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Thomas Hobbes on Punishment

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Abstract

This dissertation constitutes a challenge to the orthodox interpretation of Thomas Hobbes's theory of punishment. The tradition understands Hobbes to reject the view that subjects authorize the sovereign to punish them for transgressing the law. Instead, the tradition understands Hobbes to identify the right to punish with the sovereign's right of war, a natural right that only the sovereign retains upon the institution of a Commonwealth. On the traditional account, the right to punish is not an essential attribute of sovereignty; rather, the right to inflict punishment belongs, not to the office of sovereignty, but to the natural person who holds the office.

This dissertation challenges the orthodox interpretation by arguing that the right to punish, for Hobbes, is not exceptional. The right to punish, like all rights of sovereignty, is artificial; it is a right that belongs to the office of the representative of the Commonwealth. The challenge to the tradition is posed through attending to three central issues that establish the rudiments of a *theory* of punishment: i) the foundation of the state's right to punish; ii) the rationale or justification of the practice of punishment; and iii) the principled constraint on the state's right to punish. Attention to the first issue reveals Hobbes to hold the view that no person possesses a pre-political right to punish. The right of nature serves as the *foundation* of the right to punish; however, the two rights are not identical. The right to punish is an artificial right exercised by an artificial person. Attention to the second issue reveals that the rationale of punishment, for Hobbes, is not to deter crime through coercive measures but, rather, is found in prospective subjects' covenanting to hold themselves accountable to law in order to establish the *in*

foro externo obligatory status of the law. Attention to the third issue reveals that Hobbes's appeal to the laws of nature prohibiting cruelty, ingratitude, and inequity as an argument against the punishment of the innocent is best understood as an appeal to maintain legitimacy in punishment, legitimacy grounded in the authorization of the sovereign to punish transgressors.

Keywords

Thomas Hobbes, Theory of Punishment, Authorization, Artificial Rights, the Right to Punish, the Right of War, Deterrence, Guilt and Innocence.

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Dedication

Dedicated to the memory of Ann Russe Prewitt.

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Introduction

Political authority, according to Thomas Hobbes, is best understood as the product of a social contract. Subjects authorize (or are understood to have authorized) the sovereign; as Hobbes claims, "[f]rom this institution of a commonwealth are derived all the *rights* and *faculties* of him, or them, on whom the sovereign power is conferred by the consent of the people assembled."[1] The right to make law, the right of judicature, the right to censor opinions, the right to levy taxes, etc., are all conferred upon the sovereign by the consent of the people assembled. The rights of sovereignty are all artificial rights; that is to say, the rights of sovereignty are the product of political *artifice*, crafted by those who are to be ruled. The right to punish is the exception, however; or is so according to the traditional view of the source of this particular right. The right to punish, according to the tradition, is not an artificial right but, rather, a natural right.

With a rare exception,[2] scholarship on his juridical and political theory attributes to Hobbes the view that the sovereign does not acquire the right to punish through the authorization by prospective subjects. Instead, the sovereign obtains the right to punish simply by not relinquishing any natural rights.[3] As one commentator puts it, "[t]he source

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[1] *Leviathan*, 18/2, 88. References to *Leviathan* are by chapter and paragraph(s) in the G.C.A. Gaskin (1996) edition, followed by page number(s) in the original (1651) edition. References to *De Cive* are by chapter and paragraph(s) followed by the page number(s) of the Howard Warrender English edition. All emphases are in the original works unless otherwise noted.

[2] As far as I am aware, only Clifford Orwin, "On the Sovereign Authorization," 31, attributes to Hobbes the view that the right to punish is a right by the authority of him who is punished.

[3] See, e.g., Deborah Baumgold, *Hobbes's Political Theory*, 38 & 150; Norberto Bobbio, *Thomas Hobbes and the Natural Law Tradition*, 141; Glenn Burgess, "On Hobbesian Resistance Theory," 75; Mario A. Cattaneo, "Hobbes's Theory of Punishment," 280 & 288; Claire Finkelstein, "A

of the sovereign's right to punish is in the *vacuum* created by the abandonment of the personal right to inflict pain on aggressors, a vacuum which is filled by the sovereign's exercise of his power."[4] The orthodox interpretation of Hobbes's view of punishment is that he identifies the sovereign's right to punish with the unsurrendered right of nature of the natural person who occupies the office of the sovereign: as another commentator puts it "[Hobbes] thus made the right of domestic punishment the same kind of thing as the right to wage foreign war."[5]

I argue that the orthodox interpretation of what Hobbes takes to be the basis of the right to punish misrepresents Hobbes's theory. The principal aim of this dissertation is, in essence, to lay the groundwork for a revisionist project of Hobbes's theory of punishment. I aim to provide an account of the proper basis by which we can understand his theory. I argue that Hobbes's conception of authorization—a process by which a representative is commissioned to act on the behalf of another person—plays a fundamental role in his theory of punishment. The importance of the role authorization plays in his theory, I argue, bears out in three central issues of punishment that Hobbes

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Puzzle About Hobbes on Self-Defense," 356; David Gauthier, *The Logic of Leviathan: The Moral and Political Philosophy of Thomas Hobbes,*146-149; Jean Hampton, *Hobbes and the Social Contract Tradition*, 117-22 & 190-191; David Heyd, "Hobbes on Capital Punishment," 123-124; Dieter Hüning, "Hobbes on the Right to Punish," 229-232; Alan Norrie, "Thomas Hobbes and the Philosophy of Punishment," 302-308; Alice Ristroph, "Respect and Resistance in Punishment Theory," 613-617; Alan Ryan, "Hobbes's Political Philosophy," 238-239; Thomas S. Schrock, "The Right to Punish and the Right to Resist Punishment in Hobbes's Leviathan," 868-873; Susanne Sreedhar, *Hobbes on Resistance: Defying the Leviathan*, 98; Johann P. Sommerville, *Thomas Hobbes: Political Ideas in Historical Context*, 58; Richard Tuck, *Natural Rights Theories: Their Origin and Development*, 125; Howard Warrender, *The Political FPhilosophy of Hobbes: His Theory of Obligation*, 197; J.W.N. Watkins, *Hobbes's System of Ideas s: A Study in the Political Significance of Philosophical Theories*, 97; Yves Charles Zarka, "Hobbes and the Right to Punish," 81-83.

[4] Heyd, "Hobbes on Capital Punishment," 123-124.

[5] Tuck, *Natural Rights Theories*, 125.

addresses: i) the foundation of the right to punish, ii) the rationale of the practice of inflicting and threatening to inflict punishment, and iii) a principled constraint on the exercise of the right to punish. There are, obviously, many more issues to which one must attend in order to convey a particular thinker's "theory" of punishment.[6] Nevertheless, a proper understanding of these three issues, it seems to me, is (indirectly, if not directly) necessary before addressing other issues related to a particular thinker's theoretical approach to the problems of punishment. Attending to Hobbes's thinking on the legitimacy of the death penalty, for example, would be fruitless without a proper understanding of the foundation of the right to punish, the rationale of the institution of punishment, and the principled constraint on the exercise of the right to punish; in other words, if the right to punish is simply the right of war, the rationale of punishment is simply to coerce, through terror, conformity to the sovereign's will, and the only principled constraint on the legitimation of punishment follows from the sovereign's obligation to the laws of nature, then it seems that there is a theoretical grounding for the legitimacy of the state deliberately taking the life of a subject.

But there is, I think, a more pressing reason to attend to these three particular issues that Hobbes addresses. Due to their centrality to a theory of punishment, scholarly attention to these three issues have, more than any others, played a role in perpetuating the misunderstanding of Hobbes's theory of punishment. We can trace the orthodox interpretation of Hobbes's rejection of authorization as the basis for the sovereign's

[6] Thus, we would, eventually, want to answer such questions as i) does punishment require proportionality, and if so, how is proportionality of punishment to crime determined? ii) does mercy have a role to play, and if so, in what way, if any, is it limited by justice or equity? iii) does capital punishment have a special character of its own and, if so, is it a legitimate penalty? iv) does restitution have a role to play and, if so, how is it related to punishment? These are only a few questions that one must answer to capture a theory of punishment. Hobbes, not surprisingly, has very interesting things to say with regard to these questions.

acquisition of the right to punish back to a common reading of the lengthy second paragraph of Chapter 28 of *Leviathan*, "Of Punishments and Rewards." Here Hobbes asks the important question: "by what door the right or authority of punishing, in any case, came in[?]"[7] Hobbes argues that subjects cannot "gift" the sovereign the right to punish. The reason most commonly offered in the literature why subjects cannot gift the sovereign the right to punish is that an antinomy arises in the social covenant between prospective subjects granting the sovereign the right to punish and prospective subjects retaining the right to resist punishment; as one commentator claims, "[*b*]*ecause* a person cannot alienate his right to self-defense when he authorizes the sovereign, Hobbes concludes that the right of the sovereign to punish 'is not grounded on any concession, or gifts of the Subjects.'"[8] It is in response to the purported antinomy that Hobbes is taken to reject subjects' authorization of the sovereign to punish them as the source of the sovereign representative's right to punish: as another commentator puts it, "[f]orced to grope for a novel account of the right to punish by his own novel declaration of the right to resist, Hobbes conceives of the right to punish as the right of war."[9]

In the first article of my dissertation, "The Right to Punish in Thomas Hobbes's *Leviathan*," I address the common interpretation of the source of the sovereign's right to punish that is central to Hobbes's theory of punishment. For Hobbes, the principal idea of authorization is representation. Representation entails that those who authorize a person—understood as an artificial person—to act on their behalf take upon themselves

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[7] *Leviathan*, 28/2, 161.

[8] Hampton, *Hobbes and the Social Contract Tradition*, 191; emphasis added. Hampton is here quoting, in part, *Leviathan*, 28/2, 161.

[9] Schrock, "The Right to Punish and the Right to Resist Punishment in Hobbes's Leviathan," 873.

responsibility for the representative's acts. Hobbes's definition of punishment, provided in the first paragraph of Chapter 28, explicitly holds authorization to be key: "A PUNISHMENT, *is an evil inflicted by public authority* [...]."[10] An act done by public authority, for Hobbes, is done by a representative of the people. Of the eleven inferences that Hobbes draws from his definition of punishment as an "evil inflicted by public authority," seven explicitly mark a distinction between punishment and hostility.[11] Hobbes, in the paragraphs adjacent to the second, distinguishes punishment (as an act of authority) from hostility (as an act of war). The traditional interpretation of the second paragraph attributes to Hobbes first the claim, then the denial, and then the claim again that the authority to punishment follows from subjects' authorization of the sovereign to punish them for transgressing the law. I argue that no such denial occurs in the second paragraph; Hobbes does not hold such blatantly inconsistent views.

Hobbes claims that prospective subjects cannot "gift" the sovereign the right to punish; but the reason is not that an antinomy arises in the social covenant between prospective subjects granting the sovereign the right to punish and prospective subjects retaining the right to resist punishment. Rather, prospective subjects cannot "gift" the sovereign the right to punish because no person possesses a pre-political right to punish; no infliction of violence in the state of nature can be understood as reinforcing a moral order among persons. That persons do not possess a pre-political right to punish, however, does not preclude the possibility of subjects granting the sovereign the right to punish. I argue that the authorization of the sovereign to punish transgressors of the law does not, for Hobbes, require a "gift" of the right to punish. Prospective subjects

[10] *Leviathan*, 28/1, 161.

[11] See *Leviathan*, 28/3, 5-7, & 10-13, 162-163.

authorize the prospective sovereign to exercise his (or their—if sovereignty is instituted as an assembly) unsurrendered right of nature. Because there is no pre-political right to punish, the prospective sovereign's unsurrendered right of nature provides what Hobbes calls the *foundation* of the right to punish. But the sovereign representative's right to punish is not identified as the right of nature (right of war). I argue that the right to punish is, for Hobbes, an artificial right exercised by an artificial person.

I argue that Hobbes holds the view that through the authorization by prospective subjects the sovereign representative acquires the "right or authority of punishing." This prompts us to attend to a question that is naturally overlooked by the tradition: given that the sovereign is authorized by prospective subjects to punish them for transgressing the law, to what end, according to Hobbes, do prospective subjects establish the institution of punishment? The aim of the second article of my dissertation, "Hobbes on the Rationale of Punishment," is to provide an answer to this question.

The tradition, as noted, holds that the right to punish is not specially established through the social contract. As one commentator notes, "[Hobbes] gives a separate explanation for the sovereign's right to punish; it is part of his right of nature and thus independent of the rights transferred to him in the social contract."[12] Because the right to punish is "independent of the rights transferred to him in the social contract," an answer to the question of the justification of punishment is, on the traditional view, independent of any appeal to the rationale for the sovereign's possession of the right to punish. According to Hobbes, the seventh law of nature requires "*that in revenges* (that is, retribution of evil for evil), *men look not at the greatness of the evil past, but the*

[12] Sreedhar, *Hobbes on Resistance,* 16.

greatness of the good to follow."[13] The "good to follow" that justifies punishment, on the traditional view, is implicit in the rationale for exercising the natural right to retributive violence, namely, to ensure one's own future security through deterrence. Accordingly, on the traditional view of Hobbes's theory of punishment, the rationale for inflicting (or threatening to inflict) punishment is simply to *deter* subjects from acting contrary to the will (command) of the person who does not renounce any natural rights. As one commentator claims, in "Hobbes's general theory of criminal punishment [...t]he general justification for applying punishments for law violations is a purely forwardlooking one: to prevent crime, primarily by deterrence."[14]

The orthodox view that Hobbes is a straightforward deterrent theorist bears out in another related view commonly attributed to Hobbes: most, if not all, citizens require the threat of punishment as a necessary *coercive* step to motivate conformity to the law. As one commentator puts it, "[m]utually beneficial covenants find their initial justification in the fact that it is prudentially rational for individuals to agree to them [...] and their continuing justification in the fact that it is prudentially rational for individuals to adhere to them (because violations are subject to the sovereign's wrath)."[15] In other words, on the traditional view, it is mutually beneficial for prospective subjects to renounce the right of nature, but it is individually beneficial to not exercise the renounced right because doing otherwise would prompt the sovereign to respond with the exercise of his unsurrendered natural right to violence.

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[13] *Leviathan*, 15/19, 76.

[14] Gregory S. Kavka, *Hobbesian Moral and Political Theory*, 250.

[15] Richard Nunan, "Hobbes on Morality, Rationality, and Foolishness," 44-45.

In the second article of my dissertation, I argue against the noted reading of Hobbes. Given that Hobbes holds that prospective subjects grant the sovereign the right to punish,[16] I argue that we ought to avail ourselves of the rationale of punishment *within* (and not *independent* of) the context of the social covenant that institutes a sovereign representative. According to Hobbes, the social covenant that institutes a juridical authority is void without the authority to enforce the law; as Hobbes states, "covenants, without the sword, are but words and of no strength to secure a man at all."[17] The covenant that holds the authority of the law over renounced natural rights would be invalid, not because most persons do not desire the law to be binding but, rather, because *reasonable suspicion* of non-performance invalidates covenants. I argue that, for Hobbes, the rationale for each prospective subject granting the sovereign the right to punish him for transgressing the law is to overcome the reasonable suspicion that invalidates the social covenant that establishes the authority of the law. Put another way, the grant is *collateral* each person puts up in order to overcome the ubiquity of diffidence—mutual distrust—in the state of nature.

Hobbes holds that each person is obliged to the laws of nature in two ways: *in foro interno* obligation, which always binds one conscience, and *in foro externo* obligation, which binds one's action only when there is sufficient security. The rationale

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[16] As noted above, in Chapter 18 of *Leviathan*, "Of the Rights of Sovereigns by Institution," Hobbes contends that mutual authorization by prospective subjects is the means by which "all the *rights* and *faculties* of him, or them, on whom the sovereign power is conferred by the consent of the people assembled" (*Leviathan*,18/2, 88). The right to punish, we must appreciate, is included in the catalogue of rights *conferred* upon the sovereign, a list of which Hobbes provides in the same chapter. Hobbes maintains, "to the sovereign is *committed* the power of rewarding with riches or honour; and of punishing with corporal or pecuniary punishment, or with ignominy, every subject according to the law he hath formerly made" (*Leviathan*, 18/14, 92; emphasis added).

[17] *Leviathan*, 17/2, 85.

for establishing the institution of punishment, for Hobbes, is to converge the two modes of obligation; and the rationale for threatening punishment is to maintain the convergence of the two modes of obligation. Deterrence, for Hobbes, does not provide the principal rationale for punishment but, rather, a secondary means to maintain such convergence. Hobbes notes, "though the wicked were fewer than the righteous, yet *because we cannot distinguish them*, there is a necessity of suspecting, heeding, anticipating, subjugating, self-defending, ever incident to the most honest and fairest conditioned."[18] The issue of the rationale of the practice of punishment is, first and foremost, epistemological; the issue of motivation is subsumed under the epistemological concern. The threat of punishment bridges the epistemic gap between persons, thus, shores up the motivation for each subject to conform his actions to the law. Specifically, subjects, when made aware that each other subject is made aware what will happen to those who transgress the law, will be motivated to conform to the law. We should not understand the threat of punishment, for most subjects, to work as a coercive measure; rather, for most subjects, the general threat of punishment is the necessary last step in making the law *in foro externo* obligatory.

The issue of the principled constraint on the sovereign's right to punish is the focus of my third article, "Hobbes on the Punishment of the Innocent." Guilt, for Hobbes, is a necessary requirement for punishment; as Hobbes claims, "there can be no punishment of the innocent."[19] There are two schools of thought on what accounts for Hobbes's claim. The first school holds that Hobbes espouses a logical doctrine; the second school holds that Hobbes espouses a normative doctrine. According to proponents

[18] *De Cive*, Author's Preface to the Reader, 33; emphasis added.

[19] *Leviathan*, 28/22, 165

of the first view, Hobbes's claim that "there can be no punishment of the innocent" is an elucidation of the term "punishment." As a representative of the first school argues, "Hobbes saw that by definition, punishment is retributive or penal. There can be no punishment properly called, where there has been no transgression of the law and such a description cannot therefore be applied to actions against the innocent."[20] According to proponents of the second view, the principle that guilt is a necessary requirement for punishment is, for Hobbes, grounded in three laws of nature. As a representative of the second school contends, to punish the innocent "is to wage war on subjects; it is an act of hostility, not of punishment, and reintroduces the state of war that sovereignty served to supercede."[21]

In the third article of my dissertation, I argue that the first view just sketched is mistaken. I argue that the second view has merit in that it acknowledges Hobbes's concern as normative and not logical, but it fails to explain why the punishment of the innocent is an act of hostility or why the punishment of the innocent risks reintroducing the state of war.

I argue that the attribution of "logical retributivism" to Hobbes—a theory whose proponents understand punishment to be retributive by definition— to account for his claim that "there can be no punishment of the innocent" requires us to i) disregard that, for Hobbes, the distinction between punishment and hostility draws on an account of punishment as based on the authorization of the sovereign to punish transgressors of the law and ii) ignore the *prescriptive* role the laws of nature play in his theory of punishment. The attribution of "logical retributivism" to Hobbes, in particular, requires

[20] Warrender, *The Political Philosophy of Hobbes*, 184.

[21] Edward G. Andrew, "Hobbes on Conscience within the Law and without," 218.

us to disregard Hobbes's appeal to the laws of nature as providing an *argument* against the punishment of the innocent.

Hobbes argues that the laws of nature are "articles of peace" and that, by breaching the laws of nature prohibiting cruelty, ingratitude, and inequity, the punishment of the innocent introduces war. In response to the proponents of the second view, who argue that the laws of nature ground the principle that guilt is a necessary requirement for punishment, I argue that to understand the claim that cruelty, ingratitude, and inequity in punishment—the punishment of the innocent—introduces war we must understand i) what it is about cruelty, ingratitude, and inequity in particular that, for Hobbes, make them relevant to the issue of the punishment of the innocent and ii) why Hobbes holds that cruelty, ingratitude, and inequity in punishment is an act of hostility and an invitation to war. I argue that proponents of the second view are correct in holding that cruelty, ingratitude, and inequity in punishment leads to war; however, they are unable to explain why the punishment of the innocent leads to war without appealing to subjects' authorization of the sovereign to punish them for, and only for, transgressing the law. Accordingly, I argue that each of Hobbes's three appeals to the laws of nature, offered as arguments against punishing the innocent, are best understood as arguments to maintain legitimacy in punishment—legitimacy based on each subject's authorization of the sovereign to punish him if he transgresses the law.

I argue that inequity in punishment betrays the *trust* for which the sovereign is authorized to distribute punishments for transgressions of the law and causes subjects to reject the sovereign as the arbiter of justice. I argue that ingratitude in punishment betrays the *expectation* of protection under the law for which the sovereign is authorized to

punish transgressors of the law and causes subjects to regret the gift of sovereign authority. Lastly, I argue that cruelty in punishment betrays the *purpose* for which the sovereign is authorized to punish transgressors of the law, thereby annulling the *in foro externo* obligation to the law. I argue that Hobbes's appeals to maintaining the trust, expectation, and purpose in punishment attends to each subject's authorization of the sovereign to punish him *for, and only for, transgressing the law*. The punishment of the innocent would be contrary to domestic peace because it would be viewed as an illegitimate exercise of sovereign authority. Hobbes's appeals to the laws of nature, on my account, are best understood as appeals to maintaining legitimacy in punishment.

Hobbes claims that when a subject is punished, "*he is author of his own punishment*, as being, by the institution, author of all his sovereign shall do."[22] Those who address Hobbes's theory of punishment discount or dismiss entirely the significance that we ought to attach to this claim; as one commentator remarks, "[o]ne would expect him [Hobbes] to consider the ruler's right to inflict pain upon his subjects also as a new right created by authorization. But Hobbes did not argue in this way."[23] Hobbes, I contend, does argue in this way. We can hardly overstate the significance of Hobbes's claim. The authorization by prospective subjects of the sovereign to punish transgressors of the law grounds the all-important distinction Hobbes draws between punishment and hostility—this is the distinction between violent acts performed by the representative of the Commonwealth and violent acts performed by a natural person. As Hobbes maintains, "it is of the nature of punishment to be inflicted by public authority, which is the

[22] *Leviathan*, 18/3, 89; emphasis added.

[23] Hüning, "Hobbes on the Right to Punish," 231

authority only of the representative itself."[24] The authorization by prospective subjects of the sovereign to punish transgressors also grounds the all-important distinction Hobbes draws between the retributive response to crime and the retributive response to treason—this is the distinction between retributive responses to those who continue to recognize the sovereign's authority (including the authority to punish) and those who no longer do so; as Hobbes maintains,

> harm inflicted upon one that is a declared enemy falls not under the name of punishment, because seeing they were either never subject to the law, and therefore cannot transgress it; or having been subject to it, and professing to be no longer so, by consequence deny they can transgress it, all the harms that can be done them must be taken as acts of hostility. […] For the punishments set down in the law are to subjects, not to enemies; such as are they that, having been by their own act subjects, deliberately revolting, deny the sovereign power.[25]

The authorization by prospective subjects of the sovereign to punish transgressors of the law provides the conceptual foundation of Hobbes's theory of punishment. We cannot avoid the conclusion that we miss something of vital importance for understanding his theory of punishment if we fail to attend to Hobbes's claim that a subject punished "is author of his own punishment." Or so I shall argue.

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[24] *Leviathan*, 28/12, 163.

[25] *Leviathan*, 28/13, 163.

