

# A History of Violence: Distinguishing War and Punishment in Liberal States

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## Introduction

On 5 March 2012, Attorney General Eric Holder offered the Obama administration's first official statements on the legal rationale justifying the targeted killing of Anwar al-Awlaki by American drone strike in September of 2011. Al-Awlaki, a Yemeni imam with suspected ties to al-Qaeda, was born in the United States and was, consequently, an American citizen. Although he had already been found guilty *in absentia* of conspiracy to commit acts of terrorism in Yemen, al-Awlaki had not been charged with or convicted of any crime in the United States. Various civil rights groups questioned the strike, on the grounds that such military action, devoid of public transparency or any oversight outside the executive branch, was an inappropriate and potentially illegal response; Glenn Greenwald, for instance, criticized the Obama administration for violating the due process guarantees in the Constitution; al-Awlaki, he wrote, "was simply ordered killed by the President: his judge, jury and executioner."<sup>1</sup> In reply, Holder articulated the position that the executive branch is authorized to use lethal force against American citizens in the event that the citizen is a "terrorist who presents an imminent threat of violent attack" and it is not "feasible to capture" her or him.<sup>2</sup> He further stated,

**Some have argued that the president is required to get permission from a federal court before taking action against a United States citizen who is a senior operational leader of Al Qaeda or associated forces. This is simply not accurate. 'Due process' and**

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<sup>1</sup> Greenwald, Glenn. "The Due-Process-Free Assassination of U.S. Citizens is Now Reality." *Salon*. 30 September 2011

<sup>2</sup> Savage, Charlie. "U.S. Law May Allow Killings, Holder Says." *The New York Times*. 5 March 2012.

**'judicial process' are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.** <sup>3</sup>

This style of legal argumentation received increased attention in early 2013 when Senator Rand Paul of Kentucky filibustered the nomination of John Brennan as the Director of the Central Intelligence Agency. Paul's filibuster was a response to claims made by Holder about the scope of the executive's power; in particular, Paul cited comments from a letter by Holder that suggested it might be potentially legal for the executive branch to use lethal force, in the form of a drone strike, against an American citizen within the borders of the United States.<sup>4</sup> Although Holder later stated that the executive branch was not claiming the power to kill American noncombatants on U.S. soil,<sup>5</sup> concerns persist over the exact nature of the executive's understanding of its dual powers to fight enemies abroad and to punish crime domestically.

These stories are indicative of a legal trend toward greater ambiguity between the state's ostensibly separate powers to make war and punish criminals. Various aspects of the "War on Terror" (indefinite detention, warrantless and roving wiretaps, and mass data surveillance and collection by the NSA of American citizens and foreign allies alike) as well as more purely domestic matters (the militarization of the police, the police response to mass protest movements like Occupy, and even "Stand Your Ground" laws) all speak to the erosion of any

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<sup>3</sup> Ibid.

<sup>4</sup> See Weiner, Rachel, Aaron Blake, and Philip Rucker. "Eric Holder Responds to Rand Paul with 'no,' Paul Satisfied." *The Washington Post*. March 7 2013

<sup>5</sup> Holder's response is exceptional for its snark. The day after Paul's thirteen hour filibuster, Holder sent him a brief letter that read: "Dear Senator Paul: It has come to my attention that you have now asked an additional question: 'Does the President have the authority to use a weaponized drone to kill an American not engaged in combat on American soil?' The answer to that question is no." See Voorhees, Josh. "Eric Holder's Two-Sentence Response to Rand Paul's 13-Hour Filibuster." *Slate*. 7 March 2013.

clear, conceptual difference between the institutions of punishment and war. Increasingly, military tactics and hardware are used to combat the commission of domestic crime, while simultaneously the United States wages a “War on Terror” that, at least in its aims, more resembles the punishment of international criminals than the traditional picture of combat between nations.

This trend strikes many as a conflation counter to the spirit and character of the foundational political commitments of not only the United States, but of the liberal political tradition itself.<sup>6</sup> This paper explores the ways in which the inability to distinguish between punishable actions committed by citizens and acts of aggression committed by external agents is, in fact, deeply rooted in the philosophical progenitors of the liberal tradition. Specifically, the natural law and social contract traditions have both historically defended a view that implicitly links the concepts of war and punishment by deriving them from the same sources. Although the main figures associated with both theoretical traditions write of punishment and war as seemingly separate institutions, a close reading of the philosophical justifications for the state’s use of coercive force offered by these individuals reveals that such a separation is either unintended or untenable. The most influential figures in these traditions all derived the right to punish from a more general power to make war, and any distinction between the transgressions of citizens and noncitizens arises for pragmatic rather than conceptual reasons.

