel, whose *Droit de Gens* preserved punishment as a potential just cause of war but effectively emptied the category of its content, while fully embracing arguments about personalized punishment for offenses which violated the laws of war.
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Introduction

This dissertation examines the disappearance of punishment as a justification for interstate war in European political theory, and its rise as an individualized process applicable to what modern-day scholars call “war crimes.” This involves studying a moment in the history of natural rights theories which, compared to the long lifespan of punitive war as a feature of international relations, brought that concept to its knees extremely quickly. The process that ultimately led to the disappearance of punitive war was set in motion by the publication of Hugo Grotius’s *De jure belli ac pacis* in 1625, a work widely considered by contemporaries and successors to be a major accomplishment and innovation in natural law theory. The final blow to punishment was not struck by the international legal positivism of the 1800s—though for obvious reasons that movement was hostile to the idea of punishment—but instead by developments in natural law theory which culminated with the publication of Emer de Vattel’s *Droit de Gens* in 1757. In the span of just 132 years, punishment lost the legitimacy it had held for nearly two millennia in both classical and Christian thought on the international realm. With this disappearance, however, came a new body of thought about punishment which stressed that war necessarily involved enforceable limits on a belligerent’s conduct toward its enemies—limits enforceable through individualized punishment for transgressions of that law. This led to the creation of the civilian/combatant distinction, as well as extensive protections for prisoners of war, both which continue to undergird the modern laws of armed conflict.

Punishment’s long legacy in European political theory could be traced back to the ancient world. Cicero’s *De officiis* included punishment among the causes of war; he stressed that there are duties even to individuals who have wronged us, so punishment must therefore be proportionate, which leads to his general insistence that “the only excuse, therefore, for going to
war is that we may live in peace unharmed.”¹ The most authoritative Christian writers endorsed and elaborated on this principle. Augustine’s Questions on the Heptateuch contained the most famous formulation, stating that “We usually define just wars as those that avenge wrongs, when peoples or political communities need to be punished either because they have failed to rectify wrongs committed by their subjects, or because they have failed to restore property unjustly seized.”² When Thomas Aquinas gave his description of just causes of war in the Summa, he simply quoted directly this passage of Augustine.³ Among writers more contemporary to Grotius, the claim that punishment was an acceptable cause of war was likewise accepted. Alberico Gentili, author of one of the most authoritative humanist texts on the laws of war, included punishment among the legitimate causes of war,⁴ and the same was true of the Scholastic writers on law of war; Francisco Suarez, for example, noted in 1613 that “war may also be justified on the ground that he who has inflicted an injury should be justly punished...This conclusion is commonly accepted.”⁵

The disappearance of this venerable position in international thought has been noticed in recent years, but has met with surprising indifference and little interest in tracing its decline. In modern scholarship on just war theory, Michael Walzer is highly unusual in discussing the issue at all, though hedevotes little more than a paragraph to noting that it was a traditional though

³ ST II-II, Qu. 40, Art. 1, in Baumgarth and Regan at 165.
ultimately ill-defined justification for war. Similarly, David Luban, in one of the most philosophically acute examinations of the justifications for punitive war, briefly surveys punitive war from Cicero through John Locke, but notes the disappearance of the concept by concluding simply that “the punishment theory of just cause eventually disappeared and was replaced by the proposition that self-defense is the only just cause for war.” Luban identifies a variety of objections to the practice—in particular the victim’s biased judgment and consequent lack of a proportionate response, and the concern that such punishment reaches innocent civilians instead of those actually responsible for the war—and occasionally references historical versions of these complaints, but these are not tied to any overarching examination of the decline of punishment as a justification for war.

The closest Luban comes to an explanation of punishment’s decline is the claim that it “declined with the consolidation of the nation-state system, because it seems inconsistent with the theory of sovereign equality,” and indeed this has stood as effectively the only explanation for the decline of international punishment. Harry Gould has similarly concluded that the rise of sovereignty as a definitive attribute of the state contributed significantly to punishment’s downfall, with Leibniz, Wolff, and Vattel representing the final harbingers of this new approach; Vattel provided “a rigid formulation of sovereignty” which made punishment untenable.

Scholars with a more recent focus have noted that while the punitive ethos did not feature in formal doctrine on the international order after Vattel, it has been in particular disrepute since World War I, when the harsh reparations payments placed on Germany after the war were

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8 Id. at 316.
sometimes justified in punitive terms.\(^{10}\) This has led to a shift in present-day international law toward an ethos of prevention, with the vocabulary of punishment excised from the official doctrine of international law.\(^ {11}\)

However, a simplistic narrative focusing on the rise of sovereignty obscures more than it explains about the disappearance of punishment from the international order. Conceptions of sovereignty certainly did change from the time of Grotius to the time of Vattel, but the justifications for the decline of punishment depended a great deal on the details of those shifts. Writers like Hobbes, with a “rigid formulation” of sovereignty, could perfectly well endorse action in the international order that looked strikingly punitive and relied on a logic of collective responsibility. Even writers who ostensibly rejected collective responsibility, like Grotius and Locke, recognized the possibility of personal responsibility for collective crimes. It was by no means clear to most of the writers in the early-modern natural law tradition that states (and by extension, their citizens) could not be held responsible for their violations of the law of nature in the international realm; there was active debate on this issue throughout the period. As we will see, even when Vattel ultimately concluded that collective punishment of almost any sort was unacceptable, he did so primarily by avoiding the difficult questions which his predecessors had addressed.

Similarly, a focus on a superficial account of sovereignty obscures the critical shifts in natural law doctrine which enabled the rise of individualized punishment of enemies alongside the decline of punitive war. It is a strikingly unnoticed fact that every writer in the tradition which ultimately came to dominate natural law thought on the international realm in the 18th

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\(^{11}\) Id., *passim.*
century—Leibniz, Wolff, and Vattel—endorsed a Grotian natural individual right of punishment, and analogized the state’s right of punishment to that individual right. This has been ignored in part because of a persistent misreading of Vattel, who is often seen as claiming that natural law was no longer enforceable\textsuperscript{12}—a misreading which I aim to correct. As I demonstrate, Grotius’s legacy on international punishment was a complicated one, and it was ultimately the particular elaboration of Grotian thought put forward by Leibniz, and developed fully by Wolff and Vattel, that led to the downfall of punitive war and the rise of individualized punishment.

Grotius may seem an extremely unlikely candidate for the beginning point for the decline of punitive war. One of the most striking features of Grotius’s arguments in \textit{De jure belli} was his claim that individuals held a right of punishment prior to the creation of civil society which persisted after its foundation. The place of punishment in Grotius’s theory thus expanded dramatically, not only as a justification for interstate war but also as an individual right which private persons still could—and on Grotius’s account, did—employ in ungoverned spaces. This bolstered both Grotius’s vindication of the Dutch revolt and the legitimacy of the activities of the Dutch East India Company (VOC), which played a major role in the Dutch war effort. Further, Grotius endorsed the claim that the individual’s right to punish extended over all violations of the natural law, whether those violations injured the punisher or not, and consequently endorsed war for the purposes of punishing cannibalism, human sacrifice, and similar offenses against the law of nature.

However, describing punishment as an individual right raised numerous difficult questions, and as early-modern natural law thought turned to an examination of individual rights

\textsuperscript{12} Numerous writers have made this claim, some of whom are catalogued in Chapter 6. For these purposes, I will simply note Harry Gould’s description: “In Vattel’s work, Natural Law was considered only hortatory in function and weight. Natural law was no longer \textit{enforceable} at all.” Gould, \textit{Legacy}, 26.
and the content and structure of the social contract which gave the state its authority, new methods of control and limitations on punishment were necessary. As an initial matter, it became important to answer the question whether individuals truly did hold a right of punishment, and the majority of significant writers in this tradition concluded that they did. Even the writers who were most ambivalent on this point—Thomas Hobbes and Samuel von Pufendorf—acknowledged that individuals initially held a right to engage in war for deterrence and future security, purposes which were often included by other writers under the notion of punishment; their objection was as much definitional as it was substantive.

If individuals initially held this power, and these individuals made up the state, Grotius’s theory posed a challenge to future writers to demonstrate why the sovereign had exclusive control over the right of punishment after the institution of the state, and further to explain the source of the state’s right. Was the state simply exercising a right granted by the individuals who made it up, or was the state a unique entity with rights of its own, either different in kind from those held by individuals or separate from the rights of the subjects? Grotius himself was quite ambiguous on this point; in his early and unpublished *De Indis*, he suggested that individuals transferred their right of punishing to the state, but retreated from that position in *De jure belli*, and never clarified in the latter work the precise relationship between individual rights and sovereign powers. This ambiguity likewise served his interests in Dutch independence and Asian hegemony, but his claims about the persistence of a private right of punishment were universally criticized by his successors, who were then able to read into Grotius’s theory either an account of individual transfer or a more Aristotelian conception of sovereign power as resulting from the state’s need to have sufficient authority to do what was necessary for its completion or
perfection. Which type of theory of sovereignty one built on Grotian foundations had important implications for the right of punishment.

The first answers we will consider to this challenge—advanced by Hobbes and Pufendorf—stressed the claim that the sovereign in some sense exercised the rights of the individual citizens when he made war as a consequence of the initial authorization granted in the social contract. This position was advanced most forcefully by Hobbes, who argued that the subject had to consider himself as the author of every act of the sovereign, since the sovereign exercised each individual’s judgment on his behalf in making decisions for the good of the whole. Pufendorf took largely the same position, with some lingering judgment for individuals which preserved a highly constrained right of resistance. While both authors assured their readers that subjects could not be held morally responsible before God for the acts of the sovereign done in their name, these subjects were certainly responsible on earth. By surrendering or renouncing all their rights to the sovereign, individuals made themselves the author of his acts in a way sufficient for an attribution of responsibility to each individual, and this collective responsibility opened the door for punishment on an extremely broad scale. It is thus unsurprising that we see in Hobbes and Pufendorf intimations of extremely savage laws of war, with no protections for enemy civilians which could be enforced by an earthly power. If every subject was in principle responsible for the acts of the state, there could be no basis for distinguishing among enemies who could or could not be killed in warfare. Instead, any limits on a belligerent’s actions were self-imposed, based on a proper understanding of what would best conduce to his own future security. Likewise, Pufendorf’s account of the acquisition of property and the rights of conquest drew heavily on the consequences of the subject’s initial authorization of the sovereign.
This theory of authorization was supplemented by the claim advanced by both Hobbes and Pufendorf that no duties of any sort were owed to enemies. A fundamental characteristic of the state of war for both authors was the fact that it freed individuals and states to act according to their independent judgment of what best conduced to their security, without any consideration of obligations to the enemy. The key difference for these writers was thus not their conception of the state of war, which was effectively identical, but instead a debate about whether the state of nature and the state of war were synonymous. Pufendorf’s formulation of the state of war proved to be particularly influential; while he insisted that it was distinguishable from the state of nature, which was generally peaceful, the critical fact about the state of war was that an individual’s violation of the laws of nature toward another severed all natural duties between the two parties, granting a right of war which was limited only by the just belligerent’s regard for his own long-term preservation and his obligations toward God.

The wide-ranging account of punishment implied by the authorization theory of Hobbes and Pufendorf presented a major challenge to subsequent writers in this tradition, though for very different reasons. For one, this model of authorization threatened to undermine the sort of consent-based government envisioned by writers like John Locke, and later, Vattel; if individuals could be held personally responsible for the acts of their sovereigns in severing obligations with another nation, leading to their subjugation in war, that appeared to threaten the consensual foundations of government both writers held dear. In addition, the breathtaking scope of violence which the authorization theory endorsed was unpalatable to those who sought to place greater limitations on warfare, including the protection of “innocent” civilians. This was of particular concern to 18th century writers like Christian Wolff and Vattel, who lived in a period when
European relations were increasingly shaped by war over the legal claims of sovereigns, and thus sought to reduce the potential import of those wars.

Responses to the challenges created by the relationship between authorization and the private right of punishment took two divergent paths, one of which proved to be a dead end. This was Locke’s response, which looked back to Grotius for a strong account of the individual right to punish. Despite apparently never reading Grotius’s *De Indis*, Locke also made the argument that the state’s power to punish was straightforwardly derived from the rights of the individuals who made it up, and he supplemented this with the claim that individuals authorized the acts of their representatives when they acted within the public trust. This enabled Locke to provide a justification for the centralization of punitive violence in the state, though his interests in colonial affairs led him to leave space for the delegation of that power to lower authorities. Similarly, Locke attempted to revive in even stronger form Grotius’s claim that individuals held judgment about the state’s employment of the individual’s rights, and thus could be individually punished for the sovereign’s decision to engage in an unjust war. Critically, however, this punishment was exclusively individual, never collective. Locke offered a pair of arguments for this position, one based on the claim that individuals could never authorize their sovereigns to undertake an unjust act, and the other based on his famous theory of property, which denied that any sort of political power could ever result over individuals who were not personally guilty of some offense against the enemy. Those who had committed such an offense were subject to absolute slavery and even death, based on the same severance rationale apparent in Pufendorf; consequently, no protections existed for prisoners of war in Locke’s schema. The resulting theory thus shielded property far more than any account before or since, while doing far less to protect life than would come to be characteristic of later theories of the law of nations.
Yet Locke was ultimately virtually alone in stressing the possibility of individual responsibility for state crimes, and in his unique degree of protection for property. Ultimately the dominant strain of thought stemming from Grotius built on a very different aspect of the Dutchman’s theory, and a corresponding rejection of the vision of the state of war put forward by Hobbes, Pufendorf, and Locke. This strand began, somewhat unexpectedly, with the work of Gottfried Wilhelm Leibniz, despite the fact that he never wrote a systematic treatise on natural law or international affairs. From early in his career, Leibniz was attracted to Grotius’s views on natural law, in particular because of what Leibniz viewed as a shared opposition to the voluntarist theories of moral obligation put forward by Hobbes and Pufendorf. In his works on natural law, Leibniz adopted Grotius’s account of perfect and imperfect rights, but supplemented that account with a very detailed discussion of the obligations on others which those rights impose. This discussion had largely been absent from Grotius and from the tradition stretching from Hobbes through Locke, but it became central to Leibniz’s limited discussions of justice and natural law.

The core of Leibniz’s argument was that individual rights existed for the sake of satisfying obligations, and this prioritization of obligations over rights had immediate consequences for limiting punishment and the conduct of belligerents in war, though Leibniz himself never drew those conclusions. These connections were largely drawn by Wolff, who systematically applied this theory of natural law to the international arena. Most significantly, this approach to natural right implied that the severance of obligations which had characterized the theories of Pufendorf and Locke was untenable; instead, the obligations of an individual or state always set limits to the exercise of the consequent right, including the right of punishment. For Wolff, this meant that the right of war could only be employed against those who actively
resisted the restoration of a just belligerent’s right, and this enabled Wolff to systematically distinguish between combatants and non-combatants in war, leading to a distinctly modern conception of civilian status. It also permitted Wolff to shield prisoners of war, who by their surrender removed themselves from the category of those who resisted the restoration of the belligerent’s right. Finally, it created a theoretical space for individualized punishment of enemy belligerents who violated the restraints on war implied by this conception of right; those who deliberately targeted civilians, for example, could conceivably be subject to punishment for their actions upon their capture.

While Wolff employed Leibniz’s ideas to create space for individualized punishment in the international realm, he did not completely eliminate the concept of collective punishment, and once again the concept of authorization played an important role. Leibniz had taken a decidedly non-contractual view of the state’s powers, and in some respects Wolff followed this position; in particular, Wolff viewed each individual state power as flowing from its obligation of perfection, rather than any grant of power from individuals in an initial contract. However, Wolff was a contractarian theorist, and his social contract theory focused heavily on the state’s new ability to control or override the judgment of the subjects. Unlike Hobbes, however, there was no corresponding claim that the sovereign’s judgments reflected the judgments of the individual subjects. This was possible in large part because Wolff wholeheartedly endorsed a claim which Hobbes and Pufendorf had been keen to avoid: that the initial contract created a persistent, rights-bearing entity called the “people.” While Hobbes and Pufendorf had viewed this as threatening because of its implications for resistance, Wolff made this the foundation of his social contract theory. The sovereign represented and exercised the rights and duties of this unified entity, and in principle the people as a unit was completely responsible for the
sovereign’s acts. Consequently, the people as a unit could be punished for the sovereign’s misdeeds, though Wolff struggled to explain how this could be meaningfully distinguished from punishment of the individuals who made up the people.

Wolff’s theory had sharply limited the scope of punishment without completely eliminating it, but the work of Vattel was to effectively put an end to punitive war in the normal course of international affairs. Self-consciously building on the theories of Leibniz and Wolff, Vattel’s innovations with respect to punishment primarily focused on the contractual aspects of Wolff’s thought. While Vattel retained the claim that the ruler exercised the rights of the people and his judgments were to be attributed to the people as a whole, he quietly rejected the suggestion that the people could ever be held responsible for the sovereign’s misdeeds in a way which made the collective body amenable to punishment. While there were limited exceptions to this rule—primarily in relations with non-European peoples—Vattel generally severed the connection which had traditionally bound ruler and subject, or at least ruler and people. Vattel paired this rejection with the claim that natural law required that both sides in a conflict treat the other side as acting justly in the absence of incontrovertible evidence to the contrary, a position far more expansive than the general claims put forward by Grotius and Wolff that third parties must act as if each belligerent had gone to war on just grounds, and therefore had equal right to kill enemies and acquire property. These two arguments concerted to effectively drain punishment of its content; while Vattel preserved punishment as a legitimate justification for war, the circumstances in which it could be employed were extremely rare, as Vattel had ruled out most of the traditional situations in which punishment could be employed.

However, Vattel clearly had a desire to preserve punishment under very limited circumstances rather than rule it out altogether. The theory of natural right he had inherited from
Wolff made it difficult to justify any sort of universal jurisdiction—if the right to engage in war resulted from the other party’s interference with the belligerent’s obligation to pursue perfection, then it was difficult to see how any other nation could claim a right to punish an unjust belligerent or even non-state actors, like pirates, who flaunted the laws of nature. Wolff had run into this problem particularly acutely in addressing the age-old question of whether another nation’s rising power or aggressive military expansion was sufficient justification for war against it; his answers to this question varied throughout his text, never reaching a satisfactory conclusion. Vattel sought to answer this question more directly, since it was all the more urgent in a Europe where Frederick the Great had begun to assertively advance Prussian ambitions. Despite his vigorous defense of punitive war under limited circumstances, Vattel’s explanation for every state’s power over pirates, violators of certain provisions of the laws of war, and those who engage in war without pretext struggled for coherence with his overall philosophical project. The restrictive theory of punishment which Wolff and Vattel had created, while extremely effective for creating a modern conception of civilian status and attempting to impose limits on warfare, was ultimately ill-suited to confront the systemic challenges presented by aggressive sovereigns and elusive pirates.

Tracing these developments is particularly important because, while punitive war has dropped out of the doctrine of modern international law, the impulse to punish remains. Contemporary debates about universal jurisdiction, state responsibility for serious crimes, and the definition of “collective punishment,” outlawed by the laws of war, suggest that these questions about international punishment and collective responsibility were not resolved by excising punishment from hornbook law. Moreover, the disappearance of punitive war—and indeed, any punitive sanction—from international law has not eliminated the very human
impulse to punish, but simply force parties to find other justifications for their punitive impulses. The questions faced by the writers between Grotius and Vattel thus have more than passing relevance for the future of international law, as these issues continue to lurk in the background of much of the modern international legal regime.
Grotius and the Justification of Private Punishment

Hugo Grotius’s contributions to thought on the international order have long been recognized, to the point of granting him the title of “Father of International Law,” a writer whose guidelines on war marked the transition from largely religious ways of thinking about inter-state relations to a secular and state-centric account of the international realm. Grotius’s legacy as a natural lawyer has been hotly contested, with a voluminous literature debating whether Grotius is a writer principally interested in rendering Thomist ideas in a Protestant and humanist idiom or a fundamentally anti-Aristotelian humanist whose primary focus was participating in the debates over philosophical skepticism prominent in humanist circles, sketching a minimalist account of natural law that could achieve universal acceptability. Yet scholars on both sides of this debate have long recognized that Grotius does something truly unusual in his theory of punishment. Grotius was the first theorist to articulate a private and individual right of punishment, and that remarkable claim set in motion a series of debates about punishment in the law of nations which was to ultimately lead to the effective disappearance of punishment as a feature of the international realm. In making this argument, Grotius drew on a wide range of sources, humanist and Thomist, and the debates about his relationship to skepticism and his impact on

contemporary international law have obscured a significant shift in Grotius’s thought on the international realm between his early *De Indis* and his mature *De jure belli*.4

In illuminating these shifts, this chapter does contribute to the debate about Grotius’s overall philosophical orientation. When Grotius posited his private right of punishment in *De Indis*, he knew he was offering something strikingly new, a position which was not accommodated either the humanist or Scholastic literature on the international order. More importantly, Grotius insisted that the private right of punishment persisted even after the creation of civil society, a claim which he knew to be equally radical. This suggested a new conception of sovereignty which permitted a right to violence to remain in individuals even after the creation of civil society, and it is this aspect of Grotius’s thought and its relationship to punishment which has been mostly neglected in the literature. While many of Grotius’s claims remain the same between *De Indis* and *De jure belli*, one of the major shifts is in Grotius’s treatment of collective punishment, a subject inextricably bound up with his theory of sovereignty.

In the earlier work, justifying a particular case, Grotius was content to adopt entirely Scholastic models of collective responsibility and the protections due to “innocent” enemies, since such a position enabled him to vindicate the cause of the Dutch East India Company (VOC) while justifying his position in terms of a theory largely promulgated by Spanish theorists, an undoubted rhetorical advantage. Thus it is no surprise that we see Grotius in *De Indis* adopt a theory of sovereignty which is fundamentally indistinguishable from Vitoria and other Spanish Scholastic writers, a point Grotius reminded the reader of with frequent quotations and citations. Grotius’s primary innovation was the claim that individuals originally held a right

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4 I opt for the moniker *De Indis*—the name Grotius himself gave to the work—because it emphasizes the issues of private action in Asia at the forefront of his mind and central to the questions at stake regarding punishment.
of punishment and that in the absence of effective judicial recourse could employ that right. He was entirely conventional in his arguments about collective responsibility for punishment, maintaining the same broad justifications for and limitations on subject responsibility as were visible in Scholastic writers.

By the time of *De jure belli*, this position had shifted, but Grotius did not provide a thorough account of the relationship between punishment and sovereignty. Instead, Grotius remained ambiguous about the precise scope of and justification for sovereign control over punishment and violence more generally. As we will see, it is clear that Grotius rejected the essentially Scholastic framework which he had advanced in *De Indis*; that much is evident from his arguments about collective punishment. However, Grotius also does not advance a fully-formed doctrine of sovereignty based on the transfer of individual rights to the sovereign, a notion Grotius appeared to adopt with respect to punishment in *De Indis* and which would receive a later (though apparently unknowing) articulation by John Locke. Instead, Grotius avoided the question of the original source of sovereign authority entirely, couching his few discussions of the question in deeply ambiguous terms. This ambiguity did, however, permit Grotius to advance a set of protections for civilians and limits on warfare—at least with respect to the moral obligations on belligerents—which went far beyond what the Scholastics had advanced, and indeed much further than many writers after him were prepared to go.

It is also important to remember that Grotius’s objectives in advancing all of these positions were closely tied to the position of the Dutch republic. While *De Indis* most clearly bears the marks of these concerns, *De jure belli* is no less invested in protecting the claims to independence advanced by the Dutch. Alongside the land war in Europe, the Dutch launched an aggressive campaign of overseas colonial expansion, funding the revolt and directly challenging
Spanish and Portuguese trade monopolies. This led Grotius to think intensely about the possibilities for private participation in public warfare, since the VOC was an ostensibly private body which engaged in warfare against European and Asian states half a world away. While it had become commonplace in both Thomist and Humanist thought to state that the sovereign held complete control over violence, the realities of colonial expansion meant that increasingly private individuals or entities declared, conducted, or participated in war in spaces far removed from sovereign jurisdiction or control. Grotius was one of the only theorists to accommodate this reality. As we will see, these themes form the background to the claims Grotius advanced about punishment, initiating the long decline of punishment in the international realm.

I. Justifying Private Action

Grotius’s direct involvement with these questions began in 1604, when the VOC directors commissioned Grotius to write a defense of the capture of the *Santa Catarina*, a Portuguese carrack sailing in the Singapore Straits. The ship was captured by Jacob van Heemskerck, a VOC admiral who sailed from Holland in 1601 carrying a commission from Prince Maurice of Nassau, the Lord High Admiral of Holland. The commission apparently permitted van Heemskerck to both act in self-defense and to seek reparations for damages sustained, a formulation which suggests that it was effectively a letter of reprisal—a delegation of public authority to act for the reparation of injuries suffered by an individual at the hands of members of another state. Upon his arrival in the Indies, van Heemskerck found it difficult to obtain sufficient cargo for his ships, largely due to Portuguese blockades and threats against local rulers. Frustrated by these roadblocks, van Heemskerck met with his admirals in council and

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resolved to attack “our public enemies” when two richly laden vessels were scheduled to pass through the Singapore Strait roughly three weeks later.\(^6\) One of those ships, the *Santa Catarina*, surrendered on February 24, 1603.\(^7\)

Back in Holland, proceedings were brought before the Dutch Admiralty Board to declare the vessel and its cargo good prize. The verdict of the Admiralty Board, announced on September 9, 1604, was “one big jumble, intellectually speaking.”\(^8\) Broadly, the Admiralty Board invoked two rationales. After describing the evils committed by the Portuguese against the Dutch in the Indies in some detail, the Board’s decision declared that the actions taken by van Heemskerck after his meeting with his admirals were “means, permitted by the natural law and *jus gentium* and enjoined by the commission of his Princely Excellency.” The latter justification, resting on van Heemskerck’s commission from Prince Maurice, became the primary rationale; “the Admiral derived his authority not only from the written laws and the *jus gentium*, but also from edicts of the Estates General and in particular his commission.”\(^9\) Neither the references to natural law and the *jus gentium* nor the legitimacy of van Heemskerck’s commission were ever fleshed out in a systematic fashion by the court; that task fell to Grotius.

Famously, Grotius’s primary tool for justifying the capture of the *Santa Catarina* was his claim that individuals hold a private right of punishment which persists in some form even after the creation of civil society. This aspect of his theory has attracted considerable attention in recent years as “a major innovation in legal theory and practice,”\(^10\) and indeed the “vital move”

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\(^{6}\) See the minutes of this meeting translated in id. at 531-532.

\(^{7}\) The account of the capture of the *Santa Catarina* is found in a letter from van Heemskerck to the VOC Directors on August 27, 1603. The letter is translated in id. at 533-543.


\(^{9}\) All quotations are from the judgment translated and reprinted in the van Ittersum edition of *De Indis*, p. 510-514.

\(^{10}\) Van Ittersum, *Profit and Principle*, 29.
in Grotius’s account, but the implications of that right and its relationship to Grotius’s other doctrines—particularly his account of sovereignty—have not been fully explored. This chapter will fill that gap, both in service of what it tells us about Grotius and because of the importance of Grotius’s claims to future writers.

It is important to understand what made Grotius’s claims so unique. Punishment was accepted as a legitimate justification for war by virtually every writer in both the humanist and Scholastic traditions, so the general claim that punishment was a feature of international relations was not controversial. However, no one prior to Grotius had tried to argue that public punishment was in any way derived from a private right to punish, but had consistently viewed the right of war in all its forms—including punishment—as confined to sovereign powers. This was a point of agreement between humanist and Scholastic writers on the law of war. Jean Bodin, who exercised a particularly marked influence over Ayala and was frequently cited by Gentili, famously opened his *Six Books of a Commonweale* by distinguishing a commonwealth from “great assemblies of robbers and pirats, with whome we ought not to have any part, commercement, societie, or alliance, but utter enmitie” and claimed that pirates and robbers could never be just enemies. Bodin’s first and most important mark of sovereignty—which by

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13 As Tuck notes, “Grotius made his vital move in a passage discussing the right of punishment, or the *jus gladii*—the fundamental right to use force, possessed (according to every traditional theorist) by the civil magistrate and only the civil magistrate.” Tuck, *War and Peace*, 81.


16 Id. at 2.
definition could only be exercised by the sovereign—was the power to make laws, which itself included the right of punishment up to the penalty of death, and his second mark was the power “to denounce war, or treat of peace.”

Gentili repeatedly insisted that war is waged only by sovereigns, not by private individuals, and cited approvingly to Augustine for this claim.

The Scholastic tradition was equally emphatic on this point; the first requirement for a just war in Aquinas’s account was “the authority of the sovereign by whose command the war is to be waged.” Francisco Suarez, one of the leading theorists in this tradition, stands as an excellent example of the arguments at play: punishment is a permissible cause of war, but requires that some wrong have been committed. War between nations exists as a substitute for judicial process, which is available to individuals, and the “jurisdiction” of the just belligerent exists because of the crime of the transgressor, which generates superiority. Suarez is at pains to reject the position that “by a like reasoning, any private person who might be unable to secure such punishment through a judge could take the law into his own hands, executing it on his own authority.” Suarez makes two arguments in response. First, he claims that “punishment has for its essential purpose not private but public good, and hence it has been committed not to the private individual, but to the public body,” such that if the public is unable to avenge an injury, a subject must endure the loss. Second, individuals can never obtain the jurisdiction which Suarez describes, since “if they could possess it, there would be no need to employ the public power of jurisdiction; or at least, since this power of jurisdiction is derived from men themselves, each one

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17 Id. at I.x, p. 159, 163.
18 See Three Books on the Law of War Liii, p. 15 (citing Augustine); Lvii, p. 35.
19 II-II, qu. 40, Art. 1.
would have had the power to refrain from transferring it to the state official, retaining it, on the contrary, for himself,” a possibility “opposed to natural law.”

Grotius thus faced a monumental task in justifying the capture of the Santa Catarina, and despite his youth managed to produce a strikingly original explanation. This impressive though unpublished achievement must be examined first as the foundation for what was to come.

II. Theorizing Private Punishment

As we have seen, Grotius was entirely conventional in claiming that punishment was a legitimate purpose for a just war. What made Grotius distinctive was his claim that the sovereign’s right to punish derived from the rights of the individuals who made up the state. Yet Grotius made a further and even more radical claim that this right persisted for individuals in some form after the institution of civil society, enabling them to act independently of the state which ostensibly held the right of punishment.

Grotius first sketched this position in De Indis. The Prolegomena of De Indis consists of the deduction of nine rules and thirteen laws governing the behavior of individuals, and, by extension, the conduct of war. Grotius begins by articulating his first two “precepts of the law of nature…that It shall be permissible to defend [one’s own] life” and “It shall be permissible to acquire for oneself, and to retain, those things which are useful for life.” These two led logically to two additional laws, the “law of inoffensiveness”: “Let no one inflict injury upon his fellow,” and the “law of abstinence”: “Let no one seize possession of that which has been taken

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21 DI p. 23. All citations to De Indis [DI] are to Hugo Grotius, Commentary on the Law of Prize and Booty, trans. Gwladys Williams, ed. Martine Julia van Ittersum (Indianapolis: Liberty Fund, 2006), and are by page number only.
into the possession of another."\textsuperscript{22} These four precepts give shape to all the others in the Prolegomena, and in particular to Grotius’s accounts of the power of punishment in the state of nature and civil society. The rights of peaceful possession and defense against injuries give rise to two additional laws, that “Evil deeds must be corrected” and that “Good deeds must be recompensed.”\textsuperscript{23} These laws lead to Grotius’s first discussion of punishment. Grotius is quickly insistent that punishment is just not only for those who have injured an individual, but also for “those persons who have inflicted universal injury.”\textsuperscript{24} This proves to be a very broad category, as any injury to an individual is the concern of all of human society due to the example such conduct sets.\textsuperscript{25}

Civil society comes about in an attempt to provide protection against and ensure punishment of individuals who ignore these obligations.\textsuperscript{26} This takes place primarily through socially-administered punishments; civil society creates adjudicatory mechanisms to avoid the problem of individuals “repeatedly carried away not by true self-love but by a false and inordinate form of that sentiment, the root of every evil,”\textsuperscript{27} such that:

...even though the precepts of nature permitted every individual to pronounce judgement for himself and of himself, it is clear that all nations deemed it necessary to institute some orderly judicial system, and that individual citizens gave general consent to this project. For the latter, moved by the realization that otherwise their own weakness would prevent them from obtaining their due, bound themselves to abide by the verdict of the state. Indeed, as is quite commonly acknowledged, the very nature of jurisdiction renders it absolutely impossible for any jurisdiction to be established save by general consent.\textsuperscript{28}
The importance of judicial process becomes a central feature of his account. Grotius is adamant that in civil society, the law of nature provides that “No citizen shall seek to enforce his own right against a fellow citizen, save by judicial procedure.” The same holds for conflicts between citizens of different states, though Grotius contends that this principle derives its force not from natural law, but instead from the “secondary law of nations,” a body of “mixed law, compounded of the [primary] law of nations and municipal law.” Such a law, like municipal jurisdiction generally, binds as a result of an expression of consent, and the requirement of judicial settlement is thus “binding upon the various peoples as if by force of contract.”

Given this emphasis on recourse to the judicial process, Grotius still needed to explain why individuals retained a right of punishment after the institution of civil society. In answering this question, Grotius leaned heavily on the analogy between individuals in the state of nature and states on the world stage. Throughout the remainder of the work Grotius treats “private war” and “public war” as two species of the same genus. Grotius contends that “private wars (for these should be dealt with first) are justly waged by any person whatsoever, including cases in which they are waged in conjunction with allies or through the agency of subjects.” The only thing that bars a private individual from waging war is the natural law forbidding individuals from enforcing their rights against fellow citizens outside of the judicial process. Otherwise, individuals are entitled to wage private wars based on the same four causes as states are permitted to wage war—self-defense, defense of property, recovery of debts, and “from

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29. 43.
30. 46. “Neither the state nor any citizen thereof shall seek to enforce his own right against another state or its citizen, save by judicial procedure.”
31. Id.
32. 46.
33. 95.
34. 96.
wrongdoing, and from every injury…inflicted with unjust intent.” 35 But Grotius quickly turned to address the relationship between this private right of punishment and the requirement of judicial process he had sketched in his account of natural law. Grotius’s response was to claim that the requirements of judicial procedure become “dormant.…when judicial means for the attainment of our rights are defective.” 36 This dormancy can be temporary, as in a case of immediate self-defense, 37 or reflect a “continuous lack of means for judicial settlement,” which occurs “when in a given place there is no one possessing jurisdiction, a state of affairs which may exist in desert lands, on islands, on the ocean or in any region where the people have no government.” 38 Similarly, a continuous lack of jurisdiction can exist if the ruler who would have jurisdiction cannot investigate or when his subjects refuse to obey his rulings. 39

Grotius then turned to how justice should be done in those times of dormancy, beginning with the understated admission that “since a great many persons maintain that the power to punish has been granted to the state alone (wherefore judgements, too, are [habitually] termed “public”), it might seem that private application of force is ruled out entirely.” 40 To justify this, Grotius turns to “what was permissible for individuals prior to the establishment of states.” 41 This leads Grotius to the crux of the problem:

In the light of the foregoing discussion, it is clear that the causes for the infliction of punishment are natural, and derived from that precept which we have called the First Law. Even so, is not the power to punish essentially a power that pertains to the state? Not at all! On the contrary, just as every right of the magistrate comes to him from the state, so has the same right come to the state from private individuals; and similarly, the power of the state is the result of collective agreement, as we demonstrated in our discussion of the Third Rule. Therefore, since no one is able to transfer a thing that he

35 102-104.
36 130.
37 131.
38 131-132.
39 132.
40 133.
41 Id.
never possessed, it is evident that the right of chastisement was held by private persons before it was held by the state.\textsuperscript{42}

On this straightforward syllogism of transferal, Grotius is able to conclude that “whatever existed before the establishment of courts, will also exist when the courts have been set aside under any circumstances whatsoever, whether of place or of time.”\textsuperscript{43} This claim about transfer is at once conventional and radical; the Scholastic writers on whom Grotius drew for his theory of sovereignty had insisted that sovereign power was the product of consent and the result of a transfer from the people to the sovereign, but there was no corresponding claim that the power of the “people” came from the individuals themselves.\textsuperscript{44} Thus, as we saw in the case of Suarez, it was entirely consistent to argue that punishment was a power transferred from the people to the sovereign while simultaneously denying that punishment was a possibility for individuals.

As his reference to the “great many persons” opposed to his position indicates, Grotius was well aware that this was unique, and the somewhat flimsy evidence Grotius presents in support is indicative of the challenge he faced. Unlike his usual stream of Biblical and classical examples, Grotius finds himself leaning heavily on one obscure story about Caesar’s attack on a band of pirates who had previously taken him prisoner, an attack launched “when the Proconsul neglected to punish the guilty captives.”\textsuperscript{45} Grotius’s account takes some liberties with Plutarch and Velleius Paterculus, the sources he cites. Grotius notes that Caesar “pursued with a hastily

\textsuperscript{42} 136-37.
\textsuperscript{43} 140. Structurally, this claim is possible because of Grotius’s priority order presentation of the rules and law of the Prolegomena, with the ultimate conclusion that when two laws cannot simultaneously be satisfied, the earlier laws (which permit punishment) must take precedence of the laws commanding judicial process. DI 49.
\textsuperscript{44} On the position in Thomist thought that the sovereign held his authority through a contract with the people, see Quentin Skinner, The Foundations of Modern Political Thought, 2 vols. (New York: Cambridge University Press, 1978), II:148-66. On the variations in this tradition, see Tuck, Philosophy and Government, 141-42; Tierney, Natural Rights, 290-315.
\textsuperscript{45} 141. The story is not cited by any of the traditional writers on the laws of war; it goes unmentioned in Belli, Ayala, and Gentili, including in Gentili’s Wars of the Romans, a work rich in Roman historical scholarship. See Alberico Gentili, The Wars of the Romans, ed. Benedict Kinsbury and Benjamin Straumann, trans. David Lupher (New York: Oxford University Press, 2011).
raised fleet the pirates by whom he had been captured on an earlier occasion.” After the consul’s neglect, “Caesar himself put out to sea again and crucified the culprits, influenced undoubtedly by the knowledge that the judge to whom he had appealed was not fulfilling the functions of the judicial office, as well as by the consideration that it was apparently possible to take such action guiltlessly upon the seas, where one is governed not by written precepts but by the law of nations.”

However, neither of these accounts suggests that judicial recourse was altogether unavailable, but only that Caesar was unsatisfied with its speed and severity, and in both Caesar’s killings took place on land, not at sea. As Paterculus describes it, he handed his captives over into custody, and when Juncus, the judge, decided only to sell the pirates into slavery rather than execute them, “Caesar returned to the coast with incredible speed and crucified all his prisoners before anyone had had time to receive a dispatch from the consul in regard to the matter.”

Plutarch at least does not claim that the judge had reached a decision, but only that he told Caesar “that he would consider the case of the captives at his leisure,” at which point Caesar “went to Pergamum, took the robbers out of prison, and crucified them all.”

Grotius, however, forges ahead; the story demonstrates that “circumstances could exist…in which it would be possible under the natural law for a private person to inflict punishment upon another person without sinning.”

If individuals can engage in punitive war, Grotius is equally emphatic that those wars have the same effects as public wars—a point of particular importance to the VOC. Here, Grotius returned to his analogy between judicial proceedings and war; “things seized in war and

46 141.
48 For the full story see Plutarch, Caesar 1.4-2.4; quotation is from 2.3-2.4. Plutarch, Plutarch’s Lives, trans. Bernadotte Perrin (London: William Heinemann, 1919). Notably, when Grotius repeats this story later in the text, he cites only Plutarch, who is more circumspect about the judge’s actions. DI 200.
49 DI 141.
things seized on the basis of a judicial award fall into the same class.”\textsuperscript{50} In situations where judicial recourse is permanently unavailable, the private party “act[s] for himself in the capacity of judge, [and] acquires forthwith the goods seized as a pledge from the other belligerent.”\textsuperscript{51} Such a claim is final and not subject to review by a court should it be challenged at some later point; even a judgment in civil law “ought to be interpreted not as bestowing the right of ownership but merely as a declaration that the said right has been acquired.”\textsuperscript{52} Similarly Grotius explains why the VOC (rather than van Heemskerck himself) could acquire the \textit{Santa Catarina}: the “principal author of a private war becomes the owner of goods taken in that war,” since there can be acquisitions made through agents: “persons who have received their orders from the initiators in war” includes those “persons who attach themselves to the principal agent but who do not assume for themselves an equal status as principals.”\textsuperscript{53} In this respect, a private corporation mirrors the state in its control over prizes captured by its “agents.”

These background principles make Grotius’s position in Chapter 12 of \textit{De Indis}, where he turns to a specific justification of the \textit{Santa Catarina} seizure on the grounds of private warfare, a relatively straightforward exercise,\textsuperscript{54} relying heavily on the private right of punishment, and in particular on the VOC’s ability to engage in warfare. Grotius was explicit that if an individual can engage in warfare, “no one will maintain that the East India Company is excluded from the exercise of that privilege, since whatever is right for single individuals is likewise right for a

\textsuperscript{50} 191.
\textsuperscript{51} 199.
\textsuperscript{52} Id.
\textsuperscript{53} 200, 202.
\textsuperscript{54} The chapter is most famous in its later revision as \textit{Mare liberum}, and much of the material in \textit{De Indis} deals with the question of the ability of the Portuguese to establish sovereignty over the seas or over the lands of the “infidel” peoples of Asia. The editing of the chapter for publication saw Grotius completely eliminate the material about the private right of punishment, largely to ensure that the pamphlet did not enflame Spanish opinion during truce negotiations in 1608. Martine Julia van Ittersum, “Preparing \textit{Mare liberum} for the Press: Hugo Grotius’ Rewriting of Chapter 12 of \textit{De iure praedae} in November-December 1608,” in Blom ed., 247-75.
number of individuals acting as a group.” 55 With liberal citation of Spanish thinkers, Grotius contended that the right to trade “cannot be abrogated.” 56 Warfare by the VOC was justified by a laundry list of Portuguese misdeeds, covering each of the four just causes of war identified by Grotius in earlier chapters; initially, the war was just “to defend the use of those things which, according to natural law, should be commonly enjoyed,” 57 such as “the bare fact that commerce was prohibited.” 58 But more importantly, Grotius argued that the Portuguese were amenable to punishment by the VOC as wagers of an unjust war, based on their murder of Dutch sailors at Macao, perfidious conduct, use of poison and assassins, and general violence. 59

As this last point suggests, Grotius was willing to extend liability for punishment far beyond the individual Portuguese who had actually committed harms against the VOC. This raised a question which we have not yet seen Grotius answer: why was the Santa Catarina, which Grotius had not alleged committed any of the offenses of the Portuguese, legitimately subject to confiscation as a punishment? This required Grotius to make a set of claims about the relationship between individuals and the state, and individual responsibility for state action, which could explain the permissible scope of punishment.

III. Individual and Collective Responsibility in De Indis

This task led Grotius back to his theory of sovereignty in order to explain the relationship between subjects and sovereigns, as well as to demonstrate that Portuguese subjects as a whole were amenable to punishment for the crimes Grotius alleged the Portuguese state had committed. In sketching this story, Grotius hewed largely to Scholastic models of responsibility, especially

55 DI 302.
56 356.
57 364-65.
58 367. See also the justification from self-defense and recovery of possessions (370-71).
59 373-376.
those present in the work of Vitoria, and along with it adopted the general account of sovereign authority which Vitoria and others held. This examination of sovereignty was critical for Grotius, since he intended to vindicate Dutch sovereignty by arguing that “it is nevertheless more accurate to say that in actual fact it is a public war and that the prize in question was acquired in accordance with public law, the author of the conflict being, in reality, the States Assembly of Holland, now allied with the other Provinces of the Low Countries.”60 However, this argument sat somewhat uneasily alongside the claim advanced in the context of punishment that “every right of the magistrate comes to him...from private individuals.” This theory also created difficulties for Grotius in attempting to justify the claim that van Heemskerck, despite the limited nature of his commission, had acted legitimately and with state authority in making his capture. Traditionally, the right of war had been viewed as the exclusive provenance of the state, and Grotius needed an explanation of why participation in a public war was possible even in the absence of a fully-fledged sovereign commission.

Defending the notion that the capture of the Santa Catarina was justified as an act of public war required Grotius to provide a defense of Holland’s sovereignty. Despite his earlier assertion that all the state’s power is derived from the power of individuals, Grotius does not openly break with the fundamental suppositions of Scholastic thought on sovereignty; instead, he attempts to operate within that framework. Central to this account is the question of who holds the public’s right of war. Grotius sees a tight linkage between public and private war, and offers two justifications. While individuals hold a right of war, “the power to wage war publicly resides primarily in the state.” To demonstrate this, Grotius falls back on the Spanish Scholastics and their definition of the state, in particular the claim that “a state must be conceived of as

60 392. See also 301: “…let us treat of the incident as if we were dealing not with an act of public warfare (as is really the case) but with an act of private warfare.”
something ἀὐτῶρκης, ‘self-sufficient,’ which in itself constitutes a whole entity,” citing Cajetan, Vitoria, and Aristotle. The right of war is a critical component of self-sufficiency, ensuring the state’s ability to protect itself. On this derivation, the state holds the right of war in order to preserve itself, and the relationship of this right to the right of war held by individuals is largely one of analogy. The sovereign exercises that right by virtue of a transfer from the people; as he puts it, “when the state has once transferred its will into the keeping of the magisterial will, whatever is permissible for the state on its own behalf is likewise permissible for the magistrates on behalf of the state,” including the right of war, which is undoubtedly “given into the hands of him in whom it has placed the greatest trust.” The very purpose of the state demands the centralization of the state’s warmaking authority in the sovereign.

Grotius returns to this theory in Chapter 13, where he applies it to the position of Holland. Grotius notes that “the primary and supreme power to make war resides with the state, and…any perfect community is (so to speak) a true state.” As a result, “both by natural and divine law (according to the thoroughly sound conclusion which we borrow from the aforementioned Victoria), all civil power resides in the state, which is by its very nature competent to govern itself, administer its own affairs and order all its faculties for the common good.” Once again, Grotius stresses that princes exercise that power only as a delegation, a point which Grotius illustrates by reference to the right of war: “the right to undertake a war pertains to the prince only in the sense that he is acting for the state and has received a mandate from it. Therefore the greater and prior power to declare war lies within the state itself, which is regarded as having set up the prince as its substitute for those purposes which the state could not

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61 96.
62 97.
63 97-98.
64 392-393. The citation to Vitoria is De Potestate Civili § 7.
conveniently realize by its own direct action.” From these premises Grotius reaches a somewhat circular conclusion: “it is clear that the state of Holland, even if it was subject to a prince, did not lack authority to undertake a public war independently of that ruler; for otherwise the said state would not have been self-sufficient.” Even if Holland was not analogous to an independent state under an emperor but was instead comparable to a lower magistracy, “we have maintained, in agreement with Victoria and with other authorities, that in cases where the prince is inactive, inferior magistrates are empowered not only to repel injuries but also to initiate a public war for the purpose of punishing foreign malefactors. This argument grounds the Dutch right to declare war firmly in the Spanish tradition of thought; in addition to Vitoria, Grotius cites multiple times to Covarruvias and Vazquez.

Grotius had thus managed to combine the Scholastic theory of sovereignty with his own insistence that the rights of the state—and ultimately the sovereign—were derived from the rights of individuals. This gives the sovereign control over public war, but by supplementing the Scholastic account with an argument about the individual natural right to punish and the transfer of that right to the state, Grotius preserved the possibility that the private right will return to

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65 393.
67 This is hardly surprising, given Grotius’s heavy reliance on the Spanish Scholastics throughout his corpus. Vitoria is the most cited single writer in Grotius’s two primary works, cited 68 times in De Indis and 58 in De jure belli, for a total of 126 cites; the closest second is Vazquez, with 103 (72 in the prior work, 31 in the later), followed by Covarruvias (34 and 52 times, respectively). Antonio Truyol Serra, “Francisco de Vitoria y Hugo Grocio,” Ciencia Tomistica 111 (1984), 23. As Richard Tuck has noted, “the scholastic sources are not particularly prominent in the body of [De Indis]; they appear mainly in a set of footnotes added later.” Tuck, Philosophy and Government, 171. Of course, this is not true of the straight appropriation of Vitoria’s arguments on sovereignty and the authority to punish in the Prolegomena of De Indis, discussed infra, and as we shall see, Vitoria figures prominently in De jure belli as well. Tuck also notes that among the Spanish sources, Vitoria appears to be the one with whom Grotius was most familiar (Tuck, War and Peace, 81). However, more significant is the extent to which Vitoria is cited in Commentarius in Theses XI, Grotius’s work on sovereignty and the legitimacy of the Dutch revolt. While scholars have struggled to assign a precise date to the work, the most thorough treatment dates the text to the period between 1603 and 1608, precisely when Grotius would have been working on De Indis. See Peter Borschberg, Hugo Grotius “Commentarius in Theses XI” (New York: Peter Lang, 1994), 193-99. On Grotius’s frequent citation of Vitoria in the work, see id. at 48-53. The citations were largely used in an effort by Grotius to refute the views of Bodin, and also had the benefit of being less controversial to his intended Spanish audience for the Commentarius. See id., 108-109, 115-135.
individuals whenever courts are unavailable. Retaining elements of the Scholastic theory did, however, have its advantages. First, it enabled Grotius to claim that he was working within this traditional (and largely Spanish) framework of sovereignty, minimizing the radicalism of his arguments. Second, it permitted Grotius to tap into Scholastic arguments about the origin of government in consent which were important for his arguments about the legitimacy of the Dutch republic, in particular the claim that lower magistrates could engage in war to defend their jurisdictions and those under their protection.

For the Scholastics, this theory of sovereignty had been critical in explaining the scope of subject responsibility for sovereign acts, and in turn for determining who in the state could be punished for the state’s acts. These writers, working from their basic premises of sovereignty as originally founded on some degree of consent and the sovereign controlling the power of war and peace by necessity, generally sketched a moderate course on these questions which enabled them to suggest a set relatively generous protections for “innocent” civilians dictated by the natural law. For every significant late Scholastic writer on the laws of war, political communities were in some sense responsible for the actions of their sovereigns. Vitoria, for example, described an agency relationship between subjects and sovereigns:

If a sovereign wages an unjust war against another prince, the injured party may plunder and pursue all the other rights of war against that sovereign’s subjects, even if they are innocent of offense. The reason is that once the sovereign has been duly constituted by the commonwealth, if he permits any injustice in the exercise of his office the blame lies with the commonwealth, since the commonwealth is held responsible for entrusting its power only to a man who will justly exercise any authority or executive power he may be given; in other words, it delegates power at its own risk. In the same way, anyone may lawfully be condemned for the wrongdoings of his appointed agent. 

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This agency relationship, however, does not lead to unlimited punishment of an enemy nation. Instead, Scholastic writers were consistent in placing limits of varying degrees on the amount of permissible punishment of the individuals who make up the collective body. The organizing principle was the claim that, with respect to life, only those enemy subjects who were “responsible” for the war in some sense were subject to threats to their lives as a result of their behavior. The scope of responsibility was often quite broad, but also a contested point within the Scholastic literature. Vitoria, for example, took the position that even after victory is secured it is lawful under certain circumstances to kill all the enemy soldiers, since they are “responsible for the injury inflicted.” The same rationale justifies killing all those among the enemy who surrender, and it is only an agreement among Christian nations that protects prisoners from being justly killed as well. Molina adopted an effectively identical position. While Suarez agreed with the general premise, he took issue with Vitoria’s claim that “all the adult men in an enemy city are to be thought of as enemies, since the innocent cannot be distinguished from the guilty; and therefore they may all be killed”; while “human judgment looks upon those able to take up arms as having actually done so,” implying such individuals are subject to punishment, Suarez advocates for a presumption of innocence in the absence of clear evidence of culpability.

Those who shared in some guilt for the war were contrasted with the “innocents” in a political community, who were categorically excluded from punishment or even deliberate

69 De jure belli §§ 46, 48, in id., p. 320-21.
70 Id., 49, p. 321-22.
71 Luis de Molina, De jure et justitia, Vol. 1 (Mainz: Johannes Godofredi Schonwetteri, 1659), Disp. 122, p. 470-71. See also P. Lucas Garcia Prieto, La Paz y La Guerra (Zaragoza: Octavio y Felez, 1944), 246-49, who notes the similarities between Vitoria and Molina on this issue.
72 Vitoria, De jure belli § 38, p. 316-17.
73 Suarez, De Charitate, Disp. XIII, § 7, p. 843, 846-47. I include Suarez here because while his comments on war (like his famous work on law) were not available to Grotius when he wrote De Indis (not being published until 1621 and 1613, respectively), they were in print by the time of the first edition of De jure belli. However, as will be clear, Suarez said little that would have surprised Vitoria or Molina on these questions.
targeting. Broadly speaking, two rationales explained these restrictions. One rationale excluded those who are in some sense not a part of the state; thus Suarez shielded foreigners and travelers, who “are no part of the state,” and Molina sheltered clerics, since “they are not considered parts of the Republic.” The second rationale was the claim that certain individuals, even if nominally members of the state, could not be guilty of an offense, because they could not bear arms or lack the rationality to commit crimes. On this account, Suarez declared that “It is implicit in natural law that the innocent include children, women, and all unable to bear arms.” Molina, while generally accepting this position, took a somewhat broader view, contending that women who accompany enemy forces or assist in sieges are amenable to punishment. Vitoria likewise argued that women, children, the elderly, and clerics are protected, though he was not entirely clear about whether this had its origin in natural law or custom.

Membership in the state did, however, entail that individuals—even “innocents”—might be subject to confiscation of property in order to satisfy a penalty imposed by a just victor. Property and sovereignty are seen as “goods of fortune” subject to confiscation. While the victor’s first step should be to seek restitution from the guilty, for Suarez “the innocent form a portion of one whole and unjust state; and on account of the crime of the whole, this part may be punished even though it does not of itself share in the fault.” The victor’s greater right over property is attributable to the fact that the state has power over property, while “life does not fall

74 Id. at 843.
75 De jure et justitia, Disp. 119, no. 5, p. 465. Suarez, by contrast, referred this effect to the canon law. De Charitate, Disp. XIII, § 7, p. 843.
76 Id.
79 De Charitate, Disp. XIII, § 7, p. 843.
under human dominion.” Molina took broadly the same position, though like Vitoria added that this greater right over property was what justified the practice of reprisal in creating a single political entity.  

The differences among these writers should not mask their agreement on a core principle: that membership in a state is sufficient to incur liability for punishment under some circumstances, even when the individual subjects—rank and file soldiers, women, children—have no influence over the initial decision to go to war. While Grotius was to turn sharply against this idea in *De jure belli*, in *De Indis* it served his purposes by providing an explanation for why it was legitimate to capture the *Santa Catarina*, and he largely adopts Scholastic models of subject responsibility. Grotius follows entirely Scholastic lines in arguing that war cannot be just on both sides with respect to sovereigns, “voluntary agents” who act without restraint and are thus subject to the laws of nature in their purest form. For subjects, however, the rules are somewhat different, because “the will of subjects is ruled by the will of those who are in command, but with the proviso that reason must not rebel, a proviso which in itself constitutes a phase of justice.” The result is that subjects are required to obey the sovereign’s commands in any doubtful case; it is only when a war is indisputably unjust that a subject can legitimately refuse a command, and consequently a war can potentially be just on both sides from the perspective of subjects.  

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80 Id. at 845.
81 *De jure et justitia*, Disp. 121, p. 467-69; for Vitoria, see *De jure belli* § 41, p. 318.
82 DI 108-114, 125.
83 114.
84 117-18, 121. This account parallels Vitoria’s explanation of the duties of subjects and rulers in *De jure belli* §§ 20-32.
As Grotius notes, this theorem also answers “another question, namely: what persons may justly be attacked in war by subjects?” The short answer is that every subject of an enemy sovereign participates in resisting the restoration of our right, even if they do not directly consent to doing so; “he who resists a just execution, whether knowingly or ignorantly, causes an injury, since he either keeps back what belongs to another or fails to do that which he is under an obligation to do, and since, moreover, he is also offending against one whom he ought not to offend.” But Grotius has also concluded that these subjects act righteously in obeying the sovereign in doubtful cases, and must now make sense of these conflicting claims. Grotius fineses this problem by arguing that “it is possible for the same person to bring about a wrong and a right effect at one and the same time, though not with respect to a single object.” The basic notion is that such acts harm enemies but are worthy as acts of obedience to the sovereign.

The obedience subjects owe to sovereigns is reflected in an agency relationship between rulers and subjects. Grotius addresses this relationship in describing what is permissible for actors in a just war, with particular attention to the question of who is amenable to punishment in war. Grotius closely parallels the line sketched by Vitoria:

As for the state, it is bound by the act of its magistrate as if by the force of a contract, just as he who has set up a director or agent in some matter is bound; and at times this binding obligation embraces even liability to punishment. For those persons are liable, who have transferred authority over themselves to such representatives as might prove to be the source of injury to others, since he who has put his trust in an unworthy individual would seem to be involved, so to speak, in the fraudulence of the latter. This general principle of individual accountability for state acts is not altered by the presence of an intermediate body, the “state,” between individual subjects and the sovereign. All collective bodies, public and private, “are subject to the rule that whatever is owed by the companies

85 DI 121.
86 113.
87 122.
88 155-56. Grotius cites Vitoria’s De Potestate Civili § 12, quoted in relevant part above.
themselves may be exacted from their individual partners,” and “it is obvious that the state is
constituted by individuals just as truly as the magistrate is constituted by the state, and that
therefore the said individuals are liable in the same fashion in so far as concerns reparation for
losses, even when the claim in question is founded on wrongdoing.”

Grotius also adopts the same distinction between life and property seen in Scholastic
writers: while those who are personally guilty of injustices are liable to corporal punishment,
“innocent citizens” do not have their lives forfeited by state action, “especially since the state
itself can be punished as such. For the life of a state can be weakened (as in cases where the state
becomes a tributary, a practice sanctioned by divine law) and, in a sense, annihilated.”
Consequently, the only time subjects can have their lives at stake is during their direct
participation in war; a just belligerent may “make an attack upon all enemy subjects who resist,
whether knowingly or in ignorance, the execution of our rights. For such subjects, without
exception, are ‘bringing about’ an injury, even though that injury may not be ‘voluntary.’”
This also provides grounds for shielding certain enemies from intentional harm, such as women,
children, and prisoners of war, since they “do not impede the execution of our rights.”
With respect to property, subjects, as “essentially possessions or parts, so to speak, of another entity,”
can be penalized in lieu of the broader entity. Grotius likewise links this to the practice of
reprisal, calling it the “sole argument” for its legitimacy: “For what is owed to me by the citizen
of a state is owed by the state, too, when the latter does not enforce the claims of justice; and
what is owed by the state, is owed by its individual citizens.” In addition, Grotius states a
position he takes at several points in De Indis, noting that all enemy subjects “impede our efforts

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89 158-59.
90 159.
91 161.
92 161.
93 159-60.
by means of their resources, when they supply the revenue used in the procurement of those things which imperil our lives and which do not only hinder the recovery of our possessions but also compel us to submit to fresh losses.”94 The links of civil society thus make even innocent subjects targets for the confiscation of property and the weakening of their state.

This set of Scholastic principles about responsibility combined with Grotius’s private right of punishment to produce a straightforward justification for the VOC’s capture. Since “a state and its magistrates incur guilt when they fail to curb the openly shameful conduct of their own people,” the whole Portuguese “nation connived at the evil deeds” Grotius described.95 Since “acts which have taken place because of the state’s decision, and even those which have been decreed by a major part of the whole state or by the magistrates, are acts of the whole community,”96 the VOC could legitimately attack not only those Portuguese who had directly participated in the offenses against the Dutch, but also “the Portuguese people. For there is nothing to prevent a war from being private on one side, public for the other, and at the same time just for the former.”97

94 165.
95 376.
96 377.
97 377. Grotius does strain against this rationale at points; in applying his theoretical findings to the case of the Portuguese, Grotius offers an additional justification: every Portuguese subject is liable to attack “partly because subjects are compelled to defend their state.” (379). But the claim that subjects are obligated to defend their state cannot itself explain why all subjects are amenable to attack; Grotius had argued that subjects in fact do not always have an obligation to participate in a state’s war when it is palpably unjust. Subjects are obligated to fight for the state, Grotius had concluded, in doubtful cases, or those in which the war was just, and he conceded elsewhere that he would “not categorically deny the possibility of good faith on the part of the Portuguese.” (418). Yet even under these circumstances, Grotius’s conclusion does not follow, since he had also made a distinction between enemies who actively resist our right and those who do not. Grotius attempts to support this claim with a lengthy quotation from Augustine about the relationship between individuals and the state, concluding that “extreme and headstrong obstinacy of the Portuguese, with which they strive—both as a body and individually, uniting their fortunes and their corporeal strength for the attainment of their purpose—to prevent any Dutchman from being safe in India” properly subjects all Portuguese to “warlike attack,” but Grotius has gone beyond his theory in this claim about subject liability. (379). Grotius cites Augustine’s On the Heptateuch, qu. 26, On Leviticus.

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Grotius’s adoption of traditional theories about the relationship between individuals and their states based on his apparent acceptance of the self-sufficiency view of sovereignty did not, however, extend to a general claim that sovereigns wield total control over even public warfare. Grotius’s break with this point comes in his explanation of why a capture by the VOC, rather than a capture by a state warship, was legitimate. The main thrust of Grotius’s argument is to demonstrate that the VOC and its members are part of the Dutch state, and thus “must be regarded as combatants acting in good faith.”

Taking this position required Grotius to demonstrate that van Heemskerck, despite holding a commission which provided only for a right to engage in self-defense, was acting on public authority in taking the *Santa Catarina*. This was a controversial position because the dominant theory about the distinction between legitimate privateering and illegitimate piracy stressed the importance of sovereign authorization. As Gentili described it, the essential difference between a pirate and a privateer was public authorization: “The claim to the title of general will be justified, not so much by the command of a regular army or by the capture of cities…as by the assumption of a public cause.” Gentili examines the example of Don Antonio, a claimant to the throne of Portugal in the 1580s. Several Frenchmen on ships in the service of Antonio were captured by the Spanish and treated as pirates. Gentili’s defense of their legitimacy had nothing to do with the justice of Antonio’s cause or the strength of his forces, but “they were not pirates…from letters of their king which they exhibited; and it was that king whom they served, not Antonio.” Holding a commission from a recognized sovereign became the first

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99 Gentii, *Three Books on the Law of War*, I.v, p. 25-26. As Alfred Rubin has noted, this position massively strengthened the hand of sovereigns in evaluating the legal status of pirates and privateers; “each ‘sovereign’ would seem to be accorded the legal power, by ‘recognizing’ anybody’s legal status needed to license privateers or naval commanders…to determine what legal
step in differentiating between pirates and privateers. Privateering had played an immensely important role in the Dutch revolt,\(^{101}\) and so Gentili’s position would have been doubly attractive to the Spanish; it is perhaps worth noting that Gentili served as the Spanish crown’s advocate in the London admiralty courts for much of his career.

Grotius directly attacked this traditional line of reasoning, though the innovative character of his answer has not been generally noted.\(^{102}\) First, Grotius argued that “in war every duty incumbent upon subjects concerns either the foe or the magistrates of the subjects themselves.” By duties owed to foes Grotius presumably meant the rules about legitimate targets in warfare which he had adopted from the Scholastic tradition, but Grotius directly confronted the Gentilian position on piracy with the further claim that “the question of whether or not an order was given is plainly a matter which in nowise concerns the foe, for whom it should suffice that cause for attack existed…the problem of whether they were despoiled by command or independently of any command is no concern of theirs.”\(^{103}\) Yet Grotius did not explain why the Portuguese could not question van Heemskerck’s legitimacy; the traditional definitions of piracy and privateering depended on that distinction.

Instead, Grotius turned to a series of arguments which ultimately led to the claim that the VOC commanders were entitled to use their individual rights to punish in the assistance of the

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\(^{102}\) Compare van Ittersum, Profit and Principle, 28, 45-47. An exception is Michael Kempe, who notes that “To defend the expanding privateering policy of the Vereenigde Oostindische Compagnie (VOC) the legal side of taking booty has been extended by Grotius to a considerable dimension.” Michael Kempe, “Beyond the Law: The Image of Piracy in the Legal Writings of Hugo Grotius,” in Blom, ed., 394.

\(^{103}\) DI 421.
state, even lacking public authorization. Grotius effectively conceded that these commissions did not authorize van Heemskerck and his companions to wage war, but nonetheless attempted to argue “that the act in question was authorized by such letters as were received, even if other authorizations were lacking.”104 He notes that “the letters addressed to van Heemskerck forbid him to join battle with anyone, unless he is compelled to do so by injuries essayed against himself, his men, or his ships,” and then entitled him to seek reparation for those injuries.105 Perhaps sensing the futility of relying on this commission, Grotius shifted to those granted to the subordinate admirals: “the men in command of the individual vessels are invested by the letters of the Prince with the powers proper to captains, or centurions,” though this is further hedged by the fact that they, too, are forbidden from engaging in conflict “unless it shall so happen that some person makes a hostile attempt to prevent them from engaging in navigation or in commerce.”106

Grotius’s key argument was the claim that it would be wrong “to suppose that orders authorizing the waging of war are of narrower import than [letters of] reprisal.”107 These peacetime measures for satisfaction of international claims would permit the capture of ships of another nation to satisfy claims for an individual’s previously received losses; Grotius effectively obliterated the distinction, arguing that under these orders “whatever acts could have been committed by private individuals under the law of nations [and have been committed in the present case], those individuals shall now be held to have committed with retroactive public authorization and in circumstances equivalent to a decree of war.” Under this interpretation, the letters authorized van Heemskerck and his men to utilize their private rights as individuals to

104 422.
105 423.
106 423.
107 424.
engage in warfare, both for reparation and for punishment, with subsequent public endorsement; as Grotius stresses, “the expression ‘reparation for injury’ implies not only exaction of compensation for losses and expenses, but also punitive measures.”\(^{108}\)

The importance of this extraordinary claim was driven home by Grotius’s next argument. After a brief recapitulation of the atrocities committed by the Portuguese against the Dutch in order to demonstrate that an injury had occurred,\(^{109}\) Grotius claimed that:

Even if no order specifically concerned with prize had been issued, nevertheless, owing to the fact that both the Admiral of the fleet and the captains of the individual vessels had been granted jurisdiction by the state, these commanders would have been empowered—in the absence of other judges, and in defense of the rights of subjects as well as of their own authority—to impose punishment upon Portuguese offenders against that authority, and to seize the property of such offenders.\(^{110}\)

With this argument, Grotius assumed that the relatively weak commissions given to van Heemskerck and his admirals made them equivalent to lower magistrates in the service of the state; the historical example he uses is that of Gaius Pinarius, who commanded a garrison on the island of Sicily during the Second Punic War. While he was left “to govern not the city but the garrison, when he perceived that a rebellion on the part of the townsmen was impending and that neither the Roman People nor even the Consul had the power to undertake an attack, he not only inflicted capital punishment for the incipient treachery, but also handed over the entire city to be plundered by the soldiery.”\(^{111}\) If lower magistrates can declare war if necessary to defend their own jurisdiction, and acquire property as a result, so could the VOC commanders. However, this goes against Grotius’s previous admission that the commissions fell short of a general right to

\(^{108}\) 424. See also van Ittersum, *Profit and Principle*, 46, who calls the equation of a letter of marque and a privateering commission “startling,” but does not elaborate on why this is so.

\(^{109}\) DI 424-25.

\(^{110}\) 429.

wage war, and would reflect a dramatic expansion of the otherwise quite limited scope of letters of reprisal.

Grotius’s defense of the capture of the *Santa Catarina* thus made significant but unacknowledged breaks with traditional doctrine on multiple levels. Most famously, Grotius asserted a private right of punishment which could return to individuals under certain circumstances, legitimating the VOC’s actions in the absence of sovereign authority. Less appreciated, however, is the way Grotius attempted to link private and public rights in order to expand the VOC’s legitimate participation in public wars. This permitted Grotius to assert Dutch sovereignty against the Spanish and legitimate the VOC’s significant role in the Dutch revolt. Underlying both of these theories was the claim, adopted from Scholastic theories of sovereignty, that subjects were amenable to punishment for the acts of their state. However, Grotius was to abandon many of the Scholastic underpinnings of this aspect of his thought in *De jure belli* and adopt an approach to punishment simultaneously broader and narrower than the one he had inherited. This approach likewise involved a new approach to sovereign authority, and it is to Grotius’s mature work that we now turn.

**IV. Private Punishment in *De jure belli***

Grotius’s *De jure belli* is a much more ambitious work than his youthful *De Indis*. It is this work which gave rise to Grotius’s contested reputation as the “Father of International Law,” a controversial moniker due to the debate about the “modernity” of Grotius’s laws of war. A major theme in these debates has been the proper understanding of Grotius’s account of the laws of war in Book III of *De jure belli*, which contains both a set of capacious permissions for just and unjust belligerents and an extensive list of moral restraints on the conduct of warfare which
belligerents ought to observe. This aspect of Grotius’s theory has received disproportionate attention as scholars have attempted to trace the relationship between Grotius’s specific pleas for moderation and the modern laws of war, which in many respects embody the same substantive rules as those put forward in the chapters on “moderation” in Book III.\footnote{For a summary of this trend, see Tanaka Tadashi, “Temperamenta (Moderation),” in Onuma ed., 304-07; G.I.A.D. Draper, “Grotius’s Place in the Development of Legal Ideas About War,” in Hugo Grotius and International Relations, ed. Hedley Bull et al. (Oxford: Clarendon Press, 1990), 176-207.}

These features of *De jure belli* are significant for us less for what they reveal about Grotius’s “modernity” and his present-day impact than for what they show about Grotius’s shifts on the question of punishment in the international realm in general, though undoubtedly a close examination of Grotius’s theories of punishment will inform these debates. As scholars have noted, the theory of private punishment does not appear to be part of the fabric of *De jure belli* in the way it was in *De Indis*.\footnote{See supra note 11.} However, there has been little attempt to trace the development of the private right of punishment between the two works.\footnote{The only significant attempt is van Nifterik, who focuses on the way the sovereign receives his power to punish in Grotius’s account. Van Nifterik, Right to Punish, 407-413. Straumann simply concludes that “the doctrine of the right to punish in *De iure belli ac pacis* is identical with the one expounded in *De iure praedae*,” though he focuses primarily on the right to punish as a justification for war without consideration of who wields that power of punishment. *Grotius’s Natural Law*, 9.} Yet Grotius made significant alterations in his theory which attempted to cabin its potentially broad scope, most importantly through a reevaluation of his theory of sovereignty. A careful ambiguity about the origin of sovereign power—whether the result of transfer from individuals or the natural consequence of civil society—marks the entirety of *De jure belli*, and there is simply no statement of the individual origin of state authority in the later work on par with Grotius’s claims about the right of punishment in *De Indis*.

The reality was that Grotius’s objectives in *De jure belli* led him to defending a set of positions which did not fit comfortably under either theory of sovereignty. Most famously,
Grotius’s stated purpose was to demonstrate both that war was a legitimate activity for Christians (against Erasmus and other Protestant pacifists) and to show the proper limits on its conduct, which Grotius felt were frequently trampled upon by Christian nations.\footnote{Hugo Grotius, \textit{De jure belli ac pacis libri tres}, trans. Francis W. Kelsey (Oxford: Clarendon Press, 1925), Prolegomena, p. 20. All citations to \textit{De jure belli} are from this edition by book, chapter, and section number, followed by the Latin and page number from the same edition in parentheses.} At the same time, however, Grotius remained committed to the Dutch cause, which still struggled for official recognition and featured a prominent role for private entities like the VOC and its companion Dutch West India Company in military operations. The pursuit of these dual objectives required a careful balancing act which is particularly visible in Grotius’s discourse on sovereignty and punishment. The private right of punishment remains, and can still be exercised by individuals (even after the institution of civil society) under the proper circumstances. Further, Grotius continues to argue that there is no necessary requirement that individuals seek sovereign authorization to engage in reprisal or to participate in a public war.

At the same time, Grotius attempted to minimize the scope of his previously capacious doctrine of punishment. Grotius quietly, and with little explanation, argued that the right of punishing for the good of mankind, originally held by all individuals, is now exclusively held by the state and can never return to individuals. Similarly, Grotius offers a new understanding of the relationship between subjects and sovereigns which minimizes subject liability for punishment. Where Scholastic doctrine had claimed that individuals could necessarily face punishment, at least in their property, as a result of their membership in the state, Grotius reversed his position from \textit{De Indis} and rejected virtually any subject responsibility for the actions of the state. This enabled Grotius to make a set of arguments in his pleas for “moderation” which were much more protective of civilians than any prior thinker on the international order.
As these considerations indicate, both theories of sovereignty Grotius employed in *De Indis* were unsuited to the claims he wished to advance. By the time of *De jure belli*, Grotius was prepared to concede that certain rights could be alienated entirely and perpetually. If this was true, however, it created a new challenge in explaining why the right of punishment was not irrevocably surrendered in its entirety. Similarly, the attempt to weaken the subject-sovereign relationship raised uncomfortable questions under Scholastic notions of sovereignty, which stressed the centralization of violence in the state and the agency relationship between subjects and sovereign as natural consequences of the creation of sovereign authority.

With these goals in mind, Grotius did not alter many of the basic tenets of his theory of natural law. The careful schema of laws and rules that marked the Prolegomena of *De Indis* is absent from *De jure belli*, and while the conclusions remain the same, Grotius has refashioned his discussion in ways that were to have a significant impact on future writers.116 Grotius spent the first chapter of *De jure belli* assessing different definitions of "law," with particular focus on law “viewed as a body of rights....In this sense a law becomes a moral quality of a person, making it possible to have or to do something lawfully.”117 These rights are subdivided into perfect and imperfect, “faculty” [*Facultas*] and “aptitude” [*Aptitudo*], respectively.118 Perfect rights—faculties—carry with them a capacity of compulsion, as in the right “of the master over slaves; ownership, either absolute, or less than absolute, as a usufruct or right of pledge; and contractual rights, to which on the opposite side contractual obligations correspond.”119

Aptitudes, by contrast, cannot be compelled, but still oblige in conscience. This description of

116 On Grotius’s schematic shift between the two works, see Laurens Winkel, “Problems of Legal Systematization from *De iure praedae* to *De iure belli ac pacis*,” in Blom ed., 61-78; Tuck, *Philosophy and Government*, 199-200.  
117 I.i.4, p. 35. ...quo sensu jus est, Qualitas moralis personae, competens ad aliquid juste habendum vel agendum.  
118 Id.  
119 I.i.5, p. 35-36. ...ut patria, dominica: Dominium, plenum sive minus pleno, ut ususfructus, jus pignoris: & creditum, cui ex adverso respondet debitum. (2)
rights as a moral *facultas*, scholars have noted, itself owes a debt to Scholastic thought; most notably Suarez preceded Grotius in defining three senses of right, including as “a certain moral power [*facultas*] which every man has, either over his own property or with respect to that which is due to him.”¹²⁰ But Grotius was unique in his claim that what defined a *facultas* was the right of enforcement, and his concomitant division of right into *facultas* and *aptitudo*.¹²¹

Despite the unique presentation, Grotius did not substantively alter his account of the implications of these rights for private war and punishment. Unlike many prior thinkers, humanist and Scholastic, Grotius applied the term “war” to all conflicts, not simply those waged by a state¹²²: war is “not a contest but a condition; thus war is the condition of those contending by force, viewed simply as such. This general definition includes all the classes of wars which it will hereafter be necessary to discuss.” This included private war, which Grotius described as “more ancient” and of “the same nature” as public war.¹²³ Grotius’s elimination of the requirements of public authorization and just cause from the definition of “war” indicated from the beginning his desire to break with traditional thought on the centralization of violence in the sovereign.