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Article 1

1 The Right to Punish in Thomas Hobbes`s *Leviathan*

1.1 Introduction

There is an ambiguity in Thomas Hobbes's account, in *Leviathan*, of the source of the sovereign's right to punish.[1] The ambiguity stems from the fact that Hobbes appears to claim both that the prospective sovereign is granted the right to punish by prospective subjects and that the prospective sovereign is not granted the right to punish by prospective subjects. With the former, we understand that the acquisition of the right to punish follows from a process of authorization—a process by which a representative is commissioned to act on the behalf of another person. With the latter, we understand that the possession of the right to punish is merely the product of the mass relinquishment of rights—the prospective sovereign, that is, the person who occupies the office of sovereignty, alone does not relinquish any natural rights.[2]

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[1] References to *Leviathan* are by chapter and paragraph(s) in the G.C.A. Gaskin (1996) edition, followed by page number(s) in the original (1651) edition. All emphases are in the original work unless otherwise noted.

[2] Hobbes draws a distinction between the relinquishment of a right and a transfer of a right. See *Leviathan*, 14/7, 65. To relinquish a particular natural right is to oblige oneself to not interfere with all other indeterminate persons' exercise of that right. To transfer a particular natural right is to oblige oneself to not interfere with the exercise of the right by the particular person or persons to whom you transferred. Some commentators view the transaction of the right to punish as a renouncement, while others view it as a transfer. Hobbes, we should note, seems to claims that the right to punish is the product of a renouncement of rights: "And this is the foundation of that right of punishing which is exercised in every Commonwealth. For the subjects did not give the sovereign that right; but only, in laying down theirs, strengthened him to use his own as he should think fit for the preservation of them all: so that it was not given, but left to him, and to him only" (*Leviathan*, 28/2, 162). However, both interpretations are, arguably, consistent with Hobbes's claim; that is, one could argue that a person may "lay down" a right *to* a particular person. We do

The orthodox interpretation of Hobbes's account is that he rejects the view that the sovereign's acquisition of the right to punish follows from the authorization of the sovereign by prospective subjects to punish them for transgressing the law. Following from remarks in the second paragraph of Chapter 28 of *Leviathan*, "Of Punishments and Rewards," Hobbes is almost unanimously understood to identify the right to punish with the unrelinquished right of war of the natural person who occupies the office of the sovereign and, accordingly, the infliction of punishment is understood to occur outside the bounds of a juridical relationship between the sovereign and subject condemned.

In this paper, I argue against the orthodox interpretation. The identification of the right to punish with the unrelinquished right of nature—right of war—misrepresents Hobbes's treatment of punishment in *Leviathan*. The traditional view, which I recount in section 1.2 of this paper, is that Hobbes's identification of the right to punish with the right of war is a response to a purported antinomy generated between subjects *granting* the right to punish to the sovereign and subjects *retaining* the right to defend themselves from harm. The tradition generally recognizes that, for Hobbes, rights do not have corresponding duties; thus, the sovereign's exercise of the right to punish does not require the condemned subject to assist in his own punishment. However, according to the orthodox interpretation, the inevitable conflict between the exercise of rights is not where the problem with the right to punish lies; the grant of the right to punish itself is—or, rather, would be—vitiated by the retention of the right to resist violence. Because Hobbes holds the absolute primacy of the right of self-defense, the right to punish, according to the tradition, is not granted to the sovereign. The right to punish is *merely* left to the

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not need to resolve this interpretative issue presently. With regard to the right to punish, both interpretations involve identifying the right to punish with the sovereign's unrelinquished natural right of war.

person who occupies the office of sovereignty by the mass relinquishment of non-defensive natural rights.

In section 1.3 of this paper, I argue that there is, for Hobbes, no antinomy between prospective subjects granting the sovereign the right to punish and retaining the right to resist violence. The latter does not pose an obstacle for the former. There is no antinomy within the social covenant for the simple reason that Hobbes does not hold that the right to resist the sovereign enters through the social covenant. Rather, as I argue in section 1.3, the right to resist violence (of all kinds) is retained because it is inalienable, not because prospective subjects refuse to alienate it. The inalienable character of the right to resist does not pose a problem for granting the sovereign the right to punish.

But not only is there no antinomy in the social covenant, the purported solution to the antinomy attributed to Hobbes in the second paragraph of Chapter 28 is incompatible with Hobbes's treatment of punishment in adjacent paragraphs of the chapter and throughout *Leviathan*. In section 1.4 of this paper, I argue that the purported identification of the sovereign's right to punish with the right of war of the person (or persons) who occupies the office of sovereignty is incompatible with both i) Hobbes's definition of punishment, provided in the first paragraph, as an act inflicted by *authority*, and ii) the inferences he draws from the definition of *punishment*, provided in the third to the thirteenth paragraphs, as distinguished from an act of *hostility*.

What remains to be addressed is an explanation of the second paragraph of Chapter 28. In section 1.5 of this paper, I argue that Hobbes's answer to his inquiry "by what door the right or authority of punishing, in any case, came in"[3] is that prospective subjects authorize the person or persons who will hold the office of sovereignty to

[3] *Leviathan*, 28/2, 161.

exercise the unsurrendered natural right to perpetrate violence. The natural right to perpetrate violence that the person who will hold the office of sovereignty does not relinquish serves as the *foundation* of the right to punish, but it is through authorization that the sovereign representative's perpetration of violence is understood as the political right to punish. I argue that Hobbes has only one account, and not two competing accounts, of the sovereign's right to punish.[4] The two claims noted above—the acquisition of the right to punish follows from a process of authorization and the possession of the right to punish follows from the non-relinquishment of natural rights by the person or persons who will hold the office of sovereignty—are not at odds with one another. Rather, the two claims outline the process by which the sovereign representative acquires the right to punish—a right that does not exist prior to the establishment of civil society. Because there is no pre-political right to punish, the unrelinquished right of nature of the person who will occupy the office of sovereignty provides what Hobbes calls the *foundation* of the right to punish. But the sovereign representative's acquisition of the right to punish follows from a process of authorization. The right to punish, for Hobbes, is an artificial right exercised by an artificial person.

1.2 The Traditional View

In Chapter 18 of *Leviathan*, "Of the Rights of Sovereigns by Institution," Hobbes contends that mutual authorization by prospective subjects is the means by which "all the *rights* and *faculties* of him, or them, on whom the sovereign power is conferred by the

[4] Two Hobbes scholars provide analysis of Hobbes's account of the sovereign's right to punish that acknowledges authorization. See F.C. Hood, *The Divine Politics of Thomas Hobbes: An Interpretation,* 156-159; and Alan Ryan, "Hobbes's Political Philosophy," 238-239. However, both view Hobbes as offering two distinct and incompatible accounts of the grounds of the sovereign's right to punish.

consent of the people assembled."[5] The right to punish is included in the catalogue of rights *conferred* upon the sovereign, a list of which Hobbes provides in the same chapter. Hobbes maintains, "to the sovereign is *committed* the power of rewarding with riches or honour; and of punishing with corporal or pecuniary punishment, or with ignominy, every subject according to the law he hath formerly made."[6]

However, when Hobbes, later in Chapter 28, "Of Punishments and Rewards," addresses the question of the *foundation* of the sovereign's right to punish, "a question to be answered, of much importance,"[7] he appears to rescind his earlier account of the right to punish as based on the authorization of the people assembled. Hobbes claims that "no man is supposed bound by covenant not to resist violence; and consequently it cannot be intended that he gave any right to another to lay violent hands upon his person."[8] As such, according to Hobbes, "before the institution of Commonwealth, every man had a right to everything [...] And this [right to everything] is the foundation of that right of punishing which is exercised in every Commonwealth."[9] In explaining how the sovereign comes to possess the right to punish, Hobbes claims, "the subjects did not give the sovereign that right; but only, in laying down theirs [the right to everything], strengthened him to use his own […] so that it was not given, but left to him, and to him

[5] *Leviathan*, 18/2, 88.

[6] *Leviathan*, 18/14, 92; emphasis added.

[7] *Leviathan*, 28/2, 161.

[8] *Leviathan*, 28/2, 161.

[9] *Leviathan*, 28/2, 161.

only."[10] The right to punish, seemingly contrary to Hobbes's earlier remarks in *Leviathan*, is not a right conferred upon the sovereign. Accordingly, as Richard Tuck puts it, "[Hobbes] thus made the right of domestic punishment the same kind of thing as the right to wage foreign war."[11] The tradition concurs,[12] as Hobbes is generally regarded as identifying the right to punish with the right of war.

Hobbes, in Chapter 28 of *Leviathan*, is understood to rescind the sovereign's authorization by prospective subjects to punish them for transgressing the law as the means by which the sovereign acquires the right to punish. An antinomy purportedly arises in the social covenant between prospective subjects granting the prospective sovereign the right to punish and prospective subjects retaining the right to resist violence. As Jean Hampton claims, "[*b*]*ecause* a person cannot alienate his right to self-defense when he authorizes the sovereign, Hobbes concludes that the right of the

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[10] *Leviathan*, 28/2, 162.

[11] Richard Tuck, *Natural Rights Theories: Their Origin and Development*, 125. Tuck is here referring to Hobbes's position in *De Cive*, but adds "and in *Leviathan* he was to move even further in this direction."

[12] See, e.g., Deborah Baumgold, *Hobbes's Political Theory*, 38 & 150; Norberto Bobbio, *Thomas Hobbes and the Natural Law Tradition*, 141; Glenn Burgess, "On Hobbesian Resistance Theory," 75; Mario A. Cattaneo, "Hobbes's Theory of Punishment," 280 & 288; Claire Finkelstein, "A Puzzle About Hobbes on Self-Defense," 356; David Gauthier, *The Logic of Leviathan: The Moral and Political Philosophy of Thomas Hobbes*, 146-149; Jean Hampton, *Hobbes and the Social Contract Tradition*, 117-22 & 190-191; David Heyd, "Hobbes on Capital Punishment,"123-124; Dieter Hüning, "Hobbes on the Right to Punish," 229-232; Alan Norrie, "Thomas Hobbes and the Philosophy of Punishment," 302-308; Hanna Pitkin, "Hobbes's Concept of Representation--II," 913; Alice Ristroph, "Respect and Resistance in Punishment Theory," 613-617; Thomas S. Schrock, "The Right to Punish and the Right to Resist Punishment in Hobbes's Leviathan," 868-873; Susanne Sreedhar, *Hobbes on Resistance: Defying the Leviathan*, 98; Johann P. Sommerville, *Thomas Hobbes: Political Ideas in Historical Context*, 58; Howard Warrender, *The Political Philosophy of Hobbes: His Theory of Obligation*, 197; J.W.N. Watkins, *Hobbes's System of Ideas s: A Study in the Political Significance of Philosophical Theories*, 97; Yves Charles Zarka, "Hobbes and the Right to Punish," 81-83.

sovereign to punish 'is not grounded on any concession, or gifts of the Subjects.'"[13] We find that many in the tradition concur,[14] as Hobbes is understood to view the retention of the right to self-defense as vitiating the grant of the right to punish.

Because the social contract cannot account for the purported contradictory relationship between granting the right to punish and retaining the right to resist violence, it is assumed that one right must be sacrificed to the other: either the inalienability of the right to resist is untenable or the right to punish cannot be conceived as an essential right of the sovereign representative but, rather, a right belonging to the natural person (or

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[13] Hampton, *Hobbes and the Social Contract Tradition*, 191; emphasis added.

[14] Not all commentators who endorse the orthodox interpretation attempt to provide an explanation for Hobbes's purported identification of the right to punish with the right of war. For those who attempt to provide some kind of an explanation, we find that the identification of the right to punish with the right of war in some way follows from the absolute primacy Hobbes assigns to the right of self-defense. See, e.g., Gauthier, *The Logic of Leviathan*, 147: "no man can be supposed to authorize another to punish him, or kill him […] but no man has the right to harm himself, for the right of nature is a right to do what is conducive to one's preservation. Fortunately, Hobbes himself recognizes this." Heyd, "Hobbes on Capital Punishment," 122, notes: "the fact that a penalty is psychologically impossible to endure entails that the individual cannot rationally agree to introduce it into the contract." Hüning, "Hobbes on the Right to Punish," 230, claims that, "[t]he power of punishment cannot be derived from an act of a renouncing the right of self-defence. As Hobbes says, it is not possible by the terms of the social contract to give up or relinquish the right of self-defence." Ristroph, "Respect and Resistance in Punishment Theory," 613, maintains that, for Hobbes, punishment "is a form of violence, and as we have already seen, Hobbes recognized an inalienable right to resist violent assaults. Accordingly, the commonwealth's right to punish 'is not grounded on any concession…of the subjects'" Schrock, "The Right to Punish and the Right to Resist Punishment in Hobbes's Leviathan," 873, notes: "[f]orced to grope for a novel account of the right to punish by his own novel declaration of the right to resist, Hobbes conceives of the right to punish as the right of war." Sreedhar, *Hobbes on Resistance*, 16, notes: "Hobbes makes a strong point of separating the subject's right to resist the sovereign in self-defense from the sovereign's right to punish the subjects. Indeed, in Chapter 28 of *Leviathan*, he gives a separate explanation for the sovereign's right to punish; it is part of his right of nature and thus independent of the rights transferred to him in the social contract." Watkins, *Hobbes's System of Ideas*, 97, notes: "No man renounces his right to defend himself. Thus, the right, which the *commonwealth* hath to put a man to death for crimes…remains from the first right of *nature*." Lastly, to conclude our sample list, Zarka , "Hobbes and the Right to Punish," 76, claims that "if the right to resist is inalienable, then subjects have never conceded the right to punish them to the sovereign, and that right cannot be conceived as an essential attribute of sovereignty emanating from the convention which institutes the state."

persons) who holds the office of the sovereign. Accordingly, and as noted above, Hobbes scholars takes Hobbes not only as recognizing this antinomy in the second paragraph of Chapter 28 but also resolving the antinomy by embracing the latter. The right to punish, as the tradition underscores, was "not given, but left to him [the sovereign], and to him only."[15] According to proponents of the traditional view, we find Hobbes, here in Chapter 28, identifying the sovereign's right to punish with the natural right to perpetrate violence of the person who holds the office of the sovereign.[16] As we see next, because of this identification, Hobbes scholars understand the state of affairs in which the person who holds the office of the sovereign exercises the right to punish to be identical (in the relevant sense) to the state of affairs in which one exercises the natural right to wage war.

Since, on the orthodox interpretation of Hobbes's view, the sovereign's authority to punish is not based on the subject's authorization, the infliction of punishment cannot be understood to occur within the margins of legitimate juridical authority. Instead, the infliction of punishment occurs within the state of nature, that is, a state of affairs defined, in part, by the absence of any juridical relationship between the parties. David Gauthier argues, for example, that "the person punished, in violating the civil law, has violated an obligation undertaken in the institution of the sovereign, and so has already placed himself, in effect, in the state of nature."[17] Again, the tradition concurs,[18] as the

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[15] *Leviathan*, 28/2, 162.

[16] See *infra* notes 11 and 12 and corresponding text above.

[17] Gauthier, *The Logic of Leviathan*, 148.

[18] See, e.g., Bobbio, *Thomas Hobbes and the Natural Law Tradition*, 141, who explains the consequence in the following way: "we can remark that the covenant between sovereign and [recalcitrant] subject has been broken. Both are back in the state of nature, that is, in that condition in which everyone has as much right as he has power." Cattaneo, "Hobbes's Theory of

consequence of identifying the right to punish with the natural right to perpetrate violence, which all but the person who holds sovereignty relinquishes, is that the exercise of the right to punish—the infliction of punishment—is not conceived of as the exercise of a juridical right by an authority over a subject.

Without authorization serving as the basis for the sovereign's right to punish, as we have seen, the sovereign is left to exercise his natural right to perpetrate violence. But the natural right to perpetrate violence is not a right to punish. Punishment is a right that belongs exclusively to the sovereign representative; it is one of the rights that, as Hobbes puts it, "make the *essence* of sovereignty."[19] The sovereign, as a natural person, does not

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Punishment," 282 draws a similar conclusion: "at the moment when the […] penalty is inflicted, the rights of the sovereign and the subject are placed on the same plane, and there is a return to the state of nature, whereby at that moment the conflict between the sovereign and subject takes on the character of a state of war." Cattaneo's stated concern is exclusively the death penalty (and torture), but perhaps we can, without being uncharitable to his view, generalize his remark to encompass most, if not all, punishments. Andrew Cohen, "Retained Liberties and Absolute Hobbesian Authorization, 40, notes: "As soon as the sovereign comes to inflict violence on a subject, the reason for having constituted the sovereign is undone. The person who was once a subject is now thrown back into the state of nature with the sovereign." As Heyd, "Hobbes on Capital Punishment," 122 claims, "this [the infliction of punishment] means in effect a return to the state of nature. For no such struggle between the state authority and the convicted individual could take place within the boundaries of any legal authority." Norrie, "Thomas Hobbes and the Philosophy of Punishment," 308, notes: "if the exercise of punishment is based upon an unconceded right of nature, then every threat or act of punishment is itself a reversion to the state of nature. Every such threat or act is a potential or actual act of war." Ristroph, "Respect and Resistance in Punishment Theory," 615, notes that "[o]nce a subject has disobeyed the sovereign, he and the sovereign are in the state of nature vis-à-vis each other […] the criminal has put himself and the sovereign into a conflict with no mutually recognized third-party adjudicator." Ryan, "Hobbes's Political Philosophy," 239, notes: "The view that punishment rests on the sovereign's state-of-nature right of self-defense has some awkward consequences. One is that we appear to remain in the state of nature vis-à-vis the sovereign." Lastly, Schrock, "The Right to Punish and the Right to Resist Punishment in Hobbes's Leviathan," 873, notes, "Hobbes conceives of the right to punish as the right of war, i.e., as the right which, in another manifestation, is the right to resist! He orchestrates a face-off within the commonwealth between two manifestations of the right of nature."

[19] *Leviathan*, 18/16, 92; emphasis added.

have a right to punish. Hobbes, unlike Hugo Grotius[20] before him and John Locke[21] after him, does not maintain but, in fact, rejects the view that persons have a pre-political right to punish. In the absence of a mutually recognized authority, one cannot be accused of breaching the moral law or of violating another's rights—contra Locke and Grotius, respectively. The absence of moral accountability to others in the state of nature is central to Hobbes's view of the state of nature as a state of *blameless* liberty. To be sure, one can breach the laws of nature, but such violations, according to Hobbes, are only of one's conscience.[22] Prior to the social covenant, there is no moral accountability to others. A voluntary undertaking of obligation is the basis of accountability to others, as Hobbes states, "there being no obligation on any man which ariseth not from some act of his own; for all men equally are by nature free."[23] Accordingly, before the social covenant—before the mutual voluntary undertaking of accountability—no application of violence can be understood as maintaining or reinforcing a moral order among persons. The concepts of guilt and innocence are, to Hobbes's mind, inapplicable in the state of affairs outside of civil society. As Hobbes states, "it is lawful by the original right of nature to make war;

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[20] See Hugo Grotius, *On the Rights of War and Peace: An Abridged Translation*, Book II, Chap. 20, Sec. 9, paragraph 2: "The right of inflicting such punishment, is also, by Natural Law, in the hands of every man." See also Hugo Grotius, *De Iure Praedae Commentarius*, 92: "Is not the power to punish essentially a power that pertains to the state? Not at all! On the contrary, just as every right of the magistrate comes to him from the state, so has the same right come to the state from private individuals."

[21] See John Locke, *The Second Treatise of Government*, Chap. 2, §7 and Chap. 2, §8: "the execution of the law of nature is, in that state, put into every man's hands, whereby every one has a right to punish the transgressors of that law to such a degree, as may hinder its violation" and "*every man hath a right to punish the offender, and be executioner of the law of nature.*"

[22] See *Leviathan*, 27/3, 152: "the civil law ceasing, crimes cease: for there being no other law remaining but that of nature, there is no place for accusation; every man being his own judge, and accused only by his own conscience."

[23] *Leviathan*, 21/10, 111.

wherein the sword judgeth not, nor doth the victor make distinction of nocent and innocent as to the time past."[24]

We are, it seems, confronted with an impasse. To the central role Hobbes assigns punishment or the threat of punishment in maintaining a state of peace and security, we find that the identification of the right to punish with the right of war is at cross purposes. Yves Charles Zarka and Alan Norrie articulate what is at stake here. Zarka notes:

> [T]he fundamental difference which Hobbes establishes between punishment (an evil inflicted upon a citizen by the public authority) and an act of hostility (an evil inflicted on an enemy of the republic) no longer holds […] The very notion of punishment loses all meaning.[25]

Norrie notes:

> [W]hile the Sovereign is supposed to protect men from the state of nature, the Sovereign's primary tool for achieving this is itself a weapon of war and a logical conduit back into the natural state. […] The whole structure of *Leviathan* is shaken if the Sovereign's right of punishment is natural and not social, for the state of nature has never really been transcended.[26]

The identification of the right to punish with the natural right to perpetrate violence exposes the impossibility of establishing punishment as a juridical institution. The institution of punishment, as an integral institution of the Commonwealth, is an institution of war—it is an institution whose *modus operandi* exists external to the Commonwealth. That the infliction of punishment, according to the orthodox interpretation, occurs outside the scope of representation or authority reveals a serious flaw in Hobbes's social contract theory. Thomas S. Schrock argues that the flaw is so serious, in fact, that the failure to institute a sovereign with the right to punish

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[24] *Leviathan*, 28/23, 165.

[25] Zarka, "Hobbes and the Right to Punish," 83.

[26] Norrie, "Thomas Hobbes and the Philosophy of Punishment," 308.

"precipitates a crisis in Hobbes's political theory"[27] such that "Hobbes fails to discover and exhibit a right to punish – therewith also, of course, failing to give us a sovereign and thus a commonwealth."[28]

Fortunately for Hobbes's political theory no such crisis of this nature exists, or so I shall argue. Hobbes does not identify the right to punish with the right of war. There is no crisis because, contrary to the traditional view, the issue that Hobbes addresses in the second paragraph of Chapter 28 is not an antinomy, the purported solution to which is the identification of the right to punish with the right of war. The issue Hobbes addresses with regard to the question of the *foundation* of the right to punish is how to establish political representation in punishment given that there is no pre-political right to punish. That the *foundation* of the right to punish rests upon the prospective sovereign's unrelinquished right of nature does not entail that the sovereign representative's right to punish is to be identified as the right of war.

1.3 The Right to Resist Violence

As subjects' retention of the right to resist violence is taken to be the stumbling block for subjects granting the sovereign the right to punish, we need to analyze the relationship between the two rights *within the context of authorizing a sovereign representative*.[29] I do

[27] Schrock, "The Right to Punish and the Right to Resist Punishment in Hobbes's Leviathan," 853.

[28] Schrock, "The Right to Punish and the Right to Resist Punishment in Hobbes's Leviathan," 857.

[29] The antinomy, we must keep in mind, is not found in the inevitable *conflict* between the exercise of the right to punish and the exercise of the right to resist; rather, as the tradition characterizes the problem, the *contradiction* is understood to be involved in granting the right to punish given the absolute primacy Hobbes assigns to the right to defend oneself from harm. See *infra* notes 13 and 14 and corresponding text above.

not explore in any great detail Hobbes's theory of resistance. My focus in this section is limited to Hobbes's understanding of subjects' retention of the right to resist (defend themselves from) violence.

It is clear that, for Hobbes, the paradigmatic case of the resistance of violence is against the sovereign.[30] Of course, Hobbes does not assume that every exercise of the right to resist violence is against the sovereign's lawful infliction of violence. Subjects possess the right to defend themselves from other subjects' unlawful infliction of violence. As Hobbes states,

> A man is assaulted, fears present death, from which he sees not how to escape but by wounding him that assaulteth him; if he wound him to death, this is no crime, because no man is supposed, at the making of a Commonwealth to have abandoned the defence of his life or limbs, where the law cannot arrive time enough to his assistance.[31]

Be that as it may, it is without doubt that it is against the sovereign that we are to regard as the paradigmatic case of the resistance of violence.

