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### Recommended Citation

Geddert, J. S. (2014). Beyond Strict Justice: Hugo Grotius on Punishment and Natural Right(s). *The Review of Politics* 76(4): 559-588. <https://doi.org/10.1017/S0034670514000576>

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## Beyond Strict Justice: Hugo Grotius on Punishment and Natural Right(s)

*Jeremy Seth Geddert*

**Abstract:** Hugo Grotius is often seen as reducing justice to the systematic protection of individual rights. However, this reading struggles to account for the surprisingly robust place he accords to punishment. An offender cannot plausibly claim punishment as a right, and the right to punish gives little direction about how best to carry out punishment. These difficulties point toward Grotius’s little-noticed bifurcation of justice into “expletive” and “attributive” categories. While expletive (or “strict”) justice provides a grounding for the right to punish, its subsequent exercise must be governed by attributive justice. This higher justice considers persons and situations; requires imagination and prudential judgment; looks to the future; aims for the common good; acknowledges the importance of virtue; and never claims perfect solutions. Thus, Grotius’s supposedly modern understanding of natural rights is best understood within an account of his specifically political thought—one that acknowledges an overarching framework of classical natural Right.

Hugo Grotius has long been portrayed by North American scholarship as a modern natural-rights thinker. His position on subjective rights is often seen as the basic orienting principle of his politics. In the legal field, he has variously been portrayed as the father of modern international law, modern natural law, or the modern science of law. Many political theorists of the past generation have described him as a precursor to figures such as Hobbes, and thus as representing a break with the classical understanding of a politics guided by natural Right.

This understanding of Grotius’s place in the history of political thought reflects a variety of imposed assumptions. First among them is his supposed

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I would like to thank Nalin Ranasinghe, David Walsh, Dan Mahoney, B. J. Dobski, Greg Weiner, Pat Corrigan, Marc LePain, Lance Lazar, Rick Sorenson, and several anonymous reviewers for their helpful comments on earlier drafts of this manuscript. I am also grateful to Geoffrey Vaughan, Steve McGuire, Paul Higgins, Jim Kruggel, Jordan Watts, and Teepen Schlachter for their feedback and support as I developed the argument.

emphasis on rights rather than goods. These possessive rights confer on individuals a status that guarantees their immunity from injustice, thus obviating the need for guidance in making use of the right. This leads to the second point: an emphasis on civil society as existing to protect and enlarge private goods, rather than to foster a common public good. A third common theme in these accounts is that Grotius outlines a conception of politics as an impersonal system in which abstract theory and calculative reason can solve the problems of politics (for example, by channeling enlightened self-interest). This universal science of politics can theoretically be applied to any political community, regardless of its particular historical situation. Finally, Grotius is seen to reject an action-based understanding of politics as a practice requiring (and inspiring) political virtues, especially the classical virtue of prudential judgment. Justice fundamentally resides in the safeguards of the system, rather than in the character of a people.<sup>1</sup>

Yet this portrait leaves some important questions unanswered. Why does Grotius's basic enumeration of rights include what is essentially a duty of punishment? Why does he anticipate a world of sovereign states, yet emphasize the justice of war to punish crimes against natural law? Why does he devote hundreds of pages in his best-known work to evaluating various possible exercises of rights and duties? Why does that work cite eight different classical figures over a hundred times each? I would like to suggest that the conventional wisdom on Grotius is only a starting point.

Richard Tuck is a representative (and influential) figure who situates Grotius as breaking with the classical order to help inaugurate the modern order. Tuck argues that Grotius sees no distinction between theoretical and practical sciences, with systematic mathematical rationality covering the whole of morality. This opens the door to "a definite and *a priori* science of ethics." This leads Grotius to a theory of secular natural rights built on premises that even a relativist could accept. In this reading, Grotius has no need of virtues that might depend on a prior philosophical anthropology, which constitutes a "final and public break" with Aristotle. Tuck continues, "after the *De Jure Belli*, it was impossible for anyone who wished to think about politics in a modern way—that is, in terms of natural rights and the laws of nature—to pretend that they were still Aristotelians." Thus, Grotius's justice is limited simply to upholding the rights of others, and

<sup>1</sup>See, for instance, Michel Villey, *La Formation de la Pensée Juridique Moderne* (Paris: Montchretien, 1975); Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979); Tuck, *Philosophy and Government, 1572–1651* (Cambridge: Cambridge University Press, 1993); Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (New York: Oxford University Press, 1993); Peter Haggemacher, "Droits subjectifs et système juridique chez Grotius," in *Politique, Droit et Théologie chez Bodin, Grotius et Hobbes*, ed. Luc Foisneau (Paris: Kime, 1997), and Jerome Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (New York: Cambridge University Press, 1998).

ignores the question of how those rights might be exercised. Tuck concludes that Grotius leaves “little room for individual judgment or the exercise of *phronesis*.”<sup>2</sup>

Tuck’s thorough treatment has set the agenda for subsequent studies of Grotius, and even many of his critics accept basic elements of this portrayal. For instance, Brian Tierney challenges Tuck’s portrayal of Grotius as an essentially modern figure. However, Tierney does this by identifying antecedents in the development of subjective rights and situating Grotius as a mere agent of transmission in a new world. He leaves unchallenged the assertion that subjective rights are the basic ordering principle of Grotius’s political thought.<sup>3</sup>

In recent years, some scholars have begun to question this consensus. Although Knud Haakonssen reinforces the anti-Aristotelian reading of Grotius’s justice, he acknowledges that Grotius’s conception of rights depends on prior relations of justice, and concedes some place for teleology in his thought without fully accounting for it.<sup>4</sup> Oliver O’Donovan goes much further, identifying in Grotius’s reconstruction of Aristotelian categories of justice a limitation on subjective rights.<sup>5</sup> Christoph Stumpf has developed these themes in a more systematic treatment of Grotius, suggesting a classical patrimony.<sup>6</sup>

<sup>2</sup>Richard Tuck, “Grotius and Selden,” in *The Cambridge History of Political Thought, 1450–1700*, ed. J. H. Burns (New York: Cambridge University Press, 1991), 506–7, 515–19. For a variation on this specific line of thought, see Villey, *Formation*, 619–20, or John Finnis, *Natural Law and Natural Rights* (New York: Oxford University Press, 1980), 205–8.

<sup>3</sup>Brian Tierney, *The Idea of Natural Rights* (Grand Rapids, MI: Eerdmans, 2001), 324–42. For an instructive debate, see Brian Tierney, “Natural Law and Natural Rights: Old Problems and New Approaches,” *Review of Politics* 64, no. 2 (2002): 389–420, including responses by John Finnis, Douglas Kries, and Michael Zuckert.

<sup>4</sup>Knud Haakonssen, “Hugo Grotius and the History of Political Thought,” *Political Theory* 13, no. 2 (1985): 241–42, 249–53; Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (New York: Cambridge University Press, 1996), 26–30, 34–35, 64, 102; Knud Haakonssen, “Review: The Rights of War and Peace,” *Mind* 111, no. 4 (2002): 499–502.

<sup>5</sup>Oliver O’Donovan and Joan Lockwood O’Donovan, “Hugo Grotius (1583–1645),” in *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (Grand Rapids, MI: Eerdmans, 1999), 787–92; Oliver O’Donovan, “The Justice of Assignment and Subjective Rights in Grotius,” in Oliver O’Donovan and Joan Lockwood O’Donovan, *Bonds of Imperfection: Christian Politics, Past and Present* (Grand Rapids, MI: Eerdmans, 2004).

<sup>6</sup>Christoph Stumpf, *The Grotian Theology of International Law* (New York: Walter de Gruyter, 2006). Several recent treatments are generally consistent with the approach of O’Donovan and Stumpf but do not explore their claims in detail. For example, see Terence Irwin, *The Development of Ethics: A Historical and Critical Study* (New York: Oxford University Press, 2007), 88–99; Steven Forde, “The Charitable

Yet few of these studies provide a detailed examination of Grotius's approach to punishment. This is an omission of some importance. Legal historian J. M. Kelly identifies chapter 20 of *DJB* as the "first extensive self-contained major treatise on criminal punishment,"<sup>7</sup> and O'Donovan describes it as best exemplifying Grotius's doctrine of Right.<sup>8</sup> Only one study, *A Normative Approach to War*, offers a chapter-length treatment. Yet even here, Furukawa identifies two basic themes that only further support the dominant paradigm. First, he draws a clear line between traditional approaches that treat punishment as morally educative and enlightenment conceptions that view punishment as purely contractarian. Reading Grotius as a secularizer, he places him firmly in the latter camp, reinforcing the "revolutionary modernizer" narrative. Second, he views Grotius as limiting the severity (or even the application) of punishment, echoing (and citing) Michel Villey's summary conviction of Grotius for supposedly prioritizing bourgeois peace over classical virtue. Because these limits are simply a necessary and opposite reaction to

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John Locke," *Review of Politics* 71, no. 3 (2009): 452. For a tentative antecedent, see Richard Cox's chapter "Hugo Grotius," in *History of Political Philosophy*, ed. Leo Strauss and Joseph Cropsey (Chicago: University of Chicago Press, 1963), 344–53, which helpfully points out the distinctiveness of Grotius's understanding of punishment as natural rather than conventional.