As in *De Indis*, Grotius contended “that private wars in some cases may be waged lawfully” based on the theory of rights he has already propounded, and immediately turns to parry the claim “that after public tribunals had been established private wars were not

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¹²¹ A point Tierney himself appears to have recognized; see Brian Tierney, *Liberty and Law* (Washington: Catholic University Press, 2014), 232. Brett has also pointed out that the language of *facultas* was used by Vazquez, but that “it was largely Grotius who was responsible for turning this discourse of faculty or absolute right into one of *ius* in general.” Annabel Brett, *Liberty, Right, and Nature* (New York: Cambridge University Press, 1997), 204. See also Zuckert, *Natural Rights*, 141-42.

¹²² Compare Gentili, *Three Books*, I.ii.17, who calls war “a just and public contest of arms.”

¹²³ I.i.2, p. 33. ...ut non actio; sed status eo nomine indicetur, ita ut sit Bellum status per vim certantium qua tales sunt: quae generalitas omnia illa bellorum genera comprehendit de quibus agendum deinceps erit. (1)
permissible.”\textsuperscript{124} While Grotius conceded that the wiser course is to establish tribunals, Grotius’s initial presentation of the importance of judicial process stressed its convenience rather than any natural requirement that individuals create adjudicatory institutions. Courts were instituted because it is “much more consistent with moral standards, and more conducive to the peace of individuals, that a matter be judicially investigated by one who has no personal interest in it.”\textsuperscript{125} This creation is not absolute; any legal requirement of judicial recourse “is ordinarily understood as applicable only where judicial process has been possible,” demonstrating that the law of nature does not require that the right of private war disappear entirely after the creation of courts.\textsuperscript{126} Once again, Grotius viewed a lack of recourse as either temporary or permanent, with the latter category consisting of times when “one finds himself in places without inhabitants, as on the sea, in a wilderness, or on vacant lands, or in any other places where there is no state; in fact, if those who are subject to jurisdiction do not heed the judge, or if the judge has openly refused to take cognizance.”\textsuperscript{127} Grotius likewise retained the claims that war can exist between states and individuals, and that lower magistrates can, by the law of nature, defend the citizens in their charge or protect their own jurisdiction, though this can be curtailed by the civil law.

All of these points reflect a systematization of many of the arguments already advanced in \textit{De Indis}, but scholars have frequently noted a discontinuity between Grotius’s accounts of sovereignty in the two works, even referring to it as “the one feature of \textit{De jure belli} which was completely new.”\textsuperscript{128} These accounts have focused on a range of features in Grotius’s theory. Tuck emphasizes Grotius’s new acceptance of the idea that a people could engage in “the total

\begin{itemize}
\item \textsuperscript{124} I.iii.1, p. 91. Sed forte putet aliquis id faltem post constituta judicia publica non licere. (46)
\item \textsuperscript{125} I.iii.i, p. 91. ...sed a facto sunt humano, cum tamen multo sit honestius & ad quietem hominum conducibilius, ab eo cujus nihil interit rem cognosci quam homines singulos nimium saepe amantes sui. (46)
\item \textsuperscript{126} I.iii.2, p. 92. ...nam lex vetens sine judicio suum consequi, intelligi commode debet ubi copia est judiciai. (46)
\item \textsuperscript{127} Id. ...si quid versetur in locis non occupatis, ut mari, solitudine, insulis vacuis, & si qua alia sunt loca in quibus nulla est civitas: facto, si subditii judicem non audiant, aut judex aperte cognitionem rejecerit. (46)
\item \textsuperscript{128} Tuck, \textit{Natural Rights}, 77.
\end{itemize}

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alienation of all their original liberty...to one ruler,” leading to Grotius’s adoption by proponents of absolutism. Likewise, Annabel Brett has argued that Grotius’s shifts between the two works reflect two different ways of constituting the “unity” of a city, largely responding to currents in humanist thought. Tierney, by contrast, argues that Grotius’s approach in *De jure belli* reflects an attempt to step back from the strongly individualist transfer theory of *De Indis*, “balancing” it with aspects of an account which Tierney likens to Scholastic thought.

While these accounts all draw attention to important aspects of Grotius’s theory, they do not examine the first link in the chain suggested by Grotius when discussing punishment in *De Indis*: the transfer of authority from individuals to the community. This is a critical point, because Grotius’s pronouncements on this point in *De jure belli* are remarkably vague, and Grotius never makes the argument about the transfer of the right of punishment which appears in the earlier work. This ambiguity has led Haakonssen to argue that the only thing which is surrendered in the initial contract is “the right to punish others,” such that individuals always retain their natural rights but simply lose the ability to enforce those rights in civil society. For Haakonssen, this right is simply the practical version of a general right to resistance against the sovereign, which Grotius is clear is no longer held by individuals. Van Nifterik, along similar lines, claims that the initial contract involves a surrender of the individual’s right to engage in private war on any of the four just causes, not just punishment, but agrees that the underlying rights (as opposed to the power of enforcing them) are maintained. On this reading, the ruler’s right to punish in *De jure belli* has the same derivation as in Hobbes’s *Leviathan*: “the subjects

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129 Id.
130 Brett, *Natural Right*.
132 A point also noticed in passing by Tierney in id. at 334 n. 65.
133 Haakonssen, *Grotius*, 246. Haakonssen cites Liv.2 for this proposition (p. 139 of the Kelsey translation).
did not give that sovereign that right to punish; but only in laying down theirs, strengthened him to use his own.”

However, both these claims overstate the clarity of Grotius’s arguments about sovereign power in *De jure belli*, in particular the character of Grotius’s arguments about the state’s (occasionally) exclusive right to engage in punishment in the international realm. In examining sovereignty in *De jure belli*, Grotius once again tightly links the issues of legitimate warmaking authority and sovereign power because “a public war ought not to be waged except by the authority of him who holds the sovereign power,” so in order to properly understand the laws of war “it will be necessary to understand what sovereignty is, and who hold it.” Yet understanding what sovereignty *is* does not involve the same tasks as understanding its *origin*, and Grotius’s discussion of sovereignty focuses almost exclusively on the definition and content of sovereign power. Even the chapter explicitly devoted to the acquisition of power over other persons avoids this issue; his discussions of civil power in that chapter focus on the right of majority to control the decisions of a corporate body, though notably concluding only that the majority has the power to bind the members to a course of action, without any claim that a majority decision reflects the will of the whole.

In fact, Grotius’s argument about a straightforward transfer of punitive power from individuals to the state is nowhere employed in *De jure belli*, and only once does Grotius approach this position, in his discussion of the right of resistance. Grotius opened his chapter on rebellion by noting that while individuals originally hold a right to resist injury, at the creation of civil society “the state forthwith acquires over us and our possessions a greater right” in order to

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135 I.iii.5, p. 100-01. ...bellum publicum geri non debere nisi eo auctore qui summam potestatem habeat...necessarium erit, quae sit summa illa potestas, qui eam habeant intelligere. (51)
ensure peace.\textsuperscript{137} While Grotius largely rejected any right to engage in resistance against the sovereign, he conceded that under extreme circumstances such a right might be permitted, and did so by reference to the original contract:

Now this law which we are discussing—the law of non-resistance—seems to draw its validity from the will of those who associate themselves together in the first place to form a civil society; from the same source, furthermore, derives the right which passes into the hands of those who govern. If these men could be asked whether they purposed to impose upon all persons the obligation to prefer death rather than under any circumstances to take up arms in order to ward off the violence of those having superior authority, I do not know whether they would answer in the affirmative, unless, perhaps, with this qualification, in case resistance could not be made without a very great disturbance in the state, and without the destruction of a great many innocent people.\textsuperscript{138}

The only place where Grotius explicitly makes an argument about individual transfer of rights is thus a situation of renouncing a right to resist the sovereign, but he said nothing about the origin of any of the sovereign’s powers. Indeed, this claim is not far from one advanced in writers like Suarez, in which the consent of individuals is necessary to create civil society in the first instance, and to the extent that just resistance is the exercise of a particular form of the right of war—self-defense—many writers in the Scholastic tradition had recognized that individual resistance would be permissible against tyrants on the basis of the tyrant’s lack of a contract (in the case of an illegitimate usurper) or violation of the compact between sovereign and people.\textsuperscript{139}

The novel feature of Grotius’s argument was the claim that individuals could have completely renounced this right, but interpreted fairly had almost certainly chosen not to.

\textsuperscript{137} I.iv.2, p. 139. ...statim civitati jus quoddam majus in nos & nostra nascitur. (80)
\textsuperscript{138} I.iv.7, p. 149. Haec autem lex de qua agimus pendere videtur a voluntate eorum, qui se primum in societatem civilem consociant, a quibus jus porro ad imperantes manat. Hi vero si interrogarentur an velim omnis hoc onus imponere, ut mori praepetent, quam ullo casu vim superiorum armis arcer, nescio an velle se sint responsui, nisi forte cum hoc additamento, si resisti nequeat, nisi cum maxima reipublicae perturbatione, aut exitio plurimorum innocentium. (86) Of the scholars to assess Grotius’s theory of sovereignty, only Tuck draws significant attention to this passage. Tuck, Philosophy and Government, 200; Tuck, Natural Rights, 79-80.
\textsuperscript{139} De legibus ac deo legislatore III.ii.1-5, p. 372-77; Defensio VI.iv.1, 6, p. 705, 709-10. On this point, see Tierney, Natural Rights, 309-315, 337-38.
This dualism puts Grotius in an odd position throughout *De jure belli* when describing rights of sovereignty. By conceding that any individual rights could be renounced, Grotius opened himself to the recurring question of whether or not each individual right had been renounced, and under what terms. At the same time, however, when speaking of sovereign powers, Grotius continued to use language which could accommodate a Scholastic theory of state power as based on the powers necessary to form a state, and never resolved the question of whether a “transfer” of rights from individuals was necessary to justify any particular state power, much less the bundle of sovereign rights taken as a whole. Nowhere was this more apparent than in Grotius’s discussion of sovereign control over punishment. While spelling out the arguments for just causes of war, Grotius notes that “in a private war, self-defense is generally the only consideration; but public powers have not only the right of self-defense but also the right to exact punishment.” Grotius does not go into detail here, but this marks a shift from his earlier account, in which punishment, even on behalf of human society as a whole, was an acceptable justification for private war even after the institution of civil society. When Grotius finally reaches his detailed discussion of punishment in Chapter 20 of *De jure belli*, his answer is no more satisfying.

Grotius defines punishment as “an evil of suffering which is inflicted because of an evil of action,” and he makes clear that the right to inflict this punishment originates in the wrong of the criminal, not in any special status of the punisher. Grotius analogizes this condition to that of a contract of sale with implied conditions; “so he who does wrong seems by his own will to have obligated himself to a penalty, because a serious crime cannot be unpunishable; hence,

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140 II.i.16, p. 184. Praeterea in bello privato ferme defensio mera consideratur at publicae potestates cum defensione & ulciscendi habent jus. (108)
141 II.xx.1, p. 462. *malum passionis quod infligitur ob malum actionis*. (314)
142 II.xx.2, p. 464.
whoever directly wills to sin, by consequence has willed also to deserve a penalty.”¹⁴³ This obligatory aspect of punishment is important because it enables Grotius to retain the critical argument from De Indis that “the subject of this right, that is that agent to whom the right is given, has not been definitely fixed by nature itself.”¹⁴⁴ This denies any claim that by nature the state has exclusive claim to the right of punishment, since even though “nature makes it clear enough that it is most suitable that punishment should be inflicted by a superior,” the term superiority must be “understood to imply that he who has done wrong by that very act may be considered to have made himself inferior to some one else and as it were to have demoted himself from the class of men into the class of beasts which are subject to man.”¹⁴⁵ This leaves open the possibility of individual punishment for three potential purposes: the “advantage of the person who does wrong, or of the person against whose interest the wrong was committed, or of other persons in general,”¹⁴⁶ each of which Grotius addresses in turn.

By the law of nature, anyone can punish as a way of reforming the wrongdoer, and while Grotius frames his discussion of this principle as a “proof,” it largely consists of quotations from sources illustrating the human laws which curtail its exercise. This sets up a recurring pattern in Grotius’s discussion; the underlying principle of an individual right to punish is assumed rather than proved throughout the chapter, with Grotius largely attempting to bolster his claims with copious examples. Even when Grotius addresses a theoretical question, he offers little in the way of firm guidance. For example, in discussing the legitimacy of killing as a punishment “for the good of the offender,” Grotius notes that this is generally impossible, but that on “rare

¹⁴³ Id. at 464-65. ...ita qui delinquit sua voluntate se videtur obligasse poenae, quia crimen grave non potest non esse punibile, ita ut qui directe vult peccare, per consequiam & poenam mereri voluerit. (316)
¹⁴⁴ II.xx.3, p. 465. Sed hujus juris subjectum id est cui jus debetur, per naturam ipsam determinatum non est. (316)
¹⁴⁵ Id. ...nisi vox superioris eo sumatur sensu, ut is qui male egit, eo ipso se quovis alio inferiorem censeatur fecisse & quasi ex homium censu destruissse in censum bestiarum quae homini subjacent. (316)
¹⁴⁶ II.xx.6, p. 470. Dicemus ergo, in poenis respici aut utilitatem ejus qui peccarit, aut ejus cujus intererat non peccatum esse, aut indistincte quorumlibet. (319)
occasions” it may be justifiable to kill “men of incurable natures,” who are better off dead than alive. A similar pattern occurs in his discussion of punishment for the good of the victim. By the “bare law of nature,” punishment for the good of the victim is permitted “whether vengeance is exacted by one who was injured himself or by another, since it is in harmony with nature that man should be helped by man” to the extent an argument is made, it recurs to the general notion of a society of mankind, and by extension to Grotius’s original proof.

A similar pattern occurs with respect to sovereign control over punishment. The first indication of Grotius’s shiftiness this issue in Chapter 20 is in Grotius’s discussion of how states come to hold the right of punishment for the good of the victim. In the earlier work, Grotius had claimed that the power of punishment was transferred directly to sovereigns by the individuals making up the state. Here, Grotius is more ambiguous about the source of state authority to punish. State punishment is encouraged by the partiality we feel towards ourselves and our family, such that “as soon as numerous families were united at a common point judges were appointed, and to them alone was given the power to avenge the injured, while others are deprived of the freedom of action wherewith nature endowed them.” This formulation of the power of civil punishment could fit perfectly well with any number of potential explanations of sovereign authority: transfer of individual rights, a Scholastic notion of the powers necessary for a “perfect” state, or even the “renunciation” of individual rights in favor of the private right of the sovereign, akin to Hobbes.

147 II.xx.7, p. 471.
148 II.xx.8, p. 472. ...sive fiat ab ipso qui laesus est, sive ab alio, quando hominem ab homine adjuvari naturae est consentaneum. (320)
149 II.xx.8, p. 473. ...ideo simul multae familiae in unum locum convenerunt, judices constitui, & his solis data potestas vindicandi laesos, ademta caeteris quam natura indulserat libertate. (321)
Grotius does not further explain the origin of this aspect of civil power. Instead, he turns to a discussion familiar from *De Indis*, though in a notably different context. This he does through a discussion of Caesar’s attack on the pirates which he found in Plutarch and Velleius Paterculus:

Nevertheless, the old natural liberty remains, especially in places where there are no courts, as, for example, on the sea. An example of this is perhaps the conduct of Julius Caesar. He, while yet a private citizen, with a hastily levied fleet pursued the pirates by whom he had been captured, sank some of their ships, and put the rest to flight. When the proconsul failed to punish the pirates who had been taken, he himself set out to sea and crucified them. The same right will exist in desert places, or where men lead a nomadic life.\footnote{II.xx.8, p. 475. Manet tamen vetus naturalis libertas, primum in locis ubi judicia sunt nulla, ut in mari. Quo forte referri potest, quod Cajus Caesar privatus adhuc piratas a quibus captus fuerat classe tumultuaria perfecutus est, ipsorumque naves partim fugavit, partim mersit, & cum procunsul negligeret animadvertere in captus piratas, ipse eos in mare reversus cruci suffixit. Idem locum habebit in locis desertis, aut ubi Nomadum more vivitur. (321)}

This passage closely parallels Grotius’s description of Caesar in *De Indis*, but Grotius has relocated the example within his argument. In *De Indis*, the example served as evidence for the claim that individuals not only hold a right of punishment, but can exercise it over any offenses in the absence of state action or authority. Here, Grotius ties it to the specific case of punishment on behalf of the individual who was injured, reducing its import to his argument.

This foreshadows Grotius’s retreat with respect to the general power of punishment for “the good of mankind in general.”\footnote{II.xx.9, p. 475.} This end of punishment looks to the same objectives as punishment for the good of a victim, and is one that “according to nature, may rest with any person whatever.”\footnote{II.xx.9, p. 476. Hujus quoque juris potestas naturaliter penes unumquemque est. (322)} But despite this fact—and unlike the case of punishment for the good of the victim—this right appears to have been entirely lodged in the state. In discussing the general right of punishment, Grotius notes again that the risk of partiality and the difficulty of determining the justice of a particular case have made it so that “in communities animated by a
sense of right men have agreed to select as arbiters those who they think are the best and wisest, or hope will prove to be such."  

Later, Grotius turns specifically to the case of a war waged for punishment with this end in view:

The fact must also be recognized that kings, and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever. For liberty to serve the interests of human society through punishments, which originally, as we have said, rested with individuals, now after the organization of states and courts of law is in the hands of the highest authorities, not, properly speaking, in so far as they rule over others but in so far as they are themselves subject to no one. For subjection has taken this right away from others. 

Once again, this passage maintains a studied ambiguity about the origin of the state’s authority.

There is no language specifically linking the sovereign’s punitive authority to a transfer, but Grotius has likewise not taken the position that it is a necessary power inherent in the very concept of sovereignty. There is no discussion—as we might expect from Grotius’s theory of resistance—of why individuals should be fairly assumed to have given up the right to punish for the good of mankind, or an implication that they could have retained this power if they had chosen. This passage also approaches the closest to a Hobbesian position, in which individuals renounce their rights while the sovereign retains his, but that explanation does not account for the fact that Grotius permits individuals to continue to engage in punishment for the good of the victim, as the Caesar example indicates. Why has “subjection” not removed the right of those individuals to engage in punishment without authorization from civil society? This is doubly true of the fact that Grotius no longer argues that there are circumstances when individuals who have

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153 II.xx.9, p. 477. ...eo placuit hominum justis communitatibus eos deligere quos optimus ac prudentissimos putarent, aut fore sperarent. (322-23)
154 II.xx.40, p. 504-05. Sciendum quoque est reges, & qui par regibus jus obtinent, jus habere poenas poscendi non tantum ob injurias in se aut subditos suos comissas, sed & ob eas quae ipso peculariter non tangunt, sed in quibusvis personis jus naturae aut gentium immaniter violantibus Nam libertas humanae societati per poenas consulendi, quae initio ut diximus penes singulos fuerat, civitatibus ac judiciis institutis penes summas potestates refedit, non prope qua aliis imperant, sed qua nemini parent. Nam subjectio alii id jus abstulit. (338)
entered civil society regain the right of punishment for the benefit of all mankind. To be sure, Grotius contends that “traces and survivals of primitive right persist in those places and among those persons who are subject to no fixed tribunals, and in some other exceptional cases,” but these seem to be cases where individuals live without any settled government and thus no system of “subjection” removes their original right.\footnote{II.xx.9, p. 477. \textit{...manent vestigia ac reliquiae prisci juris, in iis locis, atque inter eas personas, quae certis judiciis non subsunt: ac praeterea in quibusdam casibus exceptis.} (323) Grotius had examples of these sorts of communities; in discussing the right of punishing for the good of the victim, for example, Grotius had noted cases “where men lead a nomadic life” as instances where the private right of punishment prevails. II.xx.8, p. 474.} As for “exceptional cases,” Grotius mentions a Jewish law permitting anyone to kill a fellow Jew “who fell away from God and the law of God,” as well as the “full right of punishment” permitted to parents and masters in places like Sparta.\footnote{II.xx.9, p. 477-78.} But despite the equally clear absence of jurisdiction, Grotius never explains why one right returns and the other does not.

The classic question surrounding punishment for the good of mankind was the issue of whether war could be waged on non-European peoples on the ground of impiety or for other causes, and Grotius entered this debate as well. As the preceding discussion implies, the only power that could claim to engage in such a war was the state, and Grotius endorsed punitive war against “those who act with impiety toward their parents…against those who feed on human flesh…and against those who practice piracy.”\footnote{II.xx.40, p. 505-06. \textit{Sic non dubitamus quin justa sint bella in eos qui in parentes impii sunt...in eos qui humanam carmem epulantur...in eos qui piraticam exercent.} (338) The right to wage war against pirates was added in the 1631 edition. See Kempe 386.} Grotius proclaims that he “follow[s] the opinion of Innocent, and others who say that war may be waged upon those who sin against nature. The contrary view is held by Victoria, Vazquez, Azor, Molina, and others, who in justification of war seem to demand that he who undertakes it should have suffered injury either...
in his person or his state, or that he should have jurisdiction over him who is attacked.” Yet
Grotius’s ultimate position—and the tools he uses to cabin the right of punishment he has so
painstakingly created—paralleled Vitoria quite closely.

This in itself should not be surprising; as we have seen, Grotius relied heavily on
Vitoria’s arguments in articulating his early theory of sovereignty. And despite Grotius’s
criticism, Vitoria had endorsed the legitimacy of warfare for the purposes of preventing
cannibalism and human sacrifice, since those practices reflected violations of natural law. Further, these offenses are distinguishable from other violations of the natural law, which are not
susceptible to universal punishment, by the fact that “they involve injustice to other men,” not
merely because they are against natural law. The victims of cannibalism or human sacrifice
have a right of self-defense, and “therefore princes can defend them.” Defense is even permitted
for a supposedly willing victim or a criminal about to be sacrificed. As James Muldoon has
noted, Vitoria “explicitly cited Innocent IV’s argument concerning the right of Christians to
intervene in cases where infidels violated the law of nature,” even though he did not resolve the
conflict with his earlier arguments for why punishment of offenses against natural law was
insufficient for justifying intervention. Nearly identical, though somewhat compressed,
arguments are seen in Vitoria’s De Indis.

158 II.xx.40, p. 506. Et eatenus sententiam sequimur Innocentii & aliorum qui bello ajunt peti posse eos qui in
naturam delinquunt: contra quam sentiunt Victoria, Vasquis, Azorius, Molina, ali, qui ad justitiam belli requirere
videntur, ut qui suscipit aut laesus sit in se aut republica sua, aut ut in eum, qui bello impletetur, jurisdictionem
habeat. (339)
160 I.5, pg. 225.
161 Id.
163 De Indis § 15, p. 288. Gentili may have had Vitoria in mind when he endorsed “the cause of the Spaniards” in
fighting those “who practised abominable lewdness even with beasts, and who ate human flesh.” L.xxv.198. Gentili,
however, limits this power to states, and does not engage in any attempt to explain how these offenses can be
demonstrated to be unjust to the Indians (or whether they need to be).
Grotius likewise reflected concerns about the applicability and determination of punishable offenses under natural law, and his attempts to resolve those issues showed striking parallels to Vitoria. Most importantly, Grotius develops more fully a point suggested in Vitoria’s work: that the degree of evidence available to prove a natural law proposition is essential to its eligibility for universal punishment. Like Vitoria, Grotius contended that the punishment of offenses against the law of nature must be limited to offenses “so evident that they do not admit of doubt.”

This plays a particularly important role in his discussion of wars of religion; Grotius, again like Vitoria, rejected the argument that divine law could be a basis for punishment. He is insistent that “we should not hastily class with the things forbidden by nature those with regard to which this point is not sufficiently clear, and which are rather prohibited by the law of the Divine Will.” Only outright atheism could justify war on religious grounds, since two tenets of the Christian religion are so obvious as to be laws of nature: “that there is a divinity (I exclude the question of there being more than one) and that he has a care for the affairs of men.” These propositions are demonstrable “by arguments drawn from the nature of things,” specifically the fact “that our senses show that some things are made, but the things which are made lead us absolutely to something that is not made.” These propositions thus satisfy the critical test for universal punishment, even though these facts are not understood by every individual, since “in every age throughout all lands, with very few exceptions, men have accepted these ideas.”

164 II.xx.43, p. 507. De Indis § 40, p. 274.
165 II.xx.42, p. 507. …ne temere annumeremus a natura vetitis ea de quibus id non satis constat, & quae lege potius divinae voluntatis interdicta sunt. (339)
166 II.xx.46, p. 513. …numen aliquod esse (unum an plura sepono) & curari ab eo res hominum. (343)
167 II.xx.45, p. 512. …etiam petitis ex rerum natura argumentis demonstrari potest, inter quae illus validissimum est quod res aliquas esse factas ostendat sensus, res autem factae omnino nos ad aliquid non factum deducant. (342)
168 Id. …sufficit quod ab omni aevo per omnes terras, paucissimis exceptis, in has notiones consenserunt. (342)
For Grotius, this led to a series of conclusions that looked effectively identical to Vitoria, though he justified them in different terms. Like Vitoria, Grotius endorsed war for the purposes of stopping human sacrifice and the persecution of Christians by non-Christian rulers, alongside the prevention of cannibalism. For Grotius, these are straightforwardly situations of punishment, for which no civil jurisdiction is necessary. Thus, while Grotius may have “aligned himself with Innocent IV and against Vitoria” on the issue of jurisdiction, the practical results of their doctrines were nearly identical. The key move was simply for Grotius to eliminate the idea of jurisdiction from the conversation altogether; the punitive power of a sovereign over these offenses, like the right of a trading company to enforce its contracts, is the product of natural law, illustrated by ample evidence from the consent of nations and obvious by reason. No notion of jurisdiction was necessary if the execution came by means of war.

Grotius’s ambiguities about sovereignty enabled him to simultaneously limit the scope of his broad doctrine of punishment while continuing to maintain an opening for private war after the institution of civil society. Both the subject matter of the right of punishment for the good of mankind, as well as who could hold that right, were sharply curtailed in Grotius’s discussion, though without completely eliminating them. Grotius also avoided difficult questions about the reasons behind the partial exclusivity of the state in engaging in punishment in the international realm. Transfer or Aristotelian “perfection” remained open possibilities for explaining the state’s authority. The increased scope of public control over the power of punishment relative to De Indis is also significant when compared with the ways Grotius continued to weaken the overall control of the state by insisting that private actors could engage in publicly sanctioned wars and

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169 Tuck, War and Peace, 103.
that individuals were not responsible for the actions of their sovereign. It is to this public face of power on the international stage that we now turn.

V. Private Action and Public Authority

Grotius’s ambiguity about sovereignty in *De jure belli* is easier to comprehend when considered in light of the most obvious shift in the relationship between subjects and sovereigns between the two works: the liability of subjects for the actions of the sovereign. While this feature of Grotius’s theory has elicited virtually no comment in prior scholarly examinations, it is crucial for understanding Grotius’s reluctance to spell out an exact theory of sovereignty as well as his ability to limit the scope of legitimate punishment. Grotius’s shiftiness on this point enabled him to maintain a variety of positions without articulating the precise relationship between them. We have already seen some of the problems inherent in the transfer theory which Grotius avoided in discussing the power of punishment; given the conclusion that certain powers could be irreparably abandoned, Grotius needed an explanation for why the power of punishment had not been completely surrendered or transferred. But similar issues attached to the theory of sovereign authority as deriving inherently from the nature of sovereign power. While in *De Indis* Grotius had found a way to simultaneously adopt a private right of punishment in individuals and the view of certain powers as inherent in the nature of sovereignty, that had raised difficult and unanswered questions about the subject’s position in public wars exposed in Grotius’s defense of the van Heemskerck commission. Grotius clearly wanted to maintain space for the VOC to operate both independently and in support of the state, and a theory of sovereignty which stressed that punishment and warmaking authority were naturally controlled by the sovereign did little to advance this position. Along these lines, Grotius was no longer able to accept the tight
linkage between subject and sovereign which characterized much Scholastic thought, as well as his own positions in *De Indis*.

The result of these rather contradictory positions is that Grotius’s theory of sovereignty in *De jure belli*, while in principle more absolutist than his earlier positions, actually reflected a very thin conception of sovereignty, in which sovereign control over violence was not absolute and where subjects and sovereigns had a very attenuated relationship. Subjects can contract into a sort of slavery, but can still retain the right to engage in violence against foreigners and cannot be said to be subject to punishment for the actions of their sovereign. The usual focus on the absolutist—or, in more sensitive treatments, “Janus-faced”—character of Grotius’s theory of sovereignty obscures the ways in which Grotius undermines critical potential consequences of his absolutist line of thought with respect to liability for punishment.

The central feature of this retreat is Grotius’s claim that individual subjects are largely free from responsibility for the acts of their sovereign. For Grotius, the core principle for punishment is the claim that “an obligation to punishment arises from desert; and desert is something personal, since it has its origin in the will, than which nothing is more peculiarly ours.” From this principle, Grotius concludes that subjects can never have their private property because of a public wrong unless they have consented to it. The principles applicable to subjects are the same as those applicable to children, who likewise cannot share in the personal guilt attributable to their parents. In addition, even when the community is liable to

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170 Tuck, *Natural Rights Theories*, 79.
171 II.xxi.12, p. 539. ...sed quia obligatio ad poenam ex merito oritue: meritum autem est personale, quippe ex voluntate ortum habens. (375)
172 II.xxi.7, p. 535.
173 II.xxi.13, p. 540.
punishment for some act, the duration of that desert depends on the continuing presence of some individuals who are guilty of the act in question.\textsuperscript{174}

However, as Grotius’s reference to wrongs done “without their consent” indicates, it is possible for individuals to be liable to punishment for state acts under certain circumstances. Grotius begins his discussion of collective punishment by noting that “guilt will pass from the highest authority to those subject to it, if those subject to it have consented to crime, or if they have done anything by order or advice of the highest authority which they could avoid without committing wrong.”\textsuperscript{175} Grotius illustrates this by way of citation to the same passage of Augustine which he had employed in De Indis, emphasizing that the community cannot exist in the absence of individuals.\textsuperscript{176} However, Grotius attempts to limit the scope of punishment of a community by stressing that only individuals who have “agreed to the crime” are guilty, not those who have simply been outvoted.\textsuperscript{177} In the most extreme case, communities are punished by their dissolution and destruction—the equivalent of the death penalty for individuals—or by confiscation of public belongings, such as public lands, money, and military supplies.\textsuperscript{178}

Grotius is less than clear about exactly how this liability to punishment is to be calculated, and this is further clouded by the fact that Grotius implies that relatively fine-grained distinctions must be made among subjects and types of government:

What we have said with regard to the inflicting of evil upon children because of the wrong-doings of their parents may be applied also in the case of a people that is truly subject (for a people that is not subject may be punished because of its own guilt, that is for its negligence, as we have said), if the question is raised whether such a people may suffer for the crimes of its king or its rulers. At present we are not inquiring whether the

\textsuperscript{174} II.xxi.8, p. 536.  
\textsuperscript{175} II.xxi.7, p. 534. ...vicissim a summ potestate in subditos culpa transibit, si in crimen subditi consenserint, aut si quid facerint summae potestatis imperio, aut suasu, quod facere sine facinore non poterant. (372)  
\textsuperscript{176} Id. at 534-35.  
\textsuperscript{177} Id. at 535.  
\textsuperscript{178} Id.
consent of the people itself is involved, or whether there has been any other act on the part of the people deserving of punishment; we are concerned merely with the relation which arises from the nature of the body whose head is the king, and whose members are the other citizens.\(^{179}\)

Certain arrangements of sovereign power—particularly those in which the sovereign wields absolute authority—seem particularly unlikely to subject individual members of the society to liability, but these are not completely dispositive. In a footnote to his point on consent by a people, Grotius offers a quotation from Philo’s commentary on Genesis 12, Abraham’s sojourn in Egypt, in which “the Lord plagued Pharaoh and his house with great plagues because of Sarai Abram’s wife,” where Philo attributes the extension of punishment to the household to the fact that “none of them had felt any indignation at his lawless conduct, but had all consented to it, and had all but co-operated actively in his iniquity.”\(^{180}\) Grotius also cites Josephus’s interpretation of the story of Jeroboam in 1 Kings 14, who is told that God “will give Israel up because of the sins Jeroboam has committed and has caused Israel to commit” in worshipping the goddess Asherah.\(^{181}\) Josephus’s description of this event stresses collective responsibility: “The multitude also shall themselves partake of the same punishment, and shall be cast out of this good land, and shall be scattered into the places beyond Euphrates, because they have followed the wicked practices of their king, and have worshipped the gods that he made, and forsaken my sacrifices.”\(^{182}\) As these examples suggest, there may be instances when even a “people that is

\(^{179}\) II.xxi.17, p. 543–44. Quod de liberis malo afficiendis ob parentum delicta diximus, idem aptari potest & ad populum vere subditum: (nam qui subditus non est, ex sua culpa, id est ex negligentia puniri potest, ut diximus) si quaeatur an is populus malo possit affici ob regis, aut rectorum facinora. Non jam quaerimus si ipsius populi consensus accesserit, aut factum alium quod per se sit poena dignum, sed agimus de eo contractu qui ex natura oritur ejus corporis cujus caput est rex, membra caeteri. (377)


\(^{181}\) 1 Kings 14:16 (NIV).

truly subject” can consent in such a fashion as to create liability to punishment, but there is nothing in the subject-sovereign relationship *per se* which imposes that liability on subjects.

After these citations, Grotius reiterates the rule that “individuals who have not given their consent” cannot be punished for the wrongdoing of the community, but he never specifies the degree of consent or connivance necessary to create liability for individuals. The straightforward identity between individual, community, and sovereign which marked his theory in *De Indis* is notably absent. And even absent this explanation, it is clear the innocent citizens will still suffer as a result of the punishment, and to accommodate this fact Grotius leans quite heavily on the claim that there is a distinction between punishment and suffering a loss as a consequence of the punishment of another, repeatedly stressing that those who “look forward to the possession” of a thing may still lose that right in the course of the punishment of others. The basic point is that the proper exercise of a right which results in some loss to another is not an injury to that person, just as the confiscation of the property of parents, though it creates “inconvenience” for their children, “is not a punishment, because the property that was to be theirs would not become theirs actually unless it had been preserved by their parents to the end of life.” A community, which is guilty “through the crime of the majority,” is punished by the loss of “political liberty, fortifications, and other profitable things,” and Grotius admits that “the loss is felt also by the individuals who are innocent, but only in respect to such things as belonged to them not directly but through the community.”

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183 *De jure belli* II.xxi.18, p. 544.
184 II.xxi.16, p. 543.
185 II.xxi.10, p. 537. ...sed propriæ ea poena non est, quia bona illa illorum futura non erant nisi a parentibus ad ultimum spiritum essent conservata. (374)
186 Id. at 537-38. ...sed ea in re quae ad ipsos non pertinebat nisi per universitatem. (374)
Perhaps sensitive to the fact that this explanation seems to ignore the realities of war—which Grotius himself would address in time—he offers a second justification for the inconveniences suffered by subjects, this time based on the notion of suretyship. In a surety contract, an individual who stands surety suffers a loss “not in such a way that fault is the proximate cause of the act,” but “the immediate cause of the obligation is the promise itself.”  

Under such circumstances, the loss is not a punishment, properly speaking. A similar situation occurs when an individual loses a right which is “terminable at the pleasure of the grantor” or when a subject loses property as the result of the exercise of the right of eminent domain; “there is in this not properly a punishment, but the execution of an antecedent right that was vested in the person who takes the thing away.” These distinctions, taken together, permit Grotius to claim that “no one who is innocent of wrong may be punished for the wrong done by another.”

Grotius’s thin conception of sovereignty and his claims about the sharing of punishment thus offers little in the way of viewing nations as complete entities, capable of sharing in decisions as a collective body rather than a group of leaders or, in the case of a democracy, a group of individuals making up the majority. This suggests limits on legitimate punishment in the international order which are quite extreme; as an entirely individual procedure, no subject could ever be punished with confiscation of property, and certainly not with death, on account of his sovereign’s acts. However, taking this radical position effectively ruled out war as commonly practiced, and there were advantages to the ability to view another nation as a collective whole in which the members could be held to account for the actions of the corporate body. This led Grotius in Book III to describe a set of practices permitted by the voluntary law of nations which

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187 II.xxi.11, p. 538.
188 Id. at 539. ...poena in illis proprie non est, sed exsecutio juris antecedentis, quod erat penes auferentem. (375)
189 II.xxxi.12, p. 539.
looked extremely savage, creating a curious dissonance between Grotius’s stated objective at the beginning of *De jure belli*—to demonstrate the existence of laws governing conduct in war, and to undermine the “lack of restraint in relation to war” he observed among Christian nations\(^{190}\)—and the actual content of his theory. What is most striking and unnoticed about Grotius’s claims in Book III is that they turn fundamentally on rejecting the rules about sovereignty and collective responsibility which Grotius had sketched in the first two books of the work.

Grotius’s awareness that collective responsibility is a critical element of any realistic conception of the international order is immediately apparent in his treatment of reprisal. This forms the second chapter of Book III, and the first chapter in which Grotius addresses laws of war drawn from the law of nations. Grotius begins his discussion by reiterating that “by the strict law of nature no one is bound by another’s act,” and immediately takes the precise opposite position on corporate liability from the one he had advanced in *De Indis*: “The debt of the corporation, moreover, is not a debt of the individuals, as Ulpian well declares, especially if the corporation has property; for the rest the members of a corporation are not bound as individuals, but as a part of the corporate body.”\(^{191}\) But group liability for debts has been introduced “because otherwise a great license to cause injury would arise; the reason is that in many cases the goods of rulers cannot so easily be seized as those of private persons.” Grotius returns to the analogy of a surety: “this principle...is not so in conflict with nature that it could not have been introduced by custom and tacit consent, since sureties are bound without any cause, merely by their consent.”\(^{192}\) Notably, Grotius does not refer this to the original contract constituting civil society,

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\(^{190}\) Prolegomena, p. 20.

\(^{191}\) III.ii.1, p. 623. Nec quod universitas debet singuli debent, ut diserte loquitur Ulpianus: nimimum si universitas bona habeat: alioqui enim tenentur non singuli, sed qua pars sunt universorum. (443-44)

\(^{192}\) III.ii.2, p. 624. ...quod alioqui magnae daretur injuriis faciendo licentia, cum bona imperantium saepe non tam facile possint in manus venire, quam privatorum qui plures sunt....Non autem ita hac naturae repugnat, ut non more ^ tacco consensus induci potuerit, cum & fidejussores sine ulla causa ex solo consensus obligentur. (444)
but instead to the consent of nations among themselves; while individuals apparently did not bind themselves to the debts of the whole in forming a civil society, the sovereign has sufficient power to bind them by agreement with other nations.

As proof, Grotius offers examples of declarations of war in which entire peoples declare war on entire peoples, and this foreshadows his massive expansion of permissible targeting and acquisition in public wars. Grotius lays down two conditions which are unique to properly declared public wars. First, Grotius distinguishes two senses of the “permissibility” of acts in war—acts which are “right from every point of view and...free from reproach, even if there is something else which might more honorably be done,” and acts which “among men [are] not liable to punishment.” This latter sense covers “the effects of a public war,” insofar as the law of nations is more permissive than the law of nature: “it is permitted to harm an enemy, both in his person and in his property.” Second, Grotius claims that the law of nations has introduced a principle that all acts by both sides in a public war will be accorded the effects of lawful acts by neutral nations; “it has seemed altogether preferable to leave decisions in regard to such matters to the scruples of the belligerents rather than to have recourse to the judgments of others.” Neutral nations have to respect the transfer of property by capture in warfare without regard to the justice of the cause, and most importantly, cannot punish a belligerent for actions taken in a public war, which would otherwise constitute theft or murder on the part of an unjust belligerent.

193 Id.
195 III.iv.3, p. 643-44.
196 III.iv.4, p. 644. ...ita ut omnino praestiterit haec religioni bellantium exigenda relinquere quam ad aliena arbitria vocare. (457)
197 III.iv.3, p. 643-44.
Guided by these principles, Grotius then addressed the specific permissions nations have agreed to grant under the law of nations. Their content is startling; it is permissible to kill anyone in enemy territory, including women and children, prisoners, those who attempt to surrender, and hostages. In a further indication of Grotius’s willingness to abandon Scholastic norms, even foreigners in enemy territory, who are the test case for the argument that those who are not part of a civil society are not liable to punishment, may be killed. The right to kill any member of an enemy society likewise entails the lesser rights to confiscate or destroy all of their property and to enslave them, as well as to take over the civil power of a nation. Yet Grotius acknowledged that these principles conflicted with his arguments about the sharing of punishment. In assessing what could be done to the persons of enemies in war, he reaffirmed that “retaliation that is lawful, and properly so called, must be inflicted upon the very person who has done wrong, as may be seen from what has previously been said on the sharing of punishment,” while by contrast in war “what is called retaliation very frequently brings harm to those who are in no way to blame for that on which the issue is joined.”

The consequence of these claims was that all of Grotius’s arguments about who could legitimately share responsibility for the state’s acts were shifted to the realm of “moral justice,” part of Grotius’s pleas for moderation in war. Once again, Grotius was careful to split his treatment according to whether the punishment related to life or property. Only those who “have done wrong, in a matter punishable with the penalty of death” should be killed in war, though

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199 III.iv.6-7, p. 646
201 III.iv.13, p. 650-51. Nam talio justa & propri de dicta in eandem personam quae deliquit exercenda est, ut intelligi potest ex his quae de poenae communicacione dicta sunt supra. Contra vero ex bello plerumque id quod talio dicitur in malum redundat eorum quorum in eo quod accusatur nulla est culpa. (461)
Grotius does not go into detail because “what needs to be known has been sufficiently set forth in the chapter on punishments.” Those who are compelled to serve should be spared, since they lack “hostile intent,” and “we must distinguish between those who are responsible for a war and those who followed the leadership of others.” Morality often encourages even remitting punishment of those responsible for a war.

With respect to property, Grotius reiterates his claim from his discussion of reprisal that insofar as war is waged for reparation, all nations have agreed that all subjects can be responsible for the nation’s debts: “This right of the law of nations, indeed, we hold to be of another kind than that which exists in mere impunity or the external power of courts of law....a right is acquired by a kind of common consent, which through a certain force contains in itself the consent of individuals, in the sense in which a law is called ‘a common agreement of the state.’” This right was approved by nations “not only for the sake of avoiding greater evil but also to secure to each one his right.” Yet with respect to punishment, Grotius continued to hew to very narrow assessments of responsibility, since Grotius did not “see that by the agreement of the nations such a right has been extended to the property of the subjects.” The result of this is that “the property of the subjects of enemies cannot be acquired on the ground of punishment, but only that of those who have themselves done wrong; among these are included also the magistrates who fail to punish the crimes.”

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202 III.xi.2, p. 723.
203 III.xi.3, p. 724.
204 III.xi.5, p. 729. ...distinguendos qui actores belli fuerunt ab his qui alios ducentes secuti sunt. (516)
205 III.xi.7, p. 731-33.
206 III.xiii.1, p. 757. Quod quidem jus gentium alterius generis credimus quam illud quod in impunitate sola, aut externa vi judiciorum consistit....sic & ex communi quodam consensu, qui singulorum consensum vi quadam in se continet, quo sensu lex communis pactio civitatis dicitur....non sola majoris mali vitandi causa, sed etiam juris cuique sui consequendi gratia introducta est. (541)
207 III.xiii.2, p. 758. Ergo poenae nomine acquiri res subditorum hostilium non poterunt, sed eorum duntaxat qui ipsi deliquerint, in quibus & magistratus continentur qui delicta non puniunt. (541)
By this point, the payoffs of Grotius’s strategy should be clear. While his thin conception of the state eliminated the categorical protections which women and children received under the natural law in the Scholastic writers, it also eliminated the natural law requirement that combatants must be subject to punishment for their acts in pursuing an unjust war. This latter point carried Grotius much further along the path toward restraining war by moral means than the natural law requirements but forward by the Scholastics, and without the potentially dangerous consequence of encouraging punitive wars against those who persistently violated the dictates of the law of nature with respect to war. Of course, this latter point was only necessary because Grotius continued to insist on a potentially wide sweep for punishment, including a persistent individual right to punish.

In fact, one of the most significant consequences of Grotius’s mode of reasoning was that it enabled him to preserve a very wide sweep of private action. Grotius persistently claims that there is no natural law restriction on what individuals can do as part of a public war, and continues to argue that by natural law individuals can engage in a range of violent activities absent state authorization. We have already seen Grotius’s willingness to permit individuals to continue to engage in punishment in the absence of state jurisdiction, and he takes a similar position with respect to the continued viability of legitimate reprisal. As Grotius argues, “by the law of nations individuals possess the right of taking sureties, as at Athens, in the seizure of men. By the municipal law of many countries this right is sought in some cases from the supreme authority, in other cases from judges.” Similarly, the bare act of seizure is sufficient under the law of nations to legitimately transfer ownership of property in reprisals.208

208 III.ii.7, p. 629. Iure gentium singulis pignorandi jus est, ut & Athenis [androplepsia]. Iure civili multorum locorum peti id solet alibi a potestate summa, alibi a judicibus. (447)
The wrinkle in this claim is that individuals can still take action to satisfy their private debts while viewing all members of their debtor’s society as liable for the debt; this appears to be the source of Grotius’s claim that this right persists by virtue of the law of nations and not the law of nature, a point that baffled Barbeyrac. As Barbeyrac noted, the source of reprisal rights must be “the Law of Nature itself,” though he appeared not to recognize that Grotius’s arguments about sovereignty required that the law of nations introduce collective liability. Barbeyrac was, however, attuned to Grotius’s claim that private violence remained permissible, complaining that “the End of civil Society requires, that private Persons should not make use of this Right, but with the Permission, either express or tacit, of the Sovereign,” and that Grotius “does not explain himself sufficiently in this Place.” Yet Grotius’s thin conception of sovereignty accommodates both positions; the only unusual feature is the claim that individuals are permitted to take advantage of the imposition of collective liability by the law of nations when taking enforcement into their own hands.

Grotius is equally open to private action in other aspects of his theory, and this was one of the most consistently criticized features of Grotius’s thought among his many annotators. Consistent with Grotius’s presuppositions about sovereignty, the state acquires property through its agents only as a result of the law of nations, which has agreed “that the property of enemies should stand to enemies in the same relation as ownerless property.” Along these lines he distinguishes between public and private hostile acts taken in a public war, making clear that it is possible for individuals to acquire property for themselves in a public war without sovereign authorization. Goods “taken outside of the public service” are owned by the individuals who take

210 De jure belli III.vi.8, p. 670.
211 III.vi.10, p. 671.
them, such as “spoils seized by soldiers in free and unauthorized raids at a distance from the army.”²¹² Barbeyrac was once again mystified by this claim; in every public war, since it is waged on the authority of the people, the capture of enemy property must result from “either express or tacit” consent from the sovereign.²¹³

The same set of arguments was reflected in a short chapter late in Book III, “On Acts Done by Individuals in a Public War,” in which Grotius doubled down on the claim that individuals could fully participate in public wars absent sovereign authorization. Grotius began by discussing a passage in Cicero’s De Officiis which was universally taken to demonstrate that such authorization was needed. In the passage, Cicero relates a story about the elder Cato in which he wrote a letter to his son, who had been mustered out of the military, in which (in Grotius’s description) “he warns the youth to avoid engaging in battle, for the reason that it is not right for one who is not a soldier to fight with an enemy.”²¹⁴ Grotius, however, is at pains to dismiss this traditional view. This obligation cannot proceed from the law of nations, since “enemies are held to be entitled to no consideration.” The law of nations imposes no duties with respect to enemies, so enemies certainly cannot complain that an unlicensed individual has attacked them; consequently, “the advice of Cato...comes from Roman military discipline.”²¹⁵ Grotius contends that this institution of Roman law does not reflect anything about the natural law; “If, however, we regard the law of nature and moral justice, it is apparent that in a lawful war any person is allowed to do whatever he trusts will be of advantage to the innocent party,

²¹² III.vi.12, p. 672-73.
²¹³ The Rights of War and Peace, III.vi.10 n. 1, p. 1330.
²¹⁴ De jure belli, III.xviii.1, p. 788. ...quibus eum monet ut caveat ne praelium ineat: neque enim jus esse qui miles non sit pugnare cum hoste. (564)
²¹⁵ Id. ...ex disciplina militari Romana. (564)
provided he keeps within the proper limits of warfare.” The critical conclusion is that “those who support a part of the war with their own expenditures, such as those who fit out and maintain ships at private cost,” are entitled to participate in combat; they are deemed to have a “special command” just like a combatant who is paid by the state.

In principle, it appears such violence could include engaging in punishment on the state’s behalf, so long as that punishment was “within the proper limits of warfare,” and Grotius is explicit that individuals can develop independent causes of action separate from those of their state in the course of a public war. With respect to these, Grotius does not describe the scope of permissible punishment, sticking exclusively to the rights of self-defense and reparation, but nothing in Grotius’s theory categorically excludes engaging in punishment; indeed, his claim that punishment returns as a legitimate act when the state is unavailable suggests that it must be available to individuals who participate in a public war or have causes arising from a public war.

VI. Conclusion

Grotius’s famous innovation—the private right of punishment—touched off a whole series of re-evaluations of core aspects of the tradition of sovereignty and just war theory which Grotius inherited. These challenges were heightened by Grotius’s continuing need to justify both the Dutch revolt and the VOC’s position in it. The result was a set of doctrines about punishment which were extremely wide in their permissive scope but narrow in their proper application—far narrower than any of the previous major writers in the tradition of thought on the laws of war had advanced. Ultimately, these headlining changes with respect to private punishment and the

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216 Id. at 789. At jus naturae & internum si respicimus, videtur in bello justo cuilibet concessum ea facere quae parti innocentii intra justum bellum modum profutura confidit. (564-65)
217 III.xviii.2. p. 789.
218 III.xviii.5. p. 791.
“moderation” of belligerents depend on a set of arguments about the relationship between punishment and sovereignty which have gone essentially unnoticed. Grotius broke quite dramatically with the Scholastic tradition of thought on the question of subject responsibility, and he forged new ground in claiming that subjects could participate in public wars absent sovereign authorization. But these shifts were problematic insofar as Grotius could not (or perhaps chose not to) reconcile them with an overarching theory of sovereignty; as we have seen, the theory presented in *De jure belli* is incomplete and subject to multiple interpretations.

However, Grotius’s arguments were to have immense influence on the course of thought on international punishment, and his concerns touched off a long series of debates about the relationship between national crime and individual responsibility. To understand these developments, it is important to recognize what was lacking from Grotius’s account: a theory in which the will of the state or sovereign was considered equivalent to or reflective of the will of the individual subjects who made up the society. While Grotius’s sovereign clearly controls the “will” of the public insofar as he declares and ends public wars, there is no sense in which his will is attributable to the individuals, and thus no way to satisfy the demand that individuals only be punished for crimes they have personally willed. This claim, of course, was the opposite face of Grotius’s argument that individuals could retain their rights to engage in war, but privately and on behalf of the public, and it was this dual aspect of the theory that drew resistance from later writers. Reconciling the sovereign’s complete control over war with the claims to right made by individuals in the international order—especially the right to punish—formed the basic challenge for Grotius’s successors, and it was precisely on this question of the relationship between subject will and sovereign will that Grotius came under attack.
The Hobbesian Challenge

Grotius’s arguments in favor of an individual right of punishment were not immediately accepted among his most famous successors in the natural law tradition. The most important of these were Thomas Hobbes and Samuel Pufendorf, each of whom advanced significant challenges to the idea of punishment in the international realm. Hobbes’s resistance to Grotius’s project, in particular his claims about sovereignty, was deeply rooted in a different conception of natural law which conditioned the applicability of those laws on the presence of security. In many ways Hobbes represented a polar opposite position from Grotius on the questions of punishment and the enforcement of natural law in the international realm. Where Grotius had endorsed a conception of natural law that could be enforced through punishment in the international order, Hobbes denied that such a law existed. Where Grotius carefully distinguished causes for making war, and suggested that more limited forms of violence might be appropriate for recouping debts as opposed to punitive actions, Hobbes denied such a distinction was possible, and rooted the right to legitimately engage in war in the actor’s subjective evaluation of fear. Finally, and most provocatively, where Grotius insisted that collective punishment was unacceptable because “an obligation to punishment arises from desert; and desert is something personal, since it has its origin in the will,”¹ and strove to preserve a wide range of permissible action for subjects under the law of nature, Hobbes proposed a theory of authorization which completely centralized warmaking authority in the state and made every subject responsible for the acts of his sovereign.

One of the results of this powerful critique was that it made little sense to speak of “punishment” in the international order, and when Hobbes uses the term in De cive, it is in a very

different sense from that used by Grotius or his predecessors. While all violence in the
international realm was permitted by natural law and sought future security—a critical purpose
of punishment—the punisher was in no sense carrying out a punishment for a transgression by
another party, since there was no law between parties to transgress. This, at least, was the
situation in Hobbes’s De cive, his more famous work on the continent; by the time of Leviathan,
Hobbes had given “punishment” a unique meaning which tied it exclusively to the exercise of
state power to exact retribution for violations of the civil law, further undermining any claim that
punishment was a feature of international affairs. Some of Hobbes’s continental readers—most
notably Pufendorf—picked up on this aspect of Leviathan.

To the extent that Thomas Hobbes’s views on the international order are discussed, it is
usually to identify him as the intellectual godfather of “realism” in international relations. Much
recent scholarship emphasizes the ways in which this picture of Hobbesian international relations
is inaccurate or incomplete, and attempts to rescue Hobbes from his realist interpreters. The
difficulty in applying Hobbes’s thought to international affairs exists in part because Hobbes
spent remarkably little time in his works discussing the international order, and so considerable
extrapolation about Hobbes’s state of nature is necessary to grasp the consequences of his
thought for the international arena. This has been the focus of much of the most admirable work
correcting our understanding of inter-state relations in Hobbes’s thought.

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Elsevier house of Amsterdam, with Hobbes’s notes, was the most influential of the editions. One of the features of
De cive (as opposed to Leviathan in both its English and Latin versions) is that it contains both Hobbes’s first and
most complete treatment of the relationship between the law of nature and the law of nations.
3 The locus classicus of this view is Charles Beitz, Political Theory and International Relations (Princeton:
4 See, in particular, the very fine works by Laurie Johnson, Thucydides, Hobbes, and the Interpretation of Realism
(DeKalb, Ill.: Northern Illinois University Press, 1993); Murray Forsyth, “Thomas Hobbes and the External
This chapter is not designed to recapitulate those efforts. Instead, the focus here is on the features of Hobbes’s thought which proved particularly challenging and influential for the gradual disappearance of punishment in the international realm. Hobbes’s focus on fear as the underlying legitimate cause of war made him “the *reductio ad absurdum* of the tradition running from the Romans through Gentili to Grotius, and separating him from the more acceptable figures in that tradition became a constant concern of writers in the late seventeenth and eighteenth centuries,” but critical components of this theory remained attractive for writers on the international order. In particular, the claim that the social contract involved some surrender of judgment, rather than a “transfer” of power in the sense that term was employed by Grotius in *De Indis*, gained a great degree of (often unacknowledged) popularity among writers interested in the international order because of its potential for explaining why subjects, despite holding rights against foreigners under natural law, could not exercise those rights independent of the sovereign’s authority. Similarly, Hobbes’s eventual claim that punishment was strictly limited to the domestic arena was attractive to some of his immediate contemporaries, and required rebuttal from later thinkers who maintained the line, drawn from Grotius, that individuals held a right of punishment, as distinct from other reasons for engaging in violence. Finally, Hobbes’s theory of threat and conduct in war—which stressed the constant fear men always have of others in the state of nature as a justification for engaging in any war judged to ensure preservation and security—presented a challenge to writers who sought to contain the impacts of warfare by distinguishing between purposes for war other acts of violence, as well as to ensure compliance with some standard of international conduct through a mechanism of legitimate punishment.

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I. Authorization and Subject Responsibility

Hobbes’s theory of authorization is one of his most famous and controversial contributions to the history of political thought. It rests on the proposition that each subject lacks a will on political questions independent of the sovereign’s will, such that there is no power of judgment remaining in individuals on any questions which could create conflict. Further, the authorization of the sovereign by the subjects means that his acts are their acts, a position with significant potential consequences for the scope of punishment. This notion is diametrically opposed to Grotius’s thin conception of the state; it creates airtight links between the sovereign’s acts and the subject, while eliminating any possibility that private parties could retain a degree of discretion to participate in public wars or initiate conflicts of their own. While debates about the relationship between Hobbes and Grotius have focused on their shared relationship (or lack thereof) to early-modern Skepticism, there can be little doubt that Hobbes offered a fundamentally different view from Grotius on the questions at stake in debates over sovereignty and punishment, and to the extent that both men shared a commitment to a minimal natural morality, they drew radically different conclusions about what that minimal morality entailed for the creation of civil society. Further, while Hobbes did adopt aspects of Grotius’s thought with

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6 Unsurprisingly, it has been the focus of an immense body of literature attempting to trace its contours and consistency, though my claims—that in both De cive and Leviathan the acts of the sovereign are attributable to the subject, and all violence (outside of immediate self-defense) is centralized in the state—should be largely uncontroversial. More recent debates focus on the proper position of the state in Hobbes’s schema of persons from Chapter 16 of Leviathan, with Quentin Skinner contending that the state is a “purely artificial person” in roughly the same sense as a scheme of representation for a bridge or other inanimate object. Skinner, “Hobbes and the Purely Artificial Person of the State,” in Visions of Politics, Vol. 3, “Hobbes and Civil Science” (New York: Cambridge University Press, 2002), 177-208. David Runciman, by contrast, contends that it is a “person by fiction.” Runciman, “What Kind of Person is Hobbes’s State? A Reply to Skinner,” The Journal of Political Philosophy 8 (2000): 268-78. However, both sides of this debate agree that Hobbes’s position is an attempt undermine both theories of divine right (which denied the artificial character of the state) and Parliamentary supremacy. Skinner 204-08; Runciman 277. Older accounts of the theory tended to focus on its inconsistencies; see, e.g., David Gauthier, The Logic of Leviathan (Oxford: Clarendon Press, 1969), 120-77; Hanna Pitkin, The Concept of Representation (Berkeley: University of California Press, 1967), 14-37; Jean Hampton, Hobbes and the Social Contract Tradition (New York: Cambridge University Press, 1986), 114-31, 173-88.

respect to the international order—specifically the claim that the natural rights of individuals and states were identical in the state of nature, as well as his thoughts on colonization—his theory entailed rejecting the entirety of what Grotius termed the “voluntary” law of nations, instead endorsing an account of natural law which placed no enforceable restraints on the conduct of warfare.

To fully understand the account of sovereign authority offered in *De cive*, it is useful to return to the moments before civil society is created. Individuals first attempt to gain enough allies to ensure their own safety, since such safety would give them sufficient security to practice the natural law in act as well as conscience. However, a critical element is lacking from agreements for mutual aid; the parties to the agreement are likely to have conflicting ideas about what is in the best interest of the group, as well as individual interests that at times conflict with those of the group. This conflict of interests prevents the group from behaving in accordance with natural law in its internal relations. Consequently, “something more is needed, an element of fear, to prevent an accord on peace and mutual assistance for a *common good* from collapsing in discord when a *private good* subsequently comes into conflict with the *common good*.”

Hobbes thus distinguishes men from bees and other “political” animals, which have identical desires and interests and thus coexist as many wills directed toward the same end, because the

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10 Hobbes’s treatment of alliances in the state of nature—here used to make a point about authorization—likewise has important implications for the possibility of alliances between states in international relations, a point we will return to below. See Forsyth, *External Relations*, 196-209.
absence of a single common will excludes them from the category of commonwealths and they do not require an artificial agreement in order to live in harmony.\textsuperscript{12}

There is only one solution to this problem: “a single will among all of them in matters essential to peace and defence. This can only happen if each man subjects his will to the will of a single other, to the will, that is, of one Man or of one Assembly, in such a way that whatever one wills on matters essential to the common peace may be taken as the will of all and each.”\textsuperscript{13} This creation of a unified will results from an agreement from each member of society “not to resist the will of the man or Assembly to which he has submitted himself; that is, not to withhold the use of his wealth and strength against any other men than himself.”\textsuperscript{14} The end result is a commonwealth, “one person, whose will, by the agreement of several men, is to be taken as the will of them all; to make use of their strength and resources for the common peace and defence.”\textsuperscript{15} This leads Hobbes to his definition of sovereign authority, which “consists in the fact that each of the citizens has transferred all his own force and power to that man or Assembly,” though Hobbes quickly acknowledges that this is partially fictional: “no one can literally transfer his force to another,” so the creation of sovereign power means that each individual “has given up his power to resist.”\textsuperscript{16} This unitary will is what separates a commonwealth from a simple crowd [multitudo] of men, where each man “has his own will and his own judgement about

\textsuperscript{12} V.v, p. 71-72. Hobbes identifies six differences between men and bees in this passage, all aimed at demonstrating that bees do not dispute over the common good in a way that requires an artificial union.
\textsuperscript{13} V.vi, p. 72. Hoc autem fieri non potest, nisi vnuquisque voluntatem suam, alterius vnius, nimirum, vnius Hominis, vel vnius Concilij, voluntati, ita subiiciat, vt pro voluntate omnium & singulorum, habendum sit, quicquid de iis rebus quæ necessariae sunt ad pacem communem, ille voluerit. (133)
\textsuperscript{14} V.vii, p. 72. … quando vnuquisque eorum vnicuique cæterorum se Pacto obligat, ad non resistendum voluntati illius hominis, vel illius Concilij cui se submiserit, id est, ne usum opum & virium suarum…contra alios quoscumque illi deneget. (133)
\textsuperscript{15} V.ix, p. 73. … persona vna, cuius voluntas, ex pactis plurium hominum, pro voluntate habenda est ipsorum omnium; vt singulorum viribus & facultatibus vti possit, ad pacem & defensionem communem. (134)
\textsuperscript{16} V.xi.73-74. Quæ Potestas & Ius imperandi in eo consistit, quod vnuquisque ciium omnem suam vim & potentiam, in illum hominem, vel Concilium transtulit. Quod fecisse, (quia vim suam in alium transferre naturali modo nemo potest) nihil aliud est, quàm de iure suo resistenti decessisse. (134)
every proposal.” The crowd cannot collectively claim property in any particular thing, and no action can be attributed to the crowd; anything the crowd agrees to do is nothing more than numerous individual men acting in a certain way. It is only after the creation of a single will that the crowd can “perform voluntary actions, such as command, make laws, acquire and transfer a right, etc.”

This account of the sovereign will unsurprisingly places heavy stress on the sovereign’s control of violence. A “complete commonwealth” is described as “a commonwealth in which no citizen has the Right to use his strength at his own discretion to protect himself, or in which the right of the private sword is excluded,” and this is tightly linked to subjection of an individual’s will to that of the sovereign. The creation of sovereign power implies that an individual has “subjected his will to the will of the commonwealth on the terms that it may do with impunity whatever it chooses.” The only limit is that a subject cannot be obligated to violate the fundamental principle of self-preservation; the subject can legitimately refuse to kill himself, or perform any act worse than death (Hobbes gives the example of killing a parent). Further, the sovereign can find someone else to carry out his right, so this refusal does not frustrate the sovereign’s basic authority and the original compact. Even in those cases, however, the sovereign’s “right of killing those who refuse obedience” continues.

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17 VI.i, p. 75. …quorum vnusquisque suam habet sibi voluntatem, & suum circa omnia proponenda iudicium. (136)
18 VI.i, note, p. 76-77. …voluntate enim prædita est, ideoque actiones facere potest voluntarias, quales sunt imperare, leges condere, jus acquirere & transferre, & cætera. (137)
19 VI.xiii, p. 81-82. …vbi nulli ciuium lus est, viribus suis ad propriam conservacionem suo arbitrio vtendi, siue vbi gladij priuati ius excluditur. (141)
20 Id. at 82. Quicunque enim voluntatem suam ita voluntati ciuitatis subiecit…omnium suo arbitrio vti. (142)
21 Id. at 82-83.
22 Id. at 82.
23 Id. at 83. Nam illi in nullo casu, eos qui obedientiam negabunt interficiendi jus adimitur. (143)
The final step is to demonstrate that the subject’s original covenant is irrevocable, since in general, someone can withdraw his delegated authority at any time. For this purpose, Hobbes introduces an additional obligation on behalf of the citizens, not simply to each other, but also to the sovereign. The original transfer of right, Hobbes contends, constitutes a “gift of right” to the sovereign. Natural law bars the breaking of agreements, which includes “asking for the return of a gift,” and such an attempted revocation would violate the bedrock principle of good faith which undergirds all contractual relations, including the social contract.

Hobbes’s efforts to avoid the implication that there is a contract between subject and sovereign are a reflection of his repeated emphasis that after the institution of the commonwealth there is no competing political body—the “people”—to which individuals can claim allegiance as distinct from the sovereign. In De cive this position required some effort to maintain, because Hobbes concluded that in the initial assembly to create the society, the form of government is naturally “a Democracy” in which the people could then decide to erect a different form of government, such as an aristocracy or monarchy. In each case, however, Hobbes has to insist that this initial democracy is disbanded by the creation of a different sovereign, which requires Hobbes to argue that “prior to the formation of a commonwealth a People does not exist, since it was not then a person but a crowd of individual persons. Hence no agreement could be made between the people and a citizen. But after a commonwealth has been formed, any agreement by a citizen with the People is without effect, because the People absorbs into its own will the will of the citizen (to whom it is supposed to be obligated); it can therefore release itself at its own

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24 VI.xx, p. 90.
25 Id. at 90. …iuris donatione. (149)
26 Ill.iii, p. 44. Pacti violatio sicut & dati repetitio… (109)
27 VII.v, p. 94; monarchy and aristocracy are discussed in VII.viii-xii, p. 95-96.
discretion; and consequently is in fact free of obligation.”

In similar fashion, the creation of monarchy or aristocracy occurs when “the total right of the whole people, or of the commonwealth, is transferred to those who have been elected,” such that “the people, as a single person, no longer exists.”

This impulse to undermine the possibility of collective resistance was likewise expressed in the new account of “authorization” Hobbes offered in *Leviathan* in a new chapter, “Of Persons, Authors, and Things Personated,” which served in part as a response to the arguments of Parliamentarian writers of the 1640s. Hobbes defines a “person” as “he, whose words or actions are considered, either as his own, or as representing the words or actions of another man, or of any other thing to whom they are attributed, whether Truly or by Fiction.” Persons can be natural or artificial, and the distinction between the two is whether a person acts in his own name or as the representative of someone else. Artificial persons can additionally have their actions “owned” by some other person, meaning that the artificial person is an “actor,” acting with authority from the “author” to make agreements or perform other acts in the name of the author. Any covenants made by the actor, for example, “bindeth thereby the Author, no

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28 VII.vii, p. 95. …ante constitutionem ciuitatis, *Populus* non exitit, vt que non erat persona aliqua, sed multitudo personarum singularium. non potuit igitur inter *populum* & *ciuem* pactum vllum intercedere. Postquam autem ciuitas constituta est, si ciuis cum *Populo* paciscitur frustrâ est, quia *Populus* voluntate suâ voluntatem ciuis illius ( cui supponitur obligari) completitur, ideóque liberare se potest arbitrio suo, & per consequens, iam actu liber est. (153)

29 VII.viii, p. 95. …in electos autem transferri ius omne totius *populi*, siue ciuitatis, ita vt quod iure *populus* priùs poterat, id nunc iure possit *curia* electorum *optimatum*. Quo facto patet Populum, vt personam vnam, *summo imperio* ad hos translato, non amplius existere. (154)


32 Id.

33 Id. at 112.
lesser than if he had made it himselfe."\textsuperscript{34} For Hobbes, "A Multitude of men, are made One Person, when they are by one man, or one Person, Represented; so that it be done with the consent of every one of that Multitude in particular. For it is the \textit{Unity} of the Representer, not the \textit{Unity} of the Represented, that maketh the Person \textit{One}."\textsuperscript{35} In principle, Hobbes applies this rationale to a range of entities, such as corporations, bridges, and hospitals, but it is clear that his primary concern is the state, as he stresses again that each individual is author "of every thing their Representative saith, or doth in their name; Every man giving their common Representer, Authority from himselfe in particular; and owning all the actions the Representer doth."\textsuperscript{36}

This new chapter comes at the conclusion of Part I of \textit{Leviathan}, and Part II begins with Hobbes’s explanation of the initial foundation of the commonwealth. Men come together to seek security, which is unavailable in the state of nature, and such security must come from more than a mere alliance. Just as in \textit{De cive}, Hobbes stresses the need for a common will: “be there ever so great a Multitude; yet if their actions be directed according to their particular judgements, and particular appetites, they can expect thereby no defence, nor protection, neither against a Common enemy, nor against the injuries of one another.”\textsuperscript{37} Even if they could agree to work together for one battle, their unity would fall apart once the threat had passed.\textsuperscript{38} The only way to create a sovereign with sufficient strength to secure the society

\ldots is, to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will: which is as much to say, to appoint one Man, or Assembly of men, to beare their Person; and every one to owne, and acknowledge himselfe to be Author of whatsoever he that so beareth their Person, shall Act, or cause to be Acted, in those things which concerne the

\textsuperscript{34} Id.
\textsuperscript{35} Id. at 114.
\textsuperscript{36} Id. Notably, Hobbes’s account of the authorization of inanimate entities like bridges shifts between the English and Latin \textit{Leviathans}, though it is not clear that to make clear that what is fictional about the authorization is that the bridge is a person and thus capable of representation. Skinner, \textit{Artificial Person}, 194-96; Latin \textit{Leviathan} XV.4.
\textsuperscript{37} Ch. 17, p. 118.
\textsuperscript{38} Id. at 119.
Common Peace and Safetie; and therein to submit their Wills, every one to his Will, and their Judgements, to his Judgment.\textsuperscript{39}

This leads Hobbes to a description of the specific covenant which creates civil society, in which each individual declares that “\textit{I Authorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner.}”\textsuperscript{40} This places authorization at the center of Hobbes’s social contract, and his definition of a commonwealth reinforces it; “\textit{One person, of whose Acts a great Multitude, by mutuall Covenants one with another, have made themselves every one the Author, to the end he may use the strength and means of them all, as he shall think expedient, for their Peace and Common Defence.}”\textsuperscript{41}

Once again, Hobbes is steadfast in his denial that the “people” constitute a body which gives authorization to the sovereign; paraphrasing \textit{De cive}, Hobbes repeats the argument that there is no contract of this sort

\textit{…is manifest; because either he must make it with the whole multitude, as one party to the Covenant; or he must make a severall Covenant with every man. With the whole, as one party, it is impossible; because as yet they are not one Person: and if he make so many severall Covenants as there be men, those Covenants after he hath the Sovereaignty are voyd, because what act soever can be pretended by any one of them for breach thereof, is the act both of himselfe, and all the rest, because done in the Person, and by the Right of every one of them in particular.}\textsuperscript{42}

Similarly, such a set of individual covenants would be fruitless in the first place, since there would be no party to decide disputes about whether the sovereign has breached those covenants, returning individuals to the state of war. As scholars have noted, denying the existence of a body independent of the sovereign serves to rebut Parliamentary arguments about the accountability of

\textsuperscript{39} Id. at 120.
\textsuperscript{40} Id.
\textsuperscript{41} Id at 121. On this passage, see Skinner, \textit{Artificial Person}, 202-03.
\textsuperscript{42} Ch. 18, p. 122-23.
sovereigns to the people.\textsuperscript{43} This also serves to short-circuit claims that the “people” has a will independent of the sovereign’s will.

While this expanded account of authorization shifts the analytic focus from the lack of a contractual relationship between subjects and sovereigns to the obligations subjects have as a result of their authorization,\textsuperscript{44} it is not difficult to understand why both accounts represented a radical challenge to Grotius’s theory. Grotius’s conception of the state looked considerably more like the “crowd” Hobbes described, in which individuals retained a high degree of separate judgment and were not responsible for the acts of their sovereign. Unsurprisingly, Hobbes has no discussion of the obligations subjects have to weigh the legitimacy or wisdom of a public war, as well as no space to devote to questions about the determination of which individuals in a society are responsible for the state’s acts; such questions make little sense insofar as all the sovereign’s acts are also the acts of the subjects. Hobbes also did not provide a theory for exempting subjects from responsibility for sovereign acts, as Grotius had offered in partial form.

