PUNISHMENT'S JUSTIFICATION

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1*Error! Main Document Only.* Position and acknowledgments.
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INTRODUCTION

“Whoops of joy and a thunderous applause erupted in the normally staid federal courtroom in downtown Manhattan yesterday as Bernard Madoff, mastermind of the biggest financial fraud in history, was sentenced to 150 years behind bars.”

People cheered when history’s biggest swindler was sentenced notwithstanding the fact that we had just imposed a life-time of suffering on another human being. Yet for everyone in the courtroom and many outside of it, the severity of Madoff’s punishment seemed eminently reasonable, and, more significant, nearly all would agree that some punishment was necessary.

It is unlikely that many of those who applauded Madoff’s sentence had read Kant’s theory of retribution or were conversant in Mill’s and Bentham’s deterrence theories. It is likely, however, that they cheered because they thought that Bernard Madoff got what he deserved—an element of retribution theory—or because they thought that now he would never do that again—an example of specific deterrence. As to the feeling that Madoff got what he deserved, it felt right. More important, it felt just. But why?

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2James Duran, Applause in Court as Disgraced Financier Madoff Gets 150 Years, THE IRISH TIMES, Front Page (June 30, 2009).
If Madoff announced that he had the funds to pay back everyone with interest and would do so, would the courtroom have cheered if the judge had given Madoff probation? Some would have been happy but some, perhaps many, would feel that justice would not be served without a punitive sentence. So what is it that made Madoff’s prison sentence feel like a just desert?

Punishing criminality does feel right. We have punished criminals for millennia. We accept the need for punishment for most offenses. But we also feel the need to justify punishing another person.

Over the centuries we have articulated many justifications for punishment. They include lex talionis (eye-for-eye), Kant’s retributivism—his class-infected ius talionis, character retributivism, utilitarian retributivism, counterstrike, annulment of crime, redistribution of burdens and benefits, legal integrity, deterrence (both general and specific), and public safety. All of these ideas, however, are incomplete or they are perspective-based justifications. None reaches the core of the question of why we prefer

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3As John Rawls noted in 1955, “Only a few have rejected punishment entirely, which is rather surprising when one considers all that can be said against it.” John Rawls, Two Concepts of Rules, 64 PHIL. REV. 3, 3–4 (1955). This same statement would be true today, although the nature of the objections to punishment have changed. Cf., Henry T. Greely, Neuroscience and Criminal Justice: Not Responsibility but Treatment, 56 KAN. L. REV. 1103, 1103–1138 (2008) (arguing that developments in neuroscience will lead to treatment regimens for criminal behavior).
punishing criminals to other alternatives. These justifications lack an epistemic source. They are theoretical justifications assembled to explain an inherited practice.

As a result much of the philosophical writing and discussion dwells on the moral justification for punishment. This seeks to answer the question: If an offender remains a member of the moral community, then how may that moral community justify the infliction of suffering upon him?

We can say that punishment “feels right.” “To say that crime deserves punishment is another way of saying people feel criminals should suffer.” To say that punishment, especially as retribution, feels right is to say that it seems instinctual. It is “part of the nature of man.”

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5Kevin M. Carlsmith et al., Why Do We Punish?: Deterrence and Just Deserts as Motives for Punishment, 83 J. PERSONALITY & SOC. PSYCHOL. 284 (2002); see JOHN STUART MILL, UTILITARIANISM 63 (1957) (“It is natural to resent and to repel or retaliate against any harm done or attempted against ourselves or against those with whom we sympathize.”).

6E. CHRISTIAN BRUGGER, CAPITAL PUNISHMENT AND THE ROMAN CATHOLIC MORAL TRADITION 53 (2003); JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (1883) (“[T]he sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax. It converts into a permanent final judgment what might otherwise be a transient sentiment.”).

If the impulse towards punishment is instinctual, if it is “part of the nature of man,” then it should have an epistemic source. We should observe the same impulse operating in modern primitive societies and find evidence of it in ancient primitive societies. Because the social, commercial, and criminal rules that govern primitive societies should be simpler than those of modern society, we should be able to peel away civilization’s layers in order to find and describe the epistemic justification for punishment at a more fundamental level. Because their rules are generally not written, the practices of primitive societies should be bound less by form and more by a sense of justice in an individual case—a sense of justice that is formed from experience and custom.

I am convinced that our many and varied justifications for punishment are not a result of an inability to agree on fundamental principles. Instead they are a result of

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238, 308 (1972) (Stewart, J., concurring).

8By a primitive society, I generally mean a pre-literate society that has not been influenced or at least not significantly influenced by the ideas of a written world culture or world religion. It is pre-positive law. Ancient societies may be highly complex, so when I refer to primitive societies, I mean generally tribal or clan-based societies grounded in societal custom. For example, William Ian Miller points out that Iceland was generally free from “outside impingements.” Neither the Church, royalty, nor Roman administration affected Icelanders’ conduct of their internal relations. William Ian Miller, Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland 5 (1990).
complex social and religious mores that were developed as society became more complex and more difficult to govern and administer. Punishment for theft would not exist without a developed idea of private property. Once the idea of private property is developed, a system of rules for ownership and transfer of property also develop. The development of such a system leads to a definition of theft.⁹

Our justifications for punishment are necessarily influenced by the mores that governed the writer’s society. Since the Eighteenth Century many writers have tended to justify the punishment that operated in their society. I want to look at punishment at a more fundamental level.

I examine primarily three primitive societies: the Germanic and Scandinavian tribes of *Beowulf* and the Icelandic sagas; the head-hunting tribes of northern Luzon; and the Cheyenne Indians of North America, as described by George Bird Grinnell, by Father Peter Powell’s *Sweet Medicine*, and Karl Llewellyn’s and E. A. Hoebel’s *The Cheyenne Way*. Each of these groups, although isolated from the other by geography and time, share similar fundamental concepts of punishment. While any group might

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⁹The definition of theft has its own overlays. For example, in English common law, adverse possession, the taking of another person’s real property by occupying it and working it continuously and openly, in a manner that is hostile to the owner’s possession, while excluding others, confers title on the “thief” after a passage of years. In other political systems, there is no private interest in property and ownership itself may be a crime. *See* Criminal Code [UK RF] arts. 97, 154-1, 199 (1965) (RSFSR).
have literate members, the societies themselves at the time in question relied upon oral history for their laws and customs.

The stories of the Northern Luzon and Northern European tribes are stories of external relations among close neighbors. That is, offense and conflict are described as taking place between unrelated or distantly related groups. The Cheyenne story is one of internal relations among close neighbors. Offense and conflict take place between a Cheyenne and the Tribe or a Cheyenne and another Cheyenne.

I use the case-method, examining cases described by the anthropological literature and found in semi-historical accounts (the Northern European and Icelandic Sagas). But this is not an anthropological study. Anthropology warns against generalizing across cultures.\textsuperscript{10} I have engaged in an inductive approach. I looked for and found common principles that define an appropriate punitive action.

I generally limit my examination to fundamental offenses – homicide in particular. Proscriptions against and customs encouraging homicide are basic in all three societies. Among the Cheyenne, the Northern Luzon tribes, the Danes, and the Iceland Vikings, those proscriptions had common aspects and they existed regardless of the simplicity or complexity of the society.\textsuperscript{11}


\textsuperscript{11}This article is not intended to be a work of anthropology. I use tribe, clan, and kindred interchangeably, although I recognize that among anthropologists these are terms of art that have different meanings.
At the end of this work I conclude that the fundamental justification for punishment is not vengeance, it is liberation from dominion. In other words, Kant was not far from the mark when he said, “But what does it mean to say, ‘If you steal from someone, you steal from yourself’? Whoever steals makes the property of everyone else insecure and therefore deprives himself (by the principle of retribution) of security in any possible property.”\textsuperscript{12} Although Kant came close, he failed to recognize that the wrongdoer also gains dominion over the society from whose member he has stolen or whose member he has killed. The offender communicates and understands that his act, if left unanswered, gives him power over others. Without a response, he and his encouraged kin may harm again with impunity if he chooses to do so. His unanswered act frees him to inflict a new injury and permits him to exact tribute from the members of the victimized group as a price for refraining from future injurious acts.

Punishment frees a victimized society from the power of the offender. This distinguishes punishment from vengeance, even where the emotion of revenge may be satisfied by punishing the wrongdoer. When the members of the victimized group strike back at the offender, they communicate and understand that their act repulses the offender’s attempt to exercise power over them. Of course, they may fail and be destroyed or fail and lose their power to inflict future punishment. But if they do nothing, they must be subject to the offender’s will. As Lawrence Rosen noted, doing

\textsuperscript{12}\textsc{Emmanuel Kant}, \textit{The Metaphysics of Morals} 142 (Mary Gregor trans., 1991).
nothing threatens the survival of the family or the clan.\textsuperscript{13} This, as we shall see in the cases that follow, is the impulse that ran through primitive societies.

Finally, I consider what this means for more modern justifications for punishment. Is punishment purely a matter of morality? What is the proper measure of punishment and how do we justify that measure? Is a murderer’s death required? Is injury a pre-requisite to punishment?

First I want to review modern justifications for punishment. None, I argue, offers an epistemic answer to the question, “Why do we punish?”

\textbf{MODERN JUSTIFICATIONS FOR PUNISHMENT: RETRIBUTION}

All that has been written about the retributive theory of punishment would fill many shelves. I prefer Rawls’s “rough” definition of retributivism:

What we may call the retributive view is that punishment is justified on the grounds that wrongdoing merits punishment. It is morally fitting that

\textsuperscript{13}LAWRENCE ROSEN, LAW AS CULTURE 5 (2006) (asking “When Muddarubba reacted to the woman’s [insult] by throwing a spear at her, was he envisioning her use of that word as a challenge to his manhood—and with it his ability to provide for his dependents in a difficult environment? Or was it . . . a challenge to the authority structure that has allowed the tribe as a whole to survive?”).
a person who does wrong should suffer in proportion to his wrongdoing.

That a criminal should be punished follows from his guilt.\textsuperscript{14}

Under retributive theory a state of affairs in which a criminal is punished is morally better than one in which he is not. This is true without regard to any other positive or negative aspect or consequence or derivative result of punishment.\textsuperscript{15} It does not matter, therefore, whether society becomes more or less safe in the short run by reason of a given criminal’s punishment because over the long run, society is morally better and therefore intrinsically safer.

Hans Kelsen finds “[n]o sharp distinction” between vengeance and retribution. Both are reactions to a breach of social norms. Retribution, he suggests, differs from vengeance because it is a qualified reaction to the breach. Kelsen also suggests that vengeance (and hence retribution) elevates and satisfies the injured in relation to the injurer.\textsuperscript{16}

In contrast to Kelsen’s view, it should be apparent that under Rawls’s definition retribution has nothing to do with vengeance. Vengeance is vindictive. It is an exercise of individual personal desire and satisfaction. It seeks to expiate grief, anger, and hatred through the infliction of injury upon the person who or the thing that is seen as

\textsuperscript{14}Rawls, supra note 3, at 4.

\textsuperscript{15}Id. at 4–5; see Ernest van den Haag, The Ultimate Punishment: A Defense, 99 Harv. L. Rev. 1662, 1662–1664 (1986) (arguing that a punishment applied unfairly may nevertheless be moral).

\textsuperscript{16}HANS KELSEN, SOCIETY AND NATURE: A SOCIOLOGICAL INQUIRY 50 (1943).
the cause of those feelings. Vengeance is exacted because of hatred, and is therefore based in emotion. While retribution may satisfy someone’s need for vengeance, it is not vengeance. This becomes apparent in the various elaborations of retribution, to which I now turn.

**Lex Talionis**

That retribution is not vengeance becomes clear when we consider the more familiar sub-category of retribution, *lex talionis* or eye-for-an-eye. Unregulated, an individual’s desire for revenge for an injury may be best satisfied by inflicting a more serious injury on the offender. In primitive societies vengeance is often sought by, if not required of, a relative of the injured, and the result is often vendetta or feud in which each side engages in escalating and ongoing violence. This situation is harmful to society (not to mention the victims of each side’s vengeance.) A society that is engaged in tit-for-tat vengeance is not productive. It loses important members to the vendetta.

*Lex talionis* caps the escalation of violence by imposing limits on vengeance and on retribution. If an eye has been taken, then no more than an eye may be taken in return. The revenge-seeker may not take an eye and an arm, nor may he take a life for an eye. When the response to the offender is limited by *lex talionis*, neither the offender nor his family may complain that they are in turn entitled to respond to an escalation of harm. Peace is maintained by limiting and channeling the retributive and vengeful responses. Limiting and measuring the flesh-for-flesh compensation also allows the parties to reach rough equivalence in blood. Blood-equivalence, as we shall see, provides a necessary condition to settle the feud with blood-money.
Emmanuel Kant rejected *lex talionis*. He argued for *ius talionis*, which, he explained, is no more than desert. The criminal earns the punishment he receives because he has imposed it upon himself. How has he done that? When he steals, he creates a condition in society in which all property, his own included, is at risk of deprivation. He therefore loses his property by reason of his acts and society’s retribution. Kant considered death, imprisonment, and forfeiture as proper retributive responses to various offenses. We recognize additional forms of deprivation: taking property through fines, taking labor through penal slavery, and imposing permanent civil disabilities. In Kant’s view, the criminal’s own actions determine the nature of retributive punishment: through his crime, the criminal makes certain for himself what he has made possible for society. This is *Gleiches mit Gleichem*, or like for like, or, in Gregor’s interpretation, in-kind for in-kind, that is, the punishment and the offense are alike in quality and degree (measure). The criminal deserves punishment: he has brought the punishment upon himself.

But I ask what does it mean that one who commits a crime makes his own property or his own life insecure? If one who steals, steals from himself because he

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17 *KANT, supra* note 12, at 168.

18 *Id.* at 142.

19 *Id.* at 289, n. 64.

20 *Id.* at 141.
makes all property, including his own, insecure or if one who kills, makes all life, including his own, insecure, what is that insecurity? Is it the invitation to others to steal or murder? Is it the degradation of society’s rules and mores that increase that insecurity?

The first, the invitation, is redressed by deterrent effect of punishment. But deterrence alone is a weak justification for punishment because greater deterrence may actually be achieved by injustice.\textsuperscript{21} From a standpoint of justice and morality, when we speak of insecurity caused by a crime, we should speak about the degradation of society’s rules. Therefore, the principle of \textit{ius talionis} is about restoring that security that has been lost by the fraying of society’s rules and mores.

If this is true, then the measure of punishment should be that which re-establishes society’s rules and mores. Fining the thief in a measure that equals the value of his theft is not sufficient. It is not sufficient to require him only to make full restitution to the victim because such a remedy restores only the victim. It does not restore society (and it may not restore some victims.)\textsuperscript{22} So retributive punishment not

\textsuperscript{21}See \textit{infra} pp. 19-20.

\textsuperscript{22}We may think of this in different ways. My act (let’s say I leave my sprinkler untended and ruin some of my neighbor’s tomatoes) may be an injury to my neighbor but not an injury to society. My neighbor may well be satisfied by my private apology. If I spray his tomatoes out of spite, he likely would not be satisfied by an apology and a few of my tomatoes. Even if he was, my private apology would be insufficient because, in the second case, my spraying spited not only him but society as well.
only imposes a penalty that equals the loss, it adds to the penalty, striking back at the crime by striking harder at the criminal. As Kant pointed out, a small fine assessed a rich person for an insult may be insufficient even though the same fine imposed on a poor person may be severe. Additional punishment – the wealthy person’s public apology that restores the victim and, because it is public, restores society – may better satisfy the retributive principle.\textsuperscript{23} If this is true with respect to a rich person, then the corollary is true for a poor person. A fine that is sufficiently retributive for one person may be insufficiently retributive for another and may be excessive with respect to a third. Therefore, the quality of retributive punishment must not only fit the crime, its measure must fit the crime and the criminal. So we have two parts to retributive punishment: the nature of the punishment, which society deems necessary to re-establish its moral order, and the measure of punishment, which addresses the particular circumstances of the crime and the offender.

Kant does not explain why a society that punishes under a \textit{ius talionis} principle is more moral than one that does not. He speaks of “blood guilt” left on the hands of those who fail to execute a murderer. But this is little more than an assertion.\textsuperscript{24} It is no more a justification for retribution than is an assertion that executing a murderer leaves blood-guilt on the hands of the society that imposes death as a punishment.\textsuperscript{25} His

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\textsuperscript{23}See Kant, \textit{supra} note 12, at 141.
\textsuperscript{24}There is an epistemic justification for this view, however. \textit{See infra} p. 94.
\textsuperscript{25}This is the view held by the Cheyenne for whom any killing of a Cheyenne by another Cheyenne left a stain upon the Tribe’s Sacred Arrows and therefore upon the
\end{small}
assertions about a moral society are no better than the counter-assertion that a society that punishes in a certain way is, by reason of its punishment, less moral.\textsuperscript{26}

Kant defined modern retribution. Yet there are several glosses on his argument that we should review because the practices of primitive societies help to reveal their flaws.

**Character Retributivism**

Character retributivism holds that the wrongdoer deserves punishment not merely because of his wrongdoing but also to account for his character. Character retributivism is often cast in terms of leniency—a person who shows genuine remorse shows good character and should be punished less severely than someone who does not.\textsuperscript{27} Although much of the discussion around character retributivism relates to Tribe itself. *See infra* p. 74.

\textsuperscript{26}This is one of the arguments made by death penalty opponents. *See* Hugo Adam Bedau, *Thinking of the Death Penalty as a Cruel and Unusual Punishment*, 18 U.C. DAVIS L. REV. 873, 883-886 (1985) (arguing that morally unjustified punishments are not necessarily cruel and unusual but that cruel and unusual punishments are always morally unjustified).