<sup>7</sup>J. M. Kelly, *A Short History of Western Legal Theory* (New York: Oxford University Press, 1992), 238. There is now a significant literature, particularly associated with the Cambridge School, exploring the apparent progression of Grotius's thought over time. Particular attention is given to the way in which Grotius's works might have served his own interests, first as associate of the Dutch East India company, then as Remonstrant politician, then as exile in Paris. This has led to an explosion of interest in Grotius's *de Jure Praedae*, written at the age of twenty-one, whose fundamental presuppositions would be substantively altered as Grotius underwent a practical education in politics and began publishing in earnest in the 1610s. For the purposes of this study, I focus on Grotius's mature thought in the 1632 edition of *DJB*, his final major political work. *DJB* contains Grotius's only major study of punitive war, as well as his most explicit and extensive (if not most profound) treatment of expletive and attributive justice. Works tracing the historical development of (and influences on) Grotius's thought include Richard Tuck, *Philosophy and Government, 1572–1651*, 157–70, 176–90; Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), 78–108; Harm-Jan Van Dam, "de Imperio Summarum Potestatum Circa Sacra," in *Hugo Grotius—Theologian*, ed. G. H. M. Posthumus Meyjes et al. (Boston: Brill, 1994), 19–40; Annabel Brett, "Natural Right and Civil Community: The Civil Philosophy of Hugo Grotius," *Historical Journal* 45, no. 1 (2002): 31–51; Martine Julia Van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories, and Dutch Power in the East Indies* (Boston: Brill, 2006).

<sup>8</sup>O'Donovan and O'Donovan, "Hugo Grotius," 791.

the traditional conception, they do not help to illuminate Grotius as a systematic thinker; in fact, they force Grotius into internal contradictions.<sup>9</sup>

On the contrary, I aim to show that Grotius's approach to punishment actually reveals a recognition of the limits of rights, a high regard for the virtue of prudence, and a classical understanding of politics as oriented toward the good of the person. While his practice of punishment does, indeed, require the rights-based status of "punisher" and "subject of punishment," this status does not confer on the punisher a self-interested claim-right to a tangible possession, but instead a difficult duty. Nor does the very crime automatically dictate the redress—the content of the duty—in mathematically reciprocal fashion. Rather than looking backward to restore a previous equilibrium, punishment looks forward to consider the particularities of context and to imagine new possibilities. As a result, the justice of punishment is not one of ultimate solutions, like a mathematical problem; rather, it is an orientation point toward which a community moves in time. Thus, while a rights-based conception of justice plays an initial role in punishment, it is insufficient to realize the true purposes of punishment.

This understanding of punishment, in turn, illustrates another fundamental element in Grotius's political thought, one that further prepares the path cleared by recent scholarship. This is his early division of political justice in *DJB* into what he terms "expletive" and "attributive" components. While many readers comment on this distinction, most find it to be of little substantive import, perhaps because the term "attributive justice" does not appear frequently in the remainder of *DJB*.<sup>10</sup> Yet Grotius regularly contrasts "expletive" (or "strict") justice with another, "wider," sense of justice, which he variously terms "attributive," "governmental," "rectoral," or "internal" justice.<sup>11</sup>

<sup>9</sup>Furukawa Terumi, "Punishment," in *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius*, ed. Onuma Yasuaki (New York: Oxford University Press, 1993), 221–43. John Salter, "Sympathy with the Poor: Theories of Punishment in Hugo Grotius and Adam Smith," *History of Political Thought* 20, no. 2 (1999): 205–24 offers a careful (if short) reading of Grotius on punishment, one that is more attentive to the concepts of expletive and attributive justice discussed below. This study will expand on his observations that only violations of expletive justice can be punished, due to the importance of freely willed virtue (see 206–11). In his limited space, Salter does not expand on how the two types of justice are related to each other or address the implications for international relations, nor does he identify the extent of Grotius's debts to Aristotle. Steven Forde, "Hugo Grotius on Ethics and War," *American Political Science Review* 92, no. 3 (1998): 643–47 valuably treats elements of war in light of the distinction between positive law and natural justice, without drawing further distinctions within the category of natural justice.

<sup>10</sup>Tuck's dismissal is more nuanced: he deems attributive justice nonjusticiable, and thus irrelevant to politics. See Tuck, *The Rights of War and Peace*, 98–99.

<sup>11</sup>The structural importance of attributive justice can be seen in one of Grotius's private letters. Here he lays out a diagram of his structure of justice, with natural law divided into that which is mandatory and that which is appropriate. See Hugo

Stumpf is one of the few to outline in detail the contours of both types of justice, as he explores their implications for political authority and property. However, the example of punishment is perhaps an even better illustration, as it clarifies the relationship between these two categories.<sup>12</sup> First, it specifically indicates that an exclusive focus on expletive justice can in fact undermine good political order. Second, it shows how the limitations of this “strict” justice are overcome in attributive justice. Expletive justice deductively grants the political authorities a strict natural right to punish law-breakers. However, the actual exercise of law enforcement must then be governed by attributive justice—the specifically *political* component of justice. Here Grotius emphasizes the importance of prudence and magnanimity in the ruler, as he or she deliberates over the particular punishment which will best secure the common good. Without such justice, the associated punishment, while legal, would fail to fulfill the actual purposes of punishment.

Hence, while the mainstream reading may be accurate as a description of Grotius’s expletive justice, a study of attributive justice helps to situate this reading within a broader theoretical context. Individual rights may not be the final word in his political thought. He may in fact create a space for the protection of rights without sacrificing the higher goods to which those rights are ultimately ordered. If Grotius is indeed a modern natural-rights thinker, his work suggests that modernity need not constitute a repudiation of classical natural Right.

### Conceptions of War

For all the lack of focus on punishment in Grotius, the topic is remarkably central to the structure of his argument in *DJB*. He begins the central book (Book II) by outlining two primary justifications for war: self-defense (or the recovery of property), and punishment.<sup>13</sup> The remainder of the book treats these topics in turn. A brief study of his treatment of defensive war will help to lay the groundwork for—and provide an instructive contrast to—his treatise on punishment.

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Grotius, letter to Willem de Groot, 21 May 1638, in *Some Less Known Works of Hugo Grotius*, ed. Herbert F. Wright (Leiden: Brill, 1928), 210.

<sup>12</sup>Stumpf also includes a chapter on war, but devotes only two pages to punitive war (222–24). This paper will develop his insights in greater detail and draw wider implications. More generally, Stumpf makes an interesting and subtle argument that the possibility of subjective rights is incompatible with Grotius’s conception of natural Right (59–63); my argument here is that the former leads to the latter.

<sup>13</sup>Hugo Grotius, *The Law of War and Peace*, trans. Francis W. Kelsey, intro. James Brown Scott (New York: Bobbs-Merrill, 1925), 2.1.2.2, 171. Subsequently cited as *DJB*.

The United Nations Charter acknowledges state sovereignty as the fundamental premise of international relations. As a result, it permits its members to fight only once they have been attacked, or to assist another under such attack. The invaded state is entitled to resist the aggression, and also to recapture the territory unjustly annexed by the aggressor. Hence, only wars of defense can be legitimate. This approach is characteristic of liberal thought. For example, Immanuel Kant's doctrine of right provides wide license for self-defense while absolutely prohibiting punishment outside the juridical confines of the republican state.<sup>14</sup> More recently, John Rawls argues that only defensive actions can confer a just title to war.<sup>15</sup> In legal terms, one might say that the aggressor incurs a debt to the offended state, which can only be repaid by returning the conquered territory to its prewar status. Hence, such a defensive war is analogous to repayment of debt in private law.

It cannot be denied that Grotius's treatment of defensive war demonstrates many of the characteristics commonly attributed to him. First, its justification arises from an offense against the claim-right of an individual nation to be sovereign over a particular territory. That nation's status of sovereignty is absolute; it does not depend on exercising good government over that territory. Second, the matter in question is a physical, tangible piece of territory. It is a possession that exists in the material world. Third, the reasoning necessary to determine both the violation of justice and its remedy is amenable to simple calculation: justice obtains when the territory returned equals the territory taken. The determination of injustice automatically reveals the condition that must obtain in order to restore justice. Fourth, justice in defensive war ultimately looks backward rather than forward. It seeks to return to a previous condition, in which ownership of the territory rested with the original ruler, rather than a creative new solution. Fifth, justice can be fully accomplished in defensive (or restitutionary) war, because it is

<sup>14</sup>Immanuel Kant, *The Metaphysics of Morals*, ed. Mary Gregor (New York: Cambridge University Press, 1996), sec. 56, 116; Immanuel Kant, *Toward Perpetual Peace*, ed. Pauline Kleingeld (New Haven, CT: Yale University Press, 2006), 70–73.

<sup>15</sup>John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 91–92. State sovereignty can be seen as an extension of the liberal principle of self-sovereignty; states cannot punish other governments for their domestic actions just as the state cannot punish supposed violations of private morality. (Indeed, Tuck argues that the development was the other way around: the sovereign state led to the sovereign individual [Tuck, *Rights of War and Peace*, 140].) Kant argued that no individual can be punished for even a public crime unless the individual has consented to the punishment. Contemporary calls for humanitarian intervention are often grounded on liberal terms of protecting human rights. Such appeals extend the principle of defensive war from defense of oneself and one's compatriots to the defense of individuals in other countries attacked by their own governments. Although such appeals may oppose the UN definition of *who* is entitled to armed defense, they do not necessarily challenge the principle that only wars of defense are legitimate.

possible to return the territory unjustly annexed. There is no ambiguity about justice: it is a status that either fully obtains or does not obtain at all. Finally, this right confers a status on each participant, and the course of action required to bring about justice is clear, requiring little prudential judgment. Grotius's approach to war thus far resembles the common rights-based portrait of his political theory. Indeed, Villey's influential reading of Grotius draws exclusively on this section of *DJB*, without a single citation from the remaining half of the work.

### Punitive War

While self-defense and restitution are undoubtedly valid titles to war, such efforts do little to change the aggressor's acquisitive desires or restrain the aggressor from future offenses. Nor do they allay its neighbors' fear and mistrust, or provide them with any lasting security. Only the possession of territory has been altered; the threat of future expansion is unaltered and the absence of trust remains. Thus, as with a burglar, it may be necessary to invoke the criminal-law paradigm: the aggressor must also be punished. Punitive war has generally been neglected in the post-World War II secular rediscovery of just war theory. However, calls to punish the Assad regime in Syria for its alleged use of chemical weapons show that the concept remains perpetually timely. Indeed, the just war tradition has consistently emphasized punishment as a valid cause of war.<sup>16</sup> Grotius follows squarely in this tradition.

