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François Tanguay-Renaud

Osgoode Hall Law School of York University, ftanguay-renaud@osgoode.yorku.ca

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STATE CRIMES

François Tanguay-Renaud*

Abstract: *Is a category of state crimes theoretically sound and important? This chapter defends the view that it is, based on some of John Gardner's key theoretical commitments about the possibility of state agency and wrongdoing. The central contention is that the category of state crimes is useful as a means of singling out those condemnable state wrongdoings that warrant punishment. Other existing normative categories such as state injustices and violations of human rights are not sufficiently discerning to pick out this important subset of state wrongs. The category also helps focus inquiries about the justification of the more deliberately burdensome responses that may be imposed on states—be it internationally or domestically, institutionally or popularly—for their morally graver legal wrongs. Punishment of states for such wrongs must be considered, I argue, as they may be justified in terms of their deterrence effect, but also as symbolically marking these wrongs and, to a lesser (and more questionable) extent, as giving states their just desert.*

Be it as a scholar or as a doctoral supervisor, John Gardner often liked to provoke. This chapter is meant as a response to one such provocation.

Gardner believed that, through a combination of what he called natural and artificial agency, institutions can be agents whose actions cannot simply be reduced to that of their individual human members.¹ He thought that, through the intercession of their members acting together in accord with a suitably-designed normative framework, institutions can act in the

*Associate Professor at Osgoode Hall Law School, and member of the Faculty of Graduate Studies of the Department of Philosophy, York University, Toronto.

¹ See John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford: Oxford University Press, 2012), at pp. 61-66.

world in distinct ways, and even engage in wrongdoing of their own. For example, Gardner moots the possibility that a police force—understood not so much as a collection of officers acting individually, but as “a whole system”—may sometimes go astray and turn into a distinct institutional “assassin.”² He even maintains that the state as a whole can sometimes engage in wrongdoing. Thus, Gardner cautions, “the state,” like any other moral agent, “must not murder or be complicit in murder. It must not rape or be complicit in rape. It must not rob or be complicit in robbery.”³

When, as a graduate student, I first read this last passage, many questions arose. Amongst them, the question of whether, if one adopts Gardner’s theoretical commitments as deployed in the article in question, states should also sometimes be thought of as criminals, when they engage in crimes that in some way recognize in the law moral wrongs such as murder, rape, and robbery. Gardner’s response to my query was characteristic of his empowering supervisory style. “Interesting and underexplored question,” he proclaimed, “since there is no doubt that states also regularly engage in legal wrongdoing.” That was before he added: “What do *you* think?”

Many years later, here is (part of) my attempt at providing an answer,⁴ grounded in by Gardner’s own theoretical commitments about the possibility of distinct state agency, the applicability to the state of the general principles of morality that bind us all, and about some version of legal moralism as the best way of understanding criminal wrongdoing.⁵ To be sure, since Gardner never attempted to answer this question himself, I must depart from his work in a number of ways to do so, and this chapter may be somewhat less exegetical than others as a result. Still, given that

² John Gardner, “Criminals in Uniforms” in RA Duff, Lindsay Farmer, SE Marshall, Massimo Renzo, and Victor Tadros (eds), *The Constitution of Criminal Law* (Oxford: Oxford University Press), pp. 97-118, at p. 115.

³ John Gardner, “Prohibiting Immoralities”, *Cardozo Law Review* 28(6) 2007: pp. 2613-2628, at p. 2628.

⁴ See also François Tanguay-Renaud, “Criminalizing the State”, *Criminal Law and Philosophy* 7(2) (2013): pp. 255-284.

⁵ On this last commitment, see John Gardner and James Edwards, “Criminal Law,” in Hugh LaFollette (ed.), *The International Encyclopedia of Ethics* (Chichester: Wiley-Blackwell 2013).

Gardner long encouraged me to pursue this project, which his work inspired and now frames, I believe it is a fitting tribute.

WHY STATE CRIMES?

Taking seriously Gardner's assumption that states can commit both moral and legal wrongs that cannot simply be equated with those of their individual members, do they also perpetrate crimes?

For years, criminologists have been studying so-called state crimes.⁶ However, analytic criminal law and political theorists, more scrupulous about the concepts they employ, are generally much more reluctant to speak of the normative category of crime as applicable to states. Their hesitation is understandable: while states are certainly paradigmatic criminalizers and worthy of theorization as such, what practice of singling them out as agents of crimes is there for us to theorize? In name, at least, there isn't much, either at the international or domestic level.

Admittedly, the wording of Article 9 of the Nuremberg Charter may have allowed the Military Tribunals to declare organizations—possibly, the Nazi state—guilty of crimes.⁷ Instead, though, criminal organizations were judicially defined as aggregates of guilty individuals, thus rendering the notion of organizational criminality—including state criminality—obsolete.⁸ Early drafts of the International Law Commission's *Articles on State Responsibility* later also made room for the category, defining a state crime as “[a]n internationally wrongful act which results from the breach

⁶ See as far back as Horace King, *State Crimes* (Worthing: Little Hampton Book Services, 1967), and Charles Tilly, “War Making and State Making as Organized Crime”, in Peter B. Evans, Dietrich Rueschemeyer, and Theda Skocpol (eds.), *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985), pp. 169-191.

⁷ “At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization”. *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal*, Aug. 8, 1945, Art. 9, 59 Stat. 1544, 82 UNTS 279.

⁸ Judgment of the International Military Tribunal: The Accused Organizations. Online: <<http://avalon.law.yale.edu/imt/judorg.asp#general>>.

by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole.”⁹ Aggression, genocide, the establishment and maintenance by force of colonial domination, slavery, apartheid, and massive pollution of the atmosphere or of the seas were then listed as paradigmatic examples. Still, the category was ultimately dropped from the final version of the *Articles*.¹⁰ Indeed, international organizations such as the United Nations Security Council are generally very careful not to frame their treatment of states that violate international law as criminal-law-like, opting instead to limit themselves to preventive, regulatory, and reparative language and means.¹¹ To be sure, many of the crimes initially listed in the International Law Commission’s drafts ended up being recognized in the *Rome Statute of the International Criminal Court*. However, despite requirements of actions pursuant to or in furtherance of a state or organizational policy,¹² or of involvement with the use of armed force by a state,¹³ these crimes are now explicitly and exclusively understood as crimes of *individuals*—against humanity, of aggression, or war—not as crimes of states.

Domestic legal systems are no exception. In most of them, “the state” is explicitly excluded from the ambit of the criminal law.¹⁴ Admittedly, in some rare cases, statutory provisions or court rulings do contemplate the possibility of criminal prosecutions not so much of the state

⁹ James Crawford (ed.), *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentary* (Cambridge: Cambridge University Press, 2001), at pp. 352-353.

¹⁰ *Ibid.*, at pp. 16-20.

¹¹ See further Gabriella Blum, “The Crime and Punishment of States”, *Yale Journal of International Law* (2013) 81(2): pp. 57-122, for a helpful survey of relevant international practice.

¹² Rome Statute of the International Criminal Court, July 17, 1998, Art. 7(2)(a), UN Doc. A/CONF.183/9* (www.un.org/icc), reprinted in 37 ILM 999 (1998).

¹³ Resolution RC/Res.6, Review Conference of the Rome Statute, Annex I on the Crime of Aggression (http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf).