It might be tempting to respond to the limitations of our historical philosophical foundations by calling for a clean break with the past. After all, there is already much reason to

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<sup>6</sup> For an example that has received a significant amount of attention in recent times, see Balko, Radley. *Rise of the Warrior Cop: The Militarization of America’s Police Forces*. New York: Public Affairs Press, 2013.

be suspicious of Enlightenment ideals that preach the fundamental equality of individuals, yet arose in a historical and geographic circumstance characterized by rampant inequality, exploitation, and violence against any person who did not meet extraordinarily specific social, racial, and gender criteria. If these political theories also fail us in one of the critical tests of the current age, all the worse for adhering to them. Whatever the merits of such a break, however, it be revolutionary in every sense of the word; the present Constitution of the United States would need to be radically revised in order to better reflect whatever political principles we chose to endorse in place of the current ones. Given the unfathomable scope of that alternative, this paper will instead seek an answer to this problem within the extant liberal structure.

Despite the deep connections between the powers of punishment and war implicitly posited by both the natural law and social contract traditions, I will argue, there is a theoretical solution available that would address the problem of delimiting species of state violence from within the framework of the liberal tradition. This solution takes the form of revisions to the classical social contract approach. In effect, this would provide a richer, more stable basis from which to make claims against the ongoing blurring of the line between war and punishment in this country. This solution involves two elements. First, we must recognize that any conception of state authority that relies on substantive natural laws will be ultimately unable to distinguish between war and punishment. I contend that the natural law tradition's justification for the state's use of coercive force necessarily renders it blind to the affiliations of citizenship; all those who violate natural law are deserving of the same treatment. This is a necessary feature of modern natural law theory, and there is no consistent way to explain state force that does not all originate in the same power. This is not true, however, of those social contract accounts that do

not rely on substantive or normative conceptions of natural law. While the social contract was historically formulated in ways that also contribute to the blurring of war and punishment, there are possible formulations of the social contract that would enable the adoption of a strict separation between war and punishment.

The second element of my solution involves delineating the body of positive law from the principles of justice contained in the hypothetical social contract. This distinction allows for a more nuanced version of social contract than the theories sketched out by Hobbes and Rousseau. I call this approach the “two-tier” social contract theory. By decoupling the social contract from any account of natural law, the state’s authorization to use force is no longer linked to a transferred individual right of nature. Further, by recognizing that the social contract is not, in fact, between the citizens and the state, but rather amongst the citizens themselves, the two-tier view need not treat violations of positive law as breaches of the social contract. This opens up the conceptual space, allowing for a theory with a distinct, inviolable space for punishment of citizens.

## **I. Natural Law**

The constellation of ways of thinking about political authority and moral obligation that form the natural law approach dates back to at least Stoics, if not to Aristotle and Plato.<sup>7</sup> During the medieval period, competing variations of natural law theories came to dominate Christian philosophy.<sup>8</sup> While there were substantive disagreements between natural law theorists over

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<sup>7</sup> Kainz, Howard P. *Natural Law: An Introduction and Re-examination*. New York: Carus Publishing Company, 2004. pp. 5-10

<sup>8</sup> *Ibid.*, p. 17-25

the ages, the essential details remained more or less unchanged. According to the proponents of natural law, there are moral rules that objectively constrain the behavior of all human beings. These rules are discoverable by reason and independent of any social or civil affiliations; they are rules we are subject to simply by virtue of our humanity. During the millennium between the rise of Scholastic Christian theology and the development of secular political philosophy, these rules were explicitly seen as authored and enforced by God. Just as God was the author of the natural laws governing the physical world, so too had God created the moral laws governing humankind.

The form of natural law theory that concerns us at present, however, can be traced to 1625 and the work of Hugo Grotius. While there are clear similarities and affinities between the work of the ancients and medievals and that of the early moderns, the developments of the natural law tradition in the seventeenth and eighteenth centuries mark a dramatic shift away from the classical and toward the contemporary. By adopting a secular (or, at least, agnostic) cosmology, Grotius and the major natural law theorists who followed – prominently including Samuel von Pufendorf, John Locke, and Jean-Jacques Burlamaqui – paved the way for the use of natural law theory to not only ground the secular, liberal state, but argue for the moral necessity of such a form of political organization.