That the paradigmatic case of the resistance of violence is against the sovereign is taken to support the tradition's supposition that an antinomy exists in the social covenant between subjects granting the sovereign the right to punish and subjects retaining the right to resist violence. As noted above, we find consensus in the literature that the retention of the right to resist violence poses an insurmountable obstacle to the sovereign

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[30] For example, according to Hobbes, a subject may, without injustice, refuse the following: i) to execute some dangerous office; ii) to kill or wound himself; iii) to abstain from the use of food, air, medicine or anything else without which he cannot live; iv) to confess to a crime without assurance of pardon; v) to not resist those who assault him; and vi) to cease defending his life even upon committing an unjust act, that is to say, to not resist punishment (*Leviathan*, 21/12-15, 111-113).

[31] *Leviathan*, 27/20, 155.

being granted the right to punish.[32] But the antinomy requires explanation. A number of commentators have taken up the task of explaining how "it cannot be intended that he gave any right to another to lay violent hands upon his person" follows from the fact that "no man is supposed bound by covenant not to resist violence."[33] And we find uniformity in the attempts to locate the incompatibility between the two rights.

Commentators contend that the *purpose* for each subject retaining the right to defend oneself against violence is that it is to be held against the sovereign. Schrock remarks: "[c]alled a 'true liberty of a subject,' the right to resist is the right [each subject] has, *first*, to assure himself that the sovereign has no plans to punish or otherwise harm him."[34] Claire Finkelstein, in addressing the question "against whom would civil agents *require* a right of defensive response?" notes that "the right of self-defense is *primarily* necessary against the sovereign, since he is the only person or entity who retains an entitlement to use the kind of force against which a right of self-defense in civil society might be necessary."[35] And, as Zarka notes, "[t]he part of the natural right which each person retains in the civil state defines the sphere of legitimate resistance to the political power."[36] The right to resist violence is purportedly retained, first and foremost, to provide recourse against the sovereign's threat to one's preservation. And, according to

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[32] "[B]ecause," as Hampton claims, "a person cannot alienate his right to self-defense when he authorizes the sovereign, Hobbes concludes that the right of the sovereign to punish 'is not grounded on any concession, or gifts of the Subjects.'" Again, see *infra* notes 13 and 14 and corresponding text above.

[33] *Leviathan*, 28/2, 161.

[34] Schrock, "The Right to Punish and the Right to Resist Punishment in Hobbes's Leviathan," 884; emphasis added.

[35] Finkelstein, "A Puzzle about Hobbes on Self-Defense," 356; emphases added.

[36] Zarka, "Hobbes and the Right to Punish," 83.

our commentators, it is in the purpose for which the right is retained that we locate the potential for contradiction in the social covenant that would include granting the sovereign the right to punish. Alice Ristroph finesses the point well:

> There is a sense in which Hobbes's recognition of a right to resist punishment is related to his claim that penal power is not grounded on the consent of those who may face punishment. A desire for security or self preservation provides the motivation to grant power to the sovereign in the first place, and whatever else preservation of a person might require, it cannot require that person's destruction.[37]

We find that the purpose for retaining the right to defend oneself against violence is, in some way, related to the desire to ensure one's preservation against the sovereign's power. If this is the case, then it is contrary to this purpose to grant the sovereign the right to harm oneself for transgressing the law. According to our commentators, the purpose for the retention of the right to resist the sovereign's infliction of violence, as part of that fundamental right of self-preservation, vitiates the grant to the sovereign of the right to punish.

While it may be true that the paradigmatic case of the resistance of violence is against the sovereign's infliction of violence, this fact does not entail that the right to resist violence is retained to be *primarily* or *principally* held against the sovereign. As I argue below, the paradigmatic case of resistance does not entail that there is a *purpose* for the retention, in civil society, of the right to resist violence. Hobbes does not hold the view that the right to defend oneself from violence enters society *in order* to be held against the sovereign.

The retention of the right to resist the sovereign—and in particular the sovereign's infliction of punishment—is *derived* from the *inalienability* of the right to self-defense.

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[37] Ristroph, "Respect and Resistance in Punishment Theory," 617.

Covenanting away the right to resist violence, according to Hobbes, cannot meet the validating criterion of covenants, as no good can be understood to follow from such alienation. As Hobbes states,

> a man cannot lay down the right of resisting them that assault him by force to take away his life, because he cannot be understood to aim thereby at any good to himself. […] And therefore if a man by words, or other signs, seem to despoil himself of the end for which those signs were intended, he is not to be understood as if he meant it, or that it was his will, but that he was ignorant of how such words and actions were to be interpreted.[38]

Any person who purports to have covenanted away his right to defend himself against violence—or the sovereign's infliction of punishment in particular—cannot be morally or legally held to such an undertaking, as the covenant would be void *ab initio*. In order for a covenant to be valid, the particulars of the covenant must be understood to track some good to the person who transfers or relinquishes a right. For Hobbes, a covenant that purports to relinquish the right to defend oneself from violence is unintelligible, as there is, according to Hobbes, no assignable interpretation that could make sense of such a relinquishment.

For Hobbes, legitimate resistance to the sovereign's infliction of punishment is a *corollary* of the natural right to resist violence *simpliciter*. Put differently, the specific right to resist the sovereign's infliction of punishment is *derived* from the inalienable right of self-defense. And we find the *derivation* in the following passage:

> [S]eeing sovereignty by institution is by covenant of every one to every one [...] it is manifest that *every subject has liberty in all those things the right whereof cannot by covenant be transferred*. I have shown before, in the fourteenth chapter, that covenants not to defend a man's own body are void. *Therefore*, If the sovereign command a man (though justly

[38] *Leviathan*, 14/8, 66.

> condemned) to kill, wound, or maim himself; or not to resist those that assault him […] that man [has] the liberty to disobey.[39]

"Therefore," as Hobbes infers, by virtue of the inalienability of right of self-defense, subjects have the right to defend themselves from violence on every occasion in which the need arises, including against the sovereign's infliction of lawful violence, i.e., punishment. Subjects possess the right to resist the sovereign's infliction of violence because the right to resist violence is inalienable. Subjects are not understood to refuse to alienate the right to resist violence so as to hold it against the sovereign; that is to say, Hobbes does not hold the view that the right to resist enters society *in order* to be held against the sovereign. Thus, Finkelstein's answer to her question, "if everyone has abandoned a right of offensive attack, against whom would civil agents require a right of defensive response?"[40] mistakenly picks out the sovereign. And contrary to Schrock's insistence, it cannot be the case that "the right to resist is the right [each subject] has, *first*, to assure himself that the sovereign has no plans to punish or otherwise harm him."[41]

However, there is a way in which an antinomy would arise within the social covenant *if* subjects secured the right to resist the sovereign's infliction of punishment through the social covenant. A contradiction would arise in the social covenant that included granting the sovereign the right to punish, namely, when granting the sovereign such a right subjects also intend to be a recipient of punishment. This would entail a contradiction of purposes, namely, protection under the law (the purpose for the grant of

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[39] *Leviathan*, 21/11-12, 111-112; emphases added.

[40] Finkelstein, "A Puzzle about Hobbes on Self-Defense," 356.

[41] Schrock, "The Right to Punish and the Right to Resist Punishment in Hobbes's Leviathan," 884; emphasis added.

the right to punish) and protection against the law (the purpose for retaining the right to resist punishment); recall, the purpose for retaining the right to resist violence, according to our commentators, is that the right is retained in civil society in order to be held against the sovereign's infliction of punishment. To be sure, a prospective subject who intends to breach the social covenant would insist on the right to resist being taken to the gallows. But, we must surely appreciate, subjects do not grant the sovereign the right to punish with a concurrent expectation, for example, of being hanged for murder.[42]

A concern remains regarding one of the central statements in the second paragraph of Chapter 28. Hobbes, recall, insists that "no man is supposed bound by covenant not to resist violence; and consequently it cannot be intended that he gave any right to another to lay violent hands upon his person."[43] As we have seen, this claim serves as the basis for the traditional view that an antinomy exists between granting the right to punish and retaining the right to resist punishment. We must appreciate that what follows from this claim that "no man is supposed bound by covenant not to resist violence" is not simply that "it cannot be intended that he gave any right to another to lay violent hands upon his person," but, more precisely, that "it cannot be intended that he gave any right to another to lay violent hands upon his person" *without the corresponding*

[42] I set aside analysis of the rationale for instituting the practice of punishment for my second article, "Hobbes on the Rationale of Punishment." However, a passage from Jean-Jacques Rousseau, *The Social Contract*, Bk. II, Chap. V, is instructive: "It is in order to avoid being the victim of an assassin that a person consents to die, were he to become one. According to this treaty [i.e. the social contract], far from disposing of his own life, one thinks only of guaranteeing it. And it cannot be presumed that any of the contracting parties is then planning to get himself hanged." Hobbes, likewise, does not hold that persons, when covenanting thus "unless I do so, or so, kill me" (Leviathan, 14/29, 70), concurrently plan to (or explicitly state that they plan to) not do so or so, that is, concurrently plan to not act in conformity with the law.

[43] *Leviathan*, 28/2, 161.

presumption that he is not obliged to not resist.[44] Hobbes is clear on this matter in a number of places. The most evident case is made in Chapter 14, "Of the First and Second Natural Laws, and of Contracts" and repeated in Chapter 21, "Of the Liberty of Subjects":

> A covenant not to defend myself from force, by force, is always void. For [...] no man can transfer or lay down his right to save himself from death, wounds, and imprisonment, the avoiding whereof is the only end of laying down any right; and therefore the promise of not resisting force, in no covenant transferreth any right, nor is obliging. *For though a man may covenant thus, unless I do so, or so, kill me; he cannot covenant thus, unless I do so, or so, I will not resist you when you come to kill me*.[45]
>
> Again, the consent of a subject to sovereign power is contained in these words, *I authorize, or take upon me, all his actions*; in which there is no restriction at all of his own former natural liberty: for by allowing him to *kill me*, I am not bound to kill myself when he commands me. It is one thing to say, *kill me, or my fellow, if you please*; another thing to say, *I will kill myself, or my fellow*.[46]

It is clear that Hobbes does not think that retention of the right to resist violence entails that an antinomy exists between the rights in question, or entails a subsequent renunciation of subjects' authorization of the sovereign to punish them for transgressing the law. The two rights, for Hobbes, are not mutually incompatible. I can covenant with others that the sovereign, "unless I do so or so, kill [harm, or imprison] me." And, as we

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[44] This is confirmed in Hobbes's claim immediately following the claim above: "In the making of a Commonwealth every man giveth away the right of defending another, but not of defending himself. Also he obligeth himself to assist him that hath the sovereignty in the punishing of another, but of himself not" (*Leviathan*, 28/2, 161). The right to punish, conferred upon the sovereign by each subject, is not grounded in each subject obliging himself to carry out his own punishment; the condemned subject is not obliged, so to speak, to drink the hemlock nor is he obliged not to resist consuming the hemlock.

[45] *Leviathan*, 14/29, 69-70; emphasis added.

[46] *Leviathan*, 21/14, 112.

see, I can make this covenant even in light of the presumption of the retention of the right to resist the sovereign if the sovereign comes to kill, harm, or imprison me.

To conclude this section, we can appreciate that Hobbes holds that prospective subjects cannot both grant the sovereign the right to punish and *renounce the right to resist violence*. As we can now also appreciate, this proposition has been interpreted by the tradition as follows: prospective subjects cannot both grant the right to punish and *retain the right to resist violence*. However, there is, for Hobbes, no antinomy within the social covenant to institute a sovereign with the right to punish for the simple reason that he does not hold the view that the right to resist violence (including the sovereign's infliction of violence) enters civil society through the social covenant. The right to resist violence or to defend one's person from violence is what Hobbes calls a "true liberty of a subject,"[47] but it is a true liberty of a subject because, Hobbes contends, it "cannot by covenant be transferred."[48] Prospective subjects covenant thus: "unless I do so, or so, [the sovereign has the right to] kill me."[49] Thus, each prospective subject grants the sovereign the right to punish him if he transgresses the law. However, each prospective subject retains the right to resist *because*, according to Hobbes, "he cannot covenant thus, unless I do so, or so, I will not resist when [persons] come to kill me."[50]

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[47] *Leviathan*, 21/10, 111.

[48] *Leviathan*, 21/11, 111. The "true liberties of a subject," thus, are liberties that a subject possesses through his natural liberties; in other words, the "true liberties of a subject" are rights that each subject has by virtue of his natural personhood and not his political citizenship. The "true liberties of a subject" is a bit of a misnomer, as they are liberties retained independent of the social covenant, i.e., the covenant that establishes political subjection.

[49] *Leviathan*, 14/29, 70.

[50] *Leviathan*, 14/29, 70.

The antinomy appears to those who mistakenly view the right to resist as secured through the social covenant in order to be held against the sovereign; and, the incompatibility between the two rights, as we have seen, lies in the purpose for granting the right to punish and the purpose for retaining the right to resist, that is, protection of the sovereign and protection from the sovereign. However, not only is the right to resist not retained for a purpose, it is not retained through the social covenant. Without an incompatible purpose set against prospective subjects' grant of the right to punish, the social covenant does not suffer from the inclusion of an antinomy. Subjects' retention, in civil society, of the right to resist violence of all kinds does not, to Hobbes's mind, pose an obstacle to prospective subjects granting the sovereign the right to punish. To attribute to Hobbes a concern for resolving an antinomy is to misunderstand Hobbes's concern in the second paragraph of Chapter 28. As we will later see in section 1.5 below, Hobbes's concern is to account for how prospective subjects generate the political right to punish when no person possesses a pre-political right to punish. Thus, what the tradition takes to be the resolution of the antinomy—the identification of the sovereign representative's right to punish with the right of nature—is unwarranted.

1.4 The Right to Punish

The tradition is mistaken to regard Hobbes as identifying the sovereign representative's right to punish with the unsurrendered right of war of the natural person who holds the office of sovereignty. Furthermore, by making such an identification, the tradition fails to capture Hobbes's understanding of punishment as an act of political authority or, what is the same, the exercise of an artificial right by an artificial person. The second paragraph of Chapter 28 is situated between articulations of the two central characteristics of

Hobbes's account of punishment: i) the act of punishment is performed by an artificial person or a person granted authority to punish, and ii) acts of punishment are distinguished from acts of hostility. It would, indeed, be uncharitable to attribute to Hobbes such a blatant contradiction as one that claims, denies, then claims again that punishment is a right that follows from subjects' authorization of the sovereign to punish them for transgressing the law.[51] In section 1.5 below I show that there is no such denial in the second paragraph. Before that, let us first take note of the contents of the paragraphs preceding and following the second.

Immediately preceding the second paragraph, Hobbes articulates the first of the two central characteristics of punishment in his definition:

> A PUNISHMENT, is an evil inflicted by public authority, on him that hath done, or omitted that which is judged by the same authority to be a transgression of the law; to the end that the will of men may thereby the better be disposed to obedience.[52]

It is important to note that the infliction of punishment is not merely characterized as a person with power inflicting harm upon another. Punishment is an act characterized as "inflicted by public authority." Hobbes's way of stating the matter is significant, as it follows from his understanding of representation and attributable actions.

The qualification of punishment as an act "inflicted by authority" or something "done by authority" draws on the distinction between actions that are authorized—i.e., those actions which are performed by a representative commissioned to so act—and those actions that do not follow from authorization. As Hobbes claims in Chapter 16 of

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[51] Showing that Hobbes holds that prospective subjects authorize the sovereign to punish them for transgressing the law is the focus of the remainder of this article. I attend to the rationale for subjects' authorization of the sovereign to punish them for transgressing the law in my second article, "Hobbes on the Rationale of Punishment."

[52] *Leviathan*, 28/1, 161; original emphases omitted.

Leviathan, "Of Persons, Authors, and Things Personated," the chapter in which he presents his theory of authorization, an act "*done by authority* [is] done by commission or license from him whose right it is."[53] Acts *done by* authority are distinguished from acts *of* authority. The latter is simply an "original" right—i.e., a right not bestowed upon a person by another—or what Hobbes also calls a "warrant," to perform an action.[54] Both acts done by authority and acts of authority are performed by a representative, but only acts done by authority are performed by an artificial representative. As we will see next, the compass of representation gives content to Hobbes's account of personhood.

Hobbes defines a "person" as follows:

> A PERSON is he whose words or actions are considered, either as his own, or as representing the words or actions of another man, or of any other thing to whom they are attributed, whether truly or by fiction. When they are considered as his own, then is he called a natural person: and when they are considered as representing the words and actions of another, then is he a feigned or artificial person.[55]

When a person acts on his own behalf—represents himself only—then that person is a "natural person." As a natural person, he *owns* the words and/or the actions that he performs, that is, he is ascribed responsibility for the act. When a person acts on the behalf of another—represents another—then that person is an "artificial person." As an artificial person, he does not own the words and actions he performs, that is, he is not ascribed responsibility for the act.

The person (or persons) who occupies the office of the sovereign does not own the act of punishment. When a subject receives a punishment for which he is liable, that

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[53] *Leviathan*, 16/4, 81.

[54] *Leviathan*, 16/4, 81.

[55] *Leviathan*, 16/1-2, 80.

subject owns the punishment. As Hobbes notes, "he that attempteth," for example, "to depose his sovereign be killed or punished by him for such attempt, *he is author of his own punishment*, as being, by the institution, author of all his sovereign shall do."[56] And to be an author of an action is to own that action. As Hobbes states, of "persons artificial, some have their words and actions *owned* by those whom they represent. And then the [artificial] person is the *actor*, and he that owneth his words and actions is the AUTHOR, in which case the actor acteth by authority."[57]An action "*done by authority*," as noted above, is "done by commission or license." Natural persons, who act *in the absence of authorization or commission*, simply represent themselves; they are the authors of the actions they perform. But, as Hobbes clearly implies (in the first quote of this paragraph), the person who occupies the office of the sovereign is *not* the author of the punishment. Hobbes claims that "every man or assembly that hath sovereignty representeth two persons, or, as the more common phrase is, has two capacities, one natural and another politic; as a monarch hath the person not only of the Commonwealth, but also of a man."[58] With regard to punishment specifically, the person who "hath sovereignty" acts in his capacity as the commissioned representative of the Commonwealth, and not in his capacity as the representative of his own person, when inflicting punishment on a subject.

Hobbes articulates the second central characteristic of punishment—that acts of punishment are distinguished from acts of hostility—immediately following the second paragraph. Of the eleven inferences Hobbes draws from his definition of punishment as

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[56] *Leviathan*, 18/3, 89; emphasis added.

[57] *Leviathan*, 16/4, 81.

[58] *Leviathan*, 23/2, 123.

an "evil inflicted by public authority," seven explicitly mark a distinction between punishment and hostility.[59] One particular inference, the eleventh, is most relevant for our purposes here. The final inference that Hobbes draws provides us with the definitive response to the traditional view. Hobbes, with the final inference, clearly rejects any identification of the right to punish with the right of war:

> Lastly, harm inflicted upon one that is a declared enemy falls not under the name of punishment: because seeing they were either never subject to the law, and therefore cannot transgress it; or having been subject to it, and professing to be no longer so, by consequence deny they can transgress it, all the harms that can be done them must be taken as acts of hostility. […] For the punishments set down in the law are to subjects, not to enemies.[60]

Harm inflicted upon another in the absence a juridical relationship, whether that relationship is severed or never existed, cannot be construed as punishment. Contrary to the orthodox interpretation, Hobbes does not hold that punishment entails a return to the state of nature. Only violent acts that are performed by a juridical authority can be construed as punishment. As Hobbes maintains, "it is of the nature of punishment to be inflicted by public authority, which is the authority only of the representative itself."[61] The sovereign does not hold authority over an enemy, which is the same as claiming that

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[59] See *Leviathan*, 28/5-7, and 9-13, 162-163.

[60] *Leviathan*, 28/13, 163.

[61] *Leviathan*, 28/12, 163. Of course, this is only one of the necessary requirements for harm to count as punishment. Additionally, punishment can only be a retributive response to a transgression of known law (*Leviathan*, 28/11, 163), thus cannot be inflicted upon the innocent (*Leviathan*, 28/22, 165) or retroactively inflicted upon subjects (*Leviathan*, 27/9, 153); it must be inflicted for the purpose of disposing obedience to the law (*Leviathan*, 28/7, p. 162); can only be inflicted after public condemnation and trial (*Leviathan*, 28/5, 162); its infliction must be consistent with declared penal law (*Leviathan*, 26/38, 148 and 28/10, 162); it cannot be inflicted upon children, fools, or madmen, all whom are incapable of authorizing or being authors of actions, i.e., being held responsible for the performance of actions (*Leviathan*, 16/10, 82); and, most significantly for our purposes here, can only be understood to be inflicted upon subjects, not enemies (*Leviathan*, 28/13, 163).

the sovereign neither directly nor indirectly represents an enemy. The sovereign does, however, hold authority over a criminal.

Not only does the sovereign hold authority over the criminal, they remain in a juridical relationship—they are tied by penal law. An enemy of the Commonwealth certainly does not have legal standing to challenge what harms may befall him. As we see in the following remarks, Hobbes holds that a criminal does have such standing:

> If a subject have a controversy with his sovereign [...] *concerning any penalty*, corporal or pecuniary, *grounded on a precedent law*, he hath the same liberty to sue for his right as if it were against a subject, and before such judges as are appointed by the sovereign. For seeing the sovereign demandeth by force of a former law, and not by virtue of his power, *he declareth thereby that he requireth no more than shall appear to be due by that law*. The suit therefore is not contrary to the will of the sovereign, and consequently *the subject hath the liberty to demand the hearing of his cause, and sentence according to that law*.[62]

The orthodox interpretation of Hobbes's account of the right to punish—whereby the right to punish is identified as the right of war—would have us ignore his theory of penal law. "*Penal* [*laws*]," according to Hobbes, "*are those which declare what penalty shall be inflicted on those that violate the law*; and speak to the ministers and officers ordained for execution."[63] Penal law declares what penalty *shall* be inflicted. The normative element that governs punishment is the declared penal law. Punishment is not tied to the capricious will of the sovereign; rather, the sovereign is held to "punishing with corporal or pecuniary punishment, or with ignominy, every subject according to the law he hath formerly made."[64] A criminal is only liable to receive penalties in accordance with penal

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[62] *Leviathan*, 21/19, 113; emphases added.

[63] *Leviathan*, 26/38, 148.

[64] *Leviathan*, 18/14, 92.

law. An enemy, conversely, "may lawfully be made to suffer whatsoever the representative will."[65]

The exercise of the right of nature—the right of war—is not bound by public law. But the institution of punishment, like all the other institutions of the Commonwealth, is administered through law. The sovereign is authorized to govern through law and, in particular, to punish through penal law. Subjects transcend the state of nature through the institution of an artificial person, *a person whose will is necessarily tied to law*; as Hobbes states, "the sovereignty is an artificial soul, as giving life and motion to the whole body [of the Commonwealth…] *equity* and *laws* [are] an artificial *reason* and *will*."[66] The "public authority" Hobbes refers to in his definition of punishment is the artificial person specially instituted by prospective subjects with the mandate to uphold the authority of law over the mutually renounced natural rights.

As I argue in the next section, it is clear that Hobbes, even in the second paragraph, does not think that the exercise of the right to punish entails the absence of a juridical relationship; the exercise of the right to punish does not transpire in the state of nature. In the second paragraph of Chapter 28, Hobbes claims that the sovereign's original right of nature provides the *foundation* of the right to punish, yet he also states that "this [right of nature] is the foundation of that right of punishing which is exercised in every Commonwealth."[67] The right to punish, according to Hobbes, is exercised *in* the Commonwealth; it is exercised within the context of a sustained juridical and political authority over the criminal. What we need, then, is to understand the relationship between

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[65] *Leviathan*, 28/13, 163.

[66] *Leviathan*, Introduction/1, 1; original emphases omitted.

[67] *Leviathan*, 28/2, 161-162.

the foundation of the right to punish and the possession by the sovereign, as a representative authority, of the right to punish. This will be the focus of the next section.