Grotius begins his section on punitive war in *DJB* with a lengthy chapter on the philosophical foundations of criminal punishment. In this disquisition, he identifies three specific purposes of punishment: reformation of the criminal; deterrence of the criminal (or others in the community) from reoffending; and satisfaction, which—according to Grotius—reasserts the glory and integrity of the public institutions whose dignity the criminal act has violated.<sup>17</sup> Restitution is conspicuously absent in this section, which helps to show the contrast with the private law paradigm of defensive war.<sup>18</sup>

<sup>16</sup>James Turner Johnson, "Historical Roots and Sources of the Just War Tradition in Western Culture," in *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*, ed. John Kelsay and James Turner Johnson (New York: Greenwood, 1991), 9–10.

<sup>17</sup>Grotius, *DJB*, 2.20.5–6, 467–70. Before outlining these three purposes, Grotius first distinguishes punishment from revenge, and emphatically opposes the latter. He argues that vengeance cannot be part of natural Right because it proceeds from the animal soul rather than the rational soul; it is like "when a dog bites the stone that is thrown at it."

<sup>18</sup>Grotius's public conception of satisfaction (outlined in *DJB* 2.20.8–9) answers the reasonable rejoinder that satisfaction might include—or even be fully constituted by—restitution. As outlined below, Grotius fundamentally sees crime as an act against

Punitive war begins in the same way as defensive war: with the punisher possessing a right to punish. Similarly, the right can only arise when another person (or nation) has clearly offended against the law, whether positive or natural. However, beyond this initial commonality, Grotius departs from the first characteristic of defensive war: the nation possessing a right to punish does not seek a tangible possession, and does not even hold a claim-right. Indeed, while the right to wage defensive war confers self-interested benefits on the holder, the right to wage punitive war confers only a difficult duty—as any sensitive law enforcement official (or parent) is aware. Thus, punishment fundamentally differs from restitution, because it does not confer external benefits, and it may indeed increase the obligations of the person holding the right to punish.<sup>19</sup> Grotius's conception of a right goes beyond an individual claim on a possession.

Likewise, in contrast to the second element of defensive war, punishment is not exercised in one's own self-interest, but on behalf of the entire community. This can be seen in domestic criminal proceedings, where it is the state ("the people," for example) that brings the charges and carries out the punishment. On its most essential level, a crime is committed against the community. Thus, the existence of punitive war emphasizes the fundamentally public nature of Grotius's political thought. Punishment does not exist to increase the stock of possessions of individuals. Rather, it exists to promote the well-being of the social realm—of which the safeguarding of private property is only one element.

Furthermore, unlike the third characteristic of defensive war, the initial determination of injustice in punitive war does not automatically provide a remedy. When an aggressor acts unjustly by taking territory, defensive war

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the public good rather than against the individual. For this reason, it is the state which brings the charges and prosecutes the crime. Punishment and restitution are not mutually exclusive, as the victim (or his or her family) may sue for restitution (as in the case of "wrongful death"). However, as a private citizen, the victim could not bring the suit to a criminal court. This distinction is amplified in Grotius's *de Satisfactione Christi*, or *A Defence of the Catholic Faith Concerning the Satisfaction of Christ, Against Faustus Socinus*. Here Grotius confronts the Socinian approach to Atonement theology, arguing that it erroneously portrays God as a creditor to whom sinful humanity must repay its debt. On the contrary, Grotius portrays sin as an offense against God's moral government—a crime for which satisfaction is necessary. As the loquacious title indicates, Grotius does not reject the concept of satisfaction; however, his argument unambiguously distinguishes it from restitution. See Hugo Grotius, *The Satisfaction of Christ*, 2.16, 820, in Oliver O'Donovan and Joan Lockwood O'Donovan, *From Irenaeus to Grotius; Hugo Grotius, Defensio Fidei Catholicae de Satisfactione Christi Adversus Faustum Socium Senensem*, ed. Edwin Rabbie, trans. Hotze Mulder (Assen: Van Gorcum, 1990), 6.18–20, 197–99.

<sup>19</sup>Grotius, *DJB*, 2.20.2.2, 464.

brings about justice through an equal and opposite reaction. In other words, it looks backward to restore an exact condition that obtained in the past. However, in punishment, such calculative reasoning and backward-looking orientation is inadequate. The criminal act cannot simply be undone; it is no longer possible to return to the original condition. Indeed, it would be strange if a judge should rule that justice would be served by providing the victim with legal immunity to carry out an equal crime against the perpetrator. Such a simple calculation would, in the memorable words of Tevye in *Fiddler on the Roof*, leave everyone blind and toothless. This reciprocal action—which, in restitution, is the essence of justice—would, in punishment, undermine the very spirit of justice.

Thus, in contrast to the fourth characteristic of restitution, punishment requires the requisite wisdom to ascertain the course of action that would best conduce to the future common good. This can take the form of reformation of the criminal, deterrence of others from committing the same crime, and/or emphasizing the dignity of the law and its sovereign overseer(s). As Grotius says, “All punishment aims at the common good, and particularly at the preservation of order and deterrence.”<sup>20</sup> Thus, rather than looking backward, punishment instead looks forward to help bring about a future that can never be predicted with precision. Likewise, it requires the use of imaginative reasoning to visualize a more just future in which nations are less inclined to offend against the common good.

As a result, in contrast to the calculative reason associated with restitution, the determination of how to exercise punishment is a “difficult and obscure” topic.<sup>21</sup> Unlike the fifth component of defensive war, justice in punishment can never be perfectly fulfilled. In punishment, authorities cannot simply follow the letter of the law, because such universally applicable dictates of calculative reason are inadequate to the situation at hand. Rather, punishment must weigh nondeductive considerations of an individual’s context. Thus, justice cannot be fully determined in advance of particular situations. For instance, a criminal who broke the law in order to avoid “death, imprisonment, pain, or extreme poverty” should generally be judged in light of these extenuating circumstances.<sup>22</sup> Indeed, one must take care to “estimate the desert” of punishment in cases where natural causes largely circumvented the perpetrator’s faculty of reason and judgment. In addition to the aforementioned emphasis on imaginative reason, these counsels display Grotius’s attention to prudential reason and situational judgment. The necessary

<sup>20</sup>Grotius, *The Satisfaction of Christ*, ed. O’Donovan, 2.16, 820. This shows that Grotius’s public conception of satisfaction is also forward looking. The purpose of restoring the dignity of God’s moral government is chiefly to promote virtue, thus preparing believers for the hereafter.

<sup>21</sup>Grotius, *DJB* 2.20.37, 502.

<sup>22</sup>Grotius, *DJB* 2.20.29.1, 494.

virtue of prudence in public officials shows that politics cannot be reduced to a universal science or system that discounts context.<sup>23</sup>

This analysis of particular circumstances leads to another, more fundamental, consideration of prudential reason in punishment: a discernment of the individual's internal state. Unlike restitution, where a judge needs only a knowledge of external factors, in punishment the authorities must have the wisdom to discern the character of the person. As an example, Grotius distinguishes between the severity of the law broken and the manner in which it was broken. This indicates that the intensity of one's malicious intention is more important than the severity of the damage that resulted, as can be seen in the charge of attempted murder.<sup>24</sup> Here Grotius directly draws on Aristotle's distinction between "wrongs" and "faults" in the *Rhetoric* and the *Ethics*. While an (internal) wrong results in punishment, an (external) fault should bring about only restitution. Indeed, Grotius so highly values this "truly notable" passage of Aristotle that, in the midst of his own work, he translates the entirety of *Ethics* V.8. Grotius later draws on Aristotle's distinction between "acting wrongly" and "doing that which is unjust," noting that the former concerns the "doer" but the latter only the "deed."<sup>25</sup>

Indeed, Grotius does not simply prioritize the intention over the act, but also the even more foundational character from which that intention sprang. He draws a distinction between isolated acts and settled character when he cites Seneca's counsel that "the wise man will remit many penalties; he will save many persons whose character is not sound but is curable." Here and elsewhere he shows shades of Aristotle's own distinction between vice and mere incontinence. This clearly reveals his understanding that actions flow from character, and that punishment ought to address the latter. Indeed, Grotius later cites a description of punishment as "surgery for the soul." Like a surgeon, a punisher must have knowledge of what is inside a person.<sup>26</sup> Thus, Grotius's understanding of prudence is not the modern conception that emphasizes self-preservation and mutual advantage. Instead, it is more akin to Aristotle's understanding of the term, which connotes a discernment of (and action toward) the good of persons with a rational and social nature. Grotius's engagement with Aristotle seems to be more of a substantive acknowledgement than a "public break."<sup>27</sup>

This emphasis on prudence and personal character provides the final contrast with restitution, and points to the limits of the law. If the deed is contrary to the law, the judge must convict. However, if the doer is innocent of guilt, higher justice would counsel the governor to relax the penalty or even

<sup>23</sup>Grotius, *DJB* 2.20.9.4, 477.

<sup>24</sup>Grotius, *DJB* 2.20.46.1, 513.

<sup>25</sup>Grotius, *DJB* 3.11.4.2–5, 725–27; 2.23.13.1–3, 565–66.

<sup>26</sup>Grotius, *DJB* 2.24.3.3, 570; 2.20.30.3–2.20.31.2, 496–98; 2.20.7–8, 470–71.