¹⁴ For an example of statutory exclusion, see e.g., *Code pénal* (France), at s. 121-2 (“Les personnes morales, à l’exclusion de l’État, sont responsables pénalement”).

per se, but of various organs, such as “municipalities”, “governmental entities”, “public bodies”, or “the Crown”.¹⁵ Yet, insofar as they were ever invoked—which is sometimes not even the case—these provisions and decisions have by now generally fallen in desuetude.¹⁶

Be that as it may, a lack of practice surely does not prevent one from speculating about the normative prospects of a category of state crimes. To what end? I argue that there are good reasons for both criminal law and political theorists to turn their minds to the possibility of state crimes, including the fact that the issue lies at the intersection of their fields of study, which remains significantly underexplored. My main contention is that these theorists’ reluctance to consider state crimes is symptomatic of a broader inattentiveness to the difficult question of what remedies for state wrongdoing may be justified. More specifically, I argue that if we take seriously the possibility that the state may be punished for its perpetration of certain wrongs, then, without the idea of state crimes, we lack a concept that would helpfully allow us to single out such wrongs. We lack an important concept, just as we would lack one were we to abandon, without replacing it, the idea that some punishable individual wrongs are crimes. I intend to get to this point by addressing a series of key objections to the idea of state crimes, namely: (1) that different norms that already apply to states satisfactorily regulate the kinds of conduct which legal systems generally treat as crimes, when they are engaged in by individuals or non-state organizations; (2) that institutions and safeguards required for legitimate criminalization are currently unavailable for states, and (3) that states are not kinds entities that can be valuably punished.

STATE CRIMES IN OTHER GUISES?

If, as John Gardner holds, states can engage in wrongdoing and crimes are wrongs, then it seems at least worth asking why analytic philosophers are so reluctant to even consider the possibility of state crimes. Some, it must be said, are not so averse to the idea. Thomas Nagel, for example, writes quite unhesitatingly of “certain types of criminal conduct [such as war

¹⁵ See e.g., *Criminal Code of Canada*, RSC 1985, c. C-46, at ss. 2, 22.1, 22.2; *Indiana Code Ann.*, at s. 35-41-1-22; *New York Penal Law*, at s. 10.00(7); *Cain v. Doyle* (1946), 72 Commonwealth Law Reports 409 (High Court of Australia).

¹⁶ See Stuart P. Green, “The Criminal Prosecution of Local Governments”, *North Carolina Law Review* 72 (1993): pp. 1197-1246.

crimes or crimes against humanity], usually by states, against other states or against individuals or ethnic groups.”¹⁷ Consider also Avia Pasternak who discusses in passing the legitimacy of “assigning individual liability for state crimes”,¹⁸ or Paul Gilbert who argues that “State terrorism is a crime”.¹⁹

A standard rejoinder to such assertions is that they are merely metaphorical. That is, they refer to kinds of wrongdoing which, although not criminalized when engaged in by states, commonly are—either internationally, domestically, or both—when engaged in by ordinary individuals or officials in their personal capacity. The point is sometimes couched in even more trenchant terms: doesn’t the intrinsically metaphorical nature of these assertions account, at least in part, for the ease with which they often veer into hyperbole—as in Emma Goldman’s infamous characterization of the state as “the greatest criminal, breaking every written and natural law, stealing in the form of taxes, killing in the form of war and capital punishment”?²⁰

This kind of rejoinder does not constitute much of an objection to state crimes. Indeed, the authors cited might well genuinely think that the kinds of state wrongdoing to which they refer *should* be recognized as crimes, even if existing legal systems fail to do so. In other words, their mentions of state crimes may be more aspirational than metaphorical. Even if we do not yet have legally-recognized state crimes, these authors might argue, the cause is not the unintelligibility or illegitimacy of the category so much as political myopia, hypocrisy, or sheer obstruction. There is no denying that a sustained inquiry would be needed to flesh out the justified parameters of any plausible category of state crime. Yet, is this not

¹⁷ Thomas Nagel, “The Problem of Global Justice” *Philosophy and Public Affairs* 33(2) (2005): pp. 113-147, at p. 114.

¹⁸ Avia Pasternak, “Limiting States’ Corporate Responsibility” *Journal of Political Philosophy* 21(4) (2013): pp. 361-381, at p. 20.

¹⁹ Paul Gilbert, *Terrorism, Security & Nationality* (London: Routledge, 1994), at pp. 133, 157.

²⁰ Emma Goldman, “Anarchism: What It Really Stands For”, in *Anarchism and Other Essays* (New York: Mother Earth Publishing Association, 1911): pp. 3-11, at p.8.

precisely, as John Gardner once suggested to me, the sort of task that serious theorists should be willing to consider undertaking?

Ironically, a more significant objection to recognizing state crimes arises from the writings of those very theorists whose work otherwise shows openness towards the category. Such theorists often seem to think that state crimes double up as violations of other more familiar norms, whose applicability to states is already commonly accepted. For example, Nagel understands state crimes as state violations of duties of justice, while Pasternak and Gilbert often seem to associate them with violations of human rights.²¹ If, indeed, these norms are equivalent, isn't a category of state crimes at best redundant?

State Crimes as Injustices?

Let us first turn to Nagel's suggestion. Are all crimes, and especially all conceivable state crimes, best understood as injustices? This question must be answered in the negative, at least if one adheres to John Gardner's understanding of the domain of justice—in my view, the most perspicuous—as concerned with allocative moral questions, such as who is to get what and how much of it.²² Many international crimes such as those that Nagel understands as paradigmatic state crimes are cases in point. There are normally no questions, either of a comparative or non-comparative nature, to be asked about who should be enslaved, about the proper grounds of genocide, or about how much one should be tortured. There are normally no such allocative questions because these forms of conduct are, quite simply, inhumane. It is their inhumanity—i.e., their sheer disrespect for their objects' intrinsic value as autonomous beings—not their unjust character, that makes them wrongful. Except perhaps in some rare tragic scenarios where, for example, the only way to prevent some people from being enslaved would be to enslave others, or where the only means

²¹ Nagel, "The Problem of Global Justice", *supra* note 17, at p. 114, refers to state war crimes and crimes against humanity as an "aspect of global justice". Pasternak, "Limiting States' Corporate Responsibility", *supra* note 18, at p. 379, writes of "state crimes in regimes that violate their citizens' basic human rights", whereas Gilbert, *Terrorism, Security & Nationality*, *supra* note 19, at p. 133, speaks of the state crime of terrorism as "a grave infringement of human rights".

²² See John Gardner, "What is Tort Law For? Part 1. The Place of Corrective Justice" *Law and Philosophy* 30(3) (2011): pp. 1-50, at p. 6.

of saving some from being tortured a lot would be to torture others to a lesser extent, the mere asking of allocative questions about such actions reveals moral confusion or, worse, grave insensitivity. Thus, if wrongs that are most likely candidates for state crimes are not best understood as injustices, it seems unwise to seek to reduce the category to violations of duties of justice.

This is not to say that state injustices may not amount to wrongs that could be properly criminalized. Thus, the suggestion is sometimes encountered that a state that distributes wealth unjustly and, thus, generates criminogenic conditions amongst those it fails to support, may be complicit in the crimes they perpetrate as a result. In such a scenario, the claim often goes, the state really “ought to be a co-defendant”.²³ Surely, though, not all state injustices should be categorized as crimes. Otherwise, all imperfectly just states would be criminals. That is, all existing states would be guilty of crimes every time they cannot account for an injustice of theirs as justified—say, as necessary to avoid larger evils—or as excused—say, as grounded in reasonable epistemic mistakes. While such a radical suggestion would certainly please someone like Emma Goldman, who believes that all attempts by states to redistribute wealth are likely to wrongfully miss the mark, it would fly in the face of how most people—including all liberals—conceive of the normative position of the modern state. Other things being equal, states ought to strive for greater justice, and may be criticized for their failures, but below a certain threshold of injustice, the label of crime seems wholly inappropriate. Indeed, general popular discourse tends to echo this assessment, reserving this label for state actions that amount to gross injustices (when injustices are the wrongs at issue), such as widespread expropriations without compensation, endemic misappropriation of public funds, indiscriminate internment or killing of those belonging to a given racial group, or abject neglect of needy communities.

I would like to suggest that an important reason for this intuitively plausible popular demarcation is that characterizing some wrongdoing as a crime is commonly understood as calling for a distinctive set of harsh responses—namely, for the perpetrator’s condemnation and punishment. Thus, it is unsurprising that a political anarchist like Emma Goldman would choose to depict states as criminals, since she otherwise argues that their

²³ Victor Tadros, “Poverty and Criminal Responsibility”, *Journal of Value Inquiry* 43 (2009): pp. 391-413, at pp. 391, 410.

wrongdoings are so grave and pervasive as to warrant condemning them to death *qua* purportedly authoritative corporate organizations, through popular overthrow and dismantlement. Of course, if punishment is understood like John Gardner understands it, as the intentional infliction of an inconvenient or burdensome deprivation, or suffering, in response to wrongdoing (or claimed wrongdoing),²⁴ it need not be so drastic. Yet, by definition, the practice is deliberately disruptive, not to say intrusive, and, in many cases of state injustice (or wrongdoing more generally), we may well think that no such interference is called for.