\textsuperscript{27}*See* Jeffrie G. Murphy, *Remorse, Apology, and Mercy*, 4 OHIO ST. J. OF CRIM. L. 423, 423-443 (2007) (most character retributivists “will be strongly inclined in theory to count repentance and remorse in favor of the criminal, since these states of character, if truly present, will be viewed as revealing an inner character that is much less vicious than the character present in the unrepentant criminal”); Mary Sigler, *Mercy,*
leniency, character retributivism cuts both ways. For example, Bibas and Biersbach point out that the “good character” offender may be more culpable for an offense than the offender who has not developed, or worse, has not had the opportunity to develop the moral/ethical code of behavior that the first offender knowingly violated.

Clemency, and the Case of Karla Faye Tucker, 4 Ohio St. J. of Crim. L. 455, 455-465 (2007) (“For the character retributivist, an offender’s post-offense conduct will have a direct and profound bearing on whether he is a good candidate for mercy”); Douglas Robbins, Resurrection from a Death Sentence: Why Capital Sentences Should Be Commuted upon the Occasion of an Authentic Ethical Transformation, 149 U. Pa. L. Rev. 1115, 1142-1143 (2001) (“A wrongdoer’s desert can thereby be diminished through serving his sentence, not in a prison of the body, but through anguish of the mind.”).

See John Tasioulas, Repentance and the Liberal State, 4 Ohio St. J. of Crim. L. 487, 503 (2007) (“Character retributivism holds that ‘evil people are to be punished in proper proportion to their inner wickedness.’ ”) (quoting Jeffrie G. Murphy, Moral Epistemology, the Retributive Emotions, and the “Clumsy Moral Philosophy” of Jesus Christ, in The Passions of Law 153 (Susan A. Bandes ed., New York University Press 1999)); Stephen P. Garvey, What’s Wrong with Involuntary Manslaughter?, 85 Tex. L. Rev. 333, 349 (2006) (“Character retribution says that deserved punishment is ultimately based on the odious character an actor reveals when he commits a crime without justification or excuse.”).

In my view character retribution carries undesirable baggage when it plays a role in measuring punishment. We may argue that the defendant has a right to just (by which I do not mean fair) punishment. He comes before the court with a presumption of entitlement to the punishment that comes with the offense and with the circumstances attached to the offense. When we increase his punishment because he has characteristics that are not related to the offense, we deny him that presumption, in the same way that we would deny him the presumption of innocence by taking his personal characteristics into account when deciding guilt. In addition to punishing him for the offense, when we take character into consideration, we add punishment because of who he is. The additional measure of punishment has nothing to do with desert.

Once society determines the nature and measure of punishment—initially by policy and secondly by the circumstances of the offense—it turns to the question of mercy. The offender’s unique circumstances may affect the measure of mercy, so the second way to think about measure of punishment is to think about upon whom the punishment actually operates and whether the retributive measure of punishment should be reduced to account for his unique circumstances. This differs from the retributive measurement of punishment—fining a poor man less, for example—in a subtle way. In a retributive system, the nature and maximum extent of punishment is determined for the particular offense and the extent or quantity of that punishment is further determined by the offender’s ability to satisfy it. For example, we establish a range of punishment for homicide. Regardless of the actor, a more horrific murder will carry a more severe penalty. The measure of punishment for the offense is determined before (as policy) and after (as adjudication) the offense occurs.
Any reduction of the quality or quantity of this pre-determined punishment to account for the offender’s circumstances is an act of mercy. It is through mercy that we take into account the sad and sometimes unusual circumstances of the defendant. We look more mercifully on one who must steal to eat than we do on one who steals for fun. We execute adults but not children. By the extension of mercy we excuse a portion of the wrong that is entitled to retributive punishment.

Arguably, one who has had the opportunity to develop a moral character may be less entitled to mercy than one – the child, for instance – who has not. But what of one who has not had the opportunity to develop a moral character and who, by reason of age or other circumstances, is not likely to develop a moral character?

In that instance, character retributivism plays an appropriate role when it properly measures the degree to which the offender holds the social compact in contempt. When we convict and punish a prisoner for the first time, we look to his actions. We should not increase his sentence because he was a poor student, because he did not respect his parents, or because he swears and drinks. If we convict the prisoner for a subsequent offense, then we may look to the first conviction and conclude that, for purposes of determining the measure of his punishment, he has contempt for the social compact. Not only has he broken the law, he has broken the law after being quite severely informed that it is contrary to society’s norms that he do so. This, of course, is not so much a comment on his character as a comment upon his attitude towards the social compact in the commission of the subsequent offense.

To summarize, in my view character retributivism may operate only to measure the offender’s attitude towards the social norm. Acts that do not break the formal rules
but of which many members of society disapprove should not increase the measure of punishment. Acts other than the current offense that do break formal rules should be considered when determining the measure of retributive punishment. Acts (such as genuine demonstrations of remorse) that persuade the judge that the offender does not flout society’s norms, may warrant a retributive punishment that is less. The offender’s personal characteristics may permit mercy—which means that the proper measure of retributive punishment may be reduced.

MODERN JUSTIFICATIONS FOR PUNISHMENT:  
UTILITY

Deterrence
Utilitarians argue that an act is just if it increases the happiness or collective welfare of society over the long run. Early utilitarians seem to treat punishment as a necessary evil rather than a good in itself. That is, punishment was necessary to enforce a rule but the rule must improve the overall welfare of society.\(^{30}\) This did not quite satisfy the utilitarian principle that the act itself must increase the general happiness of society. Under that principle, punishment should have inherent utility. Bentham finds the utility in deterrence, which is “the chief end of punishment” and notes that were an

offense an isolated act, “the like of which would never recur, punishment would be useless.”\(^\text{31}\)

If punishment is utilitarian, it should be utilitarian on its own. And so the utilitarian justification argues that punishment deters both specifically and generally, what Bentham called “particular prevention” and “general prevention” of the recurrence of an offense.\(^\text{32}\) The offender is specifically deterred from committing a new offense by disabling him and by discouraging him. Future offenders are generally deterred by the fear of punishment or, if they in fact calculate their risks and benefits, by removing the incentive to offend. In this way, punishment increases the collective happiness and the welfare of society because there is less crime and would-be wrongdoers turn to more productive activity.

But this was not enough for Bentham, because he recognized that, unlike other acts of society, punishment is inherently an evil. Therefore, he said, punishment must also have a corrective, reformative, and rehabilitative nature with respect to the offender.\(^\text{33}\)

Utilitarian punishment uses a human being – inflicts injury on a human being without compensation to him – to achieve a societal goal. So not only is punishment itself an inherent evil, the act of using a human being to achieve a general good is a separate evil. Utilitarians counter this by arguing that punishment falls only on one who

\(^{31}\text{Jeremy Bentham, The Rationale of Punishment, bk. I, ch. 3.}\)

\(^{32}\text{Id.}\)

\(^{33}\text{Id. bk. I, ch. 7.}\)
has committed an offense. This, of course, is the retributive justification, and does not offer the more fundamental justification as to why it is ever moral to inflict injury on another human being.

Utility, when employed as a general justification for punishment, also justifies punishing the innocent or the formerly innocent or justifies punishing the less guilty more severely in order to achieve Bentham’s good of “general prevention.” That is, society may deter potential wrongdoers by extending a rule of substance, relaxing a rule of procedure, or requiring a harsh sentence for a minor crime. Although greater deterrence may be achieved by punishing the formerly guilty, the price is injustice: punishment of the formerly innocent and severe punishment of the less culpable. After all, if putting someone in prison for ten years discourages the commission of an offense, wouldn’t twenty years be more effective? It would double the period in which the offender is disabled, which is one of the aims of specific deterrence, and it would ensure that not only do others not commit the offense but they refrain from conduct that might come close to the offense. I address this in greater detail in the next section.

**Utilitarian Retributivism**

From one point of view utilitarian retributivism attempts to marry utilitarianism with standard retributivism. Utilitarian retributivism, for example, recognizes the retributive concept of just desert. Looked at from a different aspect, utilitarian retributivism is no more than utilitarianism that pays slight lip service to retribution.

Robinson and Darley recognize just desert in the course of utilitarian justification:
While we argue that society ought to assign criminal punishments on essentially just desert grounds, our arguments are based on purely utilitarian considerations. We argue that, because it promotes forces that lead to a law-abiding society, a criminal law based on the community’s perceptions of just desert is, from a utilitarian perspective, the more effective strategy for reducing crime.34

Darley and Robinson contend that while the arguments for the two positions, retribution and utility, are irreconcilable, “their practical applications, properly done, suggest similar distributions of liability and punishment.”35

The second, lip service, aspect arises in the work of H.L.A. Hart and John Rawls. Although Professors Hart and Rawls may not have described their arguments as utilitarian retributivism, Christian Brugger does.36 Hart and Rawls (in part) were responding to the criticism that the utilitarian justification for punishment would justify the punishment of the innocent. The claim goes like this: if the utilitarian purpose of punishment is the prevention of future offenses, then greater prevention can be achieved by increasing the severity of punishment or extending the breadth of offense to reach more people—in other words, greater safety may be achieved by excessive punishment of the guilty or unwarranted punishment of the factually innocent. In the most extreme case, the conscious punishment of an innocent person—one who, for example, comes close to but does not cross the line between lawful and unlawful conduct—will serve to keep the rest of us away from the line.


35Id.

36BRUGGER, supra note 6, at 50-52.
Rawls answered the criticism in *Two Concepts of Rules*. Rawls argued that the utilitarian aspect of punishment arises in the practice concept of rules, the point where a system of rules—an institution—is developed that describes the practice of the society in the “game” of criminal justice. He argued that retribution, on the other hand, comes into play when those rules are applied to a specific case.\textsuperscript{37} Under Rawls’s two-concepts approach, the legislature is forward-looking and utilitarian: the judge is backward looking and retributive. Rawls asserts that at the stage where the utilitarian rule is applied—where retribution comes into play—the judge would never punish the innocent. The flaw in Rawls’ assertion lies in the idea of “the innocent.” An ideal judge may not find the guilt of a purely-innocent accused. But even the ideal judge is rarely faced with a purely-innocent accused. More often, the accused may be guilty of something. Deterrence would justify punishing for one offense the accused who is legally innocent of that offense but legally guilty of another.

Rawls’s *Two Concepts* describes morés-based sanctions—the development of a scheme to enforce complex rules that describe society’s values. Because of this level of complexity, *Two Concepts* does not offer a fundamental explanation for punishment.

In *Punishment and Responsibility*, Professor Hart sought to craft a “compromise between distinct and partly conflicting principles” of utility and retribution.\textsuperscript{38} Like *Two Concepts*, *Punishment and Responsibility* is concerned about the claim that a utilitarian

\textsuperscript{37}Rawls, *supra* note 3, at 5. Interestingly, Carlsmith, Darley, and Robinson’s study offers some empirical support for Rawls’s theory. Carlsmith et al., *supra* note 5.

\textsuperscript{38}H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 1 (1968).
justification for punishment justifies the punishment of the innocent.\textsuperscript{39} Hart argues that the claim is a result of error in analysis. He segregates the \textit{Aim} of punishment from the question of \textit{Who} should be punished and \textit{How} severely. He argues that, like principles that describe property, punishment may be described by a \textit{Definition}, a \textit{General Justifying Aim}, and \textit{Distribution}. Under Hart’s analysis, utility is the \textit{General Justifying Aim} of punishment. Hart’s utilitarian \textit{Aim} incorporates retribution but does not address retribution’s question of \textit{Who} should be punished. That question is answered by his \textit{Distribution} principle, which comprises two subdivisions, those of Entitlement (\textit{Who}) and Amount (\textit{How}). The \textit{Distribution} principle holds that only the guilty should be punished, only for a crime, and only in a just amount. The retributive \textit{Distribution} principle therefore limits the utilitarian \textit{General Justifying Aim}.

Hart argues that once we divorce the question of \textit{Distribution} – \textit{Who} should be punished and \textit{How} – from the \textit{General Justifying Aim}, the justification for punishment reveals itself to be utilitarian. That is, even the retributive purpose has at its heart an interest in seeking conformity with certain moral laws, which is a utilitarian statement.\textsuperscript{40} Retribution, then, is a kind of “cloaked” utilitarianism.\textsuperscript{41}

Yet even this cloaked utilitarianism suffers the risk of imposing punishment on the formerly guilty or more severe punishment on the formerly less culpable. For example, in 19\textsuperscript{th} Century England, severe punishments for minor crimes were justified

\textsuperscript{39}Id. at 5-6.

\textsuperscript{40}Id. at 8.

\textsuperscript{41}BRUGGER, supra note 6, at 53-55.
by a deterrence principle. The minor crimes were difficult to detect and therefore a
severe punishment was necessary to deter them.

Compared to my question of the fundamental purpose of punishment, Hart’s
definition is a second level definition. It assumes the pre-existence or prior creation of
certain moral laws. It does not account for the impulse that brought those laws into
existence or why they were considered to be moral in the first instance. The question I
want to answer is the question that Hart does not address: why do we employ
punishment in the first place? Why are criminal statutes, civil punitive statutes, and
common law punitive damages retributive in character, even when they are adopted for
utilitarian reasons?

Neither Rawls’s defense of utility nor Hart’s attempt to marry retribution and
utility help us understand the impulse towards punishment. Moreover Hart’s is a
positivist’s answer, one that is based on the idea that government acts to promote
certain goods. He analyzes the outer layers of the onion. I want to peel them back. I do
not dispute anyone’s assertion that retribution has a utilitarian aspect. A just retributive
punishment will always have the beneficial effect of discouraging crime and a just
utilitarian punishment will have the beneficial effect of punishing only the guilty for
their crime in an appropriate amount and thus maintain the moral order of society.
MODERN JUSTIFICATIONS FOR PUNISHMENT: OTHERS

Redistribution/Equity; Annulment; and Strike and Counterstrike

The remaining justifications tend to be short-hand descriptions of retributive punishment.42 Some approach an epistemological explanation for punishment. None, in my opinion, truly reach it.

Under equity theory, “punishment seeks to ‘set the balance right’ by mending the breach caused by the wrongdoer and reaffirming social and community norms.”43 This does not tell us much. Why does punishment set the balance right?

Philosopher John Finnis answers that an ordered society is a society of fairness, that is, “a fairly (it is supposed) distributed set of advantages and disadvantages, the system of benefits and burdens of life in human community.”44 Disorder is caused by


self-preference “in opposition to that fairly established order.” The criminal’s exercise of will for self-preference in opposition to the community gives him an undue advantage over the rest of society. Punishment takes that advantage away from the criminal, restoring the balance in a way.\textsuperscript{45}

George Fletcher takes a similar view. A criminal act is “the source of the offender's obligation to suffer punishment . . . for his offense creates an imbalance of the benefits and burdens in the society as a whole. Those who obey the law incur burdens that offenders refuse to take upon themselves. To rectify this imbalance the offender must suffer an appropriate punishment. His refusal to conform generates the proverbial ‘debt’ that must be paid.”\textsuperscript{46}

Hegel articulates a similar theory. Hegel holds that a criminal has a right to punishment. “Retribution is construed somewhat differently by Hegel, who conceives it not so much as an equalization or balancing of a disturbed order of fairness, as a correction of wrong by the assertion, or rather reassertion, of right.” Hegel sees “the good order of society” as an “order of right.” Crime opposes right and the exercise of force in opposition to crime, that is the imposition of punishment, restores right. Furthermore, “Punishment is the ‘annulment’ of the crime at its source, namely, in the

\textsuperscript{45}B\textit{rugger, supra} note 6, at 40-41, \textit{citing} J\textit{ohn Finnis, N\textit{atural L\textit{aw and N\textit{atural R\textit{ights}}} 263 (1980).}

\textsuperscript{46}G\textit{eorge Fletcher, R\textit{ethinking C\textitriminal L\textit{aw} 416-418 (1978).}
Cottingham criticized Hegel’s theory as describing nothing more than restitution.48

Pope Pius XII held that “[I]t is a fundamental demand of ‘justice,’ whose role in morality is to maintain the existing equilibrium, when it is just, and to restore the balance when it is upset. It demands that by punishment the person responsible be forcibly brought to order; and the fulfillment of this demand proclaims the absolute supremacy of good over evil; right triumphs sovereignty over wrong.”49 “Punishment is the reaction demanded by law and justice against crime; they are like blow and counter-blow. The order of justice that is disrupted by the crime demands to be re-established and restored to its original equilibrium.”50

These formulations come closer to my subject – the fundamental reason for society’s resort to punishment of a criminal act. Nevertheless Finnis’s and Fletcher’s idea of restoration of balance – payment of debt– sounds like restitution. Why, then, is the balance not restored when the offender makes restitution to the victim? Finnis and Fletcher do not quite answer this question.

47BRUGGER, supra note 6, at 41-42.
48Cottingham, Varieties of Retribution, in PUNISHMENT, supra note 42, at 81.
When organizing themselves, members of society agree to refrain from certain conduct or to engage in certain conduct. That is, they refrain from seeking a good or acting in ways that forego an individual good in order to achieve a greater good for all. The criminal’s act obtains that individual good but in the process takes away from the greater good of society. The driver who exceeds the speed limit arrives earlier at his destination but at the price of increased risk to the safety of others when the speeder is on the road. That risk is removed by taking the offender off the road or by fining him to remove any advantage that he might enjoy by his early arrival and thereby discouraging his future speeding. This does not sound retributive to me. It sounds like deterrence.

Likewise a thief obtains property to which he is not lawfully entitled and enjoys the advantage of increased wealth. In the thief’s case, what has society lost? Why is it not sufficient to take the property from the thief and return it, together with a reasonable sum for loss of use, to the victim? Such an approach would mean that crime does not pay – if you are caught. Because there is a probability that the thief will escape detection, we will add a premium to the sanction. This would balance the books with respect to the offender’s pecuniary gain and no more.