1.5 A Question of Much Importance

It remains to be shown that in the second paragraph of Chapter 28 Hobbes does not rescind the view that subjects authorize the sovereign to punish them and the right to punish is not identified as the natural right of war. In this section, I argue that the second paragraph of Chapter 28 is consistent with the other remarks Hobbes makes regarding punishment in *Leviathan*. As the lengthy second paragraph of Chapter 28 is the centerpiece of this section, it will serve us well to have it before us:

> Before I infer anything from this definition, there is a question to be answered of much importance; which is, by what door the right or authority of punishing, in any case, came in. For by that which has been said before, no man is supposed bound by covenant not to resist violence; and consequently it cannot be intended that he gave any right to another to lay violent hands upon his person [*without the corresponding presumption that he is not obliged to not resist*]. In the making of a Commonwealth every man giveth away the right of defending another, but not of defending himself. Also he obligeth himself to assist him that hath the sovereignty in the punishing of another, but of himself not. But to covenant to assist the sovereign in doing hurt to another, unless he that so covenanteth have a right to do it himself, is not to give him a right to punish. It is manifest therefore that the right which the Commonwealth (that is, he or they that represent it) hath to punish is not grounded on any concession or gift of the subjects. But I have also shown formerly that before the institution of Commonwealth, every man had a right to everything, and to do whatsoever he thought necessary to his own preservation; subduing, hurting, or killing any man in order thereunto. And this is the foundation of that right of punishing which is exercised in every Commonwealth. For the subjects did not give the sovereign that right; but only, in laying down theirs, strengthened him to use his own as he should think fit for the preservation of them all: so that it was not given, but left to him, and to him only; and, excepting the limits set him by natural law, as entire as in the condition of mere nature, and of war of every one against his neighbor.[68]

[68] *Leviathan*, 28/2, 161-162.

As we have seen, for Hobbes, there is no natural or pre-political right to punish. But this presents us with somewhat of a puzzle: how do persons generate the right to punish when they themselves do not possess such a right? Hobbes himself contemplates this very question in the second paragraph of Chapter 28: "there is a question to be answered of much importance; which is, by what door the right or authority of punishing, in any case, came in."[69] As we have seen, the tradition understands Hobbes to deny that punishment is a right that follows from subjects authorizing the sovereign to punish them for transgressing the law. But, as we have also seen, this view is contrary to Hobbes's understanding of punishment throughout *Leviathan* (and not merely in Chapter 28) as an act of authority, that is to say, as an act that, in some sense, follows from the process of authorization.

The answer to Hobbes's question set out above, simply put, is that the sovereign representative's acquisition of the right to punish follows from each subject authorizing the person (or persons) who will hold the office of sovereignty to exercise his (or their) own natural right to perpetrate violence. Each subject takes upon himself the sovereign representative's infliction of legitimate violence. One scholar recognizes Hobbes's harmonizing of the authorization by prospective subjects of the sovereign's right to punish and the sovereign's non-relinquishment of his natural right to perpetrate violence. Clifford Orwin, after remarking that Hobbes "rests it [the sovereign's right to punish] squarely upon his original unsurrendered right to all things," claims that the "answer to the question of the right or authority by which the sovereign punishes is that the right by which he punishes is *not authority* but that he punishes *by authority* and by the authority

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[69] *Leviathan*, 28/2, 161.

of him whom he punishes. The subject has authorized his punishment."[70] The mutual authorization of the sovereign's right of nature—his natural right to violence—is the basis of the artificial right to punish.

This, I think, captures how Hobbes intends us to understand the second paragraph of Chapter 28. And this view is not *ad hoc*. We find that Hobbes articulates this view in an earlier chapter. According to Hobbes, "the consent of a subject to sovereign power is contained in these words, *I authorise, or take upon me, all his actions*; in which there is no restriction at all of his own former natural liberty."[71] There are no restrictions on the sovereign's exercise of his own *former natural liberty*—it is a former natural liberty or right, as the right, insofar as the sovereign representative exercises it, is an artificial right. There is no restriction "excepting," as Hobbes reminds us in the second paragraph of Chapter 28, "the limits set him by natural law,"[72] and excepting the duties the prospective sovereign acquires by virtue of representing the Commonwealth. The prospective sovereign's duty is closely tied to political representation: as Hobbes claims, political representation follows when prospective subjects "appoint one man, or assembly of men, to bear their person; and every one to own and acknowledge himself to be author of whatsoever he that so beareth their person shall act, or cause to be acted," with the assumption that such representation is limited to, that is, ownership is limited to, "those things which concern the common peace and safety."[73] The right of nature is the

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[70] Clifford Orwin, "On the Sovereign Authorization," 31; emphases added.

[71] *Leviathan*, 21/14, 112.

[72] *Leviathan*, 28/2, 162.

[73] *Leviathan*, 17/13, 87.

foundation of the right to punish, but the right to punish is not identified as the right of nature. The artificial right to punish is bound to "*salus populi* (the people's safety),"[74] and not to the capricious will of the person who exercises the right of nature.

We must appreciate that the artificial right to punish is not exceptional. There is, for Hobbes, neither a pre-political right to make law nor a pre-political right to the judicature (to adjudicate legal controversies).[75] There is no pre-political right to make law, but there is a pre-political right to undertake to coerce another. There is no pre-political right to the judicature, but there is a pre-political right to pass judgment on what equity (or the other laws of nature, as the means to peace) requires. And there is no pre-political right to punish, but there is a pre-political right to perpetrate (retributive) violence. The natural right to coerce, pass judgment on equity, and perpetrate violence, respectively, serve as the foundation of the artificial rights of the three principal branches of government. The tradition's focus, as we have seen, is placed on the (purported) failure to authorize punishment. Of course, the focus was predicated upon the (mistaken) supposition of an antinomy within the social covenant. However, we recognize a similar puzzle in the right to make law and the right to adjudicate legal controversies when we recognize that both of these rights belong only to the state as well. Like punishment, the making of law and the making of judicial decisions are exclusively acts of political representation. The issue of the foundation of the legislative and judiciary branch of government is very much tied to the issue of the foundation of the executive branch. As

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[74] *Leviathan*, Introduction/1, 1.

[75] Nor, for that matter, is there a pre-political right to levy taxes, commit others to war, censor opinions or doctrines, etc.—such rights all which belong to what Hobbes calls "the essence of sovereignty" (*Leviathan*, 18/16, 92).

we can appreciate, the solution to this particular problem of punishment is intimately tied to Hobbes's general account of political representation.

The authorization of the sovereign to punish transgressors is the "door by which the right or authority of punishing came in." The right to punish is exercised by the one person (or assembly of persons) who is authorized to represent the Commonwealth (and, as we have seen, the right is "exercised *in* the Commonwealth"). It is when certain background conditions are met that we construe the sovereign's infliction of violence as the exercise of the right to punish. It would, thus, be mistaken to identify the foundation of the right to punish—the sovereign's right of nature—with the right to punish. Such identification entails that all acts of violence that the person (or persons) who occupies the office of sovereignty perpetrates on subjects are legitimate acts of punishment. However, as I claimed in section 1.4 above, the juridical context in which the exercise of the right to punish occurs requires the fulfillment of many conditions for the infliction of harm or violence to be construed as punishment; and it is the failure to fulfill these conditions that entails that the harm is to be construed as an act of hostility. To re-iterate, an act of violence, to be construed as punishment *proper*, must meet the following conditions: it must, first and foremost, be inflicted by public (political) authority; it must be a retributive response to a transgression of known law (thus, there can be no retroactive punishment or the punishment of the innocent[76]); it must be inflicted for the purpose of disposing obedience to the law;[77] it can only be inflicted after public

[76] Hobbes's concern with the punishment of the innocent warrants its own analysis, which I provide in my third article, "Hobbes on the Punishment of the Innocent."

[77] Hobbes's concern with the purpose of punishment warrants its own analysis, which I provide in my second article, "Hobbes on the Rationale of Punishment."

condemnation and trial; its infliction must be consistent with declared penal law; it can only be inflicted upon rational persons; and it can only be inflicted upon subjects, not enemies.[78] When the person or persons who "hath sovereignty" fulfills this mandate in punishment, then we understand him (or them) to act in the capacity as the sovereign representative, and the act of violence is construed as an act of punishment.

The right of nature serves as the *foundation* of the right to punish because prospective subjects do not make a gift of the right to punish. As Hobbes contends, "[i]t is manifest therefore that the right which the Commonwealth (that is, he or they that represent it) hath to punish is not grounded on any concession or gift of the subjects."[79] Prospective subjects do not possess a right to punish. As noted in section 1.2 above, Hobbes's view of punishment does not align with the views of Locke or Grotius.[80] For Hobbes, there is no pre-political right to punish. Hobbes reiterates this position in the second paragraph of Chapter 28, this time in the context of the generating of an artificial right. As Hobbes states,

> Also he [each prospective subject] obligeth himself to assist him that hath the sovereignty in the punishing of another, but of himself not. But to covenant to assist the sovereign in doing hurt to another, unless he that so covenanteth have a right to do it himself, is not to give him a right to punish.[81]

No prospective subject has a right to do "it" himself; no prospective subject has a pre-political right to punish. But the fact that the right is not based on a gift or concession

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[78] See *infra* note 61 above for the references to each of these requirements of punishment.

[79] *Leviathan*, 28/2, 161.

[80] See *infra* notes 20 and 21 above.

[81] *Leviathan*, 28/2, 161.

does not entail that the right is not granted to the prospective sovereign. We have, thus, come full circle. As I mentioned at the beginning of this paper, in Chapter 18 of *Leviathan*, "Of the Rights of Sovereigns by Institution," Hobbes contends that mutual authorization by prospective subjects is the means by which "all the *rights* and *faculties* of him, or them, on whom the sovereign power is conferred by the consent of the people assembled."[82] The right to punish is included in the catalogue of rights *conferred* upon the sovereign, a list which Hobbes provides in the same chapter. Hobbes maintains, "to the sovereign is *committed* the power of rewarding with riches or honour; and of punishing with corporal or pecuniary punishment, or with ignominy, every subject according to the law he hath formerly made."[83] Authorization, as a process of commissioning another as a representative, does not require the licence or warrant to exercise the right; authorization does not require that one gift or transfer to another a right that one possesses. A grant or commission of authority simply entails that the person of authority—the representative—is not responsible for those actions that fall within the commission of authority. As Hobbes makes it clear in the second paragraph—"the right which the Commonwealth (that is, he or they that *represent* it) hath to punish"[84]—representation (of the Commonwealth) is the central issue in understanding the right to punish.

Before concluding this paper, we must attend to one final question: why, we may ask, do subjects not each "gift" the sovereign their respective natural right to perpetrate

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[82] *Leviathan*, 18/2, 88.

[83] *Leviathan*, 18/14, 92; emphasis added.

[84] *Leviathan*, 28/2, 161; emphasis added.

violence? If the natural right to violence serves as the foundation of the political right to punish, then why do prospective subjects not grant this right, which each of them possesses in the state of nature, to the prospective sovereign? The answer Hobbes provides, simply put, is that prospective subjects mutually renounce the natural right to perpetrate violence. As Hobbes states in the second paragraph of Chapter 28, prospective subjects, "in laying down theirs [their right to everything], strengthened him to use his own as he should think fit."[85] The mutual relinquishment by prospective subjects of the natural right to perpetrate violence is central to Hobbes's account of transitioning from the state of nature to a state of peace. As we see, this mutual relinquishment is required by the second law of nature:

> From this fundamental law of nature, by which men are commanded to endeavour peace, is derived this second law: that a man be willing, when others are so too, as far forth as for peace and defence of himself he shall think it necessary, to lay down this right to all things […] For as long as every man holdeth this right, of doing anything he liketh; so long are all men in the condition of war.[86]

[85] *Leviathan*, 28/2, 162. As mentioned in *infra* note 2 above, to transfer a particular natural right, according to Hobbes, is to oblige oneself to not interfere with the exercise of the right by the particular person or persons to whom you transferred. See *Leviathan*, 14/7, 65: "Right is laid aside, either by simply renouncing it, or by transferring it to another. By *simply* RENOUNCING, when he cares not to whom the benefit thereof redoundeth. By TRANSFERRING, when he intendeth the benefit thereof to some certain person or persons. And when a man hath in either manner abandoned or granted away his right, then is he said to be OBLIGED or BOUND, not to hinder those to whom such right is granted, or abandoned, from the benefit of it." To transfer the right to violence to the sovereign, that is, for each prospective subject to "gift" the prospective sovereign the right to violence, entails that each retains the right to violence against each other. To establish peace amongst one another, each prospective must renounce the right to perpetrate non-defensive violence.

[86] *Leviathan*, 14/5, 63; original emphasis omitted.

The right to inflict retributive harm must belong *exclusively* to the state.[87] The state possesses a monopoly on legitimate retributive violence. To claim otherwise would be to hold that persons retain, in civil society, something akin to what Hobbes calls the "right of zeal."[88] This was a right, in Judaic Law, that provided the witness of a killing to stone to death the killer. This right, exercised in civil society, Hobbes cautions, was not a private right, or "was not by right of private zeal."[89] According the Hobbes, "the lawfulness of [the] act [i.e., the stoning] depended wholly upon a subsequent ratification by Moses."[90] The exercise of the right to kill a killer, although granted by God to his people, is not an act of punishment until the sovereign determines that capital punishment should be administered in this fashion. As Hobbes states, "neither private revenges, nor injuries of private men can properly be styled punishment, because they proceed not from public authority."[91] It is the prospective sovereign's own right of nature, in this case, the right to stone to death a killer, that serves as the foundation of the political or artificial right to punish a murderer.

Like all rights of sovereignty, the right to punish must be both exclusive and universal; that is to say, only the sovereign can possess such a right and each subject must be liable for punishment. Hobbes claims that the right "is left to him and to him only, and, excepting the limits set him by natural law, [is] as entire as in the condition of mere

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[87] Again, the right to punish belong to what Hobbes calls "the essence of sovereignty" (*Leviathan*, 18/16, 92).

[88] *Leviathan*, Review and Conclusion/10, 392.

[89] *Leviathan*, Review and Conclusion/11, 393.

[90] *Leviathan*, Review and Conclusion/11, 393.

[91] *Leviathan*, 28/3, 162; emphasis added.

nature, and of war of every one against his neighbour."[92] The right to punish is "as entire as in the condition of mere nature." But, we must note, Hobbes here does not claim that the right to punish is exercised in the state of nature, as many commentators have taken him here to imply.[93] Hobbes's claim concerns the universality of scope of the natural right to perpetrate violence: the possession of the right of nature, as a right to everything, entails that no person possess an immunity against another's exercise of the right; in particular, everyone in the state of nature is liable to be a recipient of violence. It is that universality of scope of the right to perpetrate violence that is carried over into the Commonwealth. No subject possesses an immunity against the sovereign's infliction of *legitimate* violence.

1.6 Conclusion

Two seminal seventeenth-century philosophers, John Locke and Samuel Pufendorf, sketched the contours of the interpretation of Hobbes's punishment theory that together have become orthodoxy. In a rather transparent allusion to Hobbes, Locke, almost forty years after the publication of *Leviathan*, criticizes his account of the relationship between sovereign and citizen. Locke writes:

> Betwixt subject and subject, they [defenders of absolute monarchies] will grant, there must be measures, laws and judges, for their mutual peace and security: but as for the *ruler*, he ought to be *absolute*, and is above all such circumstances; because he has power to do more hurt and wrong, it is right when he does it. To ask how you may be guarded from harm, or injury, on that side where the strongest hand is to do it, is presently the voice of faction and rebellion: as if when men quitting the state of nature entered into society, they agreed that all of them but one, should be under the restraint of laws, but that he should still retain all the liberty of the state of

[92] *Leviathan*, 28/2, 162.

[93] See *infra* notes 17 and 18 and corresponding text above.

> nature, increased with power, and made licentious by impunity. This is to think, that men are so foolish, that they take care to avoid what mischiefs may be done them by *pole-cats*, or *foxes*; but are content, nay, think it safety, to be devoured by *lions*.[94]

Law mediates subjects' relations. But the sovereign is above the law or juridical accountability. The sovereign alone retains the natural right to all things, and this follows from the agreement among prospective subjects to relinquish such a right. The sovereign's authority to do hurt is simply the product of the monopoly of power. Accordingly, any hurt inflicted by the sovereign upon a subject, Locke notes, "is right when he does it." Locke's interpretation captures the orthodox interpretation of Hobbes's view canvassed in this paper.

This interpretation, however, is at odds with much of what Hobbes has to say about punishment and the penal law. As noted in section 1.4, those who sentence and execute punishment, as representative of the sovereign's authority, are bound by the declared penalties that *shall* be inflicted. When addressing the issue of punishment directly, Hobbes explicitly connects the norms of penal law with the infliction of penalties: "if a punishment be determined and prescribed in the law itself, and after the crime committed there be a greater punishment inflicted, the excess is not punishment, but an act of hostility."[95] For Hobbes, inflicted physical harms, imposed pecuniary fines, or sentenced prison terms in excess of what the law prescribes do not count as punishment. The sovereign representative steps beyond the commission or authority to punish on those occasions when the penal law is ignored or overridden. The criminal, as we have seen, has the legal standing to challenge an imposed sentence that is greater than

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[94] Locke, *Second Treatise of Government*, Chap. 7, §93.

[95] *Leviathan*, 28/10, 162.

the law prescribes.[96] Such recourse takes place within the courts. And although judges are commissioned by the sovereign, this does not entail that they will be biased. Judges, according to Hobbes, are required to adjudicate according to "*a right understanding* of that principal law of nature called *equity.*"[97] Any adjudicated repeal of an iniquitous sentence is not contrary to the sovereign's will. The amended sentence accords with the sovereign's declared law.

Samuel Pufendorf, thirty or so years after Hobbes wrote *Leviathan*, criticizes Hobbes as trying to derive the right to punish from the sovereign's right to all things; Pufendorf writes:

> [I]n his *Leviathan*, chap, xxviii, [Hobbes] lays down that the right held by a state to punish does not arise from the concession of citizens, but that the foundation of this right is based upon that other, which, before the establishment of a state, belongs to every man, namely, to do whatever seemed to him necessary for self-preservation. And that therefore this right was not given but left to the state, which [...] it may use at its own pleasure, supposing it has the strength, in order to preserve all its citizens. To this reply can be made that the right to exact punishment differs from that of self-preservation, and that since the former is exercised over subjects, it is impossible to conceive how it already existed in a state of nature, where no one man is subject to another.[98]

Pufendorf, and most Hobbes commentators subsequent to him, interpret Hobbes as identifying the right to punish as the right of nature. However, instead of attributing to Hobbes the somewhat perplexing view that the infliction of punishment occurs in the absence of a juridical relationship, as most Hobbes commentators have done, Pufendorf does not give any credence to this view. Punishment, as Pufendorf hints at in the passage,

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[96] See *infra* note 62 and corresponding text above.

[97] *Leviathan*, 26/28, 146.

[98] Samuel Pufendorf, *The Law of Nature and Nations*, viii, 3, §1.

occurs within the bounds of a legal and political order. We cannot, according to Pufendorf, generate the artificial right to punish by identifying such a right with the right of nature. Pufendorf is correct: this identification does not, by itself, generate a right to punish. But, as we have seen, this reading misrepresents Hobbes's account. Hobbes, like Pufendorf after him, does not contend that persons posses a pre-political right to punish.[99] The generation of the rights of sovereignty, including the right to punish, like the generation of the Commonwealth itself, "resemble[s] that fiat, or the *let us make man*, pronounced by God in the Creation."[100] The Commonwealth, and all the rights of its representative, is the product of an artifice or political craftsmanship, built upon a social convention understood to be made outside of (or prior to) civil society. As Hobbes states:

> For by art is created that great LEVIATHAN called a COMMONWEALTH, or STATE (in Latin, CIVITAS), which is but an artificial man, though of greater stature and strength than the natural, for whose protection and defence it was intended; and in which the sovereignty is an artificial soul, as giving life and motion to the whole body; […] *reward* and *punishment* (by which fastened to the seat of the sovereignty, every joint and member is moved to perform his duty) are the nerves, that do the same in the body natural.[101]

Unlike God, however, persons' generative powers are limited to their natural capacities and rights, and these serve as the grounds for the edifice of the Commonwealth. The natural right to inflict violence serves as the foundation of the juridical right to punish in the same way that the natural right to coerce serves as the foundation of the juridical right to make law. As I argued in this paper, it is the juridical context in which the person

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[99] See Pufendorf, *The Law of Nature and Nations*, viii, 3, §2: ""For those who live in natural liberty there is no place for punishment," and "the enforcement of one's subjective claims is only by means of war; but evils inflicted by means of war are not […] punishments in the proper sense of the word."

[100] *Leviathan*, Introduction/1, 1.

[101] *Leviathan*, Introduction/1, 1.

who holds the office of the sovereign and who possesses the full right of nature—the right to everything—inflicts violence that such violence is to be construed as punishment. Authorization provides the norms for this juridical context; that is to say, the right to punish is a political right by virtue of prospective subjects authorizing the prospective sovereign to represent the Commonwealth when inflicting violence upon one of its members.

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Article 2

2 Hobbes on the Rationale of Punishment

2.1 Introduction

The threat of punishment plays a central and indispensable role in Thomas Hobbes's political theory. Hobbes defines punishment as follows:

> A PUNISHMENT is an evil inflicted by public authority on him that hath done or omitted that which is judged by the same authority to be a transgression of the law, to the end that the will of men may thereby the better be disposed to obedience.[1]

Punishment involves the deliberate infliction of suffering, by the state, upon its citizens. Like most theorists who provide a justification for the practice of deliberately inflicting harm or threatening to inflict harm on a citizen, Hobbes thinks that the practice is necessary. Punishment, according to Hobbes, "dispos[es] the delinquent or, by his example, other men to obey the laws."[2] Such remarks seem representative of a straightforward deterrence theory of punishment. And, in fact, Hobbes is often cast as a pure or simple deterrent theorist, which bears out in two related views commonly attributed to him.

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[1] *Leviathan*, 28/1, 161. References to *Leviathan* are by chapter and paragraph(s) in the G.C.A. Gaskin (1996) edition, followed by page number(s) in the original (1651) edition. Other Hobbes works will be cited as follows: References to *De Cive* are by chapter and paragraph(s) followed by the page number(s) of the Howard Warrender English edition. References to *A Dialogue between a Philosopher & a Student of the Common Laws of England* are by page number of the Joseph Cropsey edition, followed by page number of original (1681) edition. All emphases are in the original works unless otherwise noted.

[2] *Leviathan*, 28/7, 162.

The first view is that, for Hobbes, the *rationale* of punishment is to *deter* transgressions of the law. As Gregory S. Kavka notes, "[t]he general justification," for Hobbes, "for applying punishments for law violations is a purely forwardlooking one: to prevent crime, primarily by deterrence."[3] We find this kind of rationale in the works of the classical utilitarians to whom Hobbes is often cast as a precursor. As Mario A. Cattaneo notes, the "outline of the purposes of punishment [prevention and correction] leads me to conclude that Hobbes's conception contains in essence the basic principles of a utilitarian theory of punishment, principles that were later developed and elaborated by Beccaria and Bentham."[4]

The second view is that, for Hobbes, each citizen requires the threat of punishment to motivate social justice—social justice understood as keeping to the social covenant that places the authority of the law over renounced natural rights. In other words, the standard view is that, for Hobbes, the threat of punishment is a necessary *coercive* step in motivating each citizen to conform to the law. As Richard Nunan states, "[m]utually beneficial covenants find their initial justification in the fact that it is prudentially rational for individuals to agree to them [...] and their continuing justification in the fact that it is prudentially rational for individuals to adhere to them (because

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[3] Gregory S. Kavka, *Hobbesian Moral and Political Theory*, 250. See also, e.g., Dieter Hüning, "Hobbes on the Right to Punish," 227-228; John Laird, *Hobbes*, 222; D.D. Raphael, "Hobbes on Justice," 169; Alice Ristroph, "Respect and Resistance in Punishment Theory," 603; Johann P. Sommerville, *Thomas Hobbes: Political Ideas in Historical Context*, 101; Howard Warrender, *The Political Philosophy of Hobbes: His Theory of Obligation*, 184-185; and J.W.N. Watkins, *Hobbes's System of Ideas: A Study in the Political Significance of Philosophical Theories*, 96-98.