State Crimes as Violations of Human Rights?

One may be tempted to argue that human rights already play the relevant demarcation role. Here, I am not referring to human rights generically understood as the rights that humans have in virtue of being human—the kind of broad moral understanding to which John Gardner seems most attracted.²⁵ While, all things considered, this conception may be most perspicuous, it is unlikely to be the one that those who analogize state crimes to violations of human rights have in mind. An analogy between violations of human rights so understood and state crimes in particular is not obvious and, insofar as it is, the demarcating potential of the former category is questionable. There exists an alternate conception, defended by many contemporary political philosophers, which presents a much more direct challenge to the need for a distinct category of state crimes. According to it, the practice of international human rights delineates norms, most often legal, whose violations are so wrongful that they require, or at least permit, external interference with state sovereignty.²⁶ I will assume its soundness, for the sake of discussion.

²⁴ See e.g., John Gardner, “Introduction” in HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed (Oxford: Oxford University Press, 2008), pp. xiii-liv, at pp. xiv, xvii-xviii, xxv, xxxi.

²⁵ See John Gardner, “‘Simply in Virtue of Being Human’: the Whos and the Whys of Human Rights”, *Journal of Ethics and Social Philosophy* 2(2) (2008): pp. 1-22.

²⁶ See especially Joseph Raz, “Human Rights without Foundations”, in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), pp. 321-337; Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), esp. at ch. 5-7; John Rawls, *The Law of People* (Cambridge, Ma: Harvard University Press, 1999), at pp. 78-81.

If, as is traditionally the case, state sovereignty is understood as the normative ability of states to block external actors from interfering with their internal affairs, even when what they are doing is wrong, and human rights define principled limits to this ability, then permissible responses to their violation might conceivably extend to condemnatory punitive interferences. This suggestion is all the more powerful insofar as human rights tend to be conceived as limits on state sovereignty because of their close connection with conditions necessary for decent human lives to be lived. Thus, some, like John Rawls, go so far as to affirm that state violations of human rights are “to be condemned and in grave cases may be subjected to forceful sanctions and even to intervention”.²⁷ Obviously, more needs to be said to vindicate the view that violations of human rights, so understood, are equivalent to crimes of states, but one can here begin to see why theorists like Pasternak and Gilbert might be tempted to go down this road.

For many years now, the ideas of individual sovereignty and principled limits to it have been closely associated with efforts to delineate the legitimate scope of state-defined crimes and state-imposed punishments of individuals. Consider Immanuel Kant’s understanding of individual domestic crimes as violations of others’ sovereignty (individual or collective) through which perpetrators forfeit their right to assert their own sovereignty against state punitive responses.²⁸ Or think of John Stuart Mill’s insistence that “[o]ver himself, over his own body and mind, the individual is sovereign”, such that the legitimate scope of “compulsion and control” that may be exercised over him—including through criminal law and punishment—is limited to behaviour that causes harm to others.²⁹ No doubt, the analogy between human rights and crimes, as norms the violation of which may legitimize condemnatory and punitive interferences with sovereignty—states’ and individuals’, respectively—is alluring. Still, one could interject that it is far from perfect.

For one thing, the value of state sovereignty is not the same as the value of individual sovereignty. Whereas the latter arises from the intrinsic

²⁷ Rawls, *ibid.*, at p. 81.

²⁸ Immanuel Kant, *The Metaphysics of Morals* (tr. Mary Gregor) (Cambridge: Cambridge University Press, 1996), at pp. 95-110.

²⁹ John Stuart Mill, *On Liberty and Other Writings* (ed. Stefan Collini) (Cambridge: Cambridge University Press, 1989), at p. 13.

importance of respecting individuals' autonomy-related interests and independent status as beings capable of choosing their own ends,³⁰ such considerations do not apply, or do not apply in the same irreducible way, to institutional organizations like states. That is, even if, as some argue, states can be persons, in the sense that they can, *qua* organizations, appropriately respond to reason and perform in the space of obligations, they are not persons whose status and interests are irreducibly valuable. States are first and foremost instrumental creations and, in accordance with the commonly-accepted principle of value individualism, their worth ought to be assessed “wholly” based “on the returns promised for individuals”.³¹ Now, endorsement of such value individualism does not entail that state sovereignty is worthless. On the contrary, it is often of tremendous value for individuals. It is valuable given the plurality of values in our world, which may legitimately be instantiated in principles and social forms and structures that vary, contingently, from one society or culture to another. Insofar as respect for autonomous and independent state governance facilitates recognition of such diversity, and allows for meaningful responsiveness to local traditions, understandings, and practices, it may then be worthy of great protection against external interferences.³² So although the analogy between state and individual sovereignty, and permissible grounds of interference with them, must be handled with care due to their different relations to the realm of value, it may still provide a useful point of departure for thinking about the possibility of state crimes.

To be sure, should we really think of violations of human rights as the be-all and end-all of what might otherwise be conceived as ‘criminal’ grounds for limiting state sovereignty? I have several reasons for doubting it. First, if, as is sometimes the case, human rights are defined as a “subset of justice”³³—say, as injustices of a certain degree or kind—then we run

³⁰ John Gardner explores and defends important aspects of this idea in the context of his discussion of rape in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007), at pp. 1-32.

³¹ Philip Pettit and Christian List, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford: Oxford University Press, 2011), at pp. 180-183.

³² John Rawls first appreciated the importance of this point. See further Samuel Freeman, “Distributive Justice and the Law of Peoples”, in *Justice and the Social Contract: Essays on Rawlsian Political Philosophy* (Oxford: Oxford University Press, 2007), pp. 297-321.

³³ See e.g., Christopher Heath Wellman, “Taking Human Rights Seriously”, *Journal of Political Philosophy* 20(1) (2012): pp. 119-130, at p. 120, fn 3.

into a problem similar to the one I identified above when discussing wrongs like torture and slavery. That is, insistence that all violations of human rights are injustices—including, for example, violations of the rights not to be tortured or enslaved—mischaracterizes what makes many such violations morally problematic. Accordingly, it runs the risk of blurring the parameters of the debate about what kinds of state behaviour properly call for external interference.

Notice, though, that even if the category of human rights is understood more broadly, as including rights grounded in a variety of values, it may still not do an adequate job at delimiting the scope of justified interferences. Indeed, assuming that a state's sufficiently significant wrongdoing is required to justify external interference in its internal affairs, are there not wrongs that meet this threshold, yet cannot be equated with violations of human rights? Genocide, often recognized as a paradigmatic interference-justifying wrong, provides a useful counterpoint. While genocide typically involves multiple violations of individual rights, such as violations of the rights to life and bodily integrity of a group's members, it is unclear that there is any distinctive right against genocide over and beyond these subsidiary rights. Rather, some argue, genocide seems to garner its distinguishing wrongness from the intention with which violations of such other basic rights are perpetrated—namely, the intention to destroy, in whole or in part, a national, ethnical, racial or religious group, as such—as well as their scale.³⁴ Joseph Raz expresses such skepticism even more trenchantly. “To be sure,” he writes, “committing genocide is wrong, but is it the case that I have a right against the genocide of any people” over and above other rights that I have? Indeed, “[d]o I have a right against the annihilation of other groups, for example, of university professors?”³⁵ Were I to have such rights, one may think, I would be permitted to take steps to prevent members of these groups from voluntarily assimilating into other ones. And surely, that cannot be the case. Insofar as this reasoning is sound, then, not all wrongs, even very significant wrongs, may be equated with, or best understood as, violations of rights. Another good example may be that of state terrorism, against which we do not tend to think that there is any

³⁴ See *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1948, Art. 2, 78 UNTS 277.