This did not mean that Hobbes entirely ignored this question. Throughout his works, Hobbes recognized that it was possible for a sovereign to violate the natural law, though such violations were only towards God, and the question of responsibility when a civil person violates the law of nature thus remained conceptually open. Hobbes provided a brief answer in \textit{De cive}:

\begin{quote}
...if a decision contrary to a \textit{natural law} is made in the case of a \textit{people} or a \textit{council of optimates}, the offender is not the commonwealth itself, i.e. the civil person, but the citizens who voted for the decision. For an offence issues from an expression of natural will, not from a political will, which is artificial; because if it were the latter, those who voted against the decision would also be offenders. But in a \textit{Monarchy} if the Monarch
\end{quote}

\textsuperscript{43} Baumgold, \textit{Hobbes’s Political Theory}, 44-45; Skinner, \textit{Persons, Authors, passim}. See in particular its application to the Parliamentary maxim of \textit{singulis maiiores, universis minores}, Ch. 18, p. 128.

makes a decision contrary to the natural laws, he is himself at fault, because in him the civil will is the same as the natural.\textsuperscript{45}

The implication of creating an artificial will was thus that an individual’s responsibility in conscience for the acts of the sovereign depended on his personal will, but as Hobbes made clear in the \textit{Elements of Law}, that did not make the act any less his “own” act as a result of the initial authorization: “the decree and command be the act of every man, not only present in the assembly, but also absent from it,” even though they are not responsible to God.\textsuperscript{46} This was the core difference from Grotius; it remained the case that individuals were always in some sense responsible for the acts of their sovereign, even in the absence of guilt in conscience. For Hobbes, this was a critical element in preventing resistance to the sovereign. As he made clear in \textit{De cive}, opposing Grotius and others who had argued in favor of a right for subjects to refuse participation in an unjust war, the belief that “\textit{subjects commit sin in obeying the command of their Prince which seems to them unjust}” is one of the most destructive beliefs for a commonwealth.\textsuperscript{47} Individual subjects do not sin if they do something at the sovereign’s command: “For I am not acting unjustly if I go to war at the order of my commonwealth though I believe that it is an unjust war; rather I act unjustly if I refuse to go to war, claiming for myself the knowledge of what is just an unjust which belongs to the commonwealth.”\textsuperscript{48} Insisting that

\begin{itemize}
\item \textsuperscript{45} VII.xiv, p. 97. Et in populo quidem, vel curiá optimatum, si quid decretum sit contra legem aliquam naturalem, non peccat ipsa ciuitas, hoc est, persona ciuilis, sed ciues illi quorum suffragiis decretum est; peccatum enim sequitur voluntatem naturalem, & expressam, non politicam, quæ artificiosa est; quia si hoc esset, peccarent & illi quibus decretum adisplicuit. In Monarchiá autem, Monarcha si quid decreuerit contra leges naturales, ipse peccat, quia in ipso voluntas ciuilis eadem est cum naturali. (155-56)
\item \textsuperscript{46} \textit{Human Nature and De Corpore Politico}, ed. J.C.A. Gaskin (New York: Oxford University Press, 1994), XXI.4, p. 120.
\item \textsuperscript{47} XII.ii, p. 133. \textit{...peccare subditos, quoties mandata Principum suorum, quæ sibi iniusta videntur esse, exequantur}. (187)
\item \textsuperscript{48} Id. \textit{De cive} is the only one of Hobbes’s major works where he specifically gives the example of judging the justice of a public war; the example is absent from the parallel sections of the \textit{Elements of Law} and \textit{Leviathan}. EL XXVII.iv, p. 164-65; \textit{Leviathan} Ch. 29, p. 223. \textit{... enim si militauero iussu ciuitatis, putans bellum inustè susceptum esse, id-circo inustè fecero, sed potius si militare recusauero, cognitionem iusti & inusti, quæ pertinet ad ciuitatem, mihi arrogans}. (186)
\end{itemize}
subjects do not sin when they are ordered to do something by their rightful sovereign prevents public discord.

A similar point appears in *Leviathan*, though in less clear form; the discussion of responsibility in conscience for the sovereign’s acts which had marked *De cive* and the *Elements of Law* was absent from *Leviathan*. However, Hobbes did add a chapter addressing the position of “Bodies Politique” in the commonwealth, and there discussed responsibility for collective acts. These entities largely parallel the relationship between God and the sovereign with respect to the limited ambit of these organizations and the sovereign, and acts taken which exceed the authority of the body are only attributable to those who supported or performed the act in excess of authority, since “they that gave not their Vote, are therefore Innocent, because the Assembly cannot Represent any man in things unwarranted by their Letters, and consequently are not involved in their Votes.”  

49 However, there is a significant difference from the case of the civil sovereign in one respect:

It is manifest by this, that in Bodies Politique subordinate, and subject to a Soveraign Power, it is sometimes not onely lawfull, but expedient, for a particular man to make open protestation against the decrees of the Representative Assembly, and cause their dissent to be Registred, or to take witnesse of it; because otherwise they may be obliged to pay debts contracted, and be responsible for crimes committed by other men: But in a Soveraign Assembly, that liberty is taken away, both because he that protesteth there, denies their Soveraignty; and also because whatsoever is commanded by the Soveraign Power, is as to the Subject (though not so alwayes in the sight of God) justified by the Command; for of such command every Subject is the Author.

50 Here we have an elliptical reference to Hobbes’s former claims about the requirement of a natural will for obligations in conscience. Every command of the sovereign, including a sovereign assembly, binds a subject as a result of his authorization, but that does not justify the commands themselves before God; the sovereign can still transgress the laws of nature. Further,

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50 Ch. 22, p. 158.
the difference between sovereigns and subordinate bodies, in this respect, is the completeness of that authorization; individuals can protest against decisions of the subordinate body in order to avoid responsibility, but the entire surrender of their judgment on contested matters to the sovereign means that they can never complain of injury or injustice from the sovereign, since they are themselves authors of the act which supposedly injures them.\footnote{Ch. 18, p. 124.}

The core difference then between Grotius and Hobbes as a result of authorization is that there remains a sense in which individuals are responsible for the acts of their sovereigns, even if that does not involve a violation of the natural law in conscience for every citizen who authorizes the sovereign’s will. Responsibility for the state’s acts is thus not parsed out to specific members of the state in the normal case, even though in conscience the demerit of acts against the law of nature—acts of iniquity—is assigned only to those whose “natural will” led to the act. This is particularly apparent in Hobbes’s discussion of the killing of “innocents” in war:

...the Infliction of what evill soever, on an Innocent man, that is not a Subject, if it be for the benefit of the Common-wealth, and without violation of any former Covenant, is no breach of the Law of Nature. For all men that are not Subjects, are either Enemies, or else they have ceased from being so, by some precedent covenants. But against Enemies, whom the Common-wealth judgeth capable to do them hurt, it is lawfull by the originall Right of Nature to make warre; wherein the Sword Judgeth not, nor doth the Victor make distinction of Nocent, and Innocent, as to the time past; nor has other respect of mercy, than as it conduceth to the Good of his own People.\footnote{Ch. 28, p. 219.}

A sovereign need not make a distinction between the “Nocent, and Innocent” when exercising his right of war under the law of nature; there is no requirement that he attempt to parse responsibility among enemy subjects.

While this account of authorization provided a new justification for subject liability, it also struck at another feature of Grotius’s theory by stressing the importance of the centralization
of violence in the state. The creation of civil society is accomplished by the “transfer” of the original right to all things held by individuals to the sovereign. However, Hobbes employed this term in a special sense. A transfer is never an actual handing off of a right to another, as Grotius had apparently utilized the idea in *De Indis*; we have already seen that Hobbes rejected the suggestion that any individual could “literally transfer his force to another.” It occurs instead “when he declares by an appropriate sign or signs to the party which wants to acquire *that particular right* from him that he no longer wants it to be licit for him to offer resistance to his doing some specific thing in which he could *rightly* resist him before.” Hobbes proves this by pointing out that the sovereign cannot receive a new right by the transfer, since “the recipient already had a right to all things *before the transfer of the right.*” The “transfer” of rights which takes place at the initiation of civil society thus eliminates the problem from the state of nature in which both sides in a conflict could act in accordance with the law of nature; “Justified resistance,” Hobbes notes, “is now extinguished.” It also means that outside of the narrow realm of immediate self-defense, subjects can no longer engage in the exercise of violence to protect their own security; they have renounced that right, leaving only the sovereign in possession of his original right to all things.

The important point here is that the sovereign’s uncontested possession of the right to all things—including the right of force, and thus punishment—is the central feature of a functional state, since it is the only way to provide the security required by the original compact: “security is to be assured not by *agreements* but by *penalties*; and the assurance is adequate only when the penalties for particular wrongs have been set so high that the consequences of doing them are

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53 See, e.g., VI.vi, p. 79. Quoniam ergo ad securitatem singulorum, atque adeo ad pacem communem *necessarium* est, *vt Ius vtendi gladio ad penas*, in aliquem *hominem vel concilium* transferatur. (138)
54 II.iv, p. 34.
manifestly worse than of not doing them.” On Hobbes’s account, echoing his claims about transfer in general, the right of punishment is only vested in the sovereign “when each one agrees that he will not go to the help of anyone who is to be punished.”

Hobbes describes this right to all things as the power of the sword, and possession of the sword both domestically and internationally is the exclusive province of the sovereign. “Thus the security of individuals, and consequently the common peace, necessarily require that the right of using the sword to punish be transferred to some man or some assembly; that man or that assembly therefore is necessarily understood to hold sovereign power in the commonwealth by right.” This power of the sword is likewise transferred with respect to international affairs:

It is useless for men to keep peace amongst themselves, if they cannot protect themselves against outsiders; and it is impossible to defend themselves if their strength is not united. It is therefore necessary to the preservation of individuals that there be some one Assembly or one man who has the right to arm, muster, and unite, on each occasion of danger or opportunity, as many citizens as the common defence shall require, taking into account uncertainty about the number and strength of the enemy; as well as the right to make peace with the enemy when advantageous. It must therefore be recognized that the individual citizens have transferred the whole of the Right of war and peace to one man or assembly.

Along with this power of the sword comes absolute discretion in determining when and how this power will be used. The whole of man’s previous power of violence (other than immediate self-defense) is thus transferred to the sovereign, and while the internal and external use of force

55 VI.i.v, p. 78. Securitati itaque non pactis, sed penis prouidendum est; tunc autem satis prouisum est, cum penne tante in singulas iniurias constituuntur, vt apertè maius malum sit fecisse, quàm non fecisse. Omnes enim homines necessitate naturæ id eligunt quod sibimet ipsis apparenter bonum est. (138)
56 VI.v, p. 78. ...quando vnsusque paciscitur se non auxiliaturum esse ei qui penas daturus est. (138)
57 VI.vi, p. 78. Quoniam ergo ad securitatem singulorum, atque adeo ad pacem communem necessarium est, vt Ius vtendi gladio ad penas, in aliquem hominem vel concilium transferatur; is homo, vel illud concilium necessario intelligitur summum in ciuitate imperium iure habere. (138)
58 VI.vii, p. 78-79. Frustra autem pacem inter se colunt, qui se contra externos tueri non possunt; neque possibile est iis se sutari contra externos, quorum vires vnite non sunt; ideoque necessarium est ad singulorum conservacionem, vt sit Concilium aliquod vnum, vel homo vnus qui ius habeat armandi, congregandi, & vniendi tot ciues in omni periculo, vel occasione, quot pro incerto numero & viribus hostium ad communem defensionem opus erit; rursusque cum hostibus quoties expediet pacem faciendi. Intelligendum ergo est singulos ciues in vnum, vel hominem vel concilium totum hoc Ius belli & pacis transtulisse. (139)
59 VI.viii, p. 79.
come under different names, there is no differentiation between them in the state of nature, where such separate realms do not exist.

Of course, one of the radical features of Grotius’s account was its claim that the right of punishment originally held by individuals could return under certain circumstances, along with the parallel insistence that by the law of nature, individuals could continue to participate in public wars even absent sovereign authorization. These passages leave no doubt that from Hobbes’s perspective, Grotius’s claims about the persistence of private right were unacceptable; the consolidation of violence in the state was complete and irreversible. This is hardly surprising given Hobbes’s political commitments; just as for Grotius the continued salience of the VOC as a tool of Dutch power encouraged his insistence that private entities could engage in conflict, for Hobbes the Ship Money controversy provided a vivid illustration of the importance of consolidating judgment in the sovereign. A key question in the case was the scope of the king’s judgment about threats to the realm, since this would provide a justification for taxation; the largely Royalist judges concluded that the king was both judge of the danger presented by a foreign state and how best to meet it.60 The controversy clearly shaped Hobbes’s political commitments, as Hobbes’s first statement of his political philosophy, the *Elements of Law*, is frequently seen as a contribution to the ship money debate.61

Hobbes’s approach to the centralization of punishment in *Leviathan* was largely identical in its core suppositions, though it shifted the terminology. Hobbes maintained the special sense

of “transfer,” but the natural law which discussed punishment in De cive is edited to address “Revenges, (that is, retribution of Evil for Evil,)” which must always be forward-looking. From this general principle is derived the rule that “we are forbidden to inflict punishment with any other designe, than for correction of the offender, or direction of others.” Any sort of revenge that does not look to future deterrence is pointless triumph—vainglory—and “tendeth to the introduction of Warre; which is against the Law of Nature; and is commonly stiled by the name of Cruelty.”

The implication that punishment is a subspecies of the broader category of revenges is bolstered by the introduction of a new chapter on punishment, which gives a definition: “an Evill inflicted by publique Authority, on him that hath done, or omitted that which is Judged by the same Authority to be a Transgression of the Law; to the end that the will of men may thereby be better disposed to obedience.” Further, as in De cive, the foundation of the right is man’s previous

…right to every thing….For the Subjects did not give the Soveraign that right; but onely in laying down theirs, strengthened him to use his own, as he should think fit, for the preservation of them all: so that it was not given, but left to him, and to him onely; and (excepting the limits set him by naturall Law) as entire, as in the condition of meer Nature, and of warre of every one against his neighbour.

What can be properly termed “punishment” is then contrasted with other acts that are merely “hostile,” such as any pain inflicted without public authority (such as without a trial) or without a precedent law (such as punishing beyond the statutory amount, or for a crime that was not illegal at the time committed). Acts of hostility are an exercise of the sovereign’s right of war, such as

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62 Ch. 14, p. 92-93.  
63 Ch. 15, p. 106.  
64 Id. at 106-107.  
65 Ch. 28, p. 214.  
66 Id.  
67 Id. at 215-16.
“Harme inflicted upon one that is a declared enemy.” This, Hobbes contends, is the reason why individuals who rebel against the sovereign are killed or otherwise harmed by right of war rather than the right of punishment; the rebel “denyes such Punishment as by the Law hath been ordained; and therefore suffers as an enemy of the Commonwealth.”

While in *Leviathan* the sovereign’s power of punishment is not presented as the result of a transfer, it still has its roots in the undifferentiated right of violence present in the state of nature. Punishment is simply a specialized form of that right of violence, and by presenting this limited definition, Hobbes undercut claims that a sovereign could ever legitimately be punished—“Because it is of the nature of Punishment, to be inflicted by publique Authority, which is the Authority only of the Representative it self.” However, Hobbes’s definition of punishment in *Leviathan* also rules out punishment in the international order, since punishment, properly understood, must proceed from a shared civil law and public authority. The case of rebels, who are killed by right of war because they deny the sovereign’s authority to make law, demonstrates this differentiation.

II. *The Law of Nations and International Justice*

It is not difficult to see the enormous implications for international punishment Hobbes’s theory of authorization could have. This theory provides grounds for precisely the sort of

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68 Id. at 216.
69 Id.
70 Id.
responsibility which Grotius had insisted was absent in the case of civil societies as a whole. However, Hobbes himself never drew these conclusions, because his theory of natural law effectively ruled out punishment in the international realm, at least in the sense in which it was envisioned by Grotius and distinct from other justifications for engaging in war.

This difference had its roots in Hobbes’s theory of natural right. Hobbes made clear quite early in *De cive* that he rejected the idea of a universal human community with enforceable obligations built on natural sociability, since that notion, “though very widely accepted, is nevertheless false; the error proceeds from a superficial view of human nature.” Instead, Hobbes declares that “the origin of large and lasting societies” is “men’s mutual fear.” Men have this fear due to their natural equality (a roughly equal ability to kill), their tendency to overestimate their own strength and abilities, and “intellectual dissension” with its accompanying desire for vainglory. However, Hobbes contends that “the most frequent cause why men want to hurt each other arises when many want the same thing at the same time, without being able to enjoy it in common or to divide it.” These constant threats to man’s safety play on man’s irresistible desire for self-preservation, “a real necessity of nature as powerful as that by which a stone falls downward.” It therefore cannot be against right reason to do anything to preserve...

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72 I.ii, p. 22. Quod Axioma, quamquam à plurimis receptum, falsum tamen erroque à nimis leui naturæ humane contemplatione profectus est. (90) While this position is at least partially a criticism of Grotius, it was less marked than traditionally assumed, since in the Prolegomena to the 1625 edition of *De jure belli* Grotius had stressed man’s self-interested nature much more than in the subsequent editions (which became the basis for future translations of the text), though he did continue to argue that men had some natural impulse for a social life. See Tuck 1999: 94-99. A translation of the 1625 Prolegomena is available in Vol. 3 of the Liberty Fund edition of *De jure belli*, pp. 1745-62.

73 Id. at 24. Statuendum igitur est, originem magnarum & diuturnarum societatum, non à mutua hominum benevolentia, sed à mutuo metu exstitisse. (92)


75 I.vi, p. 27. Frequentissima autem causa quare homines se mutuò lædere cupiunt, ex eo nascitur, quod multi simul eandem rem appetant, quâ tamen sæpissimè neque frui communiter, neque diuidere possunt. (94)

76 I.vii, p. 27. ...idque necessitate quadam naturæ, non minore quam quâ fertur lapis deorsum. (94)
oneself, and “what is not contrary to right reason, all agree is done justly and of Right.” This leads to an absolute right of self-preservation: “the first foundation of natural Right is that each man protect his life and limbs as much as he can,” and along with it comes the right to employ any means necessary to achieve that end.78

These basic premises are paired with two other conclusions about the natural order. First, each man is the sole judge of what is in his interest in the state of nature; whether his preservation is best served by a particular course of action is entirely within his judgment, as well as whether some other person constitutes a threat.79 Second, in the absence of any agreement to create a civil society, “every man was permitted to do anything to anybody, and to possess, use and enjoy whatever he wanted and could get.”80 This unlimited right creates a serious challenge to the pursuit of peace; “although one could say of anything, this is mine, still he could not enjoy it because of his neighbor, who claimed the same thing to be his by equal right and equal force,”81 and in those circumstances each man could be said to rightfully engage in war. This mutual right, along with the difficulty of defense in the state of nature, leads Hobbes to conclude that “it cannot be denied that men’s natural state, before they came together into society, was War; and not simply war, but a war of every man against every man.”82 Such a state is obviously incompatible with man’s long-term preservation, and “so it comes about that we are

77 Id. …Quod autem contra rectam rationem non est, id iustè, & iure factum omnes dicunt. (94)
78 Id. Itaque Iuris naturalis fundamentum primum est, vt quisque vitam & membra sua quantum potest tueatur. (94)
79 I.ix, p. 27.
80 I.x, p. 28. Hoc est, in statu Iure naturali omnia esse omnium merè naturali, siue antequam homines vllis pactis sese inuicem obstrinxissent, vnicuique licebat facere quaecunque & in quoscunque libebat, & possidere, vti, frui omnibus quæ volebat & poterat. (95)
81 I.xi, p. 29. Quamquam enim quis de re omni poterat dicere, hoc meum est, frui tamen eà non poterat propter vicinum, qui æquali iure, & æquali vi, prætendebat idem esse suum. (96)
82 I.xii, p. 29. …negari non potest quin status hominum naturalis antequam in societatem coiretur Bellum fuerit; neque hoc Belli & Pacis definitiones. simpliciter, sed bellum omnium in omnes. (96)
driven by mutual fear to believe that we must emerge from such a state and seek allies; so that if we must have war, it will not be a war against all men nor without aid.”

Punishment plays a limited role in this dire state. The first two natural laws dictate self-preservation and that each individual should “seek peace when some hope of having peace exists, and to seek aid for war when peace cannot be had.” The twin dictates of self-preservation and peace shape all the additional laws of nature Hobbes advances, including his primary discussion of punishment. In listing other laws of nature, Hobbes identifies as a precept that “In revenge or Punishment consider future good, not past evil. That is, it is only permitted to inflict a penalty in order to correct the wrongdoer or so that others may be reformed by taking warning from his punishment.” The justifiable infliction of punishment or revenge is thus self-regarding in the sense that it prevents future harm to the punisher both by “correct[ing] the wrongdoer” and acting as an example for others. Any other infliction of harm—one which does not aim at future security—creates war, and thus runs counter to the most basic postulate of the law of nature. Of course, Hobbes cannot frame punishment in the state of nature as enforcing compliance with some element of natural law, and neither does he view punishment as reflecting love toward a person whom we chastise to improve. Similarly, there is no claim that the party whom we punish has in some sense deserved the punishment, or subordinated himself by his act; the natural equality between individuals remains in this condition. Punishment is simply the specific case of employing violence in order to protect one’s own future security, as opposed to fending off an immediate assault or uselessly committing “cruelty.”

83 I.xiii, p. 30. Atque ita euenit ut mutuo metu, et tali statu exeundum & querendos socios putemus; vt si bellum habendum sit, non sit tamen contra omnes, nec sine auxilii. (97)
84 I.xv, p. 31.
85 III.xi, p. 49. …In vltione, siue Penis, spectandum esse, non malum præteritum, sed bonum futurum. Hoc est, infligere penam nullo alio fine licitum esse, nisi vt ipse qui peccavit corrigatur, vel alij supplicio eius moniti fiant meliores. (113)
All these points are dramatically different from Grotius’s conception of punishment, and one indication of this is that unlike Grotius, Hobbes has no real need to distinguish punishment from reparation, since on his account there is effectively no place for reparation. In the 1647 edition of De cive, Hobbes added a note that made explicit the consequences of the right of all men to all things: “nothing that one does in a purely natural state is a wrong [iniuria] against anyone, at least against any man....For injustice against men presupposes Human Laws, and there are none in the natural state.”

Iniuria is fundamentally a feature of contractual agreements: “The breaking of an Agreement, like asking for the return of a gift, (which always occurs by some action or failure to act) is called a wrong [iniuria].” There can thus be no claims to injustice or injury between individuals who have no agreement. Critically, this means there can be no claims to property across international borders; all obligations to refrain from the goods of others are imposed by the civil law, such that “property and commonwealths came into being together, and a person’s property is what he can keep for himself by means of the laws and the power of the whole commonwealth.” The same holds for other crimes; “Theft, Murder, Adultery, and all wrongs [iniuriae] are forbidden by the laws of nature, but what is to count as theft on the part of a citizen or as murder or adultery or a wrongful act [iniuria] is to be determined by the civil, not the natural, law.”

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86 II.10, note, p. 28. Hoc ita intelligendum est, quod quis Annotatio fecerit in statu merè naturali, id injurium homini quidem nemini esse. Non quod in tali statu peccare in Deum, aut Leges Naturales violare impossibile sit. Nam injustitia erga homines supponit Leges Humanas, quales in statu naturali nullæ sunt. (95)

87 III.iii, p. 44. Pacti violatio sicut & dati repetitio, (que semper sita est in aliqua actione, vel omissione) vocatur iniuriva. Actio autem ilia, vel omissio, inuista dicitur; vt idem significat iniuria, & actio vel omissio iniusta, atque vtraque idem quod pacti vel fidei violatio. (109)

88 VI.15, p. 85. …proprietatem initium sumpsisse cum ipsis ciuitatibus, atque esse id cuique proprium quod sibi retineret potest per leges, & potentiam totius ciuitatis. (144)

89 VI.16, p. 86. Furtum, Homicidium, Adulterium, atque iniuriae omnes legibus naturæ prohibentur; ceterum quid in ciue furtum, quid homicidium, quid adulterium, quid denique iniuria appellanturm sit, id non naturali sed ciuili lege determinandum est. (145)
The concept of a right to restitution that crosses international borders—either between states or between individuals from different states—thus becomes nonsensical on Hobbes’s account. This much is implied by Hobbes’s matter-of-fact description of piracy, which he likely drew from Thucydides; in *De cive* he writes that “in early times there was a way of life, which was also a kind of trade, which they called ἄποροκον, living by Plunder; in those conditions it was not against the law of nature, nor without glory if practised with courage and without cruelty.” The reference to “in those conditions” is later clarified in Hobbes’s discussion of the best ways increase the wealth of citizens, where Hobbes notes that military activity “was once regarded as a gainful occupation under the name of piracy or raiding. And before the formation of commonwealths, when the human race lived dispersed in families, it was considered just and honorable. For raiding is simply making war with small forces.” The implication is that piracy is no longer an acceptable way of life because it has become too risky, not because of any claim the victims might have to their goods.

The lack of enforceable natural obligations, along with Hobbes’s denial that consensual institutions can be created outside the strictures of civil society, means that punishment simply cannot have the same meaning in the international realm that it had for Grotius; there are no principles of natural law to enforce, and there are no consensual institutions (like property) to

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90 V.ii, p. 69-70. Ideoque priscis temporibus vitae institutum, & quasi oeconomia quaedam erat, quam vocabant ἄποροκον, Rapto viuere; que neque contra legem naturæ erat, rebus sie stantibus, neque sine gloriâ illis qui eam fortiter, nec crudeler exercerant. (131). See also *Leviathan* Ch 17, p. 118.

91 XIII.xiv, p. 150. Quartum autem, nimimum militia, in numerum quidem olim venit artium lucratiuarum, sub nomine lestrice, siue predatorio. Et genere humano ante constitutionem ciuitatum per familias disperso, iusta & honorifica habita est. Est enim nihil aliud predatio, quàm quod paruis copiosis geritur bellum. (201-202)

92 Hobbes concludes that the profits from raiding, both of the sort practiced by early pirates and that engaged in by the Greeks and Romans, should not be counted on in the modern state, since “as a means of gain, military activity is like gambling; in most cases it reduces a person’s property; very few succeed.” XIII.xiv, p. 150. This also points to a reason why writers like Beitz are incorrect in viewing Hobbes’s theory as assuming states will be acquisitive or expansionistic; Hobbes is quite skeptical of the benefits of engaging in such wars, insofar as they do not procure future security. See *De cive* XIII.xiv, p. 150; *Leviathan* Ch. 29, p. 230. For secondary comments, see Malcolm, *Aspects of Hobbes*, 440-44; Patricia Springborg, “Hobbes, Donne and the Virginia Company: *Terra Nullius* and the ‘Bulimia of Dominium,’” *History of Political Thought* 36 (2015), 156-62.
which those principles could attach. The focus instead is on self-preservation. This also means that Hobbes does not have to address a range of questions which had occupied Grotius’s time. For example, there is no need to explain when and within what limitations a nation can capture enemy property in war, or which enemy subjects can be killed. The sovereign’s right to all things means that there can be no conflicting claims across societies, and the entirely self-regarding character of the law of nature means that sovereigns can order the destruction of anyone or anything if they believe it is calculated to their self-preservation. Even if they deliberately exceed the bounds of what is necessary for future security, committing the offense of cruelty, they offend only God, not the enemy. More importantly, the violation would consist not in failing to fulfill a duty of charity or Christian love toward the enemy—as it does for Grotius throughout his pleas for moderation in *De jure belli*—but in failing to properly fulfill the duty we have to ourselves to ensure our own preservation.

These principles make sense of Hobbes’s treatment of the international arena and the law of nations to the extent they figure in both *De cive* and *Leviathan*. The fact that the impulse to civil society is entirely driven by safety gives rise to the duties of sovereigns, which can be summarized succinctly: “the safety of the people is the supreme law.” 93 This obligation cannot be enforced, as “those who hold sovereign power among men cannot be subject to laws properly so called,” but they continue to have a duty to act in accordance with this law. 94 Hobbes offers a categorization of “the good things citizens may enjoy,” of which the first is “defence from external enemies.” In the course of his discussion of what a sovereign should do to ensure the safety of his state, Hobbes offers a characterization of the international order:

93 XIII.ii, p. 143. *Salus populi suprema lex*. (195)
94 Id. Quamquam enim ij qui summum inter homines imperium obtinent, legibus propriè dictis, hoc est, hominum voluntati subiici non possunt. (195)
For the state of commonwealths towards each other is a natural state, i.e. a state of hostility. Even when the fighting between them stops, it should not be called Peace, but an intermission during which each watches the motion and aspect of its enemy and gauges its security not on the basis of agreements but by the strength and designs of the adversary.\textsuperscript{95}

Hobbes was to repeat this in \textit{Leviathan}, with his famous characterization of sovereigns as constantly “in the state and posture of Gladiators; having their weapons pointed, and their eyes fixed on one another.”\textsuperscript{96} Further, as a natural state, the international arena is governed by the same self-regarding obligations of the law of nature, both in relation to their subjects and to other states:

\textit{Natural law} can be divided into the natural law of \textit{men}, which alone has come to be called the \textit{law of nature}, and the natural law of \textit{commonwealths}, which may be spoken of as the \textit{law of nations}, but which is commonly called the \textit{right of nations}. The precepts of both are the same: but because commonwealths once instituted take on the personal qualities of men, what we call a \textit{natural law} in speaking of the duties of individual men is called the \textit{right of Nations}, when applied to whole commonwealths, people or nations. And the Elements of \textit{natural law} and \textit{natural right} which we have been teaching may, when transferred to whole \textit{commonwealths} and \textit{nations}, be regarded as the Elements of the \textit{laws} and of the \textit{right of Nations}.\textsuperscript{97}

There is thus no difference between the principles of the law of nature for states and individuals, a point Hobbes made pellucid in \textit{Leviathan}: “every Soveraign hath the same Right, in procuring the safety of his People, that any particular man can have, in procuring his own safety.”\textsuperscript{98} States are entitled to behave in the same self-regarding ways as individuals in the state of nature, and there can be no claims to right between them except insofar as they have agreements. While we

\textsuperscript{95} XIII.vii, p. 144-45. Status enim ciuitatum inter se, \textit{naturalis}, id est, hostilis est. Neque si pugnare cessant, idcirco Pax dicenda est, sed respiratio; in qua hostis alter alterius motum vultumque obseruans, securitatem suam non ex pactis, sed ex viribus & consiliis aduersarij aestimat. (197)
\textsuperscript{96} Ch. 13, p. 90.
\textsuperscript{97} XIV.iv, p. 156. Rursus \textit{naturalis} diuidi potest, in naturalem \textit{hominum}, quæ sola obtinuit dici \textit{lex naturæ}, & naturalem \textit{ciuitatum}, quæ dici potest \textit{lex Gentium}, vulgo autem \textit{ius Gentium} appellatur. Præcepta vtriusque eadem sunt: sed quia ciuitates semel institute induunt proprietates hominum personales, \textit{lex} quam loquentes de hominum singulorum officio naturalem dicimus, applicata totis ciuitatibus, nationibus, siue gentibus, vocatur \textit{ius Gentium}. Er que \textit{legis} & \textit{iuris naturalis} Elementa haec tent tradita sunt, translatæ ad \textit{ciuitates} & \textit{gentes} integras, pro \textit{legem} & \textit{iuris Gentium} Elementis sumi possunt. (207-08). See also \textit{Leviathan}, Ch. 30, p. 244: “…the Law of Nations, and the Law of Nature, is the same thing.”
\textsuperscript{98} Ch. 30, p. 244.
may be able to objectively judge the degree to which nations have lived up to the obligations of reason in their relations with other states, there are no enforceable duties placed on states regarding their actions toward other states.\textsuperscript{99}

The combination of these doctrines creates a set of bleak prospects for international justice. However, the picture is not quite so dire in practice. For one, treaties remain possible in the international realm to create some weak obligation, and provide the closest analogue to international punishment of the Grotian sort available in Hobbes’s theory. Hobbes does not deny that treaties and alliances are a feature of the state of nature, and in fact his “second of the derivative laws of nature is: \textit{Stand by your agreements}, or keep faith,”\textsuperscript{100} since such agreements help to secure peace; after all, the social contract is itself an agreement made in the state of nature. \textit{De cive} features a lengthy chapter on the natural law of contracts which discusses the rules for agreements in the state of nature, including even “agreements made by a contract of mutual trust (by which both parties trust the other and neither makes any performance immediately),” which bind until “a just cause for fear arises on either side.”\textsuperscript{101} Further, Hobbes’s famous response to the “Foole” in \textit{Leviathan} stresses the importance of keeping agreements in order to preserve future security.\textsuperscript{102}

However, Hobbes’s repeated condition that no one can contract away the basic right of self-defense limits the effectiveness of these agreements. For Hobbes, “it is for the fearful party

\textsuperscript{99}This is not to deny the important point—central to a proper understanding of Hobbes’s views of the international order in general—that the law of nature does at times apply to sovereigns or individuals in the state of nature as a dictate when they have sufficient security to apply those principles. See Malcolm, \textit{Aspects of Hobbes}, 438-40, 449-50; David Boonin-Vail, \textit{Thomas Hobbes and the Science of Moral Virtue} (New York: Cambridge University Press, 1994), 72-81. Indeed, the concept of “cruelty” would have no meaning if these laws never applied. My point here is simply that while violations of the natural law can occur in the international realm, there is no violation of a duty toward another such that that individual or sovereign could engage in “punishment” of the sort envisioned by Grotius.

\textsuperscript{100}III.i, p. 43.

\textsuperscript{101}II.xi, p. 37.

\textsuperscript{102}Ch. 15, p. 102. See also Malcolm, \textit{Aspects of Hobbes}, 449-50.
to decide” whether a just cause for fear has arisen, so these agreements have limited practical applicability, but they remain possible and even desirable in principle. Further, no one—a criminal or a state—is obligated to submit to punishment, particularly death, and Hobbes illustrates this with a comparison of a legitimate and illegitimate contract:

It is one thing to agree: *If I do not do such-and-such by a certain date, kill me.* It is another thing to agree: *If I do not do such-and-such, I will not resist your killing me.* Everyone makes use of the first mode of agreement if there is need to do so, and sometimes there is; no one uses the second mode, and there never is a need to do so. For in the purely natural state, if you wish to kill, you have the right to do so on the basis of the natural state itself; so that there is no need to trust first and kill later when he lets you down....If in a state of nature—for instance in relations between commonwealths—an agreement were made to kill if a certain condition is not fulfilled, the implication is that this agreement was preceded by another agreement, not to kill before a certain date. Hence if the condition is not fulfilled by that date, the right of war returns, i.e. a state of enmity, in which all things are allowed, including therefore resistance.

The case of a violated treaty is thus an unusual one. By violating the agreement, the other party has presumably committed an injury, but Hobbes does not describe the act of making war on that state in response as “punishment”—in fact, he brings up the example of the treaty only after arguing that individuals in the commonwealth do not give up their right to resist. The violation of an agreement on the international plane simply returns states to their pre-existing condition of enmity, where both sides may legitimately wage war for their own preservation, even if one side claims to be enforcing the terms of the original bargain.

If treaties were not particularly effective instruments for peace in the international realm, Hobbes did at least recognize that some disputes could be peacefully resolved across

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104 II.xviii, p. 39-40. *Aliud est, si sic paciscor: Nisi fecero constituta die, interfice. Aliud si sic, Nisi fecero, interficienti non resistam. Primo modo, paciscuntur omnes, si opus est; opus autem est aliquando: secundo modo nemo, nee unquam opus est. Nam in statu merè naturali, si occidere cupis, jus habes ex ipso statu; ita ut opus non sit prius credere, ut fallentem post interficias. In statu vero civili ubi jus vitae & necis, omnisque poenæ corporalis penes civitatem est, illud ipsum jus interficiendi privato concedi non potest....Si in statu naturæ, velut inter duas civitates, fieret pactum de interficiendo ni fecerit, intelligitur praecessisse aliiud pactum de non interficiendo antè præstitutum diem. Itaque eo die si præstitutum non sit, reedit jus belli, hoc est, status hostilis, in quo omnia licent, ideoque etiam resistere.*
international boundaries. In his *Dialogue Between a Philosopher and a Student of the Common Laws of England*, Hobbes notes the existence of admiralty courts in England. The admiralty courts apply the Roman law, “and though the Civil Law used in the Admiralty were at first the Statutes of the Roman Empire, yet because they are in force by no other Authority than that of the King, they are now the Kings Laws, and the Kings Statutes.”\(^{105}\) Later, Hobbes emphasizes that such laws are in force “not by the Will of any other Emperor or Forraign Power, but by the Will of the Kings of *England* that have given them force in their own Dominions.”\(^{106}\) This reflects a convergence on a matter of convenience, since “the causes that arise at Sea are very often between us, and People of other Nations, such as are Governed for the most part by the self same Laws Imperial.”\(^{107}\) While these law-governed relationships with foreigners are only the fortuitous consequence of a shared legal heritage, presumably the heightened security provided by large, well-governed states makes possible a situation of sufficient security for individuals to behave in accordance with the natural law—through the dictates of the civil law—in their relationships with foreigners.

### III. Conclusion

Hobbes’s account of the international order, despite the belief that individuals and states had the same obligations under the law of nature, thus shared remarkably little with Grotius on the key questions surrounding punishment in the international realm. In a sense, Hobbes represents the polar opposite position from Grotius—a world in which individuals and states have *no* enforceable claims against outsiders under the law of nature, and where the state has entirely taken over the powers of punishment and restitution that Grotius felt continued to rest

\(^{105}\) The *Dialogue* can be found in *Writings on the Common Law and Hereditary Right*, ed. Alan Cromartie and Quentin Skinner (New York: Oxford University Press, 2005), 19.

\(^{106}\) Id. at 55.

\(^{107}\) Id.
with individuals. Indeed, his psychology of fear and his commitment to the claim that each individual in the state of nature can act based on his subjective assessment of threat did much to undermine the project of creating an international order in which states and individuals could be bound by enforceable obligations toward other states or individuals not part of their own civil society. While Hobbes’s theory of the international realm was not as anarchic as many of his modern readers have suggested, it was at least unsettling for most writers who wished to maintain some foundation for international society which could give rise to enforceable claims and a just war theory which did not concede to both sides an equal right to engage in conflict. It is thus no surprise that this feature of Hobbes’s thought was one of the two Grotius singled out for criticism after reading De cive in 1642: “I cannot approve of the foundation on which he builds his opinions,” Grotius wrote to his brother. “He thinks all men are naturally at war with one another, and has some other principles which differ from my own,” though Grotius noted that he agreed with Hobbes’s comments on kings and “would be glad if the King’s cause can be defended in this way, as it deserves.”108

However, Hobbes had at least succeeded in addressing some aspects of the Grotian system which later writers were likewise to oppose, in particular by providing a theoretical foundation for the centralization of violence (and thus punitive authority) in the state. Judgments about the proper use of force, and even what constitutes property and theft, are left with the sovereign as a condition of establishing domestic peace; likewise, in the international arena, it is

108 Grotius’s other complaint was about Hobbes’s insistence that subjects must outwardly observe the religion prescribed by the sovereign. Epistolae quotquot reperiri potuerint (Amsterdam 1687), 951-52, 11 April 1643. For the various passages I have used the translations in Malcolm, Aspects of Hobbes, 472-73, and Tuck, Philosophy and Government, 200. The entirety of Grotius’s comments on De cive read as follows: Librum de Cive vidi, placent quae pro Regibus dicit. Fundamenta tamen quibus suas sententias superstruit, probare non possum. Putat inter homines omnes a natura esse bellu & alia quaedam habet nostris non congruentia. Nam & privati cujuque officium putat sequi Religionem in patria sua probatam, si non assensu, at obsequio. Sunt & alia quaedam quae probare non possum. Librum non puto venalem esse, sed inquiram. Gaudebo si causa Regis ita ut oportet defendatur: quad ad rem pertinentia quardam scripsi ad D. Reigersbergium.
essential to give the sovereign free rein to establish peace in the best way that presents itself, free from the demands of individuals. This centralization of judgment was to prove very attractive to Hobbes’s major successors in thinking on the international order, all of whom—with the solitary exception of Leibniz—employed some version of the claim that individuals had surrendered their “judgment” or “will” with respect to international affairs as part of an initial social contract. However, joining this claim with a doctrine of natural law which permitted enforcement through war—which Hobbes had denied—raised the possibility that individual subjects could be subject to punishment for the actions of their sovereigns, dramatically expanding the scope of who might permissibly be punished in war and correspondingly shrinking the category of civilians which had been protected by their lack of personal responsibility for the acts of the state. This was especially true insofar as theorists adopted a notion of threat comparable to that seen in Hobbes; if all enemy subjects represent a potential threat because their judgment is implicated in their sovereign’s decision to attack me or otherwise violate some duty toward me, then there appears to be little preventing the sort of wholesale punishment which the doctrine of authorization suggests is potentially legitimate. A theory of this sort was provided by Pufendorf, who largely adopted Hobbes’s claims about the relationship between subject and sovereign wills and, while insisting that there could be enforceable claims to justice in the international sphere, took a Hobbesian attitude toward the permissible scope of warfare under natural law once war began. Pufendorf’s adaptation of Hobbesian premises to the international order is where we now turn.
Pufendorf and the Restoration of Perfect Right

While Hobbes’s account of authorization presented a link between subjects and sovereigns which undermined the distinctions which Grotius sought to draw, the full consequences of that position were masked by Hobbes’s purely self-regarding account of natural law. It fell to Samuel von Pufendorf to apply Hobbes’s theory of authorization to an international realm governed by enforceable natural laws. This entailed a fundamental rejection of Hobbes’s theory of right, returning to a position closer to that advanced by Grotius, but enabled the restoration of some measure of justice to the international realm.¹ This highly sophisticated critique of Hobbes, along with elements of Pufendorf’s approach to natural law which resembled Grotius, led many Enlightenment writers to associate Pufendorf quite closely with Grotius, and his works came to assume a status comparable to the great Dutchman. Until the publication of Emer de Vattel’s work in 1757, Grotius and Pufendorf were viewed as the authoritative sources on the law of nations. Pufendorf’s texts went through dozens of editions and were used as university textbooks throughout Protestant Europe.² Pufendorf’s thoughts on international affairs, in particular, captured the attention of Enlightenment writers; the international relations theory of Diderot’s Encyclopédie owes much to Pufendorf’s work,³ and Grotius and Pufendorf’s thoughts on natural law and international affairs were routinely linked by their successors. Jean

¹ This is reflected in Pufendorf’s claim that Hobbesian “rights” are not rights at all, insofar as others have no corresponding obligations. Richard Tuck, Natural Rights Theories (New York: Cambridge University Press, 1979), 159-61. For the debate about Tuck’s claim that Pufendorf anticipates the “correlativity thesis” advanced by utilitarian writers, see Thomas Mautner, “Pufendorf’s Place in the History of Rights-Concepts,” in Revolution and Enlightenment in Europe, ed. Timothy O’Hagan (Aberdeen: Aberdeen University Press, 1991): 13-22; Knud Haakonssen, Natural Law and Moral Philosophy (New York: Cambridge University Press, 1993), 37-41.
³ Patrick Riley, “Review of Moralphilosopie und Naturrecht bei Samuel Pufendorf,” American Political Science Review 67 (1973), 1354. This does suggest the oddity of Leonard Krieger’s claim that Pufendorf was not interested in international affairs as such; Pufendorf was certainly viewed as an important writer on these topics, and his historical works frequently addressed issues of international import. Krieger, The Politics of Discretion (Chicago: University of Chicago Press, 1965), 164.
Barbeyrac, in particular, was keen to associate the two writers, and this reflected a more general tendency among Enlightenment figures to emphasize the differences between Pufendorf and Hobbes. That linkage carried over into much modern scholarship on Pufendorf, which stressed his attack on the Hobbesian theory of right and obligation, as well as his discomfort with elements of the Hobbesian social contract.

However, on the key questions surrounding punishment in the international realm—its existence, its control by the state, and who bears the brunt of punishment when a nation or state violates natural law—Pufendorf’s position reflected an adoption or adaptation of Hobbes’s principles. The close relationship between Pufendorf and Hobbes has been the subject of much corrective scholarship on Pufendorf in recent years, expressed in particular in the debate over the precise content of Pufendorf’s *socialitas*, which some have taken to be simply Hobbesian self-interest in disguise, as well as a reappraisal of Pufendorf’s criticisms of Grotius on international affairs. In particular, scholars have noted Pufendorf’s rejection of international punishment of the Grotian sort, which alongside his revision of Grotian notions of property served as a counterweight to the colonial ambitions of the English and Dutch. This rejection of punishment as a tool in the international order relied in part on Hobbes’s theory from *Leviathan* and its claim that punishment must by definition proceed from a superior. It was also of undoubted importance

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5 This was at the core of the Barbeyrac-Leibniz debate over Pufendorf’s position on voluntarism, which we will discuss in greater depth when examining Leibniz’s intervention in this tale. Tuck, *Natural Rights*, 158-59.


to a writer who lived in a Germany still reeling from the effects of the Thirty Years War, with all
the religious fanaticism and interventionist warfare that period represented.

Less noticed, however, has been the extent to which Pufendorf adopted Hobbes’s theory
of authorization as his own, and from that theory derived a set of conclusions about war which
made the exclusion of punishment from the international arena small consolation to subjects
whose sovereigns committed violations of the law of nature. The theory of authorization enabled
Pufendorf to sketch an account of the laws of war which gave immense discretion to just
belligerents. If every member of the people was in some sense responsible for the state’s act,
every subject could in principle suffer in response, and the perfect duties to refrain from harming
others and to repair injuries were dissolved with respect to every member of the enemy society.
Any act of hostility designed in good faith to obtain adequate reparation and a promise of future
security was thus legitimate, since the acts of the sovereign could be attributed to the subjects. In
this respect, Pufendorf’s theory of the state of war looked remarkably like Hobbes’s theory, in
which it remained theoretically possible to violate the law of nature by committing “cruelty” or a
similar offense, but such offenses were transgressions because they undermined future security,
not a violation of a perfect duty to an enemy.

However, Pufendorf modified Hobbes’s theory in two ways which were to have long-
lasting consequences in the international order. First, Pufendorf persistently claimed that the
people continued to exist as a collective entity after the institution of the sovereign. This led to a
corresponding claim that it was the will of the people as a collective entity, rather than the
individual wills of the citizens, which the sovereign exercised. These points were to be critical to
later thinkers on international affairs as they grappled with the proper subject of punishment for a
state’s bad acts. Second, by confining the savagery of war to situations in which some violation
of the law of nature has occurred, Pufendorf sought to limit war to cases of direct injury, rather than viewing it as the normal condition of man. This also led Pufendorf to posit limits on the judgment sovereigns had in the international realm, as in his very restrictive view of attacks against hostile nations which had violated the rights of others or which threatened to become too powerful. This resulted in the somewhat strange character of Pufendorf’s theory, as it simultaneously attempted to limit the legitimate causes of war while expanding the scope of legitimate conduct in war. Pufendorf, however, did not view these as conflicting aims; savage warfare made warfare less likely and wars shorter, as a resolution was reached more quickly.

Pufendorf thus represented in many respects the full flowering of Hobbesian principles when wedded to an account of enforceable natural law, but with an eye toward international peace as an attainable and desirable objective. While he rejected the idea that punishment could occur in the international order, his adoption of Hobbesian premises about authorization enabled a degree of violence in the pursuit of future security which looked remarkably like punishment, and presented a significant challenge to later writers intent on restoring civilian protections and mitigating what could legitimately be done in pursuing peace.

I. Natural Law and the Possibility of International Justice

Pufendorf’s initial task was to sketch an account of natural law which enabled enforceable claims to justice in the absence of a common sovereign. Like Grotius, Pufendorf did so in part by examining the natural law to determine which rights, duties, and obligations are perfect, and which are imperfect, with the difference determined by whether or not a power of enforcement existed in another person. This also entailed a rejection of Hobbes’s claims about

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10 As David Boucher has noted, “Pufendorf’s theory constitutes an outright denial of the Realist contention that the moral order is confined to the internal relations of the state and that between states there can be no justice and injustice.” Political Theories of International Relations (New York: Oxford University Press, 1998), 227.
the right of all men to all things, which Pufendorf viewed as absurd. In short, Pufendorf appears to have believed that Hobbesian rights were simply not rights: “’tis ridiculous Trifling to call that Power a Right, which, should we attempt to exercise, all other Men have an equal Right to obstruct or prevent us.” Instead, a right must create “this moral Effect in other Persons, that they shall not hinder him in the free Use of these Conveniences, and shall themselves forbear to use them without his Consent.”¹¹ This sort of conception of right obviously created the possibility of enforceability, and Pufendorf was quite clear that some degree of sociability existed in the natural state and formed the foundation of justice between individuals not part of the same civil society.

The precise contours of this sociability have been contested; in De Iure Naturae Pufendorf’s presentation of this obligation suggests that it is rooted primarily in weakness and self-interest, which has led to the argument that Pufendorf is effectively adopting Hobbes’s claims about human society as the result of a self-interested utilitarian calculation.¹² It is certainly true that Pufendorf rejects the notion that sociability is an inborn disposition, but this does not make human society purely the product of utility or “unnatural.” The natural desire for self-preservation is implanted by God, who has also given other characteristics to mankind which suggest that self-preservation is not the sole or overriding concern; Pufendorf is clear, for example, that the reason we do not kill others is not because of the utility we get from refraining from violence, but because “the Person being another Man, that is, another Animal related to us by Nature, it would be a Crime to offer him any Harm.”¹³ Thus, when Pufendorf posits an

¹² Hont, Jealousy of Trade, 37-47, 159-84.
¹³ II.iii.18, p. 138.
obligation that man “be social; that is, that he unite himself to those of his own Species,”¹⁴ he
does so not because sociability is the only means to self-preservation (though it does aid in that
end), but because man recognizes that God has imposed natural laws on him which conduce to
the preservation of the entire race of man, as well as the members who make it up. Man’s natural
weakness and need for the assistance of others in order to preserve himself is only half the
justification for sociability; the other half is a recognition that sociability based purely on self-
regard would rapidly disintegrate, thus requiring that individuals cultivate a society with some
exchange of good offices with others—a kind of “strategically other-regarding” behavior that
moves beyond bare peace.¹⁵

It is with this framework in mind that we must read Pufendorf’s derivation of the
foundational principle of natural law. The complicated relationship between self-preservation
and other-regarding behavior is displayed in Pufendorf’s description of the origins of natural
right:

What kind of Rights attend Men in a State of Nature we may easily gather, as well from
that Inclination common to all living Things, by which they cannot but embrace and
practise, with the greatest Readiness and Vigor, all possible Ways of preserving their
Body and their Life, and of overcoming all such things as seem to drive at their
Destruction; as from this other Consideration, that Persons living in such a State are not
subject to any Sovereignty or Command. For from the former Reflection it follows, that
Men plac’d after this manner in a natural State, may use and enjoy the common Goods
and Blessing, and may act and pursue whatever makes for their own Preservation, while
they do not hence injure the Right of the rest. From the latter Supposition it is clear, that
they may use not only their own Strength, but their own Judgment and Will (provided

¹⁴ II.iii.15, p. 134.
University Press, 1991), xxvi. See especially II.iii.14, p. 132-33. The exact derivation of Pufendorf’s theory of
sociability is highly contested and not particularly clear, but I have here followed the dominant line of thought as
against Palladini and Hont’s claim that Pufendorfian sociability is simply self-regarding Hobbesian principles in
disguise. For the full development of this argument, see Tully xxiv-xxix; J.B. Schneewind, “Pufendorf’s Place in the
History of Ethics,” Synthese 72 (1987): 134-38; Kari Saastamoinen, The Morality of the Fallen Man (Helsinki:
Societas Historica Finlandiae, 1995), 72-94.
they are form’d and guided according to the Law of Nature) for procuring their own Defence and Safety.\textsuperscript{16}

The emphasis on self-preservation makes this argument sound very similar to Hobbes’s position, but Pufendorf’s stress on how the rights of quiet enjoyment of property and self-preservation have an outer limit—“while they do not hence injure the Right of the rest”—demonstrates Pufendorf’s disagreement with the purely self-regarding character of Hobbes’s law of nature even at the level of self-preservation. Hobbes himself, Pufendorf claims, “supposes a Man subject to the Laws of Nature,” and a right of all men to all things could never conduce to the preservation of man.\textsuperscript{17}

The critical point is that reason teaches men that they should behave in ways which encourage others to act peacefully toward them, and this applies to the international realm after the creation of civil societies just as clearly as it applies to the natural state of disunited families before the creation of civil society.\textsuperscript{18} This gives the content of the “fundamental Law of Nature, \textit{Every Man ought, as far as in him lies, to promote and preserve a peaceful Sociableness with others, agreeable to the main End and Disposition of human Race in general.”\textsuperscript{19} This is the central obligation from which all the laws of nature are derived, such that “there is no natural Obligation bearing a Regard to other Men, the Reason of which is not terminated here, as in the

\textsuperscript{16} II.ii.3, p. 103. Quae jura porro statum hominis naturalem comitentur, facile colligi potest tum ex inclinatione illa, omnibus animantibus communi, qua non possunt ad conservationem sui corporis, vitaeque; nec non ad dispellenda ea, quae eandem destruere videntur, omnibus modis incumbere: tum quod in eo qui regunt statu nullius hominis imperio sunt subjecti. Ex priori enim consequitur, quod in naturali statu constituti possint omnibus in medio positis uti, frui, omniaque adhibere, & agere, quae ad conservation sui faciunt, in quantum alioruin jus inde non laeditur. Ex posteriori autem, quod idem sicuti propriis viribus, ita & proprio judicio atque arbitrio ad legem tamen naturalem format, utantur ad procurandum sui defensionem; atque conservationem. (108) The Latin text is from \textit{De jure naturae et gentium libri octo}, Vol. 1 (Oxford: Clarendon Press, 1934).

\textsuperscript{17} II.ii.3, p. 103.

\textsuperscript{18} See also Saastamoinen, \textit{Fallen Man}, 93-94. It is also notable that Pufendorf claims that a “pure” state of nature of disunited individuals never existed; see Hont, \textit{Jealousy of Trade}, 163-64; Krieger, \textit{Politics of Discretion}, 89-90.

\textsuperscript{19} II.iii.15, p. 134. …fundamentalis lex naturae ist haec erit: cuilibet homini, quantum in se, colundam & conservandum esse pacificam adversus aliens sociabilitem, indoli & scope generis humani in universum congruentem. (143)
chief Head and Fountain of Duty.”20 This central natural law gives rise to two absolute duties: “no Man should hurt another” and “in case of any Hurt or Damage done by him, he fail not to make Reparation.”21

Critically, these duties towards others are perfect. At the beginning of the work, Pufendorf had distinguished between perfect and imperfect rights, judging a right to be perfect when it can be enforced by violence against another person. Pufendorf singles out two groups of commitments which create perfect rights and duties: those which “conduce to the very Being” of society (as opposed to its general wellbeing), and those which are the result of covenant.22 Ultimately, the list of perfect rights and duties is quite short. Pufendorf is clear that the two absolute duties under the prime natural law are perfect, since society cannot be maintained in the absence of their exercise. While it is possible to live in peace with individuals who do us no positive goods through fulfilling the duties of humanity, the violation of security activates each man’s innate desire for self-preservation and makes peaceful relations impossible.23 Further, while the duty not to harm others is absolute and thus exists even in the absence of human institutions, “it must be supposed to spread itself thro’ all those Compacts or Institutions, by which the Propriety of any Thing is made over to us; since without it they could obtain no Force or Effect.”24 Compliance with the duty of reparation similarly can be compelled in order to ensure that individuals do not get away with violations of the basic duty of abstention from harm.25 These two duties are the sum of perfect, absolute natural duties; while the law of nature suggests numerous other absolute obligations—that we should assist our fellow man, in

20 II.iii.19, p. 139.  
21 III.i.1, p. 211.  
Ut ne quis alterum laedat, utque, si quod damnum alteri dederit, id reparet. (213)  
22 I.vii.7, p. 78.  
23 Id. at 212.  
24 Id.  
25 III.i.2, p. 212.
particular—those obligations are always imperfect, since individuals do not know how best to assist each other and cannot possibly assist every other man all the time.26

Alongside these rules, which apply to all men at all times, there are “hypothetical” duties derived from the agreements particular men make among themselves. As suggested above, Pufendorf views these hypothetical obligations as subject to and expressing the perfect absolute obligations as well, and this is the principle undergirding the foundational requirement of good faith. Consequently, “what I owe another upon Pact, or Agreement, I therefore owe him, because he has obtain’d a new Right, holding good against me by virtue of my free Promise or Consent.”27 This is explicitly linked to the requirements for perfect duties, since “in as much as without these Transactions there would be no possible Means of preserving Peace and Society in the World.”28 The obligation of good faith is thus among the most fundamental precepts of the law of nature, since it preserves peace.29 Obligations stemming from a pact, however, “if not voluntarily tender’d, we may procure by forcible Means.”30

While this provides a foundation for obliging counterparties to stand by treaties in the international realm, these hypothetical perfect duties are especially important because they allow Pufendorf to apply the basic schema of absolute rights and duties to a huge range of human institutions, enabling claims to justice in the international realm. Careful attention to the rules governing pacts is critical because “Pufendorf’s primary concern was to show that all [pre-social] institutions, without exception, have their effective ground in contract, and thus in the

26 III.iv.1, p. 259.
27 III.iii.1, p. 260. …quae alteri ex pactis & conventionibus debeo, illa ideo debeo, quia novum sibi jus iste adversus me ex proprio meo consensu quaesivit. (257)
28 Id.
30 III.iv.6, p. 265.
mutual consent of individuals who voluntarily abridge their own liberty for a cause.”  

The most critical of these is property that can be recognized outside of the civil society in which an individual lives. Pufendorf is clear that property is an entirely human institution—“Property and Communion are moral Qualities, which do not affect the Things themselves, as to their intrinsick Nature, but only produce a moral Effect with Regard to other Persons.” Human property is thus best conceived as the result of a steady accretion of pacts, such that property was established “not at the same Time, and by one single Act, but by successive Degrees; according as either the Condition of Things, or the Number and the Genius of Men, seem’d to require.” The initial pact of property gives rise to obligations under natural law, since it is a dictate of reason that “every Man shall suffer another, who is not engaged in Hostility against him, to dispose of his own Possessions, and likewise quietly to hold and enjoy them.”

This method is employed repeatedly in addressing a series of other human institutions. The first of these is language, which Pufendorf views as the result of two compacts, the first of which establishes some conventional meanings of words, and the second of which requires honesty toward others. Pufendorf’s account of commercial relations also rests on a contractual foundation; the institution of money, for example, came about “by Agreement,” when “the most civiliz’d Nations…thought fit to set a certain eminent Price upon some particular thing, as a Measure and Standard for the Price of every thing else.” Pufendorf treats the different forms of

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32 IV.iv.1, p. 363. …proprietatem & communionem esse qualitates Morales, quae ipsas res non physic & intrinsece afficiant, sed effectum duntaxat morale producunt in ordine ad alios homines. (362)
33 IV.iv.6, p. 368. …non quidem simul & semel, sed successive, & prout conditionis rerum, aut indoles & multitudo hominum videbatur requirere. (367)
34 IV.xiii.1, p. 450. …quod quilibet teneatur alterum non hostem pati de rebus suis disponere, iisdemque quiete frui. (449)
36 V.i.12, p. 466. Hinc visum suit plerisque gentibus, quois amplior vitae cultura arridebat, conventione quadam pretium aliquod eminens certae rei imponere. (468)
contracts, renting and hiring, partnerships, and a variety of other contractual arrangements.

Pufendorf is unabashed in his belief that these contracts provide an illustration of the rules applicable to civil societies; his chapter on interpretation notes that “although we design to treat hereafter of those Pacts which presuppose civil Government…most of what we have to say upon this Head has Relation to such an Establishment.” Similar principles carry over into the household, where the family is a prime example of contractual relations. Before a marriage, “all human Persons, whether of one Sex, or of the other, are naturally equal in Right: and that no one can claim the Sovereignty over another, unless it be obtained by the free Act of one of the Parties.” A covenant for political authority over the wife constitutes a separate covenant connected to the marital contract. Finally, Pufendorf’s account of slavery “emphasize[s] its origin in contract,” covering even the situation of an individual who trades lifelong labor for lifelong sustenance. Even slavery resulting from war has an element of compact, since any slave who is not kept in chains must have traded his life for his servitude; until such a compact intervenes, he could be killed by right of war.

Pufendorf’s opposition to Hobbes on this point is obvious; Hobbes had denied such institutions were possible in the state of nature, only existing by dint of civil law. Pufendorf’s treatment of the relationship between natural and civil law serves as a direct response to Hobbes’s position. In civil society, the natural laws “upon the Observation of which the common Quiet of Mankind entirely depends” oblige as civil laws of their own force, but the laws of

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37 V.xii.1, p. 534. ...Quanquam autem inferius demum sit agendum de illa pactorum specie, quae imperium civile prae supponunt, & pleraque etiam ad leges pertineant. (541)
38 VI.i.9, p. 565. ...naturaliter omnes homines esse aequalis juris, ac nulli imperium in alterum competere nisi id suo vel alterius actu fuerit quasitum. (581)
39 Id.
40 Krieger 111.
41 VI.iii.4, p. 612.
42 VI.iii.6, p. 613. This position is extremely close to Hobbes’s treatment of slavery in De cive VIII.i-iv, p. 103-04.
charity and humanity do not without some codification by the prince.⁴³ Pufendorf makes his objection to the Hobbesian doctrine explicit:

Besides, the Supposition Mr. Hobbes goes upon is false; that what belongs of Right to me, and what to another Man, is a Question of the Civil Law; and that out of civil Government there is no Propriety: for tho’ Men that live under it have a more secure Enjoyment of their Proprieties, than they that live out of it; since the first are defended in their Rights and Fortunes by the united Strength of a Number of Men, besides the Assistance of the Magistrate; and the latter can support themselves only by their own single Power; yet, notwithstanding, there can be no Grounds of Proof to assert, that there was no Propriety before the Institution of Civil Government. For all sovereign Princes and Commonwealths are now actually in a State of Nature, and their Proprieties are not determi’n’d by any Law or Judge, but solely by Compact, and the natural Means of Acquisition; and yet I believe no Body ever imagin’d, that Princes might ravage, or steal from one another, without incurring the Guilt of Rapine or Theft. So that admitting, that a Man cannot make any Compact that will be valid about what is forbidden by the Civil Law, yet certainly it cannot be denied, but that they who live in a Liberty of Nature, may make certain Compacts, which it will be an Injury to violate.⁴⁴

Immediately noteworthy is Pufendorf’s recognition that pacted property is critical to maintaining international peace. For Hobbes, not only were individuals never secure in their property in the international order, but likewise states as a whole could not have any claims to property enforceable against other nations. For Pufendorf, such claims are entirely sensible, and provide a basis for international peace insofar as all individuals and states lie under an obligation to respect the original pact of property, along with its modes of acquisition. Pufendorf made the possibility of international justice even clearer in another passage where he rejected the claim that societies which looked entirely to their own self-preservation could be considered just:

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⁴³ Id. …citra quorum observationem pax interna inter cives stare omnino nequit. (772)
⁴⁴ VIII.i.3, p. 747. Praeterea falsum est, quod praesupponit, juris civilis presse dicti quaestionem esse, quid sit alienum, quid nostrum; & extra civitates non esse proprietatem rerum. Nam eti longe certior & firmior sit rerum suarum proprietas illis, qui in civitatibus, quam qui extra easdem vivunt, cum illorum bona junctis multorum viribus, & per auxilium praetoris defendantur, hi autem propriis duntaxat viribus nitantur: tamen quin & ante civitates institutas dominium rerum fuerit, gratis negatur. Sic cum hodie regis & resp. invicem in statu naturali vivant, eorumque dominia non communi aliqua lege aut judice, sed solis pactis, ac naturalibus adquirendi modis nitantur; quis tamen assereere ausit, regem unum alteri etiam quicum pactum ipsi non intercessit, res suas clam aut vi posse eripere citra furti autraptus crimen? Sicutut concedimus, non posse aliquem valide pacisci circa rem, per leges civiles inderdictam; tamen quin illi, qui inter se in libertate naturali vivunt, pacisci queant, sic ut pacto violato siat injuria, quis inficias ibit? (765-66). This also demonstrates the inaccuracy of the claim that Pufendorf, like Hobbes, viewed the laws of nature as mere “theorems” in the state of nature. Hochstrasser, Natural Rights, 64.
...supposing there was a Nation in the World maintaining Peace and Justice amongst themselves, and of such mighty Strength as to be formidable to all others, and so not restrain’d from hurting them by the Fear of a like Return; yet should this Nation or People assault, drive, kill, or drag into slavery their weaker Neighbours, as often as they thought convenient, we should pronounce them actually guilty of a Breach of the Law of Nature. And yet (as we suppose) these People might preserve themselves, whether they allowed any Rights to others, or not.  

Mere preservation is thus not enough to satisfy the claims of justice, which apply just as definitively in the international realm. Pufendorf’s description of natural law thus instituted enforceable natural restrictions, and used those as the foundation of a set of institutions which made claims to international justice part and parcel of the international realm. This was the aspect of Pufendorf’s theory which approached closest to that of Grotius; in the rest of the aspects of his theory relevant to the question of international punishment, as we will see, Pufendorf hewed quite closely to the Hobbesian line. This was particularly true with respect to Pufendorf’s theory of the social contract, which despite its more elaborate character borrowed heavily from Hobbes with regard to the connections between the subject and sovereign wills necessary to create civil society.

II. Subject and Sovereign Wills

Despite rejecting key features of Hobbes’s account of natural right, Pufendorf largely accepted Hobbes’s account of authorization, viewing the sovereign as in some sense representing the will of the subjects and thus making them responsible for sovereign acts. Pufendorf’s theory of civil society relies on an analogy to any other sort of voluntary human association, and the pacts which create civil society share characteristics with those which form other “compound moral persons.” In Pufendorf’s first discussion of these bodies, which include anything from

45 II.iii.16, p. 137. Tuck notes that “It would be hard to imagine a clearer denial of Hobbes’s fundamental beliefs than this.” Tuck, War and Peace, 152.
corporations and churches to civil commonwealths, he specifies that this sort of moral person 
comes into being

…when several individual Men are so united together, that when they will or act by 
Virtue of that Union, is esteem’d a single Will, and a single Act, and no more. And this 
is supposed to be done, when the particular Members submit their Wills to the Will of 
one Man, or of one Council, in such a Manner as to acknowledge, and to desire others 
to acknowledge, for the common Act of Determination of them all, whatever that Man, 
or that Council shall decree or perform, in Matters which properly concern such an 
Union, and are agreeable to the End and Intention of it.46

When Pufendorf turns to the particular form of moral persons known as commonwealths, the 
proviso about “Matters which properly concern such an Union” becomes extremely important, 
along with Pufendorf’s particular conception of the will which the commonwealth possesses.

Pufendorf’s contractual theory is by far the most elaborate of the early-modern 
contractarians, consisting of two pacts and a decree. The fundamental reason for instituting civil 
society is that the state of nature—or, more accurately, the situation of dispersed families headed 
by patriarchs—lacks sufficient guarantees of security and compliance with natural law. Man’s 
many vices, especially those not shared with beasts, make him particularly unsuited to being a 
member of civil society, such that the generality of men have to be held in check by the power of 
punishment.47 Consequently, “The true and leading Cause, why the Fathers of Families would 
consent to resign up their natural Liberty, and to form a Commonwealth, was thereby to guard 
themselves against those Injuries, which one Man was in Danger of sustaining from another.”48

46 I.i.13, p. 8. …quando plura individual humana ita inter se uniuntur, ut que vi istius unionis volunt aut agunt, pro 
una voluntate, unaque actio, non pro pluribus censeantur. Idque tunc peri intelligitur, quando singuli voluntatem 
suum voluntati seu voluntate unius hominis aut concilii ita subjiciunt, ut pro omnium voluntate & actione velit 
agnoscere, & ab aliis haberi, quicquid iste decreverit aut gesserint circa illa, quad ad unionis ejus naturam ut talem 
spectant, & fini ejusdem congruunt.
47 VII.i.4, p. 623.
48 VII.i.7, p. 625. Genuina igitur, & princeps causa, quare patresfamilias, deserta naturali libertate, ad civitates 
constituendas descenderint, suit, ut praesidia sibi circumponerent contra mala quae homini ab homine imminent. 
(654)
Civil society is thus fundamentally necessary for protection, and this fact undergirds Pufendorf’s claims about the way civil society ought to be designed.

As the emphasis on the necessity of punishment and the drive for security suggests, Pufendorf’s account of the structure of the social contract parallels Hobbes’s theory from *De cive* in almost every significant respect—indeed, the organization of the chapter in which Pufendorf treats the origins of civil society largely follows Chapter Five of *De cive*, first addressing the difference between a disunited multitude and a genuine civil society, then providing an explanation for the difference between human societies and those seen in bees and other social animals, advancing the same six reasons as Hobbes for the difference between human and bee societies, before moving to the content of the contract itself. Like Hobbes, Pufendorf contends that a unity of wills is necessary to avoid disputes over what should be done in pursuit of common security, such that men need “some farther Tie” to ensure that they “may be hindered, by some Fear, from drawing back and disagreeing, when they find their private Advantage clashing with the publick.” The only way to accomplish the union of wills necessary for this pact is to have “each Member of the Society submit his Will to the Will of one Person, or of one Council; so that whatever this Person or this Council shall resolve, in Matters which necessarily concern the common Safety, shall be deemed the Will of all in general, and of each in particular. For, when I have made over my Power to another, his Act and Choice is interpreted as mine.”

Once again, Pufendorf follows Hobbes in clarifying that “the Strength and Power of the Subjects are not, by any natural Conveyance, transferred really on the Sovereign, as if, for Instance, the

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49 VII.ii.4, p. 632-34. 50 VII.ii.3, p. 632. Ut qui semel ad pace & mutuum auxilium causa communis boni consenserint, metu prohibeantur, ne postea, cum bomun suum privatum a communi discrepare visum fuerit, iterum dissentiant. (661)

51 VII.ii.5, p. 634. Sed hoc demummodo multae voluntates unitae intelliguntur, si unusquisque voluntatem suam voluntati unius hominis, aut unius conciliii subjiciat, ut pro voluntate omnium & singularum habendum sit, quicquid de rebus ad securitatem commune necessariis ille voluerit. (663)
Strength, which lay in the Shoulders of all the Subjects, should be removed to the Prince’s Shoulders.”

This leads Pufendorf to his procedure for creating civil society, and here Pufendorf finally displays some disagreements with Hobbes’s position. The first step is “a covenant with each in particular, to join into one lasting Society, and to concert the Measures of their Welfare and Safety, by the publick Vote.” Next, “it is then farther necessary, that a Decree be made, specifying what Form of Government shall be settled amongst them.” Finally, a second pact is necessary “by which the Rulers, on the one hand, engage themselves to take care of the common Peace and Security, and the Subjects, on the other, to yield them faithful Obedience; in which, likewise, is included that Submission and Union of Wills, by which we conceive a State to be but one Person.”

Pufendorf is explicit that this is a rejection of Hobbes, whose arguments about the single pact were intended to undermine the claim that there was any political entity external to the sovereign to whom individuals could appeal, and he attempts to assuage fears that this covenant will lead to resistance by subjects. A covenant where one party gains the authority to direct the actions of another does not necessarily lead to a power of enforcement on the side of the

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52 Id. at 635. Pufendorf’s general acceptance of Hobbes’s theory of authorization has received comparatively little attention; the most detailed exception is Ian Hunter, Rival Enlightenments (New York: Cambridge University Press, 2001), 182-93. See also Thomas Behme, “Pufendorf’s Doctrine of Sovereignty and its Natural Law Foundations,” in Natural Law and Civil Sovereignty: Moral Right and State Authority in Early Modern Political Thought, ed. Ian Hunter and David Saunders (New York: Palgrave Macmillan, 2002), 47-48.

53 VII.ii.7, p. 635. …ut futuri cives primo omnium inter se singuli cum singulis pactum ineant, quod in unum & perpetuum coetum coire velint. (665)

54 Id. at 636. …necessum ulterius est, ut decretum siat, qualis forma regiminis sit introducenda. (665)

55 VII.ii.8, p. 636. …quod hi quidem ad cura communis securitatis & salutis, reliquiad obsequium his praestandu sese obstringunt; cui simul subjectio illa & unio voluntatum instet, per quam civitas una persona intelligitur. (665-66).

Pufendorf illustrates this with the example of the foundation of Rome from Dionysius Halicarnassus: “a Number of Men flock together, with Design to fix themselves in a new State; in order to which Resolution a tacit Covenant, at least, must be supposed to have passed amongst them. After this, they deliberate about the Form of Government, and that, by Kings being preferred, they agree to invest Romulus with the sovereign Authority.” Id. at 637. Ibi enim primo multitufo hominum struendae novae sedis causa confluxit; inter quos utique pactum saltem tacitum intervenit. Inde deliberatur super forma rep. & cum regnum placeret, Romulo demum summa potestas deserter. (667)
subordinate party; a sovereign can only be responsible for a violation of the covenant if “he either utterly abandon all Care of the Publick, or take up the Mind and Carriage of an Enemy towards his own People, or manifestly, and with evil Design, recede from those Rules of Government, the Observation of which was, by the Subjects, made the necessary Condition of their Obedience.”

However, the most important reason to reject Hobbes’s notion of a single contract is to account for the basic rules of contractual obligation. It is extremely dangerous to make obedience dependent on covenants among individual citizens, since “every Subject will seem to make the Obedience of every other Fellow-subject the necessary Condition of his own: And, consequently, if any one happens to violate his Engagement, all the rest stand released from theirs.” Consequently, a second compact is necessary to ensure that every subject is “bound to his Sovereign in his own Person, without any Dependence on the Obedience of others.”

The result of this procedure is a state “conceived to exist like one Person, endued with Understanding and Will, and performing other particular Acts, distinct from those of the private Members.” This leads to Pufendorf’s definition of a civil state: “It is a compound moral Person, whose Will, united and tied together by those Covenants which before passed among the Multitude, is deemed the Will of all; to the End, that it may use and apply the Strength and Riches of private Persons towards maintaining the common Peace and Security.”

The sovereign’s position in this scheme is to exercise the newly created will of the state:

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56 VII.ii.10, p. 638. Unde imperans violate pacti nequiti argui, nisi aut omnem reip. curam abdicaverit, aut hostilem in suos animum induerit, aut manifeste a regulis gubernandi, abs quorum observatione tanquam a conditione cives obsequium suum suspenderunt. (668)

57 VII.ii.11, p. 639. Nam hoc modo quilibet civis obsequi sui necessitatem videbitur suspendisse ab obsequio cujuslibet civis; & consequenter, altero non praestante obsequium, & reliqui liberi forent. (669)

58 Id. …quemlibet civem pro se, & citra conditionem obsequi alieni summo imperanti obstringi. (669)

59 VII.ii.13, p. 641. …quae ad modum unius personae concipiitur, intelligentis & volentis, aliasque actiones peculiares a singulorum actionibus separatas edentis. (671)

60 Id. Unde civitatis haec commodissima videtur definitio, quod sit persona moralis composita, cujus voluptas, ex plurium pactis implicita & unita, pro voluntate omnium habetur, ut singulorum viribus & facultatibus ad pacem & securitatem commune uti possit. (672)
Where the Sovereignty is lodged in one Man, there the State is supposed to choose and desire what that one Man (who is presumed to be Master of perfect Reason) shall judge convenient; in every Business or Affair, which regards the End of civil Government, but not in others. For Instance, if a Prince declare War, if he make Peace, or enter into an Alliance, this is interpreted as the Will and Act of the State.61

Formally, then, Pufendorf differed little from Hobbes’s theory of authorization. The series of pacts resulted in a single, artificial will that “is deemed the Will of all,” and the sovereign who exercises that will performs acts on behalf of the state.