Hegel’s and Pope Pius XII’s concepts of retribution have to do with society’s view of itself. Punishment is the means by which moral actors come to grips with what, on its face, is an immoral act – deliberately causing another human being to suffer. A just society must punish transgressors in order to assure itself of its justness. These ideals fail to lead us to why punishment “feels right.”

All of these justifications, as I have suggested, are affected, if not effected, by the complex systems of modern society. When we turn to more primitive societies’
approaches to offense, we discover the fundamental explanation for punishment. The reason both “feels right” and provides a complete justification for punishment.

JUSTIFYING PUNISHMENT AMONG NORTHERN EUROPEAN AND ICELANDIC CLANS:

BEOWULF AND THE ICELANDIC SAGAS

Among the warrior and chieftain societies of the Northern Germanic and Scandinavian tribes, feud and warfare prevailed as responses to homicides committed by outsiders. Unwritten rules governed these responses. No side could seek a settlement if the butcher’s ledger was unbalanced. A homicide in a fair or just fight could be settled by the payment of *wergeld* – the man price or blood money. On the other hand, death by treachery could rarely be atoned with money. Blood feuds could be resolved by marriage. Yet even these settlements could be scuttled by an insult from one of the former foes, for insult asserted dominion and destroyed the equivalence that had been restored by marriage or *wergeld*. Practices of blood feud and resolution of feud appear in the *Beowulf* heroic epic and in the Icelandic sagas. In *Beowulf* we

51I will use *wergeld* throughout this article to describe compensation paid by the offender or his family or clan to settle a grievance or to purchase the peace.

52Miller, *supra* note 8, at 66.

53*Id.* at 262.
discover how insult exerts power over another and how the principle of equivalence
leads to the resolution of a feud.  

*Principles of Fair Fight, Equivalence, Restoration, and Just Treatment in Beowulf*

Two stories of inter-clan feud are recounted by the *Beowulf* characters: the
battles between the Frisians and the Healfdanes at Finnburg and the feud between the
Heathobardan clan (who contended for leadership of the Danes) and the Scyldings or
Healfdanes who held power. Beowulf is a Geat and a descendant of two Swedish clans.
Beowulf’s father either owes a debt to or is a thane to Hrothgar, leader of the
Scylding/Healfdanes. The Healfdanes have called Beowulf to Hrothgar’s mead-hall,
where they have been terrorized by the monster Grendel. When Beowulf arrives and his
identity and relationship to Hrothgar are confirmed, Hrothgar holds a great feast in his
honor. A poet sings of the Finnburg fight as part of the entertainment. During his time
at Hrothgar’s hall, however, Beowulf observes tensions between the Scylding/Healf-
Danes and the Heathobards. The song, and Beowulf’s description of the feast, offer
glimpses of rules that governed the resolution of a wrong committed by members of one
group against members of another.

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54I should note that the rules governing feud were far more complex than I set out
here. Miller describes the complex vertical power relationships that determined when a
feud was initiated, who would feud with whom, and how a feud could be composed. *Id.*
at 185. For example, a chieftain would never retaliate for the killing of his slave, if the
slave had committed an act that warranted his death. *Id.*
After slaying Grendel and Grendel’s mother, Beowulf returns triumphantly to his home among the Geats. At a feast he tells about his experiences, including his observations about the tenuous peace between the Healfdanes and the Heathobards. He recounts what Chambers refers to as the “Ethics of the Blood Feud.” Here is the passage:

—But first I went
Hrothgar to greet in the hall of gifts,
where Healfdane’s kinsmen high-renowned,
soon as my purpose was plain to him,
assigned me a seat by his son and heir.
The liegemen were lusty; my life-days never
such merry men over mead in hall
have I heard under heaven! The high-born queen,
people’s peace-bringer, passed through the hall,
cheered the young clansmen, clasps of gold,
er she sought her seat, to sundry gave.
Oft to the heroes Hrothgar’s daughter,
to earls in turn, the ale-cup tendered,—
she whom I heard these hall-companions
Freawaru name, when fretted gold
she proffered the warriors. Promised is she,
gold-decked maid, to the glad son of Froda.
Sage this seems to the Scyldings’-friend,
kingdom’s keeper: he counts it wise
the woman to wed so and ward off feud,
store of slaughter. But seldom ever
when men are slain, does the murder-spear sink
but briefest while, though the bride be fair!
Nor haply will like it the Heathobard lord,
and as little each of his liegemen all,
when a thane of the Danes, in that doughty throng,
goes with the lady along their hall,
and on him the old-time heirlooms glisten


Hrothgar’s queen, Wealtheow.
hard and ring-decked, Heathobard’s treasure,  
weapons that once they wielded fair  
until they lost at the linden-play  
lieгeman leal and their lives as well.57

Froda, chieftain of the Heathobards, was slain in battle with the Healfdanes, who were led by Hrothgar. Hrothgar pledged his daughter, Freawaru, to Ingeld, Froda’s son and heir, in order to bring peace between the two clans. But Beowulf predicts that the peace will not last long, for the spoils of that battle, Froda’s armor, are displayed, and he predicts that they will be worn triumphantly into the hall of the Heathobardan by one of Freawaru’s relatives, who will accompany her following her marriage.58 In the face of such an insult, and when egged on by one of his late father’s comrades-in-arms, Ingeld, the once “glad son of Froda,” will “well[] with war-hate,” and as to his beautiful queen, “wife-love now after the care-billows cooler grows.”59 Beowulf predicts that Ingeld must inevitably kill Hrothgar’s swaggering thane and re-ignite the feud.

So I hold not high the Heathobards’ faith  
due to the Danes, or their during love  
and pact of peace.60


58Id. at 110-111, ll. 2032-2040.

59Id. at 111-112, ll. 2041-2066.

60Id. at 112, ll. 2067-2069.
So when the “son of a certain slaughtering Dane”\textsuperscript{61} inevitably demonstrates the power and the dominion of his clan over the Heathobards by wearing the armor and arms of their late king, the peace sealed by marriage cannot last.

There is a different version to this story, told by Saxo the Lettered.\textsuperscript{62} Frode, the son of Fridleif, was invited to a banquet by Swerting, a leader of the Saxons. There, while a guest, he was slain by Swerting, who was also killed. Slaying a guest counts as treachery and is not atoneable and Frode’s son, Ingeld, who succeeds Frode as king, should continue the feud. Saxo recounts that Ingeld was dissolute and a glutton and his “soul was perverted from honour.”\textsuperscript{63} Starkad, an old warrior and comrade of Frode, exiled himself to Sweden out of disgust over Ingeld’s failure to continue the fight. Swerting’s sons, fearing punishment for their father’s (and their own) treachery, offer their sister in marriage to Ingeld. The two marry and Ingeld’s brothers-in-law become guests in Frode’s hall. Starkad learns of this and returns to Denmark, where Freawaru and her brothers treat him ignominiously. In a vigorous speech in which he rails against the Swertings’ treachery and Ingeld’s sloth, he awakens Ingeld’s honor. Ingeld slays his brothers-in-law and divorces his wife.\textsuperscript{64}

\textsuperscript{61}Id. at 111, l. 2053.


\textsuperscript{63}Id. at 159.

\textsuperscript{64}Id.
Both versions reveal the ethic of the blood-feud and a fundamental principle of punishment. A feud may be healed by marriage, for inter-marriage restores equal status to the injured clan. Inter-marriage also confers limited mutual kinship duties upon the former foes. But, when the status of equality is shown to be false, as when that “son of a certain slaughtering Dane” struts through the hall of the defeated showing off their former chieftain’s arms and armor, not even marriage will prevent the resumption of the feud. By this insult, the offender once again communicates his power over the injured and the injured must respond or remain, like Saxo’s Ingeld, dissolute, dishonored, and subject to the overweening power of the murderers.

The epic poem of the Finnburg fight, which is sung by Hrothgar’s poet in honor of Beowulf’s visit, tells us more about the ethic of the feud. Finn of Finnburg, chief of the Frisians, had married Hildeburh, a princess of the Healfdanes, ending a feud between the two clans. Their marriage has been happy and fruitful. The peace has lasted sufficiently long for Hildeburh to bear at least one son who has grown to fighting age.

Hnaef, Hildeburh’s brother, is described as a prince of the Healfdanes. Hnaef and his warriors come to Finnburg to visit his sister and Finn. The Jutes, who are

65 As we shall see below, taking surviving children as foster-children is another means of reconciliation. MILLER, supra note 8, at 122-124.

66 A reconstruction of the poem and another document, The Finnsburg Fragment, suggest that there were several battles. See CHAMBERS, supra note 55, at 245-276.
among Finn’s subjects, are present for the occasion. Unfortunately, there has been bad blood between the Jutes and the Healfdanes and a fight breaks out between the two groups.

This causes two problems for Finn. First, Hnaef is Finn’s guest and therefore entitled to Finn’s protection. The death of a guest at the hands of his host is considered treacherous and cannot be atoned with wergeld. The rule extended to the death of a guest caused by the thanes of the host, even if the thanes are not of his kin. Finn must choose between maintaining the peace between the Frisians and the Healfdanes and the security of his brother-in-law’s band on one hand, and his duty as lord to the Jutes on the other.

For reasons that are unexplained by the song, Finn joins the battle on the side of the Jutes. Hnaef is slain. Finn and Hildeburh’s son, Hnaef’s nephew, is also killed. The warring parties become exhausted and Finn offers terms to Hengest, who is the surviving captain of the Healfdanes. Hengest accepts and the warriors swear oaths and agree not to break the compact and that if Finn’s people insult them, then they will pay with their lives.

The settlement of the Finnburg fight shows it is important that the losses of the two sides were relatively equal, for equivalence is often necessary to compose a feud. It also demonstrates the importance of just treatment:

67 Some commentators place Finn’s hall outside Frisian territory. See Id. at 283; GUMMER, supra note 57, at 69-70 n.6. Others place it in Frisian territory. In the latter instance a band of Jutes is also visiting.
Healfdane hero, Hnæf the Scylding,
was fated to fall in the Frisian slaughter
Hildeburh needed not hold in value
her enemies honor! Innocent both
were the loved ones she lost at the linden-play,
bairn and brother; they bowed to fate,
stricken by spears; ‘twas a sorrowful woman!

* * *

By war were swept
Finn’s own liegemen, and few were left;
in the parlaying-place he could ply no longer
weapon, nor war could he wage on Hengest,
and rescue his remnant by right of arms
from the prince’s thane. A pact he offered:
another dwelling the Danes should have,
hall and high-seat, and half the power
should fall to them in Frisian land;
and at the fee-gifts, Folcwald’s son
day by day the Danes should honor,
the folk of Hengest favor with rings,
even as truly, with treasure and jewels,
with fretted gold, as his Frisian kin
he meant to honor in the ale-hall there.
Pact of peace they plighted further
on both sides firmly. Finn to Hengest
with oath, upon honor, openly promised
that woeful remnant, with wise-men’s aid,
nobly to govern, so none of his guests
by word or work should warp the treaty,
or with malice of mind bemoan themselves
as forced to follow their fee-giver’s slayer,
lordless men, as their lot ordained.
Should Frisian, moreover, with foeman’s taunt,
that murderous hatred to mind recall,
then edge of sword must seal his doom.68

The warriors place uncle and nephew on the same funeral pyre. The peace holds
through the winter until the weather permits another band of Healfdanes, led by Oslaf,

68 GUMMERE, supra note 57, at ll. 1069-1106.
to sail. They, having heard of the treachery, sail to Finnburg to avenge the death of their prince. Finn dies in this battle and the Healfdanes return Hildeburh to her family. 69

From these accounts, we discover several principles. From the Finnburg fight we learn that it is possible for two warring clans to be reconciled when death is caused in a fair fight. Finn had committed no personal act of treachery. (Other guests initiated the fight.) Because Hengest knew that Finn was unavoidably drawn into the battle, it was possible for the two warring bands to reach a settlement, Finn’s duties to his guest notwithstanding. Chambers notes, as do others, that reconciliation became possible when the losses of the two sides became relatively equal. 70 In his discussion of “Ethics of the Blood Feud,” 71 Chambers says, “That men, after a fair fight, could take quarter from, or give it to, those who had slain their lord or closest kinsman, is shown by abundant references in the sagas and histories.” 72 We also learn that when death is

69 Id. at 73-74, ll. 1125-1159. Hengest’s fate depends on the translation of the poem. One view describes one of the Healfdanes, Hun, pressing the sword Lafing to Hengest’s breast and reminding him of his primary loyalty. Hengest then repudiates his oath to Finn. Chambers, supra note 55, at 285. In other interpretations Hun (in one view believed to be one of Finn’s subjects, in others a Healfdane) pierces Hengest’s breast with Lafing. The latter interpretation suggests that Hengest had held to his oath to Finn. Gummere, supra note 57, at 69-70 n.6 & ll. 1142-1145.

70 Chambers, supra note 55, at 285 n.1.

71 Id. at 276.

72 Id. at 278.
perceived to have been caused by treachery—when, for example, one is slain by his host while a guest—reconciliation by marriage or by payment of *wergeld* is unlikely.\textsuperscript{73}

So, from Hengest’s and Finn’s points of view, the fight was fair. Fair fight and equivalence in loss means that either may sue for peace without kneeling before the other. Neither is in a position to exert power. From Orslaf’s perspective, however, Finn has committed a treacherous killing that demands a violent response.

The poem also illustrates the tension between just treatment and insult. Finn openly promises “nobly to govern, so none of his guests / by word or work should warp the treaty, / or with malice of mind bemoan themselves/ as forced to follow their fee-giver’s slayer.” Nevertheless, as the poem tells us, “if any Frisian with speech overbold/ should call to mind that murderous hatred” then the feud would be renewed. Indeed, and the poem is not clear, Finn himself may enforce just treatment. For the Healfdanes have taken an oath to Finn and Finn to the Healfdanes, which restores them to an equal footing with the surviving Frisians. Rubbing the Healfdanes’ nose in this circumstance, however, would be an insult that changes the polite fiction of equality and warrants a punitive response – the “edge of sword [that] must seal his doom.”

We see several principles that operate to permit the composition of an inter-clan killing: fair fight, equivalence, restoration, and just treatment. These are opposed by

\textsuperscript{73}See *id.* at 282-283. It sounds contradictory to describe the Finnburg fight as both fair fight and treachery. Those involved in the fight must recognize that Finn has been drawn in against his will. The Healfdanes who hear of the fight, however, recognize only that Hnaef was a guest killed by his host.
principles that initiate, continue, or resume a feud: treachery, dis-equivalence, dominion, and insult. These conditions call for a punitive response, which is necessary to restore the status quo ante.

The principle of equivalence appears throughout primitive societies. Hans Kelsen notes that the equivalence principle of *lex talionis* appears among the ancient Hebrews,74 the Maori,75 the Jibaro Indians,76 and the tribes of Melanesia.77 Equivalence may prevent continuation of a feud but only if the injured family views the response as equivalent. If one side’s just response is the other side’s unjust murder, the parties will not likely reach settlement.

Seligmann’s work on the Melanesians illustrates the difference between war and punishment in this context. Warfare seeks dis-equivalence in order to achieve superiority and dominion. Punishment restores equivalence in a way that does not invite additional warfare. As Bentham noted, punishment in excess of that necessary to

74 HANS KELSEN, SOCIETY AND NATURE: A SOCIOLOGICAL INQUIRY 57 (1943) (citing H. CLAY TRUMBULL, THE BLOOD COVENANT 259 ff. (2d ed. 1893)).

75 Id. at 58.

76 Id. at 59 (citing RAFAEL KARSTEN, BLOOD, REVENGE, WAR, AND VICTORY FEASTS AMONG THE JIBARO INDIANS OF EASTERN ECUADOR 10, 13 (USGPO, 1923)).

77 Id. at 60 (citing MAURICE LEENHARDT, NOTES D’ETHNOLOGIE NEO-CALEDONIENNE VIII TRAVAUX ET MéMOIRES DE L’INSTITUTE D’ETHNOLOGIE 464 (1930) and C.G. SELIGMANN, THE MELANISIANS OF BRITISH NEW GUINEA 569 ff. (1910)).
prevent a future offense is “needless” punishment. Needless punishment is dis-equivalent and dis-equivalence kindles feud. Feud also encompasses violence that follows when equivalence appears to have been restored on its face but, in fact, an insult, and therefore a superiority, remains unredressed. Feud may also be simply inter-group hatred triggered by a long-forgotten wrong. Nevertheless, something besides the otherness of the opposing group must fuel the hatred. It may be that the need for retribution has been satisfied but that the need for vengeance has not, a circumstance that we will discover in the Icelandic Sagas.

The Icelandic Sagas also illustrate the ethic of the blood-feud. Icelandic feuds adhered to the same principles. A feud may be settled by marriage or payment of wergeld. Fair fights were atone-able; treachery was not. Equivalence was important. Actions that demonstrated one’s dominion over another required a punitive response. Insults by the offender’s party, we shall see, were a thumb on the equivalence scale and wreck efforts to settle.