<sup>27</sup>See Tuck, "Grotius and Selden," 520.

pardon the defendant. While clemency can never be required by strict justice, it is fitting to goodness and moderation, and characteristic of a lofty soul.<sup>28</sup> The opposite case also illustrates the point. If the penalty for the infraction is relatively small, but the intention of the criminal highly malicious, the public official may punish even more severely than the maximum set out by the law. However, the ruler requires a “worthy reason” to do so; he or she must consider not only the good of the individual, but the whole.<sup>29</sup> While some situations may call for mercy, in others, clemency might actually be detrimental to the whole. Likewise, a punishing nation must consider whether the expenditure of resources involved in punitive war would compromise the maintenance of order and justice in its own realm. The potential good must still be weighed against the costs. Thus, even the higher good of clemency cannot be arbitrarily exercised; rather, it must be guided by the virtue of prudence.<sup>30</sup>

In addition to directing this punishment toward the reform of the offender, Grotius also emphasizes the character of the punisher. In aiming to deter or reform the offending nation, a punishing nation must display virtue in its exercise of punishment. Punishment cannot follow from the vengeful desires or injured pride of the offended party, which Grotius describes as contrary to reason. Rather, punishment must take its bearings from an other-oriented desire to reform the subject of punishment, or, more broadly, a service to “human society.” Thus, the punishing nation must not punish out of malice. For this reason, Grotius adds a further condition for punitive war: the punisher must be free of the very crime for which it punishes the guilty party. Thus, not only must the punisher aim at the (internal) good of the recipient, but its own internal character must be virtuous.<sup>31</sup>

For these reasons—and also, no doubt, the likelihood that all involved parties will have dirty hands—Grotius says that it is more honorable for a third-party state to exercise the punishment.<sup>32</sup> This reemphasizes the public nature of punishment, because the punisher now has no interest at stake in exercising punishment. The right to wage punitive war derives not from victimhood, but by reference to the “good of mankind in general.”<sup>33</sup> Indeed, if

<sup>28</sup>Grotius, *DJB* 3.11.7.1, 731.

<sup>29</sup>Grotius, *DJB* 2.20.24.1, 492.

<sup>30</sup>Grotius, *DJB* 2.24.3–5, 572. This balance between prudence and generosity, or judgment and mercy, is taken up in a more direct (and profound) fashion in Grotius’s *Satisfaction of Christ*.

<sup>31</sup>Grotius, *DJB* 2.20.5, 467–69; *DJB* 2.20.40.1, 504–5; 2.20.7–9, 470–78. One might contrast this service to “human society” with Hobbes’s assertion that vainglory and diffidence are two of the natural passions in man, and his expectation that they cannot be changed, but only overwhelmed by the threat of force, which arouses the comparably greater passion for self-preservation.

<sup>32</sup>Grotius, *DJB* 2.20.40.1, 505.

<sup>33</sup>Grotius, *DJB* 2.20.9.1, 475.

victimhood were a requirement, then third-party states would actually be prohibited from punishing. Grotius understandably sees this as theoretically and practically absurd, given that one of the very purposes of civil society is to ensure third-party judges.<sup>34</sup> Moreover, as with any true punishment, sacrifice is required on the part of the punisher: a nation must put its own soldiers in harm's way.<sup>35</sup> The same is true of defensive wars on behalf of others, or of humanitarian intervention, to which Grotius devotes a specific chapter.<sup>36</sup> This reemphasizes the idea that the 'right' to punish is not a self-interested possessive right automatically bestowing on its holder a legitimate claim on a tangible commodity. Rather, it is a status that confers a public duty to be exercised on behalf of others, and whose exercise requires virtue.

The necessity of virtue in carrying out punishment shows that, while the mere possession of a right initially seems to confer full freedom of action on its own terms, right-holders are ultimately subject to a higher standard that limits their exercise of these rights. Indeed, after having established the just causes of war, Grotius spends a full chapter exhorting rulers not to charge rashly into war, even if the cause is just.<sup>37</sup> No one should think that simply because "a right has been adequately established," that "either war should be waged forthwith, or even that war is permissible in all cases."<sup>38</sup> The remainder of the chapter is devoted to exploring such cases. Thus, while possession of a right may be necessary for justice, alone it is insufficient to realize the highest dimension of justice. Indeed, possession of that status leads toward action, which must be guided by a different standard of justice.

Naturally, this counsel of moderation in exercising a right applies not only to the decision to engage in war, but also to the actual prosecution of wars. This is evident throughout Book III of *DJB*, in which Grotius treats six elements of war according to the (rather permissive) law of nations (*jus gentium*), before devoting six more often-overlooked chapters to outlining the guidance of prudence, moderation, and charity.<sup>39</sup> Having obviously read the former section, Rousseau famously denounced Grotius for permitting soldiers to enslave their captured prisoners of war. Tuck cites a similar Rousseauian criticism as he begins his portrayal of Grotius as apologist for colonial imperialism.<sup>40</sup> Yet in the latter section, Grotius asserts that such

<sup>34</sup>Grotius, *The Satisfaction of Christ* 2.6, 817.

<sup>35</sup>This provides a counterpoint to Villey's assertion that Grotius sees "subjective Right" as subsuming and replacing "objective right." See Villey, *Formation*, 627.

<sup>36</sup>See Grotius, *DJB* 2.25.

<sup>37</sup>Grotius, *DJB* 2.24.1.1, 567.

<sup>38</sup>*Ibid.*

<sup>39</sup>See Grotius, *DJB* 3.3–9 for the former; 3.11–16 for the latter.

<sup>40</sup>Tuck, *The Rights of War and Peace*, 102–8. Recent scholarship has shown an increased interest in Grotius's position on slavery; see Forde, "Hugo Grotius on Ethics and War," 643–47; John W. Cairns, "Stoicism, Slavery, and Law," *Grotiana* 22/23 (2001/2002): 197–216; Gustaaf van Nifterik, "Hugo Grotius on 'Slavery,'" *Grotiana*

indiscriminate subjugation is actually contrary to the virtuous conduct of good men. While all captives who fought for an unjust cause have presumably committed a wrong “deed,” the captor must yet ascertain whether or not the “doer” is truly culpable of criminal wrongdoing. If the individual soldier is not guilty, he is to be released, likely for the *quid pro quo* ransom that Grotius cites as the common practice of Christian nations. (Such a payment for damages fits with his emphasis on restitution as concerning the deed rather than the doer.) To underscore the point, Grotius publicly laments the fact that so many soldiers become enslaved for having invincibly followed the orders of their rulers, who are the true criminals.<sup>41</sup>

In the event that the soldier *is* personally guilty of a crime, the captor’s consequent right to punish through enslavement must then be guided by what Grotius here calls “internal justice.”<sup>42</sup> As he does in each of the latter six chapters, Grotius explains in lengthy detail how the virtuous man will treat his slave. In one example, he compares the rule of a slave to the breaking of a horse, which must be done gently. More systematically, Grotius envisions the master’s coercive power in much the same way as that of a governor: both may rightly execute a subject only for the most grievous crimes. This similarity between the good exercise of mastership and governorship is pointedly different from Locke’s direct contrast between political and despotic rule, the latter of which is defined by the possibility of arbitrary killing. For Grotius, if a master so much as illegitimately breaks the tooth of a slave, he ought to free the slave—not because the slave has a right to freedom, but because the higher guidance of beneficence and virtue ought to guide the master.<sup>43</sup> Grotius cites an example of this practice in Exodus 21, the exact passage that Locke would later cite as evidence that the Hebrews did not actually permit true slavery, but only a condition of mere “drudgery.”

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22/23 (2001/2002): 233–44; James Farr, “Locke, Natural Law, and New World Slavery,” *Political Theory* 36, no. 4 (2008): 500–504; and Mary Nyquist, “Hobbes, Slavery, and Despotical Rule,” *Representations* 106, no. 1 (2009): 12–14.

<sup>41</sup>Grotius, *DJB* 3.14.1–2, 761–62. Grotius argues that individuals are responsible to determine for themselves the justice of the war before they participate. However, unless they are convinced that the war is unambiguously unjust, they are to follow the orders of their rulers. See Grotius, *DJB* 2.26.3–4, 587–94.

<sup>42</sup>According to Grotius, prior to civil society, all individuals have a right to punish crime, as long as they are not guilty of the same crime. In the creation of the state, individuals give up the right to punish their compatriots (in ordinary circumstances) to their common government. However, in international relations, individuals retain the original right to punish—and expletive justice imposes no limitations on its exercise. See, for instance, *DJB* 2.20.8.5, 474–75.

<sup>43</sup>As Grotius later points out, there is little virtue in simply respecting a right that is protected by coercive force. Unless it is safe to remain ungrateful, there is no virtue in gratitude (*DJB* 2.20.20, 489).

Inasmuch as this Lockean distinction is sound, Grotius actually prohibits slavery.<sup>44</sup>

While the example of captives shows how punishment requires prudence and virtue, another example—this time from peaceable international relations—shows that prudence may counsel the complete pardon of a criminal. This is the common practice of diplomatic immunity, a custom for which Grotius was instrumental in developing the modern legal doctrine of *quasi extra territorium*.<sup>45</sup> If the crimes of diplomats were to be punished by their host countries, their home countries would hesitate to send them in the first place. Consequently, the very institution of diplomacy—so central to a peaceful international society—would likely collapse. International relations would descend into a jungle of animalistic bloodshed, rather than being a venue for peaceful dispute resolution befitting humans of a social nature. Hence, Grotius states that guilty diplomats should simply be returned to their home country, even though doing so may allow them to avoid punishment.<sup>46</sup>

Grotius's line of reasoning seems to license the extension of this principle to other areas of war. For instance, any demand during hostilities that the other side be brought to full justice upon conclusion of the war might cause that side to fight to the last man. Only an international political order that allows for the possibility of pardon can provide the grounds on which the losing party will be willing to accept a cessation of hostilities. A punitive war without the possibility of clemency might be a perpetual war of all against all.<sup>47</sup> Thus, an order that demands full punishment is unlikely to produce peace or justice.