It is thus not surprising to see Pufendorf draw several conclusions which are effectively identical to Hobbes or logical extensions of Hobbes’s position when applied to a set of enforceable natural laws. Pufendorf’s acceptance of the artificial character of the state’s will is quickly apparent in his assessment of the relationship between subjects and sovereigns. For example, individuals cannot claim responsibility for the state’s acts: “it hath peculiar Actions proceeding from it, which private Persons can, on no account, assume or challenge to themselves.”62 Similarly, when Pufendorf turns to the question of responsibility for a sovereign’s bad acts—“ordain evil Laws, execute wrong Judgment, appoint unfit Magistrates, or undertake unjust Wars”—he follows the Hobbesian line, concluding that such acts are always acts of the public, but that “in the Court of Conscience no Man is accountable for such an Act, unless he contributed positively and effectually towards its production.” Consequently, subjects in general, as well as those who vote against a proposal, “are not charged with the Faults of the Government.” This does not, however, entitle subjects to any exemption from the consequences of unjust state acts; “the Inconveniences, which innocent Subjects suffer on account of these publick Crimes, are to be ranked amongst those general Evils to which human Nature, in this

61 VII.ii.14, p. 642.
62 VII.ii.13, p. 641. ...absqua itidem peculiares actiones proficiscuntur, quae singuli hautquidquam sibi tribuere aut arrogare queant. (672)
Condition of Morality, lies necessarily exposed.” It is thus unsurprising to see Pufendorf vigorously argue that subjects can engage in unjust behavior at the sovereign’s command; “I will not deny but a Man may engage barely in the Execution of an Action commanded by his Prince, the Guilt of which shall be imputed solely to him who commanded it, and not to him who was the Instrument in the Execution of it.” Certain conditions attach to this requirement—that the subject not offer any counsel about the act, attempt to avoid it, and do it only under threat of compulsion—but the basic principle of sovereign responsibility in conscience remains. The same principle is applied to the example of a sovereign command to bear arms in an unjust war. In general, for those commanded to obey, “it must be consider’d, that all Nations, acted by any Sense of Justice or Honour, before they engage in War, always suppose, that the Cause of it is just, and where they do not, it is no Purpose to talk of Conscience.” The sovereign’s judgment on these questions is thus decisive, and the sovereign bears responsibility in conscience for violations of the law of nature which result.

As a result of this theory of authorization, Pufendorf takes a quite draconian approach to the laws of war. While subjects may not be liable in conscience for the acts of their sovereign, they can be held responsible for the state’s acts in ways Grotius was keen to avoid. The identity of the subject as responsible for the sovereign’s acts allows Pufendorf to endorse a strong theory of conquest. A conqueror in a just war has every right to assume sovereignty over a conquered territory, since the opposing party has wronged him. Unlike Grotius, Pufendorf makes no distinction between the sovereign and the citizens or those who have consented and those who

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63 VII.ii.14, p. 642. Quae tamen incommoda in cives immerentes ex ejusmodi delictis publicis redundant; inter illa mala sunt referenda, quibus humana conditio in hac mortalitate obnoxia est. (673)
64 VIII.i.6, p. 750-51.
65 VIII.i.8, p. 753.
66 VII.vii.3, p. 706.
have not, and indeed, such a distinction would be quite difficult to draw in light of his theory of authorization. Pufendorf made this point particularly bluntly in *De officio hominis et civis*:

The legitimate title of this power is partly drawn from the fact that if he had wished as victor to take advantage of the strict rights of war, he might simply have taken the lives of the vanquished; and thus, by allowing them to get off with a lesser misfortune, he also earns a reputation for clemency. But it is also drawn from the fact that his enemy in going to war with one whom he had previously wronged, and to whom he has refused reasonable satisfaction, has placed all his fortunes on the gaming tables of Mars; he has thus already given tacit consent to whatever condition the event of war may assign him.⁶⁷

All the subjects are included in this gambit, and all suffer equally when it fails. Pufendorf does insist that a pact must intervene between conquerors and conquered in order to end the state of war and confirm the new sovereignty, but the conqueror “lies under no Necessity of caressing those whom he hath subdued, and of winning their Consent by Flatteries or Intreaties, but may extort it by denouncing the severest Evils.”⁶⁸

The consequences of Pufendorf’s endorsement of this theory of authorization are also visible in his account of the killing of enemies and the acquisition of property in war. As we saw, Grotius broke from Scholastic writers in two directions, both by demanding less accountability for subjects under a proper understanding of the laws of nature and by permitting belligerents to engage in degrees of killing and plunder which Scholastic writers rejected. Pufendorf applies his Hobbesian theory of authorization to conclude that natural law permits belligerents to do everything which Grotius had accorded to the permissions of the law of nations. This is most apparent in his treatment of reprisal. Where Grotius had justified the practice of taking reprisal on the goods of a fellow-subject of our attacker on the grounds of convenience and convention, Pufendorf’s theory of authorization makes clear “that as it is a natural Consequence of the

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⁶⁸ VII.vii.3, p. 706.
Combination of Men into civil Bodies, that the Injuries which one Member suffers from a Foreigner, seem to affect the whole Commonwealth; so it doth not appear to be unjust, that every particular Subject should be obliged to assist the Discharge of the publick Debts.”

Pufendorf’s discussion of the rights of belligerents is correspondingly brief: “How far in particular it is usual to extend the Liberties of War upon the Persons of the Enemy, may be seen at large in [Grotius], Lib. iii. Chap. iv.” Of course, this reference is not to the extensive chapters on moderation which filled most of Book III of Grotius’s work, but to the extensive rights of violence described as permissions of the law of nations in Grotius’s schema. As we saw, a central feature of those permissions was their disregard for the rules about collective responsibility Grotius supplied to supplant the Scholastic account of subject guilt. In Pufendorf’s hands, and consistent with his broadly Hobbesian premises about authorization, these permissions can be straightforwardly converted into natural law rules about legitimate violence. Pufendorf pursues the same method with respect to the acquisition of enemy property, citing once again to Grotius’s account of the permissions of the law of nations. The consequence of this account, already apparent in Hobbes, was the effective destruction of the category of civilian; every enemy subject, by virtue of authorization, is responsible for the state’s act and can be legitimately targeted insofar as it advances the just warrior’s goals of obtaining reparation and ensuring future peace.

Yet Pufendorf did not follow Hobbes at every step; what distinguished Pufendorf on these points was not the general claim about authorization, but instead his apparent conception of what that will represented. Hobbes had always referred to the state’s “single will,” but this will

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69 VIII.vi.13, p. 846. …quemadmodum ex conjunctine in corpus civile factum est, ut quae uni infertur injuria per extraneos, ea totum civitatem videantur tangere; ita non iniquum visum, singulos velut in subsidium pro debito civitatis obligatos esse. (888-89)

70 VIII.vi.19, p. 849.
was straightforwardly to be taken as the will of each individual, reflected in the will of the sovereign. Pufendorf was never entirely clear about his position on this question. He was never willing to state, as Hobbes frequently did, that the sovereign’s judgments were in fact the subject’s judgments. Indeed, as we will see, such a claim ran counter to Pufendorf’s desire to insist that no individual ever consents to his own punishment. Instead, Pufendorf appeared to view the sovereign’s will as standing in for the collective will of the people, as distinct from the individuals who compose it.71

Part of the difficulty in grasping Pufendorf’s account is that he was less than entirely clear about the parties to the second and final contract. His assertion that the second contract is between “the Subjects” and the sovereign leaves open the possibility of either a series of individual pacts or a pact between a collective entity and the sovereign. This question has been a matter of some debate among scholars, but it appears clear from other passages that Pufendorf envisioned the second contract as a series of agreements between individual subjects and the sovereign, and in this respect he remained quite close to Hobbes.72 We have already seen Pufendorf’s stress on the need for a second compact to ensure that every subject is “bound to his Sovereign in his own Person, without any Dependence on the Obedience of others.”73 In addition, Pufendorf stresses that monarchies can be formed by individual pacts with the sovereign alone,74 and that all those who join a pre-existing state do so not by swearing any allegiance to their fellow-subjects—and thus joining in the first pact—but by swearing obedience

71 This ambiguity in Pufendorf’s thought was noticed by commentators; Barbeyrac, among others, noted that Pufendorf’s Hobbesian definition of a civil state “confounds the Sovereign with the State,” arguing that on Pufendorf’s principles “the State indeed is a Body of which the Sovereign is the Head, and the Subjects the Members.” VII.ii.13, n. 4, p. 641.
72 Krieger, Politics of Discretion, 123-24 notes this problem, but does not attempt to resolve it. Horst Denzer has apparently taken the position that the second contract is between the sovereign and a collective entity, a point on which he is challenged by Behme. See Behme, Sovereignty, 48, 55-56 n. 46.
73 VII.ii.11, p. 639. …quemlibet civem pro se, & citra conditionem obsequi alieni summo imperanti obstringi. (669)
74 VII.ii.8, p. 637.
directly to the sovereign. While subjects may choose to reaffirm their commitment by making a commitment to their fellow-citizens, such a covenant is unnecessary and “seldom practiced.”

Finally, viewing the second contract as individual best makes sense of Pufendorf’s theory of resistance; the striking feature of this account is that it remains a fundamentally individual process. Individual subjects can be injured and can resist the sovereign under tightly limited circumstances. However, the import of this concession is limited by the fact that even if an individual is unjustly attacked by the sovereign, “it doth not hereby become lawful for the otherSubjects to throw off their Allegiance, or protect the innocent Party by forcible Means.”

Pufendorf gives two reasons for this—first, because subjects cannot judge the sovereign’s exercise of judicial power, and second, because “every particular Subject engageth the Prince’s Care and Protection only for himself, and doth not suppose it a Condition of his own Obedience, that all and each of his Fellows shall be justly treated.”

Despite his apparent adoption of the claim that the second contract occurs between individuals and the sovereign, it is clear that Pufendorf was intent on preserving the continuing relevance of the unified entity of “the people,” and he spent considerable time rejecting Hobbes’s arguments that the people disappeared after the institution of the sovereign. For Pufendorf, the

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75 VII.ii.11, p. 639. See also VII.ii.8, p. 637, where Pufendorf reiterates this claim.
76 VII.ii.11, p. 639. It should be noted that many of Pufendorf’s defenders and critics were likewise confused by this aspect of his thought. Gershom Carmichael, in his notes on Pufendorf, insisted that a compact between individuals and the sovereign (as in the case of a naturalized citizen) must always include a pact joining the subject to the body of the people, and that the second compact must be understood as obligating the subjects “all together as a body to the sovereign.” “Supplements and Observations upon Samuel Pufendorf’s On the Duty of Man and Citizen according to the Law of Nature, composed for the Use of Students in the Universities,” in Natural Rights on the Threshold of the Scottish Enlightenment, ed. James Moore and Michael Silverthorne, trans. Michael Silverthorne (Indianapolis: Liberty Fund, 2002), 149. Barbeyrac retracted his initial criticism of Pufendorf on this point only after reading Carmichael’s gloss. See id. at 152 n. 7.
77 These restrictions include a requirement of flight and a preference for passively dying over actively resisting, but he ultimately concedes resistance is permissible; see VII.viii.5-8, p. 718-24.
78 VII.viii.5, p. 720. …non tamen ideo caeteris civibus obsequium exuere, aut innocentium vi protegere licebit. (759)
79 Id. Ideo quod quisque civium pro se curam sibi, & protectionem ejusdem stipulator, nec tanquam conditionem suae subjectionis supponit; si omnes & singulos cives juste tractaturus sit. (759). Kennett’s translation misleadingly refers this to the “first Contract,” a translation unwarranted by the Latin.
basic notion was that the people represented the product of the first pact—an agreement to live
together under a common sovereign\(^{80}\)—and while this entity had no political authority or ability
to resist, it was the will of the people as a collective entity which the sovereign’s will was said to
represent. Where Hobbes had insisted that every act of the sovereign was the subject’s act,
Pufendorf appeared prepared to countenance greater distance between individual subjects and the
sovereign. Pufendorf made this clear in rejecting Hobbes’s argument from *De cive* that “In every
commonwealth the *People* Reigns; for even in *Monarchies* the *People* exercises power; for the
people wills through the will of one man.”\(^{81}\) Pufendorf takes this to mean that either the people is
the same as the state, which makes this claim a “ridiculous Tautology,” or that “*The People, as
distinct from the Prince, rules in every State,*” which “is absolutely false.” This brings Pufendorf
to his discussion of the relationship between the people’s will and the sovereign’s will: after
quoting the passage from *De cive*, Pufendorf replies that “he ought rather to have said more
plainly thus: In a monarchical Government the Will of the Prince is supposed to be the Will of
the State.”\(^{82}\) The simple equation of subject will and sovereign will which had marked Hobbes’s
theory is thus partially absent from Pufendorf’s account, replaced by the fictitious will of a
collective body which has no political functions of its own and exercised through the will of a
sovereign, whether a king, aristocracy, or assembly.

For Pufendorf, preserving this entity of the people served important practical purposes.
This was not to ensure the possibility of legitimate resistance to the sovereign; this procedure, as
we have already seen, was fundamentally individual because of the individual contracts between

\(^{80}\) VII.ii.12, p. 641. Ian Hunter greatly overstates the import of the first agreement by claiming that it is the point at
which “individual delegate their capacity for self-defence to another, agreeing in doing so that the sovereign alone
should decide the best means to this end, and that he should have absolute power to coerce those who subsequently
dissent from his decisions.” Hunter, *Rival Enlightenments*, 187. Pufendorf is explicit that this necessary union of
wills takes place in the second compact, not the first.

\(^{81}\) *De cive* XII.viii, p. 137.

\(^{82}\) VII.ii.14, p. 642-43.
subjects and the sovereign, and Pufendorf is clear that he agrees with Hobbes that it is impossible
to say that “the State hath rebelled against the King,” or that resistance can ever take place
“under the Name and Colour of the People.”\textsuperscript{83} Instead, the persistence of the people through the
first contract is invaluable “in the Case of an Interregnum, during which, the Society, being held
together only by the prime Compact, it is frequent to enter the Debate about the Frame and
Model of the Commonwealth.”\textsuperscript{84} This, he made clear, was an explicit rejection of Hobbes, who
had argued that the death of the sovereign without a successor dissolved civil society entirely.\textsuperscript{85}
This is not a trivial concern; in a Europe (and particularly Germany) marked by sovereigns ruling
over differently constituted political units, Pufendorf’s arguments on this point enable him to
argue that “when a Kingdom consists of very large integral Parts, as suppose of diverse Nations,
Provinces, or great Cities; it shall, in case of an Interregnum, appear like some collective or
systematical Form.”\textsuperscript{86} In these “systematical” forms, each previously subordinate entity is
permitted to choose its own form of government upon an interregnum, without a dissolution of
the original compact.\textsuperscript{87}

This retention of the “people” as a separate entity with its own will, in some way distinct
from the wills of the individual citizens who make it up, was to play a very significant role for
later thinkers on international affairs. Working with this notion enabled later writers, notably
Christian Wolff, to claim that punishment was reserved for the “people” or “state,” whose “will”
was exercised in committing an injustice, rather than the individuals who made it up, a critical
step in the eventual disappearance of punishment as a justification for war. However, making this
move entailed the position that sovereignty was originally held by the people and then delegated

\textsuperscript{83} Id. at 643.
\textsuperscript{84} VII.ii.8, p. 637.
\textsuperscript{85} VII.vii.9, p. 710.
\textsuperscript{86} VII.vii.7, p. 709.
\textsuperscript{87} VII.v.16, p. 681.
to a sovereign, and Pufendorf expressly rejected this claim. The second compact, by which sovereign authority actually arose and the unified will of the state was created, was a compact between every individual member of the state and the sovereign, not between the people and the sovereign, and consequently Pufendorf stuck to the assertion that the sovereign’s will could be taken for the will of each individual in the society in a way sufficient to make them responsible for sovereign action.

III. War and Punishment

Pufendorf’s endorsement of the Hobbesian theory of authorization aimed to decrease both internal and external conflicts by eliminating the ability of individual subjects to substitute their judgment for that of the sovereign on any questions related to public affairs. Individuals thus could not engage in resistance to the sovereign or judge for themselves the legitimacy of his conduct, at least toward other individuals or nations. However, this had also entailed accepting Hobbesian claims about the scope of subject responsibility which would have been extremely unappealing to Grotius or even Scholastic writers. Yet Pufendorf’s acceptance of binding, enforceable laws of nature enabled him to confine these consequences to the state of war, which (unlike for Hobbes) was a state of limited duration brought on by the violation of some perfect right. Such a violation permitted a victim to engage in war for reparation and future security, with a treaty restoring peace.

However, Pufendorf was keen to reject two potential consequences of this account. First, as against Hobbes, he wanted to stress that the judgment each sovereign had in the state of nature was not unlimited. Hobbes had endorsed the notion that sovereigns could engage in war after any good-faith conclusion that another nation represented a threat. Thus, if another nation appeared
too powerful, or if it had attacked another nation, a sovereign could attack to ensure his state’s future security. Pufendorf was keen to reject this conclusion; only an injury could justify war, since the basic precept of equality demanded that some rupture occur between the parties before war could take place. However, Pufendorf was equally keen to reject the claim, from Grotius, that this sort of war could be described as punishment for the other nation’s failure to live up to its natural law obligations. While all legitimate violence sought peace and security for the future, Pufendorf drew on Hobbes’s account of punishment in *Leviathan* to argue that punishment was solely a product of legitimate sovereign authority, and thus entirely distinct from war. These claims—along with the insistence that minimal restrictions on the laws of war actually decreased the likelihood and severity of conflict over time—formed Pufendorf’s attempt to reduce conflict in the international arena.

Pufendorf was blunt in his rejection of any suggestion that there was a free-floating right of punishment of the sort envisioned by Grotius, or an equally open-ended right of violence against those who presented a potential threat to the state, instead advocating that only a victim of attack could legitimately engage in war to repair an injury:

> ...we are not to imagine that every Man, even they who live in the *Liberty of Nature*, hath a right to correct and punish with War any Person who hath done another an Injury, barely upon Pretence that common Good requires, that such as oppress the Innocent ought not to escape Punishment, and that what toucheth one ought to affect all. For otherwise, since the Party we suppose to be unjustly invaded, is not deprived of the Liberty of using equal Force to repel his Enemy, whom he never injured; the Consequence then would be, that instead of one War, the World must suffer the Miseries of two. Besides, it is, also, contrary to the natural *Equality* of Mankind, for a Man to force himself upon the World for a Judge, and Decider of Controversies. Not to say what dangerous Abuses this Liberty might be perverted to, and that any Man might make War upon any Man upon such a Pretence.  

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88 VIII.vi.14, p. 847.
As this passage implies, Pufendorf strongly rejects the Grotian claim that there is any individual right of punishment, and indeed objects to punishment of any sort in the international realm. This attempt to refashion both the Hobbesian and Grotian doctrines of permissible violence in the absence of civil authority was particularly important for Pufendorf in light of the still-vivid memories of the Thirty Years War, with its accompanying conflicts stemming from religion rather than an identifiable injury to a belligerent. Unsurprisingly, Pufendorf takes the position that the mere fact that a party has committed an injury to either his own citizens or another nation is not sufficient to grant other nations a right of war against him; instead, only the victim and those “particularly obliged to defend” him can take action. Injury is thus the essential prerequisite for war; a party who is attacked by a nation which he has not injured “is not deprived of the Liberty of using equal Force to repel his Enemy,” creating unnecessary additional conflict. Most important, however, are the “dangerous Abuses this Liberty might be perverted to, and that any Man might make War upon any Man upon such a Pretence”—hardly a distant concern in a Europe still attempting to preserve the arrangements of Westphalia.

To alter the Hobbesian and Grotian lines on permissible violence, Pufendorf opens his discussion of punishment by describing a conundrum: “How such a Power could by Compact, from particular Men, be transferr’d to the Commonwealth?” Pufendorf frames this question not in terms of punishing others in the state of nature, but instead focuses on whether an individual...
can be said to punish himself in some sense, since he views this as the central point on which Grotius and Hobbes are in agreement. Pufendorf’s response to both writers is to stress that no individual simply accepts the punishment to which they have supposedly consented by their misdeed. Punishment is by definition “an Evil inflicted against the Consent of the Party punished, and that which a Man inflicts upon himself, cannot be said to befall him against his Consent.”

Pufendorf attacks both writers by name, beginning with Hobbes. Pufendorf adopts the Hobbesian view that the original covenant to create civil society obliges each man to both refrain from defending the person about to be punished as well as to assist the sovereign in carrying out that punishment. But Pufendorf believes this fact demonstrates the falsity of the claim “that whatever the Sovereign takes away from the Subjects by Way of Punishment, is done by their Consent, because they at first consented to allow of, and confirm every Action of the Sovereign”—one way of reading Hobbes’s position on punishment. Since individuals are able to avoid punishment by complying with the law, and no one enters into the original commonwealth with the assumption that they will break the law, Pufendorf contends that such a position in untenable. But Pufendorf also rejects Hobbes’s claim that the power of punishment is the residual right of the sovereign to all things, expressed in civil society; “the Right of Punishing is different from the Right of Self-preservation: and, by the Exercise of it upon Subjects, we can never understand what a State of Nature allowed, where there is no Subjection.” It is a new and different right, not derived from the citizens but a consequence of their union, and the requirement of superiority reinforces that position. Pufendorf takes a similar tack in addressing

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92 Id. …poena sit aliquid, quod invite infligitur, quod autem quis sibi ipsi infert, accidere invito nequeat. (791)
93 VIII.iii.1, p. 761.
94 Id. …quod aliqui volunt; quae a superiori auferuntur per modum poenae, volentibus auferri, quia in superioris actiones ratas habendas jam olim consensum est. (792)
95 Id. …jus poenas sumendi esse diversae naturae a jure seipsum conservandi; cumque illud exercetur in subjectos, intelligi non posse, quomodo jam tum in statu naturali extiterit, ubi nemo alteri subjectus est. (792)
Grotius’s argument that because men know in advance the punishment for a certain action, they consent to their punishment by violating the law anyway; as with his critique of Hobbes, Pufendorf simply claims that no one ever commits a crime without attempting to conceal it.96

This leads Pufendorf to his rejection of the Grotian notion that individuals could ever hold the right of punishment, and indeed many of his positive assertions about punishment depend upon rejecting this claim. Pufendorf consistently attempts to define punishment as proceeding from a civil sovereign, and begins from the proposition that there must be no such power in individuals initially; instead, “Bodies politick, which are compounded of a Number of Men, may have a Right resulting from such a composition, which no one of the Particulars was formally possess’d of; which Right derived from the Union, is lodged in the Governors of such Bodies.”97 For Pufendorf, this is straightforwardly analogous to the power of legislation, which no single individual possessed in the state of nature.98 Pufendorf’s own definition of punishment stresses its public character: “some uneasy Evil inflicted by Authority, in a compulsive Way, upon View of antecedent Transgression.”99 Unsurprisingly, when he addresses Grotius’s argument that the law of nature leaves it unclear who holds the right of punishing, Pufendorf responds that “I cannot be persuaded, but that the Power of punishing is a Part of Sovereignty, and, consequently, that no body can properly be said to inflict Punishment upon a Man, unless he has authority over him.” While punishment is necessary for the peace of human society, “yet it does not follow, that every Man is obliged to undertake every Action that tends to advance that End.” Instead, punishment must be implemented by a superior, and Pufendorf rejects the notion that a person,

96 VIII.iii.5. p. 768.
97 Id. …ita & corpora moralia, ex pluribus hominibus Constantia, aliquod jus habere possunt, ex ipsa illa conjunctione resultans, quod formaliter penes neminem singulorum fuit; quale jus ex ejusmodi velut coalitione ortum per rectores istorum corporum exercetur. (791)
98 Id. at 760-61.
99 VIII.i.4. p. 762. …malum aliquod molestum, quod per modum coactionis & pro imperio alicui intuitu antegessi delicti imponitur. (793)
by his crime, makes himself inferior to others such that any individual can punish him; not every crime “leaves such a Blot upon a Man’s Honour and Character, that he must presently be thought no better than a Beast.”

Yet if punishment, as Pufendorf concedes, is “absolutely necessary to the Preservation of Society in the World,” this raises the natural question of why such a right does not exist for those still in the natural state, like sovereigns, who could use it to enforce claims of right. This is doubly true since Pufendorf agrees that punishment enables us to gain security against future injuries. Pufendorf’s response to this problem is to adopt and expand the Hobbesian suggestion that there is a distinction between the right of punishment and the right of war, though without the underlying claim that the two are essentially exercises of the same power under different names. From the beginning of his treatment of punishment, Pufendorf is keen to distinguish it “from those Evils a Man suffers, either by War, particular Quarrels, and Self-Defence, or by private Malice,” and Pufendorf provides a lengthy catalog of the differences between punishment and war, which each essentially rest on the presence of pre-existing civil authority: Pufendorf’s definition of punishment requires infliction by a superior, discretion in the superior to determine whether or not to inflict it, and a predetermined penalty. None of these are characteristic of war, which has no set degree of violence, no relationship of superiority, and no superior to direct the action. Pufendorf is clear that “every Evil which is inflicted upon antecedent Transgression, cannot properly be call’d Punishment, but that which was threatened before, and is inflicted after the Crime is known. And, therefore, the Evils of War, and all Acts of

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100 VIII.iii.7, p. 769. Nam falsum est, quaelibet peccata ita deformare hominis dignationem, ut ob ea patrata statim velut inter bestias sit referendas. (800)
101 Id.
102 Id. …eo ipso separamus eam ab illis malis, quae invitis in bello, pugnave, & inter reluctantiam, vel etiam per meram alterius injuriam infliguntur. (794)
103 VIII.iii.7, p. 769.
Hostility, must not be call’d Punishments, tho’ tis true, that we procure Caution against future Injuries by them.” ¹⁰⁴ To drive his overarching point home, Pufendorf cites Hobbes’s definition of punishment from *Leviathan*, and praises him for concluding that any violence meted out which does not proceed from an antecedent law is not a punishment, but an act of “hostility.” ¹⁰⁵

The practical upshot of this position is clear: there is no punishment in the state of nature, and consequently, no power of punishment between states. Pufendorf is able to further bolster his attack on Hobbes’s right to all things, and works to undermine Grotius’s claims about a subject’s consent to punishment. The concerns which marked Grotius’s account are shifted to the domestic realm, where Pufendorf largely agrees with Grotius’s prescriptions about punishment, adopting the same three ends for punishment and many of Grotius’s conclusions. However, as we have seen, this rejection of punishment did not lead Pufendorf to adopt a restrictive view of permissible conduct in warfare; Pufendorf’s theory of belligerent conduct was in fact as or more severe than that advanced by Grotius. This curious feature of Pufendorf’s account originated in his claims about what happens to the jural situation of parties to a conflict when one declares war on the other in response to an injury.

The core insight here is that since the obligations of the law of nature are mutual, as soon as a party has failed to fulfill those obligations, all bets are off.

*The Law of Nature* obligeth Men to a mutual Exercise of the Offices and Duties of *Peace*; and the Person who first violates them to my Prejudice, releases me, as far as lies in his Power, from paying any of those Offices to himself: And, in Consequence, as long as he professes himself my Enemy, he gives me a *Liberty* to use *Violence* against him in *infinitum*. ¹⁰⁶

¹⁰⁴ VIII.iii.7, p. 769.
¹⁰⁵ VIII.iii.7, p. 770.
¹⁰⁶ VIII.vi.7, p. 840. Scilicet cum exhibitio officiorum pacis ex lege naturae mutual debeat esse; qui prior illa adversus me abr uptit, me quoque quantum in se absolvit a praestandis officiis pacis: eo quedum hostem sese meum profitetur; licentiam concedit vim contra ipsum experendi in infinitum. (884)
Without this unlimited right of violence, just warriors would never be able to accomplish the goals of war, and Pufendorf is clear that such a right applies even where an enemy is not waging a campaign of extermination, “For he hath no more Right to give me a slight Wound, than one that may prove mortal.”\textsuperscript{107} In war, a just belligerent is permitted not only to recover damages for the injury which occasioned the war, but also to “further oblige him to give me Caution for the future.”\textsuperscript{108} Indeed, this unlimited power differentiates war from punishment, bolstering Pufendorf’s earlier arguments against Grotius; the need for punishment to be proportionate to crime is characteristic of “Courts of Judicature, where Punishments are always inflicted by Superiors,”\textsuperscript{109} while in war no such requirement pertains.

The result of this claim is that Hobbes’s state of nature, in which there are no obligations to an enemy, is converted into Pufendorf’s state of war. Pufendorf makes this clear in his treatment of the “Law of Humanity,” which is how Pufendorf describes the rules of moderation advanced by Grotius. While nations often prescribe rules for the conduct of soldiers in war, “this is not done because they suppose the Enemy is or may be injured, but because it is necessary that the General’s Orders should be obey’d, and that military Discipline should be strictly observ’d.”\textsuperscript{110} Similarly, there are no restrictions on the use of assassins, since it is indifferent how an enemy is killed where all rights are broken off between us.\textsuperscript{111} Pufendorf recognizes that agreements are sometimes made between belligerents about the conduct of war in order to mitigate its severity, but in general “we ought to think that the shortest Way to the Attainment of that End is most agreeable to Nature. And therefore since by Compacts, that tend only to moderate and qualify Hostilities, the War is only drawn out into greater Length; it is evident that

\begin{footnotes}
\item 107 Id. at 841.
\item 108 Id.
\item 109 Id. at 841. \ldots in tribunalis, ubi poenae a superioribus infliguntur. (884)
\item 110 VIII.vi.16, p. 847.
\item 111 VIII.vi.18, p. 848-49.
\end{footnotes}
they must be contrary to Nature.”¹¹² Similarly, the enforcement of all such agreements is difficult because the victim of the violation cannot “claim any new Right against the Person who betrayed him by it; because the State of Hostility itself already gives him as much Liberty as he desires.”¹¹³ The only reason agreements of this sort are at all advantageous is because war is frequently stirred up “to gratify their Ambition and Avarice,” and thus making “War a Sort of Trade and Profession” may reduce the injuries suffered by the populace.¹¹⁴

Of course, a conqueror may wish to refrain from exercising the full measure of his right, and the law of humanity encourages him to consider “what it may be proper for a generous Conqueror to inflict,” such that if possible a just belligerent should proportion violence to the degree necessary in punishment, so far as his “own necessary Defence and future Security will permit.”¹¹⁵ However, these rules, like Hobbes’s self-regarding laws of nature, exist in order to promote the future security of the victor: “besides, the Uncertainties and Turns of Fortune which may happen in War, ought to persuade Men to be very temperate in the Use of those Liberties, for fear an Alteration in Affairs should, as it were, make their own Weapons recoil, and return upon themselves the Usage they gave others.”¹¹⁶ In this sense the laws of humanity are much like Hobbes’s offenses against the law of nature, such as cruelty. While unenforceable by either enemies or third parties, they provide guidance on policies most likely to ensure future security, though the just belligerent always retains ultimate and unquestionable judgment about what is necessary for his victory and security. Pufendorf, like Hobbes, acknowledges that it is possible

¹¹² VIII.vii.2, p. 854. The citation is to De cive III.27.
¹¹⁴ Id.
¹¹⁵ VIII.vi.7, p. 841.
¹¹⁶ Id.
for a just belligerent to act “with greater Cruelty and Outrage than the Law of Nature will permit,” but denies that any third state can take cognizance of these offenses.\textsuperscript{117}

Pufendorf thus clearly rejected the notion that punishment properly understood was a legitimate feature of the international order, but at the same time accepted that states could engage in violence to ensure future security—one of the purposes associated with international punishment in previous accounts. The adoption of a theory of authorization quite similar to the one Hobbes propounded—even if somewhat muddled—likewise vastly widened the scope of those who would be subject to this sort of earthly chastisement, regardless of its precise terminology, once natural rights were violated. While wars of international punishment were thus ruled out on Pufendorf’s framework, the consequences of the wars Pufendorf did endorse were both quite dire and difficult to distinguish from punitive war. Pufendorf’s vision of a more peaceful international order thus rested primarily on reducing the number of potentially legitimate justifications for war, not mitigating the severity of conflict once initiated.

\textbf{IV. The Control and Persistence of Private Violence}

Pufendorf’s modification of the Hobbesian theory of sovereignty had one additional consequence. As we saw, one of the unusual features of Grotius’s theory was that Grotius continued to insist on the right of private individuals to employ their own private rights of violence—including a right of punishment— independent of state authority, whether as part of a public war or a private war. Hobbes’s approach, by contrast, provided a new justification based on contract for the renunciation of individual rights of war and the complete centralization of violence in the state. Pufendorf largely adopted Hobbes’s principles on this point, but he never

\textsuperscript{117} VIII.vi.16, p. 847.
entirely managed to break free from the Grotian argument that some residual authority to engage
in violence remained in individuals. In particular, Pufendorf struggled with this problem in
situations where the state failed to carry out its obligation to protect its citizens and vindicate
their claims to justice against foreigners, leading him to quietly adopt aspects of Grotius’s
account which preserved some scope for private violence.

However, Pufendorf had no trouble rejecting the claim that individuals could participate
in public wars absent sovereign authorization. Like Hobbes (and indeed the entire tradition of
thought outside of Grotius), Pufendorf argues that the power of war is confined to civil
governors: “the Right of War, which always attends all Men in the State of Nature, is taken away
from private Persons in Commonwealths.” Pufendorf has no patience for the suggestion that
individuals could participate in a public war on their own account:

…upon [Grotius’s] Distinction of Acts of Hostility into publick and private Acts, which
are undertaken only upon the Occasion of the publick War, it may be observ’d, that it
may be very justly question’d, whether every Thing taken in War by private Hostilities,
and by the Bravery of private Subjects, that have no Commission to warrant them,
belongeth to them who take it. For this is, also, Part of the Right of War, to appoint
what Persons are to act in a hostile Manner against the Enemy, and how far. And in
Consequence, no private Person hath Power to make Devastations in an Enemy’s
Country, or to carry off Spoil or Plunder, without Permission from his Sovereign. And
the Sovereign is to determine how far private Men, when they are permitted, are to use
that Liberty of Plunder; and whether they are to be sole Proprietors in the Booty, or only
to share a Part in it: So that all that a private Adventurer in War can pretend Right to, is

118 VIII.vi.8, p. 842. …jus belli, quod statum naturalem comitatur, singulis in civitate ademtum esse. (885). This has
led to the claim that Pufendorf’s theory represents the moment when “the states’ monopoly of levying war [in] the
theory and practice of European warfare assumed its final, modern form.” J.L. Holzgrefe, “The Origins of Modern
contributions (see Tully xxxii), but also (as we will see) overstates the degree of centralization present in Pufendorf.
119 Id. at 842-43. Nam jus belli gerendi hoc utique continent, ut proprio ex judicio bellum possit suscipi, idque
quousque visum fuerit geri, & per pacta cum hoste componi. (885)
no more than what his Sovereign will please to allow him. For to be a Soldier, and to act
offensively in an hostile Manner, a Man must be commission’d by publick Authority.
And therefore Cato us’d to say, that no Man had any Right to fight an Enemy who was
not a Soldier.\footnote{VIII.vi.21, p. 849-50. Ubi circa distinctionem actuum bellicorum in publicos, & privatos, qui occasione duntaxat belli publici suscipiuntur, observandum: non extra dubium esse, omne id, quod privatis actibus, & injusso privatorum asus in bello capitur, id capientium utique fieri. Nam & haec est pars juris belli, designare, quinam hosti nocere debeant, & quousque. Ergo privatis non liceas ex hostico agree, aut quamcunque rerum hostilium invader sine permessu summii imperii. Cujus itidem est definire, quousque privati eam praedandi licentiam debeant exferere; & tota praeda, an pars aliqua ipsis cedere debeat. Sic ut quidquid heic privatis competit, id omme ex indultu summii imperii dependeat. Scilicet ut aliquis miles sit, & actus bellico officiosos exercere queat, publice autorandus est. Inde Cato negat jus esse, qui miles non sit, pugnare cum hoste. (893)}

The space for private action in public wars has thus completely disappeared, in line with
Hobbes’s account.

However, issues arise for Pufendorf because of his claim that civil society—like all
 corporate bodies—controls the judgment of its members with respect to those matters for which
the society was instituted.\footnote{This is the difference between what Behme terms Hobbes’s “absorptive representation” and Pufendorf’s more limited personation of subjects with respect to certain purposes. Behme, \textit{Doctrine of Sovereignty}, 48-49.} In the case of civil society, Pufendorf was clear about the end:

…as for Subjects submitting their Will to the Will of the State, this must be interpreted
and restrain’d according to the true End and Design of civil Communities; and then the
whole Matter will come to this Issue: Every Subject submits his Will to the Will of the
State in all those Affairs which respect the common Interest and Safety; and in any
Business of this kind a private Member cannot complain of Injury, tho’ he should
happen to dislike the publick Proceedings.\footnote{VII.viii.2, p. 717. Subjectio autem voluntatis civium civitatis facts ex sine hujus interpretanda & limitanda est. Sic ut eo demum res redeat: singuli cives suam voluntatem voluntati civitatis subjecerunt circa negotia, quae ad conservationem civitatis faciunt; in quibus si factum civitatis cive displiceat, injuria huic non sit. (756)}

Indeed, a society is “obliged to defend” its own subjects, since “the End Men at first propos’d to
themselves, by giving up their natural Liberty, and submitting voluntarily to a \textit{Civil State}, was
the Enjoyment of such a Defence.”\footnote{VIII.vi.14, p. 846. …debemus defendere….quia ut tali defensione fruerentur, imperia liberi homines ulitro constituerunt, aut subierunt. (889)} However, this duty is qualified and holds only “when it
will be no great Inconvenience or Disadvantage to the Whole, or the Majority of the other
Subjects, because the \textit{Government} is obliged to have a greater Concern for the Whole than for a
This raises the question of how to make up the gap between the commonwealth’s capacity to vindicate the injuries of its subjects and the subject’s right to vindication, a particularly acute problem on the high seas.

Grotius had insisted that individuals retained a right of violence under these circumstances, and Pufendorf’s stronger theory of authorization could lead to the conclusion that individuals had entirely lost that right. Surprisingly, however, Pufendorf retained the possibility of individual violence in the international realm. When Pufendorf addressed these questions in detail in Book VIII, he somewhat vague about the rights held by subjects when their rights are violated outside the jurisdiction of civil society. While subjects can regain their right of self-defense against foreigners when they are outside the territory of any state, Pufendorf also suggests that a subject can, in the event his state refuses to assist him in recovering property lost to a foreigner, take matters into his own hands. That appears to be the practical upshot of one of Pufendorf’s more confusing arguments:

And therefore, if a Man be set upon in the open Seas, he need not give himself the Trouble to use all his force; but only just so much as will resist present Danger, because, when his Enemy comes back to his own Country, he may enter an Action against him there. But if a Man be assaulted by a Subject used to despise and defy the Authority of the Magistrate, or the Magistrate himself openly refuse to do Justice, he must right and defend himself as he can, whenever he goes out of the Dominions of his own Commonwealth. But if the Magistrate should excuse himself, by pleading the Iniquity of the Times, or the bad State of the Commonwealth, and desireth either that the Prosecution of the Cause should be deferred to some other Time, or that the Neglect of Justice should be thought pardonable in the present Unhappiness of the Commonwealth; every sensible and good Man ought to acquiesce in, and be satisfied with the Answer.

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124 Id. Quippe cum istorum officium magis circia totum, quam circa partem versetur, & quo pars est major, eo propius ad totum accedit. (889)
125 Id. at 843.
126 Id. Unde si quis in Oceano libero invadatur, non semper neecessum habet vim propriam ultra depulsonem periculi expromere; cum invasori, ubi ad suos iterum adpulerit, actui in sua civitate intentarari queat. Sed & defensionem suo arbitrio instituere quis potest, si judicis autortatem cives neglexerint, aut judex aperte justitiam administrare detrectet; praeertim si extra territorium civitatis excedat. Quod si tamen judex tempora reip. praetendat, & ut persecutionem meum injuriarum differam, aut reip. condonem hortetur; boni civis est, ipsius voluntati acquiescere. (885) By comparison, the Oldfather translation renders this passage as follows: “Therefore, if a man is attacked upon...
Pufendorf seems to veer back and forth between describing attack by a fellow-subject and attack by a foreigner without clarifying which he is referring to. The final two sentences appear to apply with equal weight to either scenario. This is bolstered by a closer examination of the phrase *praesertim si extra territorium civitatis excedat*, which Kennett renders as “whenever he goes out of the Dominions of his own Commonwealth”; when read as “especially if he goes beyond the territory of his state,” it becomes apparent that a right of self-help in response to an open refusal of justice or in the face of enemies who routinely ignore their sovereign (whether mine or a foreign ruler) returns regardless of the source of the offense. Further, while a good citizen (Kennett translates *civis* as “Man”) ought to acquiesce to the government’s request to postpone his satisfaction, the state evidently cannot compel the citizen to do so.\(^{127}\) The injured party is entitled to stand on his rights and execute them himself when he cannot obtain justice from a magistrate or the support of his own state.

This tension in Pufendorf’s theory is visible in other areas where Pufendorf endorses private violence. For example, while actions taken against pirates are acts of war (not punishment), Pufendorf is clear that they “are common Enemies, and every Man may draw his sword against them,”\(^{128}\) and is perfectly willing to countenance private violence against them. He endorses as “good Advice” Grotius’s proposal that ships should “procure Commissions for themselves from publick Authority to take all Pirates, wherever it be their Fortune to come up

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\(^{127}\) The notion of duty which appears in both the Oldfather and (to a lesser extent) in the Kennett translations appears to have no warrant in the text. A more neutral rendering of *boni civis est, ipsius voluntati adquiescere* would read, “it is noble of a citizen, to acquiesce to the will of [the judge].”

\(^{128}\) VIII.iii.13, p. 774. …si quid perpetratur in illis locis, atque inter illas personas, quae certis judiciis non subsunt, puta in piratas; id ad jus bellii pertinere, quod a potestate poenas exigendi diversum est. In piratas enim ac praedones, cum omnium hostes sint, quilibet quoque homo miles est. (807)
with them, that so, when they are obliged to it, they may engage them, not as by their own, but
upon the publick Authority." However, there is no suggestion that this authorization is
mandatory, just as Grotius contended that it was not. Similarly, we have already seen that
Pufendorf adopted Grotius’s account of reprisal effectively wholesale. But Pufendorf left
unedited Grotius’s claim that there is no requirement, under either natural law or the “voluntary”
law of nations which Grotius endorses, of state authorization to engage in reprisal.

V. Conclusion

Pufendorf’s approach to the international order, while rejecting “punishment” as a
justification for war, left ample room for violence justified based on the need to preserve future
security. In this respect, as in many of the features of his thought relative to the international
order, Pufendorf took on Hobbes’s position, expanding on the claim that punishment was strictly
a feature of civil society, regardless of its overarching purpose. Pufendorf’s efforts to tame
punishment thus look relatively empty to modern eyes; the collective body of the people still
shares responsibility for the sovereign’s unjust acts, and thus all are subject to violent execution
of the just warrior’s rights if it conduces to the ultimate restoration of peace and future security.
The adoption of a Hobbesian theory of authorization to explain the transformation from equal
individuals into a relationship of subordination created the possibility of collective liability, even
if it did not extend to the consciences of the subjects. This left no room for the categorical
protection of civilians; while states could have tacit agreements to limit their warfare, Pufendorf
stressed that these were not binding and displayed a great deal of skepticism about their
legitimacy and their origins, which seemed to encourage war rather than discourage it.

129 Id. …consultius esse navigaturos instrui mandatis a publica potestate ad perseverandos piratas, si quos in mari
repererint: ut data occasione uti possint, non quasi suopte ausu, sed ut publice jussi. (807)
However, Pufendorf’s overall effort to supplement a severe outlook on legitimate warfare with a set of restraints on when warfare could be initiated was ultimately rejected by succeeding thinkers on international affairs, and no major writer in the natural law tradition accepted Pufendorf’s claim that punishment was never a justification for war. These rejections took two tacks. One strand, represented by John Locke, adopted many shared premises with Pufendorf—the baseline claim that natural law was the exclusive foundation of international relations, the account of authorization and subject responsibility, and the notion of the state of war as one in which it was impossible to injure an enemy—and grafted onto that account a Grotian theory of punishment, including the claim that any violator of the law of nature was amenable to punishment by any other person. Locke’s thoughts on sovereignty and international affairs drew him quite close to the arguments advanced by Grotius in *De Indis*, in which the state’s right of punishment is a direct derivation from the rights originally held by individuals in the natural state. From Hobbes and Pufendorf he also borrowed an account of subject authorization which he used to rule out the private exercise of violence in the international realm. Yet unlike those writers, Locke attempted to integrate this theory of authorization with Grotian limitations on subject responsibility, aided by his unique theory of property.

Another strand of thought, almost concurrent with Locke, borrowed only Pufendorf’s tentative willingness to recognize the persistence of the people as a unified entity after the institution of civil society. The notion of a double contract, as well as the idea that the central feature of the contractual procedure was the surrender of private judgment, was thus critical to writers like Christian Wolff and Emer de Vattel. However, their conception of natural law borrowed heavily from Leibniz, and as a result both writers expressed overt hostility toward Pufendorf’s views on natural law. As we will see, the new theory of natural law both these
writers propounded, while allowing for a private and state right of punishment, stressed its
Grotian roots on the way to severely restricting the permissible conduct of belligerents in war.
Paradoxically, their acceptance of Grotian premises ultimately led to the elimination of
punishment and, along with it, the intellectual foundation for strong civilian protections, but they
continued to look back to Pufendorf for an account of the social contract—unavailable in Grotius
or Hobbes—which constituted the people as a rights-bearing entity with continuing importance.
Lockean Authorization and the International Order

John Locke is generally viewed as an unlikely candidate for inclusion in the canon of thinkers on international affairs. None of his major works—and in particular the Two Treatises—deal directly with international relations, and his references to the international order in the Two Treatises are not systematic. Two relatively small pockets of commentary have developed around the implications of Locke’s thought for international affairs. One such enclave consists of those who analyze the implications of Locke’s political thought for colonialism, with a particular focus on his theory of property and the acquisition of wasteland.\(^1\) A second batch of commentary, largely following the influential interpretation of Leo Strauss, has strenuously argued for Locke’s similarity to Hobbes, advocating an international order effectively devoid of law and implicitly reliant on the reason of state doctrine.\(^2\) However, overarching treatments of Locke’s approach to the international order are extremely rare.\(^3\)

However, this chapter joins some very recent work in suggesting that international affairs and the law of nations were central concerns for Locke in crafting his theory in the Two

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Treatises. However, instead of focusing rather narrowly on the issue of intervention, as these recent accounts have,⁴ the important feature of Locke’s account of the international order is that it addressed precisely the questions which we have seen occupying previous thinkers on the international realm. In particular, Locke was concerned with the question of international punishment, which is part of what has led to the focus on the implications of his views for intervention in modern scholarship. However, Locke’s engagement with social contract theory and the question of authorization led him to address critical questions about private possession of the power of punishment and the extent of punishment which had important analogies in earlier writers. Surprisingly, despite Locke’s well-known engagement with these thinkers, little effort has been made to connect Locke’s explicit commentaries on international affairs—especially his account of the rights of conquest—to his predecessors in the social contract tradition.⁵ The discussion of Pufendorf will be particularly important, since there is evidence that Locke was first engaging with Pufendorf’s works at approximately the time he drafted the Two Treatises, with a particular focus on the colonial implications of Pufendorf’s work.⁶

The striking feature of Locke’s account of punishment in the international realm is that it attempts to accommodate punishment in a very different way from later accounts of the international order, and in this respect Locke’s theory represents a road not taken in political thought. Every significant natural law thinker on the international realm after Pufendorf accepted

⁵ Cox discusses Locke’s relationship to Hobbes, Hooker, and Grotius, but not Pufendorf. However, Cox couches his discussion of these thinkers as evidence of his conclusion that Locke follows Hobbes’s view of the international order, and as will be made clear in this chapter, that view is untenable in significant respects. See Cox, War and Peace, 139-147.
⁶ As Richard Tuck has pointed out, Locke acquired his copies of Pufendorf’s texts in 1681. While controversy continues over the order in which the First Treatise and Second Treatise were drafted, and the precise dating of their composition, 1681 is squarely in the period when Locke is believed to have been working on at least part of the text. Tuck, War and Peace, 168.
that punishment was a feature of the international legal order, and on the questions that right
gave rise to, two competing strands developed, both plausibly claiming descent from Grotius.
The first of these was Locke’s theory, which looks odd to modern eyes precisely because it is
virtually the only representative of a current of Grotian thought which sought to maintain a
strong account of private punishment even after the institution of civil society, largely in service
of Locke’s arguments about rebellion. The somewhat unusual character of Locke’s thought on
this question has partially masked the quite significant importance of the issues which bedeviled
Grotius, Hobbes, and Pufendorf—conquest, the acquisition of property in war, and collective
punishment—to Locke’s theory, which was forced to engage with these thorny problems in order
to vindicate his unique conception of jurisdiction and support his claims about legitimate
resistance.

While Locke adopted an account of authorization which shared some formal features
with Hobbes and Pufendorf, and used that account (contra Grotius) to explain why the right of
punishment in the international arena is held by the state after the institution of civil society,
Locke ultimately took a largely Grotian approach to these issues. Individuals held a right of
punishment in the state of nature, and that right passed to states in the initial contract. While
individuals had given up their right of punishment, it could be delegated back to them by the
state, a critical element of English colonial policy with which Locke was intimately familiar.
Locke also never took the position advanced by Hobbes that the sovereign was sole judge of
violations of the law of nature; individuals retained an immense amount of private judgment,
akin to Grotius. Further, Locke adopted Grotius’s restrictions on the scope of punishment,
attempting to reinstate the requirement of moral responsibility that Grotius advanced in De jure
belli without the harsh permissions of the law of nations which Grotius likewise endorsed. Locke
thus advocated extremely harsh consequences for those who have violated the law of nature and engaged in an unjust war. However, this was mitigated to some degree by Locke’s unusual conception of jurisdiction, which viewed governmental power as reaching individuals through their property, and Locke resorted to the Grotian language about moral responsibility in order to shield that property from foreign acquisition and preserve the claim that consent was the only legitimate origin of government.

I. **Lockean Natural Law and Natural Punishment**

Locke, like Grotius and Pufendorf, clearly did not view the international realm as lawless or governed only by the dictates of conscience; indeed, as we will see, every thinker on the international realm we will examine, with the exception of Hobbes, concluded that some sort of enforceable natural law remained central to the international realm. Unsurprisingly, Locke’s account of natural law looked remarkably like that of Grotius and Pufendorf; the basic requirements of self-defense and reparation remained the fundamental ordering principles of the natural realm. Like his fellow natural law theorists, Locke identified the international sphere as comparable to the state of nature. The state of nature is for all men “a *State of perfect Freedom* to order their Actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature.”\(^7\) Later, Locke explicitly draws the connection: “since all *Princes* and Rulers of *Independent* Governments all through the World, are in a State of Nature, ‘tis plain the World never was, nor ever will be, without Numbers of Men in that State.”\(^8\) This condition is one of equality, with no preordained superiority, in which “all the Power and Jurisdiction is

\(^7\) II.ii.4, p. 269. All citations to the *Two Treatises* are from the Peter Laslett edition, and are cited by book, chapter, and paragraph number. John Locke, *Two Treatises of Government*, ed. Peter Laslett (New York: Cambridge University Press, 2005).

\(^8\) II.ii.14, p. 276.
The “jurisdiction” Locke speaks of refers to the prescriptive power of the law of nature, and the basic proposition of the law of nature is “that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.” This rule is justified on two grounds; first, because each individual is the product of God’s creation, and thus cannot be legitimately killed, and second, because the shared faculties of man and the community of nature demonstrate that “there cannot be supposed any such Subordination among us, that may Authorize us to destroy one another, as if we were made for one another’s uses, as the inferior ranks of Creatures are for ours.”

It is clear that this natural state is governed by a framework of perfect rights and duties comparable to those advanced by Grotius and Pufendorf, though Locke never uses this vocabulary. The corollaries to the basic rule of non-interference in the law of nature are a duty of self-preservation, which rules out suicide, and a prohibition on the use of violence against other men or their goods “unless it be to do Justice to an Offender” who has violated our safety or possessions. While Locke does not specifically address the natural law status of treaties and agreements between nations—in part because he views property as a natural, not consensual, institution—he does imply that such agreements give rise to perfect rights. Contracts in general are binding in the state of nature; bargains “between a Swiss and an Indian, in the Woods of America, are binding to them, though they are perfectly in a State of Nature, in reference to one another. For Truth and keeping of Faith belongs to Men, as Men, and not as Members of Society.” In addition, one of Locke’s only references to treaties emphasized the legitimacy of bargains between nations in securing international property: “the Leagues that have been made

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9 Id.
10 II.i.7, p. 271.
11 Id.
12 Id.
13 Id. at 277.
between several States and Kingdoms, either expressly or tacitly disowning all Claim and Right
to the Land in the others Possession, have, by common Consent, given up their Pretences to their
natural common Right, which originally they had to those Countries, and so have, by positive
agreement, settled a Property amongst themselves, in distinct Parts and parcels of the Earth.”
Presumably the violation of this property would constitute the violation of a perfect right, just
like an injury to property acquired by the natural means of labor acquisition.

A violation of the law of nature famously gives rise to Locke’s “strange Doctrine” of
universal punishment. This constitutes the other face of Locke’s natural “jurisdiction”:

And that all Men may be restrained from invading others Rights, and from doing hurt to
one another, and the Law of Nature be observed, which willeth the Peace and
Preservation of all Mankind, the Execution of the Law of Nature is in that State, put
into every Mans hands, whereby every one has a right to punish the transgressors of that
Law to such a Degree, as may hinder its Violation. For the Law of Nature would, as all
other Laws that concern Men in this World, be in vain, if there were no body in the
State of Nature, had a Power to Execute that Law, and thereby preserve the innocent
and restrain offenders, and if any one in the State of Nature may punish another, for any
evil he has done, every one may do so.

Locke thus embraced a fully Grotian position on punishment in the natural state, though in much
briefer form. While in the natural state there is no superiority over other men, Locke adopts the

14 II.v.45, p. 299. Armitage takes this, along with a passage from Locke’s early Essays on the Law of Nature, as
evidence that Locke “would never have agreed with Hobbes that ‘the Law of Nations, and the Law of Nature, is the
same thing,’” largely because this “left more room...for the continuing operation of the law of nature after civil
societies had been instituted.” Armitage, “Locke’s International Thought,” 80-81. However, as we saw in the case of
Pufendorf, it was entirely possible to maintain the view that the law of nature and the law of nations were identical
while still advocating that the states of war and peace were distinguishable. On Pufendorf’s account, consensual
laws limiting conflict in war were opposed to the law of nature, and as we will see, Locke held many of the same
principles that led Pufendorf to that conclusion. Similarly, Pufendorf argued that agreements held in the state of
nature not because they were “law,” but because the underlying principle of fidelity to agreements was a part of the
natural law, a position likewise accommodated by Locke’s theory—as in the claim that good faith belongs to men
“as Men.”

15 II.ii.7, p. 271-72. On Locke’s derivation of the right to punish in the state of nature, see Daniel M. Farrell,
position that a transgression of the law of nature provides the only non-consensual way by which
“one Man comes by a Power over another.” 16

This power is shaped by Locke’s adaptation of Pufendorf’s language about the severance
of obligations to his new claims about punishment. Locke echoes Pufendorf in arguing that by
violating the natural law, “the Offender declares himself to live by another Rule, than that of
reason and common Equity, which is that measure God has set to the actions of Men, for their
mutual security: and so he becomes dangerous to Mankind, the tye, which is to secure them from
injury and violence, being slighted and broken by him.” 17 Locke frequently reiterates this
rationale; he later stresses that an individual who commits murder has “declared War against all
Mankind, and therefore may be destroyed as a Lyon or Tyger, one of those wild Savage
Beasts.” 18 Structurally, Locke’s conception of the state of nature and state of war is thus quite
similar to Pufendorf. The state of nature is the state of “Men living together according to reason,
without a common Superior on Earth, with Authority to judge between them,” while the state of
war is instituted by “force, or a declared design of force upon the Person of another, where there
is no common Superior on Earth to appeal to for relief.” 19 Breaking the ties of reason which bind
men thus institutes the state of war, as this places the enemy on the same level as a “Wolf or a
Lyon; because such Men are not under the ties of the Common Law of Reason, have no other

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16 II.ii.8, p. 272.
17 II.ii.8, p. 272.
18 Id. This bears an unclear relationship to Locke’s simultaneous claim that punishment is limited to a proportionate
amount for each offense, a problem noted by Jeremy Waldron, God, Locke, and Equality (New York: Cambridge
University Press, 2002), 143-44. This problem could be resolved by assuming that Locke holds an effectively
identical position to Pufendorf: that the obligations to limit violence and punishment apply only in conscience, not in
any enforceable manner, with respect to the victim. However, presumably over-harsh punishment would give rise to
a right of war in other parties, who could see it as a violation of the law of nature. However, for the purposes of
Locke’s account of war between nations, which involves the most serious crimes (murder, etc.), the severance
rationale takes on particular importance.
19 II.iii.19, p. 280.
Rule, but that of Force and Violence, and so may be treated as Beasts of Prey, those dangerous and noxious Creatures, that will be sure to destroy him, whenever he falls into their Power.”\(^{20}\)

This severance of obligations, despite Locke’s claim that punishment must be proportionate to the crime, grants a tremendous amount of license to the victim. Locke defines war as “a State of Enmity and Destruction; And therefore declaring by Word or Action, not a passionate and hasty, but a sedate settled Design, upon another Mans Life, *puts him in a State of War* with him against whom he has declared such an Intention.”\(^{21}\) Locke’s description of war is thus not overtly legal or focused on the status of the parties, but instead (like Grotius’s) rooted in the fact of violent contest. As a result, any attempt “to get another Man into his Absolute Power” results in a state of war, “It being to be understood as a Declaration of a Design upon his Life.”\(^{22}\) Locke repeats his insistence that even relatively minor violations of the natural law can be grounds for war.\(^{23}\) This principle “makes it Lawful for a Man to *kill a Thief*, who has not in the least hurt him, nor declared any design upon his Life, any farther then by the use of Force, so as to get him in his Power, as to take away his Money, or what he pleases from him”; such an individual may justly be regarded as planning to “take away every thing else.”\(^{24}\)

This rationale, which heightens the import of violations of the law of nature, has an echo in Locke’s reappraisal of threat perception. Significantly, where Pufendorf had concluded that this violation severed the obligations of the natural law only with respect to the victim, Locke argues that a violation of the law of nature is the abandonment of reason toward every other member of the human community. When an individual commits a violation of the law of nature:

\(^{20}\) II.iii.16, p. 279.  
\(^{21}\) II.iii.16, p. 278.  
\(^{22}\) II.iii.17, p. 279.  
\(^{23}\) Id.  
\(^{24}\) II.iii.18, p. 279-80.
Which being a trespass against the whole Species, and the Peace and Safety of it, provided for by the Law of Nature, every man upon this score, by the Right he hath to preserve Mankind in general, may restrain, or where it is necessary, destroy things noxious to them, and so may bring such evil on any one, who hath transgressed that Law, as may make him repent the doing of it, and thereby deter him, and by his Example others, from doing the like mischief. And in this case, and upon this ground, every Man hath a Right to punish the Offender, and be Executioner of the Law of Nature. \(^{25}\)

While Locke concedes that this seems “a very strange Doctrine,” he contends that only it can explain “by what Right any Prince or State can put to death, or punish an Alien, for any Crime he commits in their Country.” \(^{26}\) The laws of the state cannot bind a stranger, because he is not part of the community that enacts the laws: “Those who have the Supream Power of making Laws in England, France or Holland, are to an Indian, but like the rest of the World, Men without Authority.” \(^{27}\) The only remaining ground for punishment of aliens is the law of nature, which provides the same power to states which “every Man naturally may have over another.” \(^{28}\)

Locke makes one other significant shift in this account of the state of war. While Pufendorf had vehemently denied that the legitimate violence which stemmed from a violation of the law of nature could be construed as punishment, instead preferring to categorize it under the term “war,” Locke takes precisely the opposite tack. Any legitimate use of violence, on Locke’s account, is punishment of some sort: all harm to another committed “lawfully” is “that we call punishment.” \(^{29}\) Locke identifies two purposes for punishment: “for Reparation and Restraint.” \(^{30}\) Locke stresses that these two functions are separate, constituting “two distinct Rights, the one of Punishing the Crime for restraint, and preventing the like Offence, which right of punishing is in

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\(^{25}\) II.i.8, p. 272.  
\(^{26}\) II.i.9, p. 272-73.  
\(^{27}\) Id. at 273.  
\(^{28}\) Id.  
\(^{29}\) II.i.8, p. 272.  
\(^{30}\) II.i.8, p. 272.
every body; the other of taking *reparation*, which belongs only to the injured party.”31 Yet Locke usually does not distinguish between the two, instead simply referring to the general power of punishment.

These two forms of punishment can be viewed as a general right of punishment and a special right of punishment. The foundation of the general right of punishment is articulated in the passage quoted above—the right each individual has to preserve mankind in general—and looks to the purpose of “Restraint.” An injured individual, however, acquires “a particular Right to seek *Reparation* from him that has done it,”32 on top of his pre-existing general right of punishment. This right grants the individual “this Power of appropriating to himself, the Goods or Service of the Offender, by *Right of Self-preservation*.”33 Further, “any other Person who finds it just, may also joyn with him that is injur’d, and assist him in recovering from the Offender, so much as may make satisfaction for the harm he has suffer’d.”34 Locke is not here clear why the right of self-preservation is the source of the individual’s special right of punishment. Instead, he reiterates his argument for the general right of punishment, emphasizing that it stems from every man’s right “of Preserving all Mankind.”35 To illustrate, Locke applies the principle to the case of murder; every man can kill a murderer, “both to deter others from doing the like Injury, which no Reparation can compensate, by the Example of the punishment that attends it from every body, and also to secure Men from the attempts of a Criminal.”36

31 I.II.11, p. 273.
32 I.II.10, p. 273.
33 I.II.11, p. 274.
34 I.II.11, p. 273.
35 Id.
Locke’s theory of punishment thus reflected a thoroughly Grotian approach, allowing punishment of any violation of the law of nature by any individual or state, even if they had not been injured by the event. Locke’s one borrowing from Pufendorf on this point—the claim that a violation of the law of nature severs the obligations individuals and states have towards each other until the state of peace is restored between them—thus strikes directly at the oddity present in Pufendorf’s account. While Pufendorf had insisted that the severance of obligations took place only toward the victim, and that natural equality demanded that other parties refrain from judgment, Locke took the severance of obligations to be general, reducing the violator to a beast in the eyes of every other party. This enabled Locke to restore the Grotian theory of punishment with even broader consequences, insofar as there could be no remaining enforceable duties toward the enemy.

II. The State as the “Body” in International Affairs

As with all the previous thinkers we have addressed, Locke’s theory of punishment gave rise to questions about the translation of that right from the individual level to the sovereign, and what consequences attended that shift. This was particularly important given that Locke had largely endorsed a Grotian theory of punishment; as we have seen, Grotius paired that theory with a set of ambiguous premises about sovereignty which enabled him to argue for a variety of residual private rights. Indeed, Locke’s initial presentation of the right of punishment appeared to leave open some space for private action; in describing punishment, Locke had noted that “the Magistrate...hath the common right of punishing put into his hands,” and consequently can pardon offenses, but he “cannot remit the satisfaction due to any private Man, for the damage he has received. That, he who has suffered the damage has a Right to demand in his own name, and
he alone can remit.” This passage immediately precedes Locke’s claim that an injured individual has a right of reparation by virtue of his right of self-preservation, and could be taken to leave open precisely the sort of private violence in response to injury which Grotius had so painstakingly justified. This sort of conclusion might be all the more plausible given Locke’s notorious remarks in the First Treatise appearing to endorse the actions of a “Planter in the West Indies” fighting “to seek Reparation upon any Injury received from” local Indians.

However, Locke ultimately adopted an account of authorization which shared an affinity with Hobbes and Pufendorf, ruling out the exercise of private violence—and thus the right of punishment—in the international realm. The surrender of the right of punishment is central to Locke’s discussion of the initial creation of the commonwealth. While man in the natural state has “a Power, not only to preserve his Property, that is, his Life, Liberty, and Estate, against the Injuries and Attempts of other Men; but to judge of, and punish the breaches of that Law in others,” a political society can only achieve its end—the protection of property—if it has the power to “punish the Offenses of all those of that Society; there, and there only, is Political Society, where every one of the Members hath quitted this natural Power, resign’d it up into the hands of the Community in all cases that exclude him not from appealing for Protection to the Law established by it.” This requires that “all private judgement of every particular Member being excluded, the Community comes to be Umpire, by settled standing Rules, indifferent, and the same to all Parties,” and the community gains the authority to mediate disputes and punish

37 II.ii.11, p. 273-74.
38 I.xi.130, p. 237.
39 II.vii.87, p. 324.
offenses.\textsuperscript{40} The surrender of the power of punishment and the presence of a common judge are thus the key determinants of whether or not individuals are within the same civil society.

While Locke describes this initial transfer in strictly domestic terms, this authority extends not only to crimes committed within civil society, but also to harms inflicted on citizens by foreigners. A society receives from its members not only the power of setting down punishments for crimes “committed amongst the Members of that Society, (which is the \textit{power of making Laws}),” but also “the power to punish any Injury done unto any of its Members, by any one that is not of it, (which is the \textit{power of War and Peace};) and all this for the preservation of the property of all the Members of that Society, so far as is possible.”\textsuperscript{41} The subject has, by his initial consent, authorized the commonwealth’s power in these respects, and can be called upon to enforce them, since “the Judgments of the Commonwealth…indeed are his own Judgments, they being made by himself, or his Representative.”\textsuperscript{42} Throughout this discussion, Locke uses the term “punish,” without differentiating between the general and special rights, but his discussion at the end of these sections implies that Locke is thinking of both rights of punishment. The legislative and executive powers, Locke states, include the authority “to determin, by occasional Judgments founded on the present Circumstances of the Fact, how far Injuries from without are to be vindicated,” with no distinction between restraint and reparation.\textsuperscript{43} This judgment is confirmed by Locke’s summary of the character of civil society, which does not distinguish between the two forms of punishment in describing civil society as one in which “any number of Men are so united into one Society, as to quit every one his Executive Power of the Law of

\textsuperscript{40} Id.
\textsuperscript{41} II.vii.88, p. 324.
\textsuperscript{42} II.vii.88, p. 325.
\textsuperscript{43} II.vii.88, p. 325.
Nature, and to resign it to the publick.” 44 By the act of entering civil society, every citizen “authorizes the Society, or which is all one, the Legislative thereof to make Laws for him as the publick good of the Society shall require,” and creates a commonwealth “with Authority to determine all the Controversies, and redress the Injuries, that may happen to any Member of the Commonwealth.” 45

Locke’s account of the original authorization of civil society stresses the metaphor of the body. The sole possible origin of civil society is consent, and the initial group of citizens “have, by the consent of every individual, made a Community, they have thereby made that Community one Body, with a Power to Act as one Body, which is only by the will and determination of the majority.” 46 The bodily image is likewise used to explain the significance of a majority requirement: “it is necessary the Body should move that way whither the greater force carries it, which is the consent of the majority; or else it is impossible it should act or continue one Body, one Community, which the consent of every individual that united into it, agreed that it should; and so every one is bound by that consent to be concluded by the majority.” 47 This majority rule requirement leads to the conclusion that individuals “must be understood to give up all the power, necessary to the ends for which they unite into Society, to the majority of the Community.” 48

As Locke notes, the chief objective of the legislative power—the supreme power in any commonwealth—“is the preservation of the Society, and (as far as will consist with the publick

44 II.vii.89, p. 325.
45 Id.
46 II.viii.96, p. 331.
47 Id. at 332.
48 II.viii.99, p. 333.
good) of every person in it.”\textsuperscript{49} The legislative power sits alongside what he terms the “Federative” power:

There is another Power in every Commonwealth, which one may call \textit{natural}, because it is that which answers to the Power every Man naturally had before he entred into Society. For though in a Commonwealth the Members of it are distinct Persons still in reference to one another, and as such are governed by the Laws of the Society; yet in reference to the rest of Mankind, they make one Body, which is, as every Member of it before was, still in the State of Nature with the rest of Mankind. Hence it is, that the Controversies that happen between any Man of the Society with those that are out of it, are managed by the publick; and an injury done to a Member of their Body, engages the whole in the reparation of it. So that under this Consideration, the whole Community is one Body in the State of Nature, in respect of all other States or Persons out of its Community.\textsuperscript{50}

This paragraph contains the kernel of Locke’s thought on the international consequences of the initial compact. From the perspective of foreigners, a given society is monolithic. The individuals who comprise the society have no international personality of their own; by virtue of their relationship with their sovereign, they cannot engage in any sort of reparation or punishment without the sovereign’s authority, and it is up to “the publick”—i.e. the sovereign—to manage any “Controversies” that arise between members of the society and foreigners. The language of the “body” returns in Locke’s imagery, emphasizing the united character of the commonwealth in its foreign relations. For Locke, the federative power encompasses “the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth,”\textsuperscript{51} thus sharply limiting the individual’s sphere of action upon entering civil society. Further, the account of the federative power underscores the extent to which Locke’s theory assumes an equivalence between the powers of the individual in

\textsuperscript{49} II.xi.134, p. 356.
\textsuperscript{50} II.xii.145, p. 365.
\textsuperscript{51} II.xii.146, p. 365.
the state of nature and the state’s power in the international arena; the federative power is a
“natural” one, a pure reflection of the individual’s prior authority.\textsuperscript{52}

Of course, a sovereign might be obligated to vindicate the claims the individual holds as a result of harms suffered, which would normally give rise to the special right of punishment. However, Locke is explicit that there is no such obligation. The federative power by definition “is much less capable to be directed by antecedent, standing, positive Laws, than the Executive.”\textsuperscript{54} Here, Locke frankly admits the predominance of realist concerns in the international arena; “what is to be done in reference to Foreigners, depending much upon their actions, and the variation of designs and interests, must be left in great part to the Prudence of those who have this Power committed to them, to be managed by the best of their Skill, for the advantage of the Commonwealth.”\textsuperscript{53} The federative power, for Locke, constitutes part of the prerogative power, “being nothing, but a Power in the hands of the Prince to provide for the publick good, in such Cases, which depending upon unforeseen and uncertain Occurrences, certain and unalterable Laws could not safely direct.”\textsuperscript{54} Prerogative power often frankly looks at the good of all over the good of individuals; Locke gives the example of pulling down one man’s house to prevent the spread of a fire, as well as the pardon power: “For the end of Government being the preservation of all, as much as may be, even the guilty are to be spared, where it can prove no prejudice to the innocent.”\textsuperscript{55} Recalling Locke’s definition of war as a state of hostility, not dependent upon the

\textsuperscript{52} The only commentator to discuss the significance of this passage is Cox, War and Peace, 124-26, who argues that the most important feature of “Locke’s concept of political society as a sovereign body, possessed of a natural right to conduct foreign relations, is the extent to which the prestige and power of the entire society thereby become involved, on principle, in matters which, under a more traditional view, were generally confined to the attention of courts and diplomats.” 125. It is unclear what “traditional view” Cox refers to; as we have seen, Grotius and Pufendorf recognized that an injury to a subject could engage the society as a whole in its reparation, up to and including a right of war, and they were hardly unusual in doing so.

\textsuperscript{53} II.xii.147, p. 366.

\textsuperscript{54} II.xiii.158, p. 373.

\textsuperscript{55} II.xiv.159, p. 375.
character of the parties, it is clear that any violence by the individual beyond immediate self-defense—whether in execution of the general or special right of punishment, or against a foreigner or fellow citizen—is not permitted. Contrary to Grotius and even the limited concessions of Pufendorf, there is no discussion of recovering this right in places outside of jurisdiction so long as one is a member of civil society.

However, while the commonwealth has indisputable judgment about whether and when to punish injuries received by its citizens, the individuals who bear the brunt of those injuries perpetually retain their rights if the state does not act upon them. In discussing the rights of conquered peoples, Locke illustrates his point with a parable of civil society, hearkening back to his earlier discussion of the commonwealth’s ability to decide whether and how to vindicate injuries to citizens.

What is my Remedy against a Robber, that so broke into my House? Appeal to the Law for Justice. But perhaps Justice is denied, or I am crippled and cannot stir, robbed and have not the means to do it. If God has taken away all means of seeking remedy, there is nothing left but patience. But my Son, when able, may seek the Relief of the Law, which I am denied: He or his Son may renew his Appeal, till he recover his Right.\(^{56}\)

In civil society, denial of justice to the individual does not result in the recovery of a right of violence; instead, an individual’s claim persists and is inheritable. This helps to make sense of Locke’s claim that the magistrate “cannot remit the satisfaction due to any private Man, for the damage he has received.”\(^{57}\) There is only “patience,” and a perpetual right to reparation, but one which is entirely dependent on the magistrate for its satisfaction in the international arena.

Locke’s stress on the state’s use of the powers of its citizens only for the public good has led to the claim that Locke’s theory contains an “asymmetry” with respect to the powers of

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\(^{56}\) Id.

\(^{57}\) II.ii.11, p. 273-74. See also the discussion of this passage, linking it to the more general personal right of resistance to the government, in A. John Simmons, *On the Edge of Anarchy* (Princeton: Princeton University Press, 1993), 176-77.
individuals and states in the international arena. On this account, advanced most forcefully by Alex Tuckness, Locke rules out any “altruistic” uses of force by the state, since the creation of civil society entails the use of force only for the protection of civil society and its members, not humanity as a whole. The executive power of the law of nature is given to society on the understanding that it will only be used for the common good, and consequently “the power of the Society, or Legislative constituted by them, can never be suppos’d to extend farther than the common good; but is obliged to secure every ones Property by providing against those three defects above-mentioned, that made the State of Nature so unsafe and uneasie.”

Thus Locke establishes certain requirements for the supreme power, including “to employ the force of the Community at home, only in the Execution of such Laws, or abroad to prevent or redress Foreign Injuries, and secure the Community from Inroads and Invasion. And all this to be directed to no other end, but the Peace, Safety, and publick good of the People.” Thus, Locke’s description of the two powers of the state as the power to make laws and the power “to punish any Injury done unto any of its Members, by any one that is not of it, (which is the power of War and Peace;)” stands as evidence that Locke restrains the power of the state to employ the power of punishment when compared with the individual’s right to punish any wrongdoer “by the Right he hath to preserve Mankind in general.” Tuckness suggests that Locke’s theory “implies the following logic: one may use the power of punishment for the preservation of the society of which one is a...

