



Punishing States and the Spectre of Guilt by Association

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Abstract

Proponents of punishing states often claim that such punishment would not distribute to members of the state, and so it would not subject innocent citizens – those who did not participate in the crimes, or dissented, or even were among the victims – to guilt by association. This essay examines three features of state punishment that might be said not to distribute to citizens: it is burdensome, it is intentionally so, and it expresses social condemnation. Ultimately, I contend that when a state is punished, the burdens do distribute to citizens as intended, condemning burdens – that is, as punishment. Thus the nondistribution of punishment thesis fails as a response to the guilt-by-association objection.

Keywords

international criminal law – punishment – mass crimes – responsibility

1 Introduction

The institutions of international criminal law that have developed in the decades since the Nuremberg trials have consistently focused on prosecuting and punishing individual human agents for their roles in mass crimes. The International Military Tribunal at Nuremberg expressed what has since become the governing view: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be

enforced.¹ In the wake of atrocities such as the genocides in Rwanda and Srebrenica, however, the tribunal's pronouncement may seem too simplistic. Genocide and crimes against humanity, after all, are by their nature group endeavours. Individuals may murder, torture, or rape, but mass crimes such as genocide result from the actions of groups of individuals, who may be organized in some strong sense or may, at least, influence each other in ways that make possible what would not have been possible from human beings acting individually. A growing literature has thus developed in recent years around the question of how best to assign responsibility for international crimes.²

One option suggested by a number of scholars is that states themselves should be subject to punishment for mass crimes, either in addition to or instead of their individual members. On this view, punishing states is often justified because states themselves are in many cases the responsible agents of genocide and other atrocities.³ Thus Anthony Lang writes: "[W]hile individuals have been rightfully accused of and punished for these crimes, it seems appropriate that *states* be held responsible as well, for only an organized community has the means to inflict violence on such a large scale."⁴ Such punishment might take different

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- 1 International Military Tribunal for the Trial of the Major War Criminals, judgment of Oct. 1, 1946; reprinted in 41 *American Journal of International Law* (1947) 221.
 - 2 See, e.g., Tracy Isaacs and Richard Vernon (eds.), *Accountability for Collective Wrongdoing* (Cambridge, Cambridge University Press, 2011); Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge, Cambridge University Press, 2005); Larry May, *Aggression and Crimes Against Peace* (New York, Cambridge University Press, 2008); Larry May, *Genocide: A Normative Account* (Cambridge, Cambridge University Press, 2010); Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge, Cambridge University Press, 2007); and Renee Jeffery (ed.), *Confronting Evil in International Relations: Ethical Responses to Problems of Moral Agency* (New York City, Palgrave Macmillan, 2008). For discussion of collective responsibility more generally, see, e.g., Larry May, *Sharing Responsibility* (Chicago, University of Chicago Press, 1992); Larry May and Stacey Hoffman (eds.), *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics* (Savage, MD, Rowman and Littlefield Publishers, Inc., 1991); Peter A. French and Howard K. Wettstein (eds.), *Shared Intentions and Collective Responsibility*, XXX *Midwest Studies in Philosophy* (2006); Larry May and Raimo Tuomela (eds.), *Collective Responsibility*, XXXVIII *Journal of Social Philosophy* (fall 2007).
 - 3 States are not, of course, the only sort of group that may commit international crimes. Nonstate entities, such as terrorist groups, may also commit crimes against humanity or genocide. In what follows, however, I focus on punishment of states.
 - 4 Anthony F. Lang Jr., 'Crime and Punishment: Holding States Accountable,' 21 *Ethics & International Affairs* (2007) 239–257. See also, e.g., Anthony F. Lang, 'Punishing Genocide: A Critical Reading of the International Court of Justice,' in Isaacs and Vernon (eds.), *supra* note 2, pp. 92–118; and David Luban, 'State Criminality and the Ambition of International Criminal Law,' in Isaacs and Vernon (eds.), *ibid.*, pp. 61–91.

forms: Lang proposes economic sanctions or reparations, or more severely, coercive military actions; similarly, David Luban suggests fines and reparations, or even conquest and reconstruction (“capital punishment”) of the state.⁵ For scholars such as Lang and Luban, punishment of states in one form or another is an attractive option insofar as it better ensures that no responsibility for the crime goes unassigned, whereas it has proven difficult to account fully for responsibility for mass crimes by prosecuting and punishing individual contributors.

If punishing states appears promising as a way of protecting against the underassignment of responsibility for mass crimes, however, such punishment also raises concerns about the overassignment of responsibility. When a state is punished by economic sanctions, for instance, it is the state’s individual members who will bear the corresponding burdens. But many members of a state punished for international crimes may not have participated in the crimes, may have expressed dissent or worked against them, or may even have been among their victims.⁶ Thus the spectre of guilt by association looms. To subject people who are themselves innocent of criminal wrongdoing to punishment for what other members of their state have done would presumably strike many of us as unjust.⁷ Such treatment appears inconsistent with the principle of respect for persons, which requires at a minimum that our treatment of others be responsive *to them*, to what they have freely done or intended to do.