³⁵ Joseph Raz, “Human Rights without Foundations”, *supra* note 26, at p. 332.

distinctive human right. Still, if any forms of state behaviour warrant condemnatory and punitive interferences, we generally think of genocide and terrorism as two exemplars.

Admittedly, for some who conceive of given communities, perhaps especially political ones, as more fundamental to individuals' meaningful and dignified survival, the genocide example may be less persuasive than the example of state terrorism.³⁶ In turn, the case of state terrorism may itself be less stark than instances of grave state wrongdoing involving no human victim—think of a state engaging in, or sanctioning, sustained campaigns of mass cruelty against animals. My point is that whatever example one prefers, it seems quite uncontroversial that at least some condemnable and, arguably, punishable state wrongs are not best understood as violations of human rights.

Again, I insist on condemnatory and punitive interferences, since condemnation and punishment are hallmarks of a criminal response—following what is characteristically a process through which alleged wrongdoers are publicly called to account for their legally individuated wrongs and found guilty.³⁷ This narrow focus is required since, at this stage of the argument, my question remains whether the normative practice of human rights could simply be said to stand in for state crimes. An additional objection could be that while violations of human rights may justify interferences with state sovereignty, there is nothing in the idea of human rights that specifically calls for, or is intrinsically connected to, a punitive response. If sound, as I think it is, this further objection entails that the category of human rights is not only under-inclusive, but also over-inclusive, in terms of the wrongs it singles out.

To be sure, theorists who think of human rights as grounds of interference with state sovereignty tend to understand them as exceptionally important and universal rights, whose violations are morally and legally

³⁶ Cf. Claudia Card, “Genocide and Social Death”, *Hypatia* 18(1) (1993): pp. 63-79.

³⁷ In *Offences and Defences*, *supra* note 30, at p. 80, John Gardner echoes this characterization of criminal law. While he insists that this legal field is “primarily a vehicle for the public identification of wrongdoing [...] and for responsible agents, whose wrongs have been thus identified, to *answer for* their wrongs by offering justifications and excuses for having committed them”, he recognizes that it is also important as “a vehicle for condemnation, deterrence, and punishment.”

condemnable. In fact, human rights are often explicitly defended as rights for whose violations states must “account” to, and can be “blamed” (condemned, censured) by, “international tribunals, where jurisdictional conditions are in place”, as well as “responsibly acting people and organisations outside the state”.³⁸ No doubt, such features of the practice of human rights provide striking parallels with what we otherwise conceive of as the province of criminalization. Since, by and large, violations of human rights are also prohibited legally—think of the plethora of international conventions prohibiting them—the main missing variable to be able to equate them with crimes seems to be punishment.

The kinds of interferences with state sovereignty that violations of human rights may warrant are generally not confined to punitive ones. On the contrary, one may easily conceive of suitable responses that are not intended in any way to set back violator states, but simply seek to prevent the continuation of their wrongful designs, or to alleviate their harmful effects through the provision of benefits or demands for reparations. Rawls foreshadowed this point when, recall, he suggested that while violations of human rights are generally to be condemned, violator states may only permissibly be subjected to forceful sanctions in some grave cases. Here, I take it, the point is not that in less serious cases, only non-forceful sanctions are warranted, but that sanctions may sometimes altogether be out of place as a form of responsive interference. Thus, what really seems to be needed here is an account of when state punishment is called for, in contrast to other possible interfering responses which, in domestic parlance, could be better described as ‘civil’ (e.g. compensatory, restitutive, etc.) or ‘preventive’ in character. That is, we need an account of what differentiates violations of human rights for which a full-blown *criminal* response may be required, or at least permitted, from those for which it is not.

The key issue here is that the normative function of the practice of human rights—as many political theorists understand it in our current (emerging) world order—is generic. It is to disable, in cases of violations, the ‘this is none of your business’ response that states could otherwise make to block interferences in their internal affairs. Once this response is disabled, further argument is needed to determine what specific kinds of interferences are either required or permitted, as well as who may interfere. What is

³⁸ Joseph Raz, “Human Rights in the Emerging World Order”, *Transnational Legal Theory* 1 (2010): pp. 31-47, at p. 42.

missing from the discussion, I suggest, is a core focus on punishment, as the key response that, at least in principle, all criminal wrongs warrant.³⁹ It is this dimension which, I think, makes the category of state crimes a meaningfully distinct sub-category of state violations of human rights—or, if one accepts my earlier point about the under-inclusiveness of the category of human rights, a meaningfully distinct normative category in its own right. Thus, state crimes do not constitute a redundant idea.

STATE CRIMES AS INTERNATIONALLY PUNISHABLE WRONGS OF STATES

So far, my suggestion has been that a distinct category of state crimes would be useful as a means of singling out those condemnable state wrongdoings that warrant punishment, as well as focusing debate about their proper normative contours. Still, one may question whether there really are any instances of state wrongdoing that warrant a punitive response. Let me focus here on harmful state wrongdoing, which tends to be the kind of state wrongdoing that is deemed most morally urgent. In cases in which such wrongdoing can be adequately compensated *ex post*, one may think that insisting on punishing it would be unjustifiably callous. The argument may go as follows: Even well-tailored punishments of large organizations like states risk saddling at least some of their individual members with unjustified burdens, losses, or other significant setbacks. Why take this risk? That is, why risk bringing additional unjustified harm into the world when adequate compensation is indeed possible?

One common retort is that punishment may be a deserved response to culpably-imposed wrongful harm and, as such, be justified along with its attendant risks as intrinsically good or right. This kind of retributive response has recently been under heavy fire from some theorists of individual wrongdoing, who argue that desert of punishment is either an irremediably obscure idea or insufficiently valuable to justify the ills of the practice.⁴⁰ Insofar as this objection is sound in respect of individual desert

³⁹ John Gardner insists that not every argument for criminal law amounts to an argument for punishment (see e.g., *Offences and Defences*, *supra* note 30, at p. 282). While I regard punishment, *qua* response to criminal wrongdoing, as more central to this legal field than Gardner allows, the ‘at least in principle’ proviso in the text concedes that, in practice, punishment may not always be a justified response.

⁴⁰ See especially Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), at p. 321.

of punishment, it is a fair question why it should not also be with respect to state desert. To be sure, some may further query whether corporate organizations like states can, *qua* organizations meaningfully distinct from their individual members, ever intelligibly be said to deserve punishment for wrongdoing. That is, insofar as states are instrumentally valuable entities, why should we think that giving *them* anything that *they* allegedly ‘deserve’ has any intrinsic value, beyond its consequential value for individuals? Seeking to ascertain the accuracy of either of these provocative suggestions would here be unduly distracting. Thus, I must restrict myself to confessing my inclination to endorse at least the second one of them.⁴¹

Even if we assume that punishing a state in proportion to some measure of desert can have some marginal intrinsic value, I doubt that it, alone, could justify most instances of state punishment. Rather, if the practice is to be justified, in light of the important resources likely needed to punish states, as well as the constant possibility of significant detrimental side-effects on individuals, a wider assessment of its valuable consequences seems called for.⁴²

What may other valuable consequences of punishing states be? For one thing, harm occasioned through state wrongdoing may well not be compensable, or only be very partially compensable. In other words, it may not be possible to ‘make it up’ *ex post facto* with something as good, or nearly as good. In some cases, even mere attempts to do so only add insult to injury. Consider all the lost lives, or psychological trauma and sense of dehumanization and exploitation, that usually arise from state-led genocides, aggressions, enslavements, or establishment and maintenance by force of colonial dominations. No doubt, such wrongfully-imposed harms should ideally be prevented before they arise, or thwarted as they unfold,

⁴¹ I do suggest some marginal ways in which one may be able to make sense of a rather shallow idea of state desert of punishment, in Tanguay-Renaud, “Criminalizing the State”, *supra* note 3, at p. 274. Cf. David Luban, “War as Punishment”, *Philosophy and Public Affairs* 39(4) (2012): pp. 299-330, who simply assumes that states can deserve punishment, and that retributive punishment proportionate to such desert can be intrinsically valuable.