59 II.ix.131, p. 353.
60 I use this term—Locke’s own term—or the term “commonwealth” because Locke never uses the vocabulary of sovereignty when advancing his own position. As will become apparent later, Locke’s attempts to undermine traditional notions of sovereignty led him to use the term repeatedly in rejecting Filmer’s position, but never in advancing his own. See John T. Scott, “The Sovereignless State and Locke’s Language of Obligation,” *The American Political Science Review* 94 (2000): 547-561, esp. 547-552.
61 Id.
62 II.vii.88, p. 324.
63 II.i.8, p. 272.
member; hence, in the state of nature, one uses this power for the preservation of all mankind...and, in a state, for the preservation of that state.” From this, he concludes, “A government that brought about harm to its citizens or damaged their property in the process of pursuing altruistic goals would not be fulfilling this condition.” While Tuckness acknowledges that each subject in principle contracts away his right “of doing whatsoever he thought fit for the Preservation of himself, and the rest of Mankind, so far forth as the preservation of himself, and the rest of that Society shall require,” he argues that the “so far forth” proviso demonstrates the ban on altruistic use.

Yet this position is inadequate for two reasons. First, it is strange to speak of individuals in the state of nature as engaging in “altruistic” punishment. Locke’s treatment of the threats posed in the state of nature, and his pairing of a Pufendorfian argument about the severance of natural law obligations with the claim that all legitimate violence is a form of punishment, makes it difficult to imagine a situation in which individuals would be engaging in truly altruistic punishment. As Locke argues when describing the right to punish a murderer under “the Right he has of Preserving all Mankind,” the exercise of this right always looks to the safety of the punisher as well, at least derivatively, since the power exists

…both to deter others from doing the like Injury, which no Reparation can compensate, by the Example of the punishment that attends it from every body, and also to secure Men from the attempts of a Criminal, who having renounced Reason, the common Rule and Measure, God hath given to Mankind, hath by the unjust Violence and Slaughter he hath committed upon one, declared War against all Mankind, and therefore may be destroyed as a Lyon or a Tyger, one of those wild Savage Beasts, with whom Men can have no Society nor Security.  

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64 Tuckness, *International Asymmetry*, 472. 
65 II.ix.129, p. 352. 
67 II.ii.11, p. 274.
An individual (or state) who engages in war represents a threat to all individuals (or states), since they have demonstrated that they cannot be trusted to abide by the dictates of reason, and indeed have declared war against all mankind. Punishment thus *always* conduces to the benefit of the punisher, regardless of his intention to benefit the victim or all mankind indiscriminately. The same logic is found in Locke’s account of why an individual can slay a robber “who has not in the least hurt him, nor declared any design upon his Life,” since “I have no reason to suppose, that he, who would *take away my Liberty*, would not when he had me in his Power, take away every thing else.”

Further, as we have seen, this was at the core of Locke’s claim that reparation, rather than being a cause of war independent of punishment, is simply a specific form of punishment available only to a victim who has lost property as a result of an attack. Locke’s evaluation of threats makes it incoherent to speak of fully “altruistic” forms of punishment.

Even in a more limited sense, however, there can be no claim that individuals might be harmed by the commonwealth’s decision to engage in war, and Tuckness’s failure to engage with Locke’s account of authorization leads him astray on this point. The scope of authority individuals transfer to the commonwealth has long been a complex question in Locke scholarship due to its importance for determining the commonwealth’s authority to regulate property, as well as its implications for Locke’s right of resistance. While we will address the content of resistance later, one area where the transfer of rights appears unambiguous is with respect to foreign affairs. The federative power is presented as a precise analogy of the individual’s power in the state of nature, and with respect to that power the individual has entirely given up any ability to judge when or how to execute claims against foreigners—such

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68 II.iii.18, p. 279-80. See also II.iii.19, p. 280 (can kill a thief who only attempts to steal “my Horse or Coat”); II.xviii.207, p. 403 (can kill a thief “when perhaps I have not 12 d. in my Pocket”).

issues are “managed by the body.” The determination of what best conduces to the security of the society is left entirely to the judgment of the commonwealth. This unity of judgment likewise explains why the state is engaged in repairing injuries done to its citizens in the first place. An injury to one is an injury to all, and individuals can make no claims on individuals from outside of their own society without the state’s support.

A more accurate way of rendering Locke’s point here would be to say that every individual in the state of nature, as well as every sovereign after the institution of civil society, utilizes his power of punishment against those who have declared themselves no longer bound by the rules of reason which guide human society in the state of nature. These violators—wolves, lions, and tigers, in various Lockean flourishes—represent a threat to every individual in the state of nature; this was a point of significant difference between Locke and Pufendorf, who had sought to circumvent precisely this sort of analysis of the natural state through his denial that a transgressor of the law of nature can be attacked by non-victims. Every use of force against these violators is a form of punishment, and by enforcing the natural law an individual or sovereign looks after the good of mankind in general while simultaneously providing for his own security by punishing the wrongdoer and deterring others who might be tempted to follow the same course. The distinction between the natural state and civil society is simply who has the right to make that judgment; only the holder of the commonwealth’s right of war can judge whether it has the strength to vindicate an injury, whether to assist another state against an aggressor, or what course of action would best conduce to the state’s (and thus mankind’s) security. It is presumably true that it would be a violation of the compact to initiate a war which would inevitably lead to the complete destruction of the society, but such a decision is likewise
forbidden to individuals, who are bound not to commit suicide and commanded to help others only “when his own Preservation comes not in competition.”

III. The Authorization of Violence and its Colonial Implications

This attention to Locke’s theory of authorization, and the question of whether the special right of punishment remains for individuals with respect to foreigners, would be somewhat superfluous were it not for the role private violence plays in the First Treatise, where Locke in several passages attributes warmaking power to a “Planter in the West Indies,” including leading the men of his plantation out “to seek Reparation upon any Injury received from” local Indians.71 These passages have attracted remarkably little attention from scholars. They figure as a sideshow in debates about Locke’s views on slavery,72 or have been seen as evidence of the fact that Locke had not yet engaged fully with the work of Pufendorf when writing the First Treatise; here “Locke discusses quite extensively the powers of life and death and of making war possessed by private individuals such as planters in the West Indies, but he nowhere implies that these powers might include the right to punish rather than retaliate—though it would have been very germane to his argument to have asserted this.”73 However, this view implies a residuum of private punitive authority in individuals which the account of Locke’s theory of authorization appears to rule out. Further, scholars have taken opposing positions on what these passages might mean for Locke’s views on sovereignty, with some arguing that Locke retained a

70 Il.ii.6, p. 271.
71 I.xi.130, p. 237.
73 Tuck, War and Peace, 168.
traditional conception of sovereignty as marked by the power of life of death, while John Scott has contended that the passage illustrates Locke’s “break with the core idea of sovereignty theory—that sovereignty is defined and identified by the possession of certain ultimate powers.” Finally, as the discussion in the previous sections suggests, the planter’s pursuit of reparation—which falls under the special rather than the general right of punishment—might be evidence that Locke does not view the special right of punishment as completely surrendered by individuals with respect to foreigners, aligning him with Grotius’s position.

To understand Locke’s position, it is useful to briefly explore the Filmerian argument he was responding to. The passages in question come in a portion of the *First Treatise* devoted to undermining Filmer’s reliance on Jean Bodin’s marks of sovereignty as evidence for his patriarchal views. Bodin was a major influence on Filmer’s thought, and Bodin’s second mark of sovereignty was the power “to denounce warre, or treat of peace,” which must be vested in the sovereign because “oftentimes it draweth after it the ruine, or assurance of the Commonweale; which is to be verified not onely by the law of the Romans, but of al other nations.” Similarly, Bodin concluded that “the right of Marque, or Reprisall” is one “which soveraign princes have proper unto themselves from all others.” Bodin’s position likewise bolstered Filmer’s contention that the entirety of the sovereign power must rest in the monarch.

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78 Id. at 180. Bodin treats the right of reprisal as part of his discussion of the sovereign’s rights over property, id. at 177-80.
79 See Scott, “Sovereignless State,” 549. Locke recognized that Filmer’s position was based on Bodin, noting at I.ii.8 that Filmer “delivers in *Bodin’s words*” numerous claims about paternal and kingly power.
In accordance with this objective, Filmer straightforwardly adopted Bodin’s views on the sovereign’s authority over war, as well as the general power of life and death, but his patriarchal argument required an additional claim that these marks of sovereignty were held by fathers of families. For this, Filmer relied on four Biblical stories. Filmer partially retells the story of Judah’s condemnation of his daughter-in-law Thamar as evidence of the power of life and death, while other accounts—two of which are familiar from Grotius—are used to demonstrate the patriarchal right of war and peace. Abraham’s participation in the war against King Chedorlaomer, central to Grotius’s account of the private acquisition of booty, is cited as evidence of the right to wage war, along with Esau’s marching to meet his brother Jacob with 400 men—somewhat tendentiously rendered as “400 men at arms” in Filmer’s retelling. Finally, “for matter of peace, Abraham made a league with Abimelech, and ratified the articles by an oath. These acts of judging in capital causes, of making war, and concluding peace, are the chiefest marks of sovereignty that are found in any monarch.”

This was the position that Locke set out to refute in his discussion in the First Treatise, but his angle of attack is somewhat unexpected. Locke did not seek to undermine the claim that the patriarchs held this authority, but instead took the radical tack of denying that either of these powers were in fact marks of sovereignty. As we have seen, Pufendorf and Hobbes rejected the possibility that the right of war and peace could possibly be lodged anywhere but with the sovereign after the creation of civil society. Grotius’s far more flexible approach, by contrast, allowed for private war, and also considered the possibility that “subordinate authorities may

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80 Gen. 38:24-29. Filmer omits that Thamar was ultimately spared.
81 With whom Filmer was also familiar, as his tract assessing Grotius’s arguments (which Locke also read) makes clear. Filmer’s Observations Concerning the Originall of Government, upon Mr. Hobs ‘Leviathan’, Mr Milton against Salmasius, H. Grotius ‘De Jure Belli’ is reprinted in Political Writings, 184-234.
82 The Biblical stories are at Gen. 14:14 and 33:1, respectively. The Biblical account does not mention Esau’s men as being armed. Filmer, Patriarcha, p. 7.
have a delegated right of beginning war” in states with large territorial scope, though that right engages the entire state in war upon its exercise.\(^84\) Locke’s partial agreement with Grotius was bolstered by his adoption of the Grotian definition of war, which emphasized the conflict between the parties, not their legal character or capacities. As we will see, such a broad definition of war permitted the claim that sovereigns need not be the only ones to hold the power of war, preserving something of the category of “less solemn” wars described by Grotius.

In responding to Filmer, Locke first addressed the argument that a general right of life and death was held by the patriarchs, and he offered two responses. First, “[t]he pronouncing of Sentence of Death is not a certain mark of Sovereignty, but usually the Office of Inferior Magistrates.”\(^85\) By contrast, “The Power of making Laws of Life and Death, is indeed a Mark of Sovereignty.”\(^86\) Locke illustrates what he takes to be Filmer’s fallacy with an analogy: “As if one should say, Judge Jefferies, pronounced Sentence of Death in the late Times, therefore Judge Jefferies, had Sovereign Authority.”\(^87\) The same fallacy underlies Filmer’s potential rebuttal to this claim, that “Judah did it not by Commission from another, and therefore did it in his own Right.”\(^88\) But the mere fact that Judah pronounced a death sentence is not proof that he actually had the right to do so; “heat of Passion might carry him to do that which he had no Authority to do.”\(^89\) Here, Locke picks up on Filmer’s decision to omit the remainder of the story of Judah and Thamar; Judah had slept with Thamar, believing her to be a prostitute, and it was not until after


\(^{85}\) _Two Treatises_, I.xi.129, p. 235-36.

\(^{86}\) Id. at 236.

\(^{87}\) Id. This passage also demonstrates that Locke edited this portion of the text before its publication in 1689; the reference to Judge Jefferies only makes sense in the context of the Bloody Assizes after Monmouth’s Rebellion in 1685-86. Thus, even if Locke drafted the _First Treatise _before his engagement with Pufendorf, as Tuck suggests, there is little explanation for why Locke would not reconcile the clearly contradictory notions that the planter holds a legitimate right of war and that individuals have surrendered this power to the commonwealth, if Locke indeed held the former position.

\(^{88}\) Id.

\(^{89}\) Id. at 236.
he declared his death sentence that it was revealed that he was the cause of her pregnancy.  

Locke presents this as another example of Filmer’s style of reasoning: “He lay with her also: By the same way of Proof, he had a Right to do that too: If the consequence be good from doing to a Right of doing.”

This style of argument is critical for understanding the context of the succeeding passage, where Locke turns to address Filmer’s arguments about the right of war. Locke’s first point is simply that the size of a family—318 men in Abraham’s case—does not require that the head of the family be Adam’s heir. “A Planter in the West Indies has more, and might, if he pleased (who doubts) Muster them up and lead them out against the Indians, to seek Reparation upon any Injury received from them, and all this without the Absolute Dominion of a Monarch, descending to him from Adam.” The essential point, for Locke, is that as an historical matter this sort of family results from purchase, not from any right derived by descent from Adam’s supposed absolute authority. “Those who were rich in the Patriarchs Days, as in the West-Indies now, bought Men and Maid Servants, and by their increase as well as purchasing of new, came to have large and numerous Families, which though they made use of in War or Peace, can it be thought the Power they had over them was an Inheritance descended from Adam, when ‘twas the Purchase of their Money?” This position would equally imply that a soldier “Riding in an expedition against an Enemy, his Horse bought in a Fair, would be as good a Proof that the owner enjoyed the Lordship which Adam by command had over the whole World, by Right descending to him.”

91 I.xi.129, p. 236.  
92 I.xi.130, p. 237.  
93 Id.  
94 Id.
Locke then turns to parry Filmer’s argument from Bodin that “making War and Peace are marks of Sovereignty,” leading to one of the most interesting passages in the First Treatise:

Let it be so in Politick Societies. May not therefore a Man in the West-Indies, who hath with him Sons of his own, Friends, or Companions, Soldiers under Pay, or Slaves bought with Money, or perhaps a Band made up of all these, make War and Peace, if there should be occasion, and ratifie the Articles too with an Oath, without being a Sovereign, an Absolute King over those who went with him? he that says he cannot, must then allow many Masters of Ships, many private Planters to be Absolute Monarchs, for as much as this they have done. War and Peace cannot be made for Politick Societies, but by the Supream Power of such Societies; because War and Peace, giving a different Motion to the force of such a Politick Body, none can make War or Peace, but that which has the direction of the force of the whole Body, and that in Politick Societies is only the Supream Power. In voluntary Societies for the time, he that has such a Power by consent, may make War and Peace, and so may a single Man for himself, the State of War not consisting in the number of Partysans, but the enmity of the Parties, where they have no Superiour to appeal to.

Locke makes several essential points. First, in any consent-based society—whether civil society or the so-called “voluntary Societies for the time”—only the authority vested with the right of war and peace can institute a war for all the members of that group. In civil society, this authority is the sovereign; this much he concedes to Filmer. However, Locke’s reliance on the Grotian definition of war—“the enmity of the Parties,” rather than the “number of Partysans”—means that this power cannot be a marker of absolute sovereignty. The capacity to engage in violence, rightly or wrongly, is held by individuals in the state of nature, and such a power is consequently no proof of absolute sovereignty. Locke also says nothing here about the justice of the planter’s actions; to assume that the individual is exercising his right when he engages in war would entail the same logical error as Locke suggested infected Filmer’s Biblical citations. This much is suggested in the following paragraph:

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95 I.xi.131, p. 238.
96 Id.
97 Lee Ward is thus incorrect in arguing that Locke “retains one important connection to the more traditional idea of sovereignty, according to which ‘making War and Peace are marks of Sovereignty.’” Ward, Modern Life, 273. That is precisely the opposite of Locke’s intention here; the point of the passage is that war and peace is not a mark of sovereignty because others—including individuals—can and do hold that power.
The actual making of War or Peace is no proof of any other Power, but only of disposing those to exercise or cease Acts of enmity for whom he makes it, and this Power in many Cases any one may have without any Politick Supremacy: And therefore the making of War or Peace will not prove that every one that does so is a Politick Ruler, much less a King; for then Common-wealths must be Kings too, for they do as certainly make War and Peace as Monarchical Government. 98

Locke’s definition of the state of war in the Second Treatise is the use of force without right where there is no common superior to appeal to, and the Second Treatise provides examples of such force; robbers and tyrants wage war even after the institution of civil society. 99 Locke has thus made no grand claims about a private individual’s authority to engage in warfare; by Locke’s definition of war, an individual always has the capacity to engage in war and conclude it with peace, so Filmer cannot be correct that the capacity to wage war is evidence that the Biblical patriarchs held the right of sovereignty. 100 Locke similarly had no incentive to include a discussion about private punishment here, even if it had advanced his argument in this portion of the text, as it would have supplied an argument in favor of Judah’s authority to punish Thamar—aiding Filmer out of his own trap. Instead, he was content to undermine Filmer’s argument that the powers possessed by the Patriarchs were actually marks of sovereignty.

Locke elsewhere illustrates the principle that the power of war and peace can be held by individuals or groups short of political societies. Locke does not define “voluntary Societies for the time,” but one possibility is that he is thinking of the sorts of societies described by Josephus Acosta, one of Locke’s favorite writers, where there is no settled sovereignty, but people “lived in Troops, as they do this day in Florida, the Cheriquanas, those of Bresil, and many other

98 I.xi.132, p. 238.
99 II.xviii.207, p. 403 (individuals are in a state of war with a robber who “with a Sword in his Hand demands my Purse in the High-way,” since there is no time to appeal to their common sovereign); II.xix.222, p. 412-13 (legislative or executive who attempts to destroy property creates a state of war).
100 As John Scott notes, when speaking of the surrender of powers to the state, “Locke uses ‘gives up’ in the sense of renouncing the exercise of a power and yielding to someone else. The underlying power cannot be transferred or alienated.” Scott, “Sovereignless State,” 551. Individuals thus always retain the power to engage in war, though the exercise of that power is sharply curtailed and may be just or unjust, depending on the circumstances.
Nations, which have no certain Kings, but as occasion is offered in Peace or War, they choose their Captains as they please.”¹⁰¹ For Locke such societies are evidence that all men were originally equal and free of political subjection, “till by the same consent they set Rulers over themselves.”¹⁰² In general, Locke viewed the model of the general-king as the original form of government, since in early societies (before the expansion of commerce), “their first care and thought cannot but be supposed to be, how to secure themselves against foreign Force.”¹⁰³ Under those circumstances, it was logical to appoint a ruler for the purposes of war and little else, and the conduct of “the Indians in America” is again held up as an example, since their kings “are little more than Generals of their Armies; and though they command absolutely in War, yet at home and in time of Peace they exercise very little Dominion, and have but a very moderate Sovereignty, the Resolutions of Peace and War, being ordinarily either in the People, or in a Council.”¹⁰⁴ Similarly, the Hebrew judges and early kings were primarily “Captains in War, and Leaders of their Armies,” rather than holding any expansive powers.

However, this does not necessarily mean that Locke believed the planter was engaging in unauthorized violence. While the individual’s previous authority to execute the law of nature was given up to the commonwealth, this initial transfer does not exclude a delegation of warmaking authority from the commonwealth to subordinate bodies, a consequence no doubt important to Locke as a colonial administrator. As secretary to the Lords Proprietors of the Carolina colony and in-house philosopher to the principal Proprietor, Lord Shaftesbury, Locke was heavily involved with the colony in the 1670s and early 1680s. Through this work he was no doubt aware that the colony’s charter contained a clause granting the power to protect the colony from

¹⁰¹ II.viii.102, p. 335.
¹⁰² Id.
¹⁰³ II.viii.107, p. 339.
“the invasions of savages and other enemies, pirates and robbers,” including the power “to make war, and pursue the enemies aforesaid, as well by sea, as by land; yea, even without the limits of the said province, and, by God’s assistance, to vanquish, and take them; and being taken, to put them to death, by the law of war, and to save them at their pleasure.”\textsuperscript{105} The charter, like many other English colonial charters,\textsuperscript{106} thus conferred the authority to engage in warfare against certain foreign enemies without sovereign authorization, and such a power was critical in the colonial context—the Carolina colony, like all other colonies, was established “in so remote a country”\textsuperscript{107} that seeking sovereign authorization before engaging in war was hardly an option. The limitation to war against the natives or “pirates and robbers” was taken seriously; the original Fundamental Constitutions of Carolina, which Locke helped to draft, included a provision vesting “all state matters, dispatches, and treaties, with the neighbour Indians or any other, so far forth as is permitted by our charter from our sovereign lord the King” in the colony’s “chancellor’s court.”\textsuperscript{108} The colony’s “grand council” was likewise entrusted with authority “to make peace and war, leagues, treaties, etc., with any of the neighbour Indians” and to control the raising and disbanding of the colony’s military.\textsuperscript{109} The peak years of Locke’s

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\item The best single source for the Carolina charter and all the variants of the Fundamental Constitutions is \textit{North Carolina Charters and Constitutions}, ed. Mattie Erma Edwards Parker (Raleigh: Carolina Charter Tercentenary Commission, 1963). This quotation is from p. 102.
\item Colonial charters contained two variants on this delegation. The form appearing in the Carolina charter was replicated in the charters of Maryland (1632), Pennsylvania (1681), and Georgia (1732). The other variant had its origins in the first Virginia charter (1606), which granted authority to “encounter, expulse, repel, and resist, as well by Sea as by Land, by all Ways and Means whatsoever, all and every such Person or Persons, as without the especial Licence of the said several Colonies and Plantations, shall attempt to inhabit within the said several Precincts and Limits of the said several Colonies and Plantations, or any of them, or that shall enterprise or attempt, at any time hereafter, the Hurt, Detriment, or Annoyance, of the said several Colonies or Plantations.” Variants of this formula appeared in the charters of New England (1620), Massachusetts Bay (1629), Connecticut (1662), and Rhode Island (1663).
\item 1665 Charter of Carolina, Parker ed., p. 102.
\item The original 1669 version of the Fundamental Constitutions is printed in John Locke, \textit{Political Essays}, ed. Mark Goldie (New York: Cambridge University Press, 1997), in addition to appearing in the Parker compilation. This language is from Art. 34 of the 1669 version, p. 169 of Goldie, p. 139 of Parker.
\item Art. 46, p. 171 of Goldie, p. 142 of Parker. The 1682 version of the Fundamental Constitutions, which Locke was closely involved in revising, retained these provisions as Arts. 35 and 50. That edition is reprinted in Parker 192, 195.
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\end{footnotesize}
involvement with the colony corresponded with a series of wars with local tribes which threatened to destroy the colony altogether, and Locke was unquestionably involved in fashioning the Proprietary response to those conflicts. Locke thus knew perfectly well that “private Planters” could and did wage war without involving the entire “Politick Body.”

Locke’s denial that the power of war and peace was a mark of sovereignty, and his broad conception of war, thus served a variety of objectives. First and foremost, it undermined Filmer’s assertion that patriarchal warfare was the consequence of a right of sovereignty descending from Adam. It also corresponded to the reality of English colonial policy, which frequently delegated warmaking authority to subordinate bodies, largely independent of the crown; the leader of such a colony “has the direction of the force of the whole Body” and can therefore declare war, but is not thereby a sovereign. Finally, Locke’s definition of war in terms of a state of affairs rather than based on party status or the size of the conflict made his discussions of warmaking authority in the *First Treatise* and *Second Treatise* consistent. The fact that individuals gave up their authority to punish, repair, and manage foreign affairs to the sovereign is only hypothetical, not actual; individuals always possess the capacity to engage in violence, whether authorized or not, and while the *Second Treatise* requires authorization for the use of force, the *First Treatise* recognizes the realities of colonial administration by permitting its delegation. This position put Locke in an odd relation to Grotius, Hobbes, and Pufendorf, simultaneously advocating greater central control over violence while also denying that such control was a necessary mark of sovereignty.

IV. Conquest, Punishment, and Consent

While Locke’s account of the state’s control over violence accommodated his colonial concerns, Locke attempted to wed his theory of authorization to a set of similarly Grotian conclusions about subject responsibility for sovereign acts. As we have seen, Locke endorsed a broadly Grotian theory of punishment alongside a theory of consolidated judgment facially similar to Hobbes and Pufendorf, and for those writers the theory of authorization had provided grounds to attribute responsibility to the entire body of subjects for unjust acts by the sovereign, and thus to inflict significant harms on subjects by a just belligerent executing his rights. For Pufendorf, this had been particularly apparent in the laws of war, such as conquest and the acquisition of property. Locke, however, was intent to restore the Grotian standard by which moral responsibility was the only possible justification for suffering from punishment; the artificial responsibility provided by authorization to a sovereign was insufficient. This led Locke to a very narrow construction of the precise content of the subject’s authorization, and unsurprisingly, this feature of Locke’s thought was particularly pronounced in his attack on conquest as a legitimate foundation for government and his general defense of the right of resistance. However, even more important, from Locke’s perspective, was a rejection of the entire traditional approach in the laws of war to the acquisition of property. Both Grotius and Pufendorf had, in different forms, contended that a right to property, including even immovable property and sovereignty, could result from conquest. Locke’s particular conception of jurisdiction, which used property as a marker of consent to civil society, could not accommodate a view that legitimated acquisition of that property through conquest.

Placing Locke’s theory of conquest in dialogue with the most important accounts of conquest and the law of nations available in Locke’s day—especially Grotius and Pufendorf—
helps to make sense of an aspect of Locke’s theory which has received comparatively little attention. Despite the admitted strangeness of this doctrine, scholarly commentary has largely passed over Locke’s doctrine of conquest by noting that it appears unusual against the background of English political thought, since no virtually no Royalist thinker argued that the Norman Conquest was the source of the king’s authority over England. Conquest—based on Grotius’s theories—did become a popular theory for justifying William’s title after the Glorious Revolution, but that claim’s ascension largely took place after the publication of Locke’s text. Alternatively, scholars have debated whether Locke intended this account of conquest to justify European colonialism. However, a closer examination of the positions of Grotius and Pufendorf will make Locke’s aims clear in this argument.

Locke opens his chapter on conquest with an outright rejection of the concept; consent is the only legitimate basis for government, but “many have mistaken the force of Arms, for the consent of the People; and reckon Conquest as one of the Originals of Government.” Later, Locke frankly concedes that his arguments about conquest “may seem a strange Doctrine, it being so quite contrary to the practice of the World; There being nothing more familiar in speaking of the Dominion of Countries, than to say, such an one Conquer’d it.” However, he

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112 See Mark Goldie, “Edmund Bohun and the Jus Gentium in the Revolution Debate, 1689-1693,” Historical Journal 20 (1977): 569-586; this position is followed by Tully, Locke in Contexts, 33-34, though Tully adds that “The constant danger that provoked Locke’s attack on conquest theories was the widespread fear, from the early 1670s to the end of the Nine Years’ War, of a French invasion.” Bohun, whom Goldie cites as on the leading edge of the tradition which invoked Grotius to justify William’s rule, published his first tract on these issues in 1689. Goldie states that, while the timing has some correspondence with Locke’s publication of the Two Treatises, such a link is only speculative. Goldie 585.
113 See, e.g., Tully, Locke in Contexts, 154-55; Arneil, Locke and America, 163-65; Seliger, Liberal Politics, 114-18. These accounts focus primarily on the Lockean exception to the rule that land cannot be confiscated as a result of war, which appears in II.xvi.184. That passage suggests that where land is uncultivated (and thus unable to produce reparations), it can be confiscated by a conqueror.
114 II.xvi.175, p. 385.
115 II.xvi.180, p. 388.
wishes not merely to reject the very idea of conquest, but also the notion that there is any right to force enemies to accept sovereignty. Hobbes and Pufendorf, for example, had both viewed political authority after a conquest as resulting from a compact, but one which could be (and likely was) coerced from the defeated enemy. Locke, however, rejects any suggestion that an extorted pact is valid.\footnote{II.xvi.186, p. 392-93.}

Most interesting, however, is how Locke assesses the rights of a legitimate conqueror. The initial power of such a conqueror “is purely Despotical. He has an Absolute Power over the Lives of those, who by an Unjust War have forfeited them; but not over the Lives or Fortunes of those, who ingaged not in the War, nor over the Possessions even of those, who were actually engaged in it.”\footnote{II.xvi.178, p. 387-88. As Ruth Grant has pointed out, this means that Locke has no category of prisoners of war subject to protection. Ruth Grant, \textit{John Locke’s Liberalism} (Chicago: University of Chicago Press, 1997), 130 n. 41.} Further, the conqueror “gets no Power but only over those, who have actually assisted, concurr’d, or consented to that unjust force, that is used against him.” These individuals are guilty because “they have used force to do, or maintain an Injustice,” while “all the rest are innocent; and he has no more Title over the People of that Country, who have done him no Injury, and so have made no forfeiture of their Lives, than he has over any other, who, without any injuries or provocations, have lived upon fair terms with him.”\footnote{II.xvi.179, p. 388.}

Two features of this account are immediately notable. The first is Locke’s effort to restore protections to those citizens who have not “assisted, concurr’d, or consented to” the unjust force, which are reminiscent of Grotius’s arguments about the proper scope of punishment under the natural law. Locke’s theory of authorization, given its formal kinship to Hobbes and Pufendorf, presumably ruled out that degree of separate judgment about international affairs.

Second, Locke is clear that the responsible subjects forfeit their lives, but not their property, and
this is critical to his arguments rejecting the acquisition of sovereignty through war. Each of these points deserves special attention.

Locke attempts to support the claim that individuals cannot be responsible for the injustices of the commonwealth by advancing the argument that the initial social contract is limited in its scope only to legitimate uses of force:

For the People having given to their Governours no Power to do an unjust thing, such as is to make an unjust War, (for they never had such a Power in themselves:) They ought not to be charged, as guilty of the Violence and Unjustice that is committed in an Unjust War, any farther, than they actually abet it; no more, than they are to be thought guilty of any Violence or Oppression their Governours should use upon the People themselves, or any part of their Fellow Subjects, they having impowered them no more to the one, than to the other.¹¹⁹

This argument appears a bit incongruous alongside Locke’s earlier claims, using Hobbesian terminology, that with respect to international affairs, citizens are incorporated into one body, governed by the will of the majority, such that “the Judgments of the Commonwealth…indeed are his own Judgments, they being made by himself, or his Representative.”¹²⁰ The “federative” power is one of the clearest examples of this surrender, as it corresponds to that power which “every Man naturally had before he entred into Society.”¹²¹ The question thus arose why the subject’s initial authorization of the commonwealth was not sufficient either as binding the individual’s will or at least satisfying the “assisted, concurr’d, or consented to” standard for liability. While Locke never spells out the precise content of his answer, the content of the initial authorization suggests that Locke gave individuals an extremely broad scope of remaining judgment, akin to the Grotian position.

¹¹⁹ II.xvi.179, p. 388.
¹²⁰ II.vii.88, p. 325.
¹²¹ II.xii.145, p. 365.
For Locke, as we have seen, what brings individuals out of the state of nature is the creation of a legislative power which can prescribe impartial rules and institute judges to determine cases arising under those rules. However, the resignation of natural power is always limited to “all cases that exclude him not from appealing for Protection to the Law established by it.”

Each subject has further given the sovereign the right to employ his own force in the execution of judgments “in all Cases, where he can Appeal to the Magistrate,” and it is these judgments which “are his own Judgments.” This leads Locke to his specific description of what judgment is given up to the commonwealth with respect to domestic and international affairs. In the domestic arena, the commonwealth may “judge by standing Laws how far Offences are to be punished,” while in the international field it has the right “to determin, by occasional Judgments founded on the present Circumstances of the Fact, how far Injuries from without are to be vindicated.”

Notably, Locke’s language does not include any claim that the commonwealth’s judgment is exclusive with respect to whether an injury has occurred, and moreover, it seems that Locke is prepared to treat international affairs somewhat differently from domestic ones. We have already seen that Locke conceded that international affairs could not be governed in the same way as domestic concerns, since they are “much less capable of being directed by antecedent, standing, positive Laws,” and that in this respect it was a power quite similar to the prerogative power of the executive, which was the ability of the executive to act for the public good in the absence of a settled law.

122 II.vii.87, p. 324.
123 II.vii.88, p. 325.
124 II.vii.88, p. 325.
125 II.xii.147, p. 366.
126 I follow Cox in noting the similarities between the federative and executive powers, including prerogative, as will be discussed throughout. Cox, War and Peace, 123-30.
The abuse of a power not governed by law, Locke suggests, is subject to two checks. First, the people, through the legislature, can always subsequently limit the power; the executive and federative powers are “both Ministerial and subordinate to the Legislative,”\(^\text{127}\) and Locke suggests that limits on prerogative power have evolved historically from early governments which were “almost all Prerogative,” as the people reacted to abuses.\(^\text{128}\) However, in the event that the holder of the prerogative declines to accept limitations on his actions, there is no judge between him and the legislature, or him and the people: “The People have no other remedy in this, as in all other cases where they have no Judge on Earth, but to appeal to Heaven.”\(^\text{129}\) This ultimate right of rebellion in the case of a transgression by the sovereign is part and parcel of Locke’s thought, and Locke quite frankly notes that “where the Body of the People, or any single Man, is deprived of their Right, or is under the Exercise of a power without right, and have no Appeal on Earth, there they have a liberty to appeal to Heaven, whenever they judge the Cause of sufficient moment.”\(^\text{130}\)

As this implies, Locke’s account perpetually leaves ample judgment in individuals to conclude that their sovereign’s actions are illegitimate. Precisely the same structure is employed in Locke’s discussion of the dissolution of government, where Locke recurs explicitly to the trustee rationale which undergirds much of his thought: “who shall the Judge whether his Trustee or Deputy acts well, and according to the Trust reposed in him, but he who deputes him, and must, by having deputed him have still a Power to discard him, when he fails in his Trust?”\(^\text{131}\) Further, while Locke never specifically mentions Hobbes or Pufendorf, his pointed references to the remaining power of judgment held by individuals leave no doubt that he has these sort of

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\(^{127}\) II.xiii.152, p. 369.
\(^{128}\) II.xiv.162, p. 376.
\(^{129}\) II.xiv.168, p. 379.
\(^{130}\) II.xiv.168, p. 379.
\(^{131}\) II.xix.240, p. 427.
absorptive theories of authorization in mind and is keen to reject them. These theories of authorization are fundamentally antithetical to civil government, representing instead absolute power. Such absolute rulers are in a state of nature with their subjects...

...with only this woeful difference to the Subject, or rather Slave of an absolute Prince: That whereas, in the ordinary State of Nature, he has a liberty to judge of his Right, and according to the best of his Power, to maintain it; now whenever his Property is invaded by the Will and Order of his Monarch, he has not only no Appeal, as those in Society ought to have, but as if he were degraded from the common state of Rational Creatures, is denied a liberty to judge of, or to defend his Right.\textsuperscript{132}

The “liberty to judge of, or to defend his Right” are inseparable on Locke’s account, and consequently the general notion of authorization cannot be taken to deprive individuals of this degree of judgment. Locke later makes clear that “every Man is Judge for himself, as in all other Cases, so in this, whether another hath put himself into a State of War with him, and whether he should appeal to the Supreme Judge, as Jephtha did.”\textsuperscript{133} The highly individual character of this judgment and resistance—as a series of individual judgments eventually involving a majority of the society—is thus a point of shared emphasis with Pufendorf. But once again, the critical importation from Pufendorf’s theory, that violation of the law of nature toward one is a violation towards all, does in Pufendorf’s limitation on individual resistance to only those who are directly injured by the sovereign; the tyrant, on Locke’s account, enters a state of war with those citizens who believe he has misused his trust, “and in that state all former ties are cancelled.”\textsuperscript{134}

As Richard Cox has noted, this remaining judgment implies that abuse of the federative power, like any other, could be a justification for revolt, though this would be less likely than an

\textsuperscript{132} II.vii.91, p. 326-27.
\textsuperscript{133} II.xix.241, p. 427. Throughout this discussion of resistance, I follow the trend of scholarship in the last 35 years, which has recognized that Locke’s right of resistance is individual, rather than purely collective. On the debate between these positions, see Simmons 1993: 172-76. For the best statements of the modern position that the right of resistance is fundamentally individual, see Nathan Tarcov, “Locke’s Second Treatise and “The Best Fence Against Rebellion.”” Review of Politics 43 (1981): 198-217; Grant, Locke’s Liberalism, 136-78.
\textsuperscript{134} II.xix.232, p. 419.
abuse directed at domestic interests. But this point only heightens the importance of understanding Locke’s claim that a just conqueror can only enslave those who have actually resisted him, or “assisted, concurr’d, or consented to” the unjust acts. If individuals are less likely to exercise their judgment with respect to abuses of the trust of their rights in the international arena, the question naturally arises whether individuals “concur” with the sovereign’s abuses by failing to resist. As we saw, Grotius had answered this question by stressing that in doubtful cases, individuals should refrain from serving, but never answered the question whether the government could ultimately compel their service. Further, to the extent subjects fought in their sovereign’s wars, victors should discriminate between those who served in war under compulsion and those who actually led the war and initiated it.

While Locke never addresses the traditional question of whether individuals retain a right to refrain from participating in a war they believe is unjust, his principles on this point appear to compel the conclusion that individuals held a right to refuse to participate in such wars, even if they were only doubtful about the legitimacy of the war. If every subject ultimately retains the right to judge whether the trust of rights is being properly used by the sovereign, and the sovereign attempts to employ the commonwealth’s force in an unjust war, it seems that Locke’s logic implies that individuals retain a right to judge the legitimacy of that use of force and refrain from participating in the war. Indeed, this apparently sweeping right of refusal would partially explain why Locke does not address this traditional question, insofar as Locke sought to present his theory in a relatively uncontroversial fashion. The only place where Locke approaches these

135 Cox, War and Peace, 129-30.
136 The Rights of War and Peace, II.xxvi.4, p. 590-94.
137 III.xi.3, p. 724; III.xi.5, p. 729.
138 This suggests that Jeremy Waldron is incorrect to conclude that conscripts should be excluded from punishment; individuals are under no obligation to obey the sovereign’s judgment with respect to an unjust war. Waldron, God, Locke, and Equality, 148.
points is in his famous claim that “the Preservation of the Army, and in it of the whole Commonwealth, requires an absolute Obedience to the Command of every Superiour Officer, and it is justly Death to disobey or dispute the most dangerous or unreasonable of them,” even though such an officer cannot confiscate a soldier’s property. Yet even this example assumes a soldier already enrolled in the military, and thus already having concluded that his participation is legitimate; under such circumstances, the authorization to the sovereign to decide the best manner in which to defend the commonwealth obligates the subject to follow orders even to the point of certain death.

However, while Locke apparently restores the tight linkage between moral responsibility for subjects and punishment in war, he is never clear about the precise scope of assistance, concurrence, or consent, and thus who can be punished. Locke’s theory of subject judgment, read alongside his claims about a just conqueror’s rights, appears to suggest that anyone who has actually participated in the war as a combatant is necessarily subject to punishment and forfeiture of life, a position much broader than Grotius endorsed. There is no plea that an individual simply followed the sovereign’s orders; this explains Locke’s insistence that “he has an absolute power over the Lives of those, who by putting themselves in a State of War, have forfeited them.” Further, Locke never addresses the degree of consent required. In discussing prerogative, Locke had noted that the scope of that power gains legitimacy from the acquiescence of the people. Such a power is “tacitly allowed,” and Locke notes that historically, “Prerogative was always largest in the hands of our wisest and best Princes,” since the people “finding reason to be satisfied with these Princes...acquiesced in what they did.”

139 II.xi.139, p. 362.
140 II.xvi.180, p. 388.
141 II.xiv.165, p. 377.
acquiescence to sovereign misbehavior would be sufficient for liability, Locke elsewhere implies active participation is necessary: subjects must “actually abet” the sovereign’s misdeeds.\footnote{II.xvi.179, p. 388.}

Ultimately, however, Locke can get away without providing an exact answer to this question for two reasons. First, an important feature of Locke’s theory is that it provides an implicit rule of judgment for victorious belligerents, and Locke has historical principles in mind as well; there can be no title in any king, much less the king of England, based on conquest. By declaring that conquerors must always distinguish amongst enemy subjects, Locke addresses one of the core inconveniences of the state of nature, and thus the international arena. Men, even when consulting the law of nature, are “biased by their Interest, as well as ignorant for want of study of it.”\footnote{II.ix.124, p. 351.} If commonwealths hold a right of enforcing the natural law, there is nothing to suggest that they will not fall prey to the same biases in interpreting that law, making the determination of a just conqueror difficult except in the most extreme cases. It is entirely possible for both sides in a conflict to believe that they are engaged in a just war, due to their own “biased” interpretations of the law of nature, and thus for a conqueror to claim just victory. However, even a belligerent who believes himself to be just must conclude, based on the rules of the social contract, that the actions of an unjust sovereign are unauthorized by the individual subjects \textit{de jure}. This is what gives Locke’s warfare its distinctive character as “between an aggregate of hostile \textit{individuals} and a \textit{society} defending itself.”\footnote{Grant, \textit{Locke’s Liberalism}, 130 n. 41.} Even an initially just conqueror who fails to abide by these rules, Locke makes clear, can never have a legitimate title to rule.\footnote{I.xvi.185, p. 392; II.xvi.187, p. 393.}
The second reason is the one implied by Locke’s initial treatment of conquest: that the property of those who have waged an unjust war can never be surrendered. The centrality of this claim is clear from Locke’s reliance on this point to address a scenario in which “all the Men of that Community being all Members of the same Body Politick, may be taken to have joyn’d in that unjust War, wherein they are subdued, and so their Lives are at the Mercy of the Conqueror.” This, in turn, depended in a particular conception of jurisdiction which viewed property, not persons, as the primary subject of government, and it thus became critical for Locke to reject the traditional views about the acquisition of property through war. As we have seen, Grotius argued that while the law of nature permitted taking an enemy’s goods up to the amount necessary for reparation and sufficient for punishment, the law of nations allowed effectively unlimited acquisition of the goods of enemies. Yet Locke’s specific objection was to the foundation of Grotius’s claim, which argued based on the Roman law that an enemy’s goods could be treated like goods which remain in common, in which property can arise “from natural possession.” Grotius cited from the Digest the statement that

…the ownership of things originated in natural possession and that a relic thereof survives in the attitude to those things which are taken on land, sea, or in the air; for such things forthwith become the property of those who first take possession of them. In like manner, things captured in war, islands arising from the sea, and gems, stones, and pearls found on the seashore become the property of him who first take possession of them.

An enemy’s property was thus just like unowned common goods, and ownership could be acquired over it by capture. This right straightforwardly extended even to an enemy’s lands, not

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146 II.xvi.188, p. 393.
148 III.vi.2, p. 666.
simply moveable goods; ownership of territory transferred when the territory was “so surrounded by permanent fortifications that the other party will have no access to it openly unless these first have been taken.”\textsuperscript{150}

Pufendorf offered a similar theory, agreeing that the goods of enemies become effectively common and open to acquisition.\textsuperscript{151} His quibble with Grotius focused on Grotius’s willingness to view sovereignty over territory, as distinct from dominion over property, as potentially acquired by occupancy.\textsuperscript{152} While this dispute had important consequences for Pufendorf’s criticisms of Grotius’s colonial objectives,\textsuperscript{153} it offered little to Locke. As we saw, Pufendorf agreed that violent conquest can “intitle us to a Sovereignty over Men,”\textsuperscript{154} and based this claim on the argument that war severs all natural law obligations toward other men, entitling the conqueror to extort an agreement from his enemies. With respect to the enemy’s goods, the conqueror is in principle bound by the requirement that he only take as much of his enemy’s goods as are required for reparation, along with any additional confiscations necessary to secure future safety.\textsuperscript{155} Pufendorf concedes, however, that “by the Practice of the World, a Man makes himself absolute and perpetual Master and Proprietor of every Thing he takes from his Enemy in a solemn War, tho’ much exceeding the Pretensions the War began upon.”\textsuperscript{156} The only exception was that such a title extended only to third parties, as the original owners retained a right to reclaim the goods until a peace treaty confirmed the conqueror’s possession.\textsuperscript{157}

\textsuperscript{150} The Rights of War and Peace, trans. Kelsey, III.vi.4, p. 667.
\textsuperscript{151} The Law of Nature and Nations, 5\textsuperscript{th} ed., trans. Basil Kennett, IV.vi.14, p. 396.
\textsuperscript{152} Id.
\textsuperscript{153} Tuck, War and Peace, 155-58.
\textsuperscript{154} The Law of Nature and Nations, 5\textsuperscript{th} ed., trans. Basil Kennett, p. 397.
\textsuperscript{155} The Law of Nature and Nations, 5\textsuperscript{th} ed., trans. Basil Kennett, VIII.vi.20, p. 849.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
The theory of property undergirding these accounts of acquisition by conquest was thus thoroughly inimical to Locke’s overall project, and even if the use of Grotius by the conquest theorists of the late 1680s and early 1690s was not Locke’s target, he had ample reason to address the law of conquest. The Roman law proposition that an enemy’s goods effectively returned to the great commons of mankind implied that property was based on some element of compact which the enemy had violated by his conduct. For Pufendorf, the severance of natural obligations meant that the offending individual or state could be compelled to consent to the rule of a conqueror or to give up claims to property. Critically, for Pufendorf, after the institution of civil society, the entire state was subject to the will of the conqueror; he made no distinction in his discussion of conquest between those members of the enemy state who participated in the war and those who did not. His account of authorization made the entire society subject to the absolute will of the conqueror in a just war.

By rooting property in natural law, and thus not derivative of a natural law obligation to abide by contracts, Locke was able to reject Grotius and Pufendorf on the question of conquest, and thus to beat back any claims about just dominion by conquest. It also enabled him to limit the consequences of his claim that violation of the natural law reduced an enemy to “a Lyon or Tyger” who can be destroyed at will. Such a question took on unique importance for Locke because his conception of political authority was so tightly bound to the regulation of property. While Pufendorf had separately treated the legitimate acquisition of moveables, the acquisition of land, and the acquisition of sovereignty through warfare, Locke’s reliance on property as the marker of consent and the conduit for political authority ruled out any such discussion. In joining the civil society, an individual not only subjected himself to the sovereign, but “annexed also, and submits to the Community those Possessions, which he has, or shall acquire, that do not
already belong to any other Government.”  

This makes both “Person and Possession, subject to the Government and Dominion of that Commonwealth, as long as it hath a being.”

After this initial explicit consent, the property becomes a marker of tacit consent. Locke repeatedly insisted that children were not subject to a government by virtue of their father’s consent, but that instead the inheritance and enjoyment of property in a commonwealth constitutes “his tacit Consent” to that government. The result is that after the original compact, “the Government has a direct Jurisdiction only over the Land, and reaches the Possessor of it, (before he has actually incorporated himself in the Society) only as he dwells upon, and enjoys that.” This makes it possible for citizens to depart their current civil society whenever their subjection is based on this sort of indirect jurisdiction: “whenever the Owner, who has given nothing but such a tacit Consent to the Government, will, by Donation, Sale, or otherwise, quit the said Possession, he is at liberty to go and incorporate himself into any other Commonwealth, or to agree with others to begin a new one, in vacuis locis.” This was not the first time Locke had attempted to clarify the link between property and jurisdiction; in the First Treatise, Locke attempted to distinguish between the power of an owner and the power of a ruler, noting that Adam had dominion over the creatures of the earth while Noah had “utmost Property” in them, and complained that the practice of primogeniture has led some “to be deceived into an Opinion, that there was a Natural or Divine Right of Primogeniture, to both Estate and Power; and that the Inheritance of both Rule over Men and Property in things, sprang from the same

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158 II.viii.120, p. 348.  
159 Id.  
160 II.viii.119, p. 348. See also II.vi.73, p. 315; II.viii.116-18, p. 345-47.  
161 II.viii.120, p. 349.  
162 II.viii.121, p. 349.  
163 Liv.39, p. 167-68; on this passage, see Grant, Locke’s Liberalism, 58-60.
Rights to property (and therefore the right of inheritance) exist “for their proper
good and behoof,” while rights to political power exist “for the benefit of the governed, and not
the sole advantage of the Governors,” and that power therefore “cannot be inherited by the same
Title that Children have to the Goods of their Father.”

Locke’s efforts to distinguish political
power from property, and the critical role of property in manifesting consent to political
authority, makes the possibility of its acquisition by conquest an anathema for Locke; as Ruth
Grant notes, Locke’s account of conquest “establishes in a negative sense what he had
established earlier in a positive sense: the connection between the consent of the governed and
legitimate government jurisdiction over territory.”

Locke’s account of conquest thus stresses the primacy of natural rights to property,
regardless of the specific form the conquest takes. In the passages that have occupied the bulk of
scholarly attention, Locke argues that the conqueror cannot gain power over individuals other
than those who have actually engaged in the war for three reasons. Consistent with his premises
about paternal power and the impossibility of obliging a son to political obedience through his
father, Locke insists that “the miscarriages of the Father are no faults of the Children,” such that
the father “can forfeit but his own Life, but involves not his Children in his guilt or
destruction.” Consequently, the conqueror cannot have title to the child’s goods so long as he
has not participated in the war. Locke implies that this is due to the child’s nascent share in his

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164 I.ix.92, p. 209.
166 Grant, Locke’s Liberalism, 140. The only other person who appears to have discussed the connection between
conquest and inheritance is David Gauthier, “The Role of Inheritance in Locke’s Political Theory,” The Canadian
Journal of Economics and Political Science 32 (1966): 38-45. Gauthier, however, does not connect his argument to
the historical background, and does not extend his argument to address the implications of Locke’s account of
authorization, though he gestures in that direction with his discussion of the consequences of conquest on 44-45.
Grant likewise does not address the historical background of Locke’s theory.
167 II.xvi.182, p. 389.
168 Id. at 389-90.
father’s estate, though without here stating the principle; this is what appears to justify Locke’s argument that an individual who has waged an unjust war, and thus severed the ties of natural law with his enemy, grants the conqueror only power over his life, not over his goods. This is in keeping with Locke’s division between the general and specific rights of punishment:

> For it is the brutal force the Aggressor has used, that gives his Adversary a right to take away his Life, and destroy him if he pleases, as a noxious Creature; but ‘tis damage sustain’d that alone gives him Title to another Mans Goods: For though I may kill a Thief that sets on me in the Highway, yet I may not (which seems less) take away his Money and let him go; this would be Robbery on my side.\(^{169}\)

Restraint and reparation, while both part of the executive power of nature, remain distinct in these cases, despite the fact that an individual has shown himself to be “a noxious Creature” worthy of death.

If the general right of punishment is confined to the enemy’s life, Locke is equally concerned to limit the scope of the special right of punishment and the reparations a victor can demand under it. Once again, the argument is made that wives and children—those who hold a share in the estate—cannot completely lose their goods to repair the conqueror’s loss. Once again, the actions of the father cannot be charged to these independent individuals, and Locke returns to the basic law of nature to resolve conflicts: “The Fundamental Law of Nature being, that all, as much as may be, should be preserved, it follows, that if there be not enough fully to satisfy both, viz. for the Conqueror’s Losses, and Children’s Maintenance, he that hath, and to spare, must remit something of his full Satisfaction.”\(^{170}\) Finally, and in keeping with Locke’s stress on property, Locke contends that even if the conqueror is to seek full reparation, the costs of reparation can never justify taking cultivated land. The value of the products of cultivated

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\(^{169}\) ii.xvi.182, p. 390.

\(^{170}\) ii.xvi.183, p. 391.
land, with its regenerative capacity, is so considerable as to counterbalance any harm that could have possibly been done to the just conqueror.\textsuperscript{171}

When Locke turns to the example of the society in which every member of the “Body Politick” is taken to have endorsed the war, he unsurprisingly turns to these property rationales to rule out the conclusion that the society as a whole can be conquered. Such a scenario would presumably fit Locke’s criteria for the dissolution of the entire civil society, since the citizens are no longer “able to maintain and support themselves, as \textit{one intire and independent Body}.”\textsuperscript{172} Under those circumstances, the individuals who previously made up the society return to the state of nature, each “with a liberty to shift for himself, and provide for his own Safety as he thinks fit in some other Society.”\textsuperscript{173} While Locke believes that it “seldom happens, that the Conquerors and Conquered never incorporate into one People, under the same Laws and Freedom,”\textsuperscript{174} there must be, in principle, an opportunity for individuals to consent to the new governmental arrangement.

Once again, Locke focuses on the separation between the rights of fathers and the rights of children. However, here he is explicit that the protections which apply to all children in his earlier formulation apply to only “Children, who are in their Minority.”\textsuperscript{175} Presumably adult children, as members of society, are included among the authors of the war. The dissolution of society due to conquest returns these children to their two most basic rights: “\textit{A Right of Freedom to his Person},” and “\textit{A Right, before any other Man, to inherit}, with his Brethren, his Fathers

\textsuperscript{171} II.xvi.184, p. 391.
\textsuperscript{172} II.xix.211, p. 406.
\textsuperscript{173} II.xix.211, p. 406-07.
\textsuperscript{174} II.xvi.178, p. 387.
\textsuperscript{175} II.xvi.189, p. 393.
The first of these rights leads Locke to explicitly connect property and consent in establishing a new state. “By the first of these, a Man is naturally free from subjection to any Government, though he be born in a place under its Jurisdiction. But if he disclaim the lawful Government of the Country he was born in, he must also quit the Right that belong’d to him by the Laws of it, and the Possessions there descending to him from his Ancestors, if it were a Government made by their consent.”

The second face of natural right—the right to inheritance likewise preserves the notion that there must be consent to civil government anew by each generation, even if only tacit. The second proposition establishes that individuals hold their right to their ancestor’s property regardless of any coerced submission to the conquering sovereign, and this claim takes almost precisely the same form as Locke’s description of what happens to individuals who have justice denied to them. These subjects “have always a Right to shake it off, and free themselves from the Usurpation, or Tyranny, which the Sword hath brought in upon them.” Locke illustrates this with the example of “the Grecian Christians,” who “may justly cast off the Turkish yoke which they have so long groaned under whenever they have a power to do it.” Until a consent-based government is established in society—based on true consent, not the coerced consent that Pufendorf was prepared to allow for in cases of just conquest—these men “are not in the state of Free-men, but are direct Slaves under the Force of War.”

The result of this doctrine is that Locke’s natural right to property serves a double function in the international order. First, it undergirds the possibility of international justice.

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176 II.xvi.190, p. 393-94.
177 II.xvi.191, p. 394.
178 A right first discussed by Locke in the First Treatise. I.ix.88, p. 206.
179 II.xvi.192, p. 394.
180 Id.
181 Id.
Because there is a natural method of acquiring property—one which Locke still viewed as legitimate “in vacuis locis”—there is a foundation for claims to reparation and property that cross national borders. As Locke makes clear in his discussion of the historical origins of the state, security from foreign invasion and assault is the primary objective of the earliest forms of civil society, and the protection of individual property from foreign attack is thus critical to the origins of the state. The right of individuals to defend their property, punish wrongdoers, and repair injuries is the source of the state’s authority to engage in war, and the compact of authorization is what makes an injury to a single citizen reparable by the body of society. Second, the natural right to property demonstrates the limitations of Locke’s analogy of the state as a single body in international affairs, and eliminates the possibility of acquiring sovereignty through conquest. This claim, even more so than the argument that individuals never authorized the state to engage in unjust behavior, provides the central protection against conquest as a legitimate form of government. While the state is a single body for the purposes of repairing injuries, the primacy of claims to property under natural law sharply limits the consequences of the unjust actions of that body in international affairs, even admitting that all citizens of the society are concurred with an unjust war. The body of the people may be dissolved by external conquest, but that does not strip individuals of their claims to property or permit the conqueror to extort consent from the remainder by force.

V. Conclusion

While Locke never directly addressed the international order, and he never systematically treated the range of questions that Grotius and Pufendorf explored, his theory engages with an important range of issues in international politics. Locke follows earlier thinkers in asserting an equivalency between individuals and states in the state of nature, and offers a theory of natural
law which makes it enforceable in the international realm. However, Locke’s description of the state as a “body” in international affairs, to the exclusion of individuals, relies on an account of authorization which (in this respect) looks remarkably Hobbesian. From the standpoint of foreigners, the state is the relevant actor in international affairs, even if individuals are the ones harmed. Locke thus appears very modern in approach on this point; the individual is, in principle, excluded from the international order after the creation of civil society, a result which even Pufendorf was unable to completely reach. However, this feature of Locke’s account is somewhat undermined by his refusal to concede that making war and peace are marks of sovereignty, presumably in the service of Locke’s colonial commitments.

More significantly, however, Locke attempted to reinstate the sort of moral responsibility required for punishment in Grotius’s theory, and without watering it down with permissions of the law of nations which provided a route for conquest. This view went hand in hand with Locke’s attack on the traditional views of Grotius and Pufendorf about the acquisition of property, given Locke’s heavy reliance on property as a marker of consent. Locke parries this concern by emphasizing the natural origins of property and attempting to sharply limit the implications of the authorization in international affairs that he believes the social contract includes. This more holistic view makes sense of Locke’s rather lengthy excursus on conquest without resorting to speculation about the precise timing of his engagement with the conquest theorists of the Glorious Revolution—though to the extent he engaged with them, he would have had all the more reason to carefully refute the arguments found in Grotius and Pufendorf.

Yet it was these final aspects of Locke’s thought that made him an unusual writer on the international order, and ultimately one whose ideas were not particularly influential. As we will see, Locke was the last writer to adopt Grotian positions about the individual’s right of judgment
with respect to international affairs and the requirement of personal moral responsibility for violations of natural law. Similarly, no writer adopted Locke’s approach to property or the power gained over an unjust enemy. In fact, Locke’s theory looks strange to modern eyes because it is precisely the inverse of the theory which came to dominate writing on the international order in the 18th century. Where Locke gave individuals private judgment and shielded their property while making them subject to slavery for their personal misdeeds, writers in the tradition after Locke stressed the centralization of judgment in the sovereign, and with it the protection of life—even of the lives of prisoners and others who had participated in the war. Property, by contrast, became a collective possession subject to confiscation regardless of guilt. The development of these alternative claims about the international arena found its roots in the work of Leibniz, to whom we now turn.
Leibniz, Wolff, and the Return to Grotius

Locke was only one of the writers in the natural law tradition who saw his arguments about punishment as building on the claims advanced in Grotius’s work. A second strain of arguments, building on very different features of Grotius’s theory, reached radically different conclusions about the place of punishment in the international realm which saw their most complete development in the work of Christian Wolff and Emer de Vattel. Despite the best efforts of Hobbes and Pufendorf, the notion of a private right to punishment became firmly entrenched in the branch of the natural law tradition which led to the first “modern” account of international law, Vattel’s Droit des Gens. But the import of that private right of punishment for the international order was to change dramatically in the hands of Wolff, Vattel’s intellectual idol, and Vattel himself. These writers took a very different approach to reconciling the private right of punishment with the possibility of punishment in the international realm—one which stressed authorization far less than the theories of Hobbes, Pufendorf, and Locke, and replaced it with a theory of sovereignty that looked back to aspects of the Grotian account which had largely dropped out of Hobbes, Pufendorf, and Locke. On this account, the state’s powers originated not from a transfer of specific individual rights to the state, but instead existed by necessity as qualities of a self-sufficient political community. This included the state’s right of punishment, which, while analogous to the right of punishment held by individuals, was not identical with it.

This shift depended in part on Wolff and Vattel’s adoption of a set of presuppositions about natural right inherited from Gottfried Wilhelm Leibniz. Leibniz’s account of natural law made significant additions to Grotius’s natural law theory in ways that had important consequences for the international order, though Leibniz himself did little to expound on those
consequences or collect them in systematic fashion. Leibniz and his successors saw in Grotius a writer who shared their anti-voluntarist convictions about moral obligation, but who had not fully expressed the implications of that position. To that end, Leibniz wholeheartedly endorsed large portions of Grotius’s natural law account—including his claims about the private right of punishment—but supplemented them with an expansive account of obligation which had been largely absent from Grotius’s work. From this combination of views about natural right and sovereignty Leibniz derived radical views about the international order which found no purchase in a rapidly solidifying European state system. Indeed, Leibniz rejected much of what came to be canonical in the 18th and 19th centuries, including the equality of states, the existence of a social contract, and the independence of European states from the control of the Holy Roman Emperor or the Pope. From the same intellectual foundations, however, Wolff set the course for modern thought on the international order.

Like Leibniz, Wolff rejected Pufendorf’s account of obligation as requiring a superior—the role played by God with respect to natural law—in favor of an account that started from the requirement of the perfection of mankind and derived obligations and rights from that point. This constituted both a perversion of Leibniz’s conception of perfection, which Wolff had appropriated, and a radical break from previous writers on the law of nations, who had begun from the proposition that individuals were rights-bearing and then derived duties and obligations from those rights. This claim had three important consequences for Wolff’s theory, all of which were fundamental to the rise of a new conception of international law as the law particular to states, and in particular the law applying to the rulers of states. First, it enabled Wolff to claim that the rights of states were distinguishable (though related) to the rights of individuals, and thus make them a separate subject of inquiry, attenuating the individual-state analogy which had
characterized virtually all prior thought on the international order. Second, it enabled a conception of the social compact as based on establishing a set of obligations and rights for the state independent of the obligations and rights of the individuals who composed it. This led Wolff to a set of conclusions about the nation and the ruler’s authorization which was remarkably Hobbesian in character, though his conclusions about sovereignty would have been deeply objectionable to Hobbes. Finally, this style of reasoning enabled Wolff to introduce a distinction among enemies in a way which introduced something like the modern concept of civilian status, but led to difficulties articulating what it could mean to “punish” another nation. This initiated the gradual decline of punishment in the international arena—not because it was no longer an individual or state right, but because the circumstances when it could be employed were sharply limited.

I. Leibniz’s Natural Law

Leibniz, despite his prodigious output, never produced a treatise systematically examining the law of nature, much less a general treatment of the law of nations. Yet his philosophical framework, as well as his scattered thoughts on the international order, proved to be hugely influential for a series of writers on international affairs, most importantly Christian Wolff and Emer de Vattel. These disciples took the overarching framework of Leibniz’s thought and developed it into a systematic legal treatment of the international order, with Vattel presenting what is widely considered the first “modern” account of international relations. Despite this fact, Leibniz receives comparatively little attention in works on the origins of
international law, except to note him as an early contributor to the codification of European state practice through his collection of treaties and diplomatic correspondence.¹

This lacuna is largely due to the fact that Leibniz’s practical arguments about the international realm have a strongly archaizing bent. Leibniz was famously a supporter of a revived Papacy and stronger powers for the Holy Roman Emperor—political impossibilities throughout his lifetime—and this has led to a focus on those more unrealistic aspects of his theory.² However, this focus on Leibniz’s specific works on international affairs—the De Suprematu, the Codex, and a few other scattered essays—masks the significant shift Leibniz inaugurates in natural law theory on the international realm. Leibniz, in responding to the detestable doctrines he found in Hobbes and Pufendorf, reached back to a conception of right he derived from the Roman law and the work of Grotius to offer a new approach to natural right which was to have far-reaching consequences for the development of the law of nations. The key move in Leibniz’s account, largely found in one of his earliest and most neglected works, the Nova Methodus Discendae Docendaeque Jurisprudentiae, was a conception of natural right which viewed right and obligation as inseparable, both within and outside contractual relationships. This conception of right and obligation also led Leibniz away from an image of sovereign power as derived from the powers of individuals, transferred by a contract, in favor of a view of the powers of sovereignty as a necessary consequence of the aims of civil society.

² Scholarship on Leibniz’s thought on international affairs is fairly rare, but under this head could easily fall both of the articles directly addressing the topic in the last 70 years: J. Walter Jones, “Leibniz as International Lawyer,” British Yearbook of International Law 22 (1945): 1-10; Paul Schrecker, “Leibniz’s Principles of International Justice,” Journal of the History of Ideas 7 (1946): 484-98. In recent years some attention has been drawn to Leibniz’s thought on the international order, particularly his conception of “international legal personality.” Janne Elisabeth Nijman, The Concept of International Legal Personality (The Hague: T.M.C. Asser Press, 2004), 29-84; Tetsuya Toyoda, Theory and Politics of the Law of Nations: Political Bias in International Law Discourse of Seven German Court Councilors in the Seventeenth and Eighteenth Centuries (Boston: Martinus Nijhoff, 2011), 81-102.
Leibniz was actively hostile to the Hobbesian model of authorization, though he did not supplement that criticism with the claim that an entity called “the people” existed separate from the state itself; instead, he believed “with Hobbes, that the state is simply an aggregation, like a herd or an army, and that its unity is found in the unity of its rulership.” This feature of Leibniz’s account would be abandoned by Wolff and Vattel, but the idea that the state’s powers derive from its obligations—rather than a contract with its citizens—was retained.

When examining Leibniz’s thought on the international order, it is also important to bear in mind that it was strongly shaped by practical considerations. Leibniz served in the court of the Dukes of Hannover for his entire life, and virtually all of his writings on international affairs were occasioned, directly or indirectly, by the political interests of the dukes. Throughout his life he was steadfastly opposed to the ambitions of Louis XIV’s France, which led to his 1683 *Mars Christianissimus*, a savage critique of French ambitions, and his 1703 *Manifesto for the Defense of the Rights of Charles III*, which sought to shore up Hapsburg claims to the Spanish throne. Leibniz’s most famous text on international affairs, the preface to the *Codex Juris Gentium* of 1693, was occasioned by a request from the Duke of Hannover to research the history of the House of Welf in hopes of shoring up the House’s recently acquired position as an Elector of the Holy Roman Empire. Leibniz never wrote the requested history, but he did publish a large collection of treaties and similar documents in the *Codex*, and the treatise has been hailed as an early moment of importance for the conception of the law of nations as a purely positive institution. The preface to the *Codex* contained a sketch of Leibniz’s views on the law of nations which was to prove influential. Leibniz’s other great statement on the international order—and

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one of his only works devoted to politics in general—comes in his *De Suprematu Principum Germaniae*, published in 1677 under the pseudonym Caesarinus Furstenerius. This text was intended to support the Duke of Hannover’s right to send and receive ambassadors—in short, to the privileges of a state in the international arena.

Leibniz’s contribution to the decline of punishment in the international arena is thus somewhat oblique, but essential, and it is no exaggeration to say that he, more than anyone else, initiated its final descent. Leibniz can claim this honor not because he abandoned the notion that punishment was an individual right—on the contrary, he drew explicitly on Grotius to make that exact claim—but because he supplemented Grotius with a new understanding of natural right which stressed the primacy of an individual’s obligations, as derived from Leibniz’s particular understanding of man’s place in the universe. Despite this radical shift in natural rights thought, Leibniz never drew these strands together himself, and indeed when he did make claims about the international order with implications for the role of punishment, he consistently took positions which ran counter to the trend of European thought on the law of nations. However, his successors in the natural law tradition recognized that Leibniz’s new approach to natural right and his concept of perfection did not compel the conclusions about the international realm which Leibniz offered, and by severing these features from the broader architecture of Leibniz’s thought, they adopted premises that assimilated a traditional social contract model to a set of claims about punishment which eventually eliminated it as a legitimate claim in the international realm.

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5 A name apparently intended to demonstrate that Leibniz supported both the Holy Roman Emperor and the princes of Germany (*fursten*).
6 Toyoda, *Theory and Politics*, 84-86.
Leibniz’s remarkably different approach to natural right depended on the unique foundations of his account of justice. These principles of justice help to explain why individuals have rights, a question Leibniz largely elided in his legal and political works, even though his answer differed markedly from any other writer we have examined. While he defined justice and injustice in the *Nova Methodus* in terms of what is good or harmful to the public, there was no overarching theory of why individuals possessed rights in the *Nova Methodus*. In the more mature *Codex*, Leibniz gave the most public version of his famous formulation of justice as “the charity of the wise man,” which he explained with reference to the concept of happiness.

“Charity is a universal benevolence, and benevolence the habit of loving or of willing the good,” which means that love, in turn, is defined as “rejoicing in the happiness of another, or, what is the same thing, converting the happiness of another into one’s own.” Wisdom guides charity, and is defined as “the science of happiness itself.” While Leibniz notes that natural right flows “from this source,” he declines to explain happiness in the *Codex*, leaving us to resort to his earlier writings to understand his meaning.

The important point is simply that happiness is the specifically human form of a broader concept: perfection, an idea which animates much of Leibniz’s metaphysics. This, in turn, depended on a deeper debate about the freedom of God’s will, one of the most fraught debates in early-modern Europe. Leibniz’s metaphysics was founded on a set of principles about God which he saw as directly contradictory to principles advanced by Descartes, Hobbes, and Spinoza. In his *Theodicy*, Leibniz began from the proposition that the world which we

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7 For the *Nova Methodus*, I am using the recent translation by Christopher Johns, as an appendix to *The Science of Right in Leibniz’s Moral and Political Philosophy* (New York: Bloomsbury, 2013), §14, p. 153 (133).
8 For the vast majority of Leibniz’s political writings, and in particular the *Codex*, I am using the edition of Patrick Riley, *Political Writings* (New York: Cambridge University Press, 1988), 171.
9 Id.
experience is a contingent world, and that other worlds are consequently possible.\textsuperscript{10} The only way to explain the particular arrangement of our world is to seek some deeper "substance which carries within it the reason for its existence, and which in consequence is necessary and eternal."\textsuperscript{11} The only substance which fits this description is God, who has the ability to comprehend the entire list of possible worlds and then create a particular, contingent one.\textsuperscript{12} But, \textit{contra} Spinoza, God does not create everything it is in his power to create—not everything can exist at once in order to preserve the harmony and balance of a particular universe.\textsuperscript{13} On the other hand, in opposition to Descartes and Hobbes, Leibniz claims that God cannot arbitrarily choose a universe to create with his unbounded will. This would make goodness no longer a quality of God.\textsuperscript{14} Consequently, God cannot act in an arbitrary fashion, but must act in accordance with some universal rules of goodness.\textsuperscript{15} God by necessity wills the greatest possible good, since he has complete understanding of all possible things, and (like all other rational things) wills only what seems good.

This is the foundation of Leibniz’s famous claim that God has created the best of all possible worlds, and the core of his point about perfection and imperfection. God is perfect and has complete understanding, and so has willed the best of all possible things. Evil, by contrast, is defined by Leibniz as an absence of goodness, and thus lacking any efficient cause of its own.\textsuperscript{16} This, in turn, is defined in terms of perfection: "\textit{Metaphysical evil consists in mere imperfection},” i.e. our inability to comprehend (like God) the entire range of possibilities,

\begin{flushright}
\textsuperscript{11} Id.
\textsuperscript{12} Id. at 127-28.
\textsuperscript{13} §173, p. 234-35.
\textsuperscript{14} §175, p. 236.
\textsuperscript{15} §303, p. 310. Leibniz made the same anti-voluntarist commitments particularly clear late in his life in his \textit{Meditation on the Common Concept of Justice} from 1703.
\textsuperscript{16} §20, p. 136.
\end{flushright}
leading us into error. The consequence is “that God is absolutely perfect,” while “created beings derive their perfections from the influence of God, but that their imperfections come from their own nature, which is incapable of being without limits.” While humans, with their limited understanding, cannot comprehend the full order of creation, and are quick to suggest ways in which the life of man could be improved, the principles which guide God’s creation look at the perfection of the whole universe, not the pleasure of individual men or even the species of mankind.

However, those moments when humans do identify something of the perfection of the universe in another thing or person are sources of pleasure, and thus happiness. As Leibniz wrote in a note, On Wisdom, “Pleasure is the feeling of a perfection or an excellence, whether in ourselves or in something else.” Perceiving excellence or perfection in other people or things “causes some of this perfection to be implanted and aroused within ourselves.” As this suggests, “nothing serves our happiness better than the illumination of our understanding and the exercise of our will to act according to our understanding, and that this illumination is to be sought especially in the knowledge of such things as can bring our understanding ever further into a higher light.” Increasing a person’s wisdom is to increase their understanding, which in turn enables them to appreciate more fully the perfections of the universe and to improve their own perfection.

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17 §21, p. 136.
19 Theodicy §118, p. 188-89.
21 Id. at 699-700.
22 Id.
This cycle is the essential background to Leibniz’s claims about justice in the Codex. When Leibniz writes that justice is “the charity of the wise man,” he defines his terms: charity is “universal benevolence, and benevolence the habit of loving or willing the good,” while love “signifies rejoicing in the happiness of another.” When those whose happiness pleases us are happy, we are also happy, and Leibniz suggests that the degree of pleasure we receive from the happiness of others and the love we have for them is conditioned on their degree of perfection. He illustrates this with the example of divine love; “God can be loved with the greatest result, since nothing is happier than God, and nothing more beautiful or more worthy of happiness can be conceived.” Wisdom, Leibniz finally says, “is nothing but the science of happiness itself,” and from this chain of reasoning we can infer that wisdom consists in the recognition and proper valuation of the perfection we perceive in other individuals and things. We love or will the good of others, but wisdom conditions that love on an accurate assessment of the perfection present in others. Charity is not unlimited, but responds to the specific characteristics in another worth loving.

These points undergirded Leibniz’s attack on Pufendorf and (as he saw it) Hobbes, whose claims about God’s unbounded will Leibniz viewed as extremely dangerous. In his Opinion on the Principles of Pufendorf, Leibniz began by praising the “incomparable Grotius” before he attacked the position that the categories of just and unjust were created by the command of a

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23 Political Writings 171.

24 Id. Leibniz also made this point in a letter to Madame de Brinon in May of 1691, writing that “Charity is nothing else than a general friendship which extends to all, but with distinction, for it must be regulated by justice according to the degrees of perfection which can be found or introduced in objects.” Quoted Riley, Universal Jurisprudence, 158.

25 This text, along with Barbeyrac’s response to Leibniz, has occasioned tremendous scholarly debate about the veracity of Leibniz’s criticisms and the effectiveness of Barbeyrac’s response. For a sampling of these debates, see Tuck, Natural Rights, 158-59; Ian Hunter, “Conflicting Obligations: Pufendorf, Leibniz, and Barbeyrac on Civil Authority,” History of Political Thought 25 (2004): 670-99; Christopher Johns, “Leibniz, Pufendorf, and the Possibility of Moral Self-Governance,” British Journal for the History of Philosophy 21 (2013): 281-301.

26 Political Writings 65.
sovereign—God for Pufendorf, and the civil sovereign for Hobbes. As we have already seen, Leibniz was keen to show that justice must exist as a concept binding even on God, and thus independent of his will: “God is praised because he is just. There must be, then, a certain justice—or rather a supreme justice—in God, even though no one is superior to him, and he, by the spontaneity of his excellent nature, accomplishes all things well, such that no one can reasonably complain of him.”

God could not be just if he were responsible for establishing justice. Leibniz focuses the practical consequences of this critique on two weaknesses, with the international realm playing a background part. First, he attacks Hobbes’s denial that a tyrant can never act unjustly, since one who “arbitrarily despoils his subjects, torments them, and kills them under torture; who makes war on others without cause” must be committing some injustice. This position had led Hobbes and his followers to deny “any voluntary law of nations whatever, for the reason, among others, that peoples cannot bring about a law by reciprocal pacts, not having the obligation rendered valid by any superior.” Here Leibniz appropriates an argument we have already seen in Pufendorf: if there can be no justice in the absence of a common earthly superior, “men cannot set up any superior for themselves by consent and agreement,” so the claim of Hobbes must prove too much. Pufendorf’s attempt to resolve this tension by introducing the superiority of God does enable him to explain the initial social contract and treaties, but “all the same the doctrine itself, which makes all law derivative from the command of a superior, is not freed of scandal and errors, however one justifies it.” Such a position would eliminate God’s justice and goodness.