5 Lang, ‘Crime and Punishment,’ *ibid.*, p. 250; Luban, *ibid.*, p. 90.

6 It is important also to note that many nonparticipants who do not express dissent or actively work against their state’s mass crimes may fail to do so either because their state offers no effective means of doing so or, worse, because the state (either implicitly or explicitly) threatens reprisals against dissenters.

7 Although I frame the guilt-by-association worry as involving the punishment of innocent citizens, some theorists have contended that punishment is only of someone guilty of criminal wrongdoing, so that, by definition, innocent people cannot be punished. See Anthony M. Quinton, ‘On Punishment,’ 14 *Analysis* (1954) 133–142; Susan Dimock, ‘Retributivism and Trust,’ 16 *Law and Philosophy* (1997) 197–203, on p. 42; and David Boonin, *The Problem of Punishment* (Cambridge, Cambridge University Press, 2008) 17–21. If we accept this as an essential feature of punishment, then one might claim that the guilt-by-association objection fails straightforwardly: innocent citizens are not punished when the state is punished, specifically because they are innocent. I share Hart’s concerns about use of what he termed the ‘definitional stop.’ H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford, Oxford University Press, 1968), 5. Regardless, for those who would build the offender’s guilt into the definition of punishment, the guilt-by-association worry can be rephrased so as not to refer to *punishment* of the innocent; rather, the worry is about imposing condemnatory, intended burdens on the innocent.

This essay scrutinizes a common line of response to the guilt-by-association objection: namely, that punishing states does not amount to punishing the states' individual members.⁸ Toni Erskine thus writes: "The group itself is the moral agent. If the group is also the proposed object of punishment ..., then the fear that punitive action is being directed against individuals who are being unfairly held to account is unwarranted."⁹ In other words, state punishment need not distribute. Is this line of response – call it the nondistribution of punishment thesis – persuasive?

In what follows, I first flesh out certain features of punishment that distinguish it from other ways of responding to international crimes. In particular, punishment is burdensome, it is intentionally so, and it expresses condemnation. I then examine whether, when states are punished, these features distribute to the individual members of the state. Advocates of the nondistribution of punishment thesis typically point to one or more of these as nondistributive, so that punishment does not trickle down, so to speak, from the state to its members. But I contend that the burdens of state punishment do distribute

8 This is not the only sort of response defenders of state punishment might offer. Here are three other options: (i) First, they might grant that when a state is punished, this does punish even those citizens who were not involved or opposed the wrongdoing, but then argue that these citizens nevertheless somehow deserve this punishment. Although Amy Sepinwall does not make this argument precisely, we find a basis for it in her argument that citizens may be morally responsible and so blameworthy for wrongdoing 'even though they did not participate in, facilitate, or even tolerate the abuses committed in their midst.' Sepinwall, 'Citizen Responsibility and the Reactive Attitudes: Blaming Americans for War Crimes in Iraq,' in Isaacs and Vernon (eds.), *supra* note 2, pp. 231–260, on p. 236. (ii) Second, they might concede that some individuals are unjustly punished when their state is punished, but then contend that this is nevertheless justified all things considered because of some overriding benefits state punishment promotes. Lang seems to endorse this sort of defense when he writes, 'this punishment might result in the harm or death of individuals who had nothing to do with the policies of the government,' but nevertheless 'one might argue that the seriousness of genocide demands that punitive measures be employed even knowing there is a significant chance that innocents might die, and regrettable as that is.' Lang, 'Crime and Punishment,' *supra* note 4, p. 255. (iii) Third, they might argue that innocent citizens need not be punished when their state is punished, because although the punishment will inevitably distribute among citizens, it can be structured so that it distributes only to the culpable citizens. I am skeptical of all three responses, although in this essay I do not address (i) or (ii). I address (iii) in section 6.

9 Toni Erskine, 'Kicking Bodies and Damning Souls: The Danger of Harming 'Innocent' Individuals while Punishing 'Delinquent' States,' in Isaacs and Vernon (eds.), *supra* note 2, pp. 261–286, on p. 276. See also Avia Pasternak, 'The Distributive Effect of Collective Punishment,' in Isaacs and Vernon (eds.), *ibid.*, pp. 210–230, on pp. 216–217.

among citizens as intended burdens, and that there is good reason for regarding these intended burdens as expressing condemnation of the state's members, as well. If, as I suggest, punishment of states does distribute to the members of the state, this raises a question of whether state punishment might be distributed in a justified manner. I discuss this question briefly in the penultimate section, and then I conclude by considering a few alternatives to state punishment.