Echoes of the dominant natural law themes are visible in many of the key documents that ground the United States' most basic political principles. The Bill of Rights, for instance, is interpreted by some scholars as a direct concession to the idea that individuals have basic,

normative rights.<sup>9</sup> The influence of natural law themes is not limited to the Bill of Rights, however, but rather is discernible elsewhere. Jurist and legal scholar Fowler Harper writes,

**The Declaration of Independence, if it has no other significance, stands as a memorial to the devout belief that the science of politics had forever indubitably proved that a government of laws had for its one and only objective the protection of individual rights against both private and social interference.<sup>10</sup>**

As we will see below, however, the presence of these elements of the natural law tradition in the foundations of the United States' most basic political principles exposes the state to potential difficulties delineating between war and punishment. This is a direct result of the way in which the classical natural law theorists justified the state's use of force. By linking the state's power to exercise coercive force with the right individuals have in the state of nature to enforce laws of nature and protect themselves, the natural law tradition establishes a conception of the state that must punish criminals and enemy combatants in the same manner, with the same methods, and for the same reasons.

### *Hugo Grotius*

Hugo Grotius is frequently taken as the starting point of the modern natural law tradition. There is a rationale behind this approach: his work takes steps away from a strict reliance on revelation with an eye toward establishing a secular basis for natural law. Indeed, he is cited by later natural law theorists such as Pufendorf and Barbeyrac as the father of modern

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<sup>9</sup> See Desmond, Charles S. "Natural Law and the American Constitution." *Fordham Law Review*, Vol. 22, No. 3 (1953) pp. 236-237

<sup>10</sup> Harper, Fowler Vincent. "Natural Law in American Constitutional Theory." *Michigan Law Review*, No. 62 (1927), p. 64

natural law theory.<sup>11</sup> A quick perusal of his masterpiece *The Rights of War and Peace* might lead one to conclude that he is still operating under a broadly medieval way of approaching philosophy, due to his continued reliance on the scholastic habit of appealing to authority. Although scholars have recently made compelling arguments against the view that Grotius was any kind of secular pioneer,<sup>12</sup> what is important for us here is how Grotius was understood by his immediate successors. On this question, there is little doubt that later natural law thinkers interpreted Grotius as employing a traditional form of writing in order to enable him to progress toward his original, secular goal with less opposition from the religious and intellectual establishment of the 17<sup>th</sup> century.<sup>13</sup> Even still, his efforts to incorporate the received wisdom of centuries of jurisprudence lead to a certain amount of tension in his work. Despite the pains he takes to weave together biblical citations and passages from Greek philosophers, Roman jurists, and medieval scholastics, unsurprisingly he cannot fully avoid some conflicts.

One point on which Grotius is relatively clear, though, is the state's authorization to use force against its own citizens. This power is directly derived from a right guaranteed to all pre-social individuals by the laws of nature, namely the right to use appropriate violence against any 'inferior.' Grotius's writings on the subject of punishment serve as an excellent illustration of this position.

Grotius holds that punishment can only be inflicted by one who has a right;<sup>14</sup> violence by one who lacks a right to punish cannot be rightful punishment – even if it is directed at one

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<sup>11</sup> See Irwin, Terence. *The Development of Ethics: Volume II: From Suarez to Rousseau*. Oxford: Oxford, University Press, 2008, p. 332.

<sup>12</sup>Haskell, John D. "Hugo Grotius in the Contemporary Memory of International Law: Secularism, Liberalism, and the Politics of Restatement and Denial." *Emory International Law Review*, Vol. 25, No. 1 (2011).

<sup>13</sup> See Irwin, 333

<sup>14</sup> Grotius, Hugo. *The Rights of War and Peace*. 1625. Richard Tuck, Ed. Indianapolis: Liberty Fund, 2005, p. 222.



who has done wrong and is in direct response to her or his wrongdoing. As for who he takes to have such a right to punish, the matter is more complicated. He holds that the question of who has the right to punish offenders is not one determined by a fixed law of nature (although the necessity of punishment is itself determined by the law of nature).<sup>15</sup> He lays out all that we can gain from a well-reasoned consideration of the issue:

**It is deemed most suitable for a superior only to be invested with the power of inflicting punishment. Yet this demonstration does not amount to an absolute necessity, unless the word superior be taken in a sense implying, that the commission of a crime makes the offender inferior to every one of his own species, by his having degraded himself from the rank of men to that of the brutes, which are in subjection to man.**<sup>16</sup>

In other words, violating the laws of nature renders one deserving of punishment – or, at least, demonstrates that one so deserves. Reason – our source of knowledge about the laws of nature – cannot tell us which specific person or persons are authorized to punish such violators. Grotius takes it as a matter of rationality, though, that the punisher ought to be a superior. The only way to make sense of this in the state of nature, he argues, is to take what will later become the standard natural law position: by violating the law of nature, the violator proves to be of an inferior sort, like an animal or a “brute.” A human might not have the right to engage in violence against her or his equal, but there is no question to Grotius’s mind that she or he does possess such a right against animals. If wrongdoers are like animals in their inability to act in accordance with law, then they are also vulnerable to abuse at the hands of other humans. This means that all law-abiding persons, insofar as they are human, are now naturally superiors and can therefore punish the wrongdoer.