[4] Mario A. Cattaneo, "Hobbes's Theory of Punishment," 289. See, e.g., Jeremy Bentham, *The Rationale of Punishment*, Book 1, Chapter 3: "General prevention is effected by the denunciation of punishment, and by its application, which, according to the common expression, *serves for an example*. The punishment suffered by the offender presents to every one an example of what he himself will have to suffer if he is guilty of the same offense. General prevention ought to be the chief end of punishment, as it is its real justification."

violations are subject to the sovereign's wrath)."[5] In other words, on the traditional view, it is mutually beneficial for prospective subjects to renounce the right of nature, but it is individually beneficial to not exercise the renounced right because doing otherwise would prompt the sovereign to respond with the exercise of his unsurrendered natural right to violence.

Susanne Sreedhar, a proponent of the traditional view of the source of the sovereign's right to punish, notes that "[Hobbes] gives a separate explanation for the sovereign's right to punish; it is part of his right of nature and thus independent of the rights transferred to him in the social contract."[6] Because the right to punish is "independent of the rights transferred to him in the social contract," an answer to the question of the justification of punishment is, on the traditional view, independent of any appeal to the rationale for the sovereign's possession of the right to punish. According to Hobbes, the seventh law of nature requires "*that in revenges* (that is, retribution of evil for evil), *men look not at the greatness of the evil past, but the greatness of the good to follow*."[7] The "good to follow" that justifies punishment, on the traditional view, tracks the rationale for exercising the natural right to retributive violence, namely, to ensure one's own future security through deterrence. Accordingly, on the traditional view of

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[5] Richard Nunan, "Hobbes on Morality, Rationality, and Foolishness," 44-45. What we can call the standard view—that the threat of punishment is necessary to coerce citizens to conform to the law—is represented in the works of five prominent Hobbes scholars. See David Gauthier, *The Logic of Leviathan: The Moral and Political Philosophy of Thomas Hobbes*, 86; Jean Hampton, *Hobbes and the Social Contract Tradition*, 133; Kavka, *Hobbesian Moral and Political Theory*, 250; Richard Tuck, *Natural Rights Theories: Their Origin and Development*, 94; and Warrender, *The Political Philosophy of Hobbes*, 143-144. See also Dieter Hüning, "Hobbes on the Right to Punish," 229-232; Alan Norrie, "Thomas Hobbes and the Philosophy of Punishment," 315; and David van Mill, *Liberty, Rationality, and Agency in Hobbes's Leviathan*, 136.

[6] Susanne Sreedhar, *Hobbes on Resistance: Defying the Leviathan*, 16.

[7] *Leviathan*, 15/19, 76.

Hobbes's theory of punishment, the rationale for inflicting (or threatening to inflict) punishment is simply to *deter* subjects from acting contrary to the will (command) of the person who does not renounce any natural rights.

In this paper, I argue against the view that Hobbes is a straightforward deterrent theorist. We risk misunderstanding his theory of punishment if we hold Hobbes to the view that each citizen requires the threat of punishment as a coercive measure to ensure conformity to the law. The view that Hobbes is a straightforward deterrent theorist does not correspond with what Hobbes takes to be the rationale of punishment. That Hobbes holds the view that prospective subjects grant the sovereign representative the right to punish prompts us to attend to a question that is naturally overlooked by the tradition: to what end, according to Hobbes, do prospective subjects establish the institution of punishment? We ought to avail ourselves of Hobbes's account of the rationale for punishment *within* (and not *independent* of) the context of the social covenant that institutes all the rights of a sovereign representative. For Hobbes, persons are obliged in their *conscience*—obliged *in foro interno*—to the laws of nature. But, without assurance that others will conform to the laws of nature persons are not obliged *in foro externo*; that is to say, persons are not obliged in their *actions* without security.[8] In this paper, I argue that, for Hobbes, the rationale for instituting the practice of punishment is to converge the two modes of obligation. I argue that, for Hobbes, the rationale for threatening to inflict

[8] See *Leviathan*, 15/36, 79: "The laws of nature oblige *in foro interno*; that is to say, they bind to a desire they should take place: but *in foro externo*; that is, to the putting them in act, not always. For he that should be modest and tractable, and perform all he promises in such time and place where no man else should do so, should but make himself a prey to others, and procure his own certain ruin, contrary to the ground of all laws of nature which tend to nature's preservation. And again, he that having sufficient security that others shall observe the same laws towards him, observes them not himself, seeketh not peace, but war, and consequently the destruction of his nature by violence."

punishment is to maintain the convergence of the two modes of obligation in civil society; put differently, the purpose for threatening punishment for crime, for Hobbes, is to maintain "the nature of a crime,"[9] and not, as generally presumed, to deter crime. As I argue in this paper, that which takes away the obligation of the law is the lack of punishment annexed to the law, but not because punishment is a necessary coercive measure. The force of the law for most citizens, according to Hobbes, is internal and dispositional. But the conditions for which persons can rationally hold the disposition to conform to the law are met by the existence of an external and coercive threat of punishment; the threat is necessary in order that each citizens who has a disposition to conform for the sake of the law does not believe that such conformity will "make himself a prey to others, and procure his own certain ruin."[10]

Hobbes claims that *just* persons—i.e., those who hold themselves to both modes of obligation with regard to the third law of nature that dictates persons to perform their covenants—are "rare." The claim has given rise to the supposition that, for Hobbes, most persons are *unjust*, that is, that most persons require the threat of punishment to coerce the performance of covenants. In section 2.2, I dispel the basis for this supposition. I argue that Hobbes's claim of the rarity of just persons occurs within the context of his examination of the laws of nature—laws, as we have noted, that do not oblige *in foro externo* without security. The rare just person, for Hobbes, is he who performs his covenants despite the lack of security. I argue that most persons recognize the value in

[9] *Leviathan*, 27/22, 156. The full proposition reads: "That which totally excuseth a fact, and takes away from it the nature of a crime, can be none but that which, at the same time, taketh away the obligation of the law."

[10] *Leviathan*, 15/36, 79.

the convergence of both modes of obligation but, without trust, most persons will not risk procuring their ruin by holding themselves to their covenants. Most persons, I argue, are "proto just citizens." To hold otherwise—to hold that most persons are essentially unjust—would leave us without a way to make sense of the rationale for collectively instituting the sovereign via the social covenant.

The right to punish is granted to the sovereign by each prospective subject. In section 2.3, I argue that the rationale for granting the sovereign the authority to punish is to establish trust among the multitude. Each person covenants with each other person to make himself accountable to the law—i.e., accountable to the law via liability for punishment for transgressing the law—in order to elicit the trust of his fellow covenanters. The state of nature is a state of ubiquitous diffidence—mutual distrust—but not because most others are unjust or wicked persons; rather, the wicked, as Hobbes claims, are fewer than the righteous but, because the unrighteous are not easily identified, suspicion of everyone is the norm. By each person making himself liable for punishment, trust between persons is established, thus enabling the initial convergence of both modes of obligation to the laws of nature.

In civil society, the threat of punishment is directed to each subject. In section 2.4, I argue that, for most subjects, the threat does not, as a coercive measure, constitute the obligation to the law. The threat of punishment has two distinct and mutually exclusive functions. The first function is to coerce conformity to the law. The second function is to maintain the *in foro externo* obligatory status of the law. Many, if not most, subjects view the promulgation of punishments as the necessary step in maintaining the *in foro externo* obligation to the law; the promulgation of punishment gives each subject a reason to

believe that all other subjects are motivated to conform to the law, thus, continually reaffirms each subject's belief that conformity to the law will not procure his ruin. Because no subject knows with certainty that any other subject is just or unjust, the threat of punishment is necessary even if there are, in actuality, no unjust subjects.

In section 2.5, the final section of this paper, I argue that Hobbes's reply to the foole—who claims that justice is nothing but a vain word—substantiates my claim that many, if not most, subjects are just, that is, that the majority of subjects do not require the threat of punishment to coerce the keeping of the social covenant, i.e., social justice. I argue that Hobbes's reply to the foole is not to be understood as an attempt to convince the foole to conform to justice for its own sake; rather, Hobbes's reply is best understood as an attempt to silence the foole by threatening him, not with punishment, but with expulsion or banishment from civil society. Hobbes's reply to the foole is to silence those who promote injustice so as to ensure that subjects continue to believe that other subjects are motivated to conform to the law.

2.2 The Wicked and the Righteous

Justice, the third law of nature, or the third of what Hobbes calls "dictates of reason,"[11] prescribes that "*men perform their covenants made*."[12] The "definition of INJUSTICE," according to Hobbes, "is no other than *the not performance of covenant*."[13] Furthermore, Hobbes notes, "[t]he names of *just* and *unjust* when they are attributed to men, signify

[11] *Leviathan*, 15/41, 80.

[12] *Leviathan*, 15/1, 71.

[13] *Leviathan*, 15/2, 71.

one thing, and when they are attributed to actions, another."[14] The defining characteristics of the just and unjust person, respectively, according to Hobbes "signify conformity, or inconformity of manners, to reason."[15] We can draw out the distinction between unjust and just persons—the wicked and the righteous—by appealing to several passages in *Leviathan* and *De Cive*.

> [T]he injustice of manners is the disposition or aptitude to do injury, and is injustice before it proceed to act, and without supposing any individual person injured.[16]
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> [A]lthough a man should order all his actions (so much as belongs to externall obedience) just as the Law commands, but not for the Lawes sake, but by reason of some punishment annext unto it, or out of Vain glory, yet he is *unjust*.[17]
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> [T]hat man is to be accounted just, who doth just things because the Law commands it, unjust things only by reason of his infirmity; and he is properly said to be unjust who doth righteousness for fear of the punishment annext unto the Law, and unrighteousnesse by reason of the iniquity of his mind.[18]
>
> [A] righteous man does not lose that title by one or a few unjust actions that proceed from sudden passion, or mistake of things or persons, nor does an unrighteous man lose his character for such actions as he does, or forbears to do, for fear [of punishment]: because his will is not framed by the justice, but by the apparent benefit of what he is to do.[19]

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[14] *Leviathan*, 15/10, 74.

[15] *Leviathan*, 15/10, 74.

[16] *Leviathan*, 15/12, 74. 'Injury,' we should note, is not harm but, rather, a synonym for injustice.

[17] *De Cive*, 4/21, 83.

[18] *De Cive*, 3/5, 64.

[19] *Leviathan*, 15/10, 74.

We find that the unjust person has the disposition to break his covenant. The unjust person does not conform his "manner of life"[20] to reason; and, as we have seen, reason dictates that a person perform his covenants made. The just person conforms his manner of life to reason; that is, the just person is disposed to perform his covenants made.

Hobbes speaks of justice as the keeping of covenants in general. But there is one covenant in particular that is central to our consideration of conformity to the law. The fundamental covenant in Hobbes's political theory is the social covenant. This is the covenant made by each person to each other that the civil law[21] will hold authority over their renounced natural rights. The erection of a common authority is, Hobbes notes,

> made by covenant of every man with every man, in such manner as if every man should say to every man: *I authorize and give up my right of governing myself to this man, or to this assembly of men, on this condition; that thou give up, thy right to him, and authorize all his actions in like manner*.[22]

What we can call "social justice"—i.e., the performance of the social covenant—entails the continued recognition of the sovereign's laws as holding authority over renounced natural rights. Conversely, "social injustice"—i.e., the not performance of the social covenant—entails the denial of the sovereign's laws as holding authority over renounced natural rights.[23] Unlike the unjust, the just person orders all his action to conform to the

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[20] *Leviathan*, 15/10, 74.

[21] The importance of Hobbes's understanding of civil law with regard to the issue of the reason for conformity to the law will bear out later in this paper. For now, we can recognize that the civil law is sovereign's judgment of what the laws of nature require.

[22] *Leviathan*, 17/13, 87.

[23] See Tom Sorell, "Hobbes and the Morality Beyond Justice," 229: "Those who question the government's right to regulate their actions by the civil law go back on an agreement that precisely transfers the right of regulating the actions of agents from the agents to a common or sovereign power." The point I will emphasize is that committing social injustice, for Hobbes, is akin to committing treason or sedition.

law for the law's sake. That a just person conforms his manner of life to the law for the law's sake should not be read in a Kantian light: the law is not understood to be good in-itself. The law, for Hobbes, has an immutable *purpose* and to conform to the law for the law's sake is to conform for this purpose. According to Hobbes,

> The laws of nature are immutable and eternal; for injustice, ingratitude, arrogance, pride, iniquity, acception of persons, and the rest can never be made lawful. For it can never be that war shall preserve life, and peace destroy it.[24]

Conformity to the law for the law's sake, for Hobbes, is conformity to the law for the sake of peace—peace as the surest means to preserve life. Insofar as he does so, the unjust person acts in conformity with the law not for the law's sake but, rather, to avoid punishment for non-conformity. The threat of punishment is, for the unjust person, a coercive measure that secures conformity to a particular law on a particular occasion.

Lastly, a just person, on the one hand, does not thereby become unjust subsequent to occasional transgressions of the law or the occasional commitment of unjust acts (crime) that "proceed from sudden passion, or mistake of things or persons."[25] The commitment of an unjust act (crime) does not entail the perpetration of social injustice (treason or sedition, i.e., the denial of the authority of the sovereign). According to Hobbes, the "source of *every* crime is some defect of the understanding or some error in reasoning or some sudden force of the passions."[26] There does not seem to be, for Hobbes, the seamless conceptual unity between unjust acts (violations of the civil law) and the violation of social justice (the covenant that establishes the authority of the law

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[24] *Leviathan*, 15/28, 79.

[25] *Leviathan*, 15/10, 74.

[26] *Leviathan*, 27/4, 152; emphasis added.

over renounced natural rights) that is often attributed to his socio-political theory.[27] A civil transgression that proceeds from a defect of the understanding or some error in reasoning or some sudden force of the passions does not entail—or, at the very least, does not *necessarily* entail—a denial of the authority of the law.[28] Crime due to the defect of the understanding, according to Hobbes, is merely ignorance of the law or ignorance of the sovereign's judgment.[29] Crime due to sudden forces of the passions is, arguably, the most common cause of transgressions of the law; as Hobbes notes, "they [passions] are

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[27] See Gauthier, *The Logic of Leviathan*, 148:"the person punished, in violating the civil law, has violated an obligation undertaken in the institution of the sovereign, and so has already placed himself, in effect, in the state of nature." See also Claire Finkelstein, "A Puzzle About Hobbes on Self-Defense," 357: "Private citizens who act offensively are violating the terms of their Covenant. […T]hey have placed themselves in a posture of war towards the rest of civil society." Norberto Bobbio, *Thomas Hobbes and the Natural Law Tradition*, 141: "we can remark that the covenant between sovereign and [recalcitrant] subject has been broken. Both are back in the state of nature, that is, in that condition in which everyone has as much right as he has power." And Alice Ristroph, "Respect and Resistance in Punishment Theory," 615: "[o]nce a subject has disobeyed the sovereign, he and the sovereign are in the state of nature vis-à-vis each other. […T]he criminal has put himself and the sovereign into a conflict with no mutually recognized third-party adjudicator."

[28] The second source of crime, for Hobbes, does appear to seamlessly tie together unjust acts and injustice. Hobbes notes that "[f]rom defect in reasoning (that is to say, from error), men are prone to violate the laws three ways" (*Leviathan*, 27/10, 153). It is the first with which we are here interested. "First," according to Hobbes, "by presumption of false principles, as when men (from having observed how, in all places and in all ages, unjust actions have been authorized by the force and victories of those who have committed them, and that potent men, breaking through the cobweb laws of their country, the weaker sort, and those that have failed in their enterprises, have been esteemed the only criminals) have thereupon taken for principles, and grounds of their reasoning, That justice is but a vain word; that whatsoever a man can get by his own industry, and hazard, is his own; that the practice of all nations cannot be unjust; that examples of former times are good arguments of doing the like again, and many more of that kind; which being granted, no act in itself can be a crime, but must be made so (not by the law, but) by the success of them that commit it" (*Leviathan*, 27/10, 153). Hobbes is here implying that this particular source of transgression follows from the presumption that the determination of what constitutes legal transgressions is not grounded in justice (i.e., the social covenant that holds the authority of the sovereign's law over renounced natural rights) but, rather, the determination of those who gain the kingdom by successful rebellion. This, as we shall see in section 2.5 below, is the foole's position, and, accordingly, warrants its own analysis.

[29] See *Leviathan*, 27/4, 152.

infirmities so annexed to the nature [...] of man."[30] With regard to fear in particular, Hobbes reflects that "in many cases a crime may be committed through fear."[31] Furthermore, according to Hobbes, only an "extraordinary use of reason"[32] can hinder the manifestation of a sudden passion. Accordingly, one cannot be accused of willfully acting *against* reason—against reason's dictate to recognize the authority of the law—when one's reason is overcome by passion.

An unjust person, on the other hand, does not view the law as holding authority over his renounced natural rights. Conformity to the law does not thereby make an unjust person just; as Hobbes notes, such a person is not just but, rather, "*guiltless*."[33] But the commitment of an unjust act by an unjust person does not entail the commitment of social injustice. One commits social injustice by *denying* the authority of the sovereign's laws.[34] Only the denial of the sovereign's authority shines a light on the unjust person.[35] As we will later see, the infamous foole is the definitive case of the unjust person for *declaring* the reasonableness of injustice.

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[30] *Leviathan*, 27/18, 155.

[31] *Leviathan*, 27/19, 155.

[32] *Leviathan*, 27/18, 155.

[33] *Leviathan*, 15/11, 74.

[34] We have to be careful not to assume that only voiced denials of sovereign authority are injustices. Some acts, for Hobbes, count as social injustice or treason, for example, an attempt on the king's life. For a fuller list of such treasonous acts, see *A Dialogue between a Philosopher & a Student of the Common Laws of England*, 101-110/87-103.

[35] The difficulty of ostensibly distinguishing just from unjust persons is, for Hobbes, significant. As we will see in the next section, it is this difficulty that plays a significant role in the rationale for instituting punishment.

With a clearer distinction in hand between just and unjust persons, we can move on to a central claim I want to defend in this paper. Hobbes, I contend, holds just or righteous persons to comprise the majority of citizens of a politically stable Commonwealth. Most citizens, for Hobbes, view the law as reason-giving; that is to say, that the sovereign legally prescribes (or proscribes) an action provides most citizens with a sufficient reason for acting (or not acting). The above view stands opposed to the standard view that the sufficient reason for conforming to the law lies in the avoidance of punishment for non-conformity. The view I attribute to Hobbes, that most citizens are just persons, seems countered by Hobbes's own claim that the just person is "rarely found."[36] This claim, undoubtedly, has led to or reinforced the (mistaken) supposition that, for Hobbes, most citizens are unjust, i.e., that most citizens require the threat of punishment to coerce conformity to the law. However, the context of Hobbes's claim of the rarity of just persons, which I examine below, attends to the just person in the state of nature. Given this context, I argue that we cannot hold Hobbes to imply that the just person is the exception in civil society.

Martin Harvey, who attends to Hobbes's considerations of motivating justice, argues that the 'just man' is not a textual aberration, but (what Harvey calls) a "live option" for Hobbes.[37] Hobbes, Harvey argues, allows for the possibility that a person may

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[36] *Leviathan*, 15/10, 74. Commentators who earnestly attend to Hobbes's just person (just man), with one exception, emphasize the rarity of such a person. See, e.g., Martin Harvey, "A Defense of Hobbes's 'Just Man,'" 68; F.C Hood, *The Divine Politics of Thomas Hobbes*, 113; K.R Minogue, "Hobbes and the Just Man," 82; Keith Thomas, "Social Origins of Hobbes's Political Thought," 202-203. Cf. A.E. Taylor, "The Ethical Doctrine of Hobbes," *Philosophy* 13 (1938): 408.

[37] Harvey, "A Defense of Hobbes's 'Just Man,'" 68.

be motivated by justice. However, Harvey claims that such a person is, as he thinks Hobbes intimates, a rare exception:

> A host of sovereign carrots, and much more likely sticks, are necessary to insure that we physically do as we morally ought. For most of us, "blinded by self love," a motivational gap will obtain between what we do and what we ought to do. Hobbes's Just Man is a notable, albeit rare, exception.[38]

Hobbes's claim that the just person is "rarely found," however, requires context: the claim is situated within his treatment of the laws of nature—laws that oblige *in foro interno* (one's conscience), but do not, without security, oblige *in foro externo* (one's actions). Of the just man (the just person), Hobbes claims: "he that should be modest and tractable, *and perform all he promises* [*covenants*] *in such time and place where no man else should do so,* should but make himself a prey to others."[39] A person who makes himself prey to others, Hobbes notes, "procure[s] his own certain ruin, contrary to the ground of all laws of nature which tend to nature's preservation."[40] Hobbes is here implying that in the state of affairs *outside of civil society* it is possible for a just person to exist, but that such a person would probably not exist for very long. In such a state, only in breaking one's promise does a person stand a chance to profit at the expense of another.[41]

Hobbes claims that the just person is a rare exception a few paragraphs preceding the above quotes: according to Hobbes, "[t]hat which gives to human actions the relish of

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[38] Harvey, "A Defense of Hobbes's 'Just Man,'" 83.

[39] *Leviathan*, 15/36, 79; emphasis added.

[40] *Leviathan*, 15/36, 79.

[41] Not discounting, of course, the option to profit by physical violence, as distinguished from profit by deception or fraud.

justice is a certain nobleness or gallantness of courage, *rarely found*, by which a man scorns to be beholding for the contentment of his life to fraud, or breach of promise."[42] We can only make sense of this quote, however, if the context is taken to be the same as the quotes immediately preceding this one, namely, the keeping of promises despite the absence of security. The kind of just person rarely found is the person who finds the third law of nature—"*that men perform their covenants made*"[43]—to oblige both *in foro interno* and *in foro externo* regardless of the lack of security because, we must recognize, with the presence or establishment of security *there is no need for the contentment of life to be beholden to gain by fraud or breach of promises*. The security the sovereign provides abolishes such a need to profit by fraud or breach of promises.[44] And, almost as important, the overly moralistic tone implied by the *scorn* of such behaviour is also toned down. With the convergence of morality[45] and civil law[46] that follows from the covenant to institute a sovereign, the projection of intrinsic value to promise-keeping, which

[42] *Leviathan*, 15/10, 74; emphasis added.

[43] *Leviathan*, 15/1, 71.

[44] Of course, the possibility to profit by deception or fraud remains, but the *need* does not.

[45] That is, the laws of nature, as the "true and only moral philosophy" as "conclusions or theorems concerning what conduceth to the conservation and defence of themselves" (*Leviathan*, 15/41, 79).

[46] See *Leviathan*, 26/8, 138: "The law of nature and the civil law contain each other and are of equal extent. For the laws of nature, which consist in equity, justice, gratitude, and other moral virtues on these depending, in the condition of mere nature (as I have said before in the end of the fifteenth Chapter), are not properly laws, but qualities that dispose men to peace and to obedience. When a Commonwealth is once settled, then are they actually laws, and not before; as being then the commands of the Commonwealth; and therefore also civil laws."