2 Punishment's Distinctive Features

Punishment is, of course, just one of a number of possible responses to mass crimes. Other responses include, for instance, reparations, public censure, or reconciliation, none of which are *necessarily* punitive (though reparations and public censure, at least, can be punitive). It will thus be useful to highlight certain features of punishment that distinguish it from other types of response to wrongdoing.¹⁰

(As a preliminary matter, it is worth noting that punishment is a response to a criminal offense that has already been committed. Here the relevant point is that punishment is conceptually distinct, and raises distinct moral considerations, from defense of self or others. Advocates of state punishment sometimes imply that it may be justified as a means of stopping ongoing atrocities.¹¹ But this conflates punishing wrongdoing with stopping wrongdoing. We can think of defense as the imposition of force on perpetrators to stop them from committing, or continuing to commit, some wrongful act. Punishment, by contrast, imposes burdens on offenders not to ward off their impending or ongoing attacks, but rather in response to some wrongdoing they have already committed.¹² Thus the use of military force with the aim of stopping an

10 For more on punishment's distinctive features, see, e.g., Boonin, *supra* note 7, pp. 3–28; and Hart, *supra* note 7, pp. 4–6.

11 See, e.g., Lang, 'Crime and Punishment,' *supra* note 4, p. 253. Of 'punishing states' through military force, he writes, 'Such actions would be both deterrent, in that they would communicate to the larger international community, and retributive, in that that the specific state committing the crime would be forced to stop.' Lang's claim here is puzzling in that, first, he regards forcing a state to halt its ongoing commission of a crime as punishment, and second, he characterizes this as retributive punishment.

12 If the aim of punishment is to deter potential wrongdoers from committing future offenses, then punishment may appear more closely analogous to defense. Indeed, a number of authors have attempted to justify deterrent punishment by appeal to considerations of defense. Nevertheless, using force in defense of self or others and inflicting

ongoing genocide would not constitute punishment, but the use of military force as a response to a genocidal campaign that has already occurred might, if it met the criteria discussed below, constitute punishment.)

First, whether we think of punishment as involving the infliction of pain or suffering, or the restriction of liberties, or the imposition of harms on offenders, it is in one form or another the imposition of a *burden*. If an offender were given gifts in response to her wrongdoing, or if she were immediately forgiven, we would not regard these responses as punishment. Even if she were censured and told not to offend again, we would not regard this alone as punishment, unless perhaps it could be shown that the censure itself constituted the requisite burden. Regardless, it is generally accepted that burdensomeness is an essential element of punishment.

Second, punishment is *intended* to be burdensome. Many public policies may impose burdens on citizens: taxation or eminent domain, for example. Punishment is distinctive, however, in that its burdens are intended. Some have argued that it is this feature of punishment – not simply that it is burdensome, but that it is intentionally so – that presents the central challenge for attempts to defend the practice.¹³ For present purposes, what is relevant to note is that even if a response to criminal wrongdoing is burdensome, if the burden is merely incidental rather than intended, this will not constitute punishment.

Third, at least since Joel Feinberg's influential article "The Expressive Function of Punishment,"¹⁴ it has been widely accepted as a distinctive feature of punishment that it serves to communicate the political community's *condemnation*, or blame, of an offender for her wrongdoing. Theorists disagree about whether this condemnation is the central function, or perhaps the

burdens as deterrent punishment are distinct notions in need of distinct justifications. The former involves using force against some attacker who is actually threatening or inflicting harm in order to prevent or stop the attack. The latter involves burdening an offender in response to some already committed act, with the aim of discouraging the offender or other potential offenders from acting similarly in the future. This conceptual distinction has normative implications, such as with respect to questions of severity: One might think, for instance, that a state is permitted in certain circumstances to use a greater degree of force to defend itself against an attacker than it may inflict as punishment, after such an attack is completed, as a means of deterring such attacks in the future.

13 This is a recurring theme throughout Boonin's *The Problem of Punishment*. See *supra* note 7, esp. pp. 61–62.

14 Joel Feinberg, 'The Expressive Function of Punishment,' in J. Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton, Princeton University Press, 1970), ch. 5, pp. 95–118.

justifying aim, of punishment, but it is generally accepted as one of punishment's distinctive features. By contrast, this condemning function is not central, for instance, to compensation. Thus if a defendant in a civil suit is required to pay compensatory damages, the aim of the decision, at least in principle, is not to censure the defendant but rather to see that those harmed by the defendant's actions, negligence, etc., are compensated.¹⁵

Theorists have cited other features, such as that punishment is imposed only by an authorized agent, for an offense against legal rules, etc.¹⁶ In this article, however, we can focus on the three features highlighted above: Punishment involves the imposition of a burden, the burden is intended rather than merely incidental, and punishment serves to express social condemnation of the offender. It is in virtue of these features that punishment is said to stand in need of justification; also, it is these features that give rise to our objections to imposing punishment on those who are innocent of criminal wrongdoing. It seems deeply unfair to inflict intended burdens, burdens that express social condemnation, on innocent people. Advocates of punishing states typically share these misgivings, and so they have sought to show that state punishment need not distribute among the state's members. If states could be punished such that their members were not burdened, or at least not intentionally burdened, or were not thereby subject to condemnation, then we could say that punishment itself did not distribute, and the guilt-by-association charge could be refuted. In the next three sections, I examine each of these elements in turn and consider whether they distribute.