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<sup>15</sup> Ibid, p. 223

<sup>16</sup> Ibid.

This account of punishment in the state of nature is well supported by what he has to say on the subject of war between states.<sup>17</sup> As Grotius's focus was on establishing rightful conditions of war that would, in turn, allow for peace to exist between nations, much of his book is given over to considerations of the various kinds of justifiable conflict. One form of international violence that he considers potentially justifiable is war initiated in order to punish another nation for gross violations of the laws of nature.<sup>18</sup> The relationship between nations is parallel to the situation of persons in the state of nature, meaning that if punishment is possible in the former case, it would also be possible in the latter. Presumably, the rationale is also similar; if a nation engages in behavior that gives others a claim of superiority, then it is punishable by these other states.<sup>19</sup>

If punishment is warranted in the state of nature due to the inferiority of one who would violate a natural law, what kind of basis can there be for punishment in civil society? After all, Grotius does not think that just anyone in a civil state has the right to punish violators of the state's laws. This power belongs exclusively to the sovereign.<sup>20</sup> The reason given for the sovereign's exclusive claim to the use of force in executing the laws and punishing violators also

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<sup>17</sup> *Ibid.*, p. 75

<sup>18</sup> It is important to note that these violations must occur between states; one state's abuse of its own citizens would not be appropriate grounds for punishment. Only the actions of states against other states are proper grounds for punishment.

<sup>19</sup> Although Grotius does not discuss limitations on punishments that can be inflicted against individuals who violate the laws of nature, we might find evidence that he envisioned such limitations by considering what he says on the subject of war. Given the parallel between states and individuals in the state of nature, the fact that he argues in favor of limiting what acts a state can engage in during warfare (for instance, he prohibits the unnecessary killing of noncombatants), would suggest that he favors similar kinds of limitations on individual punishment in the state of nature.

<sup>20</sup> Grotius allows for the possibility of a division of powers, in which case there might be a designated executive authority who is distinct from the person or body that holds supreme sovereign authority. In such a case, however, the executive is still merely an agent of the sovereign; any power that he or she wields is itself legitimate only because it is a function of the sovereign's power.

has to do with superiority. In this case, the sovereign is superior by virtue of her or his position in two senses. On the one hand, the members of the state have agreed to give such power to the sovereign. Grotius believes the governed give their consent, thus imbuing the sovereign with all the authority that he or she needs. On the other hand, the sovereign, as the one who creates laws, also has the power to enforce the laws—the same way that God is the only one who could automatically enjoy the kind of superiority necessary for enforcing the laws of nature. This also explains why the sovereign can punish illegal actions that do not directly violate a law of nature; the sovereign’s authority renders any otherwise permissible actions impermissible.<sup>21</sup>

As we have seen, Grotius explicitly connects the right to punish any violator of natural law that all pre-civil persons enjoy with the sovereign’s right to punish citizens of her or his state. The latter power is merely the extension of the former into a new situation; state punishment, in other words, is deserved in light of the criminal’s violation of natural law, either directly or indirectly. The use of violent force against citizens and non-citizens is justified in the same manner, and thus Grotius cannot make sense of any strict differences in the reasons for or methods of punishing these two different groups of people. As we will see below, this issue recurs again and again throughout the natural law tradition.

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<sup>21</sup> Take, for instance, the example of one who drives on the wrong side of the road. Certainly no one would think that driving on the wrong side of the road was prohibited by a law of nature. Rather, the individual who drives on the wrong side of the road indirectly violates a law of nature by ignoring what Grotius takes to be manifest to reason: we must follow the legitimate commands of a sovereign or suffer the consequences.

*John Locke*

Perhaps the name most associated by Americans with the social contract tradition, Locke used one version of social contract theory to defend a conception of the state that involved limited authority, division of legislative and executive powers, and a constitutionally enshrined right to resistance and even rebellion in instances in which the state routinely overstepped its bounds. The influence of such thinking is visible in the Declaration of Independence's claim that "When a **long train of abuses** and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security."<sup>22</sup>

It might seem strange, then, to list Locke as a natural law theorist, rather than with the social contract tradition. The reason for this is simple: despite his support for the social contract, Locke is still firmly committed to the view that normative laws of nature exist in pre-civil society and play a guiding role in determining the kind of state that humans could accept. In other words, Locke is indeed a social contract theorist, but he defends it because of his deeper commitment to the laws of nature. He describes the state of nature thusly:

But though this be a *state of liberty*, yet *it is not a state of license*...The state of nature has a law to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all *equal and independent*, no one ought to harm another in his life, liberty, or possessions.

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 man's hand, whereby every one has a right to punish the transgressors of that law.<sup>23</sup>

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<sup>22</sup> US Declaration Ind.