**The Principles of Equivalence, Insult, and Dominion in Njál’s Saga (*The Tragedy of Burnt Njál*)**

Kinship in society governed one’s duty and one’s risk when a feud commenced. Among Icelanders these duties could extend to fourth cousins. A man could bear

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79 **Miller**, *supra* note 8, at 144.
responsibility for a killing by his fourth cousin—even to the extent of being required to leave the home of the victim’s fourth cousin. 80 Like the Kalinga, Ilongots, and Ifugao, of whom I will speak next, the duties and risks imposed on extended kin served to limit conflict. Extended kin who risked reprisal in revenge feuds could intervene and counsel settlement. 81 Likewise, when cousins of the killer were at risk from revenge-seekers they could always avoid conflict by pointing out their kinship with the victim. 82

The Icelanders had established the Things, of which the Althing was most important. The Things served as both law-courts and informal legislative bodies. Judgments rendered by the Althing were severe and required private enforcement, which often meant more violence. 83 As a result, Saga Icelanders often resorted to an informal arbitration system by which the feuding parties entered into agreements that were typically enforced by social views of honor. 84 Submitting to arbitration but failing to abide by the award meant a loss of prestige. Loss of prestige in a society that looked to neighbors for power meant loss of power. Loss of social power was significant, for in order to prevail in an action at the Althing, one needed supporters. Without them, all could be lost. 85

80 Id. at 145.

81 Id. at 265.

82 Id. at 146, 165-167.

83 Id. at 275; 282-283.

84 Id. at 261-267; 275-276.

85 Id. at 162-164.
Njál’s Saga takes place against the back-drop of Norway’s and Iceland’s conversion to Christianity. King Olaf of Norway sent Thangbrand to Iceland to convert the Icelanders. Leaving no tool unused, Thangbrand supplemented his sermons with the sword. Instability followed and this led to an increase in inter-clan violence.

Njál’s Saga tells first of the feud between Njál’s and Gunnar’s houses. The feud was initiated by Gunnar’s wife, Hallgerda, who, having been slighted by Njál’s wife, Bergthora, directs the killing of one of Njál’s housecarles. Gunnar and Njál, however, are on the best of relations. Gunnar offers atonement and Njál names the price. Gunnar pays Njál twelve ounces of silver as wergeld. Njál is no fool, however, and he also assures Gunnar that the same price will be paid should Bergthora make mischief. Mischief she does make and Hallgerda responds in kind.

The wergeld passed back and forth between Gunnar and Njál as the blood-price increased in proportion to the social standing of the slain. Finally, Hallgerda persuades her kinsman to kill Thord, who is a freedman and the foster father of Njál’s five sons. This act must bring the Njálssons into the feud. Njál, however, assures Gunnar that he will keep a rein on his sons and accepts wergeld as settlement. (The price has risen to two hundred pieces of silver.)


87A housecarle, in Icelandic terms, is analogous to a ranch-hand in an old western movie. Miller, supra note 8, at 120-122.
This peace should hold because Njál extracts a promise from his sons that they will not avenge Thord’s death. Insult comes into play, however, as Hallgerda continues her mischief. She eggs on Sigmund, one of Thord’s slayers, and provokes him to sing a song that mocks Njál as a beardless carle, a farm-hand, and his sons as the “dungbeard boys.” Gunnar overhears the word-play and in a fury orders no one to speak of it. The women who are present, however, speak of it to Bergthora. The insult frees Njál’s sons from their promise to their father, even though he urges patience. They slay Sigmund and Skiolld, one of Thord’s killers, in a fair fight. Because the fight is fair, Njál may atone the loss and he refunds Gunnar’s two hundred pieces of silver.

We pick up the story as two groups, one led by Njál’s sons and a second group led by Thrain, Gunnar’s kinsman, are trading or raiding along the Norwegian coast. They encounter Hrapp, who is a serious trouble-maker. Hrapp had been outlawed by Norway’s ruler, Earl Haakon, and became the subject of a man-hunt after he vandalized a shrine kept by Haakon and Gudrund. Smelling trouble, Njál’s sons turn Hrapp away when he seeks to hide with them. When Thrain hides Hrapp from the Earl, the Earl burns Njál’s sons’ ships and imprisons them and their men, believing that they aided Hrapp’s escape.88

The sons escape and return to Iceland, where they seek compensation from Thrain and Hrapp, who laugh at them, and, yes, Hallgerda is there. Egged on by Hallgerda, Thrain and Hrapp resurrect the old insult, calling the sons dungbeardlings

88THE STORY OF BURNT NJÁL, chs. 86-88 (George Webbe DaSent trans., Dent 1949)(1861); NJÁL’S SAGA, supra note 86, chs. 87-89.
and sons of the Beardless Carle. The feud resumes when Njál’s sons, his son-in-law, Kari, and others go looking for Thrain. When they encounter Thrain at the river Fleet, a battle ensues and Skarpheddin, one of Njál’s sons, slays Thrain.\textsuperscript{89}

Thrain’s brother, Kettle, is also Njál’s son-in-law and so he arranges a settlement with Njál. Njál pays \textit{wergeld} and takes in Thrain’s son, Hauskuld (later known as Hauskuld the Priest) and raises him as his own.

Hauskuld grows to maturity and Njál sets him up as a lawyer-priest. Riding to a feast, Hauskuld the Priest and his uncles encounter Njál’s natural son, also named Hauskuld. The uncles urge Hauskuld the Priest to avenge his father’s death. He and the survivors of the Fleet River fight refuse, however, because Thrain’s death was atoned. The uncles, however, had no part in the atonement and so attack and kill Hauskuld (Njál’s natural son), reigniting the feud.\textsuperscript{90}

Njál’s surviving sons set upon some of the attackers before the feud can be resolved by payment of \textit{wergeld}. Hauskuld the Priest meets with his foster father, Njál, and they reach an agreement to settle the feud.\textsuperscript{91} It does not last long for a reason that pervades many tragedies – jealousy.

\textsuperscript{89}The Story of Burnt Njál, \textit{supra} note 88, chs. 90-91; Njál’s Saga, \textit{supra} note 86, chs. 91-92.

\textsuperscript{90}The Story of Burnt Njál, \textit{supra} note 88, ch. 103; Njál’s Saga, \textit{supra} note 86, ch. 98.

\textsuperscript{91}The Story of Burnt Njál, \textit{supra} note 88, ch. 105; Njál’s Saga, \textit{supra} note 86, ch. 99.
Mord, another lawyer, is jealous of Hauskuld’s success as a lawyer-priest. He tries to poison Hauskuld against Njál’s surviving sons. Hauskuld refuses to succumb, so Mord turns to Skarphedinn and Njál’s other sons, who fall prey to Mord’s lies. They ambush Hauskuld while he is in his field sowing corn. They return and claim that Skarphedinn alone has engaged in a fight with Hauskuld.\footnote{\textit{The Story of Burnt Njál}, supra note 88, chs. 107-110; \textit{Njál’s Saga}, supra note 86, chs. 107-111.} (This lie is necessary if the death is to be atoned as caused in a fair fight because the ambush was a treacherous attack.)

Hildigunna, Hauskuld’s widow, prevails upon her uncle, Flosi, to take up her claim at the next Althing. Moved by her grief, Flosi presents the case. The Althing sets \textit{wergeld} at three times the man-price and Flosi and Njál agree to it. Skarphedinn, always the rascal in this tale, scuttles the settlement when Njál and his sons meet Flosi to make payment. He insults Flosi by throwing a scarf onto the goods offered in payment and telling Flosi that it is a woman’s scarf and Flosi needs it because “‘thou art the sweetheart of the Swinefell’s goblin, if, as men say, he does indeed turn thee into a woman every ninth night.’”\footnote{\textit{Albert Kocourek & John H. Wigmore, Sources of Ancient and Primitive Law} 166 (1915); \textit{The Story of Burnt Njál}, supra note 88, ch. 122; \textit{Njál’s Saga}, supra note 86, ch. 123.} This insult scuttles the settlement and compels Flosi to continue the feud.

Chambers describes what occurs next,
In the *Njáls Saga*, Flosi has to take up the feud for the slain Hauskuld. Flosi is a moderate and reasonable man, so the first thing he does is to enquire into the circumstances under which Hauskuld was slain. Flosi finds that the circumstances, and the outrageous conduct of the slayers, give him no choice but to prosecute the feud. So in the end, he burns Njál’s hall and in it the child of Kari.\textsuperscript{94}

Flosi and his band must resume the feud. They besiege and burn down Njál’s hall, killing Njál and most of the other occupants. Kari, Njál’s son-in-law,\textsuperscript{95} and a few others escape.\textsuperscript{96} At the Althing the Njál survivors bring suit against Flosi and the others for the burning.\textsuperscript{97} Kari asks Mord Valgardsson to speak for him. Flosi asks Eyjolf to act as his lawyer but makes the error of giving him a gold ring as payment. Eyjolf throws up procedural objections at every turn, succeeding finally by tricking Mord into proceeding with the wrong number of judges, which leads to a non-suit. This result, and the fact that Flosi has paid Eyjolf to represent him (apparently this was unethical), outrages Thorhall, who has been lamed by an infected foot. Thorhall pierces his abscessed foot with a spear and goes looking for trouble. He encounters one of Flosi’s relatives and slays him on the spot. Fighting breaks out between the two contending bands and many are wounded and slain before the other Icelanders can come between them and establish a truce. The next day, the interveners arbitrate a settlement. Among other things, the arbiters decree that Flosi and the other arsonists should be banished for

\begin{footnotes}
\footnotetext{94}{CHAMBERS, *supra* note 55, at 280-281 (italics in the original).}
\footnotetext{95}{THE STORY OF BURNT NJÁL, *supra* note 88, ch. 89.}
\footnotetext{96}{KOCOUREK & WIGMORE, *supra* note 93, at 170-176.}
\footnotetext{97}{Id. at 179; THE STORY OF BURNT NJÁL, *supra* note 88, ch. 140; NJÁL’S SAGA, *supra* note 86, ch. 141.}
\end{footnotes}
three years. The fight at the Althing is fully atoned by balancing the losses and paying *wergeld*. Among the arson victims, only Kari refuses atonement for the death of his son, Thord. Having refused *wergeld*, Kari is entitled to continue the feud.

When Flosi and the other burners begin their exile and depart Iceland, Kari and his supporters pursue them to the Orkneys, Ireland, and Wales. Flosi fulfills his atonement, makes a pilgrimage to Rome, obtains absolution, and returns to his home.

Some years pass. Kari completes his own pilgrimage and on his return he is shipwrecked near Flosi’s hall. He seeks refuge at Flosi’s hall where Flosi welcomes him with open arms. Flosi extends to Kari the honor of holding the high seat next to Flosi, a gesture that communicates reconciliation. *Njáls Saga* ends with the two fully reconciled as their reconciliation is sealed by marriage. Kari marries Hildigunna, Flosi’s niece and Hauskuld’s widow, whose plea had moved Flosi to take up her claim.

Chambers continues:

Now to have burned a man’s child to death might seem a deed impossible of atonement. Yet in the end Flosi and Kari are reconciled by full atonement the father of the slain child actually taking the first step. And all this is possible because Flosi and Kari recognize that each has been

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99 Translations from the Icelandic 206-207 (W.C. Green trans., Cooper Square 1966).
trying to play his part with justice and fairness, and that each is dragged into the feud through the fault of others.\textsuperscript{100}

\textit{Beowulf} and the Icelandic sagas describe the custom of blood-feud. In such violent times where kindred were interested and loyal to their kinsmen, it was difficult to determine if a homicide was accidental or justifiable. Any homicide is sufficient to trigger retaliation by the injured tribe, without regard to whether the homicide is accidental, justified, or treacherous.\textsuperscript{101} Nevertheless, \textit{Beowulf} and the Sagas tell us that tribal chieftains would inquire into the circumstances and, depending upon the circumstances, the matter could often be atoned by payment of \textit{wergeld}, the “man-price.”\textsuperscript{102} Before a killing could be atoned, however, the equivalence principle must be satisfied. Death in a fair fight often satisfied the principle. As continuation of feud approached equivalence, any remaining difference in the parties’ losses could be satisfied by payment of \textit{wergeld}. As William Miller notes, injury offset injury; maiming offset maiming.\textsuperscript{103} On the other hand, a man who quickly accepted \textit{wergeld} for a

\textsuperscript{100} CHAMBERS, \textit{supra} note 55, at 281 (italics in original; footnote omitted).

\textsuperscript{101} Homicide by treachery is not limited to trickery. Rather, it would include all homicides committed in contravention of tribal customs, such as the duty of protection that a host owed to a guest.

\textsuperscript{102} The use of “attonement” to describe the outcome refers not to its meaning of making amends, but to its other meaning of reconciliation.

\textsuperscript{103} “To trust the saga evidence, arbitrators would declare Æethelwold’s gouged-out eye to be balanced against Wulfhelm’s sliced-off foot . . . ” WILLIAM IAN MILLER, \textit{Eye
treacherous killing showed weakness and could remain subject to the killer’s power. He was ridiculed and looked down upon.\textsuperscript{104} Thus, equivalence must be re-established. Once re-established, it counteracts the dominion of the killers. Until the equivalence that was disturbed by a treacherous killing is re-established, a feud must be pursued.

\textbf{More Insults–The Saga of Hrafnkel, Frey’s Godi}

The \textit{Saga of Hrafnkel, Frey’s Godi}, offers a twist on standard insult. Hrafnkel had been beaten in a fight by Sam Bjarnason. Under torture he agreed to permit Sam to take possession of both his farm and his chieftaincy. This was no small thing, for Hrafnkel had built the farm from nothing at age 16.

Following Sam’s judgment against Hrafnkel, the two have encountered each other but nothing has taken place. Six years pass and Sam’s brother, who had been a merchant and traveled as far as Constantinople, returns to Iceland. Loaded with trade goods, he passes by Hrafnkel’s farm. A servant woman sees him and runs to Hrafnkel’s hall, wakes him, and, like the old warrior Starkad, tells him that he has become dissolute in failing to exact vengeance. “Eyvind Bjarnason, who just rode over the river at Skalvavad with a shield so beautiful that it shone, is so accomplished that he would make a worthy object for revenge.”\textsuperscript{105}

\textsuperscript{104} Miller, \textit{supra} note 8, at 189-190; Chambers, \textit{supra} note 55, at 22-23.

Miller argues that Hrafnkel has simply bided his time until an opportune target presented itself. He contends that Hrafnkel does not avenge himself against Sam because he sees Sam as lower in stature. Taking vengeance on Sam would raise Sam in esteem and honor and lower Hrafnkel. Sam’s brother Eyvind and those like him, on the other hand, are “thought of as being greater than chieftains.”\(^{106}\) Taking vengeance on Eyvind will increase Hrafnkel’s stature.\(^{107}\)

Hrafnkel saddles up nearly twenty men and they ride down Eyvind and his half dozen. In the battle Eyvind and all of his men, save a servant boy, are killed. Hrafnkel loses twice that number. The servant boy flees and alerts Sam, who rides to the battle with twenty men but arrives too late.

Looking across the heath, Sam sees the attackers retreating and decides to pursue them. They ride hard through the bogs and lava fields of eastern Iceland but they fail to catch Hrafnkel and his men. Realizing that they are about to enter Hrafnkel’s district, Sam exercises discretion and they break off the pursuit. Both sides gather forces that day. Sam, however, rests while Hrafnkel rides to his former home. Hrafnkel and seventy men surprise Sam and his force as they are sleeping. Hrafnkel offers terms. Sam may die or he may relinquish what he took from Hrafnkel six years earlier. Sam

\[^{106}\text{id. at } 457.\]

\[^{107}\text{Miller, supra note } 8, \text{ at } 199-200.\]
may also keep all the goods that Eyvind had brought with him. Sam chooses the latter
course and lives out his life as Hrafnkel’s thrall.108

Sam later seeks help from his former supporters in far west Iceland. They beg off
because of the distance and remind Sam that they advised him to kill Hrafnkel when he
had the chance. They recognize that Hrafnkel waited until he “got the chance to kill the
person that he thought was wiser than you.”109

Miller is right. Hrafnkel increases in stature because he has bided his time. But I
think that there is more here. Hrafnkel did not know the day or hour of Eyvind’s arrival.
Neither could he predict that he would ride past Hrafnkel’s farm. When Eyvind arrives,
with his men, their shields all shining, Hrafnkel must act or lose stature. Eyvind, after
all, is considered to be one of those born with a silver spoon in his mouth, one of “those
people who grew up with their fathers,”110 instead of building a farm from the ground
up. Hrafnkel’s servant recognizes that a failure to take vengeance now, as Eyvind sports
his wealth and prestige before Hrafnkel, can only doom Hrafnkel to ridicule and
dishonor and his family to subordination.

The Criminal’s Power in The Laxdaela Saga
In many cases retaliation is understandable. Nevertheless, a man could be
considered honorable for accepting wergeld from one who was without treacherous

108Hrafnkel’s Saga, supra note 105, at 15-16.

109Id. at 16.

110Id. at 14.
fault. Such was the case in the *Laxdaela Saga*, where Olaf the Peacock accepts *wergeld* from Bolli, after he slayed Olaf’s son, Kjartan. Olaf, however, pursues Bolli’s accomplices.

As with many of the Icelandic Sagas, Kjartan’s death was part of a tapestry of kinship, feud, jealousy, and pride. There had been friction between Osvif’s and Olaf’s houses. Bolli is Kjartan’s cousin and Olaf’s nephew and foster son. Bolli, however, marries into Osvif’s family, against Olaf’s advice, while Kjartan is away serving King Olaf in Norway. Worse, Bolli marries Gudrun, whom Kjartan left behind to serve the King. When Kjartan is released from the King’s service, he returns to Iceland planning to marry Gudrun. He, of course, learns of the bad news. Unhappy that Bolli has taken his place, Kjartan snubs and insults Bolli at a feast at Osvif’s hall. In retaliation Osvif’s sons steal Kjartan’s sword, which was a gift from the King of Norway. Kjartan wants vengeance but Olaf counsels Kjartan to exercise restraint and Kjartan heeds him. Kjartan eventually recovers his sword but not the scabbard. But the Osvif clan’s wrongs continue. Kjartan suspects that Gudrun has stolen a headdress, which Kjartan received from King Olaf’s daughter and had given to Hrefna, whom he married after he returned. The theft of Hrefna’s headdress was the last straw, so, during the winter before his death, Kjartan takes a band of men and surrounds Osvif’s hall for three days, not permitting anyone to leave. This incident provokes Osvif’s sons to ambush Kjartan. Bolli initially refuses to participate in the ambush but Gudrun tells him that she will divorce him if he fails to join the party.\textsuperscript{111} The band ambushes Kjartan and in the fight

\textsuperscript{111} \textit{The Laxdale Saga}, chs. XLIV - XLIX (Muriel Press trans., Peter Foote ed.,
Bolli inflicts Kjartan’s mortal wound. Ambush is treachery and treachery must be met with violence.