3 Do the Burdens of State Punishment Distribute among Members?

One option for defending the nondistribution of punishment thesis is to contend that the burdens characteristic of punishment need not distribute among a state's members. Given that punishment essentially involves the imposition of burdens, if state punishment could be administered in such a way that its burdens did not distribute among the state's citizens, then we could say that

15 See Antony Duff, 'Theories of Criminal Law,' in Edward N. Zalta (ed.), *Stanford Encyclopedia of Philosophy*, <plato.stanford.edu/entries/criminal-law/>, 11 September 2013. This is not to deny, of course, that in practice defendants may often feel a required compensatory payment as burdensome; it is just to point out that censure is not, in principle, the purpose of civil damages.

16 See Hart, *supra* note 7, p. 5; see also Antony Flew, 'The Justification of Punishment,' 29 *Philosophy* (1954) 291–307.

the citizens themselves would not be punished – and so in particular, those citizens who did not participate in (or opposed, or even were victims of) the atrocities would not be unjustly punished. The guilt-by-association charge would miss the mark.

But how might such a punishment scheme work? That is, how could states be punished in such a way that the burdens would not trickle down to the state's members? As already noted, monetary sanctions would impact individual citizens; so would embargoes, boycotts, or the targeted military strikes such as Lang endorses. Alternatively, the international community might take away some of a state's territory.¹⁷ If the territory in question was populated, however, questions would arise about whether this would constitute a burden to those residents. Even if the territory was unpopulated but contained significant natural resources, questions of burden might arise with respect to loss of the resources. It's not immediately clear, then, how a punitive burden could be imposed on the state itself without this burden ultimately being distributed among some number of group members.¹⁸ (Perhaps the burden could be distributed only among the guilty group members. I consider this possibility in section VI.)

Advocates of holding groups collectively responsible typically contend that the actions of the group itself are often not entirely reducible to the contributions of the individual leaders, participants, accomplices, etc.¹⁹ On one version of this claim, the corporate structure of the group itself – the institutional decision-making procedures, distribution of authority, etc. – plays a causal role in the perpetration of the crime that cannot be accounted for among the contributions of the individual group members. If so, then it might seem to follow that state punishment could target these institutional aspects, replacing the problematic procedures and structures with more appropriate ones. Perhaps we might thus impose burdens on the state itself, by encroaching on its sovereignty and altering its structure, without these burdens distributing among the state's members. Indeed, if the newly imposed institutions were more effective, less susceptible to corruption, etc., than those they replaced, then this might be seen as a benefit to members of the state.

The problem here is that if no members of the state are burdened by the punishment, it is not clear where the burden falls. Punishment is burdensome

17 I thank Nate Adams for this suggestion.

18 *Cf.*, Erskine, *supra* note 9, pp. 274–279; and Pasternak, *supra* note 9, pp. 218–219.

19 *See, e.g.*, Philip Pettit, 'Responsibility Incorporated,' 117 *Ethics* (2007) 171–201, on pp. 194–198; and D. E. Cooper, 'Collective Responsibility,' in May and Hoffman (eds.), *supra* note 2, pp. 35–46, esp. pp. 37–38.

insofar as it interferes with or sets back offenders' interests. Monetary sanctions, incarceration, and capital punishment, for instance, are burdensome insofar as offenders have interests in not surrendering their money, not being locked up, not being killed. But a state itself is not the sort of entity that can have interests that are independent of its members' interests. Even if we grant that the state consists in more than just the aggregation of its members – even if it also consists in the institutional structures that govern its members' interactions – these institutional structures themselves are not the sorts of things that can have interests and thus bear burdens.

This is not to say that a state cannot have interests at all, just that a state's interests will not be entirely independent of its members' interests. In light of this, it would not make sense to speak of setting back a state's interests without, in so doing, setting back the interests of any of its members. It would not make sense, for instance, to say that Canada has an interest in continued trade with Japan, so that a trade embargo would constitute a burden for Canada, but that this would not be a burden to any Canadian. So although states may have interests that are more than the mere sum of their members' interests, they do not have interests that are completely independent of any members' interests. Thus measures imposed on a state either will inflict burdens on at least some citizens or will not inflict burdens at all, and so will not constitute punishment.

In summary, the punitive burdens of state punishment do distribute to be borne by the state's citizens. This does not yet mean, however, that the citizens themselves are punished. For this latter claim to be true, the burdens borne by citizens would need to be intentionally burdensome and also expressive of condemnation. I examine these features, in turn, in the next two sections.