Harvey attributes to the just person, is no longer the defining characteristic of a just person.[47]

As noted, the just person, for Hobbes, is characterized by the determination to conform one's manner of life to reason. Conformity to reason in civil society is conformity to the sovereign's reason, that is, the sovereign's determination of what the laws of nature require or, what is the same, what peace requires. The majority of prospective subjects, considered in the state of nature, are what we can call "proto just citizens." Most prospective subjects recognize the value of the convergence of both modes of obligation—i.e., *in foro interno* and *in foro externo* obligation. The convergence of both modes of obligation institutes the conditions upon which trust is based and, as a corollary, the conditions upon which peace is based. It is important for us to appreciate that if most prospective subjects did not recognize the value of such a convergence, the fundamental law of nature—"*that every man ought to endeavour peace*"[48]—would not motivate the instituting of a sovereign. As I attempt to show in the remainder of this paper, once the sovereign is instituted, the just person, for Hobbes, is not the rare exception but, rather, makes up the majority of citizens. As Hobbes claims, "[f]or in that they [the laws of nature] require nothing but endeavour, he that

[47] If it ever was, as pride seems to have been the underlying characteristic of the just person in the state of nature. See *Leviathan*, 14/31, 70: "The force of words [in the absence of the force of the sovereign] being (as I have formerly noted) too weak to hold men to the performance of their covenants [in the state of nature], there are in man's nature but two imaginable helps to strengthen it. And those are either a fear of the consequence of breaking their word [e.g., expulsion from confederations], or a glory or pride in appearing not to need to break it. This latter is a generosity too rarely found."

[48] *Leviathan*, 14/4, 64.

endeavoureth their performance fulfilleth them; and he that fulfilleth the law is *just*."[49] A politically stable Commonwealth, for Hobbes, entails the majority of its citizens endeavour justice.

The motivation gap to which Harvey refers—i.e., the gap between what we want to do and what we ought to do—assumes a view of the citizen commonly attributed to Hobbes, namely, that most, if not all, citizens require the threat of punishment (or "sticks," as opposed to "carrots," as Harvey puts it) to bridge such a gap. This is the standard interpretation, but this interpretation does not correspond with Hobbes's thinking.[50] Attending to Hobbes's consideration of prospective subjects' rationale for introducing the practice of punishment into civil society—i.e., the end for which prospective subjects establish the institution of punishment—reveals the standard interpretation of Hobbes's view of juridical coercion to be mistaken.

2.3 The Rationale for Instituting the Practice of Punishment

In Hobbes's depiction of the state of nature or state of affair outside of civil society, persons are not *held* to account for any transgressions of the laws of nature; no person can wrong another. As Hobbes states, "for there being no other law remaining [outside of civil society] but that of nature, there is no place for accusation; every man being his own judge, and accused only by his own conscience."[51] The *obligation to others* is absent in

[49] *Leviathan*, 15/39, 79; emphasis added.

[50] Brian Barry, "Warrender and his Critics," 127, is, as far as I am aware, the rare scholar who challenges the standard interpretation: "it is not that the sovereign obliges you to obey him by threatening sanctions if you don't, but rather that the sovereign removes the usual excuses which prevent promises from being obligatory."

[51] *Leviathan*, 27/3, 152.

the state of nature. To be sure, a person can transgress the laws of nature, but the violation is of his own conscience. What is absent is the voluntary undertaking of accountability. Without such an undertaking, the obligation to others does not exist; as Hobbes states, "there being no obligation on any man which ariseth not from some act of his own."[52] This accountability is introduced via the social covenant. Each person covenants with each other that those invasive liberties or rights held in the state of nature will be renounced. The second law of nature requires—reason dictates—the renouncement of invasive rights:

> [*T*]*hat a man be willing, when others are so too, as far forth as for peace and defence of himself he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men as he would allow other men against himself.*[53]

And, Hobbes adds, because "covenants, without the sword, are but words and of no strength to secure a man at all,"[54] it is necessary to introduce a mutual power to hold persons to their mutual covenant to renounce invasive rights. Each individual makes himself accountable to the law insofar as each individual is party to the covenant to institute a sovereign—i.e., the instituting of law that includes punishment for transgressions.

The above explication requires a bit more precision. Each person is always already accountable to the laws of nature in the limited sense that each person is obliged *in foro interno*—i.e., obliged in the internal forum or in one's conscience. Accordingly, each person covenants to hold himself publically accountable to the laws of nature, laws

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[52] *Leviathan*, 21/10, 111.

[53] *Leviathan*, 14/5, 64-65.

[54] *Leviathan*, 17/2, 85.

that become—or serve as the principles underlying—civil law.[55] This mutual instituting of accountability occurs by means of instituting a sovereign with the authority to punish outward acts or breaches of the *in foro externo* obligation to the law. The covenant each person makes to each other "to lay down this right to all things" and recognize the authority of the law over such renounced rights requires more than the institution of a juridical authority or an arbiter of "right reason."[56] Each person must also grant the sovereign the authority to punish; as Hobbes notes,

> If a covenant be made wherein neither of the parties perform presently, but trust one another, in the condition of mere nature (which is a condition of war of every man against every man) upon *any reasonable suspicion*, it is void: but if there be a common power set over them both, with right and force sufficient to compel performance, it is not void. For he that performeth first has no assurance the other will perform after.[57]

The aggregation of the grants of the right to punish is a collective endeavour to overcome reasonable suspicion, which, as we will see below, is due to the ubiquity of diffidence in the state of nature.[58] The voluntary introduction of the authority to punish is the collective attempt to establish for each person an *in foro externo* obligation to the laws of nature—

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[55] See *infra* note 46 above.

[56] See *Leviathan*, 5/3, 18-19: "when there is a controversy in an account, the parties must by their own accord set up for right reason the reason of some arbitrator, or judge, to whose sentence they will both stand, or their controversy must either come to blows, or be undecided, for want of a right reason constituted by Nature; so is it also in all debates of what kind soever: and when men that think themselves wiser than all others clamour and demand right reason for judge, yet seek no more but that things should be determined by no other men's reason but their own, it is as intolerable in the society of men, as it is in play after trump is turned to use for trump on every occasion that suit whereof they have most in their hand. For they do nothing else, that will have every of their passions, as it comes to bear sway in them, to be taken for right reason, and that in their own controversies: bewraying [revealing] their want of right reason by the claim they lay to it."

[57] *Leviathan*, 14/18, 68; emphasis added.

[58] It is important to note that Hobbes's use of the word "diffidence" is the archaic meaning of "distrust of other" and not the contemporary meaning of "lacking confidence in oneself."

i.e., obligation in the external forum or overt action. The establishment of *in foro externo* obligations is manifested in an original and voluntary act by each prospective subject making himself accountable to the law for his actions. Instituting punishment is instituting the holding of oneself accountable to the law.

The original motivation for introducing the holding of oneself accountable to the law is to vacate the state of nature—a state of ubiquitous diffidence. The limited epistemic access to the particular passions and motivations of others is the source of the ubiquitous diffidence and, as a consequence, the (main) cause of strife in the state of nature.[59] Hobbes emphasizes the role skepticism plays in his political philosophy, articulating the epistemic problem in the introduction to both *De Cive* and *Leviathan*:

> But this, that men are evill by nature, follows not from this principle [that every man will distrust and dread each other]; for though the wicked were fewer than the righteous, yet *because we cannot distinguish them*, there is a necessity of suspecting, heeding, anticipating, subjugating, self-defending, ever incident to the most honest and fairest conditioned.[60]

> I say the similitude of passions, which are the same in all men, *desire, fear, hope,* &c; not the similitude of the *objects* of the passions, which are the things *desired, feared, hoped,* &c; for these the constitution individual, and particular education, do so vary, and they are so easy to be kept from our knowledge, that the characters of man's heart, blotted and confounded as they are with dissembling, lying, counterfeiting, and erroneous doctrines, are legible only to him [God] that searcheth hearts.[61]

Even the most honest and fairest conditioned, Hobbes notes, will not project the qualities of honesty and fairness onto all others. But it is not that each person suspects all other

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[59] Marshall Missner, "Skepticism and Hobbes`s Political Philosophy," provides an account of the role the opacity of passions and the limited epistemic access to others' motivations plays in Hobbes's political argument. Missner argues, correctly I think, that Hobbes`s skepticism evolves and plays a more significant role in his later political works. The problem of the state of nature is, more than anything else, epistemological.

[60] *De Cive*, Author's Preface to the Reader, 33; emphasis added.

[61] *Leviathan*, Introduction/3, 2.

persons to hold a dishonest or wicked disposition. Rather, it is that each person lacks direct epistemic access to the particular motivations of others; thus, no one *particular* person can be known with anything near certainty to be an honest or righteous person. Another person's motivations can, occasionally, be discovered. But such discoveries are only made after the fact and only insofar as we draw upon our own experience for comparison while, at the same time, discounting all unrelated circumstances; as Hobbes notes,

> And though by men's actions we do discover their design sometimes; yet to do it without comparing them with our own, and distinguishing all circumstances by which the case may come to be altered, is to decipher without a key, and be for the most part deceived, by too much trust or by too much diffidence.[62]

Even though such discoveries are not beyond the faculty of inference, such discoveries are an insufficient basis for trust. A fellow today may be a competitor tomorrow. That is to say, for Hobbes, that an object today was one of aversion does not entail that the same object will not be one of desire tomorrow, or vice-versa; as Hobbes notes, "because the constitution of a man's body is in continual mutation, it is impossible that all the same things should always cause in him the same appetites, and aversion."[63] Persons in the state of nature are perilously exposed to both trust and diffidence. Too much trust leaves one exposed to betrayal; too much diffidence leads one to betray.

Persons recognize that such a state of ubiquitous diffidence is not conducive to self-preservation, as it requires (whether a person likes it or not), at times, to pre-empt anticipated violence with violence:

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[62] *Leviathan*, Introduction/3, 2.

[63] *Leviathan*, 6/6, 24.

> And from this diffidence of one another, there is no way for any man to secure himself so reasonable as anticipation; that is, by force, or wiles, to master the persons of all men he can so long till he see no other power great enough to endanger him: and this is no more than his own conservation requireth, and is generally allowed.[64]

Self-preservation requires one, at times, to risk self-preservation. This somewhat paradoxical state of internecine hostility is unsustainable. Accordingly, reason dictates to each person that he "seek peace and follow it."[65] The laws of nature, for Hobbes, are precepts of reason dictating the means to peace.[66] And peace is an end that all persons agree is good; as Hobbes attests, "so long as a man is in the condition of mere nature, which is a condition of war, private appetite is the measure of good and evil: and consequently all men agree on this, that peace is good."[67] However, as we have noted in the previous section, reason's dictate to abide by the laws of nature is *suspended* without the assurance that conformity to the laws does not risk self-preservation. Most persons desire peace. All persons *agree* that peace is good, but not all persons hold themselves this accord at all times. The vain-glorious, the unjust, and the wicked make up the latter.

Most persons desire the laws of nature to be reason-giving.[68] But there is a lack of trust among the multitude. Without assurances that others can be trusted to keep their

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[64] *Leviathan*, 13/4, 61.

[65] *Leviathan*, 14/4, 64.

[66] See *Leviathan*, 15/41, 80: "These dictates of reason men used to call by the name of laws, but improperly: for they are but conclusions or theorems concerning what conduceth to the conservation and defence of themselves."

[67] *Leviathan*, 15/40, 80.

[68] We can make the connection between the desire for peace and the desire for the laws of nature to be reason-giving more explicit by noting that the laws of nature are assertoric hypothetical imperatives; that is, self-preservation, as a given end, is universally desired, and the law provide the means for self-preservation. Peace, most people recognize, is the best means to secure one's perseveration. But the laws of nature do not provide the means to self-preservation unless all (or

covenant not to exercise renounced rights, one is not required to forgo exercising such rights or, what is essentially the same, one is not required to conform one's actions to the laws. Without assurances that others can be trusted to keep their covenant, one has no reason, so to speak, to regard the law as reason-giving. Moreover, each person also recognizes that no other person has reason to regard the law as reason-giving, for each person is aware that no other person has reason to regard him as trustworthy. So, despite the general desire for peace, because no one can distinguish whether another is one of the wicked few, the ubiquity of diffidence proves to be an almost insurmountable obstacle.

The only way for a person to genuinely elicit the trust of all others with whom he covenants to conform to law, and thus reap the rewards of the covenant, is to make himself accountable to law. The granting of the sovereign the right to punish is, as noted, a voluntary act, and each voluntary act aims at some good for the agent; as Hobbes states in the following passage:

> Whensoever a man transferreth his right, or renounceth it, it is either in consideration of some right reciprocally transferred to himself, or for some other good he hopeth for thereby. For it is a voluntary act: and of the voluntary acts of every man, the object is some *good to himself*.[69]

The good that is hoped for by granting the sovereign the right to punish is the establishment of trust among those with whom one covenants. Accordingly, each prospective subject grants the sovereign the right to punish him for transgressing the law;

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most) others with whom one interacts conform to the laws of nature as well. It is only when this condition is met—the belief that there will be general conformity to the laws—do the laws of nature provide a reason for acting in conformity with them. Watkins, *Hobbes's System of Ideas*, 55-56, as far as I am aware, is the first commentator to cast Hobbes's laws of nature as assertoric hypothetical imperatives.

[69] *Leviathan*, 14/8, 65-66.

as Hobbes maintains, "a man may covenant thus, *unless I do so, or so, kill me*."[70] Each grant of the authority to punish is best understood as *collateral* each person puts up in order to enter civil society. Each grant of authority to punish is a guarantee to each other prospective subject that one will keep to the covenant to relinquish one's invasive natural rights and submit to the adjudication and civil law of the sovereign. As punishment is an indispensable constituent of law,[71] any prospective subject who refuses to grant the sovereign the authority to punish him refuses both to be governed by law and to be accountable to law; that is to say, any prospective subject who refuses to grant the sovereign the authority to punish him exposes himself as untrustworthy.

The justifying aim or rationale for introducing the practice of punishment is to provide peace and security by means of establishing trust among the multitude. The establishment of trust requires making the laws of nature *in foro externo* obligatory. Recall, for Hobbes, the laws of nature are *in foro externo* obligatory for a person only when that person believes others will conform to the laws. One ought not keep one's covenants (the third law), show gratitude (the fourth law), be sociable (the fifth law), be forgiving (the sixth law), etc., when one believes others will not reciprocate. All this is to say that reason requires a person to not conform to the laws of nature when such

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[70] *Leviathan*, 14/29, 70. To be more precise, we should understand the grant of the right to punish as such: each prospective subject "covenant[s] thus, unless I do so, or so, [i.e., unless I comply with the law, the sovereign has the authority to] kill [or imprison] me."

[71] See *De Cive*, 14/7-8, 172: "But in vain doe they [the laws] also prohibit any men, who doe not withall strike a fear of punishment into them; in vain therefore is the Law, unlesse it contain both parts, that which *forbids* injuries to be done, and that which *punisheth* the doers of them. The first of them which is called *distributive*, is *Prohibitory*, and speaks to all; the second which is styled *vindicative*, or *paenary*, is *mandatory*, and onely speaks to publique Ministers. […] From hence also we may understand, *that every civill Law hath a penalty annexed to it*, either explicitly, or implicitly."

conformity will "make himself a prey to others, and procure his own certain ruin."[72] Each grant to the sovereign of the right to punish him for transgressing the law reciprocally provides each other prospective subject assurance that conformity to the law will not procure his own ruin.

When person A gives such assurance to persons B, C, and D by making himself accountable to the law by granting the sovereign the right to punish him for transgressions, persons B, C, and D now have sufficient reason to believe that A has sufficient motivation to obey the law. When each B, C, and D reciprocate to the other three with whom each covenants, each person—A, B, C, and D—has sufficient reason to believe that conformity to the laws will not procure his own ruin, as each person now has sufficient reason to believe each other is sufficiently motivated to conform to law.

For one to regard the law as *in foro externo* obligatory, what motivates another person to conform is irrelevant. All that is required is that one believes that the other person is so motivated to conform to law. Person B may be one of the so-called wicked few. But it does not matter for A, C, and D that B conforms to law because of the fear of punishment. For A, C, and D to regard the law as *in foro externo* obligatory all that is required is that each believe that B (and each other, for that matter) is sufficiently motivated, whether because B fears punishment as the consequence of non-conformity or because B recognizes the value in universal conformity to the law as the means to peace and, thus, the surest means to self-preservation. To be sure, most of those involved in the social contract are motivated by establishing trust in order to achieve peace.

That person B requires the threat of punishment to deter him from committing crime cannot be the *explicit* aim for B making himself accountable to law. Nor, as we will

[72] *Leviathan*, 15/36, 79.

see, can such an explicit aim be generalized. We do not understand each grant of the right to punish as providing assurance that one will conform to the law by virtue of a coercive counter-incentive, i.e. the fear of punishment. Hobbes does not hold such a view, and to attribute such a view to him would make the social contract ineffective at the very least, and incoherent at worst. For such a view—that each grant of the right to punish serves as a coercive counter-incentive—implies that each prospective subject *does not trust himself* not to breach the covenant. But each grant of the right to punish is taken by each other to imply that he is trustworthy, that is, that he desires peace. To attribute to each person the view that the explicit purpose for the grant is to *deter himself* from committing crime is to attribute to each person an avowal that he is not trustworthy, that is, that he does not desire peace. Collectively, the grant to punish transgressors would not serve its stated purpose, as it would not establish trust, for no one would covenant with another who implies that he cannot be trusted not to transgress the law. Hobbes intimates as much in the following passage (a passage whose significance will become even more apparent later):

> He, therefore, that breaketh his covenant, and consequently declareth that he thinks he may with reason do so, cannot be received into any society that unite themselves for peace and defence but by the error of them that receive him.[73]

The impossibility of the social contract under such a view becomes apparent: no one could receive another or be received by another into society (except by error) who implies that coercive counter-incentive is required for keeping the covenant to hold the

[73] *Leviathan*, 15/5, 73.

authority of law over renounced natural rights, that is, that social justice itself as the means to peace is not motivationally effective.[74]

2.4 The Threat of Punishment

For punishment to serve its function of maintaining the *in foro externo* obligatory status of the law, it may (and certainly does for the unjust minority or wicked few) serve as a deterrent. But, for Hobbes, deterrence of crime does not provide the principal rationale for inflicting or threatening to inflict punishment. That said, we should not understand this claim to imply that a dichotomy exists between two competing purposes for threatening punishment for transgressions—i.e., between maintaining the *in foro externo*

[74] A concern might be raised about my treatment of the justifying aim for granting the sovereign the right to punish. It might be suggested that a person (or persons) recognizes himself (or themselves) as (occasionally) weak-willed, thus, although desiring peace, may require the threat of punishment to ensure, via sufficient counter-incentives, conformity to the law. Accordingly, each person does not reveal himself to be untrustworthy by revealing that he does not desire peace. In response, I would point out that even if Hobbes's theory of voluntary action could account for weakness of will in some sense, it would not be helpful here, as it would be weakness of will in the Socratic sense that one is mistaken about one's judgment of good—i.e., that it is only apparent good: "And because in deliberation the appetites and aversions are raised by foresight of the good and evil consequences, and sequels of the action whereof we deliberate, the good or evil effect thereof dependeth on the foresight of a long chain of consequences, of which very seldom any man is able to see to the end. But for so far as a man seeth, if the good in those consequences be greater than the evil, the whole chain is that which writers call apparent or seeming good" (*Leviathan*, 6/57, 29). Thus, Hobbes's theory seems to allow for a distinction between actual and apparent good. But if one was occasionally mistaken about something or some act as good—say injustice or not keeping one's covenant—one either i) thinks that the unjust act is both good and consistent with, or brings about, peace, or ii) thinks that the unjust act is both good and inconsistent with, or contrary to, peace. Either way, we are back to my initial position: the latter person reveals himself to be untrustworthy for obvious reasons, thus not eligible to be received by anyone into civil society. The former is eligible, but the reason that person will conform to law is not because the threat of punishment will provide counter-incentive. Rather, the threat of punishment will correct the misjudgment; the fact that the act is legally proscribed reveals the act to be contrary to peace. If the person knows that he will act contrary to what the law prescribes (or in concert with what the law proscribes) because he will continue to think that the act is consistent with peace—that is, he declares that the law will not correct his judgment—then that person is not eligible to be received in society, as the person does not alienate his judgment to the sovereign of what is conducive to peace.

obligatory nature of the laws and deterring crime. As we will see, the latter, when necessary, is subsumed under the former.

As noted above, according to Hobbes, punishment is the infliction of evil "to the end that the will of men may thereby the better be disposed to obedience."[75] Punishment, furthermore, "dispos[es] the delinquent or, by his example, other men to obey the laws."[76] Moreover, according to Hobbes, "it is of the nature of punishment to have for [its] end the disposing of men to obey the law."[77] These remarks certainly seem to imply that the infliction of punishment, or the threat of punishment, disposes persons to obedience over disobedience. But this is the case only because it is the failure, on the part of the sovereign, to inflict punishment or threaten transgressions with punishment that disposes persons to disobedience over obedience.

Recall, for Hobbes, obedience to the law is not required when the general threat of punishment for transgressing the law is absent or believed to be empty or impotent. The actions that are determined to be unlawful when such a condition holds—i.e., that there is a real threat of punishment—are not unlawful in the absence of such a condition. In fact, such actions are not acts of disobedience *proper*; as Hobbes states,

> That which totally excuseth a fact, and takes away from it the *nature of a crime*, can be none but that which, at the same time, taketh away the obligation of the law […] for no man is obliged (when the protection of the law faileth) not to protect himself by the best means he can.[78]

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[75] *Leviathan*, 28/1, 161.

[76] *Leviathan*, 28/7, 162.

[77] *Leviathan*, 28/9, 162.

[78] *Leviathan*, 27/22-24, 156; emphasis added. For Hobbes, that which excuses obligation to the law is fear of the consequences of conformity to the law. Hobbes states, "[i]f a man by the terror of present death be compelled to do a fact against the law, he is totally excused; because no law can oblige a man to abandon his own preservation" (*Leviathan*, 27/25, 157).

When the law does not endeavor to protect those who will conform, then conformity to law is not obligatory. When the threat of punishment is absent, so too is the obligation to the law. Again, a subject is not obliged to conform to the law when such conformity will "make himself a prey to others, and procure his own certain ruin,"[79] and the basis for this judgment is that others are not motivated to conform to the law.

Therefore, as stated above, for Hobbes, the principal aim of punishment or the threat of punishment is to maintain the *in foro externo* obligatory status of the law. We can re-state the principal aim as follows: the principal aim of inflicting punishment or threatening the infliction of punishment is to maintain the prohibitory status of criminal action, that is, to maintain the "nature of crime." The principal aim of punishment is not to deter crime but, rather, to maintain the criminal status of those acts legislated to be transgressions. As noted above, those actions that would be considered unlawful would not be so considered without the general threat of punishment. To be sure, deterrence *contingently* contributes to maintaining the *in foro externo* obligatory status of the law, that is, to maintaining the status of crime as a transgressions. Deterrence, insofar as it is pertinent, certainly serves the purpose of punishment. But we should not take this particular means as the end.

Most subjects do not require the threat of a particular punishment to coerce conformity to a particular law; subjects require that there be the general threat of punishment for general conformity to the law. We can see that deterrence is not the principal aim of punishment—and, thus, only contingently contributes to the principal aim—when we appreciate that the threat of punishment would be necessary even if no

[79] *Leviathan*, 15/36, 79.

subject required the threat to coerce conformity to any particular law. The limited epistemic access to other persons' motivation makes the threat of punishment necessary for the general conformity to the law, as it provides the necessary condition for maintaining the trust that each other will not breach the social covenant.