This insistence on justice as a concept independent of the will of God made Leibniz particularly sympathetic to the arguments of Grotius, whose *etiamsi daremus* argument implied

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27 Political Writings 71.  
28 71.
that justice had a source discoverable by reason and not solely ordained by God, and this shared commitment led Leibniz to adopt Grotius’s basic framework of natural right from a very early stage in his career. The first and most complete sketch of his ideas came in his *Nova Methodus*, published in 1667. Much of the first part of the work sets out a program of legal reform and education, but the second part of the work contains Leibniz’s first attempt to explain his approach to natural right, and in a way that is remarkably consistent with the way he presents the same ideas in the *Codex* almost thirty years later. The work also enjoyed some scholarly popularity, being reprinted in 1748 with an introduction by Christian Wolff and again (with the same Wolff preface) in the Dutens edition of Leibniz’s works in 1768.

Leibniz’s primary objective in the second part of the *Nova Methodus* was to demonstrate the rational foundations of law—law which was applicable not only to individuals and states, but to all rational substances, including God. For Leibniz, jurisprudence is “the science of right in relation to some case or action,” and his contribution is intended to demonstrate both “the perfection of the jurisconsult” and “the way of ascent to perfection, or, where fitting, to what is second and third.” This latter category applies to the state; people and states are incapable of actually reaching perfection (unlike God), so there must be some accommodation made to human imperfection.29 Part of this project involved a demonstration that previous efforts at jurisprudence had failed to engage with underlying principles, instead piling up unhelpful distinctions and commentaries. The medieval glossators “never even dreamed of an art or technique of right,”30 and the division of the Roman sources by persons, things, and actions is as absurd as dividing surveying “not according to the form, but according to the matter, and to carry on with the measure of farms, pastures, sandy plains, and still other areas abounding in clay and

29 *Nova Methodus*, §1, p. 149.
30 §9, p. 151.
rock.”

The unnecessary repetition of dividing jurisprudence by subject is destructive, and all the more so since political and social arrangements have changed: “In the *Digest* and *Codex* the perpetual cause of order is the ancient order of right, which is as instructive to the present day as the sow is to Minerva.”

Leibniz thus turns to offering his own foundational principles of jurisprudence, which rely heavily on principles drawn from the Roman law and Grotius’s *De jure belli*. It is important to recall that Grotius, in his categorization of rights, had given one definition of rights which stressed their character as “a moral quality of a person, making it possible to have or to do something lawfully,” a definition he shared with Suarez. On this understanding, right is divided into two categories: “faculties” and “aptitudes,” with the former corresponding to perfect rights and the latter to imperfect rights. Perfect rights, or “strict rights,” as Grotius occasionally calls them, could inhere in people, property, or contractual relations.

However, Grotius never addressed obligation as an independent concept in his discussion of right. He nowhere offered a definition of the term, and his references to it were rare. Grotius’s most extensive discussion of the concept came in the context of his description of one meaning of the term “law” as “a rule of moral actions imposing obligation to what is right.” Obligation is here contrasted with “counsels and instructions,” which have non-binding force, but obligation itself is not the focus. This did not stop Barbeyrac from concluding based on this passage and

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31 §10, p. 152.
32 Id. Leibniz did have a great deal of respect for Roman law and jurisprudence, but thought its separation between natural law principles and arbitrary human artifice was incomplete. As he wrote in his letter to Thomas Hobbes in 1670, “When I first set my feet on the paths of jurisprudence, therefore, I began four years ago to work out a plan for compiling in the fewest words possible the elements of the law contained in the Roman Corpus (in the manner of the old Perpetual Edict), so that one could, so to speak, finally demonstrate from them its universal laws.” (*Philosophical Papers and Letters*, ed. Loemker, I:164).
34 I.i.5, p. 35-36.
35 I.i.9, p. 38.
Grotius’s definition of natural right meant Grotius held a non-voluntarist position on obligation, a claim which would have had obvious appeal to Leibniz.\textsuperscript{36} Similarly, Grotius’s account of property included a relatively extensive set of obligations which derived from the consensual foundation of property; people who hold my property have an obligation to notify me that they hold it and restore it to my control, obligations which are “binding upon all men, as if by a universal agreement.”\textsuperscript{37} But Grotius never developed a full-fledged account of obligation, and never articulated an individual’s other perfect rights in terms of corresponding obligations, even though the foundations of a more complete account of purely natural obligations (as opposed to contractual ones) were present, as Barbeyrac noticed.\textsuperscript{38}

Leibniz recognized the potential consequences of Grotius’s theory just as clearly as Barbeyrac some years later, and modified it primarily by supplementing Grotius with an expanded account of obligation. For Leibniz, jurisprudence represents “a science of actions, insofar as they are called just or unjust. \textit{Just} and \textit{unjust} are what are useful or harmful to the public. \textit{To the public} means first to the world, or to God, its rector, and then to humanity, and finally to the state.”\textsuperscript{39} This stress on the justice of actions is important, because Leibniz follows

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\textsuperscript{36} Indeed, Barbeyrac’s notes on Grotius’s discussion of right suggest the degree of agreement which likely would have existed between Grotius and Leibniz on these points, had Grotius considered obligation in more detail. Barbeyrac complained that Grotius’s view of obligation involved no dependence on a superior (I.i.9 n.5, p. 148) and that Grotius had inappropriately concluded that “we should be under an Obligation of doing or not doing certain Things, even tho’ we were not answerable to any one for our Conduct” (I.i.10 n.3, p. 151). Barbeyrac’s notes are in the Liberty Fund edition of Grotius’s works.
\textsuperscript{37} Il.x.1, p. 321.
\textsuperscript{38} In his commentary on Grotius’s division of strict right into rights over persons, things, and contracts, Barbeyrac noted that the contractual formulation could equally well be applied to Grotius’s account of punishment: “I am induced to think so, because first the \textit{Perfect Right}, to which the \textit{Debitum & Creditum} in Question relate, answers to the \textit{Law of Nature, or Natural Right}, properly so called, of which the Author has spoken in his preliminary Discourse, 8. Now one of the general Rules of that Law is, that \textit{those who violate its Maxims, deserve to be punished}....It is very probable therefore, that our Author, while he was enumerating the several Things which may be required in Rigour, would not forget the Punishment of Criminals.” I.ii.6 n.27, p. 140.
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Grotius in distinguishing between the justice of actions and the “morality” of an action, specifically “the justice or injustice of the act of the person.” Morality thus looks at the internal state of the actor, as opposed to the external appearance of the act itself. Leibniz follows this by introducing his conception of right and obligation: “the real quality in the order of the action is twofold, namely, the power to act, and the necessity to act; therefore, moral power is called right, and moral necessity is called obligation.” The notion of a right as a moral quality is straightforwardly adopted from Grotius, but the difference is Leibniz’s greater stress on the concept of obligation as central to every evaluation of the “real quality” of the action; Grotius did not examine the moral quality of obligation when articulating his theory of rights.

These concepts of moral power and moral necessity are central to Leibniz’s project. As he makes clear, “The object of right and obligation is the body of the subject, a thing, and a third person,” corresponding to Grotius’s three categories. Each of these rights has a different name, and in order to understand the character of right and obligation, the passage is worth quoting in full:

The right to my body, whose subject I am, so to speak, is called freedom; the right in things is called faculty, and has the following species: the direct ownership of the matter of a thing; right of use or enjoyment of a thing; the right of servitude in parts of form, that is, in qualities; the right of acquiring and retaining ownership and other material rights. The right in persons is called right to coercion, and varies in many ways: such as the right over one’s life and death; the right to punish and reproach another, etc. Obligation means not to obstruct the freedom, faculty, and right of coercion of another, the obstruction of which is called injury. And the obligation not to impede another’s right of coercion against me is called positive; the obligation through which I am bound to do or allow something is called absolute obligation. The rest of the obligations, i.e. not to impede the freedom of another or to seize his things, make up private right.
As this makes clear, there is a reciprocal relationship between right and obligation in a way not present for Hobbes; obligation is defined in terms of non-interference with the exercise of rights by another. The scope of right is thus always limited by the scope of our obligations to other people; while I have a right over my body or a right of acquiring property, that right is constrained by the obligations I owe to others not to impinge on the exercise of their right. Leibniz makes this relationship clearer in describing the source of rights and obligations. Some—specifically freedom and faculty—stem from nature, and thus nature “corresponds to the obligation in another not to impede freedom and faculty.” Right over individuals—“coercive power”—can only come about through some action, such as “possession, or injury, or compact.” An individual commits an injury by impeding the exercise of my right; “in the state of pure nature” such an injury grants a “right of war against the violator of society,” which includes a right of coercion. As Leibniz notes, this conception of injury carries over into civil society, though “In republics...this permission is restricted, so that the injured person must be content with the state’s estimation of damages, and the penalty is reserved for the state to administer, if the damages were inflicted deliberately.” While his treatment is extremely abbreviated compared to Grotius’s lengthy explication, Leibniz has clearly accepted the Grotian notions that there is an individual right to punish stemming from natural law, and that there is an obligation on the part of the wrongdoer to submit to punishment.

qualitates; jus detinendi, usucapiendi conditionem; & alia jura realia. Jus in personam dicitur Potestas, & multis modis variat, interdum vitae & necis, interdum castigationis, interdum increpationis, &c. Obligatio est, ne alterius libertas, facultas, potestasque impediatur: Quae impeditio dicitur Injuria. Et obligatio, ne potestas alterius in me impediatur, est positiva, qua teneor aliquid facere vel pari, & dicitur [absolute] obligatio. Caeterae obligationes, ne alterius libertatem impediám, vel arripiam rem, sunt magis privativae. (185-86)

44 §17, p. 154.
45 §17, p. 155.
46 §17, p. 155.
Along with possession and injury, compact can create a power of coercion over individuals, though as Leibniz notes, “Many matters…are not seen to descend from natural sources, but rather from the laws, even though they descend completely from only one of these sources—from the compact, since the people agree to submit to the legislator.” This discussion of compact is effectively the only place in Leibniz’s sprawling corpus of writings where he employs something resembling social contract theory. This compact, which creates the right of coercion over individuals, is foundational to all state activities: “all public obligations resulting from the decisions of the judiciary, including bodily and pecuniary punishments, pertain to the source of the contracts. For every subject of the state whosoever promises to respect the state’s decrees in such decisions, whether universal, such as laws, or singular, such as in legal opinions.” The contract is ultimately the source of all public right, which is designed to ensure “that one who has the power or moral necessity may also have the corresponding right or obligation.” In summing up, Leibniz underscores the inseparability of right and obligation: “The causes of right in one person are a kind of loss of right in another; that is, the second person has an obligation to the first. Conversely, acquiring an obligation from another is the cause of recuperation of right, i.e. liberation.” Compact is expressly mentioned as an example of loss of right, and Leibniz later repeats that “the law receives its validity from the people’s contract.”

This leads Leibniz to his first expression of the core principles of natural right, a formulation which would remain relatively consistent throughout his career. “Namely, the right of nature has three degrees: strict right, equity, and piety.” These rights are presented in

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47 §17, p. 155.
49 §18, p. 155. ...omnes obligationes publicorum judiciorum, sive ad poenam corporalem sive pecuniaram tendant, pertinent ad pactorum fontem: promisit enim quilibet subditus reipublicae, se decreta ejus vel universalia, ut leges: vel singularia, ut sententias. (186)
49 §20, p. 156.
50 Id.
51 §71, p. 159.
escalating importance, with strict right at the lowest level. Leibniz addresses strict right first, which “derives from the definition of terms, and when rightly weighed, is nothing other than the right of war and peace.” Individuals have rational capacities which enable them to recognize that each has a right of peace, and that right persists “as long as the other does not instigate war or harm.” By contrast, there is a perpetual state of war with beasts and nature, which lacks understanding; as a result “a lion is permitted to destroy a man, and a mountain to crush a man in an avalanche,” while man is permitted to subdue both the lion and the mountain by hunting and mining. Gaining control over these nonhuman forces constitutes possession, which simultaneously “gives the person the right to the thing and the right of war, provided that the thing belongs to no one.” Individuals thus have a right of war to protect their possessions. The final step is to demonstrate that violating the obligation of keeping faith creates a right of war; this is accomplished by arguing that “among species of harm there is pernicious deception, a harm to the mind, from which derives the need of keeping promises.” Together, these points demonstrate the first element of the right of nature: “Harm no one, in order not to give the right of war.”

Leibniz then turns to equity, his second principle. This is “the ratio or proportion between two or more [rights claims],” and it is this principle which provides for restitution, rather than war. It is also home of the golden rule, which Leibniz cites, and the source of the principles opposing “deceit and wickedness,” particularly in contractual negotiations. While “equity itself requires that strict right be observed,” Leibniz claims that equity itself does not create a right of coercion, again reaching back to Grotius:

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52 §73, p. 161.
53 Id.
54 Id.
But equity provides right only in the wide sense, or according to Grotius an aptitude for acquisition, which imposes on the other the full obligation [not to impede it]. For example, it is equitable that the one who through deceitful practices has removed a debt owed to me, nevertheless still owes me, although the legal process of pursuing the debt is not given to me; to take some action or make some exception or petition derives from pure right (unless some law is added). Nevertheless, that person is obligated to give me what I am owed. Hence this precept: *give to each his due*. But the law or superior makes way for equity, and from this sometimes provides for legal action or exception.  

There are situations in which the civil law does not ensure that justice is accomplished; under those circumstances, the debt remains, though the state does not assist in securing it. The “aptitude for acquisition” which Leibniz describes is simply a right to ask the other party to make good on the debt, despite the lack of legal process to compel it. The individual has a right from nature to request this satisfaction, and the debtor cannot impede the creditor in exercising that right. The use of coercion to obtain the debt depends upon the state, and this is the sense in which “the law or superior makes way for equity,” by converting the otherwise imperfect (i.e. unable to be extracted by force) obligation of the debtor into a perfect one; when the civil law does not do this, either because of “exception” or deceit, there is no right in the creditor to coercively receive the debt, but only to implore the debtor to pay up.

Finally, Leibniz turns to piety, and here declares that “the third principle of right is the will of the superior.” Leibniz’s discussion of the relationship between God and the principles of piety has led to extensive debate over whether Leibniz held, at this point in his career, the voluntarist view which he would later criticize in Pufendorf, but at the very least it can be said

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55 §74, p. 162. Sed aequitas dat solum jus laxe dictum, seu Grotii stylo aptitudinem uni, alteri vero obligationem plenam, v. g. Aequum est, ut qui dolosius subtilitatis se a meo debito liberavit, mihi nihilominus teneatur, sed mihi non datur in eum actio persequendi; actio enim vel exceptio, vel quaecunque postulatio ex jure mero descendit (nisi aliquid Lex addat) ille tamen est obligatus ut mihi det. Hinc illud praeceptum: Suum cuique tribuere. Sed lex aut superior dat aequitati exitum, & ex ea nonnunquam actionem vel exceptionem tribuit. (214)  
56 For the argument that Leibniz held the voluntarist position, see Patrick Riley, “Leibniz: ‘Meditation sur la notion commune de la justice’: A Reply to Andreas Blank,” *The Leibniz Review* 15 (2005): 185-216. The opposing view, which relies on reading into Leibniz’s discussion of piety the qualification that the most powerful individuals—those of the sort described by Thrasymachus—are themselves ruled by moral power, can be found in Christopher Johns, *The Science of Right in Leibniz’s Moral and Political Philosophy* (New York: Bloomsbury, 2013), 18-21.
that piety stands in as a man’s recognition of God’s goodness; “God, who is omniscient and wise, confirms pure right and equity; and since he is all-powerful, executes it. Here coincides the utility of humankind, indeed, the beauty and harmony of the world, with the divine will. From this principle it is never permitted to abuse beasts and creatures.”\(^\text{57}\) The result is that piety corresponds to the Roman law command to live honorably, completing the trifecta of natural right.\(^\text{58}\)

This conception of natural right was to remain a part of Leibniz’s philosophy for much of his career. The same tripartite division of natural right appears in the *Codex*, where Leibniz offers (for the only time) to “say something more about…[the relation of] natural law to that of nations.”\(^\text{59}\) He immediately turns to a series of arguments lifted from the *Nova Methodus*, most importantly the claim that “Right is a kind of moral possibility, and obligation a moral necessity.” Right and obligation thus describe the universe of morally permissible and required actions, as, quoting the *Digest*, “we ought to believe that we are incapable of doing things which are contrary to good morals.”\(^\text{60}\) The tripartite division of natural right is retained, with strict right, equity, and piety again taking their places, and Leibniz explicitly cites to what “I once suggested, as a youth in my little book *De Methodo Iuris,*” referring to his *Nova Methodus*.\(^\text{61}\) Once again, Leibniz stresses the relationship between Grotius’s ideas of faculty and aptitude and the concepts of strict right and equity, and the idea that the laws of the state “make it possible that those who had a merely moral claim acquire a legal claim; that is, they become able to demand what it is equitable for others to perform.”\(^\text{62}\) The same schema likewise appeared in one of Leibniz’s last

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\(^{57}\) §75, p. 162.  
\(^{58}\) Id.  
\(^{59}\) *Political Writings* 170.  
\(^{60}\) 171, quoting *Digest* XXVIII, 7, 15.  
\(^{61}\) 172.  
\(^{62}\) 172.
writings on justice, the *Meditation on the Common Concept of Justice*, where he stressed that “When it is a question of the rights of sovereigns and of peoples, one can still distinguish the *ius strictum*, equity, and piety. Hobbes and Filmer seem to have considered only the *ius strictum*.”  

Leibniz likewise praised Filmer for his recognition “that there is a right, and even a *ius strictum*, before the foundation of states.”

What the *Codex* adds to this earlier treatment is a discussion of civil law which goes beyond the principles laid out in the *Nova Methodus*. Besides natural right there is “voluntary right, derived from custom or made by a superior.” Civil laws derive their force from the sovereign, while “outside of the state, or among those who participate in the supreme power (of whom there may be more than one, even in the same state), is the sphere of the voluntary law of nations, originating in the tacit consent of peoples.” Leibniz is clear that this voluntary law need not “be the agreement of all peoples or for all times; for there have been many cases in which one thing was considered right in India and another in Europe, and even among us it has changed with the passage of centuries.” In these respects, Leibniz paralleled Grotius’s position, recognizing the divisibility of sovereignty within a state and the possibility that consent could create binding law on states. A bit later, Leibniz argues that “The basis then of international law [*iuris fetialis inter gentes*] is the same natural law whose principles I made clear a little earlier. On it are founded the institutions of international law, which changes according to time and place.” The claim that law between nations is encouraged by nature, but nature does not

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60.  
61.  
174.  
Id.  
Id.  
175.  

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prescribe its content, is not developed further in this text, though presumably many sets of positive arrangements could be imagined that serve the objective of peace more or less well.

Leibniz’s doctrine of natural right thus shared multiple points of connection with Grotius. The language of *facultas* and *aptitudo*, and the distinction between them based on their enforceability, was derived directly from Grotius’s work, and Leibniz’s adoption of the argument that individuals held a right of punishment was equally reflective of the Grotian foundations of his theory. Leibniz’s primary innovation was to stress the importance of the corresponding concept of obligation, and to develop much more fully its implications for the doctrine of natural right, a line of thought already latent in Grotius’s writings. Leibniz even appeared to adopt a theory of contract in the *Nova Methodus* which would not be out of place with aspects of Grotian thought; while, as we have seen, Grotius offered a rather ambiguous theory of sovereignty, Leibniz’s early insistence that individuals were obliged to obey the government as a result of their contract had strong resonances with Grotius’s own claims about the ability of individuals to renounce their rights to the state. Yet Leibniz eventually abandoned this position and contractarianism altogether, one of a series of arguments which ultimately make Leibniz’s arguments highly unusual in the course of thought on the international realm. From Grotian foundations, Leibniz built a very un-Grotian international order, and many of his practical conclusions were to be rejected by his successors in the natural law tradition.

II. **Sovereignty and the Unequal International Order**

As the somewhat misleading translation of *iuris fetialis inter gentes* as “international law” suggests, Leibniz appeared to have in mind the law prevailing specifically between states, not simply the generalized natural law which applies all relationships between those with no
earthly superior. As scholars have noted, Leibniz’s approach to the international order gives states a special status which they generally lacked in earlier theories; rather than viewing the state as simply an artificial individual alongside other natural and artificial individuals in the international order, Leibniz provides a theory of the state as the sole presence and actor in the international realm.\textsuperscript{69} However, less attention has been paid to the ways in which Leibniz’s underlying theory of sovereignty shifted over the course of his career to make this claim possible, thus carving out a special realm of law exclusively applicable to states. This is significant because Leibniz’s abandonment of the social contract approach led him to adopt a theory of sovereign power analogous to the Scholastic theories which influenced Grotius early in his career, though Leibniz never explored the consequences of this view for punishment. Later writers, however, were to meld Leibniz’s positions with a modified theory of contract with roots in Pufendorf to create the first modern theories of the law of nations.

Despite the rather bland contractarian formulation of civil obligation in the \textit{Nova Methodus}, Leibniz’s discussions of sovereignty in \textit{De Suprematu Principum Germaniae} and the \textit{Codex} contain virtually no reference to a contractual scheme. It has been suggested that Leibniz’s hostility to Hobbes, particularly marked in the later stages of his career, made the presuppositions of the social contract suspect.\textsuperscript{70} In \textit{De Suprematu} Leibniz complained that sovereignty was a “thorny and little-cultivated” field of study, and set out to place it on more solid ground.\textsuperscript{71} Leibniz then defined a\textit{ civitas} as “a fairly large gathering [\textit{coetus}] of men, begun [\textit{initus}] in the hope of mutual defense against a large [external] force, such as is usually feared, with the intention of living together, including the foundation of some administration of common

\textsuperscript{69} See supra note 2.
\textsuperscript{70} Riley, \textit{Universal Jurisprudence}, 206-07.
\textsuperscript{71} Political Writings 113.
While he speaks of the beginning of political society, Leibniz avoids any explicit contractual language, instead preferring more ambiguous terminology equally applicable to a more Aristotelian account of the foundation of the state. Indeed, Leibniz moves immediately to differentiate the state from other societies based on these characteristics, and follows that with a discussion of the application of the term *civitates* in light of Aristotle’s political theory. Something of Leibniz’s hostility to the social contract tradition seems to have been known even to his contemporaries. When the *Nova Methodus* was republished in 1748, Christian Wolff was invited to write a preface, in which he warned against taking everything in this youthful work as Leibniz’s considered position. Among the specific propositions which Wolff singled out as not reflective of Leibniz’s mature views was sec. 19 of part II, in which Leibniz derived the obligation of obeying the civil law from a contract.

Leibniz’s substantive theory of sovereignty in *De Suprematu* does not depend on a contract for its justification. The bundle of laws and rights which states possess over territory is never described as originating in the people or depending on a contractual relationship with them, and Leibniz goes so far as to cite “the dictum of Baldus, who used to say that hegemony inerred in a territory as the mist to a swamp.” Leibniz distinguishes the various powers a ruler might hold over a territory, focusing on three in particular: jurisdiction, “the mild power of coercion,” and “the right of military might.” Different authorities can hold these distinct powers, leading Leibniz to differentiate between “the lord of the jurisdiction and the lord of the

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72 114. *Civitas* esse videtur coetus hominium satis magnus ad spem defensionis mutuae contra vim magnam, qualis metui solet, animo cohabitandi, certa quadam rerum communium administratione constituta, initus. (357)
73 Id.
74 *Opera Omnia*, 161. Quamobrem quoque nullus dubito, Leibnitiium aetate maturiori minime probasse rationem, quam reddit part II §19 cur & quatenus testamenta sint juris naturalis, quippe quae magis ingeniosa, quam solida est.
75 Political Writings, 114-15. …memoratur Baldi dictum, qui ajebat, Superioritatem inhaerere territio, ut nebulam paludi. (357)
76 Political Writings, 115.
The lord of the jurisdiction can decide cases and enforce his judgments by force, but this power is inferior to the more significant power of military might, which belongs to the lord of the territory. Leibniz makes clear that the default position is that territorial hegemony, as demonstrated by the “highest right of coercing subjects,” contains “full discretion to command all other things, so far as these are not expressly excepted, or reserved to another.” This last scenario explains the varying legal structures across the Holy Roman Empire; a sovereign can still have territorial hegemony even though he does not hold rights to hunt, extract minerals, collect taxes, mint coins, judge capital offenses, or serve as the court of final appeal, so long as he has “in readiness the power to obtain from his subjects, either by his dignity or, when necessary, by force majeure, whatever rights do remain his.”

Leibniz’s highly functional definition of sovereignty thus stressed two factors: size and the right of military force. Leibniz required that a state be a “fairly large” gathering of men, and the right of war is the defining characteristic of sovereign power. The two principles are closely linked in Leibniz’s declaration that the designation of “sovereign” is restricted to those “who hold a larger territory and can lead out an army.” The same notion appears in the Codex. Holding sufficient strength to participate in war—and thus affect the balance of power in Europe—is central to determining whether a particular official is sovereign or not, not some underlying contractual obligation. Someone is sovereign, and “possesses a personality in international law,” when he “represents the public liberty, such that he is not subject to the tutelage or power of anyone else, but has in himself the power of war and of alliances.” This is

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77 115.  
78 115.  
79 116.  
80 116.  
81 116.  
82 175.
demonstrated by his degree of power; “Those are counted among sovereign powers, then, and are held to possess sovereignty, who can count on sufficient freedom and power to exercise some influence in international affairs, with armies or by treaties.”

Leibniz later made clear that he viewed this functional definition of sovereignty as part of a more general *de facto* approach to sovereign power. This ruled out resistance, which Leibniz was well aware had been endorsed by Locke on the basis of the individual’s punitive power, and Leibniz declared that “I am strongly of the opinion of Grotius, and I believe that as a rule resistance is forbidden to them,” except in the unusual circumstances identified by Grotius. In his comments on William Sherlock’s *The Case of the Allegiance Due to Sovereign Powers*, he made commitment to *de facto* sovereignty clear; “allegiance being relative to protection, there is a *quasi-contractus* between the government and him who enjoys the advantages of public safety.” This extended even to the case of conquest; Leibniz criticized Sherlock for being unwilling to argue for the legitimacy of conquest, since “he who is in a position to protect individuals, whether he has arrived there by conquest or by the consent of the most powerful, has a right to demand fidelity from them.” Indeed, Leibniz opened his discussion of Sherlock by asserting that “when an enemy makes himself master of a place, it is agreed that the inhabitants

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83 175. Recensetur autem inter Potentatus, ac Suprematum habere creditur, qui satis & libertatis & potentiae habet, ut rebus gentium per arma & foedera cum auctoritate intervenire possit. (306)
84 Leibniz first heard of the *Two Treatises* in 1698, and by early 1700 had read at least part of the work. Riley, *Universal Jurisprudence*, 206; Nicholas Jolley, “Leibniz on Hobbes, Locke’s *Two Treatises* and Sherlock’s *Case of Allegiance,*” *The Historical Journal* 18 (1975): 23. Leibniz also had interests in promoting the Hanoverian claim to the British throne; see Jolley 23-25.
85 Political Writings 187.
86 214. While Leibniz here reflected some sympathy for the contractual view, he followed this statement by arguing that this obligation was comparable to the Roman law’s formula *in factum* rather than *in ius*, and consequently “this obligation [of allegiance] would have its force, even if one had never made an oath or agreement.” On this point, and Leibniz’s opposition to social contract theory in general, see Jeremie Griard, “Leibniz’s Social Quasi-Contract,” *British Journal for the History of Philosophy* 15 (2007): 513-33, esp. 526-27.
87 216. See also Jolley, *Leibniz on Hobbes*, 33-34.
can swear the oath of fidelity to him and are bound thereby, even if the war should be unjust on the part of the conqueror.”

Employing this line of thought also enables Leibniz to launch a legal defense of the Empire, and leads him to a direct attack on the Hobbesian account of authorization. Numerous sovereigns, Leibniz contends, can unite into a single political unit without eliminating their own territorial hegemony. Leibniz illustrates this with reference to the difference between a society and a company. A society is made up of individuals and distributes profits amongst the members, but when a company is created “a new civil person is formed, and what is brought into the common treasury belongs not to the individuals, but to the corporation itself.” The Empire thus stands as a distinct entity with its own rights which do not detract from the sovereignty of the princes who live under it. Among the many critics of this division of authority, Leibniz singles out Hobbes for particular attention, and especially his notion of authorization. Hobbes’s account was deficient because of its insistence on a unity of judgment in civil society. As Leibniz describes Hobbes’s position, “Each man must transfer his will to the state, i.e. to a monarchy or some assembly of the magnates or the people, or to some natural civil person, so that each man is understood to will whatever the government or person which represents him wills. Furthermore, this civil person, the government, cannot be anything but unitary, and it is fruitless to divide the rights of supreme power among several persons or collegia.” Leibniz offers two criticisms of this position. First, a government organized along these principles has never existed; shared power does not inevitably lead to war, and “experience has shown that men usually hold to some

88 214.
89 117. On the analogy to corporations, compare Leibniz’s comments in the unpublished On Natural Law, where he noted that societies could be classified along two axes: equal/unequal and limited/unlimited. Civil society constituted an unlimited unequal society, since it contains an element of rulership (making it unequal) and “concerns the whole life and the common good,” which is characteristic of unlimited societies. The state thus differs from limited societies, which pursue ends such as “trade and commerce, navigation, warfare and travel.” 79.
90 118.
middle road, so as not to commit everything to hazard by their obstinacy,” citing Holland, England, the Holy Roman Empire, and France as examples of places where sovereignty does not meet the Hobbesian ideal of centralization.91 Second, Hobbes’s presuppositions about the ability of individuals to renounce their wills to the sovereign are simply untenable: “For men will choose to follow their own will, and will consult their own welfare as seems best to them, as long as they are not persuaded of the supreme wisdom and capability of their rulers, which things are necessary for perfect resignation of the will.”92 Only a state with God as its sovereign could meet these requirements, and so Hobbesian authority in the civil sovereign is simply impossible. Later in life, Leibniz supplemented these criticisms by pointing out that even for Hobbes, such extensive authorization is not conclusive: by conceding that a criminal could resist the sovereign, Leibniz says that Hobbes like likewise confess “that these same citizens, not having lost their judgment either, cannot allow their security to be endangered, when some of them are mistreated, such that at bottom, whatever Hobbes says, each has retained his right and his liberty regardless of the transfer made to the state.”93

The rejection of Hobbes also extended to the very concept of a law of nations, and Leibniz offered in embryonic form a set of claims about the law of nations, drawn partially from Grotius, that would be developed more fully by his followers. In De Suprematu Leibniz repeatedly insisted that the law of nations consisted of the right to engage in war, make peace, send ambassadors, and make treaties.94 Leibniz also picked up Grotius’s justification for the law of nations, arguing that “the supreme purpose for the law of nations is to avoid war; as the chance of war is uncertain, it is received among nations that as far as it is conducted by the ones

91 119.
92 120.
93 61.
94 See, e.g., Opera Omnia, Ch. 33, p. 408.
who have the right of use of force, a war should be regarded as just as to the formalities of the fetial law \([\textit{juris fetialis}]\) and privileges under the law of nations.”\(^{95}\) While Leibniz did not deny the distinction between just and unjust wars, the best way to avoid continual war was to grant legal validity to the results of all validly-declared public wars. He was also not clear about the relationship of this claim to the natural law; Grotius had viewed it as purely conventional, but as this argument became central to the understanding of the law of nations promulgated by Wolff and Vattel, they attempted to naturalize these restrictions.

Leibniz’s hostility to social contract theory and his emphasis on \textit{de facto} authority was likewise bolstered by his rejection of any notion of natural equality. While Leibniz emphasized in his account of natural right that men were equal with respect to their strict rights,\(^{96}\) no such equality pertained among men in general, as implied by Leibniz’s views on happiness and love. In a letter to Thomas Burnett, Leibniz made the point that men have unequal natural endowments, and “it seems that Aristotle is more correct here than Mr. Hobbes. If several men found themselves in a single ship on the open sea, it would not be in the least conformable either to reason or nature, that those who understand nothing of sea-going claim to be pilots; such that, following natural reason, government belongs to the wisest.”\(^{97}\) More striking, perhaps, is how Leibniz describes the origins of civil society: “the imperfection of human nature causes people not to want to listen to reason, which has forced the most wise to use force and cunning to

\(^{95}\) Id. at 408. \textit{Hujus gentium juris summa ratio est, ut evitentur; nam quia aniceps belli alea est, hinc receptum est inter gentes, ut justum quodammodo videatur bellum, saltem quoad formam juris fecialis, privilegia juris gentium, quodcunque ab illo geritur, qui confessam habet armorum potestatem.} Trans. Toyoda, \textit{Theory and Politics}, 89.

\(^{96}\) \textit{“Codex,”} in \textit{Political Writings}, p. 172: “In the lowest degree of right, one does not take account of differences among men, except those which arise from each particular case, and all men are considered equal.”

establish some tolerable order, in which providence itself takes a hand.”98 The social contract simply became one (unlikely) way among many that civil societies could arise.

But this abandonment of equality had equally important consequences in the international realm. For Hobbes, Pufendorf, and Locke, a fundamental characteristic of the international order was the formal equality of states created by equal individuals through the social contract, all governed by the same rules as apply to individuals. While the size of the state might be important for determining its ability to achieve its goal of protecting the members, states held the same rights regardless of the number of citizens or military strength. Institutional arrangements like the Holy Roman Empire were defective precisely because they lacked a central will created through the social contract. Similarly, the powers the state held were determined by examining the terms of the initial contract and deciding what powers must necessarily have been transferred or renounced to the state in order to achieve a set of stated purposes—most broadly, security. Even Grotius had accepted the equality of states, without the sort of functional requirements for sovereignty imposed by Leibniz.

Leibniz firmly rejected both of these points. As we have already seen, those entitled to claim rights under the *ius fetialis inter gentes* must have a certain degree of military strength, regardless of any contractual authorization from the citizens who make up a political unit. The formal equality of political bodies is eliminated, replaced by a focus on the right of force and the men and materiel available to employ it. On the second point, Leibniz’s commentary on Sherlock’s piece emphasizes that the state’s authority is not derived from any contract, but from more general obligations to ensure that the citizens are secure and capable of living well. There is no parsing of purposes or debate about the judgment remaining in individuals; the legitimacy

98 *Political Writings*, 192.
of the state does not rest on contractual foundations, but instead on its capacity to promote the welfare of the individuals who make it up. Likewise its powers are not derived from individuals, but it seemingly has authority to do whatever is necessary to accomplish its objectives.

The result was that on the litmus test issues for punishment, Leibniz simply ignored the issues which had occupied Hobbes, Pufendorf, and Locke. While Leibniz’s belief in strict right and the individual right of punishment suggest that he would have endorsed punishment as a legitimate cause for war, he never discussed this point. Leibniz’s de facto theory also clearly focused warmaking authority in the state, and he never suggested that individuals might retain or regain that right while still members of a civil society. Finally, Leibniz’s de facto theory meant that he was never forced to address the questions about collective responsibility which inhered in the contractual account, and these questions seem never to have occurred to him; the same questions were, of course, raised by Scholastic theories of sovereignty, with which Leibniz was also familiar, but there is no indication that these troubled him either. In general, however, Leibniz shared a certain kinship with the Scholastic theories we encountered with Grotius in his apparent view that there was no need to justify each power of the state in terms of an original power of individuals, or indeed to connect individuals to a larger body called “the people” by some separate agreement.

Leibniz’s overall views on the international order never gained acceptance, and virtually every major feature of the contractarian theories Leibniz rejected continued to exercise a hold on the minds of theorists of the international order, in particular the notion of the equality of sovereign states due to their creation as the product of equal individuals. Even his Grotian claim that states could create binding law through consent, while not rejected outright by his immediate successors, was in for a substantial refashioning in order to make this law largely derived from
the law of nature, rather than the consent of nations. But focusing on these aspects of Leibniz’s
theory misses the immense impact he had on the law of nations endorsed by his successors,
Christian Wolff and Emer de Vattel. This came not through his substantive prescriptions, but his
theory of perfection, as well as his attempt to supplement Grotian natural right with a more
substantial account of obligation. These doctrines, particularly through the intermediation of
Wolff, would fundamentally alter the foundations and the doctrine of the law of nations,
particularly with respect to the role of punishment in the international order. Even Leibniz’s
hostility to the idea of a contract, and his apparent willingness to derive power from the fact of
sovereignty, was to have an impact on his successors; while they returned to the notion of an
underlying social contract, that contract did not itself create the sovereign’s power. While
Leibniz never fully clarified how he viewed the relationship between natural law and civil law,
or in exactly what ways the *iuris fetialis inter gentes* could be both based on natural law and also
vary over time, he had laid down a set of claims which opened up a new set of possibilities for
thought on the international order. To see those possibilities in action, we must turn to the work
of Christian Wolff, Leibniz’s most famous successor.

**III. Wolff and the Primacy of Obligation**

Christian Wolff, despite his resistance to the idea, was often lumped together with
Leibniz by contemporaries in Germany in the early 18th century, and indeed many aspects of his
philosophy shared principles with Leibniz. In contrast to modern intellectual histories, which
give Leibniz pride of place and reduce Wolff to little more than a footnote, the claim of Wolff’s
contemporaries and immediate followers was that it was Wolff “who had taken the scattered
theses of Leibniz—his claim that this is the best of all possible worlds, his principle of sufficient
reason, and his theory of pre-established harmony—and erected on that basis the world’s first
strictly reasoned system of knowledge.”

Wolff’s positions in metaphysics and epistemology owed debts of varying magnitude to Leibniz’s ideas, but the most important linkage was on the position adopted by Grotius: the claim that natural rights would exist and bind even in the absence of God. Wolff’s famous 1721 Halle lecture *Oratio de Sinarum philosophica practica* used the Chinese as an example of a people who lacked Christianity, and yet had come to an acceptable set of conclusions about morality derived from reason, thus demonstrating the truth of Grotius and Leibniz’s position on the *etiamsi daremus* question. The outcry against this lecture led to Wolff’s expulsion from Halle on the grounds of his supposed atheism, and the prominence of this dispute in academic circles heightened the perception that Wolff was a close follower of Leibniz.

Beyond this claim about the source of natural law, Wolff took from Leibniz a set of conclusions about perfection which he employed to alter his predecessor’s arguments about natural right, in particular the way it applied in the international order. Wolff’s modifications of

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the Leibnizian theory of perfection, alongside his wholesale adoption of Leibniz’s theory of natural right, heightened the role of natural obligation in determining the rules of the international realm. Wolff also clarified the relationship between natural law and the law of nations in a way which Leibniz had declined to do. Yet alongside this Leibniz-derived notion of right, Wolff returned to the familiar positions of the contractarian theorists which Leibniz was keen to reject; the notion of natural equality returned, as did the idea that the state is the product of a social contract. Even here, however, Wolff did not completely escape Leibniz’s influence; the importance of perfection gave a justification for the state’s powers which had nothing to do with contract, and also enabled Wolff to retain the idea, introduced in Leibniz, that the state was the exclusive actor in the international arena. If the social contract was not the origin of the state’s power in the sense that individuals transferred their powers to the state, the role of the contract was relatively limited. Wolff’s explanation—ultimately influential for Vattel—was to argue that the contract achieved two purposes: creating an entity called the “nation” as a political unit which existed alongside the sovereign, and enabling that nation to make decisions that stood in for the judgment of the individuals which composed it, particularly in the international sphere. These doctrines had an immense impact on Wolff’s account of international punishment. For one, the new conception of natural right sharply limited the rights of a just belligerent, including the right to punish. This enabled Wolff to institute duties between enemies—an anathema to Hobbes, Pufendorf, and Locke—which created extensive protections for civilians. In addition, Wolff’s of an account of authorization and the social contract once again raised the complicated question of collective responsibility, which he answered in strikingly different terms from Locke, shielding life while opening the door to extensive acquisition of an enemy’s property.
Wolff’s adaptation of Leibniz’s ideas about perfection was to have far-reaching consequences for his theory, but it was never one which Leibniz endorsed. Wolff abandoned a central tenet of Leibniz’s idea of perfection. We have already seen that on Leibniz’s account, happiness and love stem from the recognition of perfection in other things or people. But Leibniz also contended that there could be a gradual increase in perfection under the right circumstances. In his New System, Leibniz noted that “it may be said that everything tends to the perfection, not only of the universe in general, but also of those created beings in particular, which are destined to such a degree of happiness that the universe is concerned in it.”¹⁰² This tendency and striving toward perfection reflected an attempt to reach unity with God, “which ought to be the whole aim of our will, and which can alone make our happiness.”¹⁰³ Yet, as Leibniz also made clear in the New System, this striving can only be successful “in virtue of the Divine goodness which is imparted to each, so far as supreme wisdom can allow,” since the result of the striving of any particular substance must still accord with the overall perfection of the universe.¹⁰⁴ This notion of pre-arrangement explained why it possible for people to seek perfection yet also maintain this harmony; “For why might not God in the beginning give to substance an inner nature or force which could regularly produce within it...everything that will happen to it, that is to say, all the appearances and expressions it will have, and that without the help of any created thing?”¹⁰⁵

It was this notion of pre-existing harmony which Wolff rejected in advancing his own ideas of perfection.¹⁰⁶ Instead of developing in order to reach conformity with some divinely-ordained end, Wolff’s man seeks his own self-perfection, using divinely implanted reason as his

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¹⁰³ Monadology, §90, p. 271.
¹⁰⁴ New System §§, p. 308.
¹⁰⁵ New System §15, p. 315.
¹⁰⁶ For this point, I am indebted to Hochstrasser, Natural Rights Theories, 159-62.
guide. This analysis of perfection was a point of discussion on several occasions in the correspondence between the young Wolff and the older Leibniz in the early 1700s, initiated after Leibniz was sent a copy of Wolff’s dissertation and asked for comment. In some of their first letters, Wolff noted that his understanding of perfection concludes that just as God acted in accordance with his perfection, man also seeks (with divine encouragement) his own perfection.  

107 In response, Leibniz complained that Wolff did not fully understand the implications of his theory of pre-existing harmony, 108 but Wolff never returned to Leibniz’s positions. Indeed, near the end of Leibniz’s life, the question of perfection returned in their letters. In late 1714, Wolff again asked for Leibniz’s definition of perfection, and while they managed to agree on a general definition, in early 1715 Wolff acknowledged his differences in a revealing passage, which also revealed the close connection between perfection and Wolff’s theory of obligation:

I need the notion of perfection for dealing with morals. For, when I see that some actions tend toward our perfection and that of others, while others tend toward our imperfection and that of others, the sensation of perfection excites a certain pleasure and the sensation of imperfection a certain displeasure. And the emotions, by virtue of which the mind is, in the end, inclined or disinclined, are modifications of this pleasure and displeasure; I explain the origin of natural obligation in this way. As soon as the perfection toward which the action tends, and which it indicates, is represented in the intellect, pleasure arises, which causes us to cling more closely to the action that we should contemplate. And so, once circumstances overflowing with good for us or for others have been noticed, the pleasure is modified and is transformed into an emotion by virtue of which the mind is, at last, inclined toward appetition. And from this inborn disposition toward obligation, I deduce all practical morals, properly enough. From this also comes the general rule or law of nature that our actions ought to be directed toward

107 Briefwechsel Zwischen Leibniz und Christian Wolff, ed. C.I. Gerhardt (Halle: H.W. Schmidt, 1860), 26-27. ...quod non solum Deus omnes suas actiones ad summam sui ipsius perfectionem intra se et summam creaturae cujuslibet in suo genere perfectionem extra se dirigat, sed quoque velit, ut ad eundem scopum actiones suas dirigat homo.
108 Id. at 32. Video ex iis quae habes ibi, Hypothesin meam vel Systema Harmoniae praestabilitae vobis nondum innotuisse.
the highest perfection of ourselves and others. Human nature forces us to proceed in this
direction and no other. Perfection for Wolff was not simply an attribute of individuals and things, but also a process of fulfillment. Wolff maintained Leibniz’s connection between perfection and happiness, but also found in it a source of obligation; natural law leads us toward perfection, and in fact requires that we should seek perfection for ourselves and for others. This theory of perfection did, however, open Wolff to the accusation of atheism in a way that was never possible with Leibniz; once an individual’s progress was no longer seen as the fulfillment of some pre-ordained divine plan, and each individual was assumed to have sufficient reason to seek perfection and a natural inclination to it, it became difficult to see what role God could still play after the initial creation of men.

When Wolff actually came to describe the relationship between this modified account of perfection and his view of natural right, however, he adopted a critical element of Leibniz’s modified Grotian account. As we saw, Leibniz’s theory of natural right had supplemented Grotian natural right with a balancing account of natural obligation, from which he was able to derive obligations of non-interference that were binding on all individuals, even in the absence of an agreement. Wolff took this account one step further. The central feature of Wolff’s approach to the natural law thus became the derivation of rights from obligations, and specifically from the foundational obligation on every individual to seek *perfectio*. Consequently, the “general principle” of the law of nature is that “man is obliged by nature to committing actions, which tend to the perfection of himself and his position.” Once this proposition is established, a series of conclusions about natural right follow. First, this obligation is the basic principle from which

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all natural right is derived. Wolff picks up the language of *facultas* from Grotius and Leibniz; *jus* is defined as the “faculty or moral power” of performing an act, and individuals must be understood to have the power to satisfy their natural obligation of perfection.

As this derivation implies, individuals have a very broad sweep of legitimate action under natural right. From the basic obligation of perfection flow a variety of rights, with their concomitant obligations. Echoing Leibniz’s objections to Hobbes, on Wolff’s account it would be self-contradictory for the law of nature to both provide a right to perform an act and also provide a right to impede the performance. Among the most fundamental of these right-obligation pairs is non-interference in the pursuit of the end of perfection, and this basic rationale is what gives rise to the right to resist individuals who attempt to interfere with actions taken in pursuit of the end of happiness. From this stems the right of self-defense, which Wolff does not strongly distinguish from the right of punishment. As it was for Leibniz, the right of punishment is viewed as simply part of the general right to security and protection, since providing for future security by punishment furthers the end of security, and therefore perfection.

This formulation of natural right was workable because Wolff adopted the principle of natural equality endorsed by most previous natural law thinkers. The equality of man was...
reflected in the equality of obligations and rights each individual possesses by nature. While Wolff retained the distinction between perfect and imperfect obligations which he inherited from Leibniz and Grotius, he extended his definition of equality to encompass all obligations, including the obligations which Leibniz had termed equity and piety. For Wolff, the core distinction between perfect and imperfect obligations was not the obligation itself—that remained regardless of the individual’s decision to satisfy the obligation—but instead between whether or not an individual could be forced to comply with the obligation. Wolff once again reached back to Grotius (likely via Leibniz) to note that imperfect rights are aptitudo. He also followed Leibniz in insisting that “the right of asking for the duties of humanity is perfect,” even though the other person cannot be forced to satisfy these obligations. Further, the concept of equality carried over as a result of the fundamental obligation of perfection; it meant that all individuals were equally obligated to cultivate their souls and intellectual capacities, among other obligations to the self, along with the perfection of others, a requirement which could not be accommodated in Leibniz’s scheme.

When Wolff did turn to the right of punishment, he showed an unsurprising degree of continuity with Grotius’s position. The right of punishment stems from the rights of security and self-defense, since punishment secures the victim from future harms. Wolff’s definition of punishment stresses the Grotian notion that individuals are obligated to suffer punishment: “A physical evil on account of moral evil inflicted by him, who holds right the right of obligating, is

117 Inst. 80, p. 41. Atque hinc patet, quo sensu obligatione ad officia humanitatis imperfecta, & ipsa haec officia imperfecte debita dicantur, nimirum ita dicuntur, non quasi obligatio naturalis imperfecta sit, ut aliquid libertati agentis relictum, utrum eodem satisfacere velit, an nolit, quod naturali libertati repugnant; sed quia petens cogere nequit alterum ut id praestet.
118 Id. Imperfectum autem a Grotio dicitur Aptitudo.
119 Inst. 82. Jus petendi officia humanitatis esse perfectum.
called Punishment.” This emphasis on “the right of obligating” does not limit punishment to the sovereign, but it does constrain the exercise of the right in instances where individuals violate the law of nature. Conformably with the notion that the right of punishment exists so that individuals can pursue their own perfection, Wolff insists that the right of punishment is held only by the individual who has himself been injured, though Wolff does not articulate why this should be the case, given our obligations to encourage the perfection (and thus the security) of others. Finally, Wolff links punishment, and all other rights of violence, to man’s basic obligation to pursue perfection: liberty, equality, security, self-defense, punishment, and even war are all rights without which we would be unable to satisfy our natural obligations.

Against this background of sweeping natural rights derived from the basic obligation of perfectio, Wolff’s return to social contract theory—and in particular to the explicit double contract model of Pufendorf and his successors—took on a different cast. In particular, Wolff’s theory of the social contract was designed to demonstrate how the obligation of perfection applied to individuals was translated to the state, which held a set of rights and duties extremely similar to those held by individuals. The fundamental obligation of perfection and the equality of individuals drawn from it thus undergirded the entire structure of the state in Wolff’s political theory.

Much like Pufendorf, Wolff viewed civil society as simply a particular kind of societas among others. He began his discussion of societas with a general definition of imperium: “the

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121 Inst. 93, p. 48. Malum physicum ob malum morale immissum ab eo, qui obligandi jus habet, Poena dicitur.
122 Inst. 93, p. 48-49. Natura igitur homini competit jus puniendi eum, qui ipsum laesit.
123 Inst. 95, p. 49-50. Ex hactenus dictis patet, quaeam sint jura hominum connata, nimirum Jus ad ea, sine quibus obligationi naturali satisfieri nequint, aequalitas, libertas, jus securitatis & inde natum jus defensionis & jus puniendi: quaeam vero hinc alia jura descendant & quomodo legi naturae convenienter aliae obligationes contrahuntur & alia jura acquiruntur, suo ostendetur loco. On war, see Inst. 98, p. 51.
right of determining the free actions of others."\textsuperscript{124} Such imperium can only arise by consent,\textsuperscript{125} but once a member of the societas has consented, he “is obligated to order his own actions according to the will of the ruling authority.”\textsuperscript{126} In anything in which the right of command has been given up, the subject has likewise given up the freedom to reject the actions of the commanding authority.\textsuperscript{127} While these points obviously have relevance to political society, Wolff maintains that a societas is simply “a multitude of men joined together for pursuing a certain end,” and that each societas differs according to its end.\textsuperscript{128} The end of the societas determines its power over the members, as well as providing the societas with the power to compel the members to fulfill obligations toward the whole.\textsuperscript{129} Further, at the creation of the societas, the members decide the manner in which the ends of the society will be reached and decisions made about the best course of action.\textsuperscript{130} Such societas could just as easily include guilds or other corporations as they could the state as a whole.

The special case of civil society was little different from the general societas, and Wolff largely follows the double contract structure envisioned by Pufendorf. Individual households cannot by themselves provide the kind of material goods and personal security necessary for a good life and the pursuit of the perfection of the individual members. As a result, civil society is necessary to provide these goods and enable the perfection of the individuals, and in this sense

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\item \textsuperscript{124} Inst. 833, p. 522. Imperium dicitur jus determinandi actines liberas alterius pro lubitu suo.
\item \textsuperscript{125} Inst. 834, p. 522-23.
\item \textsuperscript{126} Inst. 835, p. 523. ...subjectus obligatur actiones suas ad voluntatem imperantis componere.
\item \textsuperscript{127} Id. ...consequentur qui se alteri sponte subjicit, libertati naturali quoad eas actiones renunciare, in quas imperanti jus concedit.
\item \textsuperscript{128} Inst. 836, p. 524. ...multitudo hominum finis cujusdam consequendi causa consociatorum Societas dici solet.
\item \textsuperscript{129} Id. Quilibet itaque socius facere obligatur, quod ad finem consequendum facere potest & quod ut faciat specialiter conventum, consequenter sociis competit jus cogendi consortium, ut satisfaciat obligationi....obligationes vero ac jura singulorum metienda sunt ex fine, in quem consensere omnes, atque ex iis, de quibus in pacto specialiter conventum, & universis competit jus determinandi ea, quae ad finem societatis consequendum necessaria, seu ad media, quibus ad finem ut consequantur studere velint.
\item \textsuperscript{130} Inst. 841, p. 527. Quamobrem quando societas contrahitur, omnium consensus statuendum est de iis, quae constanter ac semper eodem modo fieri debent, & casu emergente, qui ad societatem spectat, quid in eo sit faciendum.
\end{enumerate}
there is a natural obligation to create civil society.\textsuperscript{131} By agreement, individuals join together in a particular kind of *societas* aimed at “vitae necessitatem, commoditatem & jucunditatem”; a *societas* with this particular end is known as a *civitas*.\textsuperscript{132} As Wolff’s definition of *imperium* implies, it is this first compact which generates the subordination of wills necessary to a functioning state; the first contract by definition creates the new right of determining the free actions of the members of the *civitas*. This creates obligations on both sides—the individual and the *civitas*—to advance the good of both the whole society and the individuals, and along with these obligations comes a power of compulsion.\textsuperscript{133} This illustrates a key difference from Pufendorf; it is the first pact, rather than the second, which creates the new unified will of the society.

Once this new *imperium* has been instituted, it is “originally in the hands of the people,”\textsuperscript{134} and the people then set up a particular form of government, which is designated by Wolff as the *Respublica*.\textsuperscript{135} In keeping with his Grotian roots, Wolff envisioned the people as holding tremendous flexibility in deciding how that power should be distributed among potential constitutional arrangements: they can give it to a king or senate or keep it for themselves; they can transfer it irrevocably or for a certain period of time; subject it to certain fundamental laws; or distribute parts of the power across different components.\textsuperscript{136} This includes the ability to alienate it altogether to an absolute monarch who holds the *imperium* in patrimony, a conclusion

\textsuperscript{131} Inst. 972, p. 597.
\textsuperscript{132} Id. Societas eo fine contracta *Civitas* appellatur.
\textsuperscript{133} Inst. 975, p. 599. Cum ex pacto, quo civitas constituta, oriatur obligatio; *singuli obligantur universis ad commune bonum pro virile promovendum, & universi singulis, quod sufficientia vitae ipsorum, tranquillitati & securitati proscipere velint, consequenter a neutra parte fieri debet, quod huic obligationi contrariatur, consequenter universis competit jus cogendi singulos, ut obligationi suae satisfaciant. See also JN VIII.28: Etenim qui in civitatem coeunt, inter se paciscuntur de bono communi conjunctis viribus consequendo, scilicet ne desint quae ad sufficientiam vitae requiruntur, & ut tranquille ac secure vivere possint, consequenter singuli contrahunt cum universis & universi cum singulis.
\textsuperscript{134} Inst. 979, p. 601. …*originarie penes populum est.*
\textsuperscript{135} Inst. 973, p. 598. Civitatis ordinatio *Respublica* dicitur.
\textsuperscript{136} Inst. 982-984, p. 602-04.
made possible by Wolff’s belief that the *imperium* held originally by the people is a form of property.\footnote{Inst. 979, p. 601. *imperium est, quod civile, vel etiam potestas civilis appellari solet, atque oritur ex pacto, quo civitas constituta, & originarie penes populum est, tanquam res incorporalis propria.*}

This unique structure is able to break from Pufendorf because Wolff does not accept the claim that “the people” does not exist as a relevant political body, whether for the second compact or after the initial transfer of authority. While some minor German theorists had begun to dispute Pufendorf’s claim that the second pact was a pact between individuals and sovereigns,\footnote{von Gierke, *Theory of Society*, 146-47, 342-44.} Wolff went further than any other in marking out the claim that “the people” continued to exist after the institution of the sovereign and were parties to the second contract. Wolff repeatedly insists that the people should decide, upon the creation of a *civitas*, whether to transfer the sovereignty and in what form,\footnote{See, e.g., *Jus Naturae*, Vol. 8, ed. Marcel Thomann (Hildesheim: Georg Olms, 1972), §§37, 38.} and this does not entail the destruction of their pre-existing unity of the people. Instead, the *gens* or *populus*—“A multitude of men joined together in a *civitas*”\footnote{Inst. 974, p. 598. *Multitudo hominum in civitatem consociatorum Populus, sive Gens dicitur.*}—forms an integral part of the political landscape, an enduring and permanent body separate from the state. Further, Wolff viewed the transfer of power from the hands of the people to a particular sovereign as contractual in nature,\footnote{Inst. 989, p. 606. *Pacta, in quibus de modo administrandi imperii inter Rectorem civitatis & populum convenitur, vel eos, qui populi jus habent, Capitulatio dicitur.*} and the “fundamental laws” governing the distribution of power in a society cannot be altered by legislation by the sovereign.\footnote{Inst. 984, p. 603-04; Inst. 1043, p. 644-45.}

The structure of Wolff’s social contract theory thus fundamentally altered many of the traditional assumptions about the character of each contract. While he endorsed the two-stage contract, he rejected Pufendorf’s conclusion that the second pact was with individuals and that
the second contract created the state’s authority over the subjects. In this respect, Wolff’s first contract looked much more like the contracts proposed by Hobbes or Locke, which created the necessary unity of judgment for a proper state. However, unlike these English writers, Wolff followed Pufendorf and Leibniz in claiming that the elements which make up sovereign power were quite broad but also not directly derived from the individual’s powers in the state of nature. Wolff routinely insisted that two moral entities (whether individuals or artificial moral persons) could not hold rights to the same thing. As we have seen, this notion was central to his justification of the right of non-interference; it would be absurd for nature to obligate an individual to engage in certain acts while simultaneously permitting others to interfere with the fulfillment of that obligation. But the general principle applied just as well to the actions of a societas; members of a societas are obliged not to take any actions “opposed to the good of the society,” since they have created the society in pursuit of some end, the fulfillment of which is defined as the common good. Wolff thus rejected Hobbes’s claim that a subject and sovereign—or two nations—could both act legitimately in disputing over a right. Importantly, however, the societas is not viewed as simply wielding the rights of the individuals, because the peculiar right created by the creation of the societas is imperium—the right to determine how individuals will employ their pre-existing natural rights to ensure the perfection of the state.

Since individuals do not transfer or surrender their rights, Wolff’s framework for civil imperium focuses on what individuals can relinquish: their separate judgment. As noted, Wolff’s defines imperium in terms of “the right of determining the free actions of others”—in other words, superseding their individual judgment. Imperium itself is defined as the ability to control

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143 Inst. 50, p. 26.
144 Inst. 837, p. 525. Quamobrem quilibet socius commune bonum promovere pro virili & modo convento debet, nec quicquam committere, quod sit saluti societatis adversum.
145 Inst. 833, p. 522. Imperium dicitur jus determinandi actines liberas alterius pro lubitu suo.
the actions of members of the *societas*, and the *civitas* is defined by a complete surrender of individual judgment with respect to the ends for which the *civitas* was instituted. In matters where the sovereign has made laws, or which are the exclusive province of the sovereign, the subject is obliged to obey as a consequence of the initial contract, not the second contract. The result is that the individual’s judgment is entirely subordinated to the *civitas*. Critically, this does not equate to a claim that the judgments of the sovereign instituted by the *civitas* are the judgments of the individual subjects; there is thus no Hobbesian theory of authorization in this sense. Consequently, the right of *imperium* created by the initial contract is not the exercise of the previous individual rights of the citizen, but instead a new right of controlling and overriding the judgments of subjects.

One practical upshot of this position is that a right of individual resistance is absent from Wolff’s theory. When Wolff writes about the right of resistance against a ruler, it is always in terms of resistance by the body of the people collectively, never by individuals. The individuals in any *societas* have given up their judgment to the body and consented to its decision procedure; Wolff does not address what happens in the event the body attempts to oppress an individual or actively prevent him from reaching perfection. Even in the limited case where Wolff permits some resistance—the right to refuse to carry out commands by the sovereign that violate the law of nature—that right is entirely passive, and individuals are required to suffer the punishment the sovereign metes out for their disobedience. The restrictive character of the initial agreement is also indicated by Wolff’s treatment of the ability

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146 *Jus Naturae*, Vol. 8, §§1054-1058. In these passages Wolff largely paraphrases Grotius’s justifications for the people to resist their sovereign, with no discussion of when individuals may resist the body or the sovereign. Similarly, in Inst. 1079, Wolff makes clear that the highest power in the state is *irresistible* by individuals, but acknowledges that the *populus* retains a right to resist violations of the *legibus fundamentalibus*.  
147 Inst. 1079, p. 672-73. Ast quia ab obligatione naturali nemo liberari potest; *si superior imperet legi naturae praeceptiva, vel prohibitiva repugnantia, obediendum non est, & patienter ferendum, si propterea puniatur, aut potius male tractetur.*
of citizens to emigrate from their state. The initial consent to the *civitas* cannot be unilaterally revoked; subjects must have the “express or tacit” consent of the sovereign to depart, and that consent is never assumed in the case of individuals who are particularly useful to the functioning or perfection of the state, such as the “rich or talented.”\(^{148}\)

This focus on *imperium* and judgment, rather than a transfer of any specific individual powers, means that the catalog of sovereign powers Wolff provides has a very different basis from that advanced by Hobbes or Locke. The various sovereign powers are described not as the result of a transfer from individuals, but instead as a necessary consequence of creating a *civitas*. The state holds sovereign rights simply because it must hold them in order to carry out its objective of providing for the perfection of the whole and of the members, in the same way as any other *societas* must be conceived of as holding authority to do whatever is necessary for the objectives of the *societas*. Wolff concludes that *jura majestatica* are those “without which the public *imperium* cannot be exercised” in pursuit of the common good; consequently, the holder of the *imperium* must have authority to engage in a range of actions necessary for the pursuit of the public good.\(^{149}\) These include making, interpreting, and abrogating laws; engaging in punishment up to and including the death penalty, which Wolff calls the *jus gladii*; and a host of smaller rights such as coining money or conferring public offices. This likewise includes the right of war, which must be part of the sovereign’s authority for the sake of external defense.\(^{150}\) While many of these rights have analogues in the position of individuals in the state of nature, the state’s authority to engage in those actions is not derived directly from a transfer from the

\(^{148}\) Inst. 1019, p. 625. *...sine consensu superioris sive expresso, sive tacito a civitate discedere non licet....divites aut locupletes.*

\(^{149}\) Inst. 1042, p. 644.

\(^{150}\) Inst. 1066, p. 664. *Cum superior Remp. defendere teneatur adversus vim externam, consequenter etiam jura populi sui & singularorum quoque subditorum vi persequi adversus gentes alias; jus etiam belli in alias habet, idque ad jura majestatica pertinet. Atque hoc bellum, quod jure civitatis geritur cum gentibus aliis publicum dici solet.*

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individuals who make it up. Instead, the act of creation invests the *societas* with obligations and rights of its own, without any elimination of the original rights of citizens. This is how we should understand Wolff’s explanation for why nations hold the right of war:

> When men come together in a state, since they agree with each other that they will jointly provide that each may enjoy his right in peace and that each may in safety obtain that from the other, and that they will jointly defend themselves and theirs against any external force, they do not lose their rights nor renounce them, but determine to exercise them jointly, consequently the rights belonging to the individuals by nature coalesce in a common right. And since states have been established in harmony with natural law, their combined rights, such as belong by nature to the individuals as regards their property and persons with respect to other persons, belong to the nation also as a nation as regards those things which belong to the nation, and as regards the entire nation with respect to outside nations.\(^{151}\)

As this passage suggests, the state’s rights are always analogous to the individual’s rights in the state of nature; shortly afterwards Wolff makes clear that “the right of war belongs none the less to nations also in every case in which the right of war belongs by nature to individuals. And hence it is that what is to be determined concerning public war is derived from private war.”\(^{152}\) Even the exalted position of sovereigns does not alter their rights under the law of nature; “after states have been introduced no other rights belong to rulers of the state, even such as have the most extensive power, than such as belong to individuals living in a state of nature.”\(^{153}\) However, the creation of the *civitas* enables that body to take responsibility for protecting the rights which individuals previously protected for themselves. *Imperium* is thus the state’s power to determine how to jointly exercise those rights—as individuals are required to lend their support to the

\(^{151}\) *The Law of Nations Treated According to the Scientific Method*, trans. Joseph Drake (Oxford: Clarendon Press, 1934), VI.613, p. 313. The translation here is quite rough. The original reads: *Quando homines in civitate coeunt, cum inter se convenient, ut conjunctim curent, ut quique jure suo quicte fruatur, & tuto ab alio id consequatur, & ut conjunctim se suaque adversus vim quamlibet externam defendant; jura sua non amittunt, nec iisdem renunciant, sed conjunctim eadem exercere constituant, consequenter jura singulis natura propria in jus commune coalescunt.*

\(^{152}\) Id. ...*non minus Gentibus jus quoque belli competit in omni casu, in quo singulis natura jus belli est.* (220)

\(^{153}\) VI.617, p. 315. *Civitatibus ergo introductis non alia sunt jura Rectorum civitatis, vel plenissimo jure talium, quam singulorum in statu naturali viventium.* (221)
decisions of the holder of imperium with respect to those tasks—in order to achieve the objectives of the civil community. Civitates derive their rights from the individuals who create them in the sense that they create a collective entity which oversees their rights, but their powers are derived from logical deductions about what is necessary for the state to fulfill the purposes the contracting individuals created it to fulfill.

Conceiving of the state’s rights as the product of the obligation of perfection, rather than the residual natural power of the sovereign or the individual rights of all the citizens, enables Wolff to make a distinction between the law of nature for individuals and the law of nature for nations which was not possible for earlier theorists. Wolff’s treatment of the law of nations began from the same basic premise as every other major writer on the subject: that nations are nothing more than “individual free persons living in a state of nature. For they consist of a multitude of men united into a state.”¹⁵⁴ The act of uniting creates obligations on the state effectively identical to the obligations placed on individuals. States have obligations of preservation and perfection because of their unique position in ensuring individual preservation and perfection, and Wolff often speaks of them in anthropomorphic terms; states, like individuals, have obligations to improve their “intellect” and “will.”¹⁵⁵

As this analogy suggests, the principles of the law of nature are no different for individuals and for states, and the importance of the priority of obligation holds for both entities. As we have already seen, this allows Wolff to derive the contours of many of the state’s powers—especially the power to engage in war and the right to punish—from the condition of individuals in the state of nature. However, Wolff’s move was to insist that the application of the

¹⁵⁴ Prolegomena, p. 9. Gentes spectantur tanquam personae singulares liberae in statu naturali viventes. (1)
¹⁵⁵ I.56, I.57, p. 36-37.
principles of the law of nature was different, and the core of the difference between natural law applied to nations and applied to individuals was rooted in the contractual origin of the nation and its obligations. Wolff made this particularly clear in the Preface to his *Jus gentium methodo scientifica pertractatum*: “since, indeed, nations are moral persons and therefore are subject only to certain rights and duties, which by virtue of the law of nature arise from the social contract, their nature and essence undoubtedly differ very much from the nature and essence of individual men as physical persons.”  

He emphasized this point repeatedly in the work, stressing that “For example, man is bound to preserve himself by nature, every nation by the agreement which it is made a definite moral person.” Similarly, “the right of defending one’s self against the injuries of others belongs to man by nature, and the law of nature itself assigns it to a nation. But the method of one man’s defence against another is not, of course, the same as the proper method of defence for nations.”

To illustrate these differences in application, Wolff describes two variations of the natural law as it applies to nations. The first was the “necessary law of nations,” which is simply the law of nature straightforwardly applied to nations in the same fashion as it is applied to individuals. This gave rise to a set of obligations to participate in a *civitas maxima* of all nations together, derived from the society “which nature has established among individuals”; if the introduction of civil society eliminated the natural bonds between individuals, civil society would be contrary to nature, so to avoid this problem, “that society which before was between

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156 Preface, p. 5. Enimvero cum Gentes sint personae morales, ac ideo non nisi subjecta certorum jurium & obligationum, quae ex societate contracta vi Juris naturae prodeunt, natura & essentia eorum a natura & essentia singulorum hominum, individuorum physicorum. (8a)
157 Prolegomena, §3, p. 9-10. ...jus se defendendi adversus injurias aliorum & homini natura competit, & Genti tribuit ipsa lex naturae. Modus autem hominis se defendendi adversus hominem alius non prorsus idem est cum modo defensionis Gentibus proprio. (2)
158 Prolegomena, §4, p. 10.
individuals continues between nations.”

While admitting that such a universal society is only a useful fiction, it is necessary in order to derive the laws of the civitas maxima. These laws make up the “voluntary law of nations,” which reflect modifications in the necessary law of nations appropriate to the position of nations and are “equivalent to the civil law.”

Wolff characterizes the derivation of the voluntary law of nations from the necessary law as the same as the manner in which “the civil law must be derived from the natural law.” Wolff’s position on this derivation was unique, and constituted his effort to explain what Leibniz had simply stated. As he made clear in the Preface to the Jus gentium, civil law was a product of man’s inability to entirely satisfy the demands of natural law; “so likewise the condition of nations is such that one cannot completely satisfy in all details the natural rigour of the law of nations, and therefore that law, immutable in itself, should be changed only so much that it may not depart entirely from natural law, nor observe it in all details.” The effect of the voluntary law—like the civil law—was to “give[] immunity of action among men and permits those things to be tolerated which could not be avoided without greater evil.” In his earlier writings on natural law, Wolff had stressed that the civil law mitigated the rigor of the natural law in order to reduce the amount of conflict in civil society. The civil law had to be aimed at the majority of men, and if it could not depart from the natural law in some respects when it was difficult or impossible for men to satisfy its obligations, it would be unworkable. Wolff analogized this departure from the rigor of natural law to the way “in the state of nature one may order to abstain

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159 Prolegomena, §7, p. 10.
160 Prolegomena, §21, p. 17.
161 Prolegomena, §22, p. 18.
162 Id.
163 Preface, p. 6.
164 Id.
165 Inst. 1072, p. 668. ...si determinationes legi naturae adjectae fuerint probate difficiles, vel prorsus impossibles, in earum locum substituendae aliae probatu faciles, quae probabiliter seu ut plurimum iisdem aequipollent.
from war from prudence on account of injuries not of great importance, or from charity." The overarching objective of this departure was to ensure that lawsuits did not multiply “to excess,” and so that disagreements can come to an end.

This approach to the law of nations points to the key distinction between individuals and states. It is not just that the state is a contractual creature; that is simply to say that individuals have created the state, with its corresponding obligations. More importantly, the state, even in Wolff’s posited *civitas maxima*, has no common judge above it in its disputes with other nations, and is under no obligation to create one, unlike men. Since the natural law allows modification in order to prevent ceaseless conflict, nations must be understood to act without judgment from others in the international realm. Since “all difficulties, even war itself between nations, ought to have an end,” and “since nations are understood to have united into a state whose individual members are individual states, to them also that might be applied which has been proved concerning the difficulties and lawsuits of private individuals in a state of which they themselves are members.” The results of any war must thus be considered legitimate, regardless of the suspicions of other nations about the justice of the victor’s cause, since “each must be allowed to follow its own judgment in determining its actions, as long as it does nothing contrary to the right of another”—in short, because “no nation can assume for itself the functions of a judge.”

This gives both sides in a conflict equal right to engage in the capture of property and any other rights accorded to a just combatant. Wolff is specific that this is not a true right, but instead

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166 Id. …cum & in statu naturali ob laesiones non magni momenti a bello abstinere jubeat prudentia, vel charitas.
167 Id. …facile patet cavendum esse, ne lites multiplicetur in nimium, & ex litibus nascantur lites, nec in foro protrahantur, atque curandum, ut exitum habere possint.
168 Law of Nations, VII.886, p. 453. Quamobrem cum Gentes in civitatem coivisse intelligantur, cujus singula membra sunt singulae Gentes; ad eas quoque applicari poterat, quod de privatorum negotiis ac litibus in civitate, cujus ipsi membra sunt, demonstratum fuit. (320)
169 VII.888, p. 454.
170 VII.889, p. 455.

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simply an immunity; only one side can actually have a just right to war, and by the law of nature the party not in the right cannot have the rights of a just belligerent. Wolff had thus, through this line of reasoning, naturalized the claim already present in Grotius that all wars should be considered legitimate in their external effects, regardless of their justice, and had restored the Pufendorfian insistence that there could be no judgment of the misdeeds of other nations.

IV. Punishing “The Nation”

This account of natural obligation, the social contract, and derivation of the differences between individuals and states in the international order—the first systematic and full-throated separation between the rights of individuals and states we have encountered since Grotius, and the first to make the claim that natural law, rather than consent, was the source of the unique legal obligations of states—enables us to see the rather significant consequences this view had for the content of the law of nations, especially with respect to punishment. First, Wolff’s assessment of punishment and responsibility in the international order differed radically from prior thinkers due to the introduction of a mediating body between sovereigns and citizens and his refusal to accept the claim that the civitas exercised the rights or personal judgment of individuals. Second, this new assessment of punishment was reflected in Wolff’s ability, unseen in previous thought on international affairs, to combine a systematic distinction between combatants and non-combatants in war with a social contract theory which consolidated judgment in the state. Wolff’s theory thus managed to centralize authority in the state and make it the exclusive actor in the international order, subject to a distinct body of law, while likewise removing individuals from the most serious responsibility for the acts of the sovereigns who

171 VII.891, p. 456.
represented them. This led to the creation of extensive legal protections for civilians and prisoners of war that were both natural and far beyond what any prior thinker had offered.

A critical first step in this shift was Wolff’s insistence that nations could and should distinguish between enemies who pose a threat to them and those who do not. We have already seen the deadly consequences of all the theories of natural law since Hobbes, which shared the claim that there were no enforceable obligations to others by the law of nature in a state of war. A violation of the natural law indicated that an enemy was likely to carry whatever offenses he had already committed to a higher pitch, justifying the use of force up to and including deadly force until peace was offered. While Wolff, like every other thinker, rejected Hobbes’s claim that the state of war and the state of nature were identical, the notion that the state of war is a place without enforceable obligations likewise has no place in Wolff’s theory.¹⁷² The reasons for Wolff’s rejection stemmed once again from his conception of the primacy of obligation. The scope of a nation’s rights, just like the scope of an individual’s rights, is determined by the means necessary to satisfy its natural obligations. In the case of war, that constrains a nation’s conduct. Every just war, Wolff claimed, was ultimately a defensive conflict, and “a right against persons arises in a just war from defence of oneself and one’s property.”¹⁷³ As a result, the right against persons in a just war “is to be determined from that which is necessary to resist the violence which an enemy is attempting or intending to use against us or our property, or to repel

¹⁷² Walter Rech, one of the only writers to comment on this shift in Wolff, locates it as originally occurring in Vattel’s work, since he claims Wolff still views punishment as an “unlimited right” akin to the degree of violence permitted by Hobbes and Pufendorf. Walter Rech, Enemies of Mankind: Vattel’s Theory of Collective Security (Boston: Martinus Nijhoff, 2013), 82-83, 166. However, this rests on a misreading of Inst. 94, which simply points out that the right of punishment is “unlimited” in the sense that the appropriate degree of punishment cannot be accurately determined in the abstract, prior to an offense’s commission.
¹⁷³ VII.791, p. 409.
him from us and from our property.” 174 Thus, despite the fact that all of the members of a warring society are enemies, “as long as they refrain from all violence, and do not show an intention to use force, [they] may not be killed nor may violence be inflicted in any way upon their persons, nor may they be treated badly.” 175 Consequently, prisoners of war—a class which had never been extended substantial protections under the natural law—were shielded from all violence as soon as they were captured. Women, children, the elderly, and other non-combatants are therefore protected—not by the humanity of the attacker or the custom of nations, as Pufendorf and Grotius had suggested, but by the law of nature itself. By definition, the just warrior’s right cannot be unlimited, contrary to the positions of Pufendorf and others, since not every enemy is a threat.