4 Are the Distributed Burdens Intended?

We might acknowledge that the burdens of state punishment distribute to the state's members, but then contend that the members themselves are not punished because the burdens imposed on the state are intended as burdens whereas the burdens that distribute to the members are not so intended. In his defense of punishing criminal corporations, Peter French compares the burdens that group members bear when their group is punished to those borne by individual offenders' family members and dependents, who "are frequently cast into dire financial circumstances."²⁰ As regrettable as the burdens borne

20 Peter French, *Collective and Corporate Responsibility* (New York, Columbia University Press, 1984) 189–190. See also Pasternak, *supra* note 9, p. 217.

by family members of offenders may be, we typically do not regard these as punishments, because these burdens are not intended; rather, they are merely incidental, unintended burdens. Perhaps, then, we should similarly think of the burdens borne by citizens when their state is punished as unintended, incidental burdens, and thus not as punishment of the citizens.

It is true that when individual offenders are punished, this creates burdens not only for their family members and friends but for community members, as well.²¹ But French's example is actually not analogous to the case of citizens whose state is punished. It's worth highlighting certain differences between the two cases. For one, the burdens created on family members when individual offenders are punished are contingent in a way that the burdens borne by citizens when their state is punished are not contingent. We could in principle develop punishments of individual offenders that do not, for instance, cast their family members and dependents into dire financial straits. Peter Moskos argues in his provocative book *In Defense of Flogging* that one advantage of a return to flogging would be that the state could impose the punishment as soon as the verdict is handed down, and then the offender could return to his family and, importantly, his job.²² Of course, punishment creates other kinds of burdens: emotional stress for family members, costs to taxpayers, etc. But the point is that none of these costs is intrinsically tied to the punishment itself, such that if punishment somehow did not result in emotional distress to family members (if, for instance, the offender had no family members or friends), or if the punishment did not cost taxpayers, it would not constitute punishment. By contrast, as we saw before, state punishment must involve burdens on citizens (at least some of them – more on this in section VI). State punishment that was not burdensome to any citizens would not actually constitute punishment.

Relatedly, in French's example, we can clearly distinguish the target of the intended burden, the offender, from the unintended bearers of burden, family members and others. Thus if we ask where, if not on the family members, the burdens are intended to fall, the answer is straightforward: The burdens are

21 See Gwen Rubenstein and Debbie Mukamal, 'Welfare and Housing – Denial of Benefits to Drug Offenders,' in Marc Mauer and Meda Chesney-Lind (eds.), *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (New York, The New Press, 2002), pp. 37–49; and Todd Clear, 'The Problem with 'Addition by Subtraction': The Prison-Crime Relationship in Low-Income Communities,' in Mauer and Chesney-Lind (eds.), *Invisible Punishment*, pp. 181–193.

22 Peter Moskos, *In Defense of Flogging* (New York, Basic Books, 2011), 64–68. We might, of course, object to flogging on other grounds.

intended to fall on the offender herself. By contrast, if we ask where, if not on citizens, the burdens of state punishment are intended to fall, there is no readily available answer. Again, this is because states themselves cannot bear burdens independently of their members. To intend that burdens fall on a state is to intend that the burdens fall on the state's members, for there is nowhere else for the burdens to fall.

The point here is that, unlike the burdens that fall, respectively, on offenders and on their family members in French's example, the burdens that fall on states and on their citizens are not two distinct effects of state punishment. Rather, to impose burdens on states just is to impose burdens on citizens. It should, therefore, also be clear why proponents of state punishment cannot appeal to the Doctrine of Double Effect to claim that the intended effect of state punishment is to impose burdens on states, and that the burdens borne by citizens are merely a foreseeable, unintended effect.²³ There are not two distinct effects of state punishment, one intended and one merely foreseen. Rather, the burdens imposed on states are burdens borne by citizens. Thus if the burdens imposed on states are intended – as they must be for the measures to constitute state punishment – then the burdens borne by citizens must be intended as well.

I contend, then, that when states are punished, the intended burdens imposed on states distribute as intended burdens to members of the state. Still, this is not enough to demonstrate that citizens are punished when their states are punished. To determine whether this is so, we need to assess whether the intended burdens that distribute to citizens are expressive of condemnation.

5 Do the Distributed Burdens Express Condemnation?

The most promising strategy for those who argue that state punishment does not distribute among members of the state is to contend that such punishment serves to express condemnation only of the state, not of its members. This is the strategy adopted by Toni Erskine,²⁴ and also by Avia Pasternak, who writes of a proposed academic boycott of Israeli universities:

[T]he costs that pass on to individual Israel academics as result of the boycott are not intended to condemn *them*. Rather, although the social meaning of the boycott is a form of corporate condemnation of Israeli

23 I thank Andrew Altman for pressing me on this point.

24 Erskine, *supra* note 9, p. 276.

academic institutions, the social meaning of its distributive effect on individual academics is a form of shared *liability*. It is a burden that they end up carrying as a result of the fact that the institution they work in acted wrongly.²⁵