⁴² As John Gardner reminds us when laying out the foundations for his pluralistic theory of criminal punishment, even when it comes to punishing individuals, the practice tends to be so costly, both pecuniarily and morally, that it “patently needs all the justificatory help it can get” (in *Offences and Defences*, *supra* note 30, at p. 214). Cf. Scott Hershovitz’s contribution to this volume.

insofar as this can be done through permissible means, without occasioning even more significant harm. Yet, what if they are not—say, because it was not realistically possible in the circumstances. And what if the most effective way of preventing the recurrence of such abominable wrongs is now to deter the wrongdoing state specifically, as well as other states more generally, by punishing it—say, by expelling it from relevant international organizations, imposing arms embargoes on it or, more drastically, occupying it, dismantling it, or reconstituting it? In a sense, punishment of the state in question would then serve as a second-best form of remediation for its harmful wrongdoing. It would provide victims (and those related to them by relevant attachments, or perhaps simply by shared humanity) not so much with compensation for the wrongful harm—since, *ex hypothesi*, it is not available—but with very valuable protection against its recurrence. Indeed, one might well think that such protection is so valuable that there is a duty for those relevantly situated to exact it.

Victor Tadros has defended an account of individual crimes along similar lines, which helps give further substance to this proposal in respect of state crimes. Core crimes, Tadros argues, are wrongs whose deleterious consequences are not compensable *ex post*, yet whose perpetrators can permissibly be used, by means of punishment, to deter further similar wrongs.⁴³ They can be so used, because they owe it to their victims (and those relevantly related to them) to do the next best thing to not having wrongfully harmed them in the first place. That is, when adequate compensation is unavailable, they at least owe it to them to rescue them from further such wrongs. Such secondary duties, Tadros contends, are enforceable, in the sense that wrongdoers may be used as means to ensure the realization of their content. In the cases that concern us, they may be punished as a means of deterring further wrongs.⁴⁴

⁴³ See Tadros, *The Ends of Harm*, *supra* note 40, chs. 12-14 (especially pp. 278-279).

⁴⁴ John Gardner disagrees with how Tadros frames his account. In “Punishment and Compensation: A Comment,” in R. Christopher (ed.), *George Fletcher's Essays on Criminal Law* (Oxford: Oxford University Press, 2012), pp. 70-75, at p. 74, Gardner insists that:

[T]here is no way to represent punishment as the fallback performance by the wrongdoer of the duty that he originally failed to perform. Unlike reparation, punishment is not something that the wrongdoer owes. For it is not something that he can give. It is something that is inflicted upon him by others, and the norms regulating it belong, in the final analysis, to their normative position and not to his.

Now, the objection against intentionally using (and harming) individuals as means to ends which are not their own, to which Tadros seeks to carve an exception for the punishment of wrongdoers, does not apply in the same way to states. One does not need to look for permissible exceptions to treat states as means to further ends, since states' primary value is their very instrumentality to the furtherance of individuals' interests. Still, all states are constituted by individuals, and derive all their matter and energy from them. So one still ought to be careful before vouching for the permissibility of any state punishment that may affect individuals detrimentally, even if it does only as side-effect (say, of sanctions targeted at a state's organizational structure or irreducible corporate decisions and plans).

Such care is perhaps especially called for in cases where suitably deterrent state punishments would risk imposing harms of a considerable magnitude on individuals. Still, the level of required care likely varies along with the kind of state wrongdoing and wrongdoer at issue. For example, in the face of wide-scale non-compensable genocides or mass killings, such as those orchestrated by the Nazi state, the Soviet Union in Stalin's time, or Mao's China, one may reasonably think that permissible punitive responses can be significantly less discriminate, as well as much more harmful and intrusive, than for lesser wrongs. In other words, deterring the recurrence of such wrongs may be so valuable, indeed so imperative, as to make it permissible to impose considerable burdens and harms, perhaps including death, on individuals—including individuals who are in no way liable to such treatment. To be sure, individuals' participation in, causal contribution to, or failure to oppose state wrongdoing, individuals' acts of identification or association with a wrongdoing state, or their general benefit from its deeds might make them liable to such ills. Yet, some extreme state wrongs may be such that even deontological constraints such as individual liability are, within reason, overridden by what is at stake.⁴⁵ I say 'within reason', to

I respond to Gardner on this point, in defense of Tadros, in François Tanguay-Renaud, "Victor's Justice: The Next Best Moral Theory of Criminal Punishment?", *Law and Philosophy* 32 (2013): pp. 129-157, at pp. 144-145.

⁴⁵ This is one of the lessons of Michael Walzer's discussion of "supreme emergencies" in, for example, his "Emergency Ethics", in *Arguing about War* (New Haven: Yale University Press, 2004) pp. 33-50. Cf. Victor Tadros, "Duty and Liability" *Utilitas* 24(2) (2012): pp. 259-277, at p. 268, who insists on framing some such *in extremis* scenarios in deontological terms.

emphasize that, of course, to be permissible, state punishment should not occasion bigger problems than it is intended to solve, and must have a reasonable chance of success.

Of course, most state wrongs will not be so extreme as to warrant the abandonment of all deontological constraints, or otherwise make it permissible to harm seriously or kill individual state members. Just war theorists of most stripes go to great lengths to emphasize this point.⁴⁶ Even when war is justified in response to wrongdoing, they recognize, it is often the case that not all means of carrying it out will be, due to applicable deontological considerations. Insofar as state wrongs are not significant enough to make it deontologically permissible to kill or harm seriously individuals, state punishments that have few, if any, detrimental effects on individuals are preferable. Yet, given the structure of states as large organized groups of individuals, most conceivable means of punishing them will risk having at least some such significant effects. It will then fall on the punisher to ensure that the individuals impacted are specifically liable to it, or that deviations are kept to a minimum and are offset by the overall value of the punishment. Insofar as this level of precision cannot be ensured, punishers should then strive to make it so that only states in which *all* individuals can permissibly be detrimentally impacted to some relevant extent are punished. Powerful arguments exist about when detrimental effects of state punishment may permissibly be dispersed amongst all their individual members (including victims), though their reach is typically limited to states that generally respect their citizens' core human rights, and whose authority is otherwise generally legitimate or not widely rejected.⁴⁷

My aim here is not to engage in a detailed exploration of these arguments. Rather, it is to highlight that there may well be instances of state wrongdoing whose punishment would, at least in principle, have great deterrence value, yet for which, all things considered, the perpetrator state cannot permissibly be punished, due to morally unacceptable effects that

⁴⁶ Compare and contrast Michael Walzer, *Just And Unjust Wars: A Moral Argument With Historical Illustrations* (New York: Basic Books, 1977) and Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009).

⁴⁷ Here, I conflate different arguments developed in Avia Pasternak, *Responsible Citizens, Irresponsible States* (Oxford: Oxford University Press, 2021); Anna Stilz, "Collective Responsibility and the State", *Journal of Political Philosophy* 19(2) (2011): pp. 190-208; Tanguay-Renaud, "Criminalizing the State", *supra* note 3.

this would have on individuals. Punishment of such wrongdoing states might then be said to be “called for,” in the subsidiary sense that, were they individual human persons, they could permissibly be (punitively) used as means to deter further wrongdoing. However, given the further problem of dispersion of burdens associated with punishments of wrongdoing states, it may not be possible to punish *them* permissibly.

To clarify, my suggestion here is that states’ wrongdoings might still be said, in a derivative sense, to be crimes, insofar as the impermissibility of their punishment is simply due to pragmatic deficiencies on the part of punishers—most notably, unavailable means of enforcing sufficiently discriminate punishments. In such cases, even if the only permissible response to wrongdoing is a “pure declaration of criminality”, it might still properly be designated as such.⁴⁸ Indeed, as most theorists of individual criminalization now accept, such a declaration may itself have significant symbolic value, even if its symbolism is ultimately derived from a sense that the wrongdoing in question is one whose punishment, although impermissible, would be of great value. Although secondary, this sense of state crime fits quite seamlessly with the overall account proposed here.