This conception of punishment and clemency actually inverts Furukawa's understanding of punishment in Grotius. In his reading, the traditional approach saw punishment as having redemptive value for the next life, and thus could never be too heavy-handed in this one. Hence, only a modern break with tradition could account for Grotius's moderate and humane approach to punishment.<sup>48</sup> However, a modern approach grounded in pure reason is more likely to exact punishment as a mathematical equivalent to the crime than a traditional approach that uses punishment to help

<sup>44</sup>Grotius, *DJB* 3.14.3–6, 763–68; John Locke, *Second Treatise of Government* (Indianapolis: Hackett, 1980), sec. 2, 7; sec. 24, 17–18; secs. 170–72, 88–90. Van Nifterik comes to a similar conclusion in "Hugo Grotius on 'Slavery.'" This provides some perspective on Tuck's treatment of slavery in Grotius (see Tuck, *Natural Rights Theories*, 147; Tuck, *Philosophy and Government*, 193–94).

<sup>45</sup>See J. Craig Barker, *The Protection of Diplomatic Personnel* (London: Ashgate, 2006), 39–45.

<sup>46</sup>Grotius, *DJB* 2.18.4–5, 441–46.

<sup>47</sup>Oliver M. T. O'Donovan, "Law, Moderation and Forgiveness," in *Church as Politeia: The Political Self-Understanding of Christianity*, ed. Christoph Stumpf and Holger Zaborowski (New York: de Gruyter, 2004), 6.

<sup>48</sup>Furukawa, "Punishment," 221–23.

others fulfill their distinctively human nature. Hence, if the right that confers a legitimate title to punish is genuinely modern, it is precisely this right that condones the very harshness of “eye for an eye” punishment. It is rather Grotius’s teleological conception of punishment that allows him to counsel a more moderate approach. Rights-based justice opens wide the door to punishment; traditional moral restraints narrow the opening.

### Expletive Justice

This examination of punishment presents an alternative portrait of Grotius, by drawing out themes that are implicit in his approach to war. However, it is not necessary to rely only on implicit themes. An examination of Grotius’s exposition of justice also reveals two explicit categories. The first category maps surprisingly well onto defensive war and the rights-based status necessary to wage punitive war. The second is coextensive with the actual practice of punitive war.

Throughout his corpus, Grotius begins his legal and political works by defining and outlining the concept of justice. *DJB* contains the fullest of these frameworks. When Grotius outlines what is meant by *jus*, he briefly defines it first in the “objective” sense as “that which is not unjust.” He quickly moves on to a more substantive exposition in which he likens *jus* to a body, and divides it into “faculties” and “aptitudes.” Faculties, which he terms “expletive” justice, include the classic definition of justice as a right to one’s own (*suum*). Aptitudes, which he calls “attributive” justice, flow from virtues such as generosity, compassion, and foresight in governing.<sup>49</sup> Expletive justice includes what he will subsequently refer to as the “strict” sense of *jus*, or “*jus* properly so called.” (This terminology likely accounts both for the lack of attention to the categories of expletive and attributive justice, as well as the assumption that expletive justice is Grotius’s only true sense of justice.) His definition of “what is due” calls to mind the idea of a possessive right.<sup>50</sup> The possessive nature of this framework produces an orientation point that starts from the individual who benefits.<sup>51</sup> Because expletive justice begins and ends with the individual, it is not concerned with the common good per se, but only a common good that is ultimately reducible to the aggregate rights of individuals.

Likewise, in regularly describing expletive justice as “strict” justice, Grotius indicates that it does not admit of exceptions due to circumstances, or adjustments based on the individuals involved.<sup>52</sup> Because of its indifference to

<sup>49</sup>Grotius, *DJB* 1.1.2–9, 34–37.

<sup>50</sup>Grotius, *DJB* 2.17.9.1, 433; Prol. 8, 13; 2.7.2.1, 268.

<sup>51</sup>Finnis, *Natural Law and Natural Rights*, 205–7.

<sup>52</sup>Grotius, *DJB* 2.7.4.1, 269–70.

proportion or modification based on the good of others, such a right has a radical quality. It confers an absolute freedom of action, constrained only by the possible interference of another (radical) right. For instance, Grotius admits that, according to expletive justice, one may take the life of a thief in order to defend one's own property.<sup>53</sup> Expletive justice thus appears to be the realm of universal rules, such as the basic individual rights to life and property. Even the corresponding duties of restitution fit into expletive justice, because the form of the normative content derives from its strict and inflexible laws of reason. Positive law also fits into expletive justice, as it arises from the mutual promises initially made in the formation of the state and subsequently guaranteed by the expletive duty to fulfill such agreements. Indeed, Grotius asserts that "legal rights are the concern of expletive justice."<sup>54</sup>

As a result, only calculative or technical skills are needed to bring about expletive justice. Once one has determined the facts of the situation, the remedy is universally clear, because it is entirely comparable to other situations. The differences in context are irrelevant, and the virtue of prudence is unnecessary. As Grotius says, the determination of expletive justice can be undertaken along the lines of mathematics, not requiring great imagination or creativity.<sup>55</sup> A single dimension of reason is adequate to ascertain and achieve justice. Expletive justice does not appear to admit of qualitative or multidimensional considerations.

The one-dimensional nature and the calculative reason associated with expletive justice also appear to eliminate any focus on internal intention. Expletive justice does not depend on the character of the person. Rather, it is achieved when a possessive right is transferred. This further confirms its place as the locus of private law, with its focus on tangible external goods as its currency. Thus, in its indifference to internal character, expletive justice corresponds to the aforementioned justice of deeds, rather than the justice of the doer. Grotius describes how two opposing actors ("doers") may both be free from internal wrong, yet—as with mutually exclusive possessions—only one can possess the "moral quality," or strict right.<sup>56</sup> Thus, expletive justice concerns the outcome of the action, and its possessive implications, rather than the internal character of the person.

Grotius's choice of terms illustrates another crucial aspect of expletive justice. The term "expletive" is a cognate of the Latin word *explere*, which is variously translated as "to complete, fulfill, discharge, satisfy, or perfect." The last of these may be particularly appropriate, as some recent observers have understood expletive justice as the realm of perfect rights and

<sup>53</sup>Grotius, *DJB* 2.1.11.1, 179.

<sup>54</sup>Grotius, *DJB* 1.1.8.1, 36–37.

<sup>55</sup>Grotius, *DJB* 2.7.2.1, 267–68.

<sup>56</sup>Grotius, *DJB* 2.23.13.2, 565.

duties.<sup>57</sup> It sets out clear expectations and standards of performance. Once achieved, all those involved can utter the words “case closed” without reservation. Thus, expletive justice can be fully and perfectly implemented.<sup>58</sup>

The possibility of full satisfaction is consistent with Grotius’s view of strict expletive justice as setting forth those only things that are not unjust, as seen in his initial characterization of *jus* as “that which is not unjust.”<sup>59</sup> Thus, this “*jus* strictly so called” does not require positive action. Rather, it is a condition that obtains in the absence of infractions. Expletive justice outlines the bounds of licit action by proscribing some acts. However, within those bounds, it is silent. The one who acts without violating expletive justice is not necessarily described as a good or worthy person, but merely “not guilty.” Thus, on its own, expletive justice does not call for positive action, but merely prohibits negative actions.

Expletive justice thus provides a basic standard of justice that does not rely on a thick conception of the person grounded in a transcendent conception of virtue (such as a Platonic form, the precepts of Yahweh, or the person of Christ). This provides a basis for universal human rights, respect for which can legitimately be demanded of all people. Expletive justice also facilitates the development of a science of law, whose black-and-white parameters are clear to all. It need not consider internal factors of motivation and intent, eliminating the need for judgments that are always open to dispute. Likewise, because expletive justice demands only restraint (rather than positive action), all should be capable of meeting its mandate. None can claim that such requirements would violate individual conscience.

In light of these characteristics, the private law dealing with property claims would seem to be the quintessential realm of expletive justice, along with its defensive war analogue. This is clear from each of the characteristics of expletive justice. For instance, it is true both in the determination of liability and the remedy. Indeed, the determination of liability (or lack thereof) already

<sup>57</sup>Samuel Fleishacker, *A Short History of Distributive Justice* (Cambridge, MA: Harvard University Press, 2004), 20–22, 139–40. See also Schneewind, *Invention of Autonomy*, 78–80, and Haakonssen, *Natural Law and Moral Philosophy*, 26–30.

<sup>58</sup>Note, however, that expletive justice can only be perfectly implemented within its own boundaries; it must artificially close off these parameters within the open-ended expanse of higher justice. In similar fashion, a perfect duty—such as the duty to provide a specific payment to a specific creditor—may be morally mundane compared to an imperfect duty that is not owed to anyone in particular and whose performance can never be final. For instance, the perfect duty of a millionaire businessman to pay a billionaire supplier may be prosaic in relation to the millionaire’s imperfect duty to promote better health among the world’s malnourished. Yet regarding the latter, it is unclear what the parameters of the duty are, to whom it is owed, what would constitute its perfect fulfillment, and whether the millionaire (or billionaire) is even capable of doing so.

<sup>59</sup>Grotius, *DJB* 1.1.2.1, 34. See also 1.2.1.3, 57.

contains within itself the remedy. Here, one typically seeks a transfer of external possessions, either of the original item, or of a quantitatively determined equivalent (often cash). Thus, there is little ambiguity about whether a debt has been fully repaid. It is a binary, one-dimensional condition with no gray areas, rather than a qualitative judgment between greater and lesser goods. As a result, its nature is final and thus static; once implemented, justice obtains perfectly, and there is nothing more to be done. Nor does it matter whether the person paying the restitution is a good person freely acting to realize the spirit of the law, or a bad person acting against their will simply to avoid imprisonment. The two acts are identical, as either one fulfills expletive justice.