Pasternak contends that groups such as academic institutions and, salient for our purposes, states can be punished without punishing their individual members when the punishment expresses condemnation of the group itself but not of the individual members. In such cases, she claims, we should think of the burdens borne by the group's members as an assignment of consequential responsibility, rather than moral responsibility. As she characterizes the distinction, moral responsibility implies "the attribution of blame (or praise) to the responsible agent," whereas consequential responsibility is "the assignment of the burdens which the injustice brought about, most importantly the duty to compensate the victims of the injustice."²⁶

This distinction is common enough, as many theorists have held that noncontributing group members may be required to bear compensatory burdens associated with the harms caused by their group even though these group members are not morally blameworthy, or deserving of punishment.²⁷ For instance, David Miller writes of a polluting, employee-controlled firm whose members decide in a majority vote not to implement more environmentally friendly practices:

It would not in general be right to blame (or punish) members of the minority for what their firm has done to the river – they could quite properly defend themselves by saying that they spoke out against the manufacturing process that caused the pollution. But it is right to hold them, along with others, liable for the damage they have caused.²⁸

Like Pasternak, Miller sees a difference between assigning consequential responsibility and punishing. The key difference is that punishment expresses

25 Pasternak, *supra* note 9, p. 217.

26 Avia Pasternak, 'Sharing the costs of political injustices,' 10 *Politics, Philosophy & Economics* (2010) 188–210, on p. 189.

27 See also, e.g., Anna Stilz, 'Collective Responsibility and the State,' 19 *The Journal of Political Philosophy* (2011) 190–208; Iris Marion Young, 'Responsibility and Global Labor Justice,' 12 *The Journal of Political Philosophy* (2004) 365–388; and Hannah Arendt, 'Collective responsibility,' in James W. Bernauer (ed.), *Amor Mundi: Explorations in the Faith and Thought of Hannah Arendt* (Boston, Martinus Nijhoff, 1987).

28 David Miller, *National Responsibility and Global Justice* (Oxford, Oxford University Press, 2007) 119.

blame, or condemnation, and so it is an inappropriate response to those who are not morally responsible for the wrongdoing. Assignments of consequential responsibility lack this condemning element, however, and thus Pasternak and Miller suggest that such assignments may be appropriate even for group members who did not participate in (or who dissented from) the harmful acts.

We can grant that if a state is held responsible in the consequential sense – that is, if the state is required to make compensation for the harms it caused – then these reparative burdens will distribute among citizens as compensatory burdens. And it is an interesting question *how* these burdens should be distributed among the state's members: proportionately, equally, randomly, etc.²⁹ But Pasternak and others go further, as we have seen; they claim that even if a state is punished, the associated burdens can be distributed to citizens not as punishment but as consequential (i.e., compensatory) burdens.

There is, I suggest, good reason to regard the burdens borne by citizens when a state is punished as expressing condemnation, and thus as punishment of the citizens themselves. Notice first that punishment imposed on a state may be significantly more severe than would be required for compensation. This is because, as we have seen, punishment is intended to be burdensome – whether because offenders deserve to suffer, or because the prospect of harm will help deter wrongdoers, etc. – whereas this feature is not essential to compensation. If a defendant in a civil suit is required to pay compensatory damages, the aim of the decision is not to impose hard treatment but rather to make reparation to those harmed by the defendant's actions. Thus sanctions imposed on a perpetrator state as punishment could be significantly more severe than would be required to compensate those harmed by the state's actions. In addition, the mode of punishment may differ from what would be required for compensation. Monetary sanctions may be an obvious method of punishing a state, but as we have seen, advocates of punishing states have suggested other options. Luban, for instance, mentions “capital punishment” for the state, that is, “conquest and reconstruction.”³⁰ And Lang suggests that punishment could include “coercive military actions, such as the use of aerial bombing against targets as identified as central to the state ...”³¹ The burdens associated with these punishments, like the burdens of monetary sanctions, would be distributive – they would be borne by the state's members. It's at least unclear, though, how such burdens would serve to compensate the victims of

29 This is Pasternak's central question in ‘The Distributive Effect of Collective Punishment,’ *supra* note 9, and ‘Sharing the costs of political injustices,’ *supra* note 26.

30 Luban, *supra* note 4, p. 90.

31 Lang, ‘Crime and Punishment,’ *supra* note 4, p. 250.

mass crimes. Thus the burdens borne by citizens whose state is punished may often be more severe than is warranted as compensation, and they may be of a mode that is not suited to the aim of compensation.

These considerations cast doubt on whether the condemnatory expression of collective punishment really remains at the level of the state, even as the burdens distribute. If (a) the international community imposes punitive burdens on a state, burdens that will necessarily be borne by the state's citizens, and (b) these burdens are in many cases either more severe or of a different mode than would be appropriate for compensating victims, then it seems reasonable to interpret the message conveyed to the burdened citizens as the message that they are being punished for their state's wrongs, not that they are being asked to bear consequential responsibility for their state's harms. This is not to deny that authorities might intend the censure to attach only at the level of the state itself, not to distribute. Nevertheless, it is entirely possible (fairly common, even) to intend to communicate one message but actually to communicate something else. Even if the international community does not intend to express censure of the state's citizens themselves, the punitive severity and mode of the burdens imposed will tend to do just that. Thus state punishment's condemnatory aspect will distribute along with the burdens.