Chambers again tells us, “In the *Laxdaela Saga*, Olaf the Peacock, in exacting vengeance for the slaying of his son Kjartan, shows no leniency towards the sons of Osvif, on whom moral responsibility rests.”\(^{112}\) Olaf does accept *wergeld* from Bolli who inflicted Kjartan’s fatal wound\(^{113}\) but “who had been drawn into the feud against his will,”\(^{114}\) and therefore has not tipped the scales by treachery. “And Olaf is not held to have lowered himself by accepting a money payment as atonement from the slayer of his son – on the contrary ‘he was considered to have grown in reputation’ from having thus spared Bolli.”\(^{115}\) Nevertheless, the feud resumes after Olaf dies and in the course of the fighting death finds Bolli.\(^{116}\)


\(^{113}\)The *Laxdale Saga*, *supra* note 111, at 178.

\(^{114}\)Chambers, *supra* note 55, at 278.

\(^{115}\)Id. The Press translation of The Laxdale Saga tells us that Olaf spared Bolli out of kinship and affection, not because he participated in the fight “against his will.” *The Laxdale Saga*, *supra* note 111, at ch. LI. I think that Chambers is suggesting that, had Bolli’s culpability been greater, this would have overcome Olaf the Peacock’s kinship principle.

\(^{116}\)Chambers, *supra* note 55, at 278.
We see that within Scandinavian tribal societies retribution resolved a change in the balance of power between kindreds. In *The Laxdaela Saga*, when Olaf counsels Kjartan to be patient after the theft of his sword, Kjartan tells him, “‘I know not whether I can put up with being thus overborne by these folk of Laugar.’”\(^{117}\) When the folk of Laugar make off with Hrefna’s headdress, a retributive response becomes necessary. The sons and daughter of Osvif have shown their disregard and exercised their power over Kjartan and his clan. The only way to free themselves from that dominion is to strike back. Kjartan strikes with restraint, confining the Laugar clan in their hall. Although Kjartan took no life, he inflicted great embarrassment on the sons of Osvif. From the perspective of the Osvif clan, rather than restoring equivalence, Kjartan demonstrated his power over them.

In the feud that follows, equivalence again plays a role in atonement of the offenses. Atonement, whether through the payment of *wergeld*, the offering of a female relative in marriage, or, as in the Finnburg fight, the offering of other terms, is the practice of reconciliation.\(^{118}\) Through reconciliation, the disputing sides formally affirm

\(^{117}\) *The Laxdaela Saga*, *supra* note 111, at 164.

\(^{118}\) Note, however, that when Olaf the Peacock expressed his desire to accept payment from Bolli, this was not full reconciliation among the clansmen. Rather, Olaf extended mercy to his kinsman. Mercy was seen as honorable because of the circumstances of Bolli’s acts. It was not, however, seen as full atonement for Kjartan’s death, at least not by Olaf’s other sons and Olaf’s wife. After Olaf’s death, the sons, egged on by their mother, set upon and kill Bolli to avenge their brother’s death. *Id.* at
an equivalence of power or the restoration of the status quo ante. This formal reconciliation could be fragile. It is here that the opposing principles of insult and just treatment come into play. Reconciliation would be broken should one side later assert its power through insult or physical harm to the other.\textsuperscript{119} In the next section we see these principles at play in other societies in other times.

\textbf{JUSTIFYING PUNISHMENT AMONG THE NORTHERN LUZON TRIBES:}

\textbf{THE KALINGAS, THE ILONGOTS, AND THE IFUGAO}

This section draws on two of R. F. Barton’s extraordinary studies, \textit{The Kalingas, Their Institutions and Custom Law}\textsuperscript{120} and \textit{Ifugao Law};\textsuperscript{121} and the work of Renato chs. LIII-LV.

\textsuperscript{119}On the other hand, a party may manufacture insult to justify the initiation or resumption of feud. In Njál’s Saga, for example, Njál’s son Hoskuld had ridden past Lyting’s farm for fifteen years after Hoskuld had participated in the death of Lyting’s brother-in-law, Thrain. \textit{Njál’s Saga, supra} note 86, at 98. Miller argues that Lyting’s strength had increased sufficiently to allow him to contend for power by attacking Hoskuld, using Thrain’s death and Hoskuld’s “insult”—riding impudently past his farm—as justification. \textit{Miller, supra} note 8, at 217-218.

\textsuperscript{120}R. F. Barton, \textit{The Kalingas: Their Institutions and Custom Law} (1947).

\textsuperscript{121}R. F. Barton, 15 \textit{U.C. Pub. in Archaeology and Ethnography} 1 (1919).
Rosaldo, *Ilongot Headhunting* (1883-1974), among others. Barton began his work at the beginning of the 20th Century. He returned to the Philippines in 1941 to finish his work on the Kalingas just in time for the Japanese invasion. After the Japanese occupied the Islands, Barton was interned and lost several of his manuscripts. One had been sent to the United States, however, and that copy became his final book.\(^\text{123}\)

A number of Malay tribes live in a remote region of Northern Luzon. One of them, the Kalingas, occupied a roughly 30 mile by 40 mile region of north-central Luzon.\(^\text{124}\) The Ifugao held a similar size territory to the south of the Kalingas.\(^\text{125}\) The Ilongots lived south of the two. They were sedentary or semi-sedentary tribes. All were “head-hunters.”

**Social Organization of the Kalingas and Ilongots**

Kalinga kindred units encompass the descendants of great-great-grandparents.\(^\text{126}\) Kindred membership carries duties of vengeance, of collective decision-making, of...


\(^\text{123}\) Barton, *supra* note 120, at v-viii.

\(^\text{124}\) *Id.* at 8.

\(^\text{125}\) *Id.*

\(^\text{126}\) *Id.* at 32.
mutual support in controversies, and of food-sharing.\textsuperscript{127} Because of the complexities that arise in determining the response of the kindred group in a controversy, each kindred looked to a group of leaders.\textsuperscript{128} The establishment of a leadership group necessarily gave rise to a formalization of the kindred’s duties. These formalities were reflected in customs for raising and distributing \textit{wergeld}, indemnifying the group’s members, and determining value of property. At the time of Barton’s study of the Kalingas, “rank and influence and wealth. . . were to a great extent attained through killing people.”\textsuperscript{129} Barton says, “The Kalinga has only a feeble, incipient [political] state, so there is no differentiation between justifiable or punitive homicide and homicide as a crime. The result is that every homicide tends to be regarded as a capital offense by the group from which life is taken and as a justified retaliation by the inflicting side.”\textsuperscript{130} Barton observed retaliation and the payment of \textit{wergeld} at several levels: to redress an injury done by one individual to another, to engage in or settle an inter-kindred group feud, and to retaliate or settle an inter-community state of war.

Membership in a Kalinga kindred group conferred duties of retaliation for wounding or death.\textsuperscript{131} As we consider Barton’s observations, we should first note that

\footnotesize
\begin{itemize}
  \item \textsuperscript{127}\textit{Id.} at 69, 71.
  \item \textsuperscript{128}\textit{Id.} at 70.
  \item \textsuperscript{129}\textit{Id.} at 72.
  \item \textsuperscript{130}\textit{Id.} at 231.
  \item \textsuperscript{131}\textit{Id.} at 52. Barton reports that the closest relatives of the slain rewarded the avenger with land.
\end{itemize}
killing and wounding are equivalent among the Kalingas. Wounding redresses a killing and a killing requires either wounding or killing in response. Second, like many customs, as the practice of retaliation developed it encountered internal contradictions. It becomes difficult to say whether a specific practice is the result of an internal contradiction or of a prior determination of custom. An example is found in the response to intra-family wounding. Barton reports that if a brother wounds a brother, the matter is settled between the two by their father or their father's brother if the father is no longer alive. His informants explained that this was the practice because there was no kinship group available to retaliate: Every relative was equally related to either brother.

First cousins who wounded first cousins exposed themselves and their relatives to retaliation. As Barton explains, in that case the offender is at risk because half of the wounded first cousin’s relatives will not be related to the offender. Ironically, the other half, those who are related to both the offender and to his wounded cousin, have no duty of retaliation but, because they are related to the offender, they are at risk of retaliatory injury from those of the wounded cousin’s relatives who are unrelated to them. The greater irony of this set of customs, Barton points out, is that compared to his cousins, 

132Because the Kalingas tend to marry first within their tribe and second, within their community or region, the result is that each kindred group has many relatives in other kindred groups. As a result, there are fewer relatives available to take sides in a fight and more relatives who would suffer if either party to a dispute were killed. Barton notes that under these circumstances, “mediation is much easier to effect.” Id. at 38.
the offender and his immediate family face retaliation from the fewest number of the victim’s relatives. Barton criticizes this as a collective justice that is less desirable than individual justice.133 I reach a different conclusion below.134

Among the Kalinga, one’s kindred relationships influence the resolution of a blood feud. Because the kindred extends to third cousins, there is a strong impetus for peaceful resolution of a feud. As Barton notes, it is common that a member of a kindred may be enmeshed in feuds between two groups to whom he is related but who are not related to each other.135 In such an instance, he has no duty of retaliation yet he will be a target for vengeance by each group in turn. As a result, he and his similarly situated cousins will make a strong argument for peaceful resolution of a dispute through payment of wergeld.136

133Id. at 81, 224.
134See infra pp. 89-90.
135BARTON, supra note 120, at 70-71.
136Id. at 70-72, 81. Barton reports that these relationships can become terribly complicated. For example, he offers the case of the father who has wounded his child with a head-ax. Id. at 225. His informant explained that the expected retaliation would be taken by the child’s relatives on his mother’s side against the father’s relatives, but not against the father. Had the child’s maternal relatives taken action against the father, their relationship to his wife would demand that they take action against those who wounded her husband—that is, against themselves. Likewise, the child, who was wounded by the father in the first place, would be obligated to retaliate against his
The principle of equivalence governs the Kalinga as it did the Northern European tribes. It appears from Barton’s discussion and his case descriptions that *wergeld* is most commonly paid at the third round of retaliation. That is, A may wound B, which leads B’s kindred group to injure A-2, a member of A’s kindred. At this point the scales are relatively even and the matter is resolved by paying *wergeld*.

Barton points out that this leads to a somewhat cold calculation by the participants in the feud. Because the retaliation is likely to be settled by payment of *wergeld*, because the *wergeld* is paid to the individual relatives of the slain, because the amount of the *wergeld* is based on the number of those relatives, and because the value paid to close relatives of the slain is greater than that paid to the more distant relatives, the avenger will likely choose a target who has few immediate family members. Barton declares, “Small wonder that Kalingas want large families!”\(^{137}\)

Killings are frequently settled by payment of *wergeld*, called *dosa*.\(^{138}\) *Wergeld* is “levied for homicide, wounding, adultery, and infractions of *apa* [taboo] declared in maternal relatives for their retaliation against his father for wounding the son. The matter was settled by slaughtering a cow and giving a feast for relatives on both sides. Barton points out that the ritual of slaughtering a cow and distributing meat is a powerful form of loyalty-building among kindred group members. *Id.* at 73-76.

\(^{137}\) *Id.* at 81, 218, 233-234.

\(^{138}\) Barton explains that the Kalingas no longer distinguish between retaliation and indemnification. Killing or wounding is a sufficient indemnity. Indemnification is sufficient retaliation. *Id.* at 230-231. In addition to *wergeld* (*dosa*), there are other
According to Barton, the payment of wergeld does no more than relieve a kindred group of their obligation of retaliation. A member of the group may still attack a member of the other kindred in order to gain prestige.\textsuperscript{140}

Among the Ilongots, the social organization is the bertan. The bertan is not strictly a kindred group but is a community of kindreds. The community is not exclusively geographical. You may leave an area but remain a member of the bertan.\textsuperscript{141} In this sense, the bertan resembles the Arab tribe or the Central Asian ulu.

The bertan defines your membership and your membership defines your adversaries. When he marries, a man leaves the bertan of his birth and joins his wife's bertan.\textsuperscript{142} Ilongots may claim up to five bertan relationships through their parents.

forms of indemnification for different harms. Sukat is a form of treble damages paid for the loss suffered as a result of a malicious injury or taking of property. Multa is small compensation paid as an informal settlement. Pakan is a hybrid form of compensation that is paid to remove the taboo that goes into effect when a member of a kindred group injures another, even a relative. The killer becomes an enemy to the injured person's kin. A taboo goes into effect that forbids the eating of the enemy's food. The Kalingas believe that they will bloat and die if they eat an enemy's food or drink his water. Payment of pakan, to each kinship member, removes the taboo. \textit{Id.} at 231, 240-242.

\textsuperscript{139}\textit{Id.} at 240.

\textsuperscript{140}\textit{Id.} at 238.

\textsuperscript{141}\textsc{Rosaldo, supra} note 122, at 64.

\textsuperscript{142}\textit{Id.} at 188-189.
But, “to have too many allies can be to place oneself in a cross fire.” Nevertheless, one’s flexibility in claiming berton membership permits conflict avoidance. If you meet a group who is feuding with one of your bertans, you simply claim membership in one of your others. It is best, of course, if you may establish a relationship with the other group. This is apparently recognized by the Ilongots and constitutes a polite way of avoiding conflict.

Principles of Equivalence, Dominion, Insult, and Restoration in Kalinga, Ilongot, and Ifugao Societies

Among the Kalinga a key example of the equivalence principle appears in the idea of amano (“balance”). A peace pact is settled by ensuring amano between the two feuding kindred groups. Thus, “if one kinship group has killed or wounded four and the other only one, three sets of weregilds have to be paid in order to bring about amano.” The Kalingas, like the Icelanders, distinguish death in open battle from

143Id. at 253.

144Id. at 251-253.

145Recall that the Kalingas consider wounding and killing equivalent. The idea of balance in the exchange appears in Saga Iceland. MILLER, supra note 8, at 216.

146BARTON, supra note 120, at 178; see Maurice Leenhardt, Notes d’ethnologie Neo-Caledonienne, in VIII TRAVAUX ET MÉMOIRES DE L’INSTITUTE D’ETHNOLOGIE 46 (Université de Paris 1930), which notes that the tribes of New Caledonia may pay
death caused by ambush. At the community level a broken peace pact may be restored notwithstanding a disparity in killed and wounded between the feuding kindred groups, provided they were slain in open battle. Unlike the Scandinavian tribes, the Kalingas generally consider disparate losses to be equivalent if they are suffered in battle.\textsuperscript{147} Barton attributes this attitude to the way in which kindred groups count the dead and wounded on the other side. If a group of men kill another in battle or during a head-hunt, each member of the group enjoys the credit for the killing regardless of who inflicted the fatal wound(s). If two kindred groups ally in battle and one opponent dies, both groups count that death as an offset against any blood-debt that the opposing kindred group may owe it.\textsuperscript{148} As a result equivalence is easily established. Barton also attributes the ease of achieving equivalence to the development of the peace pact system among the Kalinga: a peace pact would be more difficult to establish if either side demanded compensation for what would likely have been a mutually consented-to battle.

Ilongots employ the same principles of equivalence and restoration. Rosaldo says that Ilongots take heads to frighten others.\textsuperscript{149} But the practice seems more complex

\textit{wergeld} following battle. The group that suffered the fewer losses pays the other group for their greater.

\textsuperscript{147}See infra pp. 45-46.

\textsuperscript{148}Barton, supra note 120, at 178-179.

\textsuperscript{149}Rosaldo, supra note 122, at 63-64, 214.
than that. First there is the element of insult. This is related in Rosaldo’s following story of a ritual beheading.

Bangkiwa was courting a young woman only to be frustrated when Tepeg took her in marriage. Tepeg, a member of the Aymuyu bertan, had “stepped ahead” of Bangkiwa and had refused to pay him the expected compensation – an insult. Bangkiwa beheaded members of the Aymuyu bertan in retaliation. Although none of the three who Bangkiwa beheaded were Tepeg’s relatives, Bangkiwa’s message was clear. “Tepeg said that through his actions Bangkiwa had shown that he ‘did not think of me as a man.’” Each insult went to the manhood of both. Failure to retaliate would have exposed them as weak and open to further attack. Although he never admitted taking a head, Tepeg, for his part, maintained a state of constant threat to Bangkiwa’s bertan, a kind of Cold War, for over ten years. Tepeg’s threat of retaliation maintained the status quo.

Ilongot headhunting incorporates the principle of restoration. The Ilongots do not collect heads. They toss around, then abandon, the heads that they take. “To take a head is, in Ilongot terms, not to capture a trophy, but to ‘throw away’ a body part, which by a principle of sympathetic magic represents the cathartic throwing away of certain burdens of life – the grudge an insult has created, or the grief over a death in the family, or the increasing ‘weight’ of remaining a novice when one’s peers have left that

\[150\text{Id. at 213-214.}

\[151\text{Id. at 214.}

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status.”

“Regarded as a ritual, headhunting resembles a piacular sacrifice: it involves the taking of a human life with a view toward cleansing the participants of the contaminating burdens of their own lives.”