While matters relating to ownership and credit form the bulk of expletive justice, Grotius also includes the requirement of punishing offenses. Thus, expletive justice plays a necessary role in punishment, by conferring on the punisher a right over the one who has broken the law. This is a precondition for punishment.<sup>60</sup> Nonetheless, Grotius immediately encounters some theoretical difficulties attempting to situate punishment entirely within expletive justice. This arises from the aforementioned fact that the right to punish is not a claim-right. Nor would one say that the criminal has a right to be punished. Rather, one might say that the rightness of the human situation calls for punishment, or that the offender is worthy of punishment. To foreshadow the language of attributive justice, it is even more appropriate to say that it is *fitting* that someone be punished.<sup>61</sup>

In addition to the theoretical difficulty of viewing punishment solely under expletive justice, there is also what might be termed a moral difficulty. Because expletive justice is a status, the right it confers is not limited by prudential or situational considerations. For example, in the realm of debts, expletive justice confers on the creditor a full claim on the amount owing. There is a certain logic to this right; indeed, the best way to bring about justice is to take the full amount from the debtor. However, the full exercise of expletive justice in criminal punishment is more unsettling, because the authority is not over a possession but over the actual person who has committed the wrong.<sup>62</sup> For instance, in the case of manslaughter, expletive justice would seem to be unlimited, requiring the criminal's life. Individuals would have no second chances to reform themselves, and no brush with the law could serve a forward-looking, educative or redemptive purpose. As long as the punishment was carried out by those with the right to punish, it would be just in the strict sense. Such draconian and possibly arbitrary punishment would undoubtedly be superior to an anarchic condition without any punishment; after all, law-abiding citizens would now be

<sup>60</sup>Grotius, *DJB* 1.1.5.1, 35–36; Prol. 8, 13; 2.20.3, 465–66.

<sup>61</sup>Grotius, *DJB* 2.20.2.2, 464.

<sup>62</sup>Grotius, *DJB* 2.20.3, 465–66.

protected from criminals. The restriction of punishment to the governing authorities that hold the expletive right to punish would also ensure a greater sense of order. Nonetheless, in contrast to repayment of debt, prosecution of the person to the full would fail to achieve the ultimate purposes of punishment. The punisher would *have* a natural right to punish as he or she did, but would not *be* in an ‘objectively’ right condition traditionally known as natural Right.

The correlation to punitive war is clear. If one nation commits offenses against natural justice, expletive justice confers on those nations not guilty of the same (or similar) offenses the unlimited right to wage punitive war.<sup>63</sup> Furthermore, if the war has a just cause, there are very few restrictions on how the war can be waged or on the consequent assumption of sovereignty over the offending nation, or on the severity of the punishment applied.<sup>64</sup> Thus, although expletive justice is necessary to give the punisher the *just* authority to punish, it is ineffective in determining a *good* punishment. A person on whom expletive justice has conferred a status as just punisher must be governed in that exercise of punishment by the higher standard of attributive justice.

### Attributive Justice

It is no wonder, then, that after outlining expletive justice, Grotius’s conceptual outline at the beginning of Book I quickly turns to attributive justice. His understanding of attributive justice includes many characteristics that distinguish it from the common rights-based portrayal of Grotius grounded in expletive justice. In contrast to expletive justice, attributive justice (1) is active, not static; (2) is imperfect, not perfect; (3) looks ahead to the future, not back to the past; (4) uses prudential (not calculative) reasoning; (5) is concerned with the internal intention of persons (rather than external outcomes); (6) is situational, not universal; and (7) is ultimately directed toward a positive conception of the common good that includes the exercise of higher virtues. Thus, attributive justice reveals Grotius’s opening of a conceptual space for the themes implicit in his understanding of punishment.

Grotius highlights the active character of attributive justice from the beginning, when he describes it as the realm of “fitness,” or “aptitudes,” rather than “faculties.”<sup>65</sup> It is not automatically present at birth, like the basic physical faculties of hearing or touch. Rather, it resides in the character of the person, and requires the exercise of human will and virtue in order to be developed (and subsequently instantiated). This can be seen when Grotius links the term “aptitude” to the Greek word *axian*. Aristotle uses this word

<sup>63</sup>Grotius, *DJB* 2.20.7.1, 470–71

<sup>64</sup>See Grotius, *DJB*, 3.1.2.1–3, 599–600. See also Book 3, chaps. 2–8.

<sup>65</sup>Grotius, *DJB* 1.1.8.1, 36–37.

in reference to ascertaining the virtue or dignity of a person and ascribing the appropriate societal honor.<sup>66</sup> This virtue is not automatic; people must choose to develop their capacities for it. Thus, rather than being a static reality that inheres in the “objective” structure of the universe, it is a dynamic capability that manifests itself in willed human action.

The dynamic nature of attributive justice leads to a second contrast to expletive justice: any demand for perfection is inadmissible. As Grotius says, while expletive justice attaches to a perfect moral faculty, an aptitude refers to one that is imperfect.<sup>67</sup> His terminology is consistent with this claim. The verb *attribuere*, from which *justitia attributrix* is derived, is often used in conjunction with the activity of allotting or assigning. This calls to mind the judgment involved in exercising one’s responsibility to assign shares of duties or benefits. More than once, Grotius uses the example of choosing the best person to carry out a particular role in public life, such as filling the position of a magistrate.<sup>68</sup> In such a case, there can be no clear, universal instruction inherent in the nature of things. No applicant, not even the best qualified, can ever have a strict right to the position. Rather, it is fitting that the job be assigned to the most deserving candidate. Poor judgment in this decision would not violate expletive justice, but it would offend against attributive justice.<sup>69</sup>

This imperfect character is particularly salient in light of the fact that such an appointment is a beginning, not an end. The true test of the appointment is in the future performance of the role. In order to make a perfect appointment, one would—at minimum—require the ability to foretell the future with perfect clarity. Even then, however, the term “perfect” could only be applied to something that has been finished—a condition that never obtains in this world. Contrary to common colloquial usage, no candidate can ever really be perfect for a job. Likewise, attributive justice cannot admit of perfection, because it would connote a finality that would close off the possibility of human action in that matter. Only a static form of justice could ever be complete or perfect. Rather, because it is performatively instantiated, attributive justice requires a creative imagination that looks forward toward a greater good. It is no wonder that one of Grotius’s first descriptions of attributive justice is “foresight in matters of government.”<sup>70</sup>

<sup>66</sup>Grotius, *DJB* 1.1.7, 36. See Aristotle, *Nicomachean Ethics* V.6, trans. Martin Ostwald (Upper Saddle River, NJ: Prentice-Hall, 1999), 129–30.

<sup>67</sup>Grotius, *DJB* 1.1.4, 35.

<sup>68</sup>Grotius, *DJB* 1.1.8, 2.17.3, 37, 431.

<sup>69</sup>For an illuminating treatment of this issue, see O’Donovan, “The Justice of Assignment,” 181–82.

<sup>70</sup>Grotius, *DJB* 1.1.8.1, 37. Later, Grotius recognizes how unusual it is for a work on jus to treat (political) virtue. However, he reaffirms the fact that virtue often counsels one not to exercise their jus, testifying to the limits of the law. See Grotius, *DJB* 2.24.1.1, 567.

Thus, the situations governed by attributive justice are not those in which only one course of action is right and all others wrong. Rather, these situations require prudential judgment of better and worse possibilities, to which Grotius devotes an entire chapter in *DJB*. Citing Aristotle, he states that in order to rightly consider competing arguments, which may refer to the judgment of a mean between extremes, one must “rightly mould their practical judgment.”<sup>71</sup> This is because “in moral questions, . . . even trifling circumstances alter the substance.” In other words, one must have cultivated the requisite aptitude to exercise this prudential judgment well. Mathematical reasoning may be appropriate for expletive justice, because it deals with forms, of which there can be only one ideal and no intermediate stages. However, it is inadequate to the complex moral judgment and imagination involved in attributive justice. Grotius concludes by citing Aristotle’s well-known maxim that “certainty is not to be found in moral questions in the same degree as in mathematical science.”<sup>72</sup> The finite perfection of arithmetic is an inadequate guide to the infinite possibilities of embodied human experience.

This focus on the lived world also points to the limits of the science of law, which looks backward to objectively determine deviation or conformity to the law. Once the monkey wrench of crime is thrown into the machinery of law, there is no way for the law to move forward other than to return to the pre-criminal past. On the contrary, a politics informed by attributive justice need not try to carry on as though the offense never happened. It is able to look forward to redeem the past, including the subsequent reality shaped by the offense, and to build a new future.<sup>73</sup> This may involve pardoning the criminal (such as a diplomat), even in the face of objective wrongdoing.<sup>74</sup> However, this subjective character of attributive justice need not bring the connotations of relativism that often accompany the term. Indeed, the subject is ontologically higher than any mere object and can never be reduced to such.<sup>75</sup> Accordingly, attributive justice corresponds to an overarching sense of rightness covering the person and his or her relationship to the entire moral universe, not simply the status of a person over a possession. This reflects the fact that attributive justice does not blindly follow from (‘objective’) nature, but is instead—to use Grotius’s own formulation—“in harmony with

<sup>71</sup>Grotius, *DJB* 2.23.4, 558–59.

<sup>72</sup>Grotius, *DJB* 2.23.1, 557.

<sup>73</sup>Hannah Arendt’s meditations on the forward-looking character of human action are insightful here, especially her thoughts on the importance of forgiveness and pardon from the punishment set out in law. See Hannah Arendt, *The Human Condition*, 2nd ed. (Chicago: University of Chicago Press, 1998), 236–41.