Of course, defenders of the nondistribution of punishment thesis could insist that condemnation need not distribute from a state to its members, especially if punishing authorities make explicit their distinction between the state, which is the target of condemnation, and the citizens, who are not condemned.³² As I mentioned, contending that the condemning element of state punishment does not distribute is the most promising strategy for those who would argue that punishment itself does not distribute. But again, given that punitive measures imposed on a state may be more severe or different in kind from the sorts of measures that would be appropriate as compensation, it seems to me that a citizen would likely, and reasonably, interpret the corresponding burdens borne by herself and other citizens as punitive, not merely compensatory, burdens.

If, as I contend, the burdens of state punishment distribute to the state's citizens, and if these distributed burdens are best seen as intended burdens and as expressing condemnation, then it appears that punishment itself distributes from state to citizens. Thus the nondistribution of punishment thesis fails, and the guilt-by-association challenge remains. Given that some members of the

32 Pasternak, for instance, contends that sanctions could be 'designed and advertised in a way that separates the condemnation of the institution from the condemnation of its members.' Pasternak, *supra* note 9, pp. 217–218.

state may not have participated, may have actively dissented, or may even have been among the victims of the state's crimes, we have good reason to resist this sort of punitive scheme as inconsistent with basic respect for group members as autonomous moral persons.

6 State Punishment as Partially Distributing

Even if we grant that state punishment will distribute as punishment to citizens of the state, proponents of state punishment might contend that it need not distribute to all citizens of the state. Rather than the nondistribution of punishment thesis, we might call this the partial distribution of punishment thesis. And if punishment need only distribute to some citizens, perhaps a punitive scheme could be devised such that punishment would distribute only to those citizens who are culpable for the crime. Punishment might consist, for instance, of regime change and reconstruction of the state's institutions. Such measures would be burdensome for officials in the ousted regime but perhaps not for other members of the state, if the new order was more just and effective than the old. Insofar as a state's leaders typically are especially culpable for state-perpetrated atrocities, regime change and reconstruction may seem an appropriate way to ensure that the leaders should bear the burdens of state punishment, and that innocent members of the state would not be subject to guilt by association.

As initially appealing as this proposal may be, it raises certain questions regarding implementation. First, how would we ensure that states are punished so that only the culpable members of the states bear the punitive burdens? To do so would seem to require that we have some way of distinguishing the culpable citizens from the nonculpable ones. Even designing punishment so that it targets the state's leadership appears, by itself, insufficient. State leaders may often be especially culpable for crimes perpetrated by their states, but even among state leaders there may be dissenters. To avoid the guilt-by-association objection, we would need some way to distinguish those state leaders who were culpable from those who were not. But this seems to require findings of fact in which alleged perpetrators are established to be culpable through a fair legal process. Of course, this is the role that trials typically play in the criminal law. If we must first establish guilt and then design punishments so that the burdens fall only on those established to be culpable, then it is not clear how we are still considering state punishment, rather than the system of individual prosecutions and punishments that prevails in international criminal law today.

Suppose, though, that state punishment could be designed so that the punitive burdens fell solely, or perhaps at least primarily, on those culpable for the wrongdoing. And suppose that, setting aside the previous worry, there is some sense in which this can be properly characterized as state punishment. A second question of implementation arises: Would such a punishment scheme be implemented instead of or in addition to the currently existing scheme of individual trials and punishments? Lang contends that “individuals should be held responsible *together* with states, and that an institutional arrangement needs to be constructed to undertake both kinds of punishments.”³³ By implementing state punishment as well as individual punishments, proponents suggest that we can avoid leaving a “deficit in the accounting books,” to borrow a phrase of Philip Pettit’s.³⁴ Notice, however, that a system that punishes states as well as individual members risks just the opposite: namely, we may instead be left with a *surplus* in the accounting books. At least, we need to be clear about what exactly is the crime for which we are punishing the state, and what are the crimes for which we are punishing the individual citizens. The relationship between the state’s crimes and the citizens’ crimes should not be that of a whole to its parts, so that the state is held responsible for the overall wrongdoing whereas citizens are held responsible for individual components of the wrongdoing, or this would amount to an overassignment of criminal responsibility. Because the state punishment would distribute as punishment to certain members of the state (e.g., state leaders, etc.), there is a significant likelihood that some members of the state (those who have been prosecuted and punished as individuals) would be doubly punished – that is, they would bear punitive burdens for their own contributions to the crime, and they would bear additional punitive burdens as members of the state that committed the crime.