<sup>23</sup> Locke, John. *Second Treatise of Government*. 1690. C.B. Macpherson, ed. Indianapolis: Hackett Publishing Company, Inc., 1980.

In addition to the laws of nature, this passage describes Locke's commitment to a natural executive right. In other words, whenever any of our fellow humans violate the laws of nature, every other human is entitled and even obligated to respond by punishing the transgressor. I may not be the victim of a crime – or even know the victim – but I am still justified in punishing the criminal. This is a relatively striking claim, but Locke sees it as no different than the power that we have to defend ourselves from wild animals:

Every man, in the state of nature, has a power to kill a murderer, both *to deter* others from doing the like injury...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 *lion* or a *tyger*, one of those wild savage beasts, with whom men can have no society nor security.<sup>24</sup>

Like Grotius, Locke argues that the sovereign's ability to punish in a state is an extension of this executive right in the state of nature. He conceives of the state as limited in its possible powers to those that the individuals who comprise the state had themselves prior to joining the state.<sup>25</sup> There is no other source of state power or authority, and so any ability to punish must be based on the individual right that exists in the state of nature. Rather than concluding that the omnilateral, reciprocal agreement of all members is what gives rise to the that state's authorization to punish, as some later social contract theorists posit, Locke holds that this agreement is merely a consensus to allow a specific individual or body to be the sole party to act on the universal executive right that all possess.

As a result, the state's use of force is still an expression of a natural right. It uses the same authority to punish citizens who violate natural law as it does to wage war against

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<sup>24</sup>Ibid., p. 11

<sup>25</sup> Ibid., p. 70

external enemies who do the same. Like Grotius, Locke cannot meaningfully separate these two different functions of the state, but rather derives them from a single source. This problem threatens any and all natural law theories, as they analytically connect the state's use of coercive power with some pre-existing authorization. Such a connection between various uses of violence makes sense when describing pre-civil agents, and although it remains a coherent way of conceiving of state violence, it does make any distinction between war and punishment impossible. In order to avoid these conclusions, we ought to explore the philosophical underpinnings of liberalism that eschew natural law theory.<sup>26</sup>

## II. The Social Contract

The social contract tradition, reduced to its most basic common elements, is a theory of political legitimacy that holds the only truly legitimate political authority to be that which is derived from the consent of the governed. Whether this consent is explicit, tacit, or merely hypothetically rational, all social contract theories defend the view that any government that does not claim the consent of its citizens has no right to exercise coercive power.<sup>27</sup>

As we saw above, a number of natural law thinkers – like Locke – also embraced the idea of the social contract. While they saw natural law as providing a normative backdrop, they turned to the social contract as a tool for explaining the legitimacy of political authority. It is

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<sup>26</sup> Despite some of the claims cited above, there is a large jurisprudential school that argues against viewing the United States (or any other liberal democracy) as being founded on natural law. See, for instance, Hart, H.L.A. *The Concept of Law*. 1961. 2<sup>nd</sup> ed. P. Bulloch and J. Raz, eds. Oxford: Clarendon Press, 1994; or Raz, Joseph. *The Authority of Law*. Oxford: Clarendon Press, 1979.

<sup>27</sup> Regardless of how it was used or conceptualized by the social contract theorists of the seventeenth century, throughout this paper I will be discussing the social contract and associated concepts – such as the state of nature – as theoretical justificatory devices, rather than entities of historical fact. This is in line with how social contract thinkers from Kant on explicitly envisioned their political project.

important to note, however, that the social contract does not depend on the existence of natural law. Instead of viewing the social contract as normatively required by natural law, one could support it as justified on rational, prudential, or even other moral grounds. As we will see below, there are several important social contract theorists – including Thomas Hobbes and Jean-Jacques Rousseau – who were opposed to or agnostic about the existence of normative natural laws. It is only by decoupling the social contract from the specifics of the natural law that we can succeed in articulating fundamentally distinct concepts of war and punishment.

While the social contract tradition can avoid the problems caused by deriving the state's different uses of force from a single natural right, this alone is unfortunately not sufficient to guarantee that the social contract will yield distinct institutions of war and punishment. Many social contract theorists persisted in elaborating views that implicitly joined these concepts, albeit for different reasons than the natural law thinkers. Rather than thinking that the state's power to use force was linked to some pre-existing normative right, these social contract theorists conceptually linked war and punishment by accidentally eliminating the institution of punishment. Although they continue to use the term 'punishment,' the act they describe is no different than the commission of war against external enemies.