Principles of restoration and equivalence operate poorly among the Ifugao. Injuries must be satisfied with double damages. If A kills, then A and another who was involved in the killing must die. The principal participants typically are at the top of the Ifugao’s list of targets for retaliation. They include the nungolat (the organizer of the attack), the tombok (the thrower, who inflicted the wound), the iba’n di nungolat (the companions), and the montudol (the “information provider” who has told the group where and when to find its victims.) The two-for-one dis-equivalence encourages continuation of the feud. “Once started, a blood feud was well nigh eternal (unless ended by a fusion of the families by means of marriage), for the reason that what was a righteous execution to one family was a murder (usually treacherous) to the other.”

Insult takes other forms. Normally, when a wrong is compensated, confession reduced the amount of wergeld. In cases of homicide or adultery, however, confession

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152 ROSALDO, supra note 122, at 140.

153 Id. at 140.

154 Barton, Ifugao Law, supra note 121, at 63-65, ¶¶ 77-80, 82; KROEBER, supra note 122, at 160-161. The Icelandic sagas identify actors who play similar roles. NÍÁL’S SAGA, supra note 86, at 60; MILLER, supra note 8, at 197-199. The Icelanders, however, tended not to seek retribution against the informant.

155 Id. p. 75, ¶ 97.
amassed to boasting. Boasting is insult that violates the principles of restoration and just treatment.\textsuperscript{156} Insult, as we have seen with the Vikings and Germanic tribes, asserts the dominion of the offender over the injured and prevents settlement of the dispute.\textsuperscript{156}

Rank, prestige, and the strength and relative aggressiveness and war-footing of the parties determine the amount of wergeld. As noted by Kroeber, the fine for the \textit{kadangyang} (rich man) is twice that paid by the \textit{tumok} (middle class) which is twice that paid by the \textit{nawatwat} (the poor).\textsuperscript{157} These payments, however, are assessed for wrongs committed among members of the same class. Between members of different classes, the fine is a compromise between the higher and the lower fine. The compromised amount and the possibility of settlement itself depends upon the customary practice of the community but may turn on the relative power and aggressiveness of the parties. As Barton points out, if the offender is rich and the victim poor, the offender may offer a poor-man’s fine. If the offender has many armed relatives who also hold debts owed by the victim’s kin, then the victim’s kin will persuade him to accept the smaller fine rather than to initiate feud.\textsuperscript{158}

Like other cultures, the Kalinga may settle feuds by inter-marriage. Inter-marriage, especially when followed by the birth of children, substitutes duties of

\textsuperscript{156} Id. p. 66, ¶ 86.

\textsuperscript{157} Barton points out that the number of divisions of fines, between three and five, depends on the community. Barton, \textit{Ifugao Law}, \textit{supra} note 121, at 67, ¶ 88.

\textsuperscript{158} Id. p. 67, ¶ 88. On the other hand, if the poor victim is fierce, the rich offender’s relatives may counsel the larger fine.
retaliation with duties of loyalty. Where B may have sought retaliation against A for wounding B’s cousin, A’s marriage to B’s immediate relative complicates the matter, for they are now related. Barton notes that among the Kalinga, however, intermarriage is not as frequent as among other Northern Luzon tribes because of the greater frequency of fights within the kindred group.\footnote{159} This may explain the difference between the Kalingas’ and the Scandinavians’ approaches to inter-marriage. In the Sagas, the latter tend to go to battle in fewer kindred groups. Among the Kalingas, however, one group who did not participate in the battle may lose its member, when that member has participated with his cousins as a member of his other kindred group. The non-participating group’s loss would not be compensated by the death of an opponent in the battle because the non-participating clan was not there to claim it. This practice frustrates the Kalinga principle of equivalence making settlement by inter-marriage more difficult.

The Keesings also describe principles of equivalence and restoration with just treatment among the Ifugao:

\begin{quote}
In Ifugao, all but monthly, tongues loosened by native wine cause bolos (knives) or spears to flash, and only sudden action by the constabulary, followed by arbitration [I think the Keesings mean mediation] between families and the meting out of severe punishment to the offender evens the traditional balance sheet and prevents feuds being renewed. Cases where old people insult the young men and so get them to avenge an ancient wrong still come to light.\footnote{160}
\end{quote}

\footnote{159}{BARTON, \textit{supra} note 120, at 243; KEESING & KEESING, \textit{supra} note 122, at 147; ROSALDO, \textit{supra} note 122, at 255-256; Barton, \textit{Ifugao Law}, \textit{supra} note 121, at 75, ¶ 97.}

\footnote{160}{KEESING & KEESING, \textit{supra} note 122, at 134-135. The Keesings wrote during a}
So we see that even after the parties have been restored, old Starkad may roam the village in Ifugao dress.

Maintaining Restoration: Spilling Foreign Blood on Territory Governed by a Kalinga Peace Pact

As I noted above, Kalinga communities enter into formal peace pacts. These pacts follow both kindred and regional lines and are enforced by a Kalinga strongman, the pangat, a kind of arbitrator, who has been accepted as the pact-holder. The pact-holder acts as an emissary to and for the other community. Pacts nearly always contain a provision that prohibits residents of region A, a party to the peace-pact, from the spilling of the blood of a person from a third region, C, on the territory of region B, the other party to the peace-pact.

When the provision is violated, the Kalingas refer to the spilling of foreign blood as “infecting our soil.” Barton reports that this is not a matter of superstition, for the Kalingas engage in no rites of purification after this occurs. Rather, he says, the period of relative calm and their observations may be colored by their sense that the tribes were becoming more civilized under the influence of Christian missionaries.

Rosaldo, supra note 122, at 41.

161See infra pp. 64-69.

162Barton, supra note 120, at 186-190.

163Id. at 190. Compare the practices of the Cheyenne, pp. 74-75, below.
accusation reinforces the concept of neutrality. Using your peace-pact partner’s
territory as your battlefield must eventually expose your partner to retaliation, as the
victims must eventually perceive complicity in the attacks. It can also be seen as a
violation of the restoration principle. After all, the party who uses their pact-partner’s
territory in this way, exposing them to the risk of retaliation, shows them little respect.

**Restoration Through Duwal or Ritual Sacrifice**

Barton recounts the official response to the murder and robbery of a man of Daowangan by a man of Tollang. Doyak, of Tollang, had murdered a Daowangan man and stolen beads from him. The two regions had a peace-pact.

Bulaiyao, the pact-holder of Daowangan for Tollang, demanded retaliation and the return of the [stolen] beads. [In satisfaction of the demand] Ambong, pact-holder of Tollang for Daowangan, killed Lataowan, a younger brother of Doyak [the murderer] but probably really could not return the beads because Doyak had absconded with them.\(^{164}\)

Since the full price had not been paid, the Daowangan pact-holder led an expedition against Tollang. The Tollang then offered the mother of the murderer as *duwal* or ritual sacrifice. The Daowangan men hacked her to pieces on the spot. The blows were administered by the murder victim’s relatives in order of kinship, rank, and age.\(^{165}\) The retaliation in this instance was not against the offender but against someone in the offender’s clan. The initial failure to make full compensation resulted in potential

\(^{164}\)Id. at 194.

\(^{165}\)Id.
feud with the entire town, regardless of kinship. Only the additional opportunity to take the life of the mother of the offender balanced the butcher’s ledger by compensating the insult. Because both Daowangan, through the pact-holder, and Tollang participated in the bloody settlement, peace was restored.

**Maintaining Restoration Through The Pact-holder**

The story of the Daowang-Tollang dispute reveals the role of the pact-holder. When pact-holder Ambong, who was a Tollang man, killed Lataowan, he acted on behalf of the Daowang. Punishment was open and transparent and Lataowan’s relatives were not in a position to retaliate for a Daowang “murder.” Had Ambong been able to return the stolen beads, the debt would have been satisfied in full. So we see that one role of the pact-holder is to restore the balance between the disputing parties in a way that is transparent and satisfactory to the injured.

The custom of pact-holder, as described Barton’s informants, confirms this.

The ancient pact was an extension of the kinship principle. It established in each region a fictitious kinsman of the other, the pact-holder, and gave him a spear from that other with which to avenge the wrongs against it. In that epoch, the pact-holder, as a fictitious relative of the other side, killed the offender, and that was all there was to it.\(^\text{166}\)

\(^{166}\)BARTON, *supra* note 120, at 197.
When one of their region breaks the pact by wounding or killing, the pact-holder’s duty of retaliation includes killing the offender or a relative of the offender, collecting *wergeld* (which includes a small commission for himself), paying *wergeld* himself, or presiding over a token wounding. At the time of Barton’s observations, many pact-holders considered paying *wergeld* to be cowardly and dishonorable. Barton reported a pact-holder’s sense of offense at a rich person’s power to pay blood money: “If an offender against the pact came to me and offered wergilds, this is the answer I would make him: ‘So-o? You thought you could break the pact and go free because you are rich?’”

Barton’s case studies reveal the importance of the principles of equivalence and the role of insult-dominance. A kinsman of a man who is struck by another remembers that the other’s brother had wounded his father, ups the ante by reaching for his spear, and wounds his opponent. Later, a rumor that another relative of the newly wounded has also been speared nearly leads to an all-out battle, for, as Barton notes, “Two victims on one side were too many!” Each side saw disproportionality in the events and set

167 As with other primitive societies, this rule extends to both accidental as well as intentional wounding or killing. *See Id.* at 199.

168 *Id.* at 197-198.

169 *Id.* at 195-197.

170 *Id.* at 232, Case p. 88.

171 BARTON, *supra* note 120, at 233.
out to restore the balance. Neither side to such a dispute, however, considered it important to punish the actual offender. The killing or wounding of any relative was satisfactory, although “Kalingas hate to have to put up with a revenge on a third cousin.”

The principle of insult-dominance appears in another of Barton’s cases, recorded in 1941, nine months before the Japanese invasion. One young man boasted in front of Ma-ulat, “that his uncle had killed Ma-ulat’s cousin and that Ma-ulat and his kindred had been afraid to do anything about it.” Ma-ulat left, returned when the offender was asleep and beheaded him.

The liberation theory of punishment appears in the Luzon tribes’ different treatment of homicide, wounding, and adultery. All three are grounds for retaliatory homicide or for payment of wergeld. In the case of adultery, however, only a male relative of the offending male may be slain. If the matter is settled by payment, as it apparently often is, only the adulterer, not his kindred group, pays. In the case of adultery, as opposed to rape, which is wounding, only the adulterer, not his kindred, has exercised dominion over the wronged spouse.

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172 See also Id. at 250, noting that where a woman later killed a man who had raped her, the peace pact between their two regions was not affected because the two wrongs “canceled each other.”

173 Id. at 234.

174 Id. at 248-249.

175 Barton, supra note 120, at 243-246.

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When one has killed or wounded, the pre-conditions for composition of a feud depend on the principle of equivalence and liberation from dominion:

In general, the native attitude is that one violent death calls for another. In the pursuit of this endeavor the balance is often exceeded, and thus instigates fresh reprisals which may go on for generations. This is the principle of what the native calls the ‘debt of life.’ It is to him also a debt of honor. Other injuries are readily compoundable, if sufficient payment is tendered; but he who quickly accepts blood money, thereby signifies himself a coward. The consequence is that blood money is as a rule taken only when intent to kill has been lacking, or when a chief’s authority is sufficient to enforce a settlement. Where this is the case, blood feuds within the community tend to become rare because of the head man’s interests. He not only receives for himself part of the fine that he imposes, but can best maintain his own authority toward neighbors and strangers with an undivided following at his back.\(^{176}\)

Like the Scandinavians, quick acceptance of \textit{wergeld} reveals weakness that may expose the victim or his kindred to further injury.

\textsuperscript{176} Kroeber, \textit{supra} note 122, at 173-174.
Restoration Through *DaLadag* or Ritual Wounding

The Kalinga may moderate retaliation by means of agreed wounding. When the member of one kindred group injures the member of another, the members of the injured kindred may agree with the members of the offender’s kindred that the injured person will be permitted to inflict a certain level of physical harm upon the offender, in the presence of the two kindreds. This normally happens when there is a pre-existing peace-pact between the groups. Ritual wounding typically settles the case in which the offender has wounded another “accidentally.”

Anthropologists have described this practice in other cultures. A reconciliation ceremony among Montenegrin and Albanian clans employs the same principles as the Kalingas’ practice. When one Albanian has wounded another the potential feud is composed by compelling the offender to subject himself to the injured:

The humiliating position which the guilty person assumes in the presence of the injured party, which is indeed the main feature of the ceremony, is supposed to tame the savage mood of the avenger and to incline him to forgiveness. * * * The murderous weapon hanging round the neck of the guilty person denotes that he is entirely in the power of the injured person. Vialla and Kohl state that the weapon is deliberately broken. The associations of god-parents and of chosen brothers are intended to

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177BARTON, *supra* note 120, at 239, 246.
confirm the friendship of the tribes. The presence of many members of both tribes gives the act of atonement the necessary publicity.178

Ritual wounding, like other forms of composition, requires the participation of both kindreds – the kindred of the offender to show humility and to ensure that the wounding is not excessive, and the kindred of the injured to assure full restoration.

Northern Luzon and Northern Europe
We find the same principles at work among the Northern Luzon tribes that we found among the Northern European tribes. A death in a fair fight is treated differently from a treacherous killing. Equivalence must be realized before a dispute or a feud may be composed. Dis-equivalence initiates or continues a feud.

The question of domination sits at the center of all feudal disputes. All actions in response to a wrong are designed to restore the injured party to a state of rough equivalence and to remove the dominance of the offender’s kindred. Yet restoration may be defeated by insult, which is a renewed assertion of dominance. The insult, whether a boast of one’s own or one’s ancestors’ exploits against the insulted’s or a disregard of the rights of another, must trigger retaliation and a renewed round of fighting until the parties are again restored.

178 Paul Vinogradoff, The Organization of Kinship, in ANTHROPOLOGY AND EARLY LAW 67 (Lawrence Krader ed. 1966).
PUNISHMENT AMONG THE CHEYENNES

George Bird Grinnell,\textsuperscript{179} Father Peter Powell,\textsuperscript{180} and Karl Llewellyn and E. Adamson Hoebel\textsuperscript{181} documented the 18\textsuperscript{th} and 19\textsuperscript{th} Century legal and spiritual practices of the Cheyenne Tribe. Llewellyn and Hoebel focused on the process and structure of the Cheyenne legal system and relied on Grinnell’s work as well as their own informants. Grinnell’s history, while closer in time to the events that he described, often asked questions that were incomplete with respect to legal practices. As with many early ethnologists, Grinnell sought only to document and describe. Powell relied on oral histories that were sometimes several generations removed. The result of their work, however, is a quilt of information on which patterns may be discerned and from which conclusions may be drawn.

The Cheyenne differ from the Northern Luzon and Scandinavian clans in a key respect. Among the Northern Luzon tribes, inter-clan, intra-tribe killing was somewhat encouraged. The Scandinavians recognized a right to repay blood with blood. Among the Cheyennes, however, intra-tribal blood vengeance was strongly discouraged.

**Sweet Medicine the Law-giver**

The Cheyennes would be self-defined as a language group and as a religious entity governed by the customs and structures handed down by their culture hero, Sweet

\textsuperscript{179}George Bird Grinnell, By Cheyenne Campfires (1962).

\textsuperscript{180}Peter J. Powell, Sweet Medicine (1969).

\textsuperscript{181}Karl Llewellyn & E. Adamson Hoebel, The Cheyenne Way (1967) .
Medicine. Sweet Medicine lived at a time when “bad men” ruled the Cheyennes. These men terrorized the people, killing those who disobeyed them or objected to their orders.\textsuperscript{182} Feuding and blood vengeance were common.

One day during this period, Sweet Medicine killed a buffalo. An old man came to help him butcher it. Tribal custom permitted the helper a share of the meat. The old man, however, wanted the hide in addition to his share. He and Sweet Medicine struggled over the hide until Sweet Medicine struck and killed him with a thigh bone.

The men who ruled the Tribe discovered the old man and went to punish Sweet Medicine. He fled with the tribal leaders in hot pursuit. During the chase, he appeared to them on five occasions, always one ridge ahead. On each occasion he appeared in different dress, now known to be the dress of one of the four soldier societies and the Chief’s council of the Cheyenne Tribe.\textsuperscript{183} Sweet Medicine’s flight ended at a cave where strangers took him in. There, “He was taught the ceremony for renewing the Arrows, which must take place if one Cheyenne ever killed another.” Sweet Medicine was taught about good government, a “good system of police,” and a good system of “military protection,” which was lodged in four military societies, the Swift Foxes, Elks, Red

\textsuperscript{182}JOHN STANDS IN TIMBER & MARGOT LIBERTY, CHEYENNE MEMORIES 44 (2d ed. 1998).

\textsuperscript{183}Neither the soldier societies nor the Chief’s council had been established when Sweet Medicine took flight.
Shields, and Bowstrings. He remained in exile for four years, then returned to the Cheyennes bearing the Sacred Arrows.

The Sacred Arrows served a purpose similar to that of the Hebrew Ark. The Arrows were employed in war to blind the enemy. They ensured success in the hunt. Their purity was necessary to Cheyenne survival.

When he returned to the Cheyennes, Sweet Medicine preached that he had been given the Sacred Arrows to bring the Cheyennes a new life and to end the killing of one another. The arrival of the Sacred Arrows redeemed the Cheyennes, who had been starving and living on lichens and mushrooms. The next day the earth was covered with buffalo, all of whom seemed oblivious to the hunters.

Sweet Medicine organized the four soldier societies and the Council of Forty-four, or Chief’s Council, to police and govern the tribe. He instructed the chiefs on the new law for murder. No Cheyenne could kill another Cheyenne.