Note that my concern here is not, strictly speaking, with the severity of the burdens imposed. It would seem strange indeed to worry that a leader who developed and initiated a genocidal plan resulting in hundreds of thousands of deaths might not only, say, receive a sentence of life in prison but might also be forced to pay an equal share of some monetary sanction imposed on the state. My objection, rather, is with requiring that she bear whatever burdens are deemed sufficient for her contribution to the state’s crime, and then also requiring that she bear additional burdens for being a member of the state that committed the crime. In preceding sections, I discussed the worry

33 Lang, ‘Crime and Punishment,’ *supra* note 4, pp. 239–240.

34 Pettit, *supra* note 19, p. 194.

that state punishment schemes would impose punishment on innocent citizens. Here, the additional worry is that such a punishment scheme, in tandem with individual punishments, would in effect punish guilty members of the state twice in response to the same crime. It would be essentially equivalent to punishing a three-person team of bank robbers for its recent robbery, and also punishing the first member for helping plan the crime and driving the getaway car, the second member for helping plan the crime and holding the gun, and the third member for helping plan the crime and issuing the demand.³⁵ Such punishment seems unfair in that it assigns more than full responsibility for the crime; punishing states in addition to their citizens seems similarly unfair.

7 Conclusion

It is worth emphasizing, in conclusion, that although I have argued here against state punishment, I recognize the imperfections of the current system of international criminal law. Existing legal institutions do not have sufficient financial or human resources, or time, to prosecute and punish all those who, through their participation or their complicity, contribute to genocides and other mass crimes. We can acknowledge the imperfections of the current individualized system, however, without concluding that punishing states is the answer. Other options are available. First, we could continue to seek more effective, and cost-effective, ways to hold individuals accountable for their roles in mass crimes. A number of scholars have expressed tentative optimism, for instance, about the *gacaca* courts being implemented in the wake of the Rwandan genocide. *Gacaca* are local courts; suspected participants and accomplices are tried in the villages where they allegedly committed their crimes, but with oversight and procedures aimed at ensuring due process. Although the fairness of *gacaca* courts has been disputed, they have, as a practical matter, allowed for many more trials of

35 In fact, something like this occurs at the domestic level in U.S. criminal law. Douglas Husak critiques the practice of ‘charge stacking,’ whereby prosecutors may ‘bring a number of charges against a defendant for the same underlying conduct.’ Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (New York, Oxford University Press, 2008) 22. Husak explains, ‘As long as these offenses contain distinct elements, no rule or doctrine automatically prevents the state from bringing several charges simultaneously, even though, from the intuitive perspective of a layperson, the defendant has committed but a single crime.’ In my view, imposing multiple punishments on an individual for the same criminal act is unjustified whether at the domestic or international level.

low-level participants and accomplices than could have been conducted by the International Criminal Tribunal for Rwanda or the International Criminal Court.³⁶

Another option is nonpunitive censure. In addition to pursuing individualized prosecutions and punishments, the international community could issue a public condemnation of the mass crimes, and of those responsible for perpetrating them. Even if it were not determined who specifically played which roles in the crime, public censure could express condemnation of the perpetrators without specifying who they were. Such censure would not pose a danger of unjustly condemning those who played no role in (or dissented from or were victims of) the wrongdoing. Nonpunitive censure will likely be an unsatisfying option for those who believe it would serve no retributive or deterrent ends. But public censure might play valuable expressive roles: It might serve to educate the public about the wrongness of certain acts, to reinforce public consensus about their wrongness, or to ensure an accurate historical narrative.

There are other options for responding to mass crimes that might be imposed in addition to or instead of individualized trials and punishments, such as those proposed by restorative justice advocates.³⁷ Nevertheless, as a practical reality, even with modifications and improvements, a system in which punishments are imposed only on individual persons may never be able to assign full responsibility for mass crimes. Some responsibility may inevitably slip through the cracks, either because the complexities of structural or institutional forces that facilitated the crimes; because some individual citizens' contributions, though real, were small enough to escape attention; or because the time and costs associated with individualized prosecutions may often be prohibitive. Nevertheless, given the significance of what's at stake with punishment, and the strong presumption in favour of respecting people as autonomous moral beings – which involves treating them according to their own voluntary acts and omissions – I suggest that the international community

36 See Drumbl, *supra* note 2; and Larry May, 'Complicity and the Rwandan Genocide,' 16 *Res Publica* (2010) 135–152.

37 See John Braithwaite, 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts,' 25 *Crime and Justice* (1999) 1–127, esp. pp. 6, 7. See also Lucy Allais, 'Restorative Justice, Retributive Justice, and the South African Truth and Reconciliation Commission,' 39 *Philosophy & Public Affairs* (2012) 331–363. Allais contends that although South Africa's Truth and Reconciliation Commission 'did not involve criminal prosecutions and the sanctions with which these are associated, it can be seen as responding to the moral concerns underlying retributivism' (332), such as assignment of responsibility.

should continue to focus on individual criminal prosecutions and punishments rather than collective punishment.³⁸

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