### *Thomas Hobbes*

Hobbes published his masterpiece in social contract theory, *Leviathan*, in 1651. Often hailed as the first modern social contract theorist, Hobbes was motivated by a desire to provide

a stable foundation for political authority.<sup>28</sup> While similar concerns had driven Grotius to propose his natural law account of legitimate political authority, Hobbes had additional commitments that rendered any natural thinking untenable: specifically, he was a partisan of a minimalist, empirical, materialistic worldview that held any pre-existing, independent normativity as anathema.<sup>29</sup> As a result he builds his social contract up solely from the rational operations of mechanistic human agents, independent of any deep sense of natural rights or moral obligations.

This distinguishes him from his successor and foil, Locke, whose social contract doctrine rests firmly on the normative force of the laws of nature. Although Hobbes uses the term, the concept of a law of nature that is deployed in *Leviathan* is dramatically different from the one utilized by other philosophers like Grotius, Locke, and Burlamaqui. While these other natural law theorists hold such laws to be a normative, Hobbes views laws of nature as little more than the products of human prudential reasoning.<sup>30</sup> Given that we all have certain basic needs, he argues, and given the state of nature's rather unpleasant character, it is merely a matter of empirical fact that all humans would prefer to live in civil society. In order for that to happen, certain conditions must be met.<sup>31</sup> Reason, conceived of as a simple tool for means-ends calculations, tells us what these conditions are and how to meet them. This last step—how to meet the necessary conditions for escape from the state of nature—are Hobbes's laws of nature.

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<sup>28</sup> And in particular, one that could prevent the rise of civil strife and war that Hobbes witnessed in England over the course of his own life.

<sup>29</sup> See Hobbes, Thomas. *Leviathan*. 1651. J.C.A. Gaskin, ed. Oxford: Oxford University Press, 1996, pp. 33, 85.

<sup>30</sup> *Ibid.*, p. 86-87.

<sup>31</sup> Foremost among them, we must be able to reliably trust our fellow humans. This is only possible if there is a recognized authority with the power to punish transgressions against the agreements between fellow members of a state.



They are purely a product of the human mind, and rather than being universal, they are merely intersubjective. They coincide by virtue of contingent facts about human reason and desires, rather than out of objective necessity.

For Hobbes, the state is authorized to use force simply because the citizens of the state have agreed to it. There is no normative right for individuals to punish or defend themselves in the state of nature; rather, any individuals outside of civil society are free to do absolutely anything, as there are and can be no constraints on their behavior. It is the danger of this amoral condition that would lead rational agents to agree to join together with others in civil society. When entering states, individuals transfer all authority to some individual or governing body: the sovereign. The sovereign has absolute authority in virtue of the agreement that citizens make to join the state. When the sovereign punishes, it punishes with the authority of the members of the body politic; when it goes to war against external enemies, it does so with the same. Further, there are no limitations on the form, extent, or even rationale of the violence the sovereign is entitled to commit.<sup>32</sup> The sovereign can never commit injustice, regardless of its actions, for it cannot enter into contracts with individual citizens.<sup>33</sup>

When it comes to distinguishing between punishment and war, Hobbes cannot provide us with any answer. His version of the social contract ably avoids the implications of the natural

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<sup>32</sup> Hobbes does hold that the citizens of a state always retain the power to (individually) resist the state if it directly or indirectly endangers their lives. See Hobbes, p. 144. One might think that this entitlement amounts to a certain kind of check on the sovereign's use of force against citizens. This right to resist, is identical to the 'right' that individuals have to defend themselves in the state of nature, and thus citizens can respond to threats of violence in the same manner as external enemies. Once again, there is no substantial difference between punishment and war.

<sup>33</sup> The keeping of contracted agreements is, according to Hobbes, the only basis for justice. See Hobbes p. 95. Rousseau, on the other hand, thinks human beings are capable of moral progress. We perfect ourselves by improving our character. This view allows for some natural normativity, but not one governed by "laws of nature."

law tradition, but it does so in a way that provides us no better foundation for a strict, conceptual divide between punishment and war. Indeed, Hobbes cannot even meaningfully make sense of a just or legitimate use of state force and one that is unjust or illegitimate. All use of force by the sovereign is just and acceptable, and there is no meaningful difference between using it against a member of the state and a non-member.

*Jean-Jacques Rousseau*

Hobbes's version of a social contract devoid of natural law is not, however, the only one. The Swiss philosopher Rousseau defended a variation of the social contract that, for our purposes, holds a great deal of promise. He is not beholden to the laws of nature or the justifications for the state's use of force that are associated with them (although it should be noted that Rousseau is not as adamantly opposed to the possibility of natural normativity as Hobbes is).<sup>34</sup> Moreover, he is famously associated with defending the view that the social contract is an agreement amongst the members of a community, rather than between the individuals and the state. This theoretical division gives him the ability to distinguish between actions that violate the laws of the state and those that violate the terms of the social contract. It is this distinction that will serve as the basis for the two-tier social contract theory I will defend below.