Sweet Medicine’s injunction—a Cheyenne may never kill another Cheyenne—necessarily applied to intra-tribal capital punishment. The Cheyenne replaced capital punishment with banishment. Internecine blood vengeance and feud now yielded to the

\[\text{184STANDS IN TIMBER & LIBERTY, supra note 182, at 33-38; GRINNEL, supra note 179, at 266-276; 1 POWELL, supra note 180, at 96; 2 POWELL, supra note 180, at 460-466.}\]

\[\text{185STANDS IN TIMBER & LIBERTY, supra note 182, at 38.}\]

\[\text{186Id.}\]

\[\text{187Id. at 44.}\]
welfare of the Tribe. The injunction was enforced partly through religious belief. Homicide defiled the Sacred Arrows which were integral to the survival of the Tribe. Unless the Arrows were renewed in a ritual that required the participation of the entire Tribe, the Cheyenne would lack food and suffer in warfare. Thus the injunction against murder had both a social and a religious component. The renewal ceremonies impressed the rule upon the Tribe. Needless to say, Sweet Medicine’s injunction did not extend to members of other tribes.

John Stands-in-Timber reported that any tribal member who killed a tribal member would be outcast and outlawed for four years. They would be taken, assuming that they surrendered peacefully, across four rivers and four ridges. After the period of banishment the offender could re-join the tribe. At that time, the Sacred Arrow priest would meet him and perform the ceremony of re-adoption. Although the murderer might rejoin the tribe, henceforth he could not go to public gatherings or participate in religious ceremonies or in entertainment. People would not be permitted to eat with him. If he fathered children after his return, they would suffer the same restrictions.

According to Llewellyn and Hoebel, however, a murderer was banished but he was not outlawed in the Germanic sense – tribal members were not given license to kill him. Nor was banishment a sentence of starvation on the plains. The banished man

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188 *Id.* at 38.

189 *Id.* at 44.

190 *LLEWELLYN & HOEBEL, supra* note 181, at 125.
and his family and followers might join up with a friendly tribe. In practice, banishment was “in the nature of an indeterminate sentence with commutation possible on a number of grounds.” Their case studies revealed this to be true and demonstrated that the four-year term described by Stands-in-Timber in Cheyenne Memories was not a fixed sentence.

With murder largely off the table as a result of Sweet Medicine’s teaching, we look to other offenses for instruction about punishment. The liberation theory of punishment among the Cheyenne is illustrated by oral histories recounted in The Cheyenne Way.

**Pawnee: Theft and the Principle of Dis-equivalence**

Pawnee was a wild young man. Stealing horses was one of his favorite pastimes. One day the Bowstring society caught Pawnee red-handed with a horse stolen from another Cheyenne. They beat him, destroyed his weapons, saddle, and other belongings, took all of his clothing and left him naked and bloody on the prairie. He had nearly starved to death when High Backed Wolf came upon him. Like the Bishop in Les Miserables, High Backed Wolf decided to ignore Pawnee's history and fed him and clothed him. When Pawnee recovered, High Backed Wolf gave him a horse and many belongings and told him to change his ways. Pawnee reformed and was admitted to the

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191 Llewellyn & Hoebel, supra note 181, at 133.

192 Id. at 137.
Fox society. Nevertheless, he continued to carry a grudge against the Bowstrings that he never acted upon.\footnote{Id. at 6-9.}

In Pawnee’s case, dis-equivalence appears in two respects. The Bowstrings viewed Pawnee’s crime spree as altering the state of equilibrium in the Tribe. They meted out swift and severe punishment. Pawnee, however, viewed his punishment as excessive. He carried a grudge as a result.

**Sticks Everything Under His Belt: Rebellion as Dominion, and Restoration**

Sticks Everything Under His Belt declared that he would hunt only for himself. This was effectively a declaration that he was no longer subject to the rules of the Tribe, which required, among other things, that no one hunt alone. The tribal leaders met and decided that he should be ostracised. He remained outside the tribe for several years until his brother-in-law called the tribal leaders together and asked them to permit Sticks Everything Under His Belt to return. He pledged a Sun Dance and Sticks Everything joined in the pledge. They gave the Sun Dance and Sticks Everything Under His Belt was reconciled to the tribe.\footnote{Id. at 9-12.}

Sticks Everything’s ostracism was punishment and recognition that Sticks Everything had put himself outside the Tribe by his declaration. He had not actually injured any one, although solo hunting would eventually cause injury to the whole. His
declaration rejected the commonwealth of the whole and asserted his personal interests in opposition to the Tribe’s – an assertion of dominion. Giving the Sun Dance asserted his recognition of the Tribe’s priority and restored the Tribe to its proper position relative to Sticks Everything. But there is more here. The Sun Dance pledgers, in this case Sticks Everything Under His Belt and his brother, sacrifice for the benefit of the entire tribe.\footnote{Powell, supra note 180, at 611-858.} The spiritual and military leaders of the Tribe organize and prepare the dancing ground and the Sun Dance lodge.\footnote{Id. at 614-625.} When pledged by an offender and accepted by the Tribe, the Sun Dance becomes a ceremony of mutual reconciliation – a sacrament of penance and forgiveness.

Sticks Everything Under His Belt’s reconciliation then differs from Pawnee’s. Pawnee may have been broken and hungry, nevertheless he suffered less than the Sun Dance pledger, who will fast, dance, and sometimes give flesh for four days and four nights.\footnote{Id. at 614-853.} Sticks Everything Under His Belt may have suffered greatly, but his suffering was an offering accepted by the Tribe. Sticks Everything Under His Belt and the Tribe were fully reconciled. Without this ceremony of mutual restoration, Pawnee carried a life-long grudge against those who humiliated him.

\footnote{Powell, supra note 180, at 611-858.}
\footnote{Id. at 614-625.}
\footnote{Id. at 614-853.}
Cries Yia Eya: Homicide, Equivalence, and Restoration
Cries Yia Eya murdered Chief Eagle while both were drunk. He was banished from the tribe. Three years later he returned with a horse bearing bundles of tobacco—*wergeld*—and asked to be rehabilitated. The chiefs and soldier societies met to debate his request. The father of Chief Eagle agreed that he could return under the condition that he never raise his voice against another person. The father refused, however, to accept any of his “stuff.”198 (Llewellyn and Hoebel questioned whether the offering of tobacco was a bribe, atonement, or payment of a fine.)199

In Cries Yia Eya’s case, rough equivalence was achieved by Cries Yia Eya’s three year banishment, by Cries Yia Eya’s act of contrition, and by the condition that he never raise his voice against another. The status quo was restored by Crie Yia Eya’s payment of *wergeld* to the Tribe, Chief Eagle’s father’s refusal to accept it notwithstanding. Nevertheless, when Chief Eagle’s father accepted the proposed resolution, the parties were fully restored.

Walking Rabbit: Adultery and Restoration
Walking Rabbit wanted to marry his old sweetheart, who was in an unhappy marriage to another. She went off on a war party with Walking Rabbit, thereby committing adultery. There was much discussion among the other warriors in the party about settling up with her husband. While the war party was away, Walking Rabbit’s


199 *Id.* at 16.
father reached a financial settlement with the husband and his family, rendered easier because the husband was unhappy with his wife.\textsuperscript{200}

Payment of \textit{wergeld} recognized the husband’s injury and avoided feud by restoring his status through payment. Significantly all participants recognized that payment was called for. No one suggested that the husband’s acceptance of payment would be an act of weakness. Walking Rabbit’s case differs from the case of the Kalingas’ wronged Bangikiwa. Bangikiwa and Tepeg were competing for the same woman. Walking Rabbit, the husband, and the wife, on the other hand, were all unhappy with the status quo. Tepeg insulted Bangikiwa by refusing payment, thereby asserting his power over Bangikiwa. Walking Rabbit’s clan compensated the Cheyenne husband to the satisfaction of all.

\textbf{Big Footed Bull: Willful Disobedience, Submission, and Restoration}

Punishment was an act of the Tribe and an expression of approbation for willful disregard of the rules. This case offers an example: In order to maximize the results of a hunt, tribe members were forbidden from going off on their own when a herd of buffalo were spotted. The band was to hunt in an organized fashion. Those who broke this rule were punished severely. On one occasion, five or six Cheyenne violated the rule. As the soldiers rode off to punish them, “‘Big Footed Bull, who was among them [the offenders], took off the blanket he was wearing and spread it on the ground. It was one of those fine Hudson’s Bay blankets which the government used to issue to the

\textsuperscript{200}Id. at 13-15.
Indians. He stood behind it with his friends, because he meant it as an offering to the troop.’ ” The Red Shield soldiers, who were enforcing the hunt rules, tore the blanket into narrow strips and shared it and then cut off one ear of the violators’ horses. “ ‘This was how they punished them.’ ”

Llewellyn and Hoebel note,

This laying of the blanket was not bribery or buying off. It was open recognition of error, submission, and a good-will offering. It stayed the beating in good part, as we see it, because it removed the flavor of defiance about the insubordination; but it did not stay all the penalty. The duty of all the members of a society to participate in the administration of punishment and the liability of all members [of the society] to discipline in case of neglect [of administration punishment] were stated by all informants as generalized rules and are borne out in several cases.202

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**The Four Principles Among the Cheyenne**

The Cheyenne employed a system of punishment. Offenses were either met with a quick, punitive response or they were resolved by an agreed-to payment. Notably, although the Cheyenne were a relatively primitive society, *lex talionis* did not govern. Offenses were punished by other measures that were sufficient to restore the victim and the Tribe. When offenses were resolved with the agreement of the Tribe and of the

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201 *Id.* at 112-113.

202 *Id.* at 113.
victim, however, the Tribe or the victim attached conditions that ensured restoration. Cries Yia Eya must never raise his voice. Another must promise to no longer be mean and quick-tempered but temperate and good.203

The cases cited by Llewellyn and Hoebel have a common thread. Whether by direct infliction of punishment, an offer and acceptance of compensation, or an offer and acceptance of atonement, the offender either lost or gave up his position of relative power over the Tribe and his victim. The offender could no longer assert dominion over a past victim, because once the victim was restored, the Tribe stood with the victim. The Tribe saw itself as the greater victim for many offenses, especially for homicide, which fouled the Sacred Arrows. So, among the Cheyenne, a communal response to injury predominated and individual retaliation was discouraged. But in most cases, that communal response, whether acceptance of an offer by the offender or infliction of quick, violent justice, served to remove the offender from his position of relative dominion – of dis-equivalence – over the victim. The victim was restored and the conditions often included an injunction against insult.

**LIBERATION AND PUNISHMENT**

These three societies, the Northern Luzon tribes, the Cheyenne, and the Scandinavian and Germanic tribes, knew nothing of each other. None conquered the other. None traded with the other. Their primary ways of life, sedentary, nomadic, and

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203 *Id.* at 80–81.
sea-faring, were substantially different. So it is remarkable that they resolved matters of inter-clan or intra-tribal crime in similar ways. Because they did not know of each other we cannot ascribe their common practices to communication, diffusion, or assimilation.

Nevertheless, their means of addressing homicide and other offenses, and the feuds that followed them, were substantially similar. All three employed \textit{wergeld} to redress an offense. The Luzon, Scandinavian, and Germanic tribes resolved feud by inter-marriage. (This was unnecessary among the Cheyenne, because Cheyenne soldier societies prevented feud and the Cheyenne legal-religious system discouraged intra-tribal homicide.) All three groups recognized principles of fair fight, equivalence, restoration, and just treatment and their countervailing principles, treachery, dis-equivalence, dominion, and insult. Each group’s practices aimed to eliminate the dominion that the offender enjoyed over the victim, his kin, and their society.

The potential for dominion was ever-present in these societies. The concept of honor was tied up with survival and liberation from dominion.\textsuperscript{204}

\textbf{Four Principles; Four Counter-principles}

Whether an injury is or is not wrongfully inflicted, the victim and his or her kindred suffer the loss of the victim’s contribution to the group. In the case of a wrongfully inflicted injury, however, they suffer painful emotions -- shame, sorrow, guilt, anger, and hatred. Most significant, when the injury is wrongfully inflicted, the

\textsuperscript{204}MILLER, \textit{supra} note 8, at 31-32; 245-246.
victim and the victim’s kindred suffer a change in their power relationship with the offender or the offender’s group.

From the moment of a wrongfully inflicted injury, the victim and the victim’s group have few options. They may endure the offense and suffer future insults and injuries from the offending group. If they follow this course, it may expose them to victimization by other competing groups who perceive them as weakened.

The victim or the injured group may engage in a legal fiction and pretend that whatever occurred was not wrongful. This legal fiction will be encouraged by an offer from the offender or the offender’s kin that redresses the power imbalance. The fiction will be destroyed if a new injury is inflicted or an insult is cast.

Finally the injured group may respond by retaliation in an attempt to restore the former power relationship. Retaliation may initiate feud. Feud is always harmful for all sides and may be destructive for one. But the no-action alternative is certainly destructive for the injured group.

Whatever the response, the outcome is governed by four principles.

**Fair Fight**

The fair fight principle holds that a fair fight either does not create inter-clan dominance or results in dominance that can be redressed by a non-violent remedy. In more primitive societies mutual combat, including mutual exchange of insult, is not worthy of formal punishment because, first, it respects the value of the opponent and, second, injuries may be mutually inflicted. Interestingly, though, unless the combat
results in a draw that both sides recognize (such that they say, “he or they will never do that again”), one side may lose relative power. They may be compelled to continue the combat as feud. On the other hand, in a fair fight, although one may be injured or killed, so long as the fight was fair, any dis-equivalence that results can be satisfied by payment of _wergeld_. Fair fight, however, does not mean balanced fight. These feuding societies are happy to fight when the odds are in their favor, whether by reason of numbers or by reason of technology. The Osvifsons are happy to outnumber their opponent. After all, how are they to know how many men Kartan will have at hand? Likewise, Kama of Butag _bertan_ is happy to arrive at a ceremony carrying a machine gun to seal a peace covenant with a Rumyad _bertan_.

Treachery, however, is a fight initiated in violation of social norms—by trickery, by lying in wait, or by a host against a guest. Unlike mutual combat, treachery communicates a purpose to inflict future injury. A fair fight may result in unequal losses, but these may be atoned. Any loss suffered from treachery, however, is difficult to atone because more than the loss must be satisfied. The treachery must also be redressed. Treachery means that I and other relatives of the victim must look over our shoulders. A treacherous killing, in other words, is the equivalent of a criminal offense because it includes an offense against the group.

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205 _Id._ at 195-196.

206 _The Laxdale Saga_, _supra_ note 111, at XLIX.

207 _Rosaldo_, _supra_ note 122, at 94-95.

208 _Miller_, _supra_ note 8, at 249.
**Equivalence**

If there is rough equivalence after a fair fight or if rough equivalence is established after battle or retaliation, then the parties are in a position to be restored to the status quo. Exact equivalence is not necessary. Any parity that satisfies the society’s understanding of equivalence will be sufficient. For example, among the Kalinga all kindreds involved in a fight claim a death or wounding inflicted on the opposing side even if the wound was not inflicted by a member of the kindred. Saga Iceland recognized an idea of “balanced-exchange.” Thus feud or warfare seek to re-right the imbalance (or perceived imbalance) of power – to establish a moral or psychological equivalence – in much the same way that punishment does.

If, on the other hand, the survivor of a treacherous fight accepts payment, he is seen as dishonorable – as weak – for he has acquiesced in and surrenders to the treachery. Dis-equivalence must result when the survivor accepts *wergeld* without avenging a treacherous killing, and dis-equivalence means continued dominion by the offending party (if not by others who perceive the weakness of the survivor.)

Punishment differs from feud in one way. Punishment imposed by society typically has, indeed it often intends as the theory of deterrence argues, the derivative benefit of self-protection. While the feud has the same aim – it may lead to self-protection – engaging in feud may lead to self-destruction if the opposing side wins decisively. Ideally in the course of the feud each side’s losses may balance out or the

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209Miller, *supra* note 8, at 216.
offending party (who may not have been the original offending party) may do something significant to right the scales. In any event, the feud serves the purpose of establishing equivalence. Equivalence leads to a restoration of parity in power that preceded the offense.

**Restoration**

As John F. Kerrigan observes in his excellent treatise, *Revenge Tragedy*,

“Anthropological evidence suggests that, even within bitter feuds, there is an impulse towards vindictive symmetry which allows violence to register a desire to move through equivalence to settlement.”210 His observation mirrors my findings. Once the parties achieve a state of rough equivalence, there is room for restoration. Either side may now seek to settle their differences without the appearance of weakness.

At this stage several factors come into play. The circumstances of the wrong will always determine whether an offer of terms is seen as submissive or honorable. For example, when the injured party recognizes that the offender has acted for objectively acceptable reasons – he was pulled into the fight, he was compelled by clan loyalty, or he was goaded, for example – the parties are more likely to be restored.

To achieve restoration, two prerequisites must be satisfied. First, the greater loss must be compensated. Depending upon the social rules, both the duty to pay and the right to receive compensation may be shared among the kindred of the offender and the injured. This binds them to the settlement. Second, the offender or the offending group

must engage in some act, contribute payment, or participate in some ritual that demonstrates their forsaking of dominion over the injured group. For example, the offending group’s participation in ritual wounding affirms the offending group’s assertion that the offended group is power-equal. Payment of *wergeld* to satisfy an insult may demonstrate respect, not submission, to the injured kindred or to the tribal whole. Fostering the child of the victim communicates submission to the offended and serves to reconcile the parties. (It also means that the foster-child is hostage should hostilities resume.)\(^{211}\) The parties may also be restored by other formal acts: promises to behave or acts of contrition. The offer of a Sun Dance demonstrates an offending Cheyenne’s submission to the welfare of the Tribe. The Tribe’s acceptance of the Sun Dance demonstrates their reconciliation to the offender.\(^{212}\) In all cases, both parties must acquiesce if there is to be restoration.