Wolff saw quite clearly the potential objection to his position, and turned to rebut the argument “that subjects of a belligerent by their resources resist the restoration of our right, consequently concur in unjust hostilities, and make themselves participants in the crime which is committed by the enemy against our citizens, because they approve of the act of their state.” 176 Wolff’s theory provides two replies to this claim. Wolff’s initial response is simply to recur to his basic position about the obligation shaping the scope of the resulting right: “the right of defence does not extend to killing, except when that is a necessary means of preserving your own

174 Id. ...ac ideo aestimandum ex eo, quod necessarium, ut vi hostis resistatur, aut a nobis vel rebus nostris avertatur. (288)
175 VII.792, p. 409-10. ...quamdiu ab omni vi abstinent, nec animum vi inferendi produnt, interficere, aut allo modo in corpus ipsorum saevire, vel eos male tractare non licet. (288)
176 Id. at 410. ...subditos belligerantis opibus suis resistere reparationi juris nostri, consequenter concurrere ad hostilitates injustas & criminis particeps fieri, quod ab hoste in cives nostros committitur, quia factum civitatis suae approbant. (289)
life, or avoiding bodily injury.” Ultimately, Wolff contends, “the right against persons in war is not the right of promiscuous slaughter of those who are in the category of enemies.”

This argument means that for the first time it becomes conceivable to injure an enemy, even in the conduct of a just war. An enemy general who wantonly killed civilians or prisoners of war, even if fighting on the just side in a war, would thus legitimately be subject to punishment by either state involved in the conflict. Similar principles are reflected in Wolff’s discussions of property, which emphasize that it is an injury to the enemy to destroy or confiscate more property than necessary for reparation or punishment: “a heavier penalty is illegal, when a lighter one is adequate, and since in so far as the punisher exceeds the limit, he injures the one who is to be punished; if destruction of the property of an enemy is done by way of penalty, the penalty ought to be just, that is, such as the offense of the enemy deserves.” Specific types of property likewise reinforce this point; for example, Wolff declares the wanton destruction of fruit-bearing trees as illegal in general, since such destruction is “for the sole purpose of doing injury,” and “an injury ought not to be done for its own sake.”

The second response, with even more direct consequences for Wolff’s theory of punishment, was rooted in his conception of the social contract, and in particular the new character of the societas that contract created. As we have seen, Wolff conceived of the right of a nation as a new right, created by the original contract, distinct from the rights of the individual citizens who made it up, and of the nation itself as a body which remained separate and distinct

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177 Id. Jus enim defensionis non extenditur usque ad interfectionem, nisi quamdiu medium necessarium est conservandi vitam propriam, vel laesionem corporis evitandi. (289)
178 Id. Jus in personas in bello non est jus ad caedes promiscuas eorum, qui in hostium numero sunt. (289)
179 VII.823, p. 426. Enimvero cum poena gravior illicita sit, ubi levior sufficit, & quatenus puniens modum excedit, puniendum laedit; si vastatio rerum hostilium fiat in poenam, poena justa esse debet, hoc est, ut eam delictam hostis mereat. (300)
180 VII.829, p. 430.
from the individuals even after the institution of a sovereign. This conception of sovereignty meant that punishment due to the nation at least theoretically fell on the nation, not the individuals composing it. This meant that Wolff sharply limited the possibility of individuals bearing responsibility for state actions. In his specific response to the claim that all enemies endorse the state’s act and thus bear punishment, Wolff relied primarily on a vocabulary of charity: “not all who aid another can be punished in the same way,” and charity “demands that a thing, which is attributable to misfortune, should not be considered a fault and certainly not made equivalent to fraud.” The obligation of charity never ceases simply because another nation has engaged in war; elsewhere Wolff argues that “[w]e ought to love and cherish an enemy as ourselves. For every man is bound to love and cherish every other man as himself.”

Elsewhere, however, Wolff makes much the same point without a reliance on charity, tying his response much more clearly to the underlying subject-sovereign relationship. In arguing that it is never legitimate to kill those who have unconditionally surrendered, Wolff based it instead on principles about shared responsibility which would have been very familiar to Grotius:

...you may not make one who has surrendered, or all captives generally, defendants on a capital charge. It also must be understood that although subjects are bound to patient obedience, however badly the superior rules, that is, abuses the right which he has over the people, nevertheless on this account those are not to be held to punishment for his act, since no one can be punished for the act of another. For although the act of the ruler of a state is to be considered the act of the nation, nevertheless one must not argue from the entire nation to individuals. For there is no one to whom it does not seem absurd, that a whole nation is to be given over to slaughter, or even that it has deserved that penalty, for unjust hostilities; indeed, there is no reason why a few should expiate the crime of an entire state, for which their lives cannot be put in pledge.

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181 VII.792, p. 410. ...exigere, ne quod infortunio tribuendum, culpae tribuat, vel prorsus dolo aequiparetur. (289)
182 VI.743, p. 382. Hostem amare & diligere debemur tanquam nosmetipsos. Unusquisque enim hominem alium quemcumque amare atque diligere debet tanquam se ipsum. (269)
183 VII.797, p. 412-13. ...ne deditios, aut captivos promiscue omnes criminis capitalis reos facias. Tenendum quoque est, quamvis subditi ad obedientiam cum patientia obligentur, si vel maxime male imperet superior,
The acts of the nation are not the acts of the individuals who make it up, and as such cannot be a justification for punishing a particular individual; while they are obliged to obey, there is no sense in which the sovereign’s acts are also the subject’s acts. Wolff repeats the same logic to outlaw the practice of slavery. Slavery could only be justified by a crime specifically committed by the individual, not for the collective crime of the society in engaging in an unjust war.

Those things which are done in war by unjust force are charged to the nation as a whole, and not to the individuals as individuals. Therefore, although we assume that the act of the corporate body deserves punishment, nevertheless, since no one can be punished for the act of another, and since any one of those who share the punishment with each other is punished for his own act, by which he concurs in the act of another, individuals cannot submit to that punishment which the corporate body deserves.  

The notion that the *societas* stands separate from individuals, with a peculiar set of rights and obligations which it holds by virtue of being a *societas*, makes it possible to conceive of a separation between individuals and the *societas* with respect to punishment for its misbehavior. As Wolff claims, “in a state it is not inconsistent that individuals regarded as such and the corporate body should be opposed to each other as distinct persons, a thing which is perfectly clear in a democratic state, where the entire people is sovereign but the individuals are subjects.” Wolff credits Grotius with recognizing this distinction, “although he has not fully explained the details.” A conception of national right which views the state as binding

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184 VII.814, p. 421-22. Quae in bello vi injusta fiunt, ea imputantur Gentih universae, non autem singulis qui singulis. Quamobrem etsi ponamus factus universitatis mereri poenam, cum tamen nemo puniri possit ob factum alienum, & qui poenam inter se communicant, eorum quilibet puniatur ob factum proprium, quo scilicet ad factum alienum concurrit, singuli tamen non subire possunt eam poenam, quam universitas meretur. (291)

185 Id. at 422. In civitates autem non absolum est, ut singuli in se spectati & universitas sibi invicem opponantur tanquam personae diversae: id quod clarissime patet in statu populari, ubi populus universus est superior, singuli autem subditi sunt. (291)

186 Id.
individuals, though not actually exercising their personal rights, enables a separation which shields individuals from some of the consequences of the nation’s conduct.

As this implies, Wolff does accept punishment as a legitimate cause for war, but he attempts to limit that right in a variety of ways. War between states, like war between individuals, is only justified in response to some injury, and Wolff divides the just war into three permissible purposes: “(1) to attain that which is our own or which is due to us, (2) to provide for security for the future by punishing the wrongdoer, (3) to prevent wrong to ourselves through resistance to illegal force.” These aims correspond to Wolff’s three just causes: “(1) reparable wrong, (2) irreparable wrong, and (3) threatened wrong.” The second category in each group Wolff refers to as “punitive war,” which he defines “as one in which a penalty is exacted from another.” A single war can have multiple just causes and thus seek multiple ends, but every just war must have at least one of the corresponding cause/aim pairs. As this classification suggests, punitive war exists to address a set of harms not encompassed simply by lost or withheld property. Further, punishment in general is necessary to give force to the natural law; “To no purpose would the law of nature prohibit injury to nations if nation were permitted to injure nation without punishment. Therefore, from the obligation not to injure arises the right of the injured nation to punish.”

Despite the centrality of punishment to the natural law, Wolff is careful to limit the right of punishment only to those who have been injured. Wolff is emphatic in his assertion that

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187 VI.619, p. 315-16. Triplex itaque belli finis est, scilicet 1. ut quod nostrum est, vel quod nobis debitur, consequamur, 2. Ut laedentem punitiendo securitati futurae consulumus, 3. ut vi injustae resistendo nos defendentes injuriam a nobis avertamus. (221)
188 VI.620, p. 316.
189 VI.616, p. 314. Bellum punitivum dicitur, quo poena sumitur ab altero. (221)
190 VI.636, p. 326. Frustra lex naturae laesionem Gentibus prohibet, si Genti impune Gentem laedere liceret. Ex obligatione igitur Gentis non laedendi nascitur laesa jus puniendi. (229)
nations can have no authority to punish internationally unless the nation itself or one of its members has been injured: “He who has offended against a nation or committed some crime against it cannot on that account be punished by another nation to which he has come.”\(^{191}\) The same principle applies to war, where Wolff explicitly rejects Grotius’s position that certain domestic practices are so detestable as to permit punitive war; “a punitive war is not legal except for one who has received an irreparable injury from another.”\(^{192}\) Wolff’s attack on Grotius, however, by necessity took a different tack from Pufendorf—after all, Wolff had readily agreed that the power of punishing was held by individuals in the state of nature. For Wolff, the decisive evidence against Grotius was his struggle to articulate who should hold the right of punishment:

> But his error arises from this, that he persuades himself that the evil in itself is such that it certainly can be punished, and that the right to punish belongs to him who is not equally guilty. But since he himself can find no natural reason for this right which is satisfactory, he is compelled to confess that it has not been determined by nature to whom this right is due, except that nature makes plain enough that it is most suitable that it should be done by the one who is superior, nevertheless not so as plainly to prove that this is necessary, except that the word superior is taken in this sense, that he who does ill, by that fact itself may be considered to have made himself inferior to every other.\(^{193}\)

The right of punishment belongs to the superior power in a state under Wolff’s standard justification for sovereign powers: “legislative power can have no effect without the right to punish, since civil obligation is introduced by fear of penalties.”\(^{194}\) Abandoning Grotius’s

\(^{191}\)I.151, p. 82. *Qui apud Gentem unam delinquit, aut crimen aliquod perpetravit, puniri ob id nequit a Gente alia, ad quam venit.* (55)

\(^{192}\)VI.637, p. 326. *Bellum punitivum licitum non est nisi ei, qui injuriam irreparabilem putat.* (229)

\(^{193}\)Id. *Error autem inde fluit, quod sibi persuadeat, malum in se tale esse, ut puniri faltem possit, jus vero puniendi competere ei, qui non aeque nocens est. Ast cum rationem naturalem hujus juris ipse reperiri nullam potuerit, quae satisfaceret, fateri cogiturb, per naturam determinatum non esse, cui jus hoc debeatur, nisi quod satis indicet natura convenientissimum esse, ut id fiat ab eo, qui superior est, non tamen ut omnino hoc demonstrat esse necessarium, nisi vox superioris eo sumatur sensu, ut is, qui male egit, eo ipso quovis alio inferiorem senseatur se fecisse.* (229)

\(^{194}\)Id.
position also has the benefit of avoiding anything which might provide “a license for war.” 195 Wolff likewise concludes that atheism, deism, and idolatry are not just causes of war. 196

Wolff’s conception of when a punitive war is legitimate thus requires some fleshing out. Wolff is never quite clear what constitutes an “irreparable injury” justifying punishment, but his examples suggest that the category is not as narrow as its moniker suggests. In defining punitive war, Wolff gives an example of a war waged to punish “by arms an injury to legates,” 197 suggesting non-monetary harms are the primary focus. But when Wolff comes to discuss punitive war in more detail, he implies that the harms addressed by punishment are more in keeping with a general desire for deterrence. This comes through particularly in Wolff’s discussion of the relationship between punitive and “vindicative” war, which looks to take reparations for property lost. Inevitably, Wolff argues, “if any one seeks by force of arms that which has been taken from him unjustly by force, his offensive war is at the same time vindicative and punitive.” 198 Any war of this sort is analogous to an action in the state against a robber, who is both required to engage in restitution and to undergo punishment. 199 Wolff articulates the “irreparable harm” done in such a case in the following way: “Just at by one act property has been taken from its owner and also irreparable injury done him, in so far as the deed cannot be undone; so also, by one act of war, his property is regained and also he who did the injury is punished.” 200 The “irreparable injury” thus appears to be the more general loss of security as a result of an aggressor’s behavior rather than solely the fact that the underlying

195 Id. at 327.
196 VI.638, p. 327.
197 VI.616, p. 314. Wolff gives the same example in rejecting the concept of retaliation. V.578, p. 296.
198 VII.639, p. 327. Si quis vi armorum repetit, quod vi injusta sibi ablatum fuit, bellum offensivum simul & vindicativum, & punitivum est. (230)
199 Id. at 328.
200 Id. Quemadmodum uno actu & domino res sua rapta fuit, & injuria irreparabilis facta, quatenus factum infectum fieri nequit; ita etiam uno actu belli & res sua repetitur & qui injuriam fecit punitur. (231)
damage cannot be recouped through taking a certain amount of property in response, as in the case of Wolff’s example of injuries to legates.

This admission that seeking restitution for property wrongfully taken is inevitably identical with punitive war makes punitive war look suspiciously close to war based on fear of another party, and Wolff quickly turns to address a series of questions concerning the legitimacy of various pretexts for war. Wolff argues that simple fear of another country is not a just cause for war, since they have not committed any injury by augmenting their own power, and likewise refuses to countenance the claim that maintaining equilibrium might be a legitimate reason for war. The exception to this overall position is for war against a nation which routinely goes to war for manifestly unjust reasons, though even this is heavily qualified. Such a nation represents a threat to “the common security” of the international order, and can be justly resisted by other nations. However, even under these circumstances, the other nations must wait for the rogue nation to commit some act of hostility. A nation which is “manifestly considering plans for subjecting other nations to itself” should spur other nations to create an alliance in order to resist it, so that “the slightest wrong gives them the right to overthrow the growing power by armed force.” This approach helps to maintain the balance of power among nations in order to preserve their overall freedom.

However, Wolff’s insistence on an injury to at least one of the parties in an alliance before such a war can be undertaken underscores an important feature of Wolff’s account. The centrality of injury, and the limitation of the rights of reparation and punishment to the injured

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201 VI.640, p. 328-29.
202 VI.646, p. 332.
203 VI.653, p. 336.
204 VI.650, p. 334.
205 VI.651, p. 335.
party, leads to the complete absence of universal jurisdiction from Wolff’s account, even over offenses like piracy. Indeed, the term *pirata* and its derivatives almost never appear in Wolff’s text, and when they do, it is simply as an illustration that *pirata* act illegitimately. A person who participates in a public war absent the sovereign’s authorization—specifically referring to privateers—is analogized to a pirate “because they act with no authority.”

Wolff’s only other reference to piracy comes in his critique of Grotius’s position on international punishment:

“Grotius declares there is a just cause of war against those who are without reverence for parents, who eat human flesh, who practice piracy. But he confuses those things which are united with wrong to others with those by which no wrong is done to others.”

A pirate, it seems, is simply a thief, and even when addressing the age-old question of whether good faith must be kept with such criminals, Wolff prefers to use the more traditional terms *praedones* and *latrones*: “things which are promised to an enemy as enemy, nay, even to a robber and a brigand as a robber and brigand, must be observed.” The category is narrowed even further to modern eyes since Wolff declares that the use of poison and assassins against an enemy are legal methods of war.

Even in the single instance where Wolff appears to grant that nations might have a universal right of punishment—the case of the hyper-belligerent nation which frequently or admittedly makes war without cause—he does not rely on a general argument about the right to punish derived from individuals, likely because of the contradictions such a position would necessarily entail. Wolff’s primary justification looks back to his conception of a *civitas maxima*:

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206 VII.910, p. 467.
207 VI.637, p. 326. Justum bellum in eos esse *Grotius* pronunciat qui in parentes impii sunt, qui humanum carnem epulantur, qui piraticam exercent. Sed miscet ea, quae cum injuria in alios conjuncta sunt cum hisce, quibus injuria nulla alius infertur. (230)
208 VII.799, p. 413. *Quae hosti tanquam hosti, immo etiam praedoni & latroni tanquam praedoni & latroni promittuntur, servanda sunt.* (291)
209 VII.877-82, p. 450-52.
...since nations are understood to have united into a supreme state, they are bound to protect the common security by their combined powers. Therefore, since the right belongs to nations as a whole in the supreme state to coerce individual nations, if they are unwilling to satisfy their obligation, if any one relying on his power does not hesitate to disturb the common security of nations by arms unjustly assumed, other nations in general have a right to deprive him of his power.  

This sleight of hand raises more questions than it answers. The underlying justification for this argument appears to be a return to the notion that a violator of the natural law demonstrates that he is unable to live by the law of reason, and thus constitutes a threat to everyone who encounters him. Wolff even employs some classic Ciceronian language in describing the wrongdoer: “He declares himself an enemy of all nations who dares wrongfully to harass any other nation at will, and to inflict losses by force unjustly. Therefore, all nations have the right to repel unjust force by force, that the common security may be defended and preserved.” But on this rationale, it is difficult to see why other violations of the natural law would not be equally worthy of universal punishment, or the import of restricting punishment to solely the injured party; the difference between this position and the more wide-ranging theory of punishment advanced by Grotius and Locke is perilously small.

When Wolff returns to the question of the warmongering nation later in the work, he appears to have recognized this difficulty, but his second explanation likewise suffers from serious defects. Here, Wolff attempts to justify actions against a “disturber of the public peace” by claiming that his actions in fact inflict some injury on every nation. Wolff’s example is the higher cost of goods during wartime for those who live in nations that trade with the unjustly

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210 VI.652, p. 336. Etenim cum Gentes in civitatem maximam coivisse intelligantur; conjunctis viribus securitatem communem tueri tenentur. Quamobrem cum universis Gentibus in civitate maxima competat jus cogendi singulas, si obligtioni suae satisfacere nolint; si quis potentia confusus armis injustis securitatem communem Gentium turbare non veretur, Gentibus ceteris promiscue jus est potentia eam diminuendi. (236)

211 Id. Hostem Gentium omnium se declarat, qui pro lubitu quamlibet aliam injuria lacessere & vi injusta damna dare audet. Omnibus igitur Gentibus jus est vim injustam vi repellendi, ut securitas communis defendatur ac conservatur. (236)
attacked nation, who “experience no little loss of money because of the war.”\textsuperscript{212} It is this conception of injury on which Wolff founds the right to attack a warmonger: since his acts “harass other nations, and injure not only these, but also other peaceful nations...consequently every nation has the right to compel disturbers of the public peace to cease the disturbance.”\textsuperscript{213} Even here, however, Wolff does not entirely escape the supposedly abandoned rationale which undergirded his first discussion; he notes that a warmonger “shows a hostile intention towards all, so that the fear of his inflicting injuries is not vain but well founded.”\textsuperscript{214}

Wolff finally attempts to cabin this right by suggesting limitations on its exercise. Contrary to Wolff’s earlier intimations, it appears a nation can only directly engage in war with a warmonger at the invitation of the nation actually attacked; “those who are harassed with arms by disturbers of the public peace may rightfully enlist any nations in arms against them.”\textsuperscript{215} In the absence of this invitation, nations appear not to have a right of war against a disturber of the public peace; the rights nations have to act “although a direct injury is not done to them, which is the sole just cause of war, nor is such an injury feared from a neighbouring power” are limited to “bringing aid to those who are harassed with arms, and for sending subsidies to them, or assisting them in war in any other way, a thing which is allowable in itself.”\textsuperscript{216} Similarly, Wolff advocates a system of defensive treaties to deter warmongers and increase the size of coalitions against them.\textsuperscript{217} Of course, as Wolff admits, these steps are permissible against any unjust enemy by the

\textsuperscript{212} VIII.965, p. 489.
\textsuperscript{213} VIII.966, p. 489. ...laccussunt Gentes alias & non modo his, verum etiam pacatis aliis nocent, cum tamen omni modo studere debeant, ut pax inter Gentes conservetur...consequenter Gentibus quibusvis competit jus turbatores quietis publicae cogendi. (346)
\textsuperscript{214} Id. ...hostilem animum in omnes prodit, ut non vanus sit, sed justus injuriarum faciendarum merus. (346)
\textsuperscript{215} Id. Qui a turbatoribus quietis publicae armis lacessuntur, iis jure se adversus eosdem associant Gentes quaecunque. (346)
\textsuperscript{216} VIII.967, p. 489-90. Quamvis itaque injuria directe ipsis non facta, quae sola justa belli causa est, nec talis sit metus ex vicina potentia...qui armis lacessuntur, auxilium feras, & subsidia mittas, aut cos quocunque modo alio in bello adjuves: id quod in se licitem est. (346)
\textsuperscript{217} VIII.968, p. 490.
law of nature, not simply one who falls into this special category. Wolff thus appears to tacitly abandon the earlier suggestion that war against a warmonger is open to every nation as a consequence of the *civitas maxima*; the “indirect” injuries Wolff describes are insufficient for a right of war.

Of course, war against a hyper-aggressive disturber of the public peace is not the normal case when war arises among nations, and Wolff, like Grotius, endorsed the notion that the rigor of natural law should be modified in order to reduce the frequency of war among nations. In particular, this means that Wolff adopted the idea that wars should be equal on both sides with respect to their legal effects, though unlike Grotius he viewed the requirements of the voluntary law as drawn from the natural law. Wolff, however, never articulated the relationship between punishment and this voluntary law of nations, leaving open a significant question about the relationship between parties in a war. Did the intervention of the voluntary law of nations—which, unlike Grotius’s version, is not revocable by rescinding consent—require belligerents to treat each other as just combatants? And, if so, what place did this leave for punishment in Wolff’s schema in the vast majority of conflicts? Wolff never answered this question, but he gestured toward the problem in his discussions of punishment.

The core issue was the character of the voluntary law of nations. As Wolff described it, the voluntary law required that “so far as regards results, war is to be considered just on either side.” As we have seen, the rationale for this requirement was rooted in the equality of nations, which dictates that “no nation can assume for itself the functions of a judge, and consequently cannot pronounce upon the justice of the war.” This leads each side in war to

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218 VIII.967, p. 490. For the discussion of aid to a warring party, see VI.656, p. 337.
219 VII.888, p. 454. ...
220 Id. Gens nulla judicis partes sibi arrogare potest, consequenter nec de justitia belli pronunciare. (321)
have an equal license to engage in all the actions which a just belligerent can take.\textsuperscript{221} While Wolff is clear that this does not grant an actual right to an unjust belligerent, the problematic assertion is that the voluntary law grants “immunity from punishment for the action.”\textsuperscript{222} This conception of the voluntary law raised a two-part problem. First, who does the immunity of the voluntary law address? Is it simply an immunity vis-a-vis other nations, who might be called upon to assess property claims under the doctrine of postliminium or to assess the legality of other captures made in war, or does this immunity apply to the warring parties in their relations with each other? Second, if by the voluntary law, both belligerents are entitled to all the rights of a just actor in war, and those rights include a right of punishing an enemy, is there any remaining place for punishment in war outside of the individual punishment of offenders who use illegitimate means of warfare?

On the first question, Wolff appears to believe that the requirements of the voluntary law apply only to non-belligerents. An obvious problem with the alternative view is that in initiating war for reparation and punishment, a party makes itself the judge of another nation’s conduct in failing to repair or otherwise redress the injury. There would be a certain incongruity in requiring nations to view their enemy as entitled to the rights of a just belligerent, even if neutral nations are required to do so, and at times Wolff’s language picks up on this problem. In noting that both sides are entitled to all the rights of a just belligerent, Wolff notes that “you may not listen to one of the belligerent parties accusing the other of a violation of the law of nations, as long as the other does nothing which is considered illegal in war.”\textsuperscript{223} Similarly, Wolff rejects the idea that

\textsuperscript{221} VII.889, p. 455.\\textsuperscript{222} VII.891, p. 456.\\textsuperscript{223} VII.889, p. 455. Atque ideo non audias, belligerantium partem unam accusare alteram violationis juris Gentium, quamdui nil fecit, quod in bello illicitum putatur. (322)
there is ever postliminium with neutral nations, “since the war is to be considered as just on either side by nations not involved in war.”

Nations actually engaged in war retain a right of punishment, but this simply gives rise to the second problem. As Wolff had noted in discussing the destruction of enemy property, such destruction was permissible for a just warrior on multiple grounds, including the confiscation of corporeal property “as a punishment, for no other purpose indeed than that the one who is to be punished should lose it, and consequently incur loss.” While nations were theoretically constrained in the degree of punishment they could mete out by the scope of their obligations under natural law, Wolff also insisted that nations were the sole judge of the amount of punishment required in a given scenario. Closely linking the right of punishment with the rights of self-defense and reparation made it very difficult to explain why, if these latter rights inhered in both sides in war, the right of punishment did not also follow along with it. Wolff intimates as much at various points; in discussing the punishment of those “who resist a just force too stubbornly,” Wolff endorses the notion that they can be punished for their resistance in order to encourage their surrender, even though most “civilized nations” do not exercise this right.

This question of what purpose a doctrine of punishment continues to serve in the international order in light of the voluntary law of nations is further underscored by Wolff’s description of how a nation is “punished.” Through punishment “its property, both corporeal and incorporeal, can be taken away, for example, its rights to certain acts in the territory of the injured party; nay more, war also is righteously undertaken against the offender unless provision

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[224] VII.899, p. 461.

[225] VII.823, p. 426. Denique cum in poenam adimi possint res corporales quaecunque, non alio sane fine, quam ut earum jacturam faciat qui puniendus. (300)

[226] VII.807, p. 418.
can be made for security in some other way.”227 In war, this is accomplished through acts of war—the destruction of property, etc.—but also through treaties which impose punitive conditions on a nation, the legitimacy of which Wolff vigorously defends.228 These acts of punishment, however, are virtually impossible to distinguish from other actions legitimately taken in war; any belligerent (just or unjust) can confiscate an enemy’s property by occupation, and punishment simply provides another potential justification for the seizure above and beyond debts which caused or were incurred during the war.

However, these overall protections were not as powerful as they might initially appear. We noted earlier that Wolff opposed the claim that individuals might be held personally responsible for state acts, but Wolff left open quite significant space for punishment of “the nation.” While individuals could not be subjected to slavery on the basis of their membership in the state, Wolff somewhat cryptically describes a form of conquest which results in a “slave-kingdom,” acquired “within the limits of a just penalty.” Wolff is not specific about when this would apply, other than to suggest it is rare, but would occur when the nation has committed “an offence worthy of that penalty.”229 In such a circumstance, “all the subjects are reduced to personal servitude.” This can be limited in various ways, with a “mixed sovereignty, made up of civil power and that of a slave-owner,” but Wolff is equally vague about the contours of such a potential mixture,230 though in his Jus naturae, Wolff had made clear that such a kingdom could not be the result of a normal social contract.231 From Wolff’s references in the Jus naturae, it appears that he has in mind Grotius’s account of conquest, which had viewed conquest as an

227 V.581, p. 297. In poenam Genti adimi possunt res tam corporales, quam incorporales, veluti jura ad certes actus in territorio laesae: immo licite quoque sumuntur arma in laedentem, nisi aliter securitati prospici possit. (208-09)
228 IV.406, p. 213.
229 VII.874, p. 448-49.
230 Id. at 449.
231 Jus naturae VIII.i.266.
alternative to the right of enslaving enemies that every just conqueror has; but Wolff had, at least in principle, removed the premise that slavery was a legitimate consequence of all wars.

As this discussion of slavery implies, Wolff’s theoretical account of authorization and punishment meant that individuals were still to suffer much of the punishment ostensibly meted out only to the “nation.” The absolute and irrevocable character of the initial authorization made questions about collective responsibility for state acts quite easy to answer. For Wolff, the body of individuals making up the civitas is a nation (gens), and throughout his discussion of the international order, the gens created by the initial compact, not the individual or body who exercised the sovereign power in the nation’s name, was conceived of as the primary holder of the relevant rights and duties. Thus Wolff focused, for example, on the duty of a nation to preserve itself and the corresponding right to do the things necessary to that end, and emphasized that “[t]he right of war belongs to nations” as a result of the initial compact.

The ruler’s position in this scheme was merely derivative. The ruler holds the nation’s duties of preservation and perfection and also the rights to pursue those objectives, because “it belongs to the ruler of a state to exercise the civil authority, consequently to determine those things which are required to advance the public good, and therefore to accomplish the purpose of the state.” Wolff emphasized in an aside that these duties and rights “belong[] originally to the nation as a whole.” The ruler, by holding these rights and duties, therefore “represents his nation when it has dealings with others.” Such a transfer is not mandatory; “so far as the nation rules itself, a thing which occurs in a democratic state, it is itself the ruler also of the state.

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233 VI.613, p. 313.
234 I.38, p. 26. Etenim Rectoris civitatis est imperium civile exercere, consequenter ea determinare, quae ad bonum publicum promovendum, adeoque finem civitatis consequendum. (14)
235 Id.
236 I.39, p. 26. ...ac ideo Gentem suam, quando cum aliis negotium ipsi est, repraesentat. (15)
into which it has united.” However, in the event the nation does transfer its rights and duties to a ruler (whether an individual or a group), “the ruler of the state becomes a subject different from the nation, that moral person, which before existed in the nation as a whole, exists now in another physical individual.” The end result is that “the ruler of a state represents the entire nation, so far as he is considered ruler of the state.”

This claim is one of the only statements Wolff makes over the course of his work about the position of the ruler vis-à-vis the nation. He notes that the ruler is obligated to understand his nation and its territory in order to carry out his duty of perfecting it, and that he should strive to bring fame to the nation, but Wolff’s other references to the ruler’s authority are limited to identifying the rights of sovereignty which must (by necessity) inhere in civil power, as sketched in his treatment of public law. There is thus effectively no separation between the ruler and the nation; each is completely responsible for the acts of the other. This comes through especially clearly in Wolff’s description of injuries which give rise to a right of war; for example, Wolff speaks of a nation preventing another nation from engaging in innocent use of the sea, and declares that it is the nation which acts unjustly in creating this war. Similarly, Wolff describes the nation as holding the right to determine whether it can satisfy its secondary duties to other nations, not the ruler.

This carries over to Wolff’s adoption of the traditional rules about the acquisition of property through conquest. Wolff contends that “all together who make up a nation are regarded

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237 Id. ...quatenus Gens regit seipsam, id quod obtinet in statu populi, ipsamet quoque civitatis, in quam coivit, Rector est. (15)
238 Id. Atque ita Rector civitatis integram Gentem repraesentat, quatenus ut Rector civitatis spectatur. (15)
240 I.51, p. 33.
241 I.124, p. 70.
242 I.125, p. 70.
243 II.157, p. 84-85. See also II.188, p. 99 (nation holds the right to decide if it wants to engage in foreign commerce).
by foreign nations simply as one person."\textsuperscript{244} This is due to the character of nations, which are treated as individuals as regards each other. Consequently, “[w]ith respect to foreign nations all property of individuals taken as a whole must be considered as property of the nation, or property of citizens must be considered as property of the state.”\textsuperscript{245} The core of Wolff’s point is that private property is largely an institution of the civil law; a society could, on Wolff’s account, introduce complete communism, and under such circumstances all property “is the property of the state.” A state cannot sit in judgment on the laws and acts of another state, so the internal distribution of property cannot be assessed by a foreign state; consequently “foreign nations cannot look at the property of individuals otherwise than as the property of the nation.”\textsuperscript{246} By contrast, individuals are required to look at the property of foreigners as individual; “for the individuals who make up a nation do not have the right of the nation, which in fact belongs to the whole, or to the one to whom it has been transferred.”\textsuperscript{247} The result is that the property—and even the liberty—of citizens is bound for the debts of the state.\textsuperscript{248} Similar principles apply to the nation as a whole with respect to its property in the event that its leaders engage in an unjust war. If a nation engages in an unjust war, it is obligated to repay the costs of the war, along with any penalty incurred as punishment: “Of course nation is bound to nation for the penalty for a wrong, in so far as satisfaction is to be given for the wrong.”\textsuperscript{249} The nation is likewise liable for any property destruction.\textsuperscript{250}

\textsuperscript{244} III.289, p. 147. Quamobrem cum omnes conjunctim, qui Gentem faciunt, a Gentibus exteris non spectentur nisi persona una. (103)
\textsuperscript{245} Id. at 146. Respectu Gentium exterarum bona omnia singulorum simul sumta habenda pro bonis Gentis, seu bona civium pro bonis civitatis. (103)
\textsuperscript{246} Id. at 147.
\textsuperscript{247} Id. ...neque enim singuli, qui Gentem faciunt, jus Gentis habent, quippe quod est universorum, vel ejus, in quem id fuit translatum. (103)
\textsuperscript{248} IV.495, p. 256; IV.507, p. 261-62.
\textsuperscript{249} VII.789, p. 408. Nimirum Gens Genti ob injuriam in poenam tenetur, quatenus de injuria satisfaciendum. (287)
\textsuperscript{250} VII.821-22, p. 425.
The obligation of viewing other nations as individuals is thus limited to nations themselves and is the consequence of the lack of a judge between them. In the international arena, states see only other states, while individuals see only other individuals; the peculiar right of viewing a nation as a holistic entity belongs only to the state. This had obvious implications for explaining why individuals could be subject to reprisal for the actions of their fellow-citizens. Reprisals are permitted between nations “when another people does an injury to us or to our citizens, and, when asked, is unwilling to repair it within a proper time.” Further, Wolff contends, this right can only belong to the state:

There is no reason why you should object that this right belongs in a state of nature to individuals, and consequently the same also exists between citizens, or subjects of different peoples. For in a state of nature only the property of one who detains my property or of my debtor can be taken in satisfaction of a claim or by way of pledge. But that the goods of citizens are bound for the debts of a state, comes from the law of nations, consequently also the right of reprisal, by which the goods of any citizen are taken for any debt of the nation or of any other citizen, can only belong to nations. The ability to impute debts to the nation as a whole is thus peculiarly a right of the state due to the conditions of an international order lacking a judge. The only way to justify reprisal as a practice is though a nationalization of the right. While Grotius and Pufendorf had struggled to articulate a natural law justification for reprisal or the requirement that individuals seek authorization from the state before engaging in it, Wolff’s conception of state authority and the difference between the natural law for individuals and for states enabled him to naturalize both requirements. Individuals can only have claims stemming from injuries, and the state alone can vindicate those injuries, since the ability to impute the debt to other members of the same society

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251 V.589, p. 302. ...repressaliis locum non esse, nisi quando alius populus nobis vel civibus nostris injuriam facit, & imploratus eam reparare intra tempus idoneum. (212)

252 Id. Non est, quod excipias in statu naturali jus istud competere singulis, ac per consequens idem quoque obtinere inter cives, seu subditos diversorum populorum. Etenim in statu naturali expletionis juris vel pignorationis causa capi non possunt nisi res detentoris rei meue, aut debitoris mei. Quod vero bona civium obligentur pro debitis civitatis, id a jure Gentium venit; consequenter etiam jus repressaliarum, quo bona cujuscunque civis pro debito quocunque Gentis vel civis cujuscunque alterius capiuntur, nonnisi Gentibus competere potest. (212)
belongs to the nation alone. Further, Wolff notes, the right of reprisal cannot simultaneously belong to an individual and to the sovereign power.253

The idea that the nation’s property—and that of its citizens—can be taken to satisfy debts carries over to Wolff’s treatment of imperium, which Wolff had designated as a form of property. This contrasted with Hobbes and Pufendorf, who had stressed the importance of the victor’s right over the life of the conquered as justifying the coerced exchange of sovereignty. Wolff instead contended that sovereignty was simply confiscated or transferred like any other form of property, and in this respect mirrored Leibniz’s preference for a de facto approach to legitimate authority. The occupancy of sovereignty accomplished its transfer just as easily as any other form of property was transferred in war.254 The transfer is legitimate not because the sovereign can extract a surrender on pain of death, but simply because the people of the conquered territory can no longer be protected by their previous sovereign and are loosed from their earlier obligation.255 Simply ceasing to resist, Wolff contends, is sufficient to indicate acceptance of this new government, without any formal surrender,256 and in the absence of some stipulation in the surrender, the sovereign received the entire sovereignty to be held as a patrimony.257

Wolff’s positions on property acquisition in war thus produce a traditional result, even if they do not follow the traditional pattern, building from his account of the nation-ruler relationship. The right of war is held by the sovereign in a derivative fashion; since the right of war “is included among sovereign rights, consequently it is included under the civil sovereignty,

253 V.590, p. 302.
254 VII.863, p. 444.
255 VII.867-68, p. 446.
256 VII.868, p. 446.
257 VII.869-70, p. 446-47.
and since the civil sovereignty has been transferred to the ruler of the state, that he may exercise it, the right of war belongs to the ruler of the state also.”258 This right, like anything else, can be limited in various forms—part can be withheld by the people, or the people can place conditions on its exercise259—and ultimately the responsible party is the nation, as is particularly clear in a democracy, where “since the sovereignty rests with the entire people, the right of war also rests with the people.”260 Even outside of a democracy, any act by the sovereign “by which injury is caused to outsiders, the people is bound to assume as its own.”261 These facts, combined with the state’s obligation to look on the property of foreign citizens as national property so as to avoid sitting in judgment on the rules of other nations, combine to produce a relatively conventional account of property acquisition in war. While it is the nation that is, in principle, punished, the fact that the voluntary law of nations requires states to view each other as single, united entities for the purposes of property acquisition makes this punishment virtually indistinguishable in practice from the claim that individuals suffer punishment because the sovereign’s acts are their own.

V. Conclusion

Leibniz and Wolff set out a new account of natural right which sharply altered the position of punishment in the international realm. For both writers, the consequences of granting an individual right to punishment were sharply limited by an account of natural right which emphasized the obligations individuals (and states) held in the international realm. For Leibniz,

258 VI.614, p. 313. ...idque ad jura majestatica pertinet, consequenter sub imperio civili continetur, imperium autem civile in Rectorem civitatis translatum, ut id exerceat; Rectori quoque civitatis jus belli competit. (220)
259 Id. at 313-14.
260 Id. at 314. In democratia vero seu statu populari cum imperium sit penes totum populum; jus quoque belli penes eundem est. (220)
261 V.600, p. 307. Factum Rectoris civitatis qua talis, quo injuria infertur exteris, populus pro suo agnoscre tenetur. (216)
this was paired with a rejection of the social contract to promote an idiosyncratic picture of international affairs, largely breaking the individual-state analogy so central to the tradition of thought on the international order we have been exploring. States—and in particular large states—became the subjects of the *iuris fetialis inter gentes*. Leibniz never made clear precisely how the right of punishment played into the international order, in part because he seems to have viewed the right of punishment and the right of war as conceptually overlapping. This enabled Leibniz to answer questions about both the source of the sovereign’s power of punishment and his monopoly over that power in relatively straightforward ways, relying on a conception of sovereignty that looked to what powers were necessary to ensure a sufficient degree of protection for citizens (and thus obligate them to obey).

Wolff took elements of Leibniz’s theory—in particular his theory of natural obligation and sovereignty—and applied them to the broader tradition of thought on the international order. In doing so, Wolff restored several critical elements of that tradition, including its reliance on a social contract, though he continued to adopt aspects of Leibniz’s theory in order to explain the state’s monopoly on the individual power of punishment, in particular the claim that the state’s authority must be determined by an assessment of the powers necessary to create a good life for its citizens. Picking up on Leibniz’s separation between the law applicable to individuals and to states, Wolff naturalized that difference through his unique account of the derivation of civil law from natural law, making the law of nations an area of natural law (not simply convention) which theorists could explore.

This break between individuals and states had particularly important consequences for the power of punishment in the international realm. First, Wolff lays the theoretical groundwork for duties toward enemies, particularly those who are not actively threatening our citizens, a key
step toward the development of the modern laws of war. This follows directly from the notion that obligations condition the scope of rights, and from the rejection of the idea that an enemy’s violation of the laws of nature severs all obligations towards them. Yet Wolff struggled with the consequences of this prioritization of obligations over rights, giving shifting accounts of when it might be permissible to engage in war against an enemy who seemed bent on violating the principles of the law of nature.

Additionally, Wolff’s retention of a doctrine of punishment between belligerents—the punishment of nations—created its own theoretical difficulties. While individuals were in principle only punished for those things which they were personally responsible for, Wolff’s doctrine of national punishment did little to differentiate between citizens and the nation with respect to the confiscation of property (or even sovereignty) as a punishment. Wolff’s restoration of an account of authorization—absent from Leibniz’s work—created conditions which enabled the attribution of blame for sovereign actions to a the nation as a whole, even if the “nation” existed as an entity theoretically distinct from the citizens who composed it. These problems were exacerbated by the fact that Wolff, like Leibniz, made no sharp distinction between war for reparation and war for punishment; the two were always intertwined. Despite these inconsistencies, however, Wolff did manage to provide a natural justification for why neutral parties should refrain from passing judgment (and inflicting punishment) on other nations, further limiting the consequences of a right of punishment in the international realm.

All of these struggles would form the background for Wolff’s most famous disciple, Emer de Vattel, whose work on the law of nations would address many of these questions directly, including some of his most significant (and generally unacknowledged) breaks from Wolff’s position. While Vattel took on wholesale the account of rights and obligations he...
inherited from Leibniz and Wolff, he would use them to effectively eliminate punishment as a coherent category in the law of nations, at least with respect to European nations.
Vattel and the Taming of Collective Punishment

Emer de Vattel is widely viewed as the first writer on modern international law, praised for enshrining bedrock principles of the sovereignty, equality, and independence of states, and inaugurating a more humanitarian version of the law of war.¹ Vattel is also the first writer in what quickly became a self-consciously separate and independent field of international law, as treatises on the topic exploded in the late 18th and early 19th centuries into the legal field we recognize today.² Vattel’s influence was extensive, especially in the British Empire and the young United States; Vattel’s main text, *The Law of Nations (Le Droit de Gens)*, went through 29 English-language editions, 20 of them printed in the United States, and it became the foundational textbook for international law courses and practitioners in those countries through the 19th century, particularly in editions with extensive commentary by the London barrister Joseph Chitty.³ Unsurprisingly, the primary scholarly commentary on Vattel has thus focused on his doctrinal positions on relevant questions of international law, with virtually no attention paid to his position in the natural law tradition of which he was self-consciously a part.

This is a significant oversight, given that Vattel very clearly saw himself as an heir to the tradition passing through Leibniz and Wolff. As we have seen, that tradition continued to defend a private right of punishment, but the implications of that right were constrained by the

modifications to the Grotian theory of natural law made by Leibniz and expanded by Wolff. The
tensions that theory of punishment created in the international arena were already apparent in
Wolff in his efforts to restrict punishment and explain how punishment of the nation as a whole
differed from punishment of the individuals who comprised it. Vattel sought both to expand and
contract Wolff’s theory of punishment in the international realm. He attempted to expand the
theory to accommodate some forms of universal jurisdiction over crimes like piracy, the use of
poisoned weapons in war, and assassination, all of which were noticeably absent from Wolff’s
work. Vattel struggled to explain why these crimes were exceptions to the general rule that only
an injured party could punish offenses. But Vattel also sought to reduce the scope of punishment
by effectively eliminating it from properly declared public wars—particularly among European
nations—and by weakening the theory of authorization which had been common to virtually
every thinker on the international arena after Grotius.

Born in Neufchatel in 1714 to a Protestant minister and his wife, the daughter of
Neufchatel’s ambassador to Prussia, Vattel first studied at the University of Basel, where he
probably took courses based on the work of Pufendorf. From there he went to Geneva in 1733 to
continue his studies under Jean-Jacques Burlamaqui, whose lectures presented positions from
Grotius, Pufendorf, and Barbeyrac in explicating the law of nature and nations. Vattel’s first
intellectual contributions appear in 1740, and in 1741 Vattel published his longest early piece, a
philosophical defense of Leibniz’s philosophy in the form of a length commentary on the
Theodicy with responses to critics. Despite the ambivalence with which Leibniz and Wolff
regarded the tendency to lump together their work, Vattel clearly viewed the two as operating on
basically the same principles; he praised Wolff for taking Leibniz’s ideas and forming them into
a “complete and methodical system,” and elsewhere referred to the “Leibnizian System” when referring to Leibniz and Wolff. Unsurprisingly, Vattel’s primary objective was to respond to criticisms of Leibniz’s claim that this was the best of all possible worlds, the notion of universal harmony, and “the hypothesis of pre-established harmony.” The work, dedicated to Frederick II, earned him an invitation to come to Frederick’s court in Berlin, but it did little to advance Vattel’s career prospects.

In 1743, Vattel moved to Dresden with the promise of employment from the first minister of the Elector of Saxony, but quickly returned to Neufchatel while waiting to be assigned tasks in his new role. It was apparently around this time that Vattel began his intense study of the works of Christian Wolff, and the fruits of that study very quickly showed in his academic publications. In 1747 he published a collection of his essays on various theoretical topics, and the first two essays in the volume demonstrate the depth of his engagement with the work of Leibniz and Wolff. In the first essay, *Essai sur le fondement du Droit Naturel, & sur le premier principe de l’obligation, ou se trouvent sous tous les hommes, d’en observer les Loix*, Vattel demonstrated his continuing affection for Leibniz by engaging in a lengthy response to Barbeyrac’s views on obligation, as expressed in his notes on Grotius and his critical response to Leibniz’s *Opinion*. In doing so, Vattel largely hews to the “Leibnizian-Wolffian” line of reasoning on the question of the obligation of the natural law.

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4 Emer Vattel, *Defense du system leibnizien contre les objections et imputations de Mr de Crousaz, contenues dans l’Examen de l’Essai sur l’homme de Mr Pope. Ou l’on a joint la Reponse aux objections de Mr Roques, contenues dans le Journal Helvetique, par Mr Emer de Vattel* (Leyde: Jean Luzac, 1741), Preface, p. 9. Depuis que l’Illustre Mr. Wolff s’est declare en faveur de Mr. de Leibnitz, qu’il a adopte la plupart de ses Idees, & qu’en les mettant dans tout leur jour, & y ajoutant les sienes, il en a forme un Systeme complet & methodique, ou l’on admire egalement, & la vaste etendue de son Genie, & son travail prodigieux.

5 Preface, p. 10. ...quelques Theologiens de reputation se sont declare contre le Systeme Leibnitien.

6 I.i.3, p. 3-4. C’est-a-dire, que j’expliquerai le systeme de Mr. de Leibnitz sur le Choix du Meilleur & l’Harmonie Universelle, avec l’Hypothese de l’Harmonie pre-etabile; qui sont les trois points contestes par les Adversaires.
Vattel defines “Natural jurisprudence” as “a science, which teaches us what is naturally good or bad in man,” and the general source for all natural law is “the essence and nature of man and things in general.” The Leibnizian overtones of Vattel’s argument are quite clear in his rejection of other derivations for the natural law. In attacking those who “delude themselves that natural law was invented for the benefit of human society,” Vattel concludes that they could not have determined that actions are beneficial or harmful without “considering the harmony or disharmony of these actions with the nature of man and the nature of things.” Similarly, attacking the voluntarists who base natural law on “the arbitrary will of God,” Vattel gave two arguments: that God, as a wise being, “could only give laws suitable to the nature of things,” and that it would be impossible to explain why God gave one set of laws over another without reference to the nature of things.7

Vattel then moves to an account of obligation, again drawing on the “Leibnizian-Wolffian” theory. He adopts the distinction between active and passive obligation, with its accompanying distinction between the motive of the action and the necessity to act or not act, and criticizes Pufendorf and Grotius for failing to articulate the proper content of obligation and examining only its effects.8 Similarly, he attacks Barbeyrac for assuming “that we are subject to the will of a superior, which compels us to bring our conduct into conformity with this superior’s laws.”9 This fails to explain why the obligation holds. For this, Vattel argues we must resort to the “general motive which moves us,” which is “self-love, which causes us to desire and seek for our happiness or the perfection of our condition, whether internal or external.”10 Our expediency, which includes “all that can truly contribute to the perfection of our soul, our body and our

8 Id. at 751.
9 Id. at 752.
10 Id. at 753.
wellbeing in this world,“¹¹ is thus the source of all obligation, and from this Vattel derives a fairly straightforward account of obligation to the civil law. Man is a social animal, and society “is essential to him if he is to pass his life happily,” so men rather quickly realize that entering into civil society is the wisest course of action. Society thus fulfills a natural necessity, and since “this society is unable to subsist without laws or general rules observed by all its members, he is obliged, by virtue of his own expediency, to follow them.”¹² This notion of self-love as grounding obligation leads Vattel to a detailed refutation of Barbeyrac, both in his footnotes on Grotius’s account of obligation and his response to Leibniz. Vattel quotes in full Barbeyrac’s footnote on De Jure Belli I.i.10, and responds by directly reasserting Grotius’s “impious hypothesis” with his own modification: “men would be obliged to follow natural laws even by setting aside the will of God, because they are praiseworthy and useful.”¹³

In the second essay, the specific influence of Wolff’s thought was particularly evident. In Dissertation sur cette question: “Si la loi naturelle peut porter la societe a sa perfection, sans le secours des loix politiques,” Vattel signaled his complete agreement with Wolff’s theory of the derivation of civil law from the natural law. The “perfection of society” seeks “personal security” for all members, and (echoing Wolff’s language) “also their labor yields the necessities and even the comforts of life; and as a result there are no obstacles to each pursuing his own perfection, in accordance with the views of God.”¹⁴ The natural law is derived from reason and

¹¹ This sentence is absent from the Hochstrasser edition, but can be found in the original text. Emer Vattel, Le Loisir Philosophique (Dresden: George Conrad Walther, 1747), p. 21-22. Et par la-jentens tout ce qui peut veritablement contribuer a la perfection de notre Ame, a celle de notre Corps & a notre bienetre dans ce monde.
¹³ Id. at 760.
¹⁴ Id. at 773-74. Perfection also played a critical role in Vattel’s only comments on Rousseau prior to the publication of Droit de Gens; in a short essay responding to Rousseau’s First Discourse, Vattel complained that Rousseau misunderstood man’s perfectibility and innate higher qualities. “Reflections on Mr. Rousseau’s Discourse on the origins of inequality among men,” in “Emer de Vattel’s Melanges de litterature, de morale et de politique,” ed. and trans. Bela Kapossy and Richard Whatmore, History of European Ideas 34 (2008): 97-99. See also Theodore Christov, “Vattel’s Rousseau: ius gentium and the natural liberty of states,” in Freedom and the Construction of
immutable. On its own, the natural law would be sufficient to set up a perfectly functional human society, but such a dream faces two problems: many people do not know the natural law, whether due to a lack of reason or passion and prejudice, and even when they recognize the natural law, they often find themselves unable to follow it due to their passions and other interests. The civil law remedies these problems by fixing definitions and punishments for offenses, while also providing an authority with the power of punishment to compel men to obey the law even when tempted not to. However, the civil law does not—and cannot—mirror natural law in every respect. “It is only in examples where there is a necessary deviation that they can be separated; for it would be impossible to do otherwise without giving up all the benefits that these laws produce for society: natural law itself states that one must always choose the lesser of two evils.” Vattel gives the example of a French law which requires signatures of witnesses for transactions over 100 livres; while by natural law any individual would be bound to a debt if he orally agreed to it, the civil law has judged that “it is more useful to head off a host of lawsuits than harmful for one man to be deprived of the sum of money he is owed.”

Vattel had thus firmly situated himself in the tradition of Leibniz and Wolff well before the 1757 publication of his Law of Nations (Droit des Gens). Indeed, the relationship between Vattel and Wolff is so close that scholars have often discounted the originality of Vattel’s project, downgrading him to the position of a popularizer of Wolff’s views. Vattel’s praise for Wolff and his account of the history of the law of nations made this conclusion particularly easy to draw. The critical error of previous thinkers was that they had failed to recognize that the law

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15 The Law of Nature and Nations, 774-75.
16 Id. at 777.
17 Id. at 778-79.
18 Id. at 779.
19 Id. at 780.
of nature could not be straightforwardly applied to states in the same way that it could be applied to individuals. This was the foundation of Vattel’s statement, on the very first page of the work, that

There certainly exists a natural law of nations, since the obligations of the law of nature are no less binding on states, on men united in political society, than on individuals. But, to acquire an exact knowledge of that law, it is not sufficient to know what the law of nature prescribes to the individuals of the human race. The application of a rule to various subjects can no otherwise be made than in a manner agreeable to the nature of each subject. Hence it follows that the natural law of nations is a particular science, consisting in a just and rational application of the law of nature to the affairs and conduct of nations or sovereigns.20

Every major writer on the law of nations was taken to task on this point; Grotius, for example, erred in consulting “the common consent of mankind” and in failing to apply natural law to states “in a manner suitable to their nature.”21 Hobbes, Pufendorf, and Barbeyrac, successively, came closer to the truth, in noting that the law of nations is founded on the law of nature, but Hobbes (like his successors) “was mistaken in the idea that the law of nature does not suffer any necessary change in that application.”22 The only person to properly understand this fact was Wolff, Vattel’s intellectual idol: “That great philosopher saw that the law of nature could not, with such modifications as the nature of the subjects required, and with sufficient precision, clearness, and solidity, be applied to incorporated nations or states, without the assistance of those general principles and leading ideas by which the application is to be directed.”23

Similarly, the structure of the work has fueled complaints that Vattel was little more than a cipher for Wolff’s claims, even among relatively early readers of Vattel’s work. Henry

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21 Id. at 8.
22 Id. at 9.
23 Id. at 10.
Wheaton, in his 1845 *History of the Law of Nations in Europe and America*, included a table demonstrating the organizational correspondence between the two texts:

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<th>Wolff</th>
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<td>Chapter II</td>
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<td>Chapter IX</td>
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Together, Vattel’s praise of Wolff and the remarkably similar organization of the two texts led readers to assume that Vattel’s only differences from Wolff were the three specific deviations Vattel identified in the preface: the rules surrounding patrimonial kingdoms, the use of poisoned weapons in war, and most famously the foundation for the “voluntary law of nations” and the possibility of a *civitas maxima*.\(^{25}\) Wheaton only bothered to mention the last of these differences in his discussion, and many later writers have likewise followed this trend.\(^{26}\) Even when Vattel is credited with some originality, it is generally limited to his approach to specific legal questions:

Vattel “develops Wolff’s broad propositions into specific issues of actual international interest,”\(^{24}\)


viewed with the eyes of a practitioner of statecraft,” such as his treatment of neutrality, prize law, arbitration, and loans by a neutral to a warring party.27

However, Vattel himself indicated that there was more to his work than a straightforward summary of Wolff’s theory, above and beyond the three alterations he identified in the preface. While Vattel initially “thought that I should have nothing farther to do, than to detach this treatise from the entire system by rendering it independent of every thing Monsieur Wolf had said before, and to give it a new form,” he soon realized “that I should form a very different work from that which lay before me, and undertake to furnish an original production.”28 Wolff’s work was “dry” and “incomplete,” largely because “as the author had, in his ‘Law of Nature,’ treated of universal public law, he frequently contents himself with a bare reference to his former production, when, in handling the law of nations, he speaks of the duties of a nation towards herself.”29 Vattel thus claimed to have borrowed primarily “the definitions and general principles” of Wolff’s text, and wrote that his work was “very different from [Wolff’s] (as will appear to those who are willing to take the trouble of making the comparison).”30

Even when scholars take Vattel’s work on its own terms, the tendency has been to focus on Vattel’s very limited account of perfect obligations in order to explain Vattel’s eventual popularity with diplomats and statesmen, even to the point of reading Vattel to argue “that all non-positive international law was merely unenforceable ‘law of conscience.’”31 A variant on

28 Law of Nations at 12.
29 Id. at 13.
30 Id..
31 Franz Wieacker, A History of Private Law in Europe, trans. Tony Weir (Oxford: Clarendon Press, 1996), 252n7; a more nuanced but ultimately similar view is taken by Tim Hochstrasser, Natural Law Theories in the Early Enlightenment (New York: Cambridge University Press, 2000), 176-83. Even scholars who have criticized the consensus approach to Vattel’s theory have done so by stressing Vattel’s commitment to his account of imperfect
this position holds that perfect duties “can only be established through contract,” and thus do not exist purely by dint of natural law.32 While this interpretation is untenable, with respect to these issues, Vattel was largely unoriginal with respect to Wolff. But this view masks the most interesting features of Vattel’s contribution: his claims about the few perfect obligations states hold. These obligations primarily centered around war, and it was here that Vattel made significant efforts to expand some of the consequences of Wolff’s theory. In particular, Vattel sought to expand the set of natural law limitations on war and to reintroduce the possibility of universal jurisdiction for piracy and a few other particularly heinous offenses, while simultaneously effectively eliminating the possibility of punishment among European states.

Preserving some perfect obligations for states, and the concomitant possibility of war, also forced Vattel to address the entire set of questions about war, authorization, and conquest that had faced thinkers on the law of nations for centuries, and Vattel also made surprising claims in this area. While providing a social contract theory is not one of Vattel’s main objectives, he does give an account which is much-neglected, and the only two scholars to have examined it have failed to recognize its original features. Peter Remec concluded that Vattel “did not originally contribute to the social contract theory,” but instead “employed the concepts used in contemporary political thought, welding them into a readable but not quite consistent whole.”33 Remec sees traces of ideas similar to Hobbes, Bodin, Locke, and Montesquieu in Vattel’s position,34 and contends that the prince sits at some remove from actual sovereign obligations, not by examining perfect obligations in greater detail. Andrew Hurrell, “Vattel: Pluralism and Its Limits,” in Classical Theories of International Relations, ed. Ian Clark and Iver B. Neumann (New York: St. Martin’s Press, 1996), 233-55.

33 Remec, Individual, 161.
34 Id. at 162.
power. The actual seat of sovereign power is in the nation, while officeholders exercise the “delegated right to command. They only represent the sovereign entity; they are not themselves sovereign in the strict sense of the word.”35 Despite this theoretical subordination of the sovereign to the nation, “the old traits of absolutist princely sovereignty appear. The ‘will’ and the ‘conscience’ of that supreme ‘moral’ body of the nation become fused with the human will and conscience of the natural person who happens to be the ruler.”36 Frederick Whelan, by contrast, sees Vattel’s theory as “fit[ting] well into the continental tradition of Pufendorf and Wolff” due to “its general structure and frequent invocation of the terminology of sovereignty.”37 The state becomes a “unitary, sovereign whole” which “is to be considered a single moral person, capable of acting with a unity of purpose and with a collective capacity to exercise rights and assume obligations vis-à-vis other states.”38 The important shift, on Whelan’s account, is Vattel’s distinction between “sovereignty” and “the sovereign”; the former refers to “the public authority that is created by the social compact and that remains inherent in the corporate people or nation,” while the latter refers to “the ruler or rulers, or government, in whom the people or nation choose to vest the exercise of public powers.”39 Yet, as we have seen, that shift had already taken place in Wolff—indeed, Vattel was effectively indistinguishable from Wolff on this account. Vattel’s major break with all the prior theorists in this tradition is instead found in his attempt to attenuate the bond of authorization that connects the nation and its chosen ruler—precisely what Remec viewed as so standard in Vattel’s account.

35 Id. at 164-65.
36 Id. at 172.
38 Id. at 69-70.
39 Id. at 67. Whelan notes that this position was not found in Hobbes and Pufendorf, which is accurate, but misses its appearance in Wolff.
In order to make sense of Vattel’s overall project, it is thus necessary to explore how Vattel viewed himself in the context of the broader tradition of natural law theory to which he self-consciously contributed. Treating Vattel on his own terms, and taking seriously the admonition that his work is very different from Wolff’s, enables us to see beyond the merely doctrinal differences between Vattel and his predecessors and explore the deeper shifts in his thought. Critically, two of these underlying changes had major implications for the place of punishment in the international order, effectively making it irrelevant in European politics. This overall rejection of punishment between nations was paired with a quiet weakening of the account of authorization Vattel had inherited from Wolff and prior thinkers, though Vattel was never quite able to reconcile the two positions.

I. The Law of Nations and National Duty

Among the first subtle departures is Vattel’s rejection of an obligation to enter into civil society. Where Wolff had claimed that man’s obligation of perfection entailed an obligation to enter society, Vattel denies any such mandate from the start, and this rejection forms a critical part of his rejection of the Wolffian *civitas maxima*. While Vattel takes the position that there is a general society among men established by nature, “she has not imposed on them any particular obligation to unite in civil society, properly so called.”40 Instead, civil society comes about “as the only adequate remedy against the depravity of the majority...and the law of nature itself approves of this establishment.”41 If the obligation does not hold for individuals, it holds much less for states, which have not resigned their rights to a central governing body and must “be considered as so many individuals who live together in the state of nature.”42

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41 Id. at 15.
42 Id. at 14.
lead to the creation of civil society likewise have less purchase at the international level, which explains why there is no overarching world sovereign; individuals largely have their needs met by the civil societies in which they live, and states are less susceptible to the “caprice or blind impetuosity” which leads individuals to disregard the law of nature. Having thus rejected the civitas maxima, Vattel notes his acceptance of the basic proposition that a voluntary law of nations must exist, but claims that “all these alterations are deducible from the natural liberty of nations, from the attention due to their common safety, from the nature of their mutual correspondence, their reciprocal duties, and the distinctions of their various rights, internal and external, perfect and imperfect,—by a mode of reasoning nearly similar to that which Monsieur Wolf has pursued, with respect to individuals in his treatise on the law of nature.”

Vattel, true to his philosophical roots, adopts the standard categorization of obligations as internal (binding on conscience only) and external (producing some right between men). External obligations are further subdivided into perfect and imperfect based on the presence or absence of a corresponding right of compulsion in other men. Vattel’s derivation of the voluntary law of nations thus relies heavily on Wolff’s conception of the primacy of obligations over rights and duties. The necessary law of nations, with its general injunction to live sociably with others, imposed two obligations on nations: “that each individual nation is bound to contribute everything in her power to the happiness and perfection of all the others,” and “that each nation should be left in the peaceable enjoyment of that liberty which she inherits from nature.” This means that, like individuals in the state of nature, nations have the right to pursue their ends without judgment or interference from other nations, so long as the nation does not

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43 Id. at 15.
44 Id. at 16.
45 Id. at § 17, p. 74-75.
46 § 13, § 15, p. 73-74.
interfere with the perfect rights of others.\textsuperscript{47} From these postulates Vattel derives his basic principle of equality:

Since nations are free, independent, and equal,—and since each possesses the right of judging, according to the dictates of her conscience, what conduct she is to pursue in order to fulfill her duties,—the effect of the whole is, to produce, at least externally and in the eyes of mankind, a perfect equality of rights between nations, in the administration of their affairs and the pursuit of their pretensions, without regard to the intrinsic justice of their conduct, of which others have no right to form a definitive judgment; so that whatever may be done by any one nation, may be done by any other; and they ought, in human society, to be considered as possessing equal rights.\textsuperscript{48}

The equality of nations and the absence of a common judge mean that both nations in a conflict must be considered as potentially having right on its side; nations can commit crimes against their own conscience, but other nations cannot judge that conduct unless it is clearly or admittedly without justice.\textsuperscript{49} This leads to Vattel’s derivation of the voluntary of law of nations:

It is therefore necessary, on many occasions, that nations should suffer certain things to be done, though in their own nature unjust and condemnable; because they cannot oppose them by open force, without violating the liberty of some particular state, and destroying the foundations of their natural society. And since they are bound to cultivate their society, it is of course presumed that all nations have consented to the principle we have just established.\textsuperscript{50}

The overarching principle of equality in the absence of a common judge requires that nations submit to a moral scheme in which virtually all obligations are internal—applying only in conscience—rather than external. In addition, the limited external obligations are themselves almost entirely imperfect. Vattel thus opened up a huge sphere of action for nations to behave in ways that could not be sanctioned by other nations while maintaining a framework of natural right. The core difference was that while earlier natural rights thinkers counseled prudence in enforcing rights against others, Vattel sought to turn that prudence into a requirement derived

\textsuperscript{47} § 20, p. 75.
\textsuperscript{48} § 21, p. 75-76.
\textsuperscript{49} § 21, p. 76.
\textsuperscript{50} § 21, p. 76.
from natural law; passing judgment on the behavior of other nations was no longer an acceptable option.

However, this does not mean that Vattel saw states as holding no perfect external obligations in the absence of contractual relations. At times his language admittedly tends in that direction, as when he equates the necessary law of nations with what others term “the internal law of nations, on account of its being obligatory on nations in point of conscience,”\(^51\) or writes that we must “leave the strictness of the necessary law of nature to the consciences of sovereigns,”\(^52\) but overall Vattel is clear that the necessary law is always primary and can, under the right circumstances, create a perfect external obligation. As Vattel writes in distinguishing the two, the necessary law always binds the conscience, “but when there is question of examining what she may demand of other states, she must consult the voluntary law, whose maxims are devoted to the safety and advantage of the universal society of mankind.”\(^53\) The voluntary law thus qualifies the necessary law in certain key respects, but does not entirely denude its force. Indeed, much of Vattel’s account of war assumes externally perfect rights and obligations; the national rights of self-defense, obtaining reparation, and engaging in punishment in the international realm derive from the perfect right of security,\(^54\) and Vattel derives the same three perfect rights from the right of refusing to submit to injustice.\(^55\) Similarly, Vattel’s argument for punishing an enemy who violates the laws of war presupposes that such laws must carry a perfect obligation and right.\(^56\)

\(^{51}\) § 7, p. 70.
\(^{52}\) III.xii.189, p. 590.
\(^{53}\) § 28, p. 79.
\(^{54}\) II.iv.49-52, p. 288-89.
\(^{55}\) II.v.65-69, p. 296-97.
\(^{56}\) III.viii.141, p. 544.
As with Leibniz and Wolff, this right of punishment has an analogue, if not its initial source, in the right of individuals outside of civil society, and like his mentors Vattel was unafraid to translate that right into the international arena. However, while he never acknowledged his differences from Wolff on this point, Vattel sought to alter the scope of punishment available to states after the institution of civil society. As noted, Wolff’s theory effectively excludes any possibility of jurisdiction over crimes unless a member of the state is injured. Vattel attempts to restore a right of punishing a broader range of offenses, including piracy, but does so in ways which are ultimately contradictory or under-justified. Vattel’s conception of the voluntary law also goes a step beyond Wolff to require that even belligerents refrain from claiming a right to punish each other in a formally declared war. The result is that punishment largely disappears from the European stage, only to be resurrected as a tool for expansion and conquest outside of Europe.

Consistent with his intellectual mentors, Vattel concludes that the right of punishment “belongs to each individual” in the state of nature, and that it is “founded on the right of personal safety.”\(^{57}\) Because every man has a right to protect himself, “he may, when injured, inflict a punishment on the aggressor, as well with the view of putting it out of his power to injure him for the future, or of reforming him, as of restraining, by his example, all those who might be tempted to imitate him.”\(^{58}\) The creation of civil society shifts responsibility for protecting the individual members to the society as a whole, and consequently “the individuals all resign to it their private right of punishing.”\(^{59}\) Similarly, the civil society is a new body which can itself be injured, giving the civil society a right of punishing for itself. Vattel makes clear that this power

\(^{57}\) I.xiii.169, p. 190.
\(^{58}\) Id.
\(^{59}\) I.xiii.169, p. 191.
of punishment functions both domestically and internationally: “When the society use it against another nation, they make war; when they exert it in punishing an individual, they exercise vindictive justice.”60 Despite the “resignation” language, Vattel generally follows his immediate predecessors in viewing the state’s punitive authority as one of the “prerogatives of majesty” which must necessarily inhere in the overall architecture of sovereign power, however distributed.61 When Vattel returns to the right of punishment later in the work, it is routinely this derivation of punishment which receives attention. Vattel later argues that “Every nation, as well as every man, has therefore a right to prevent other nations from obstructing her preservation, her perfection, and happiness,—that is, to preserve herself from all injuries.”62 Similarly, nations are bound by a duty to observe justice, and this duty “is still more necessary between nations, than between individuals; because injustice produces more dreadful consequences in the quarrels of these powerful bodies politic, and it is more difficult to obtain redress.”63 From this flows a right to resist injustice, along with “a right to punish it,” since “the right of refusing to suffer injustice is a branch of the right to security.”64 While both of these passages make reference to the rights of individuals, Vattel makes the reference not as a demonstration that the state’s power has been derived from the individuals which make it up, but instead by way of analogy to the individual’s position in the state of nature.

This style of reasoning permits Vattel, as it had Wolff, to provide a straightforward justification for the sovereign’s exclusive possession of the right of war. While the right of punishment originally belongs to individuals, “the inference is manifest, that, since the establishment of political societies, a right, so dangerous in its exercise, no longer remains with

60 Id.
61 I.iv.45, p. 100.
62 II.iv.49, p. 288.
63 II.v.63, p. 296.
64 II.v.69, p. 297.
private persons, except in those encounters where society cannot protect or defend them." The dangers to the state that would proceed from individuals taking the right of war into their own hands demonstrate that the right of war “is doubtless one of those rights, without which there can be no salutary government, and which are therefore called rights of majesty.” The same principle applies to the right of reprisal; “this violent measure approaches very near to an open rupture, and is frequently followed by one. It is therefore an affair of too serious a nature to be left to the discretion of private individuals.” Further, the law of nations, which makes it possible to view the property of another nation as a collective entity, is limited to sovereigns: “Sovereigns transact their affairs between themselves; they carry on business with each other directly, and can only consider a foreign nation a society of men who have but one common interest.”

In assessing the right of punishment both in the natural state and in civil society, Vattel generally follows a Wolffian line. An individual “may, when injured, inflict a punishment on the aggressor,” but Vattel adds that “nature does not give to men or to nations any right to inflict punishment, except for their own defence and safety; whence it follows, that we cannot punish

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65 III.i.4, p. 470. As this indicates, Vattel is open to the suggestion that the right of war might return under certain circumstances, though he never elaborates on when that would occur. However, he does provide an extremely interesting set of claims about the residual right of war in civil society in his highly unusual discussion of dueling. Vattel condemns this practice as “a manifest disorder, repugnant to the ends of civil society,” but stops short of entirely outlawing it. Duelling represents private war in civil society, and as such should be handled by the magistrate, but Vattel concedes that it cannot be outlawed so long as magistrates are powerless to address it, giving a familiar reason: “Society cannot deprive man of his natural right of making war against an aggressor, without furnishing him with some other means of securing himself from the evil his enemy would do him.” A dueler is just like the victim of a robbery, and “on all those occasions where the public authority cannot lend us its assistance, we resume our original and natural right of self-defence.” While the idea that honor is worth killing over is a ridiculous concept, Vattel advocates providing a public recourse for the offended in the form of severe penalties for those who offend the honor of another and “a particular court, to determine, in a summary manner, all affairs of honour between persons.” I.xiii.175-76, p. 194-97.

66 Id.
67 II.xviii.346, p. 462.
68 Id.
69 Id. at 190.
any but those by whom we have been injured.” Grotius’s argument that we can attack cannibals is rejected in terms almost identical to those of Wolff; “What led him into this error, was his attributing to every independent man, and of course to every sovereign, an odd kind of right to punish faults which involve an enormous violation of the laws of nature, though they do not affect either his rights or his safety.” Such a right “opens a door to all the ravages of enthusiasm and fanaticism, and furnishes ambition with numberless pretexts.” This position also leads Vattel to his resolution of a dispute about whether sovereigns could issue reprisals on behalf of the citizens of another nation. Such a procedure is forbidden because it “is to set himself up as judge between that nation and those foreigners; which no sovereign has a right to do.” Such a position mistakes the basic nature of the state’s right to issue reprisals. States can issue reprisals in order to recover losses from the violation of the “rules of justice which nations ought to observe towards each other,” but no similar principle applies when the citizens of a foreign power are injured; “For the security we owe to the subjects of a foreign power does not depend, as a condition, on the security which that power shall grant to all other nations, to people who do not belong to us, and are not under our protection.”

Vattel is also perfectly happy to accept the claim that conditioning right on obligation restricts even a just warrior’s right against enemy citizens, making restrictions on the conduct of nations in war obligatory under natural law rather than a matter of humanity or charity. In

70 I.xix.232, p. 227.
71 II.i.7, p. 265. See also II.iv.55, p. 290, where Vattel criticizes the Spanish for making war on Athualpa on the grounds of his polygamy and murdering his subjects.
72 II.xviii.348, p. 462-63. Vattel cites in illustration an incident in 1662 when England granted reprisals to the Knights of Malta against the Dutch, citing Cornelius van Bynkershoek’s *Traité du Juge Competent des Ambassadeurs*. However, Vattel does not note that Bynkershoek contended after relating the story that the English were justified in granting reprisals. *Traité du Juge Competent des Ambassadeurs* (The Hague: Thomas Johnson, 1723), p. 265-66.
general, “the laws of justice and equity are not to be less respected even in time of war.” Vattel singles out the tradition of Pufendorf and Locke, who had viewed natural obligations as severed by the state of war, for special criticism: “To imagine that between two nations at war every duty ceases, every tie of humanity is broken, would be an error equally gross and destructive. Men, although reduced to the necessity of taking up arms for their own defense and in support of their rights, do not therefore cease to be men.” Consequently, good faith must be preserved with enemies as a matter of natural law, which gives rise to the ban on perfidy. Vattel was likewise able, like Wolff, to discriminate between combatants and non-combatants on this principle, since we cannot have a right to kill enemies who do not resist the restoration of our right by violence. Like Wolff, Vattel extends this principle to women, children, the elderly, clergy, peasants—“the unarmed inhabitants.”