<sup>74</sup>Grotius, *DJB* 2.23.13.1–3, 565–66.

<sup>75</sup>Likewise, the necessarily imperfect nature of judgment under attributive justice is not of lesser value than the perfect formulations of expletive justice.

nature."<sup>76</sup> This imagery suggests that it is distinct from nature, yet consonant with it. What is more, attributive justice actually builds upon and enriches nature, adding another dimension.

Indeed, as relating to the practice of politics rather than the science of law, Grotius consistently associates attributive justice with the realm of positive virtue. Expletive justice, as the strict sense of justice, obtains when one is merely innocent. It merely requires following the law, rather than exercising virtues.<sup>77</sup> However, Grotius states that "honour may forbid what law permits."<sup>78</sup> On its own, the law cannot reach to concerns of what is considered decent or honorable—the latter a term that Grotius regularly uses in contrast to expletive justice. However, the fullness of right by nature "holds in view not only the dictates of expletive justice . . . but also actions exemplifying other virtues, such as self-mastery, bravery, and prudence."<sup>79</sup> These statements echo his initial characterization of attributive justice as being associated with other-oriented virtues like generosity and compassion.<sup>80</sup> As the wider sense of justice, attributive justice does not simply occur in the absence of injustice, but resides in the positive actions of virtue.

Because such positive actions cannot be virtuous unless they are freely undertaken, coercing them through the laws of the state would seem to defeat the purpose. By thus reducing strict (legal) justice to the avoidance of negative actions, Grotius opens up a large sphere of personal liberties protected by expletive justice. Yet he consistently reminds the reader that this space remains governed by higher norms.<sup>81</sup> Indeed, the very formal character of expletive justice itself points to the subsequent decision of how to exercise the right. Because expletive justice is formal rather than substantive, it does

<sup>76</sup>Grotius, *Less Known Works of Grotius*, 209–10. This is consistent with Grotius's usage in other works. For instance, in *The Satisfaction of Christ*, he draws a distinction between things that are "properly natural" or "simply and universally natural," and things that are fitting, or "agreeable enough unto nature" (chap. 3, 85).

<sup>77</sup>Grotius, *DJB* 2.1.9.1, 176. This can also be seen in 2.1.11. It is noteworthy that Grotius describes as "virtues" only those virtues which Aristotle would describe as moral virtues; for Grotius, virtues of the intellect may not be virtues at all, as they correspond to the impersonal realm of nature.

<sup>78</sup>Grotius, *DJB* 3.10.1.1, 716. See also *DJB* 1.1.9, 38.

<sup>79</sup>Grotius, *DJB* 2.1.9.1, 176.

<sup>80</sup>Grotius, *DJB* 1.1.8.1, 37. See also O'Donovan and O'Donovan, "Hugo Grotius," 790–91.

<sup>81</sup>This contrasts with Brett's analysis—by no means unusual—that "beyond [expletive justice] there is only the free play of utility." See Brett, "Natural Right and Civil Community," 44. Brett offers a sensitive treatment of how Grotius's conception of the state changes from *de Jure Praedae* to *DJB*, pointing to the "changed relationship Grotius sees between justice, honesty, and utility" (48). However, she does not examine Grotius's tripartite conception of the sources of authority—generation, consent, and crime—nor does she explore Grotius's more extended discussion of political authority in *de Imperio Summarum Potestatum Circa Sacra*.

not conflict with a substantive act enjoined by attributive justice. One might say that attributive justice fulfills expletive justice without overturning it. To return to Grotius's metaphor, this permits a harmony between the two types of justice.

Such harmony presumes, of course, that one already possesses the right conferred by expletive justice. One cannot act attributively without meeting the precondition. Grotius cites the example of Xenophon's *Education of Cyrus*, in which a larger boy forcibly exchanges his own small tunic with a small boy possessing a larger one. While the attributive notion of fit would naturally endorse the outcome of this 'exchange,' Grotius argues that the taking of another's property is a procedural violation of expletive justice. Hence, it is legally and morally unjustifiable.<sup>82</sup> Many observers have interpreted this statement as a rejection of Aristotle's concept of distributive ("geometric") justice. Yet while Grotius condemns this theft of private property—surely an uncontroversial stance—his notion of attributive justice still seems to recommend that the smaller boy voluntarily offer such an exchange. Should the boy do so, a governor guided by attributive justice might then choose to publicly recognize the smaller boy's sacrifice. Yet such an honor would be a free gift of the ruler; the smaller boy could not demand it as a strict right. If he could, he might then begin to carry out similar beneficent deeds out of sheer desire for public reward, thus ceasing to be a virtuous doer.

Because expletive justice is a necessary precondition, many commentators have taken this "strict" justice as rendering inferior all other forms of justice. Yet if attributive justice is not justice in the strict sense, that is because it is a superior sense of justice. Grotius plainly states that one's duty is "sometimes taken strictly . . . by expletive Justice," and sometimes "in its larger sense."<sup>83</sup> He later asserts that the term "ought" has two meanings, the broader of which corresponds to attributive justice.<sup>84</sup> This helps to explain his use of the "more extended meaning" of justice in his initial discussion of attributive justice, especially in contrast to the "strict sense" of expletive justice.<sup>85</sup>

Hence, the mere fulfillment of expletive justice is not the end of the story; political life may yet require the "natural fitness" of attributive justice.<sup>86</sup> While attributive norms are nonjusticiable and are thus outside the law (in the strict sense), they remain relevant to public life. It is true that nobody is compelled by expletive justice to volunteer or give private charity; in fact, all are within their rights to refuse. Yet a society without either is unlikely to have social and political harmony. Few would feel comfortable in a society of devils, even if those devils should be rational enough to avoid

<sup>82</sup>Grotius, *DJB* 1.1.8.2, 37.

<sup>83</sup>Grotius, *DJB* 2.7.4.1, 269.

<sup>84</sup>Grotius, *DJB* 2.17.2.2, 431.

<sup>85</sup>Grotius, *DJB* 1.1.10.3, 39.

<sup>86</sup>Grotius, *DJB* 2.7.10.1, 277.

violating expletive justice. Reciprocally, a government that exercised its expletive right of punishment to the full would likely fail to engender loyalty and public-spiritedness—sentiments that might curtail the devils' mischief should their rationality momentarily fail. On the contrary, a ruler who enforced the law with prudence and moderation would more likely generate allegiance to the commonweal. Such a governmental example of attributive justice would actually help to promote adherence to expletive justice among the governed. Grotius's solid grounding for rights claims may actually justify the frequency of his systematic exhortations to right-holders to exercise them in other-oriented fashion.

This relationship between the two categories is particularly well illustrated in the aforementioned practice of diplomatic immunity. When Grotius outlines the five basic universal demands of expletive justice, one is that crimes be punished. This requirement is a formal precondition for any human society, a foundation upon which particular peoples are then free (at least under expletive justice) to substantively define the content of crimes in whatever humane or repressive fashion they choose. Yet the very possibility of international society—one based on the exercise of the human capacity for reason rather than animalistic violence—actually depends on transcending the universal expletive rule that demands punishment of visiting diplomats. In this case, the guidance of attributive justice is not merely a higher standard that can be withheld at the (expletive) prerogative of the right-holder. Paradoxically, it appears to be a precondition for an international order that wishes to minimize the wars that inevitably violate basic expletive rights. Expletive justice may not simply be ordered to attributive justice, but in a more subtle way, may even depend on it.

This higher place for attributive justice helps to clarify Grotius's emphasis on punitive war. Because expletive justice places few constraints after establishing the right to punish, Tuck sees Grotius's punitive war as a stalking horse for a "brutal" policy of colonization. This reading appears to hinge on a dismissal of Grotius's attributive counsels of moderation as irrelevant to political justice.<sup>87</sup> However, if attributive justice is actually a higher form of justice, Grotius's many chapters on moderation in war can be taken as serious constraints on colonial ambition. Attributive justice eliminates the self-interested motive for colonization, and dramatically reduces the frequency and severity of punitive wars wherever undertaken. Indeed, Grotius shows such respect for other religions that he outlaws war for conversion, but legitimates punitive war against those who show impiety toward their *own* (non-Christian) gods.<sup>88</sup>

<sup>87</sup>Tuck, *The Rights of War and Peace*, 102–8.

<sup>88</sup>Grotius, *DJB* 2.20.51, 521. This further emphasizes the importance of religion (and its promises of eternal rewards and punishments) in safeguarding the sanctity of (expletive) contracts.

In sum, with expletive justice, Grotius simultaneously provides a grounding for rights and an exposition of their limits. The possession of a right is a beginning, not an end. While expletive justice may confer a right of action, it has little to say about how to exercise those rights in accordance with a higher good. Because natural rights are ultimately oriented toward a natural Right that is freely instantiated, they must be understood and actively exercised according to the virtues of attributive justice. Attributive justice does not eliminate expletive justice. However, by pointing toward the higher moral reality that can overcome the internal limitations of expletive justice, attributive justice may fulfill and transcend it.

This attributive justice emphasizes the importance of political practice, as one cannot simply implement basic universal rights and conclude that a just state is thereby achieved. Rather, a magistrate must strive toward justice in particular historical situations, understanding the internal character of the people and the particulars of their unique contexts. This must be an ongoing, forward-looking quest that imagines the instantiation of the common good on an ongoing basis, while recognizing that perfect justice will never be achieved. As a result, the ruler must possess the classical virtue of political prudence, seeking not simply to change the external behavior of subjects, but to foster a particular kind of character in the community. This is particularly true in regard to law enforcement, or punishment: the ruler must know when the common good would be best suited by punishment and when by clemency. This discloses Grotius's understanding of politics as an interpersonal practice, transcending the inflexible letter of the law.