Some theorists, though, may be tempted to make more of the kinds of practical limitations I just mentioned and of my proposal. We simply do not have, the claim may be, the kinds of suitably-resourced, impartial, reliable, and effective institutions required to adjudicate state wrongdoing justly on a reasonably systematic basis and, when warranted, to impose sufficiently discerning punishment on state wrongdoers. The United Nations Security Council, controlled by its five permanent member states, which tend to be guided primarily by their self-interest, is no such institution. Nor is the International Court of Justice (ICJ), whose jurisdiction is merely optional. Indeed, like the United Nations’ Human Rights Committee, the ICJ has always steered clear of even considering the possibility of punitive state sanctions and, in any case, would have no

⁴⁸ This insight might partly explain David Luban’s emphasis on the importance that declarations of state criminality could have in the international context. See David Luban, “State Criminality and the Ambitions of International Criminal Law”, in Tracy Isaacs and Richard Vernon (eds.), *Accountability for Collective Wrongdoing* (Oxford: Oxford University Press, 2011): pp. 61-91, at p. 90.

dedicated resources to enforce them discerningly.⁴⁹ Of course, one could envisage the possibility of independently-structured international institutions with appropriate jurisdiction, procedures, and enforcement mechanisms and resources. However, is it not the case that until such institutions exist, the value of labelling *any* legally-recognized state wrongs as crimes is bound to remain symbolic? As I suggested earlier, symbolism matters and, for victims of grave state wrongdoing, symbolic criminal censure may mean a lot. Still, is it really the case that, since we do not have (now or in a foreseeable future) the kinds of international institutions that could ensure, to a reasonable extent, permissible punishment of wrongdoing states, the category of state crimes must be a symbolic one? Or, perhaps at most, an aspirational category inviting the establishment of relevant institutions?

Raz offers an appropriate rejoinder. “[U]ntil such institutions exists”, he argues, “normally one should refrain from attempts to use any coercive measures”.⁵⁰ The “normally” is crucial since, recall, a state’s wrongdoing may be so clear and so harmful that its punishment at the hands of other states, groups of individuals, or international organizations can be justified, or perhaps even required, for the sake of deterring its recurrence. That is, a state’s wrongdoing may be so clear and so harmful that its punishment may be justified, even required, *despite* its significant and indiscriminate detrimental effects on individuals (and other relevant moral costs). Thus, even in our contemporary world, the possibility of permissible international punishments of states for some of their wrongdoings is very real, although, as Rawls suggests, likely confined to the gravest wrongs. Since prohibitions of such wrongs are generally well entrenched in international legal documents, a category of state crimes reflecting the general permissibility of their punishment is then more than symbolically and aspirationally useful.

STATE CRIMES AS DOMESTICALLY PUNISHABLE WRONGS OF STATES

⁴⁹ The ICJ came close to considering the issue in the *Bosnia v. Serbia* case, in which Bosnia accused Serbia of violating its obligations under the Convention against genocide, but stopped short of doing it. *Case Concerning the Application of the Convention for the Prevention and Punishment of Genocide (Bosnia & Herzegovina v. Serbia and Montenegro)*, 2007 I.C.J. General List No. 91 (Judgment of February 26).

⁵⁰ Raz, “Human Rights in the Emerging World Order”, *supra* note 38, at p. 43.

What Raz's rejoinder critically omits to consider, though, is the possibility of permissible state punishment at the domestic level. For one thing, states' wrongdoings which are of such magnitude as to warrant, at the international level, relatively unfettered punitive interferences with their sovereignty likely often also undermine the legitimacy of their domestic authority over their individual subjects. Some such individuals may then also be in a position to interfere permissibly with the operation of their state, and to do so punitively. Indeed, since the grave wrongs in question are typically conceived as wrongs that humanity as a whole, as opposed to a distinct polity,⁵¹ has the standing to condemn and, within reason, may seek to punish, why should a wrongdoing state's population, often itself victimized by such wrongs, be treated any differently?

Here, the way in which we tend to conceive of tyrannical states' ultimate accountability to their populations is instructive. Such states, which rule through terror, by engaging in unpredictable violence against innocents, including widespread killings and torture, as well as sheer exploitation of certain classes, are commonly cited as examples of states against whose operation individual subjects can permissibly interfere forcefully, even to the point of overthrowing them.⁵² In its preamble, the *Universal Declaration of Human Rights* clearly sets out that "if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, [...] human rights should be protected by the rule of law".⁵³ Nowadays, this recourse is explicitly authorized by more than forty state constitutions and, tellingly, is often explicitly recognized as a "remedy" of last resort.⁵⁴ This remedy is clearly not a panacea. It is morally risky,

⁵¹ See e.g., *supra* note 39.

⁵² Even theorists who otherwise deny the permissibility of any forceful resistance against states tend to agree that tyrannies form a special case. See e.g., Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009), at pp. 339-343. While it is true that Ripstein also argues that tyrannical states are so far from the ideal of statehood that they should not be understood as states properly so called, his framing of the issue is misleading. No conceptual argument can show that what are commonly recognized as states cannot maintain themselves through terror.

⁵³ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <<http://www.unhcr.org/refworld/docid/3ae6b3712c.html>>.

⁵⁴ A list of relevant constitutional provisions can be found in an appendix to Tom Ginsburg, Daniel Lansberg-Rodriguez, and Mila Versteeg, "When to Overthrow Your Government:

perhaps especially insofar as it involves messy popular uses of force, which may be insufficiently measured and discriminating vis-à-vis valuable aspects of institutions and individuals themselves, as well as unlikely to succeed. Thus, as Tony Honoré insists, the remedy is likely only permissible as an “ultimate sanction” for state wrongdoing that is “weighty, crucial, and severe”, when other legal remedies are not available.⁵⁵ Still, it is unclear what exact types and scale of state wrongdoing may render this remedy of last resort permissible. For example, an argument may be made that since not every wrongdoing that exceeds a state’s legitimate domestic authority is a reason for international interference, the threshold of wrongdoing for permissible domestic popular interference, *including* punitive interference, could sometimes be lower.⁵⁶ What is more, although some, like John Locke, argue for the permissibility of forceful popular remediation only against state-led “unjust and *unlawful* force”,⁵⁷ and although constitutions typically only authorize it in response to state violations of *legally*-entrenched constitutional norms of a fundamental kind, it seems that the permission to resort to it is, at bottom, a moral one—as implied in the *Universal Declaration*. Yet, legal recognition of this remedy for condemnable state legal wrongdoing is significant for my argument. Given the conceivably punitive forms it may take, it conjures up the possibility that some legal wrongs of states may be properly singled out as domestically punishable wrongs—and, thus, in line with my earlier claims, as domestic crimes.

Of course, I am not claiming that all permissible popular acts of rebellion against states for their legal wrongdoing are punitive. Many such acts will be primarily incapacitative in aim, and simply seek to put an end to ongoing harmful wrongdoing. Still, one can imagine scenarios where stopping an instance of state wrongdoing would do little to prevent its recurrence, which might take even worse forms. In some such scenarios, it

The Right to Resist in the World’s Constitutions”, *UCLA Law Review* 60 (2013): pp. 1184-1260.

⁵⁵ Tony Honoré, “The Right to Rebel”, *Oxford Journal of Legal Studies* 8(1) (1988): pp. 34-54.

⁵⁶ This question is part of a larger debate about the precise relationship between international sovereignty and domestic legitimacy, which I cannot resolve here.

⁵⁷ John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988), at p. 402 [Emphasis added].

is at least conceivable that an oppressed population could permissibly seek to set back their wrongdoing state further than is necessary to stop its wrongdoing, so as to deter it, as well as any other organizations or individuals inclined to emulate it, from engaging in further misdeeds. Thus, justified domestic popular punishments of state wrongdoers are at least conceivable on grounds of deterrence—whose value may be bolstered by the symbolic and expressive value of explicitly treating the burdens and setbacks deliberately inflicted in response to such wrongdoing as punitive. As I suggested in previous work, in most societies, the description of such deliberately-inconveniencing responses as punishment has come to acquire valuable meaning, in that it symbolizes and expresses fitting attitudes towards culpable wrongdoers and their altered moral standing.⁵⁸ While, on its own, such symbolism may not be sufficiently valuable to justify detrimental repercussions of state punishment on individuals and other salient moral costs (e.g. the diversion of resources required for such punishment), it may certainly bolster deterrence-based arguments.