Critically, Vattel does view these protections on the lives of prisoners and non-combatants as reflecting perfect rights and obligations, and here punishment plays a significant role in his theory. As Vattel argues, “with respect to hostilities against the enemy’s person, the voluntary law of nations only prohibits those measures which are in themselves unlawful and odious, such as poisoning, assassination, treachery, the massacre of an enemy who has surrendered, and from whom we have nothing to fear.” With respect to these crimes, the voluntary law does not alter the necessary law, and thus perfects the rights and obligations attending each situation. Punishment has thus become a distinctly individual procedure, even in times of war, a point which was already implicit in Wolff’s theory. Punishment is permissible against those who are “guilty of some enormous breach of the law of nations, and particularly

73 III.viii.158n, p. 563.
74 III.x.174, p. 575.
75 III.viii.140, p. 543.
77 III.ix.173, p. 574.
when he has violated the laws of war.”’78 This is the foundation for all punishment of prisoners of war, who can only be reduced to slavery “when they have rendered themselves personally guilty of some crime deserving of death.”’79 Vattel does not specify what constitutes a “crime deserving of death,” but the basic principle straightforwardly applies to a whole range of offenses; Vattel makes clear that prisoners “are not to be treated harshly, unless personally guilty of some crime against him who has them in his power.”’80 Presumably violations related to the manner of warfare, such as rape or the indiscriminate murder of civilians, would subject a prisoner to punishment by his enemy.81

There remained some areas in which Vattel was willing to countenance much broader punitive authority than Wolff, though again along individual grounds. Vattel sub silentio goes much further than Wolff by advocating for a limited form of universal jurisdiction beyond the case of warmongers who threaten the collective security of nations. While an injured party is generally the only one with jurisdiction over an offender,

…we ought to except from this rule those villains, who, by the nature and habitual frequency of their crimes, violate all public security, and declare themselves the enemies of the human race. Poisoners, assassins, and incendiarys by profession, may be exterminated wherever they are seized; for they attack and injure all nations, by trampling under foot the foundations of their common safety. Thus pirates are sent to the gibbet by the first into whose hands they fall.82

While the injured party has priority in the event that he seeks to inflict punishment on the offenders, any party can take cognizance of these crimes. Vattel is not clear why these crimes in particular constitute an injury to all nations. Wolff had viewed poisoning and assassination as permissible means of exercising a right; if a nation has a right to kill, then the means by which an

78 III.viii.141, p. 544.
79 III.viii.152, p. 556. Vattel notes that such slavery no longer exists in Europe.
80 III.viii.150, p. 552.
81 Vattel does not draw this connection either, simply noting that soldiers are generally forbidden to commit rape by military codes, and are often punished by their commanders when they do. III.viii.145, p. 549.
82 Id. at 227-28.
enemy is killed is irrelevant. On this ground Wolff had drawn a distinction between the use of poisoned weapons and the act of poisoning wells or water sources; individuals killed by poisoned weapons were those whom a nation has a right to kill, while poisoning a water source would kill both enemy soldiers and non-combatants. Grotius had contended that assassination and the use of poisoned weapons were illegal by the law of nations, particularly where individuals engaged in treachery to carry out the assassination. Yet Grotius was clear that the law of nature made no distinction between the various ways in which an individual could be killed, though the consent of nations had created a positive custom in both respects. The custom had come about because both practices were undesirable because they increased the risk of death, especially for high-ranking leaders.

This explanation suited Grotius’s position perfectly well: European nations, through their leaders, had introduced a pair of customary laws which mitigated the harshness of the law of nature and protected those same leaders. However, Vattel’s objective was to naturalize these restrictions, a position no major prior theorist of the international order had taken, and accordingly he rejected both Wolff and Grotius on these points. Vattel began by differentiating between legitimate surprises and illegitimate assassinations; a surprise, like a soldier sneaking into an enemy’s camp and killing the opposing general, is entirely legal, while an assassination is “a treacherous murder, whether the perpetrators of the deed be subjects of the party whom we cause to be assassinated, or of our own sovereign,” such as using someone in the guise of a refugee to kill an opposing leader. Vattel then offered two justifications for this argument. The first was a rhetorical question: “Why do we judge an act to be criminal, and contrary to the law

83 VII.877-82, p. 450-52.
84 III.iv.15-18.
85 III.viii.155, p. 558-59.
of nature, but because such act is pernicious to human society, and that the practice of it would be destructive to mankind?”  

Second, Vattel recurs to Grotius’s position: that “were such a liberty once introduced, the purest virtue, the friendship of a majority of the reigning sovereigns, would no longer be sufficient to ensure a prince’s safety.”  

Ultimately, Vattel contends, anyone who “contributes to the introduction of so destructive a practice, declares himself the enemy of mankind, and deserves the execration of all ages.”  

Vattel takes a similar approach with the treacherous administration of poison, though it is particularly bad since it is so much more difficult to guard against.  

The result is that Vattel, unlike Wolff, declares someone who uses these means “the enemy of the human race; and the common safety of mankind calls on all nations to unite against him, and join their forces to punish him. His conduct particularly authorizes the enemy whom he has attacked by such odious means, to refuse him any quarter.”  

The obvious inadequacy of these arguments calls to mind Bentham’s criticism of Vattel—that he simply declares that “It is not just to do that which is unjust”—but it is not difficult to see Vattel grasping for a principle to replace the notion that had undergirded jurisdiction over the offense of piracy in earlier writers: that the violation of the law of nature toward one individual or state represents a threat to all.

Vattel’s ipse dixit on these issues is particularly interesting because his struggle to articulate a justification for the universal punishment of assassination and poisoning demonstrates something of his limitations as a theorist. Unlike the modern law of war, Vattel does not link assassination with perfidy, which involves inviting the good faith of the enemy and

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86 Id. at 559.
87 Id.
88 Id. at 560.
89 Id. at 560-61.
90 Id. at 562.
then betraying it.\textsuperscript{92} Indeed, Vattel lacked the conceptual vocabulary to make a claim of this sort. For all the thinkers in this tradition, good faith was a principle which attached to agreements, not to the general relationship between enemies; for some thinkers (like Pufendorf) it was in principle impossible to have fully binding agreements with the enemy during war, since that presupposed they were no longer an enemy.\textsuperscript{93} Even those who accepted the idea of good faith with an enemy did so on strictly contractual grounds; Wolff, for example, founded the general obligation of good faith in “things which are promised to an enemy as an enemy,” and his other examples of good faith all follow the contractual mode.\textsuperscript{94} When Vattel turns to perfidy—a category which does not exist in Wolff’s theory—he continues to link it to the presence of some express or implied compact. Perfidy, as the violation of good faith, is condemned for its tendency to undermine peace: “the introduction of which would be attended with consequences of too dreadful a nature, and would deprive sovereigns, once embarked in war, of all means of treating together, or restoring peace.”\textsuperscript{95} Vattel offers the conduct of an English ship which feigned distress to lure out a French ship, and condemns it because “making signals of distress is asking assistance, and, by that very action, promising perfect security to those who give the friendly succor.”\textsuperscript{96} However, Vattel never links assassination to good faith; in his discussion of faith with enemies and perfidy, he continues to justify the natural prohibition on assassination and

\textsuperscript{92} See ICRC Commentary on Rule 65: Perfidy. “The essence of perfidy is thus the invitation to obtain and then breach the adversary’s confidence, i.e., an abuse of good faith.” https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule65
\textsuperscript{93} This was what undergirded Pufendorf’s suspicion of truces. \textit{The Law of Nature and Nations}, 5\textsuperscript{th} ed., trans. Basil Kennett (London: J. and J. Bonwicke et al., 1749), VIII.iii.
\textsuperscript{94} \textit{The Law of Nations Treated According to the Scientific Method}, trans. Joseph Drake (Oxford: Clarendon Press, 1934), VII.800, p. 414. Other examples include his discussion of truces, VII.933, p. 476; and his account of the obligations sovereigns owe to foreigners who live in their territory as temporary citizens, IX.1063, p. 537.
\textsuperscript{95} \textit{The Law of Nations}, III.x.178, p. 579-80.
\textsuperscript{96} Id. at 580.
poisoning on the grounds that they “affect the common safety of human society,”\textsuperscript{97} though once again without articulating why these practices are naturally more harmful.

Thus it is unclear what makes the assassin or poisoner a proper subject for natural law, or for the execration of all nations, outside of the pure self-interest of generals and sovereigns. The confusion is heightened by the fact that Vattel (like Wolff) had repeatedly emphasized that custom is not itself illustrative of the law of nature, and thus is not binding on every nation; indeed, this was one of Vattel’s chief criticisms of Grotius.\textsuperscript{98} There is generally no agreement between enemies about the type of killing that will be permitted, so the consensual conception of good faith Vattel inherited from his predecessors ruled out the acts of assassination or poisoning as perfidious. Vattel’s invocation of Grotius’s rationale about the rule as a shield for sovereigns, particularly just ones, likewise hardly serves to demonstrate the natural source of the rule given Vattel’s insistence on formal equality in war. Vattel also never discussed why pirates were individually subject to the jurisdiction of all nations, a claim which Wolff had tacitly denied. In the case of piracy, there was nothing like the arguments against poisoning and assassination to fall back on—pirates did not represent a peculiar threat to sovereigns or generals, and their presence seemed unlikely to undermine the foundations of international security. It is thus instructive that Vattel’s primary discussion of piracy did not focus on individual pirates—beyond the remark that anyone can send them to the gibbet—but on piracy as a collective national crime. It is this area where Vattel made some of his most striking claims about punishment in the international arena.

\textbf{II. Vattelian Authorization and its Inconsistencies}

\textsuperscript{97} III.x.180, p. 582.
\textsuperscript{98} Preface, p. 7-8. Examples of Vattel’s repeated assertions can be found at Preliminaries 25, p. 77-78; III.xii.192, p. 592-93.
To understand the originality of Vattel’s claims about collective punishment in the international order, and the unusual content of his claims about piracy, it is important to return to a familiar aspect of all the accounts we have thus far examined: Vattel’s account of authorization in the social contract. In its initial presentation, Vattel’s theory differed little from Wolff’s. However, it is unfair to say that Vattel made no alterations in this theory or simply blindly applied it; Vattel’s theory represented a genuine, though ultimately deeply flawed, attempt to reconcile two sets of conflicting commitments. On one hand, Vattel was prepared to endorse the conception of the social contract he inherited from Wolff, which viewed sovereign powers as analogous to, but not derived from, the powers of individuals in the state of nature. The easy explanation for sovereign powers this offered fit neatly alongside Vattel’s adoption of the theory of perfection. However, as we have already seen with Leibniz, that position could very easily lead to a view of the social contract as a useless abstraction, in which the consent of the citizens to a scheme of government became a matter of secondary importance at best. While Wolff had restored the social contract to a position of prominence in developing his theory on Leibniz’s foundation, the importance of consent had been sharply limited in his theory by claims about the inability of citizens to depart from their societies and the range of possible governmental structures a society could adopt; this made it relatively easy to work backwards from any given set of arrangements (most importantly the enlightened absolutism of the 18th century) to a moment of sufficient consent. But Vattel was committed to placing more weight on consent as a significant underlying principle, even if doing so opened him to a variety of thorny issues which Wolff had handled comfortably. Chief among these were issues related to conquest and the role of continuing consent in civil society, and in addressing these scenarios, Vattel made a remarkable set of claims about authorization.
In Book I of the *The Law of Nations*, Vattel addresses “Nations considered in themselves,” including internal governmental arrangements. Vattel defines “a nation or a state” as “a body politic, or a society of men united together for the purpose of promoting their mutual safety and advantage by their combined strength.”

Sovereignty, in turn, is “a public authority, to order and direct what is to be done by each in relation to the end of the association,” and whoever holds this authority is the sovereign. By joining this body politic, “each citizen subjects himself to the authority of the entire body, in every thing that relates to the common welfare.” Once formed, a nation (the body of citizens) has two essential duties to itself: to ensure its own preservation and perfect its nature. These duties correspond to the end of civil society, presented in straightforwardly Wolffian terms: “to procure from the citizens whatever they stand in need of, for the necessities, the conveniences, the accommodation of life, and, in general, whatever constitutes happiness,—with the peaceful protection of property, a method of obtaining justice with security, and, finally a mutual defence against all external violence.”

The nation’s duty to preserve itself, along with its duty to preserve its individual members, is a consequence of the initial compact. The obligation to preserve the society originates in the initial social contract: “In the act of association, by virtue of which a multitude of men form together a state or nation, each individual has entered into engagements with all, to promote the general welfare; and all have entered into engagements with each individual, to

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99 I.1, p. 81. As multiple scholars have noted, Vattel uses the terms “nation” and “state” interchangeably, but to the extent there is a difference, “nation” refers to the body of the people alone, while “state” refers to the body of the people along with the political arrangements they have made for governance. Whelan, “Vattel’s Doctrine,” 67; Remee, *Position of the Individual*, 172.
100 Id.
101 I.2, p. 81.
102 I.ii.14, p. 86.
103 I.ii.15, p. 86.
facilitate for him the means of supplying his necessities, and to protect and defend him.”  

The only way to secure these goods is through the continuation of the society. The nation similarly has an obligation to preserve its members, both because the loss of a member weakens the state as a whole and also “in consequence of the very act of association; for those who compose a nation are united for their defence and common advantage; and none can justly be deprived of this union, and of the advantages he expects to derive from it, while he on his side fulfills the conditions.”

This prevents the nation from abandoning a town, province, or individual “unless compelled to it by necessity.” Similarly, the nation’s duty of perfection is derived from the initial contract; just as individuals are by nature bound to perfect themselves, the nation is bound to perfect itself as a result of the “reciprocal engagements” of the members.

These obligations provide the foundation for the nation’s rights—the right to do everything necessary for its preservation, as well as to prevent its destruction, and the right to do anything necessary to perfect itself. Like Wolff, Vattel concludes that the nation as a body is initially the holder of all sovereign power, and he continues his account by describing its powers over the constitutional arrangement of society. The same flexible conclusions about sovereignty result: the nation retains the right to set up the constitution in whatever manner it sees fit, or to change the form of government entirely, similarly, the nation alone has the authority to alter the constitution, and is the ultimate arbiter of all disputes that may arise about the constitution, including disagreements about succession.

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104 I.ii.16, p. 86.
105 I.ii.17, p. 87.
106 I.ii.17, p. 87-88.
107 I.ii.21, p. 88.
108 I.ii.18, 20, 23, p. 88-89.
109 I.iii.33, p. 95.
110 I.iii.34, 35, p. 95-96; I.v.66, p. 118.
However, the nation does not always retain its initial sovereign authority. While sovereignty “originally and essentially belonged to the body of the society, to which each member submitted, and ceded his natural right of conducting himself in every thing as he pleased according to the dictates of his own understanding, and of doing himself justice.”\textsuperscript{111} This initial transfer from individuals to the body is followed by a second transfer of authority to the sovereign. “A political society is a moral person inasmuch as it has an understanding and a will of which it makes use for the conduct of its affairs, and is capable of obligations and rights,” and by institution the nation “invest him with their understanding and will, and make over to him their obligations and rights, so far as relates to the administration of the state, and to the exercise of the public authority.”\textsuperscript{112} While the “moral person” of the nation does not cease to exist, it “acts thenceforwards only in him and by him.”\textsuperscript{113} This constitutes the “representative character attributed to the sovereign.”\textsuperscript{114} While Vattel is much less explicit about the contractual character of this second move—he only refers to it as a contract once, and then in passing\textsuperscript{115}—he is clear that the sovereign’s power is constrained by and subordinate to the nation as a whole. The sovereign exercises only that portion of sovereign authority which is conferred upon him, as set out by the state’s fundamental laws, and in the posthumous 1773 edition, Vattel added a footnote stressing that “the nation is superior to the sovereign.”\textsuperscript{116}

So far, we have seen little that would differentiate Vattel from Wolff on these points. But Vattel saw the very flexibility of sovereignty as illuminating a core principle which required consent to all governmental arrangements. Civil society, and therefore sovereignty, is

\textsuperscript{111} I.iv.38, p. 97.
\textsuperscript{112} I.iv.40, p. 99.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} I.iv.51, p. 104. “As soon as a prince attacks the constitution of the state, he breaks the contract which bound the people to him...”
\textsuperscript{116} I.iv.45-47, 45n, p. 100-101.
“established only for the common good of the citizens,” and this basic fact places limits on the scope of a sovereign’s power from its inception.117 These limits simultaneously constrain the authorization that can be claimed even by the most absolute rulers. Vattel rejects the view that no one has a right to resist a sovereign “invested with the supreme command in a full and absolute manner,” who “completely possesses all the political authority of the society” and is capable of doing harms to citizens that only “wound[] his conscience.”118 Vattel attacks these recognizably Hobbesian premises by first denying that there is any sovereign who holds power in this absolute sense, but more importantly, by returning to the core principles undergirding the state: if the goal of the state is the happiness and perfection of all, such a sovereign cannot be imagined, and “When therefore it confers the supreme and absolute government, without an express reserve, it is necessarily with the tacit reserve that the sovereign shall use it for the safety of the people.”119 A similar principle undergirds the return of the right of individual resistance—not simply the right of refusing to obey commands which violate the natural law, which Vattel repeats, citing the St. Bartholomew’s Day Massacre (and notably without Wolff’s qualification that a sovereign could still punish the refusal),120 but a right of individual resistance in the last extremity. Even accepting that an individual could contract away his right of self-defense, Vattel concludes that this could never occur “by his political engagements, since he entered into society only to establish his own safety upon a more solid basis.”121

This insistence on consent leads Vattel to a series of conclusions which have no parallel in Wolff. Addressing hereditary succession, Vattel emphasized that such succession is always introduced by the consent of the people. Even a succession resulting from usurpation becomes

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118 I.iv.51, p. 104-05.
119 I.iv.51, p. 105.
120 I.iv.54, p. 110.
121 Id. at 111.
lawful through tacit consent over a long span of time,\textsuperscript{122} though always subject to the same reserves as even the most absolute contract. Where Wolff viewed the initial consent to the nation as incapable of being unilaterally revoked, Vattel resorted to an underlying notion of continuing consent to permit citizens to leave under certain circumstances. Vattel’s claims about the subject’s right to leave his country are a case in point. In general, when a citizen reaches the age of majority, he can choose to leave, provided he pays for the benefits he has received from the state to that point.\textsuperscript{123} Those who have chosen to stay after reaching the age of majority have heightened obligations, but even they have a right to depart under certain circumstances, such as when the state cannot provide a living, fails to fulfill its obligations of protection towards a citizen, or attempts “to enact laws relative to matters in which the social compact cannot oblige every citizen to submission,” such as establishing a religion.\textsuperscript{124} Additional examples of this third sort arise when a society decides to alter its form of government; citizens who do not wish to live under the new constitution “may quit a society which seems to have dissolved itself in order to unite again under another form: they have a right to retire elsewhere, to sell their lands, and take with them all their effects.”\textsuperscript{125} A similar dissolution takes place if the nation decides to subject itself to or merge with another nation.\textsuperscript{126}

This underlying principle of consent has its most famous manifestation in Vattel’s rejection of Wolff’s claim that patrimonial kingdoms are acceptable. Vattel rejects the patrimonial model due to his underlying theory of the social contract. Nations cannot transfer the sovereignty in a way that makes that sovereignty alienable. The society has happiness as its end, and cannot deliver itself over to a tyrant in pursuit of that end. Vattel’s description of the social

\textsuperscript{122} I.v.59, p. 113-14.
\textsuperscript{123} I.xix.220, p. 220-21.
\textsuperscript{124} I.xix.223, p. 223.
\textsuperscript{125} I.iii.33, p. 95.
\textsuperscript{126} I.xvi.195, p. 208.
compact thus stresses the limits of contract: “When therefore it confers the supreme and absolute
government, without an express reserve, it is necessarily with the tacit reserve that the sovereign
shall use it for the safety of the people, and not for their ruin.” Patrimonial kingdoms violate
this condition, as “The end of patrimony is the advantage of the possessor, whereas the prince is
established only for the advantage of the state.” A state can confer a trust on a sovereign to
choose his successor, but the ultimate nominee must be tacitly approved by the people.

Vattel had important historical reasons for his emphasis on consent; his home principality of Neufchatel had vacillated between support for French and Prussian authority over the
territory. In 1707, the line of the French Orleans-Longueville family which controlled the
principality died out, leaving nine claimants, and the principality’s primary legal body, fearing
Louis XIV’s anti-Protestant stance, somewhat dubiously concluded that Frederick I of Prussia
had the best claim. A set of articles were drawn up memorializing Neufchatel’s special privileges
and confirming Frederick’s authority. Prussian rule, however, soon wore out its welcome, and
many citizens of Neufchatel apparently sought the transfer of Prussian sovereignty to another
ruler; as early as 1747, Vattel was apparently involved in diplomatic maneuvers to transfer the
principality to the Elector of Saxony, and his comments on international intervention look
suspiciously calibrated to the political situation of Neufchatel in the 1750s, when French rule
seemed increasingly desirable. Vattel’s conclusions about sovereignty thus had immediate

127 Liv.51, p. 105.
128 Liv.61, p. 115-16.
130 Tetsuya Toyoda, Theory and Politics of the Law of Nations: Political Bias in International Law Discourse of
Seven German Court Councilors in the Seventeenth and Eighteenth Centuries (Boston: Martinus Nijhoff, 2011),
161-90 painstakingly details the history of Neufchatel in this period and compares Vattel’s arguments to
the principality’s situation. Toyoda’s arguments about intervention suffer somewhat from the fact that the exile of
Augustus the Corpulent, seen for some time as a likely candidate to take over the principality, did not occur until
1758, a year after Vattel’s text was published. Toyoda is also not the only scholar to notice the importance Vattel
placed on consent as an underlying principle of political arrangements; see also Andrew Linklater, Men and Citizens

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political relevance for his home country, as contractual relations between subjects and sovereigns, intervention, and the transfer of sovereignty were live political issues in Vattel’s native land.

Yet in spite of this overarching commitment to consent, with its concomitant modification of many of Wolff’s positions, Vattel runs into a serious problem in attempting to explain the place of conquest and collective punishment in his theory. Here it is important to note that unlike Wolff, Vattel never characterizes sovereignty as a form of property, instead preferring to speak of it in vaguer terms as simply the “public authority” which originally belongs to the people.131 When Vattel discusses the legitimate transfer of immovable property, it is always in terms of the actual property, not the sovereignty over it: “lands, towns, provinces, &c.”132 Yet Vattel never fully accommodates conquest to his consent-based scheme. This is deeply problematic, since “nations have ever esteemed conquest a lawful title,” and Vattel is unwilling to claim that this tradition is contrary to the natural law.133 Instead, Vattel insists that even sovereignty by conquest must have its ultimate origin in consent, since “it is absurd to suppose that a society of men can place themselves in subjection otherwise than with a view to their own safety and welfare, and still more that they can bind their posterity on any other footing.”134

But when he comes to treat conquest specifically, the consent of the residents of the conquered territory is notably absent. A conquest, Vattel contends, is only valid when “a sovereign has, by a definitive treaty of peace, ceded a country to the conqueror,” but he quickly lapses into describing conquests as if they were a form of property. A victorious sovereign may

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131 I.iv.38, p. 97.
132 III.xiii.197, p. 596.
133 III.xiii.196, p. 594.
134 I.v.60, p. 114.

“possess himself of what belongs to his enemy,” including sovereignty over towns or provinces. Similarly, Vattel admits the possibility of the sale of conquered territory, again leaving little room for consent to enter the scheme. Vattel’s only concession to the principle of consent is his insistence that such territories must be transferred on the same terms as the previous ruler held it, even without a surrender stipulating conditions on the acquisition of the territory: “if he deprives him of the sovereignty of that town or province, he acquires it such as it is, with all its limitations and modifications.” Vattel presents what for Wolff was an indispensable condition of limiting a conqueror’s sovereignty as merely emblematic of the underlying facts: “Accordingly, care is usually taken to stipulate, both in particular capitulations and in treaties of peace, that the towns and countries ceded shall retain all their liberties, privileges, and immunities.” And even this stipulation applies only to territories “not simply an integrant part of nation, or which does not fully belong to a sovereign” (i.e. a Neufchatel); a territory which “fully belong[s] to a sovereign” passes completely into the control of the new sovereign, and it is governed in the same fashion as every other part of its conqueror’s territories, regardless of its traditional privileges. Vattel never clarifies precisely how the citizens of a conquered territory “place themselves in subjection” under this scheme, or whether conquest is simply an illegitimate form of acquisition which is made legitimate by long acquiescence. There is no compact extracted under duress from the citizens—after all, there is no right to kill

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135 III.xiii.199, p. 597.
137 III.xiii.199, p. 597.
138 Id.
139 III.xiii.199, p. 597-98.
140 Presumably Vattel does not intend for this to fall under the rubric of illegitimacy. He treats conquest separately from usurpation and concession, which he designates as illegitimate means of acquiring (I.v.59, p. 113-14), and lumps conquest in with “the right of a proprietor, who, being master of a country, should invite inhabitants to settle there, and give them lands, on condition of their acknowledging him and his heirs for their sovereigns.” I.v.60, p. 114.
them so long as they do not resist—but Wolff had concluded that this converted the new conquest into a patrimony, a conclusion which was clearly unpalatable to Vattel.

This problem was deeply rooted in two aspects of Vattel’s theory. First, despite his relatively traditional account of authorization and his strong insistence on consent, Vattel insisted that these factors did not merge to create a relationship in which the subject is responsible for the sovereign’s acts. While Vattel viewed the acquisition of property in war as legitimate on both sides as a product of the voluntary law of nations—an issue to which we will return shortly—Vattel still needed to explain why individual property, rather than solely collective or public property, was subject to acquisition in war. As we have seen, there were a variety of theoretical approaches to this problem, but virtually all had stressed the representative character of the sovereign as a justification for conquest. Wolff, for example, had viewed the citizens as freed from their sovereign obligations and subjected to the power of the conqueror by necessity, which led to their acquisition as a patrimony of the sovereign.141 Pufendorf had implied as much in his stress on the ability of victors to extract a compact of obedience from the conquered as violators of natural law. This was tied to a notion that all citizens were enemies, and thus in some sense contributors to the war and authorizers of the sovereign’s acts. Vattel’s theory of sovereignty, with its heavy emphasis on consent, would seem to lead naturally into a strong theory of authorization without the baggage of a permanent authorization of the sort envisioned by Hobbes. Alternatively, Vattel could have attempted to break free from the consequences of his theory of consent with a set of Lockean arguments, which decoupled individual misconduct from sovereign control over territory or theoretically limited the sovereign’s authorization to engage in unjust war. Neither position would have been particularly attractive. The Hobbesian account

threatened the sort of consent Vattel attempted to preserve, while the Lockean account would be
difficult to square with a conception of sovereign power that did not view the sovereign’s
authority as dependent on the individual’s power in the state of nature. In general, any account
which made individuals potentially responsible for sovereign acts threatened to undermine
Vattel’s overarching commitments.

Vattel ultimately settled on rejecting all of these possibilities by quietly undermining the
linkage between sovereign and people. One of the most obvious indications of this comes in his
discussion of conquest. Despite Vattel’s facial commitment to Wolff’s theory of authorization,
Vattel does not follow through on the principles animating Wolff’s account. Vattel attempts to
sever the connection between rulers and ruled and separates the nation from responsibility for the
acts of the sovereign. Vattel’s language about the sovereign appeared to place him comfortably
in Wolff’s camp: the sovereign holds the “understanding and rights” of the nation, and is “the
depository of the obligations and rights relative to government,” such that the moral person of the
nation “acts thenceforwards only in him and by him.”142 Yet Vattel severely limits the
consequences of this authorization, and at times flatly denies that the sovereign’s use of the
nation’s authority can be imputed to the nation. This is particularly apparent in Vattel’s account
of the nation’s responsibility for a sovereign who wages an unjust war. While largely rhetorical,
Vattel’s arguments underscore a crucial point about the position of subjects vis-a-vis their
sovereign when the sovereign engages in an unjust war. In such a scenario, the sovereign
undoubtedly is required to provide restitution to the victim of his unjust war or “submit to
punishment,” but the question is who should suffer the costs of that restitution or punishment:

The prince’s private property will not be sufficient to answer the demands. Shall he give
away that of his subjects?—It does not belong to him. Shall he sacrifice the national

142 Liv.40, p. 99.
lands, a part of the state?—But the state is not his patrimony: he cannot dispose of it at will. And although the nation be, to a certain degree, responsible for the acts of her ruler,—yet (exclusive of the injustice of punishing her directly for faults of which she is not guilty) if she is responsible for her sovereign’s acts, that responsibility only regards other nations, who look to her for redress: but the sovereign cannot throw upon her the punishment due to his unjust deeds, nor despoil her in order to make reparation for them.143

Despite the representative character of the sovereign as bearer of all the rights and obligations of the nation, Vattel apparently envisions the acts of sovereigns as conceptually independent of the nation. Vattel continues by arguing that individual citizens and the nation are obliged to return goods they have acquired through a war which is “acknowledged” as unjust. This does not, however, place any obligation on the members of the military, and Vattel singles out Grotius for particular criticism on this point. The soldiers and generals can only be liable “in the case of a war so palpably and indisputably unjust, as not to admit a presumption of any secret reason of state that is capable of justifying it,—a case in politics, which is nearly impossible.”144

This leads Vattel to his attempted justification of the disconnect between the sovereign and the citizens when the sovereign engages in an unjust war. Vattel returns to a longstanding question about the sovereign’s judgment in the international arena to make his claim:

On all occasions susceptible of doubt, the whole nation, the individuals, and especially the military, are to submit their judgment to those who hold the reins of government,—to the sovereign: this they are bound to do, by the essential principles of political society and of government. What would be the consequence, if, at every step of the sovereign, the subjects were at liberty to weigh the justice of his reasons, and refuse to march to a war which might to them appear unjust? It often happens that prudence will not permit a sovereign to disclose all his reasons. It is the duty of subjects to suppose them just and wise, until clear and absolute evidence tells them the contrary. When, therefore, under the impression of such an idea, they have lent their assistance in a war which is afterwards found to be unjust, the sovereign alone is guilty: he alone is bound to repair the injuries. The subjects, and in particular the military, are innocent: they have acted only from a necessary obedience.145

143 III.xi.186, p. 587.
144 III.xi.187, p. 588.
145 Id.
Vattel has thus removed the basic premise, common to all the thinkers in the tradition after Grotius, that the sovereign’s judgment in international affairs stands in for the judgment of the individuals, and can be said (with varying degrees of strength) to represent the judgment of the citizens themselves. The fact that the nation acts “only in him and by him” apparently means nothing when it comes to the waging of an unjust war.

Theoretically, Vattel’s claim that the nation is not responsible for the acts of the sovereign was particularly problematic in cases where the people chooses to retain sovereign power for itself. When there has been no second transfer from the nation to a king or aristocracy, Vattel’s theoretical framework becomes threadbare. As Vattel notes, “in the first ages of Rome” individuals likewise lost their private lands after the nation was subdued by a conqueror. This custom prevailed because “The wars of that aera were carried on between popular republics and communities. The state possessed very little, and the quarrel was in reality the common cause of all the citizens.”146 Vattel never explained what would happen in the case of the conquest of modern “popular republics,” perhaps because Vattel simply believed that this sort of governmental structure did not exist in the Europe of his day; while there were certainly republics (such as Holland, Switzerland, and Venice), and Vattel insisted in a note from the 1773 edition that “in every period of the world, there have been nations who governed themselves by popular assemblies or by a senate,”147 Vattel’s terminology was never exact. In general, he seemed to class all governments in which “the body of the nation keeps in its own hands the empire or the right to command” as “a popular government” or democracy, a moniker he never applies to a modern nation.148 Presumably the city-states of the ancient world would qualify as

146 III.xiii.200, p. 598.
147 I.v.61n, p. 115.
148 I.i.3, p. 82.
these sorts of governmental bodies, but even here Vattel is slippery; his only apparent reference
to the period of popular rule in Athens describes the city as a republic. It was thus unclear how
Vattel’s framework would apply to these sorts of governments, and at the very least enabled
Vattel to make a relatively sharp distinction between nations modern and ancient nations, with a
theoretical category of “democracy” that had effectively become irrelevant in the modern era.

Alongside this quiet alteration in the theory of authorization, Vattel likewise breaks from
Wolff in viewing the voluntary law as applying even between belligerents, thus fully excluding
punishment from the formal justifications for behavior in a properly declared war. Vattel
introduces the voluntary law of war in the chapter immediately following his denunciation of
sovereigns who wage unjust war, and the central component of the voluntary law is the claim
that the preservation of peace is furthered by proceeding as if a war is just on each side. As
Vattel immediately notes, this must necessarily include belligerents as well as neutrals, since
otherwise “each party asserting that they have justice on their own side, will arrogate to
themselves all the rights of war, and maintain that their enemy has none, that his hostilities are so
many acts of robbery, so many infractions of the law of nations, in the punishment of which all
nations should unite.” Vattel ties this rule back to the underlying rule of the law of nature
which he claims governs all of the voluntary law of nations: “The decision of the controversy,
and of the justice of the cause, is so far from being forwarded by it, that the quarrel will become
more bloody, more calamitous in its effects, and also more difficult to terminate.” Vattel made
this position even more explicit elsewhere in the text: “If the enemy observes all the rules of
regular warfare, we are not entitled to complain of him as a violator of the law of nations. He has

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I.iii.35, p. 96.
III.xii.188, p. 589.
III.xii.188, p. 589.
Id. at 589-90.
the same pretensions to justice as we ourselves have; and all our resource lies in victory or an accommodation.”

Extending the voluntary law of nations to belligerent parties as well as neutrals required some rethinking of the basic concept of war as well. Like Wolff, Vattel argues there are three legitimate objectives for war: “1. To recover what belongs or is due to us. 2. To provide for our future safety by punishing the aggressor or offender. 3. To defend ourselves, or to protect ourselves from injury, by repelling unjust violence.” Vattel likewise appears to follow Wolff in limiting punitive war to irreparable injuries. But these surface similarities mask significant departures from Wolff’s position. Vattel never defines an “irreparable” injury, even in the context of harms to ambassadors, which Wolff had viewed as the quintessential example. For Wolff, this category of irreparable injury had the potential to be extremely broad, to the point where Wolff had argued that every war for reparation was necessarily also a war of punishment. Here, too, Vattel demurs; he never links wars of reparation and wars of punishment, and without articulating what constitutes an irreparable injury, it appears that the list of offenses for which punishment is acceptable is an empty set.

This lack of precision about punishment, in conjunction with the insistence that even belligerents must observe the voluntary law of nations with respect to each other, effectively eliminates punishment as a concept in wars between nations. As we saw, Wolff’s decision to retain the concept of punishment between belligerents had led him dangerously close to a principle which both he and Vattel detested: that the declaration of war severed obligations toward others, and that an individual, merely by virtue of their status as an enemy, posed a threat.

153 III.xii.190, p. 591.
154 III.iii.28, p. 484.
155 III.iii.41, p. 490.
Vattel’s gloss managed to avoid that problem, but Vattel was not quite able to come up with a substitute rationale which enabled him to expand punishment in the ways he claimed were necessary for European security. Vattel was, however, able to use this rationale to reach a set of entirely traditional conclusions with respect to the acquisition of property in war.

However, even here the tensions of Vattel’s effort to separate the sovereign from the nation become evident. In describing the general effects of property in the law of nations, Vattel joins Wolff in contending that “the property of the individuals is in the aggregate, to be considered as the property of the nation, with respect to other states,” and Vattel offers the same justification: “it cannot be otherwise, since nations act and treat together as bodies, in their quality of political societies, and are considered as so many moral persons.”\textsuperscript{156} The nation ultimately does have a share in the property of its citizens, both due to the state’s obligation to protect their property and its power of eminent domain.\textsuperscript{157} Vattel underscores this tight linkage between sovereignty and property with the claim that the two must always run together; “the domain of the body of the nation, or of the sovereign who represents it, is every where considered as inseparable from the sovereignty.”\textsuperscript{158} The combination of these factors is what leads to a sovereign’s exclusive jurisdiction over his territory, and other nations are obligated to respect that exclusive jurisdiction; “when once a case in which foreigners are interested, has been decided in form, the sovereign of the defendants cannot hear their complaints.”\textsuperscript{159}

This approach to property and sovereignty led Vattel to a series of conclusions about the acquisition of moveable property which were completely in keeping with the traditional conclusions of thinkers on the law of nations. It is this connection which grants an injured nation “an indiscriminate right

\textsuperscript{156} II.vii.81, p. 302.
\textsuperscript{157} Id.
\textsuperscript{158} II.vii.83, p. 303.
\textsuperscript{159} II.vii.84, p. 304.
to the property of the citizens” of another nation which injures them.\footnote{160 II.vii.82, p. 303.} In war, each party is permitted to take possession of an enemy’s property, both to recoup their costs and damages and to weaken the enemy.\footnote{161 III.ix.160, p. 566.} Vattel likewise references the confiscation of property “to punish injustice or violence,” and views this as “more humane than making the penalty to fall on the persons of the citizens.”\footnote{162 III.ix.162, p. 567.} Once again, however, this is sharply limited in scope by the voluntary law of nations; punishment has its place only in situations where an enemy engages in war “unsupported by any plausible pretext, or some heinous outrage in their proceedings.”\footnote{163 III.ix.162, p. 567.} Punishment in public war has thus been effectively removed by this new conception of the voluntary law of nations.

\section{Collective Punishment and the International Realm}

If Vattel’s attempted justification for universal jurisdiction over poisoners and assassins was vague, his treatment of piracy likewise struggled to maintain consistency with his underlying natural law principles, and in particular his theory of authorization. Much of Vattel’s discussion of piracy focuses on the status of the Barbary States. These North African sheikdoms, while nominally subject to the Ottoman Porte, operated effectively independently, and disputes persisted from the early 1500s until the early 1800s about the commissions those sheiks issued to privateers, who frequently preyed on European shipping.\footnote{164 A basic history of the Barbary states and their privateering is found in Daniel Panzac, \textit{Barbary Corsairs: The End of a Legend 1800-1820}, trans. Victoria Hobson (Boston: Brill, 2005), 9-43.} This national practice of piracy tinged Vattel’s thought on the issue, but he struggled to explain why this conduct was subject to punishment. This issue also forced Vattel to address the possibility of private war and its legality. Vattel’s response was twofold. The first was to place a great deal of stress on the importance of
declarations of war to access the protections of the voluntary law of nations. Second, taking this position also enabled Vattel to resurrect punishment in scenarios where the voluntary law did not apply—in particular the situation of the overtly aggressive enemy.

For Vattel, war is simply “that state in which we prosecute our right by force,” and he adopts the traditional division between public and private war, though like Wolff he insists that private war “belongs to the law of nature properly so called.”165 Proper public wars—“a lawful war in due form”—require a sovereign power on both sides and a declaration of war, and in the absence of either of these, the immunities of the voluntary law of nations do not apply.166 This Vattel makes clear in describing “illegitimate and informal wars,” such as “the cruises of the buccaneers, without commission, and in time of peace; and such in general are the depredations of pirates. To the same class belong almost all the expeditions of the Barbary corsairs: though authorized by a sovereign, they are undertaken without any apparent cause, and from no other motive than the lust of plunder.”167 Any informal war “can be productive of no lawful effect,” and a nation “is not under any obligation to observe towards [those enemies] the rules prescribed in formal warfare. She may treat them as robbers.”168 This Vattel illustrates with a defense of the conduct of Geneva after the Escalade of 1602, when the Duke of Savoy launched a surprise attack on the city. After repelling the assault, the Swiss executed all of the Duke’s men who had fallen into their hands, “hanged up as robbers, who had come to attack them without cause and without a declaration of war. Nor were the Genevese censured for this proceeding, which would have been detested in a formal war.”169

165 III.i.3, p. 469.
166 III.iv.66, p. 507.
167 III.iv.67, p. 507.
168 III.iv.68, p. 508.
169 III.iv.68, p. 508.
Vattel has been criticized for the apparent inconsistency of this endorsement of large-scale execution with his account of responsibility, which freed soldiers and citizens from liability for the acts of sovereigns and generals. On this reading, Vattel’s argument “clearly opposed his assumption that because troops follow superior orders as a matter of principle, they could not be judged for participating in unjust wars,” and in this instance “the superior orders defence was indeed supposed to apply, as the Genevans did not blame the Savoyard prisoners for committing war crimes but only for carrying out an unjust assault.” The alleged result is that “Vattel’s justification of the execution of Savoyard troops had no legal basis whatsoever.” However, this criticism misunderstands a fundamental element of Vattel’s thought. Vattel’s heavy emphasis on the importance of formality in the conduct of warfare is the flip side of his stress on the voluntary law of nations; because it reflects the application of the necessary law of nations to the unique entity of “the nation,” it is essential that nations conduct war as nations, i.e. with all the formalities necessary to institute a public war. The declaration of war takes on immense importance as the tool by which nations invoke the immunities of the voluntary law of nations. In the absence of such formalities, war exists not between nations, but between a collection of individuals and a state.

The claim that Vattel’s inconsistency stems from his failure to recognize that the act in question was merely “the lack of apparent motives for opening hostilities and by the omission of a declaration of war,” and that these are failings of the sovereign, not the soldiers, likewise fails to save this objection. The fact that this example comes at the end of Vattel’s discussion of declarations of war is significant, since the essential predicate for instituting a legitimate public war is a declaration of war, and unlike the general question of the justifying reasons for a war,

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170 Rech, Enemies of Mankind, 150-51.
171 Id. at 151.
judgment of the existence of a declaration is entirely within the competency of citizens. A declaration of war exists as a final attempt to bring the other nation to a peaceful accommodation, and by “the natural law of nations” must “be made known to the state against whom it is made.” The failure to do so makes acts of hostility into injuries for which a nation may demand reparations. It must also be made known to the citizens of the declaring country “in order to fix the date of the rights which belong to them from the moment of this declaration, and in relation to certain effects which the voluntary law of nations attributes to a war in form.”172 In introducing the example of the Escalade at the end of his chapter on declarations, Vattel again stresses that “informal and illegitimate” wars “can be productive of no lawful effect, nor give any right to the author of it” under the voluntary law of nations.173 The simple question of whether or not a declaration of war has been made is not a matter of justification, subject to secrecy or calculations of reason of state and thus excluded from individual judgment, but a matter of natural law. Just as those who refused to carry out the Bartholomew’s Day Massacre were justified in their refusal to violate the law of nature, the soldiers who carried out the Escalade would have been justified in refusing to carry out the sovereign’s command to engage in war absent a declaration of war. The fact that they did not makes them violators of the law of nature and thus subject to punishment for their crime.174

In this respect the Savoyard actions were no different from the behavior of piratical nations, and this line of reasoning is critical to understanding Vattel’s limited preservation of collective punishment in the case of piracy or similar offenses. Vattel singled out the Barbary

172 III.iv.55-56, p. 502-03.
173 III.iv.68, p. 508.
174 There is no warrant for the suggestion that Vattel “implied that those responsible for ordering the assault on Geneva did not deserve any form of punishment.” Rech, Enemies of Mankind, 150. While Vattel does not specifically claim Charles Emmanuel I is deserving of punishment for ordering the assault, there is likewise nothing to suggest that he would not be legitimately subject to punishment for his actions, though he was not on hand to suffer the punishment.
states for particular attention. Just before introducing the Escalade, Vattel emphasizes the importance of distinguishing between formal and informal (i.e. unlawful) wars, which as we have seen includes the actions of pirates in general and in “almost all the expeditions of the Barbary corsairs: though authorised by a sovereign, they are undertaken without any apparent cause, and from no other motive than the lust of plunder.”

Vattel here entered into a long-running debate about the legal position of the Barbary states—a tradition which had overwhelmingly viewed the actions of the Barbary states as legitimate. A long chain of European writers stretching back to Jean Bodin had argued that the Barbary States could be considered justified in their activities so long as they had sovereign authorization for their behavior, or (in stronger versions of the account) if they were themselves sovereign entities. Bodin, for example, justified the behavior of the famous Barbary pirates Hayreddin Barbarossa and Dragut Reis by pointing out that the Ottoman Porte, the nominal sovereign of the Barbary States, had endorsed their activities.

Some variation on this position—linking sovereign authorization to the position of the Barbary States—was taken by every successive thinker on the issue, even those who concluded that the Barbary States were acting piratically rather than within the bounds of legitimate privateering or reprisal. Alberico Gentili, for example, whose arguments we encountered in examining Grotius’s position, saw the Barbary States as illegitimate precisely because they did not meet the requirement of sovereignty necessary to engage in lawful hostilities.

Cornelius van Bynkershoek, by contrast, had stuck up for the legitimacy of the Barbary States by straightforwardly arguing that their possession of sovereignty legitimated their behavior: these peoples were “organised states” with whom many European countries had made

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175 III.iv.67, p. 507.
treaties, and clearly met the Ciceronian definition of a regular enemy due to their possession of the institutions of a legitimate government.178

In treating the Barbary States, Vattel accepted that they were sufficiently sovereign to wage lawful wars; as Vattel noted, the Barbary expeditions were “authorised by a sovereign.”179 Yet this authorization was insufficient because it failed to satisfy the basic condition of a lawful war: a declaration of war which explained the grievances at stake and gave a final opportunity for reconciliation. It is in this sense that the Barbary States engage in war “without any apparent cause, and from no other motive than the lust of plunder.”180 Absent some justificatory explanation, even of a pretextual sort, the hostile actions of the Barbary States cannot be accorded the immunities of the voluntary law of nations, and thus the individual pirates who engage in this activity—like the Savoyard troops of the Escalade—are subject to punishment for their behavior.

But Vattel is not content to establish that individual pirates are subject to universal jurisdiction. He also attempts to establish a foundation for collective punishment of these nations in a way he had not attempted with respect to European nations, and this is directly attributable to his account of state responsibility. In general, Vattel offers an entirely traditional account of the state’s responsibility for the actions of its citizens: a state must order, ratify, or approve the acts of its citizens in order for it to be attributable to the nation.181 However, he adds one qualification to this account of responsibility not present for prior writers: “when by its manners and by the maxims of its government it accustoms and authorizes its citizens indiscriminately to

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180 Id.
181 II.vii.73-74, p. 299.
plunder and maltreat foreigners, to make inroads into the neighbouring countries, &c.”182 Vattel gives two examples of this sort of responsibility. He contends that “the nation of the Usbecks is guilty of all the robberies committed by the individuals of which it is composed.”183 This claim, apparently in reference to the Uzbek practice of raiding Russian trade caravans in the 18th century and the capture of Russian slaves, enables Vattel to argue that “princes whose subjects are robbed and massacred, and whose lands are infested by those robbers, may justly level their vengeance against the nation at large.”184 While Vattel does not fully explain it here, he also points out that it is not only the injured nation which has a right to engage in war against the Uzbeks: “all nations have a right to enter into a league against such a people, to repress them, and to treat them as the common enemies of the human race.”185 Vattel immediately recommends the same treatment for the Barbary nations, “in order to destroy those haunts of pirates, with whom the love of plunder, or the fear of just punishment, is the only rule of peace and war.”186

Notably, even this approach does not deny the basic sovereignty of the Uzbeks, just as Vattel was unable to deny the sovereignty of the Barbary States.187 The core problem of the Uzbeks, as with all “barbarian” nations, is their failure to engage in war in a way that legalizes their behavior. In discussing pretexts and justificatory reasons for war, Vattel emphasizes the low bar necessary to invoke the immunities of the voluntary law of nations; even a pretext “destitute

182 II.vii.78, p. 301.
183 Id.
184 II.vii.78, p. 301.
185 Id.
186 Id.
187 In this respect, Vattel is one of the last representatives of an older view of sovereignty; the fundamental characteristic of much 19th century thought on the application of international law to non-European peoples stressed that they lacked sovereignty, and thus could not participate in the international legal order. See Antony Anghie, Imperialism, Sovereignty, and the Making of International Law (New York: Cambridge University Press, 2005), 32-114; Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960 (New York: Cambridge University Press, 2002), 98-178.
of all foundation” can suffice to create a formal war.\footnote{III.iii.32, p. 486.} Nations which engage in war “without reasons or pretexts” are the “enemies to the human race” Vattel permits nations to ally against “for the purpose of punishing and even exterminating those savage nations.”\footnote{III.iii.34, p. 487.} The German tribes in Tacitus, the “Turks and other Tatars,” like Attila, Genghis Khan, and Tamerlane, are all examples of instances where a complete lack of pretext removes them from the protection of the voluntary law of nations.\footnote{Id.}

While the paradigmatic case was that of a non-European nation, this sort of character is possible in Europe, and Vattel alludes to those “in polished ages and among the most civilised nations, those supposed heroes, whose supreme delight is a battle, and who make war from inclination purely.”\footnote{Id.} Vattel consequently took roughly the same position as Wolff, that sovereigns who threaten to overwhelm the general balance of power and show a willingness to aggrandize themselves in unjust fashion may be attacked by a coalition of nations. Like Wolff, however, Vattel maintains the requirement that the powerful state commit some injustice before it can be humbled; when that injustice occurs, “all nations may avail themselves of the occasion, and, by joining the injured party, thus form a coalition of strength, in order to humble that ambitious potentate, and disable him from so easily oppressing his neighbors, or keeping them in continual awe and fear.”\footnote{III.iii.45, p. 494-95.} As Walter Rech has pointed out, this exception had especial importance for Vattel given his involvement with the European resistance to the expansionist
policies of Frederick the Great, whom Vattel apparently viewed as a warmonger of the sort who could justifiably be humbled by such an international coalition.\footnote{Rech, \textit{Enemies of Mankind}, 138-149. See also Toyoda, \textit{Theory and Politics}, 177-79.}

While such a figure was possible in Europe, Vattel never endorsed the idea of broader collective punishment for the subjects of such sovereigns; the claim that a nation could be punished for the “maxims of its government” seems to have been limited to the non-European world. In discussing the ravaging of enemy territory, Vattel largely hews to the line laid down by Wolff, but departs from it to argue for the legitimacy of Louis XIV’s attack on the Barbary States. Ravaging, while generally forbidden, can be permissible given “the necessity of chastising an unjust and barbarous nation, of checking her brutality, and preserving ourselves from her depredations.”\footnote{III.ix.167, p. 570.} Vattel justifies this with reference to the actions of Louis XIV in the 1680s: “The same prince whose firmness and just resentment was commended in the bombardment of Algiers, was, after that of Genoa, accused of pride and inhumanity.”\footnote{Id.} Such indiscriminate attacks are condemned on the one hand because the responsible sovereign will feel the effects of the supposed punishment only “indirectly,” as in the case of Genoa, but such collective punishment is permitted to those whose subjects are perpetually harassed by “those nests of pirates” in North Africa.\footnote{Id.}

A war against this sort of people also produces unique effects with regard to the right of conquest. When a conqueror has gone to war “not only against the sovereign, but against the nation herself, and whose intention it was to subdue a fierce and savage people, and once and for all to reduce an obstinate enemy,” the conqueror may engage in punishment, up to the point of holding them “for some time in a kind of slavery” until he is able “to curb and subdue their
impetuous spirit.” A conqueror in this scenario “perpetuates the state of warfare between that nation and himself,” and Vattel specifically rejects the doctrine of Pufendorf that there is “a kind of compact by which the conqueror consents to spare the lives of the vanquished, on condition that they acknowledge themselves his slaves,—he who makes this assertion is ignorant that war gives no right to take away the life of an enemy who has laid down his arms, and submitted.”

In the absence of some civil liberty, the state of war will continue, “though actual hostilities are suspended on their part through want of ability.” While Vattel, like Wolff, is never specific about when this applies, it is clear from the discussion of piracy and war without pretext that this could apply only in the limited context of attacking a nation like the Uzbeks.

It has been contended that these claims about collective responsibility and punishment are contradictory, and that Vattel’s “privileging of European warlike sovereigns over ‘uncivilised’ robber nations was groundless.” However, as the focus on the formalities necessary to engage in war indicates, Vattel’s position is largely consistent, even if its consequences are disturbing. The “uncivilized” nations engage in acts legitimate only in war, such as confiscating property and taking captives, without declaring war, and thus without taking the minimal steps required to invoke the immunities of the voluntary law of nations. As such, Vattel views the entire nation as punishable as a band of robbers, despite the fact that he does not deny their sovereign status. Further, those nations which attempt to “declare” war without offering even the flimsiest of pretexts fail to meet the basic requirements for a legitimate declaration, and are therefore—like the unfortunate Savoyards—subject to punishment as illegitimately engaging in war. The right of punishment, held in abeyance by the voluntary law of nations, remains in force where that law

197 III.xiii.201, p. 599.
198 III.xiii.201, p. 600.
199 Id.
200 Rech, Enemies of Mankind, 127.
does not apply. This formalist definition of war enabled Vattel to maintain the position that nations were not sitting in judgment on the behavior of other nations, since the validity of a pretext was not in question, only its presence or absence in a declaration of war.

The aspect of the theory which Vattel leaves unexplained is the precise point on which he had broken with Wolff: to what extent the sovereign’s actions could implicate the nation. In discussing European nations, Vattel had consistently claimed that punishment could be directed only at the sovereign or individuals who had engaged in specific violations of the law of nature, not the nation as a whole, as his treatment of Frederick indicates. As we saw, the coherence of that position with Vattel’s principles about conquest was questionable, but the overall impact of the position was sharply limited in terms of its impact, since in a formally declared war between European powers, punishment had effectively no theoretical place due to the commitments of the voluntary law of nations. Vattel never adequately explained why the non-European peoples he referenced were accorded different treatment, but the preceding discussion indicates the position likely underlying it. The perfect rights to be free from injury and not to suffer injustice permit punishment under the law of nature, and the actions of multiple citizens, endorsed by the government, outside of a formal war, apparently leave open the conclusion that the entire nation is responsible for its general conduct. In this respect there is a kinship with Vattel’s notion of reprisal. The very concept of reprisal requires that states sit in judgment on the actions (or failures to act) of other states in a condition short of war. The linkage between individuals and their societies in the case of reprisal is quite strong—sufficiently so that the property of every citizen can be viewed as liable for the society’s debts, despite the fact that it is his sovereign who has denied justice or ratified the acts of the perpetrators. Ratification or denial of justice as a matter of policy thus opens the door to collective responsibility which Vattel had closed in his
account of the voluntary law of nations. Of course, this does not fully explain away the
difficulty; the contradictions in Vattel’s account of authorization simply express themselves here
in slightly different form. But Vattel is at least consistent in linking the legitimacy of punishment
in the international realm to the presence or absence of a formal war.

Even in formal war, however, Vattel’s theory shows cracks. The limited areas where
Vattel permits punishment in formal war—in response to violations of the laws of war—still lend
themselves to collective punishment. How are the laws of war to be enforced when a prisoner
who has committed a crime has not fallen into the victim’s hands? The only answer Vattel can
give resorts to a notion of collective responsibility which has no apparent warrant. In the event
an enemy is “guilty of some enormous breach of the law of nations, and particularly when he has
violated the laws of war,” it becomes permissible to refuse quarter to an enemy. Vattel
characterizes this as “no natural consequence of the war, but a punishment for his crime,—a
punishment which the injured party has a right to inflict.”201 Once again, Vattel insists that this
“must fall on the guilty,” and quickly resorts to a familiar line of reasoning: “When we are at war
with a savage nation, who observe no rules, and never give quarter, we may punish them in the
persons of any of their people whom we take (these belonging to the number of the guilty), and
endeavour, by this rigorous proceeding, to force them to respect the laws of humanity.”202 Yet
the same principle applies to the more cultivated realm of European war through the practice of
belligerent reprisal, in which prisoners are killed “for the purpose of obliging [the enemy] to
observe the laws of war.”203 Vattel frankly concedes that this “condemn[s] a prisoner to death,
for his general’s crime,” but justifies this with a rule of preference: “a prince or his general has a

201 III.viii.141, p. 544. See also III.viii.142, p. 545: “if [a general] has to do with an inhuman enemy who frequently
commits such enormities, he is authorised to refuse quarter to some of the prisoners he takes, and to treat them as his
people have been treated.”
202 Id.
203 III.viii.142, p. 545.
right to sacrifice his enemies’ lives to his own safety and that of his men.”\textsuperscript{204} Even in the limited space Vattel attempts to carve out for punishment, the ambiguities between individual and collective responsibility remain.

\textbf{IV. Conclusion}

Vattel’s efforts on punishment ultimately failed to produce a fully consistent and coherent theory of punishment in the international realm, but they very effectively highlight the challenges of the effort he was undertaking. By accepting the punishment existed as a natural right of individuals, and thus also as a right of states, Vattel was forced to explain how that right could be cabined at the international level. Vattel’s efforts effectively put an end to punishment as a category of the European law of nations. His facial adoption of Wolff’s categories, such as the idea of “irreparable injury,” did not mean that Vattel took the consequences of these positions seriously. His expanded account of the voluntary law of nations, now sweeping in belligerents as well as neutral parties, removed the basic predicate for punishment between nations as a justification for war and specific actions in war. Further, by weakening the account of authorization Vattel ostensibly adopted from Wolff, he addressed a concern already present in his idol’s text: how punishment of “the nation” could be separated from punishment of the individuals who comprise it. While Wolff had relied on the formal distinction, despite its relatively limited practical impact, Vattel effectively sought to eliminate it altogether in a properly declared public war.

These commitments, however, did not always cohere. At almost every point where he needed to flesh out the relationship between his theory of consent and his theory of authorization,

\textsuperscript{204} Id.
Vattel avoided the question altogether. Vattel struggled in particular to explain the right of conquest in a manner consistent with his premises about authorization and consent, returning to the language of sovereignty as property which he supposedly detested. As we saw, his attempt to expand the scope of punishment to draw in either particularly aggressive leaders or even entire nations likewise strained for coherence with his other doctrines. Finally, even the sacred principle of individual responsibility as an indispensable condition of punishment fell away in times of war, as his account of punishment by reprisal in wartime illustrated; the only way to punish a sovereign who violates the law of war is to kill his prisoners, who have themselves done no wrong.

This sort of struggle likewise characterized even the attempt to explain why individual offenders might be subject to something like universal jurisdiction for particularly heinous crimes, such as piracy, poisoning, and assassination, though here the principles at stake were different. By adopting the natural law framework expounded by Leibniz, Vattel had backed himself into a difficult corner in making these claims. Wolff had at least been consistent in recognizing that these premises dictated that the right of punishment was limited to injured parties; there could be no claim that any particular offense was so dangerous as to justify universal war; it was difficult to see why some violations of the law of nature, as opposed to others, showed greater or lesser regard for the law on the whole. This led dangerously close to premises about threat from earlier writers which Wolff and Vattel were keen to reject in order to preserve a framework of obligations within war. But Wolff’s consistency was replaced by Vattel’s struggle to justify these expanded categories as not only natural restrictions on warfare, but also punishable by all nations.
For all these flaws, and the tensions they reveal in the natural law theory of the law of nations, Vattel’s work did become quite popular, and it served as a handbook for scholars and diplomats for several generations after its publication. In this sense its contradictions are perhaps more reflective of the contradictions of European politics in the Enlightenment period than of some failure on the part of Vattel, but the fact that natural law logic could plausibly result in a scheme which licensed sovereigns to engage in power politics, while attempting to mitigate the consequences of that game for the nation and its citizens, undoubtedly also reflects something about the malleability of the underlying logic. If the system then permitted the use of punishment in a far less restrained fashion when dealing with non-European foes, all the better for an era in which colonial expansion remained the order of the day for Western European powers.
Conclusion

Vattel stands as a useful endpoint to this story not only because of his theoretical contributions, which as we have seen effectively drained punishment of its relevance as a justification for war, but also because of what he stands for in the history of international law. While Vattel thought of himself as part of a holistic tradition of philosophical thinking, he was in fact the last of the great treatise-writers of international relations who viewed himself in this way. After Vattel, a split developed between what we now view as the canon of European political theory, which proceeded through Jean-Jacques Rousseau and Immanuel Kant on the continent, and the nascent discipline of international law. This was attributable in part to the relative dormancy of international law for the first half of the 19th century. The period following the Congress of Vienna and the conclusion of the Napoleonic Wars in 1815 saw the publication of Carl von Clausewitz’s *On War*, with its famous description of war as “politics by other means,” and remarkably few major treatises on international law were published until the late 1860s.

The few treatises which followed Vattel (who, particularly in the English-speaking world, continued to be employed as a textbook) showed the increasing reluctance to accept punishment as a feature of the international order. G.F. Martens’s 1785 *Summary of the Law of Nations* illustrated both the increasingly positivistic turn of international law with its emphasis on obligations created by treaty and the rapid decline of punishment, which receives no mention whatsoever in the text. Henry Wheaton, virtually the only writer of note in the post-Napoleonic era, likewise expressed considerable sympathy with legal positivism and its stress on self-imposed obligations of states, but at times intimated his basic agreement with Vattel’s preservation of some degree of punishment; he maintained some role for natural law, noting that
“The law of nature has not precisely determined how far an individual is allowed to make use of force...to bring an offender to punishment. We can only collect, from this law, the general rule, that such use of force as is necessary for obtaining these ends is not forbidden. The same principle applies to the conduct of sovereign states existing in a state of natural independence with respect to each other.”¹ However, punishment was nowhere fleshed out in the work, though Wheaton took a more expansive view of jurisdiction over piracy than many of his contemporaries.²

Punishment likewise largely disappeared from the treatises which signaled the beginning of the modern era of international law, conventionally dated to 1870. The conditions of the *jus ad bellum* received virtually no attention. William Edward Hall, for example, acknowledged the possibility of state punishment, but followed that claim with the argument that “However able law might be to declare one of two combatants to have committed a wrong, it would be idle for it to affect to impart the character of a penalty to war, when it is powerless to enforce its decisions....International law has consequently no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation.”³ In a footnote, Hall agreed with the characterization of all previous discussions of the justice of war, including Grotius, Pufendorf, Wolff, and Vattel, as “oiseuses.”⁴ Hall was part of the rise of international law as a special province of study in which domestic political considerations had virtually no purchase; treatises

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² Wheaton played an interesting role in the U.S. Supreme Court’s interpretation of the nation’s first piracy statute, which appeared to grant universal jurisdiction over piracy and several other related offenses. His commentary on the Supreme Court’s piracy decisions in the 1810s and 1820s sought to preserve the possibility of universal jurisdiction over a wide range of offenses, despite the court’s rejection of that concept. See Alfred P. Rubin, *The Law of Piracy* (Newport, RI: Naval War College Press, 1988), 140-41.
⁴ Id. at 53 n. 2.
no longer assessed the origin of the state’s powers or the content of the initial social contract in order to make assessments about the international order. Punitive war made little headway in this strongly positivistic community of international law scholars, whose theories stressed sovereign equality and obligations derived solely from consent.  

However, the one place where punishment continued to expand was in precisely the area where Leibniz, Wolff, and Vattel had made their unique turn. Writers after Vattel, even in the late 19th century, continued to accept that there were limits on the conduct of warfare which protected civilians, and those limits were largely set by the force necessary to achieve the aims of war. Martens, for example, adopted the set of protections for civilians and prisoners of war sketched by Wolff and Vattel effectively wholesale, along with the claim that prisoners of war can be punished for specific breaches deserving of death. Hall, despite his hostility toward the *jus ad bellum*, maintained a right of punishing enemies who violated the laws of war, and in this respect he was hardly unusual. Moreover, the latter half of the 19th century witnessed the first efforts to codify the laws of war, including the right of punishing those who deviated from them. The first such effort was the American Civil War-era code of Francis Lieber, which in turn served as an inspiration and guide for the first Hague Convention in 1899. That convention outlawed a variety of means of warfare and formalized the principle of military necessity as a binding obligation on belligerents. The aftermath of the American Civil War saw hundreds of

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9 Hague Regulations (1899), Art. 23.
trials for violations of the laws of war,\textsuperscript{10} and a series of (largely failed) war crimes trials after World War I followed provisions in the Treaty of Versailles which included permission for the Allies to try the Kaiser himself for the crime of aggression.\textsuperscript{11}

While the principle of individualized punishment has become part and parcel of the international laws of war in the 20\textsuperscript{th} century, epitomized by the Nuremberg trials, the notions of state punishment and collective punishment were no longer ignored, but instead vigorously attacked. The 1899 Hague Regulations declared that “No general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible,”\textsuperscript{12} and this language recurred in multiple Hague and Geneva treaties.\textsuperscript{13} The language has only become more restrictive over time; while the initial language left open the possibility of collective punishment for collective crimes, the language of Additional Protocol I in 1977 outlawed “collective punishments” committed “at any time and in any place whatsoever, whether committed by civilian or by military agents.”\textsuperscript{14} Similarly, no international law instrument provides for punishment of a state for the violation of an international legal obligation, whether a treaty or of the peremptory norms of international law like the prohibition on genocide.

However, while punishment disappeared from the mainstream of international legal doctrine, it continued to crop up around the margins, particularly in the wake of trying events.

\begin{itemize}
  \item \textsuperscript{12} Hague Regulations (1899), Art. 50.
  \item \textsuperscript{13} Hague Regulations (1907), Art. 50: “No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible”; Geneva Convention Relative to the Treatment of Prisoners of War (1949) [Geneva III], Art. 87: “Collective punishment for individual acts” forbidden.
  \item \textsuperscript{14} Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977) [Additional Protocol I], Art. 75(2)(c).
\end{itemize}
Damages which were perceived or avowed to be punitive were imposed on France after the Napoleonic Wars and the Franco-Prussian War, and most famously on Germany in the wake of World War I.\textsuperscript{15} The Treaty of Versailles included a clause affixing blame for the war on Kaiser Wilhelm, along with claims that the Germans were responsible for immense reparations payments to Allied nations; while these were never described as punitive, many Germans and Allied leaders perceived them that way, and in the aftermath of the war the League of Nations treaty attempted to define aggressive war as a state crime subject to punishment, though these provisions were never employed.\textsuperscript{16} Similarly, in the wake of World War II, an initial American plan for post-war Germany demanded substantial punitive sanctions on Germany, including the German people as a whole,\textsuperscript{17} and this rhetoric of collective responsibility was not uncommon; even the Potsdam Declaration stressed that “the German people have begun to atone for the terrible crimes committed under the leadership of those whom in the hour of their success, they openly approved and blindly obeyed.”\textsuperscript{18} While precisely the opposite approach—the reconstruction-oriented Marshall Plan—was adopted, the impulse for punishment was clearly present and was primarily thwarted by the growing American and European fear of communism.

This moment of crisis was likewise followed by an effort at codification and rationalization. In the wake of World War II, the International Law Commission of the United Nations began to draw up principles for state responsibility. It was not until 1976 that a first draft of these articles appeared, and Draft Article 19 defined an international crime as a “wrongful act which constitutes a breach by the state of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized

\textsuperscript{17} Blum, “Crime and Punishment,” 95-96.
as a crime by that community as a whole.”19 While no punishments were specified or even
intimated, the potential justification for punishment this article implied made it immensely
controversial; it was clear that the working out of the consequences of identifying certain state
behavior as a crime would lead to a discussion of punishment, as the article’s supporters
represented a strand “of neo-naturalism, whereby basic norms of justice must have a fundamental
place in any construct of international law.”20 As James Crawford, the rapporteur for the
principles of state responsibility, described it in defending the changes to Draft Article 19
resulting from revisions in the late 1990s, the language of state crime is particularly dangerous
because it demands attention to “issues of structure and organization, of due process and dispute
settlement,” and if the language of crime is employed “divorced from adequate procedures for
the determination of criminal responsibility,” it invites “name-calling, and will tend only to
accentuate the power of the powerful, and especially of the Permanent Members of the Security
Council, acting as such or in their considerable individual capacities.”21

Punishment continues to creep in at the practical level as well. Perhaps most famously, it
was the rationale invoked by Osama bin Laden for the September 11th terrorist attacks:

The American people should remember that they pay taxes to their government and that
they voted for their president....Given that the American Congress is a committee that
represents the people, the fact that it agrees with the actions of the American
government proves that America in its entirely is responsible for the atrocities that it is
committing against Muslims....The onus is on Americans to prevent Muslims from
being killed at the hands of their government.22

19 Jørgensen, Responsibility of States, 49.
21 James Crawford, “Revising the Draft Articles on State Responsibility,” European Journal of International Law 10
However, it is not only bloodthirsty terrorists who invoke the language of punishment and collective responsibility. The treatment of rogue regimes in Yugoslavia, North Korea, and Sadaam Hussein’s Iraq have all been seen as instances of punishment, as well as retaliatory American air strikes in Libya in 1986, Iraq in 1993, and Sudan in 1998.\textsuperscript{23} Russian President Dmitry Medvedev declared the end of his country’s 2008 war with Georgia by saying that the operation could end because “The aggressor has been punished, having sustained considerable losses.”\textsuperscript{24} Collective punishment continues to be hotly debated; the accusation is routinely employed against Israeli security measures in the West Bank and Gaza, and more recently the Russian Foreign Ministry complained that sanctions against Crimea constituted collective punishment.\textsuperscript{25} Indeed, despite the overwhelming evidence that sanctions do not “work” in the sense of convincing another nation to change its course of action, a possible explanation for their continuing use is the punitive satisfaction leaders and nations receive from their imposition.\textsuperscript{26}

With punishment constantly bubbling under the surface of international law, it is now clear that the disappearance of punishment from international legal doctrine after Vattel simply put on hold the difficult questions which Vattel had elided or found himself unable to answer. The problem of explaining why democracies are not in some sense amenable to collective punishment for their misdeeds has carried over into the modern day. Walzer, in his account of just war theory, ultimately concedes that some degree of guilt must carry over to citizens of a democracy under certain circumstances, with even the claim that “there comes a time in any tale of aggression and atrocity when such allowances [for misinformation and honest mistakes] can

\textsuperscript{24} Blane and Kingsbury, “Punishment,” 242.
no longer be made,“27 and virtually any defense of conscientious objection, including Walzer’s own, rests on a notion of individual judgment about national affairs not unlike that put forward by Locke.28 While modern scholars would be hard pressed to accept the Hobbesian notion that any government, no matter how tyrannical, is the authorized bearer of the personalities of all the individual subjects, the case of democracies raises difficulties which are not easily dismissed insofar as we believe that democratic government is preferable precisely because it is more responsive to or reflective of the people’s own will and desires. If “the people” governs, it becomes quite difficult to explain why “the people” is not in some sense responsible. Indeed, a rich literature has arisen attempting to explain the contours of democratic responsibility in general, and in particular as applied to the case of war and the possibility of punishing a democracy.29

These debates are particularly urgent given the increasing moralization of the international order. While the consensus of international law in the 19th and most of the 20th centuries was that moral judgment of other nations in the international order was not a desirable or practical feature of the international realm, that previously unassailable accord has been gradually fraying, with particular stress on the idea of sovereignty as an inviolable legal bulwark. Claims about jus cogens or “peremptory norms” of international law invite comparisons to the natural law prohibitions described by earlier thinkers, and have proved essential to the modern

human rights movement. Among the objectives pursued by members of that movement has been an expanded conception of universal jurisdiction, the modern term for an old concept: a free-floating right of punishment held by every nation over particularly egregious crimes, such as torture or genocide. In the United States, a series of cases since the early 1980s have tested the limits of American jurisdiction over the crimes of non-citizens committed abroad, and most recently the liability of foreign corporations for aiding and abetting serious human rights violations abroad. While these legal efforts have met with mixed success, the controversial development of the “responsibility to protect” doctrine, which permits attacks on governments which engage in particularly serious and widespread human rights violations, and the principle of humanitarian intervention in general, while couched in non-punitive terms, have obvious resonances with punitive justifications of the Grotian sort.

This trend has not gone unnoticed; in recent years scholars have begun to debate the disappearance of moral language and justification from the international order. The death of punitive war predated only slightly the decline of the concept of war as a legal procedure altogether, a conception of warfare which James Whitman points out had the advantage of shortening and limiting conflicts. As a result, “We have witnessed the collapse of the conception of war as a form of civil justice, founded in property law, and the triumph of a conception of war as an act undertaken only in desperate necessity. This transformation has taken place for noble reasons, but it has resulted in sprawling and amorphous wars and it has come at a high price in human lives.” Whitman’s caution is that by stripping away the legal

32 Id. at 250.
justifications for war, all that remains are moral justifications. “It is no easy task to put the brakes on the fight against evil....fighting in the name of high morality easily degenerates into hard and bitter fighting,” while the language of war as a last resort encourages this vicious descent.\textsuperscript{33} However, the key characteristic of modern international law is the disappearance of moral language from its basic doctrine, even if Whitman correctly identifies the moral intuitions which the current structure of war as self-defense stimulates. Legal principles undergirding the use of war virtually always ran alongside the possibility of punishment, which was seen for centuries as part and parcel of law enforcement in the international realm. This required not only legal judgments about property, but moral judgments about an actor’s behavior, even if the threshold for those judgments varied considerably among the writers on the international order.

If an overly moralized conception of international law and war is a threat to peace, an international legal order which strives to exclude morality is equally dangerous. As Gabriella Blum has pointed out, the language of prevention and threat which dominates so much of international legal doctrine, with its corresponding appeal to consequentialist reasoning about potential threats, enables avoiding hard moral questions about desert. However, this does not necessarily mean that avoiding these questions inevitably leads to a more stable and peaceful international order; on the contrary, there are reasons to believe that a more moralized international law could be a more restrained one.\textsuperscript{34} It would certainly be one which felt less estranged from the moral intuitions of most individuals; there is something undeniably strange about articulating a ban on sexual war crimes as a military tactic in terms of their tendency to undermine peace, rather than the moral harm to the victims which deserves to be retributed.\textsuperscript{35} As

\textsuperscript{33} Id. at 252.
\textsuperscript{34} Blum, “Crime and Punishment,” 96-98, 110-21.
\textsuperscript{35} Id. at 120-21.
Alexis Blane and Benedict Kingsbury have noted, the persistence of punishment in unacknowledged, informal ways “means this practice is forced into artificial legal categories that do not very adequately regulate it,” leaving it to operate without effective regulation in “zones of indistinct normativity.”

Grappling seriously with these questions requires examining the same problems which the famous names of the 17th and 18th century natural law tradition addressed. If it is the case, as Ronald Dworkin suggests in one of the final pieces of his lifetime, that “the positivistic, supposedly consent-based jurisprudence of international law” must be abandoned as “flawed beyond redemption,” and instead we should look back to “a golden age of the subject, seventeenth-century European politics, to an at least partially moralized conception of international law,” then the twists and turns traced in this dissertation are not of merely antiquarian interest. For the writers of that period, a punitive ethos, even if not called punishment, was part and parcel of the legal conception of war, and the debates about how to describe and justify that impulse, delineate its scope and control its exercise, and determine the proper quantum of individual and collective responsibility in societies organized on some basic principle of consent were ever-present. The separation between domestic political arrangements and international obligations was not a feature of their thought; one necessarily had an impact on the other. While the modern doctrine of international law has sublimated these questions, the issues which faced writers from Grotius through Vattel are in no less need of careful consideration.

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