Unfortunately, Rousseau does not go in this direction himself. It may be available to him, but his commitment to strict communitarian principles inclines him toward a position that

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<sup>34</sup> Rousseau, Jean-Jacques. On the Social Contract. 1762. *The Basic Political Writings*. Peter Gay, ed. Donald A. Cress, trans. Indianapolis: Hackett Publishing Company, 1987, p. 141

fails to draw the necessary distinction. Instead, Rousseau is committed to the view that any commission of crime, regardless of how small, is a violation of the social contract and grounds for the expulsion of the perpetrator. In effect, this position ultimately entails the elimination of the entire institution of punishment; all that remains is the state's power to wage war.

In his *On the Social Contract*, Rousseau keenly points out that if the social contract requires that a people must give consent to political authority, this implies that the people exist, as a community, prior to the institution of political authority.<sup>35</sup> The social contract, then, is not the establishment of a ruler, form of government, or even political constitution; rather, the social contract is the agreement by which disparate individuals become a political community together. Only such a community has the power to create a constitution or government.

When it comes to the authority that such a government has to use coercive force, Rousseau's answer closely follows Hobbes's. Rousseau argues that only the "total alienation of each associate, together with all of his rights, to the entire community"<sup>36</sup> can ensure that independent individuals can come together as a unified body politic. What this means, however, is that there are no strong checks – no inalienable rights – to keep the actions of the sovereign in check. True, the sovereign is governed by the general will, which aims unfailingly at "public utility."<sup>37</sup> All this means, however, is that the state cannot adopt policies that cause useless harm. Besides this, the state has "an absolute power over all its members"<sup>38</sup> It can, and indeed must, sacrifice the minority for the majority.

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<sup>35</sup> Ibid., p. 147

<sup>36</sup> Ibid., p. 148

<sup>37</sup> Ibid., p. 155

<sup>38</sup> Ibid., p. 156

This power is manifested in the way in which Rousseau envisions “punishment” as being carried out in civil society. He writes,

**Every malefactor who attacks the social right becomes through his transgressions a rebel and a traitor to the homeland; in violating its laws, he ceases to be a member, and he even wages war with it. In that case, the preservation of the state is incompatible with his own. Thus one of the two must perish; and when the guilty party is put to death, it is less as a citizen than as an enemy. The legal proceeding and the judgment are the proofs and the declaration that he has broken the social treaty, and consequently that he is no longer a member of the state.<sup>39</sup>**

Although he uses the term punishment elsewhere in *On the Social Contract*, in this passage Rousseau reveals that he does not leave any conceptual room for any institution of punishment. Clearly, finding a citizen guilty of crime is sufficient for revoking that individual’s citizenship.<sup>40</sup> If punishment is understood as the use of coercive force against citizens in response to some violation of positive law, then it is clear that no such thing can occur in Rousseau’s vision for the state. One cannot be both a citizen and an appropriate subject of punishment; while one is a citizen, punishment would be inappropriate and undeserved, and once punishment is appropriate and deserved, the target is no longer a citizen. Instead, the violence visited upon the criminal is not conceptually different from the force the state would use against an enemy. Given this conclusion, it is clear that Rousseau’s strict communitarianism cannot allow for the preservation of the state’s separate powers to wage war against external enemies and punish citizens guilty of crime.

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<sup>39</sup> Ibid., p. 159

<sup>40</sup> There is some ambiguity as to what Rousseau takes to be the *cause* of the loss of membership in the body politic. One possibility, which we can call the ‘revocation reading,’ is that the perpetrator of crime has her or his citizenship revoked when she or he is found guilty of committing a criminal act. In this case, the loss of membership occurs as an official function. The other possibility, which we can call the ‘recognition reading,’ is that the criminal loses her or his membership as soon as the crime is committed. In this case, the court does not revoke a criminal’s citizenship; it merely recognizes that it has already been lost.

This is the crux of the social contract's historical conflation of war and punishment. If any act of crime is construed as a violation of the terms of the social contract – a breach of the contract, so to speak – then all crimes, no matter the size or scope, effectively eject the perpetrator from civil society. Any 'punishment' is carried out against someone who is no longer a co-citizen. As opposed to natural law theorists, however, the social contractarians officially endorse the view that punishment, as a distinct form of violence, can only occur in civil society. These two positions, taken together, render punishment an impossibility, if not an outright contradictory concept. Only citizens can be punished, but the very act of crime renders one no longer a citizen, leaving no one to punish.