The necessary condition for trust is established by instituting a sovereign with the power to punish. As Hobbes claims in the following important, but often misunderstood, passages:

> THE final cause, end, or design of men [...] in the *introduction of that restraint upon themselves*, in which we see them live in Commonwealths, is the [...] getting themselves out from that miserable condition of war which is necessarily consequent, as hath been shown, to the natural passions of men when there is no visible power to keep them in awe, and *tie them by fear of punishment to the performance of their covenants*.[80]

> [B]efore the names of just and unjust can have place, *there must be some coercive power to compel men equally to the performance of their covenants, by the terror of some punishment* greater than the benefit they expect by the breach of their covenant, and to make good that propriety which by mutual contract men acquire in recompense of the universal right they abandon: and such power there is none before the erection of a Commonwealth.[81]

> When a Commonwealth is once settled, then are they [the laws of nature] actually laws, and not before; as being then the commands of the Commonwealth; and therefore also civil laws: *for it is the sovereign power that obliges men to obey them*. For the differences of private men, to declare what is equity, what is justice, and is moral virtue, and to make them binding, *there is need of the ordinances of sovereign power, and punishments to be ordained for such as shall break them*.[82]

We have to take much care in how we understand these passages. The tendency in the literature is to conflate Hobbes's argument for the breadth of the scope of the threat of

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[80] *Leviathan*, 17/1, 85; emphases added.

[81] *Leviathan*, 15/3, 71-72; emphasis added.

[82] *Leviathan*, 26/8, 138; emphases added.

punishment with his position on the pervasiveness of such a threat in coercing lawful behaviour. On the contrary, as I shall argue, the threat of punishment is necessarily directed at all subjects, but is necessary for coercing lawful behaviour only for some.

We must first recall that it is not the case that each person introduces punishment to keep himself in awe, i.e. to tie himself to the performance of his covenant. The introduction of punishment is not a case writ large of Odysseus insisting on being tied to the mast. In other words, it is not the case that each prospective subject introduces accountability to the law as a means to *thwart* his own short-term, self-interested motivations by introducing counter-motivation via the threat of punishment. The introduction of punishment, as we have seen, has a different function. Granting the sovereign the right to punish is *collateral* each person puts up in order to secure the trust of all others with whom he covenants.[83] Each grant of the right to punish is a show of trust; it is not because each person believes that he cannot be trusted. Just as no person would desire to covenant with what we can call the silent 'foole'—"who hath said in his heart, there is no such thing as justice"[84] but *not* said with his tongue—neither would any person desire to covenant with someone who does not make himself *accountable* to law. In other words, granting the sovereign the right to punish one for transgressing the law is a show of faith that one is not a silent 'foole' or one of the wicked few. Put succinctly,

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[83] In Chapter 18 of *Leviathan*, "Of the Rights of Sovereigns by Institution," Hobbes contends that mutual authorization by prospective subjects is the means by which "all the *rights* and *faculties* of him, or them, on whom the sovereign power is conferred by the consent of the people assembled" (*Leviathan*, 18/2, 88). The right to punish is included in the catalogue of rights *conferred* upon the sovereign, a list which of Hobbes provides in the same chapter. Hobbes maintains, "to the sovereign is *committed* the power of rewarding with riches or honour; and of punishing with corporal or pecuniary punishment, or with ignominy, every subject according to the law he hath formerly made" (*Leviathan*, 18/14, 92).

[84] *Leviathan*, 15/4, 72.

persons making themselves accountable to law is a collective action solution to the problem of a few bad persons who, like all others, want to be trusted, but unlike most others, ought not to be.

We are now in a position to appreciate that there are two distinct functions that the threat of punishment serves: as we see below, for most subjects—just persons—the threat of punishment is (for lack of a better word) *indirect* while for some subjects—unjust persons—the threat of punishment is (again, for lack of a better word) *direct*. I will use the remainder of this section to elucidate this distinction.

We must first note that Hobbes does not conflate but, rather, makes a distinction between a command and a threat. For Hobbes, the threat of punishment is not issued at the majority of subjects akin to a gunman threatening someone to hand over his money—a threat that one surely ought to "obey" if he values his life over his money. Although Hobbes defines civil law as a command, he does not understand the law as a command backed by threat. Hobbes defines command as such: "COMMAND is where a man saith, *do this*, or *do not this*, without expecting other reason than the will of him that says it."[85] And the will or intention of the sovereign, as Hobbes states, "is always supposed to be equity."[86] The sovereign's will, as we see below, is intimately tied to the reason why the command is reason-giving. Command is thus distinguished from council: "COUNCIL is where a man saith, *do*, or *do not this*, and deduceth his reasons from the benefit that arriveth by it to him to whom he saith it."[87] Hobbes, thus, does not view the civil law as council; the command is not a *problematic* hypothetical imperative of the following form:

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[85] *Leviathan*, 25/2, 131.

[86] *Leviathan*, 26/26, 145.

[87] *Leviathan*, 25/3, 132.

if you want to avoid punishment, then conform to the civil law—as we see below, some subjects, however, take the command as council of this form. The civil laws, for most subjects, are *assertoric* hypothetical imperatives of the following form: *because* you want peace—*because* you instituted a sovereign to whom you covenanted to obey—*do this*, or *do not this*. Insofar as a subject takes the sovereign's imperative—*do this*, or *do not this*—as a command and not council, it is viewed by that subject as an *assertoric* hypothetical imperative.[88]

"Civil law," for Hobbes, "*is to every subject, those rules, which the Commonwealth hath commanded him, by word, writing, or other sufficient sign of the will, to make use of, for the distinction of right, and wrong*."[89] The command is an imperative, but the obligatory nature of the imperative, for most subjects, does not come from a coercive threat behind the command. As Hobbes implies, the command is a determination of the rules for peace—the distinction of right and wrong. Making such determinations is the mandate conferred upon the sovereign by subjects to provide a standard of interpretation of the laws of nature that counts as right reason.[90] Hobbes claims, "it is manifest that [civil] law in general is not counsel, but command; nor a command of any man to any man, but only of him whose command is addressed to one

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[88] See Immanuel Kant, *Grounding for the Metaphysics of Morals*, second section, 25. Kant divides imperatives into categorical imperatives (which prescribe morally necessary actions) and hypothetical imperatives (which prescribe actions as means to some end). Hypothetical imperatives are further divided into problematic hypothetical imperatives (which prescribe means to a possible end) and assertoric hypothetical imperatives (which prescribe means to a given end). The command of Hobbes's sovereign falls short of absolute necessity, thus, falls short of being a categorical imperative, as the command can be vitiated by the fear of conformity. See *infra* note 78 and related text above.

[89] *Leviathan*, 26/3, 137.

[90] For Hobbes's articulation of "right reason," see *infra* note 56 above.

formerly obliged to obey him."[91] The distinction between threat and command is now apparent: the threat (insofar as it is genuine) generates an obligation insofar as one desires to avoid the harm threatened; the command does not generate an obligation but already entails an obligation via the covenant to recognize the authority of the sovereign's law (the distinction of right and wrong), as the command "is addressed to one formerly obliged to obey him." When a subject regards the law as a command it is because he acknowledges the sovereign's authority. Put differently, when a subject regards the law as a command, he does not regard it as a threat.

Civil law is, strictly speaking, not a command backed by the threat of punishment, but punishments are, nonetheless, necessarily annexed to civil laws. And such annexation is necessarily perspicuous and publicized; as noted in Hobbes's conception of penal law:

> *Penal* [*laws*] are those which declare what penalty shall be inflicted on those that violate the [civil] law; and speak to the ministers and officers ordained for execution. For though every one ought to be *informed* of the punishments ordained beforehand for their transgression; nevertheless the command is not addressed to the delinquent (who cannot be supposed will faithfully punish himself), but to public ministers appointed to see the penalty executed.[92]

Subjects ought to be *informed* of what punishments are tied to crimes, and this is incumbent upon the sovereign making laws public. As Hobbes states,

> Nor is it enough the law be written and published, but also that there be manifest signs that it proceedeth from the will of the sovereign. [...] There is therefore requisite, not only a declaration of the law, but also sufficient signs of the author and authority."[93]

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[91] *Leviathan*, 26/2, 137.

[92] *Leviathan*, 26/38, 148; latter emphasis added.

[93] *Leviathan*, 26/16, 141.

As I argue below, it is the informative aspect of the promulgation of punishment that plays a necessary role in making the civil law *in foro externo* obligatory. The informative element involved in promulgation of punishments, for most subjects, bridges the epistemic gap that is the cause of diffidence in the state of nature and, as such, bridges the gap between *in foro interno* and *in foro externo* obligation.

Once more, each subject ought to be informed of the punishments ordained. But this requirement of the promulgation of punishments is part and parcel of the conditions necessary for each subject to accept that the laws of nature—laws that become civil laws—oblige *in foro externo*. For, recall, one is not obliged to follow the dictates of the laws of nature when one believes that others will not follow suit (or one has no reason to believe that others will follow suit). The limited epistemic access to other persons' passions and motivations is not overcome in civil society; as such, it is necessary that each subject believes that every other subject knows what punishments are attached to transgressions. In other words, each subject must be made aware that each other subject is made aware what punishments follow particular crimes. This awareness is accomplished by the sufficient promulgation of punishments. The "threat" of punishment is *indirectly* issued at most subjects. What I mean by this is that the promulgation of punishments ordained fulfills a necessary condition for making the civil law i*n foro externo* obligatory. The law becomes *in foro externo* obligatory, not through fear of punishment, but rather through acknowledging the reasonableness of following the law—reasonableness couched in the *belief* that all others are motivated to conform as well.

Importantly, it is such a belief of general conformity to the law, generally held, that maps onto Hobbes's distinction between war and peace:

> For WAR consisteth not in battle only, or the act of fighting, but in a tract of time, wherein the will to contend by battle is sufficiently known: and therefore the notion of *time* is to be considered in the nature of war, as it is in the nature of weather. For as the nature of foul weather lieth not in a shower or two of rain, but in an inclination thereto of many days together: so the nature of war consisteth not in actual fighting, but in the *known disposition* thereto during all the time there is no assurance to the contrary. All other time is PEACE.[94]

Peace requires that each person believe that each other person does not have a disposition to hostility (i.e., a disposition to exercise the invasive rights renounced via the social covenant). The threat of punishment is not, generally, to provide motivation for the subject to conform to one particular law or another such that the obligatory character of the particular law is couched in fear of the consequences of non-conformity. To be sure, there are unjust subjects (silent fooles) for whom the threat of punishment works in this manner. The threat of punishment is, then, *directly* issued to unjust subjects so that they can reliably predict what punishment will follow particular transgressions (thus, hopefully, sufficiently deter). To be clear, the difference between indirectly and directly issued threats of punishments should not be taken to rest on a distinction in the intended object of the threat. As noted, it cannot be known, with certainty (save for the explicit foole who "declares" there is no such thing as justice) who is just and unjust. The distinction between indirectly and directly issued threats of punishments lies in how the person takes the threat—that is, whether the person takes it as the final step in making the law a reason for action (i.e., the final step in making the law *in foro externo* obligatory), or whether the person takes it as the pertinent or decisive information in calculating what action to take with regard to a possible transgression (i.e., whether the punishment outweighs the benefit to be gained by the crime).

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[94] *Leviathan*, 13/8, 62; latter emphasis added.

Peace, Hobbes notes, is the universally agreed upon good.[95] Most subjects recognize the law as the means for peace and most conform their "manner of life" to what is the most reasonable means to achieve peace. Hobbes claims that, "[o]f all passions, that which inclineth men least to break the laws is fear."[96] We must recognize that, for most subjects, the content of the passion that motivates the keeping of covenants is not fear of punishment but, rather, fear of a return to the state of nature, as a return to the state of nature is contrary to the universally agreed upon good. As Hobbes states, "[t]he passions that incline men to peace are: fear of death; desire of such things as are necessary to commodious living; and a hope by their industry to obtain them;"[97] all which serve to transcend the state of nature or the state of war. The state of nature casts a large and ominous shadow over civil society. Alan Ryan articulates this very point: "Hobbes relies heavily on his subjects' fear of the return of the state of nature to motivate them to keep their covenant of obedience; as he says, fear is the motive to rely on, and he spent much of *Leviathan* trying to persuade them to keep their eyes on the object of that fear."[98] The principal function of law, for Hobbes, is none other than to keep persons from the state of nature. This function of law makes law reasonable to obey. Most subjects do not see profit, and most do not see pleasure, to be derived from crime. For Hobbes, most

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[95] *Leviathan*, 15/40, 80.

[96] *Leviathan*, 27/19, 155.

[97] *Leviathan*, 13/14, 63. The convergence of reason and passions is apparent. Reason determines that the law is the means to peace, and the underlying passion is the fear of losing that peace established by the covenant to institute law. As Hobbes adds immediately following the above quote, "And reason suggesteth convenient articles of peace upon which men may be drawn to agreement. These articles are they which otherwise are called the laws of nature."

[98] Alan Ryan, "Hobbes's Political Philosophy," 225.

subjects are just persons as most subjects view the law as the stabilizing force for the protection of their person and civil liberties.

2.5 The Foole

We will now turn our attention to Hobbes's reply to the foole. There has been much ink spilled by commentators focusing on the success or failure of Hobbes's reply to the foole, Hobbes's interlocutor who "hath said in his heart, there is no such thing as justice, and sometimes also with his tongue, seriously alleging that every man's conservation and contentment being committed to his own care."[99] I do not set out to answer the question of whether Hobbes's reply is successful. S.A. Lloyd argues, quite rightly I think, that this is the wrong question to ask.[100] Instead, in this paper, I argue that attention to Hobbes's reply reveals a particular view of citizens with regard to the reasonableness of social justice—i.e., keeping to the social covenant that institutes the law as holding authority over renounced natural rights. Hobbes's reply to the foole is significant, as it is indicative of what I argue to be his view of the citizen as motivated to conform to the law for the law's sake. This view is in contrast to the view commonly attributed to Hobbes, namely, that the avoidance of punishment is what motivates social justice.[101] Closer attention to Hobbes's reply to the foole, I argue, reveals a different picture of the Hobbesian citizen than the one painted by the tradition. Hobbes, I argue, distinguishes between crime (an

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[99] *Leviathan*, 15/4, 72.

[100] See S.A. Lloyd, *Morality in the Philosophy of Thomas Hobbes: Cases in the Law of Nature*, 303: "[Hobbes] has *already proved* that the third Law of Nature requiring the keeping of covenants is a rule of reason. This point bears emphasis, because many commentators have failed to notice that Hobbes's discussion of the Foole is not intended to constitute *proof* of the third law of Nature, but is rather intended only to *answer an objection* to the possibility of any such proof."

[101] See *infra* note 5 above.

unjust act) and treason or sedition (social injustice); this distinction draws on the distinction between the response to crime and the response to treason or sedition: the former is punishment and the latter is exile. Hobbes, as we see, in his reply to the foole, does not argue that the fear of punishment is what motivates social justice.

The foole's position is problematic as it seems to follow, at least formally, from Hobbes's theory of practical rationality: "seeing all the voluntary actions of men tend to the benefit of themselves; and those actions are most reasonable that conduce most to their ends."[102] Hobbes articulates the foole's position in the following passage: "that [according to the foole] there could be no reason why every man might not do what he thought conduced thereunto [his own care]: and therefore also to make, or not make; keep, or not keep, covenants was not against reason when it conduced to one's benefit."[103] Thus, the foole "questioneth whether injustice, taking away the fear of God (for the same fool hath said in his heart there is no God), not sometimes stand with that reason which dictateth to every man his own good."[104] Reason, the foole contends, may dictate one to dismiss the social covenant that institutes the sovereign's law as authoritative.

As I noted in section 2.2 above, there is, for Hobbes, a distinction between social injustice and an unjust act; that is to say, again, Hobbes does not hold there to be a seamless conceptual unity between social injustice and an unjust act. A transgression of the law—the commitment of a crime or an unjust act—does not necessarily entail social

[102] *Leviathan*, 15/4, 72.

[103] *Leviathan*, 15/4, 72.

[104] *Leviathan*, 15/4, 72.

injustice or the denial of the authority of the sovereign's law over renounced natural rights. Put another way, Hobbes does not conflate crime with treason.[105]

An instructive way to draw out this distinction between crime and treason is to elucidate the divergent responses to crime (unjust acts crime) and treason (social injustice). On the one hand, the determination to not conform one's "manner of life" to the sovereign's determination of right and wrong—i.e., the sovereign's judgment of what peace requires—is to imply that one determines to not be ruled by law. To deny the authority of the law over renounced natural right is, in essence, a design to return to the state of nature within which the right of nature rules. According to Hobbes, the available (and appropriate) response to confirmed unjust persons is precisely what they design:

> [I]f a subject shall by fact or word wittingly and deliberately deny the authority of the representative of the Commonwealth (whatsoever penalty hath been formerly ordained for treason), he may lawfully be made to suffer whatsoever the representative will: for in denying subjection, he denies such punishment as by the law hath been ordained, and therefore

[105] Hobbes's use of the term "sin," although instructive, does not, without further clarification, capture the distinction between treason (injustice) and crime (unjust acts). Hobbes claims i) that a "SIN is not only a transgression of a law, but also any contempt of the legislator. For such contempt is a breach of all his laws at once, and therefore may consist, not only in the commission of a fact, or in the speaking of words by the laws forbidden, or in the omission of what the law commandeth, but also in the intention or purpose to transgress. For the purpose to break the law is some degree of contempt of him to whom it belonged to see it executed" (*Leviathan*, 27/1, 151); and ii) that a "CRIME is a sin consisting in the committing by deed or word of that which the law forbiddeth. […] So that every crime is a sin, but not every sin is a crime" (*Leviathan*, 27/2, 151). I take Hobbes to imply with the first claim that a sin may merely be a transgression of the law without being contempt of the legislator; that is to say, crime does not necessarily involve the intention or purpose to transgress. Recall, the "source of every crime is some defect of the understanding or some error in reasoning or some sudden force of the passions" (*Leviathan*, 27/4, 152); thus, one may commit an act that is a transgression, yet the intention or purpose of such an act is not to transgress. That is to say, there is not "the resolving to put some act in execution that tendeth thereto [i.e. the representation of the breach the law, e.g. "being possessed of another man's goods" (*Leviathan*, 27/1, 151)]." As such, with regard to the second claim, every crime is a sin in that it is a transgression of the law but not—or, at least not necessarily—contempt for the legislator. Treason, however, is both a transgression and necessarily contempt for the legislator; that is to say, treason is understood to be the breach of all the sovereign's laws at once.

> suffers as an enemy of the Commonwealth; that is, according to the will of the representative. For the punishments set down in the law are to subjects, not to enemies; such as are they that, having been by their own act subjects, deliberately revolting, deny the sovereign power.[106]

As the design of treason is a return to hostilities, the sovereign has the prerogative to respond accordingly. The response to crime, on the other hand, is punishment; and the purpose of inflicting punishment, according to Hobbes, is to ensure that "the will of men may thereby *the better be disposed to obedience*."[107] The response to crime is to ensure *better* obedience of subjects who are *already disposed* to obedience; punishment is not for those who reveal themselves to have no such disposition, i.e., confirmed unjust persons, explicit fooles, or the blatant vain-glorious.[108] Recall, for Hobbes, "a righteous man does not lose that title by one or a few unjust actions that proceed from sudden passion, or mistake of things or persons."[109] And recall, for Hobbes, the "source of *every* crime is some defect of the understanding or some error in reasoning or some sudden

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[106] *Leviathan*, 28/13, 163.

[107] *Leviathan*, 28/1, 161.

[108] The vain-glorious, like fooles, do not view social justice as a curb on their own natural liberties. The relevant difference between the vain-glorious and fooles lies in that the vain-glorious view social justice as a curb on others' natural liberties, while fooles do not: it is a presumption of their own worth that lead the vain-glorious to view themselves as exempted from the law, while it is the reasonableness of social injustice that lead fooles to think that every person, when it is to his benefit, may be exempt from the law. The vain-glorious hold that, even if they are party to covenant to renounce some natural liberties, they are exempt from such restraint; or, at the very least, they hold themselves exempt from the same punishment owed to others, of purportedly less worth, for the same breach. See *Leviathan*, 27/13, 154: "From whence [i.e., the foolish overrating of their own worth] proceedeth a presumption that the punishments ordained by the laws, and extended generally to all subjects, ought not to be inflicted on them with the same rigor they are inflicted on poor, obscure, and simple men, comprehended under the name of the *vulgar*." The vain-glorious are so convinced by their own estimation of worth and subsequent exemption from justice that they, like fooles, explicitly "*call* in question the authority of them that govern, and so to unsettle the laws with their *public discourse*, as that nothing shall be a crime but what their own designs require should be so" (*Leviathan*, 27/16, 154; emphases added).

[109] *Leviathan*, 15/10, 74.

force of the passions."[110] With regard to the response to the criminal, better obedience is ensured through correction of ignorance, correction of reasoning, and correction of passions; as Hobbes states, "the end of punishing is not revenge and discharge of choler, but *correction* either of the offender or of others by his example."[111] Put succinctly, insofar as the causes of crime are impediments to lawful behaviour, the object of punishment is the correction of such impediments; the object of punishment is not the subject's commitment to the sovereign's law as authoritative.

We must appreciate that is *not* fear of punishment that Hobbes, in his reply to the foole, argues ought to serve as sufficient reason or motivation to keep one's social covenant (to hold the authority of the law over renounced natural liberties). Rather, Hobbes argues that it is either i) fear of not being received into the collective covenant to generate civil society or, more significantly for our purpose, ii) *the fear of not remaining in civil society* that ought to serve as sufficient reason or motivation to keep one's covenant. As Hobbes claims:

> He, therefore, that breaketh his covenant, and consequently *declareth* that he thinks he may with reason do so, cannot be received into any society that unite themselves for peace and defence but by the error of them that receive him; *nor when he is received be retained in it* without seeing the danger of their error; which errors a man cannot reasonably reckon upon as the means of his security: and therefore if he be left, *or cast out of society*, he perisheth.[112]

The foole "declareth" that he is not committed to the sovereign's laws, but is only committed to those actions that serve his own immediate benefit. Justifying injustice, Hobbes warns, will almost certainly be interpreted as a renunciation of the social

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[110] *Leviathan*, 27/4, 152; emphasis added.

[111] *Leviathan*, 30/23, 182; emphasis added.

[112] *Leviathan*, 15/5, 73; emphases added.

covenant to hold the sovereign's laws as authoritative; one will be "cast out of society" and returned to the state of hostilities, as is the appropriate response to one who reveals himself as not disposed to adhere to the social covenant.

S.A. Lloyd recognizes that a *declaration* or *alleging* of the reasonableness of injustice is an appeal to justification. Lloyd argues:

> I am inclined to read all this language ["with his tongue", "seriously alleging", "declares", and "consequently declareth"] as showing, not that the Foole is someone who prospectively advertises his intentions to act unjustly [...] but rather that he is simply one who, if caught, tries to defend his unjust actions *ex post*. Someone who "breaketh his covenant, and consequently declareth that he thinks he may with reason do so", is one who breaks his covenant and subsequently tries to justify his having done so as reasonable.[113]

Lloyd's position rests on Hobbes's use of "consequently declareth" as to imply a temporal succession of transgression and then declaration of injustice as justified. I am inclined to accept Lloyd's interpretation of Hobbes's account of the foole *justifying* the injustice, but nothing in my treatment of the foole (as an unjust person or traitor) rests on the temporal sequence of the transgression and declaration. All that my treatment requires is that the judgment underlying the declarations motivates the transgression, regardless of the place in the sequence in which the declaration falls. Nothing in Hobbes's treatment of traitors' actions excludes a declaration prior to the treasonous act. More to the point, in *A Dialogue between a Philosopher & a Student of the Common Laws of England*, Hobbes makes it clear that a declaration, in words or writing, is sufficient for accusation of treason. According to Hobbes:

> Seeing then the crime is the design and purpose to kill the King, or cause him to be killed, and lieth hidden in the breast of him that is accused; what other proof can there be had of it than words spoken or written? And

[113] S.A. Lloyd, *Morality in the Philosophy of Thomas Hobbes*, 311.