Still, remember that given the moral risks attendant to it, domestic popular remediation of state wrongdoing must remain a last resort. That is, insofar as they are available, better resourced as well as more discerning and measured institutional responses are morally preferable, even when state wrongdoing is of great magnitude. The interesting point to note here is that theorists, as well as constitutional documents, admitting of the possibility of forceful popular responses to state wrongdoing commonly assume that, unlike at the international level, appropriate institutional responses are often domestically available. Before forceful popular remediation can be permissibly carried out, we are reminded, all these other legal remedies must be deemed inadequate. What might these other remedies be? No doubt, those self-imposed by the wrongdoing state itself,⁵⁹ or established by those who initially constituted it.

⁵⁸ Tanguay-Renaud, “Criminalizing the State”, *supra* note 3, at pp. 279-280.

⁵⁹ The possibility of holding oneself to account and punishing oneself is often contemplated for individuals. Thus, in “Wrongs and Fault” in Andrew Simester (ed), *Appraising Strict Liability* (Oxford: Oxford University Press, 2005), pp. 51-80, at p. 76, John Gardner writes that “The remorseful give themselves a hard time for their wrongs, a hard time which they hold themselves to deserve on the model of punishment.” Similarly, I am contemplating here the prospect of states institutionally holding themselves to account, as well as condemning and punishing themselves, for the perpetration of legal wrongs.

Indeed, in many jurisdictions with which I am familiar, an extensive apparatus for the judicial review and remediation of state constitutional wrongdoing of various kinds and degrees is already operational. I speak of wrongdoing, since the constitutions of the states in question typically guarantee a plethora of individual rights and freedoms that bind the state, and whose violations are commonly held to be publicly and legally wrongful.

Let me focus on the Canadian example, with which I am most familiar. The *Canadian Charter of Rights and Freedoms* prohibits the state from subjecting individuals to cruel and unusual treatment and punishment (s. 12), unreasonable searches and seizures (s. 8), as well as arbitrary arrest and detention (s. 9). Even more broadly, it prohibits the state from depriving individuals from life, liberty, and security, save in accordance with so-called principles of fundamental justice (s. 7).⁶⁰ Should we not think of violations of such prohibitions, irrespective of their scale, as possible domestic crimes of the state, insofar as they can now be institutionally addressed with appropriate discernment and measure? After all, in salient ways, they all seem analogous to forms of individual behaviour otherwise domestically criminalized as *mala in se*.

First off, characterizing violations of such prohibitions as crimes may strike some as awkward because of the structure of the wrongs in question. For example, there is no explicit prohibition of state murder in the *Canadian Charter*, only of state deprivations of life which are not in accordance with principles of fundamental justice. There is no prohibition of state theft, but only of unreasonable searches and seizures. I do not think that the structure of these constitutional wrongs makes them any worse candidates for state crimes. They are what John Gardner calls “fault-anticipating wrongs”, in the sense that they can only be committed without justification.⁶¹ Yet, and this is part of Gardner’s point, many existing individual crimes share this structure. Consider the crime of extortion, which consists in threatening, accusing, menacing, or using violence against another person with the intent of obtaining anything from

⁶⁰ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁶¹ Gardner, *Offences and Defences*, *supra* note 30, at pp. 150-153; “Wrongs and Fault”, *supra* note 59, at pp. 67-70.

that person, “without reasonable justification or excuse”.⁶² Or consider property crimes such as mischief or arson that require that one not have a “legal justification or excuse or colour of right.”⁶³

Note, further, that the fact that the *Canadian Charter* allows the state, when judicially called to account for rights infringements, to raise additional defenses—most commonly, that infringements were “reasonable”, “prescribed by law”, and “demonstrably justified in a free and democratic society” (s. 1)—does not make the constitutional norms infringed any worse candidates for state crimes. Indeed, it is uncontroversial that individuals called to account for crimes of murders, assaults, thefts, and so forth, can themselves invoke justificatory defenses as means of exculpation. Admittedly, certain actions which, at the hands of ordinary individuals, would constitute unjustified criminal wrongs may be justified when perpetrated by the state. For example, the state may be able to justify forcefully coercing individuals on a broad scale for the sake of public goods that it is in a position to advance. Ordinary individuals, who are differently situated, may well not be so justified. That said, the converse is also true. That is, individuals may also be able to justify wrongdoing that the state could not justify—say, because the state’s wrongful behaviour was not “prescribed by law”, in dereliction of the prescriptions of the rule of law, which specifically apply to it *qua* organization claiming legitimate authority to govern. Thus, legal definitions of state and individual wrongs (and possible justifications for them) plausibly vary in ways that do not entail that their designation as crimes is unintelligible.

Instead, I would suggest that if constitutional wrongs of states are typically not recognized as crimes, it does not have so much to do with their structure as, once again, with the remedies held to be available for them. Indeed, although constitutional wrongs are routinely condemned, remedies tend to be conceived in primarily incapacitative terms—that is, as means to put an end to ongoing state wrongdoing. Thus, in Canada, state action that violates Charter rights may be “invalidated” (i.e., deprived of any legal effect), “nullified” or “quashed” as in cases wrongful convictions and sentences, “stayed” as in cases of wrongful judicial proceedings, or ordered to be reversed as cases of injunctions or prerogative writs like *habeas*

⁶² *Criminal Code of Canada*, *supra* note 15, s. 346.

⁶³ *Ibid.*, s. 429(2).

corpus, *mandamus*, prohibition, and *certiorari*. Admittedly, in cases of very serious and clear harmful constitutional wrongdoing, courts sometimes also award damages to victims, but, by and large, only of a compensatory kind.

Then again, one may think, with Canada's preeminent authority on constitutional remedies, Kent Roach, that there is a role to play for punitive remedies, such as punitive damages, in the context of *Charter* adjudication. That role may be "to respond to cases in which there was no reason why the Charter should not have been respected and to provide incentives to respect it in the future".⁶⁴ Once again, deterrence presents itself as a central reason for responding to state wrongdoing in a punitive way. This time, though, it is discussed in the context of a much more constrained institutional setting. First, the Supreme Court of Canada has made clear that its power to craft and impose "appropriate and just" remedies for violations of rights under s. 24(1) of the *Charter*, includes the power to monitor closely the implementation and effects of the remedies it imposes.⁶⁵ Thus, the prospect of being able to punish the state, through damages or otherwise, in ways that significantly control, if not eradicate, impermissible detrimental impacts on individual members becomes more plausible. This point must be added to the various theoretical arguments, referred to earlier, according to which in a state like Canada that is reasonably legitimate, rights-abiding, and popularly assented to, some detrimental costs and burdens of state punishment might permissibly impact the general population as whole, without the need for individual distinctions. This institutional point should also be added to the possibility that some forms of institutional domestic punitive responses may have no meaningful trickle-down effects on populations. Exclusion of evidence conceived as an inconvenient sanction for the state's constitutionally wrongful acquisition of it may be just such an example, although it is only rarely discussed in such terms in Canada.

If I am right here, a category of domestic state crimes may have a real *raison d'être* that extends much beyond the kinds of grave and wide-scale wrongdoings that warrant punitive popular rebellion or sub-optimally discriminate international punishments. That the category is even more rarely discussed in the context of domestic public law than in the

⁶⁴ Kent Roach, *Constitutional Remedies in Canada* (Aurora: Canada Law Book, 2008), at pp. 11.49-11.50.

⁶⁵ See especially *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62.

international law context might then have more to do—as John Gardner himself once suggested to me—with the lack of imagination of public judges and lawyers, resulting in the slow and patchy development of their field, than with its unintelligibility or unjustifiability.