### Grotius's Classical Roots

Grotius's conception of attributive justice suggests that he is more consonant with the classical tradition of right by nature than is often assumed. In showing that justice transcends the protection of private property, he echoes Aristotle's treatment of justice in Book III, chapter 9 of the *Politics*. In this important chapter, Aristotle asserts that property is not a sufficient criterion for distributing public honors, because the true polis must also encourage a good "quality of character" in its citizens. The functions of promoting economic exchange and providing common defense are only preconditions for a polis. An exclusive focus on these lesser pursuits would cause the polis to sink into a mere "alliance": a "'guarantor of men's rights against one another'—instead of being, as it should be, a rule of life such as will make the members of a polis good and just."<sup>89</sup> Likewise, Grotius affirms the sanctity of private property while simultaneously showing that the ultimate purposes of politics aim higher.

<sup>89</sup>Aristotle, *Politics*, trans. Ernest Barker (New York: Oxford University Press, 1962), 119–20.

Grotius also sides with Aristotle in viewing justice and ethics as a practical virtue, against modern natural-law (and especially natural-rights) theories that are more apt to see political ethics as relating to intellectual virtues and as knowable through propositional statements. Aristotle argues that a good polis comes about only through prudent political rule, which seeks to instill virtue in its citizens. Because no rules are universally true in all situations, the *spoudaios* must be able to discern the good in unique and particular historical contexts. Thus, natural Right resides more in concrete decisions than in general propositions.<sup>90</sup> Politics is not simply an exercise of *technē*, but also requires (and cultivates) *phronēsis*. This emphasis on the importance of prudence is central to attributive justice.

Grotius's emphasis on practical virtue becomes particularly evident when he directly engages with Aristotle. Grotius's bifurcation of justice clearly follows from Aristotle's two categories in Book V of the *Ethics*, which Aquinas would rename "commutative" and "distributive" justice.<sup>91</sup> However, Grotius takes issue with Aristotle's use of the terms "geometric" and "arithmetic" to name them, because both terms are too deductive and nonsituational. In fact, he repeatedly uses Aristotle's broad understanding of political virtue in Book VI of the *Ethics* to criticize what he sees as Aristotle's overly mathematical conception of partial justice in Book V of the same.<sup>92</sup> Thus, where Grotius breaks with the words of Aristotle, he does so in order to develop more fully the Aristotelian spirit of *phronēsis*.

## Conclusion

Grotius is often seen as a crucial figure in the development of rights-based approaches to politics. Notwithstanding a few dissenting opinions in recent scholarship, the dominant understanding of Grotius's politics is an individualistic one focused on self-interest rather than right by nature. When his conception of natural justice is raised, it is often a thin conception focused on protection of property rights. Likewise, he supposedly rejects the traditional category of distributive justice, as well as disavowing any substantive connection between virtue and justice. Taken together, these portraits add up to a reading of Grotius as making a radical break with the classical understanding of politics. For instance, Tuck identifies "the true heir of Grotius" in Thomas

<sup>90</sup>Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953), 159. William Clare Roberts examines the implications of this approach in "All Natural Right Is Changeable: Aristotelian Natural Right, Prudence, and the Specter of Exceptionalism," *Review of Politics* 74, no. 2 (2012): 266–72.

<sup>91</sup>Aristotle, *Ethics* V.6, 129–30 (trans. Ostwald); Thomas Aquinas, *Summa Theologiae* II-II 61.1, in *On Law, Morality, and Politics*, 2nd ed., ed. William P. Baumgarth and Richard J. Regan (Indianapolis: Hackett, 2002), 124.

<sup>92</sup>See, for instance, Grotius, *DJB* 1.1.8.2, 37; 2.20.2.2, 464; 2.20.33.1, 500; 2.23.1, 557.

Hobbes, a figure whose thoughts on Aristotle are less than laudatory.<sup>93</sup> Even those who reject the supposed novelty of Grotius's approach, like Brian Tierney, still see rights as paramount for Grotius.

This identification of a Grotian foundation for modern natural rights is partially accurate, although—considering the importance of his separation between abstract natural law and dynamic human will—Kant may be a more legitimate descendant than Hobbes. Grotius's notion of expletive justice certainly grants a place for abstract and static laws that are inherent in the nature of things, laws that provide absolute and universal protections independent of historical context, and whose implementation and administration require only calculative reason. These laws may be formulated in terms of individual rights conferring a claim on an external good. Their discernment requires no special imagination of the future, nor any knowledge of ultimate goods, but simply of procedures. Their proper implementation may not require an assessment of the internal state of the people involved, nor any positive virtue in those who put them into effect. As a result, they can perfectly implement the negative condition achieved in the absence of injustice. For these reasons, no regime can be excused from protecting such rights.

Yet while much of the conventional wisdom is accurate as a description of Grotius's expletive justice, this element is a beginning, not an end. While it may be temporally first, it is not ontologically highest. A careful reading of Grotius's concept of justice, illuminated by his treatment of punishment, shows a more complete picture.

First, while Grotius's rights confer a valid freedom of action, his concept of attributive justice points to the fact that rights, on their own, are silent about the exercise of this freedom. Indeed, some rights—such as the right to punish—are not claim-rights at all; they are duties that call forth a subsequent action. Justice is not merely the forensic declaration of an absence of violations, but the positive exercise of those rights in ways that contribute to the common good. In other words, justice is active, not static. Rights are not incompatible with higher goods; rather, rights find their fulfillment in these goods. Liberty is not license, because rights cannot be conceptually separated from responsibilities. Grotius provides a firm foundation for basic rights while simultaneously showing that leaders cannot rule by rights alone.

Second, the content of the duty to punish cannot be specified in the same terms of pure reason that originally conferred the duty. A mathematically equal and opposite reaction to the original injustice fails to realize the true purposes of punishment. Instead, a just punisher must exercise prudence,

<sup>93</sup>Richard Tuck, "Grotius and Selden," 522. Hobbes's evaluation of Aristotle: "I believe that scarce anything can be more absurdly said in natural philosophy than that which now is called Aristotle's *Metaphysics*; nor more repugnant to government than much of that he hath said in his *Politics*, nor more ignorantly, than a great part of his *Ethics*" (Thomas Hobbes, *Leviathan*, ed. C. B. MacPherson [New York: Penguin Books, 1985], chap. 46, 687).

considering both the context of the person's act and the content of their character. If the strictness of the law demands an inappropriate punishment, the governor should consider pardoning the person or relaxing the punishment. Rather than looking to the past to recover a previous equilibrium, the punisher must take his or her bearings from a vision of the future that is inherently open-ended, seeking to cultivate social trust and harmony over time. For instance, while the presidential pardons of citizens of the Confederate states and of President Nixon could have been opposed on strict legal grounds, both helped the nation to move forward after highly divisive conflicts. This illuminates political life as an ongoing and participatory quest—always conscious of a higher ideal, but ever seeking the best possible approximation in a particular time and place. It also offers a caution to those who would advocate abstract solutions that are blind to the particular character of political communities.

Thirdly, just as punishment cannot be fully understood in the abstract, Grotius rejects the study of politics as a universal science with one-size-fits-all blueprints. Politics is a lived reality, not a problem to be solved with finality. Unlike the restitution of expletive justice, the higher counsels of attributive justice can never partake of perfection; perfect justice in the personal realm could come only at the end of history. Grotius's political thought thus carries an implicit warning to ideologues who advocate utopian schemes. The more important the matter, the more limited the ability of politics to bring about ultimate satisfaction.

Paradoxically, Grotius also helps to vindicate the practice of politics. Politics is often derided as a game in which self-interested partisans simply seek to preserve their own positions of power. This is confirmed in low approval ratings for legislatures, often accompanied by the implicit belief that public business is better conducted in constitutional courts. The impersonality of the legal system carries a seductive air of moral purity, and its categorical pronouncements purport to avoid the messiness of log-rolling and political compromise. However, Grotius shows the limitations of law, and the problems of the science of rights implied therein. He points out that the letter of the law is only a starting point, and shows that political judgment is essential to ascertain its underlying spirit. When public discussion ceases, justice suffers. Grotius thus opens up a robust space for political discourse and reaffirms the dignity of politics. This conceptual progression from law to politics mirrors Grotius's own career trajectory from lawyer to political counsel to legislator to diplomat. The extralegal trial, conviction, and exile that brought an end to Grotius's domestic political career adds a poignancy to his recognition—publicly advanced both before and after his trial<sup>94</sup>—of the primacy of politics.

<sup>94</sup>For instance, the primacy of politics is a consistent theme of his *de Imperio*, completed in 1617, as well as *DJB*, written shortly after his 1618–21 imprisonment in the Loevestein Castle.

Fourthly, Grotius's unwillingness to limit just wars to those of self-defense, and his qualified endorsement of punitive war, point to the fundamentally public nature of his political thought. If politics were simply the competitive maximization of private possessions, the threat of self-defense and restitution would presumably suffice to protect this ambition. Yet higher justice calls for a right relationship not simply between a person and an object, but between all the persons of a political community. Politics cannot be reduced to economics, and people cannot be treated as the mere objects of universal laws or economic forces. Grotius may begin with subjective natural rights to property, but he ends with a sense of overarching natural Right among uniquely human subjects.

Indeed, by emphasizing the human element of politics, Grotius shows that politics requires—and cultivates—virtues in the political community. This provides a critique of unscrupulous political leaders who abjure personal responsibility and integrity, based on the belief that the system demands only their enlightened self-interest. Reciprocally, Grotian political thought also emphasizes the imperative of responsibility among citizens. Citizenship is not obviated by theorems of political science, nor manifested in private accumulation, nor exhausted by the legalistic avoidance of rights violations. Rather, Grotius points to more inspiring possibilities: politics as an interpersonal practice, looking ahead to the future, motivated by a concern for the common good, and inspiring the cultivation of virtues that both strengthen the political community and further realize the social and political character of human existence.