This, however, can be avoided. There is a perfectly viable way for the social contract theory to avoid this problem, as well as the ones created by Hobbes's approach. The solution, which I will call the two-tier social contract, relies on recognizing the important differences between the community and the state. In effect, the two-tier view endorses the social contract claim that punishment is a distinctly civil form of violence; it rejects, however, the idea that any violation of the law is grounds for the revocation of an individual's membership in the community.

At the outset, the two-tier social contract closely resembles Rousseau's view. It accepts the claim that the real basis for legitimate political authority is not an explicit, tacit, or hypothetically rational agreement between the people and the government, but rather one that occurs unilaterally between each individual who will subsequently exist as a member of the community to be formed. Such an agreement creates a community, and continued membership in the community would require adherence to the basic principles of the agreement. These

principles, however, would only operate at a very abstract level; they would not govern most of the details that must be fixed by any effective, robust state. In other words, not every law represents a principle of the social contract.<sup>41</sup>

The main way in which the two-tier view differs from Rousseau's lies in the role played by the state government and positive law. After the social contract establishes the basic norms for a community, the community can craft a constitution and establish a government. The legislative products of this government are what are known as positive law; these laws fix most of the administrative details of civil society. Each one of these laws has an associated penalty that is applied to whoever violates the law. This application of punishment is justified just in the case that it follows the rules laid down in a constitution that itself was (or, potentially, could have been) created by a unified community. Punishment is not justified in virtue of some natural right, but rather because it is explicitly, tacitly, or hypothetically endorsed by the members of the community.

According to the two-tier social contract position, however, violations of positive law would not be equivalent with voiding the social contract. A member of the state could violate positive law without having her or his citizenship revoked. The only way to void the social contract and lose one's membership in the community would be to either renounce membership in the body politic or act in violation of the basic principles of the social contract. Treason against the community might entail such an expulsion, but jaywalking or even murder of a

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<sup>41</sup> An example might help. A principle of the social contract might take the form: "All citizens deserve equal consideration and respect." Governments cannot function, however, on such general principles alone. Specific laws would need to be instituted to regulate a wide range of needs, including taxes, contract law, functioning of municipalities or provinces, etc.

fellow citizen would not. In other words, the principles of the social contract and the positive laws of the government created by the community would exist at separate levels, or tiers.

In this way, the social contract theory can still make sense of using force against citizens. This category would be distinguished from violence against external enemies by virtue of its justification. As stated above, punishment would be justified by the actual or hypothetical consent of the community's members; war against enemies, on the other hand, would be justified by the presumptive power all individuals or states in the state of nature have to defend themselves.<sup>42</sup> War could never be waged against members of the state, as they are not in a state of nature with respect to the community, but rather are a part of it. The concepts of war and punishment, therefore, would remain firmly distinct.

## **Conclusion**

One might think that the blurring of the boundaries between war and punishment is not a problem, but rather indicative of the way things actually are. In both instances, the state acts to preserve the security of its citizens, and it ought to act with appropriate severity in either case. War and punishment are, after all, traditionally understood as powers of the executive branch. Perhaps they do not need to be as strongly demarcated as the sundry powers of different branches of government; regardless of rhetorical reasons, the truth is that there is no firm difference.

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<sup>42</sup> We might still think that there are moral limits to the ways in which states can engage in war. These limits, however, would be based on some normative conception that is distinct from either 1) natural law or 2) the normativity generated by state membership. Kant provides a good example of this approach in his *Towards Perpetual Peace*.

This way of thinking is, I believe, mistaken. One of the hallmarks of the liberal political tradition is the view that the citizens of a state are granted a degree of autonomy, authority, equality, and liberty not extended to non-citizens. These legal protections – what free and equal persons would select in some ideal, rational perspective – are essentially meaningless if not secured against government force by strict means. While security may be a sufficient standard for the use of force against external threats, a stronger standard exists for citizens. Rejecting these core beliefs is to reject one of the basic elements of liberal political philosophy.

Throughout this paper, I have argued that the natural law tradition is both historically and conceptually committed to such a view. According to natural law theorists, the state's authorization to use force in any and all situations is derived from a power that individuals have in the state of nature. This power is directed at one's fellow humans, with no attention paid to our affiliation with these persons. Their acts alone provide the justification for a violent response. The state is likewise unable to distinguish between its members and others; it justifies the use of force against both groups in the same manner. To attempt to draw a strong line between war and punishment would be to reject one of the basic commitments of the natural law position.

This is not true of the social contract, however. Although some contractarians might follow Rousseau in classifying all violations of law as breaches of the original contract, this need not be the case. A two-tier social contract could draw a strict distinction between crimes that threaten the original contract and those that merely violate some particular positive law. While the former might be grounds for expulsion from the protections guaranteed to citizens, the



latter would not. This two-tiered view could provide the basis for a strict distinction between the powers of war and punishment within the liberal tradition.