OF STATES, CRIMES, AND THEIR DETERRENCE

I want to consider briefly one last objection to state crimes as I have defended them so far. Alice Ristroph, who has explored the question more carefully than any others in terms of the United States constitutional context, suggests that “[d]eterrence theories may simply reflect undue anthropomorphism. Perhaps the state is not much like a person after all, and it cannot be regulated according to the same legal models that we use for private individuals”.⁶⁶ I cannot do justice to this objection here, as doing so would require an overly lengthy and complex inquiry into the nature of the state. In this chapter, I have simply accepted John Gardner’s wisdom that states can themselves engage in wrongdoing, and may be the object of remediation of various kinds for it. However, let me conclude by sketching some possible avenues of response.

Elsewhere, I have argued, following Christian List and Philip Pettit,⁶⁷ that suitably-constituted states may be corporate moral agents in their own right, which can arrange for criminal wrongdoing in ways that are irreducible to the actions and intentions of their individual members.⁶⁸ Some existing crimes already seem sensitive to this possibility—such as the various forms of the international crime of apartheid that require “legislative measures” aimed at dominating and systematically oppressing a given racial group.⁶⁹ I have also argued that states may meaningfully be held responsible for their crimes *qua* wrongdoing agents (over and above any responsibility

⁶⁶ Alice Ristroph, “Covenants for the Sword”, *University of Toronto Law Journal* 61 (2011), pp. 657-690, at p. 686.

⁶⁷ List and Pettit, *Group Agency*, *supra* note 31.

⁶⁸ Tanguay-Renaud, “Criminalizing the State”, *supra* note 3.

⁶⁹ International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. res. 3068 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243, entered into force July 18, 1976, Art. III.

that could be ascribed to their individual members). However, as Gardner's work suggests, even when states do not meet the conditions of irreducible agency, there may still be good reasons to hold something we call 'the state'—say, a more loosely-defined territorially-bounded collectivity—criminally responsible for the wrongs of relevant individuals (perhaps officials), *as if* 'the state' had perpetrated them.⁷⁰ The important point here is that, according to both the first (real agency) and the second (fiction) paradigms of state responsibility, all the matter and energy of states is provided by individuals.

In the case of the real agency paradigm, individuals' participation in the state is modulated through a suitable constitutional framework that sets out aims, divides labour, and ascribes roles and responsibilities. As a result of individuals' adherence to this framework, judgments, attitudes, and plans that cannot be reduced to those of state members arise, and may lead to irreducible state wrongdoing properly so called. Still, it is individuals who provide the state with access to evidence and enable it to gain the understanding required for making evaluative judgments about how it should act. Insofar as these individuals can understand responses to state wrongdoing as punitive, it is then likely that the state will also understand them as such. And insofar as punishment creates disincentives for specific types of action that relevant individual members understand as such, it is also likely that the state will understand it. Of course, the kinds of punitive disincentives that may deter large organizations like states from engaging in wrongdoing may sometimes be different than those that would deter individuals acting alone. Still, should this realization not be considered more as an invitation to think creatively about ways of deterring state wrongdoing, which may otherwise be irremediable, than as a reason for abdication?

⁷⁰ In *Law as a Leap of Faith*, supra note 1, at p. 65, John Gardner argues that "there is nothing wrong with a legal fiction of concerted agency, if by that phrase we mean simply that the law attributes actions by one agent (an official) to another (an institution) under norms that make the former a representative of, and hence an agent who acts on behalf of, the latter." In "Hart and Feinberg on Responsibility", in Matthew H. Kramer, Claire Grant, Ben Colburn, and Antony Hatzistavrou (eds), *The legacy of H.L.A. Hart: Legal, political, and moral philosophy* (Oxford: Oxford University Press, 2008), pp. 121-140, at p. 138, he goes even further and suggests: "Aren't there cases in which a fiction of basic responsibility may, with moral propriety, be sustained in the law (or in other institutional settings), so that the advertised precondition of consequential responsibility may be treated as satisfied when it is really not?"

In the case of the fiction paradigm, the link is perhaps even simpler. Insofar as relevant individuals understand the disincentives created by punishment of ‘the state’, it may take no more for ‘the state’ to be deterred. So, for example, List and Pettit suggest that it may sometimes be permissible to punish all individual members of a state (to some degree) for the individual wrongdoing of only some, so as to make clear to all members that, unless they develop routines for keeping these individuals in check, they will incur costs.⁷¹ Of course, general punishment of individuals in ways that do not track their personal liability may be objectionable on a variety of grounds. As I suggested, though, this objection may not be valid in all such cases. There may also be cases of collective ‘state’ punishment where all individuals are indeed liable, if only vicariously and for reasons of fairness. No doubt, state punishments meant to act as deterrent may fail to do so at an empirical level in both the fictional and real cases, but this problem is not particular to state punishment, and may extend to the punishment of individuals and corporate bodies more generally. In this chapter, I have assumed that criminal punishment of individuals can have significant, if not infallible, deterrent effects, and that the same could be true for organizations like states.

Now, another reason for thinking that states may not be deterred through punishment is that they may simply legislate themselves out of jeopardy. This is one reason why I have insisted throughout on discussing the possibility of state crimes in terms of legally-entrenched norms that, generally, cannot easily be modified by states—namely, international legal norms, such as some key human rights norms, thought to have acquired the status of *jus cogens*, as well as domestic constitutional norms. Of course, in the domestic context, where courts may be suitably independent from the rest of the state to hold it account meaningfully for its constitutional wrongs and punish it as warranted, social and political pressures may still lead them to abdicate their institutional responsibilities. Ristroph harbours this worry to a particularly acute extent, and questions judiciaries’ general ability to hold states to account and to deter them through punishment, at least in respect of their deliberately harmful wrongdoing. I tend to be less pessimistic than her about the overall prospects of state accountability—even criminal accountability—through domestic judicial avenues. Given the wide variety of state wrongdoings that courts are called upon to review, both in terms of their seriousness and magnitude, I find it hard to see,

⁷¹ List and Pettit, *Group Agency*, *supra* note 31, at pp. 168-169.

considering the judicial history of states like Canada, Germany, or even India and South Africa, why one would think that they cannot perform their role adequately in relation to a good number of wrongs. Of course, insofar as Ristroph's remarks hold true with respect to the most abusive and violent forms of state legal wrongdoing, domestic judicial accountability may have to give way to popular or international accountability. Yet, as I have sought to argue in this paper, even at these levels, criminal accountability might have its place.

One last note. In this chapter, I have emphasized the possibility of permissibly deterring some state legal wrongdoings through punishment as the primary reason for remaining open to the category of international state crimes. At various points, though, I also suggested that whatever the symbolic value of treating such responses as crimes may be, it should also be factored in. No doubt, those who think that states' desert of punishment for their wrongdoing is an intelligible and at least minimally valuable notion will also argue that it should figure in all-things-considered assessments of state criminality. At the same time, I also suggested that, given the likely high moral costs of treating state wrongdoings as crimes and punishing them, these more marginal values can play no more than a subsidiary role, bolstering the value of deterrence. Now, at the domestic level, when institutions of state accountability are already well-established and may impose much more measured and discerning punishment on states, arguments may be made that symbolism (and desert?) ought to be given more play. The variety of state wrongs properly handled as crimes at that level might then turn out to be even broader than I otherwise allowed.

CONCLUSION

I said, initially, that I would investigate the propriety and usefulness of the category of state crimes based on John Gardner's theoretical commitments to the possibility of distinct state agency, the applicability to the state of the general principles of morality that bind us all, and about some version of legal moralism as the best way of understanding criminal wrongdoing. I proceeded to argue that, if one takes the way thus paved by Gardner, a good case may be made for upholding the category. Not everyone thinks like Gardner. Amongst those who do not are more 'politically-minded' criminal law theorists, who resist understanding criminal wrongdoing in terms of its relationship with ordinary moral wrongdoing, or understand the state as an entity so radically different, both conceptually and normatively, from

ordinary individual moral agents that it is nothing short of unintelligible to analogize it to individual criminals. While I cannot fully answer this more fundamental critique here, I hope to have shown that grounding the analysis in Gardner's key commitments leads to insightful lines of arguments and credible conclusions, with which these skeptics will now have to contend.