Miller describes this process as a story. In the “[b]eginning: you took my eye; middle: threat and bargain; end: I restore my honor and dignity by taking yours from you and now we are even. The notion of getting even is inseparable from the aesthetics

\(^{211}\)Miller, *supra* note 8, at 172.

\(^{212}\)Kerrigan describes the climactic scene from *Raoul de Cambrai* in which the protagonists, at the end of an exhausting trial by combat, reconcile with their enemies by prostrating themselves before them and surrendering their swords. Not only are the two feuding clans reconciled, when the King seeks to re-ignite the feud, the two former enemies oppose him. Kerrigan, *supra* note 210, at 154.
Yet restoration means more than getting even. It often means getting related. Inter-marriage or adoption substitutes inter-clan loyalty for inter-clan conflict and substitutes familial relations for hostile relations. Restoration, by whatever means, ends the state of dominion that the offending party enjoyed by reason of the offense.

**Just Treatment**

Nevertheless, restoration is fragile. The three preceding principles alone will not preserve the peace. If the former offending party does not treat the former victim justly, the peace achieved will be destroyed. Just treatment is the maintenance of parity that avoids an assertion of dominion by the former offending party. When the three principles have been satisfied, a feud may be renewed by a violation of the fourth principle when the group that held dominion acts in some way to re-assert or display its dominion. Finn and Hengest recognize this when they promise that no Frisian shall rub a Dane’s nose in the outcome of the Finnburg fight. Beowulf recognizes that a peace sealed by marriage will last only as long as the victorious Healfdanes refrain from insulting the Heathobards. A Kalinga will maintain the peace so long as another Kalinga does not brag about his great-uncle’s killing of the first’s great-grandfather. And the murderous Cheyenne may return to the Tribe, but he must never raise his voice.

Insult, we have seen, may take many forms. It may be public and it may be intentional. It may be both unintended and recognized only by those who bear the insult. Eyvind learns that his brother Sam has dislodged Hrafnkel from his position of

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213 Miller, Eye for an Eye, *supra* note 103, at 63.
power before he loads his horses with his riches. He tells his men that he has taken no part in his brother's dispute, so he should have no need to worry when Hrafnelk and his men begin following them. Eyvind may not be as wise as the Tjostarrssons say. He fails to recognize that a display of wealth and pretty shields may be the insult that compels response. No doubt, having met with his brother Sam and learning that Hrafnelk has acted humbly during the last six years, he feels less concerned. But it is that very assumption, that Hrafnelk is weak and to be ignored, that sparks Hrafnelk's retaliation, in the same way that old Starkad shames Ingeld into retaliation. Whatever the reason, we see that Hrafnelk is faced with the dual opportunities: honor or dishonor; increased power or loss of power. And dishonor and loss of power leads to weakness, which in turn in a feudal society, means vulnerability.

**Crime and Liberation**

This leads us to a fundamental theory of punishment: liberation from dominion is the epistemological justification for punishment. A wrong-doer and the wrong-doer’s group gains power over the victim and the victim’s group. The criminal gains power over the victim and society. The wrong-doer enslaves the victim by his wrongful act, reducing the other’s autonomy whether by reason of a violation of the victim’s fundamental autonomy (freedom from physical injury) or by reason of a violation of society’s morés, which limits freedom of action. (As Kant said, theft makes all property insecure.)
The criminal wills wrong in such a way that members of society respond to him with a loss of autonomy, even if the victim does not. This is true whether the violation is of fundamental or morés-created autonomy.

Seen through the lens of primitive societies, punishment is not about vengeance, or desert, or character. For primitive societies and for us, it is about dominion and liberation from dominion; it is about slavery and emancipation.

Liberation theory and its four principles hold true in modern criminal law. The criminal achieves dominion over the victim and society when he commits his crime. Society inflicts punishment in order to remove the criminal’s dominion. But the punishment inflicted must be of a kind and of sufficient measure to achieve a sense of equivalence and restoration. If too lenient, the criminal “gets away” with his offense – he retains power. If too severe, punishment breeds resentment and a desire to respond, to engage in feud. Thus the four principles govern. Society extracts less from the offender who has stolen to eat – a reflection of the principle of fair fight. Society extracts less from the offender who shows contrition and makes restitution – a reflection of the principles of equivalence and restoration. Society restores, at least de jure, the criminal who has “paid the price.” On the other hand, society punishes more severely the criminal who re-offends and that criminal who shows defiance or disdain after he is caught.

Among the Kalingas and the Cheyenne, we see a further development. Their societies ceded some power of retaliation to the pangat (the peace-pact holder) and the soldier-societies. We see key features in these institutions. First, both the offender’s
and the victim’s clan must participate in or accede to the injury inflicted or the settlement. In order for this to be achieved, the settlement or the injury must be seen as one that satisfies the equivalence principle. These institutions are bridges between less formal primitive and more formal, positive-law, punishment systems. Like a positive-law system, these institutions remove revenge from the equation. The victim-clan’s urge to revenge may be satisfied by the response of the pangat, but when the pangats administer or direct the retaliation, their action is not necessarily tainted with emotion.

If a liberation theory of punishment is satisfactory, it ought to be tested by other circumstances. Two hypotheticals, addressing crime and consent and punishment for ignorance of the law, illustrate the operation of a liberation justification for punishment.

**Dominion and Consent**

Assume that a crime is committed against a person who doesn’t care. If there has been no exercise of power from the victim’s perspective, why should there be punishment? The trouble with this construct is that it is individualized to the injured person. The fact that the offender has willed the crime is an offense to society because the offender has exercised his will to exert illegitimate power over society.

What of a society that does not care? Assume that we have a society that is so communal that the idea of possession, ownership, and theft is totally foreign to it. In this society both the “victim’s” reaction to the taking of an object and the taker’s (the “thief’s”) will in taking the object are altered. In such a society a taking without consent cannot be an attempt to bring another under the taker’s will. Under this society’s set of
mores, it is not the taking, but rather the withholding of an object, that would be offensive.

Now, let us bring someone from the outside who is a thief who will take but will not withhold. Let us say that the thief takes a sewing awl from the hut of another villager and then hangs it outside his hut to demonstrate that he has flouted the rules. He flouts the rules of the society from which he comes, not those of the society in which he is found. So the next morning, the villagers arise, see the awl, and think, “He must have been sewing last night. How nice of him to hang the awl outside so we can find it.” It does not matter if he says to them, “I took the awl as a criminal act, as an exercise of my will over yours.” His taking is an effort to bring that society under his will, but it fails because of the nature of the society that he has entered. His boast means nothing to them and would be considered a stupid, if not bewildering statement. So they will not punish him.

From a retributive standpoint, the society should not punish him. The standard retributive answer would be that he has committed no offense, so has no guilt, and, because only the guilty should be punished, he should not be punished. Utility would not justify his punishment because punishing him would deter him from engaging in acceptable behavior.

Character retributivism, however, would conclude that the would-be thief should be punished because the village remains at risk from one who is willing to flout society’s rules, once he figures out what they are. The village may not understand this to be the
case, but it is the case. If character retributivism calls for punishment of the person who would be bad, if only the rules would let him, then the village would punish our thief for wrongful intentions, not for wrongful acts.

Looking away from traditional theories of punishment to the fundamental justification for criminal punishment—liberation from dominion—our would-be thief has exerted no illegitimate power over anyone. He has caused no harm. From the perspective of either the would-be victim or the communal society, he has no new power over them. His theft has made property no more or less secure than it was. Without actual dominion, there is no reason to strike back, no reason to free society from his non-existent dominion.

**Ignorance of the Law and Unforeseen Dominion**

Just as the fundamental justification for punishment—liberation from dominion—counsels that the would-be thief should not punished for attempting a wrong that is non-existent under his new society’s morés, so too does it counsel that he should be punished for doing what he believes to be innocent because he was unaware of his new society’s morés. In such a case retribution theory would argue that he should be punished because he is guilty. A utilitarian would say that punishment of the ignorant is generally beneficial because it ensures that all learn the rules of their new society or the new rules of their existing society.2214 If, however, we view punishment as removal of

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dominion and restoration of the altered relationship, then we need not look to either the retributive or the utilitarian justifications for punishment of those who were ignorant of the law.

In our hypothetical village, withholding property from neighbors is an offense. Our visitor notices that his own stirring spoon keeps disappearing and showing up on his neighbor’s porch. He retrieves it and locks it up. New to the village, he is unaware of his offense. If he is unaware that he had violated a rule, why should he be punished?

Although he did not know it when he locked up his spoon, our visitor now exercises illegitimate power over his neighbors. He will know the fact of his dominion sooner or later. When he learns that he has violated his new society’s morés (assuming that they do not arrest him and punish him first), he will have two choices. He may decide to enjoy his act. If so, he now willfully flouts his new society’s rules. In this case we would agree that it would be just for his society to punish him.

His alternative is to offer himself for some form of punishment. This may take the form of his explanation of ignorance, his public, sincere apology for offending his neighbors, and his promise to adhere to the rules. The villagers may accept his response as sufficient to remove their perception that he has exercised dominion over them by breaking their rules. The visitor’s apology is a form of punishment because, even though sincere and self-initiated, he understands that it is the least that is demanded of him by

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214 Utilitarians have had difficulty with this assertion. Bentham argues that punishment of the ignorant is unjust and so it would seem–unless you are a member of the offended society. Bentham, Chs. XIII, § 3.
his new society. The quality and measure of his punishment suffices to remove his dominion.

We see again that the victim (whether individual or society), who the offender both injures and dominates by the offender’s act, is the source of the need for punishment. Punishment is necessary to free the individual and society from the offender’s yoke. Punishment re-establishes equivalence and restores the power relationship between the offender and society. The offender is not punished merely as a matter of desert; he “deserves” punishment because he holds dominion over society – dominion that he has gained from an act or omission to which society did not tacitly, impliedly, or expressly consent.

Once we see that punishment removes dominion, then we also understand why ignorance of a rule cannot excuse an action that, without punishment in some form (if only in the form of a demanded apology), will give the actor dominion. When we view punishment as something that is expected or demanded of one who has committed an offense, in order to remove his dominion, then punishment is not unjust. I think that one’s sense that it is unjust to punish someone who is genuinely ignorant of a rule is explained by the severity, not the fact, of punishment. It is reasonable to say that a severe punishment, imposed upon someone who is genuinely ignorant of a rule, is unfair because it is excessive in light her ignorance. On the other hand, it is also reasonable to say that some form of punishment, sufficient to remove dominion, is necessary and therefore just. The measure of punishment is then directly related to the principle of equivalence.
If the fundamental justification for punishment is freedom from the power exerted over the victim and society by the offender then the utilitarian argument for punishment cannot survive as an independent justification. I return to Rawls’s excellent definition of the utilitarian justification for punishment:

What we may call the utilitarian view holds that on the principle that bygones are bygones and that only future consequences are material to present decisions, punishment is justifiable only by reference to the probable consequences of maintaining it as one of the devices of the social order. Wrongs committed in the past are, as such, not relevant considerations for deciding what to do. If punishment can be shown to promote effectively the interest of society it is justifiable, otherwise it is not.\footnote{Rawls, supra note 3, at 5.}

If “punishment is justifiable only by reference to the probable consequences of maintaining it as one of the devices of the social order,” then we cannot ignore those probable consequences. There are, after all, many probable consequences. Punishing a minority may, if forfeiture is part of the scheme, enrich society’s majority and this will...
be seen as an overall good by the majority. Exacting oppressive punishment for a petty offense that is difficult to detect will deter the petty offense. Both cases are as utilitarian as they are unjust. Unjust or excessive punishments, even though they may have utility, result in dis-equivalence. Dis-equivalence, as we have seen, justifies feud. And what is feud, if it is not a rationale for continuing to inflict harm on the other?

Unlike forward-looking utility, punishment justified by liberation from dominion necessarily looks to the past wrong and to earlier wrongs. The offender exerts dominion over the victim and society by his offense, which has, after all, occurred in the past. The nature and circumstances of the past offense determine the nature and severity of punishment that are necessary to free both the immediate victim and society from the power gained by the offender. It is proper therefore, to look to the offense to determine if punishment is necessary and if so, to then determine what kind of punishment and what measure of severity is necessary. It is also proper to look to a wrongs that preceded the current offense to determine the nature and measure of punishment. If the series of offenses demonstrates the offender’s disdain for society’s rules, then the offender is acting to assert his power over society and society is justified in striking back through different or more severe punishment in order to take that power from the living offender. In that sense, punishment is certainly backward-looking.

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The question, “Is punishment necessary?”, looks beyond the formal or customary definition of the offense. It asks whether the individual’s act, if not yet formally prohibited, establishes dominion over the victim or society.
This resembles Rawls’s claim that backward-looking retribution comes into play in the particular case and forward-looking utilitarianism comes into play when the (ideal) legislator writes the rule and establishes the sanction. It is not Rawls’s claim. The fundamental motivation – establishing a mechanism to free the individual and his society from the dominion imposed by wrongdoing – is both forward and backward looking.\textsuperscript{217} Under Rawls’s claim, the forward-looking legislator determines the punishment necessary to deter the offense. Under a dominion theory, the forward-looking legislator looks back at past homicides and decides that there ought to be punishment for homicide and that it should be in the range of \( x \) because punishment, and punishment in the range of \( x \) in particular are necessary and sufficient to free us from the dominion of a murderer.\textsuperscript{218}

The backward-looking judge decides that this person should be punished because he committed a homicide and homicide warrants a punishment within the range of \( x \). (This differs significantly from the more extreme utilitarian view that in order to deter a crime that is difficult to detect, greater punishment may be called for as a matter of


\textsuperscript{218}This has nothing to do with morality. Describing murder as immoral and therefore punishable begs the question of why it is immoral. Murder is immoral because of the immediate harm inflicted on the victim and his kindred and because of the dominion the murderer now exerts over the victim’s kindred and over society.
policy by the legislator or imposed as a matter of practice by the judge.\textsuperscript{219} The backward-looking judge, however, also considers the circumstances of the offense and of the offender to determine the measure of punishment. She considers the circumstances of the offender to determine if they call for mercy, that is, for leniency. The legislator creates the yardstick; the judge uses it to measure the case. Under dominion theory the judge also engages in a forward-looking utilitarian exercise when she determines the measure of punishment (within the range of $x$) that is necessary to free society from this particular criminal’s future dominion.

So, and this is significant, freeing society from the offender’s power “can be shown to promote effectively the interest of society,”\textsuperscript{220} and therefore a dominion theory of punishment has a utilitarian aspect. Freeing society from the offender’s power looks back to the circumstances of his offense, and in this way, dominion theory has a retributive aspect. In other words, the goal of freeing the victim and society from enslavement by the offender is by nature both retributive and utilitarian.

I also conclude that purely utilitarian rules and sanctions may be insufficient. A punishment may effectively promote a good of society, but if the nature or the potential severity of the punishment does not (from society’s point of view) free society from the dominion of a future offender, it will be an insufficient punishment and society will conclude that it lacks legitimacy. A minor punishment for a fraudulent act may serve to facilitate commerce, for example, but it fails to free us from the fraudulent actor.

\footnote{\textsuperscript{219}Carlsmith et al., \textit{supra} note 5, at 285.}

\footnote{\textsuperscript{220}Rawls, \textit{supra} note 3, at 5.}
order to free the victim and society, the nature and potential measure of punishment must correspond to the power of the crime.

Now we return to retribution and to Kant’s argument:

Even if a civil society were to be dissolved by the consent of all its members (e.g., if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in his public violation of justice.\(^{221}\)

We discover several things in light of the practices of our primitive societies. First, had the murderer slain someone who was not part of his immediate family, the victim’s clan may hold the slayer’s clan and his community\(^{222}\) responsible, whether the slayer’s community punishes him or not. The victim’s community must have a role in the punishment, by actual consent to punishment or otherwise, in order to ensure that whatever punishment is imposed by the slayer’s community inures to the injured clan.

\[^{221}\text{KANT, supra note 12, at [333] 142.}\]

\[^{222}\text{In this section I use community in a broad sense: it may be the members of the kindred to whom a duty of retaliation inures; it may be the bertan of the Ilongot; it may be the geographical definition.}\]

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Second, if the community kills the murderer without the murderer’s clan playing a role, this may trigger duties of retaliation by those members of the murderer’s clan who are not part of the community. Third, either the murderer’s or the victim’s community could be seen as bearing the blood-guilt of the murderer should they fail to sufficiently punish him. Bearing blood-guilt means that the members of the community would reasonably be seen as those who consider killing to be a reasonable act. To protect one’s group from such a community, feud becomes necessary.

Kant requires death. But as we have seen, the principles of feud may be satisfied by a punishment of less than death so long as the society remains intact and the interested parties participate or consent to the punishment. Upon dissolution of their society, however, a failure to execute any murderer is problematic. In such a case, society’s dissolution frees the murderer from any further punishment, communicates a certain power over others in the world (that society’s members give some degree of approval to killing), and preserves the murderer’s dominion over society’s members. Like Kari of Njál’s Saga, community members and others would be justified in pursuing the now-freed murderer across the globe until his power over them is neutralized.

CONCLUSION

We find punishment’s explanation, indeed its fundamental justification, in a theory of dominion. The four pairs of principles at play in primitive societies (fair fight v. treachery; equivalence v. dis-equivalence; restoration v. dominion; and just treatment v. insult) describe and resolve the dominion that an actor and his clan gain and enjoy as a result of a harmful act. The fundamental justification for punishment is freedom –
removal of the wrongdoer’s power over the victim and society. All other justifications, whether retributive or utilitarian in nature, derive or evolve from that fundamental impulse.

Thinking of punishment’s justification as removal of dominion offers a useful framework for analysis of our definition of crime and our development of forms and measures of punishment.