> therefore, if there be sufficient witness that he by words declared that he had such a design, there can be no question, but that he is comprehended within the statute [that maketh Treason].[114]

Hobbes does not imply in the above passage that the writing or declaration (with a witness) must follow the act of treason, only that the writing or declaration itself constitutes sufficient *proof* that the design of treason motivated the act. In other words, the writing or declaration is sufficient proof that one does not respect the authority of the law.[115]

In his reply to the foole, Hobbes argues that the possibility of being returned to the state of nature serves to adjoin what we ought to do and what we want to do. That is to say, the possibility of being returned to the state of nature serves to adjoin what we ought to do with what we want to do *only* if we desire peace and security; the purpose of the covenant, for Hobbes, is none other than the instituting of the authority of the law over the exercise of renounced natural rights. But Hobbes's reasoning here, we must surely recognize, is merely a rehashing of the argument for generating civil society.[116] Hobbes does not council the foole to avoid (the potential infliction of) punishment. Rather, Hobbes counsels the foole to avoid the (potential) annulment of the social covenant by appealing to the purpose of the social covenant. Hobbes exhorts that the fear of a return to the state of nature, within which one most likely "perisheth," makes social justice reasonable. The rationale for the social covenant, for most subjects, is to transcend the state of nature. The so-called penalty for social injustice is inexorably tied to the rationale for the social covenant: those who advocate social injustice (i.e., those who

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[114] *A Dialogue between a Philosopher & a Student of the Common Laws of England*, 107/97.

[115] Just to note, for Hobbes, the writing or declaration may itself constitute an act of treason.

[116] See *infra* note 100 above.

explicitly deny the authority of the law) ought not to reap the benefits of social justice. As Hobbes intimates, the response to a declaratory justification of the reasonableness of injustice is banishment or the "cast[ing] out of society" and, according to Hobbes, "a banished man is a lawful enemy of the Commonwealth that banished him, as being no more a member of the same."[117] Banishment, Hobbes explains, is not punishment *proper*:

> *Exile* (banishment) is when a man is for a crime condemned to depart out of the dominion of the Commonwealth, or out of a certain part thereof, and during a prefixed time, or for ever, not to return into it; *and seemeth not in its own nature, without other circumstances, to be a punishment*, but rather an escape, or a public commandment to avoid punishment by flight. [...] For if a man banished be nevertheless permitted to enjoy his goods, and the revenue of his lands, the mere change of air is no punishment; nor does it tend to that benefit of the commonwealth for which all punishments are ordained, that is to say, to the forming of men's wills to the observation of the law; but many times to the damage of the commonwealth. For a banished man is a lawful enemy of the commonwealth that banished him, as being no more a member of the same.[118]

The foole deliberately denies the authority of the sovereign by *declaring* that injustice is reasonable. To risk being cast out of society for injustice—for *explicitly* denying the authority of the law—is to risk being treated as an enemy. And an enemy is subject to hostilities but not to punishment.

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[117] *Leviathan*, 28/21, 165. See also *Leviathan*, 21/24, 114: "If the sovereign banish his subject, during the banishment he is not subject."

[118] *Leviathan*, 28/21, 164-165; additional emphasis added. Moreover, hinted at in the passage above, punishment is for subjects, not enemies. As Hobbes states, "harm inflicted upon one that is a declared enemy falls not under the name of punishment, because seeing they were either never subject to the law, and therefore cannot transgress it; or having been subject to it, and professing to be no longer so, by consequence deny they can transgress it, all the harms that can be done them must be taken as acts of hostility" (*Leviathan*, 28/13, 163).

The foole is, arguably, most foolish for dismissing the goodness of peace.[119] To deny the reasonableness of justice is to deny the end that justice serves as its means; it is to deny what Hobbes adamantly attests, namely, that "peace is good, and therefore also the way or means of peace, which (as I have shown before) are *justice* [...] and the rest of the laws of nature."[120] It does not, generally speaking, follow that one who denies the means to a particular end also denies that end as a good. It does, however, follow that one who denies the *only* means to a particular end also denies that end as a good. And this, the latter, is how Hobbes understands the foole, as justice is the only means for ensuring peace.

Granting, as Hobbes does, that the foole is received in civil society, a crucial question arises: if Hobbes holds that citizens require the threat of punishment to coerce the keeping of their covenant (to recognize the authority of the sovereign's law), then why does he not, in replying to the foole, simply appeal to the prospects of punishment as that which makes social injustice unreasonable? I have argued that the underlying assumption is false; Hobbes does not hold that most citizens require the threat of

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[119] We must not overlook that the foole's foolishness is also to be attributed to his *explicitness*. That the foole is so foolish as to explicitly justify his view, however, is taken by some in the literature to be a straw-man and that Hobbes's actual antagonist is (or, rather, should be) the 'silent' foole who says *only* in his heart that there is no such thing as justice. Moreover, these same commentators contend that Hobbes's reply misses the point, in part, because he does not adequately address the problem of the 'silent' foole who believes that an absolute curb on self-interest is contrary to reason. See, e.g. David Gauthier, "Three Against Justice: The Foole, the Sensible Knave, and the Lydian Shepherd," 17; F.C. Hood, *The Divine Politics of Thomas Hobbes*, 110; Olli Loukola, "Combining Mortality and Rationality: Hobbes on contracts and covenants," 82; and Alan Zaitchik, "Hobbes's Reply to the Fool: The Problem of Consent and Obligation," 246-247. In response to this allegation, see Kinch Hoekstra, "Hobbes and the Foole." Hoekstra argues, I think convincingly, against the traditional interpretation: we should not view the 'silent' foole as Hobbes's antagonist but, rather and only, the 'explicit' foole. For a brief explication of Hoekstra's argument, see *infra* note 126 below.

[120] *Leviathan*, 15/40, 80.

punishment to coerce the keeping of their social covenant. Beyond dismissing the antecedent, I do not see an answer. It is important to recall that, for Hobbes, banishment is not punishment *proper*, as such a penalty severs the juridical relationship between the commonwealth and banished subject. As the end of punishment is to correct the offender, "thereby the better be disposed to obedience,"[121] banishment cannot properly endeavour this end, for "a banished man is a lawful enemy of the commonwealth that banished him"[122] and an enemy cannot be viewed as eligible for "better obedience." And it is important to recognize that, for most citizens, it is the fear of a return to the state of nature via the dissolution of the Commonwealth and not simply the fear of individually being returned to the state of nature that motivates social justice. The quote from Alan Ryan merits repeating: "Hobbes relies heavily on his subjects' fear of the return of the state of nature to motivate them to keep their covenant of obedience; as he says, fear is the motive to rely on, and he spent much of *Leviathan* trying to persuade them to keep their eyes on the object of that fear."[123] Put another way, it is not, for most subjects, the fear of being cast out of society but, rather, the fear of the collapse of the social covenant as the foundation of a legal order that establishes peace that motivates social justice.

There is a lingering worry that, in his reply to the *explicit* foole, Hobbes merely counsels the foole to be a *silent* foole: that one ought not to *declare* one's view that injustice is (or can be) reasonable. This worry is well-founded, but only before we explore two explanations that point in Hobbes's favour for offering this seemingly imprudent council to the foole to be more prudent with his contempt of the legislator's

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[121] *Leviathan*, 28/1, 161.

[122] *Leviathan*, 28/21, 165.

[123] Ryan, "Hobbes's Political Philosophy," 225.

authority. That is to say, there are two explanations that go some way in addressing Hobbes's resignation that if fooles or unjust persons cannot come to acknowledge the dictate of reason that calls for social justice, then no fear of punishment can make such persons just. Hobbes states:

> the grounds of these rights [of sovereignty] have the rather need to be diligently and truly taught, *because they cannot be maintained by any civil law or terror of legal punishment.* For a civil law that shall forbid rebellion [or treason] (and such is all resistance to the essential rights of sovereignty) is not, as a civil law, any obligation but by virtue only of the law of nature that forbiddeth the violation of faith; which natural obligation, if men know not, they cannot know the right of any law the sovereign maketh.[124]

Hobbes is here implying that the threat of punishment cannot, and does not, provide external motivation for most citizens' recognition of their duty to the civil law via their duty to the first three laws of nature (i.e., to seek peace, to renounce invasive rights insofar as others are also willing, and, most importantly, to keep one's covenant granting authority to the sovereign's judgment). Hobbes, I think, is also here implying a stronger claim: civil society cannot securely remain in a state of peace—cannot remain a Commonwealth—if citizens require the threat of punishment to see reason in social justice. For if the grounds of the sovereign's right to make law are not accepted by citizens, then the reason for the sovereign's possession of the right to make law cannot be accepted by citizens (i.e., to ensure peace and security).

Returning to Hobbes's reply to the foole, Hobbes's concern lies with the *consequences* of the foole's explicit declaration for the maintaining of peace and security within civil society. Kinch Hoekstra provides one explanation along this line, which I will briefly address. I provide an alternate explanation along the same line that

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[124] *Leviathan*, 30/4, 175-176; emphasis added.

(somewhat) deviates from Hoekstra's. Hoekstra argues that Hobbes's council points to a concern to quell the possibility of rebellion or civil war. Hoekstra claims:

> In the answer to the Foole, Hobbes show that his greatest enemies—the greater for sharing the principle that it is reasonable to seek one's own advantage—are those who publicly teach disobedience or governance that will induce disobedience. From his first writings to his last, Hobbes has a consuming preoccupation with those who would incite disobedience. If these can be controlled, civil war may be avoided, although the rest of Hobbes's political program be ignored.[125]

Hoekstra, to my mind, is correct to emphasize the explicitness of the foole's position as that which occupies Hobbes's concern.[126] Hoekstra's claim that Hobbes is concerned with the consequences of disobedience is correct, but we have to recognize that (perhaps too) much weight is placed on a view of citizens on the precipice of rebellion or civil war, which Hoekstra seems to acknowledge in quoting Hobbes that citizens may be "much wounded and torne with affronts, and calamities, by them who are in Authority."[127]

While I am, of course, not denying that Hobbes held a great distaste for rebellious fervour, Hobbes's other principal concern in his reply to the foole is to silence declarations of the reasonableness of injustice. In other words, Hobbes's other principal

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[125] Kinch Hoekstra, "Hobbes and the Foole," 640.

[126] First, Hobbes's reply to the foole takes the foole to be explicit in his view, that he "declareth [and not merely sayeth in his heart] he thinks it reason to deceive those that help him can in reason expect no other means of safety than what can be had from his own single power" (*Leviathan*, 15/5, 73). As Hoekstra notes, "[i]f Hobbes's refutation of the Foole depends on the fact of the Foole's declaration, then such declaration is integral to the Foole's position" ("Hobbes and the Foole," 623). Second, Hobbes's reworking of the argument with the foole in the Latin edition of *Leviathan*, (published in 1668, seventeen years after the English edition, published 1651) is purged of all reference to the foole as saying something in his heart ("Hobbes and the Foole," 626). Third, Hoekstra points out that Hobbes remarks that etymologies are not definitions, yet he (Hobbes) concedes that when accurate they give much assistance in finding out a definition; and that *foole* comes from the Latin *follis*, meaning a bellow or windbag ("Hobbes and the Foole," 642, n. 10). Lastly, and perhaps most significantly, *error* cannot be attributed to those who receive into civil society the 'silent' foole; that is to say, error can only be attributed to those who receive into civil society the 'explicit' foole ("Hobbes and the Foole," 629-630).

[127] Hoekstra, "Hobbes and the Foole," 640.

concern, in his reply to the foole, is with seditious declarations (i.e., speech or writings that undermine the authority of the state) and not exclusively with rebellious fervour (i.e., calls to overthrow the state). The importance of silencing sedition bears out in Hobbes's list of "Those Things that Weaken or Tend to the Dissolution of the Commonwealth," the topic title of Chapter 29 of *Leviathan*:

> I observe the diseases of a Commonwealth that proceed from the poison of seditious doctrines, whereof one is that every private man is judge of good and evil actions. This is true in the condition of mere nature, where there are no civil laws; and also under civil government in such cases as are not determined by the law. But otherwise, it is manifest that the measure of good and evil actions is the civil law; and the judge the legislator, who is always representative of the Commonwealth. From this false doctrine, men are disposed to debate with themselves and dispute the commands of the Commonwealth, and afterwards to obey or disobey them as in their private judgments they shall think fit; whereby the Commonwealth is distracted and weakened.[128]

To be sure, Hobbes, in his reply to the foole, addresses the concern of attaining sovereignty by rebellion.[129] Indeed, the "successful wickedness,"[130] according to Hobbes, that follows from social injustice (i.e., the rejection of the authority of the law over renounced rights) is "the getting of a kingdom."[131] Such successful wickedness, Hobbes warns, is disquieted, as "others are taught to gain the same in like manner."[132]

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[128] *Leviathan*, 29/6, 168. Hobbes draws the above distinction between sedition and rebellion, the latter which he addresses a few paragraphs preceding this one. See *Leviathan*, 29/3, 167-168.

[129] See *Leviathan*, 15/7, 73: "And for the other instance of attaining sovereignty by rebellion; it is manifest that, though the event follow, yet because it cannot reasonably be expected, but rather the contrary, and because by gaining it so, others are taught to gain the same in like manner, the attempt thereof is against reason. Justice therefore, that is to say, keeping of covenant, is a rule of reason by which we are forbidden to do anything destructive to our life, and consequently a law of nature."

[130] *Leviathan*, 15/4, 72.

[131] *Leviathan*, 15/4, 72.

[132] *Leviathan*, 15/7, 73.

That said, Hobbes's longer and more nuanced reply to the foole takes the foole's position to be more general, namely, that social justice (i.e., holding true to the social covenant that maintains the authority of the law over renounced natural rights) is but a vain word (i.e., a covenant that ought not to have any real weight): "to make, or not make; keep, or not keep, covenants was not against reason when it conduced to one's benefit."[133] Thus, Hobbes's concern, as Hoekstra notes, is to silence "those who publicly teach disobedience or governance that will induce disobedience."[134] But what motivates Hobbes's concern is not merely, as Hoekstra contends, to quell the prospects of civil war or rebellion but also to ensure that the necessary condition that makes the law obligatory is satisfied. That is to say, Hobbes's concern in silencing fooles, I contend, is to ensure that subjects believe that all other subjects are committed to social justice in order that the laws of nature—the principles which underlie civil laws—remain *in foro externo* obligatory. Thus, silencing fooles is necessary, not merely to avoid civil war, but also to avoid the state of war *simpliciter*; that is to say, silencing fooles is necessary to avoid the state of affairs in which personal or private judgment, and not law, determines what counts as right reason.

2.6 Conclusion

As we see in the detail of the title-page for the first edition of *Leviathan*, Hobbes's "COMMONWEALTH," or "that great LEVIATHAN," cuts an imposing figure.[135]

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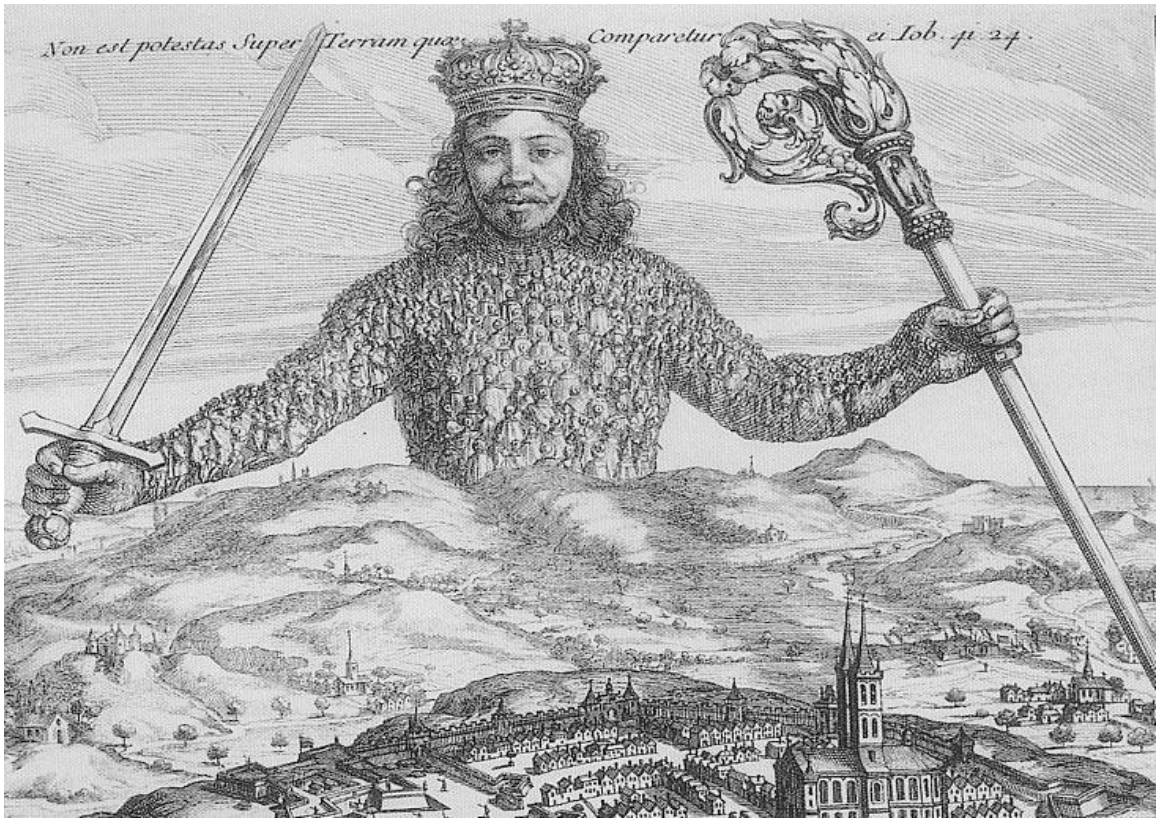
[133] *Leviathan*, 15/4, 72.

[134] Hoekstra, "Hobbes and the Foole," 640.

[135] Detail of title-page for the first edition of Leviathan, 1651: Mansell Collection. The engraving is by Abraham Bosse. The Latin inscription reads *Non est potestas Super Terram quae Comparetur ei* Job 41:24 [There is no power on earth which can be compared to him].



The Commonwealth, for Hobbes, is an artificial person. As an artifice, the person of the Commonwealth is a product of the will, that is, a product of mutual covenant, of those who shall be ruled. Hobbes defines the Commonwealth as follows:

> [T]he multitude so united in one person is called a COMMONWEALTH; in Latin, CIVITAS. This is the generation of that great LEVIATHAN, or rather (to speak more reverently) of that *Mortal God* to which we owe, under the *Immortal God*, our peace and defence. For by this authority, given him by every particular man in the Commonwealth, he hath the use of so much power and strength conferred on him that, by terror thereof, he is enabled to form the wills of them all, to peace at home, and mutual aid against their enemies abroad. And in him consisteth the essence of the Commonwealth; which, to define it, is: one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all as he shall think expedient for their peace and common defence.[136]

[136] *Leviathan*, 17/13, 87.

By terror thereof, the person of the Commonwealth conforms the will of them all to peace. But the unity of the Commonwealth—the multitude, as depicted above, who collectively comprise the person of the Commonwealth—is not constituted through the terror of the Commonwealth itself. The will of them all conforms to peace because each citizen knows that those who do not have a will to conform know they will suffer the wrath of the Commonwealth, that is, suffer the wrath of "he that carryeth this person [who] is called SOVEREIGN."[137] The terror of the Commonwealth enables each person who has a will to peace to conform his will to peace.

The person of the Commonwealth is imposing, but he is also mortal. In fact, as Hobbes notes, "he is mortal and subject to decay, as all other earthly creatures are."[138] According to Hobbes,

> THOUGH nothing can be immortal which mortals make; yet, if men had the use of reason they pretend to, their Commonwealths might be secured, at least, from perishing by internal diseases. For by the nature of their institution, they are designed to live as long as mankind, or as the laws of nature, or as justice itself, which gives them life.[139]

The significance of these remarks are clear: justice, the endeavour to keep the covenant that holds the authority of the law over renounced natural rights, is what gives continued life to the Commonwealth. As noted in the previous section, sedition, or the questioning of the authority of the sovereign's laws, is poison to the Commonwealth; again, as Hobbes states, "the poison of seditious doctrines, whereof one is that every private man is

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[137] *Leviathan*, 17/14, 88.

[138] *Leviathan*, 28/27, 167.

[139] *Leviathan*, 29/1, 167.

judge of good and evil actions"[140] tends to the dissolution, to the death, of the Commonwealth. The Commonwealth cannot stand if many or most of its subjects do not endeavour justice, that is, the recognition of the authority of the sovereign's laws. Put another way, the Commonwealth, insofar as it has had any permanence, must have had the majority of its citizens endeavouring justice. The Commonwealth cannot rely on force or fear of punishment if it is to have any sustained life. A "defectuous procreation"[141] is one in which the majority of its original subjects are unjust. A diseased Commonwealth is one in which the majority of its present subjects are unjust. As Hobbes claims, the grounds of authority of sovereignty, particularly the authority to make law, "cannot be *maintained* by any civil law or terror of legal punishment."[142] The terror that maintains the sovereign authority is not legal punishment but, rather, the prospects of the lack of sovereign authority, that is to say, the prospects of the state of war or the state of affairs wherein "every private man is judge of good and evil actions."

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[140] *Leviathan*, 29/6, 168.

[141] *Leviathan*, 29/2, 167.

[142] *Leviathan*, 30/4, 175; emphasis added.

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Article 3

3 Hobbes on the Punishment of the Innocent

3.1 Introduction

Thomas Hobbes explicitly addresses the issue of the punishment of the innocent in only a handful of passages in *Leviathan*.[1] In the following lengthy passage—a passage to which I will repeatedly refer back throughout this paper—Hobbes gives his most sustained attention to the issue:

> All punishments of innocent subjects, be they great or little, are against the law of nature: for punishment is only for transgression of the law, and therefore there can be no punishment of the innocent. It is therefore a violation, first, of that law of nature which forbiddeth all men, in their revenges, to look at anything but some future good: for there can arrive no good to the Commonwealth by punishing the innocent. Secondly, of that which forbiddeth ingratitude: for seeing all sovereign power is originally given by the consent of every one of the subjects, to the end they should as long as they are obedient be protected thereby, the punishment of the innocent is a rendering of evil for good. And thirdly, of the law that commandeth equity; that is to say, an equal distribution of justice, which in punishing the innocent is not observed.[2]

Hobbes's concern with the punishment of the innocent focuses on the scope of the distribution of punishment, that is, upon whom punishment ought to be (or can be) inflicted. The principal question I address in this paper is how ought we to understand,

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[1] References to *Leviathan* are by chapter and paragraph(s) in the G.C.A. Gaskin (Oxford: Oxford University Press, 1996) edition, followed by page number(s) in the original (1651) edition. References to *De Cive* are by chapter and paragraph(s) followed by the page number(s) of the Howard Warrender (Oxford: Clarendon Press, 1983) edition. All emphases are in the original work unless otherwise noted.

[2] *Leviathan*, 28/22, 165

within his theory of punishment, Hobbes's claim that "there can be no punishment of the innocent."

Hobbes's position against the punishment of the innocent has received modest attention in the literature. Those who address Hobbes's concern correctly hold the view that the laws of nature prohibiting cruelty, ingratitude, and inequity,[3] as "articles of peace,"[4] ground the *principle* that "there can be no punishment of the innocent," thus, to breach the laws of nature is to introduce war.[5]

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[3] There are nineteen laws of nature that Hobbes considers in *Leviathan* as "dictating peace, for a means of the conservation of men in multitudes; and which only concern the doctrine of civil society" (*Leviathan*, 15/34, 78). The laws of nature prohibiting cruelty, ingratitude, and inequity are relevant to the issue of the punishment of the innocent. In this article, I explore the manner in which these three particular laws of nature are relevant to the issue.

[4] *Leviathan*, 13/14, 63.

[5] There is a school of thought that deviates from reading Hobbes's claim that "there can be no punishment of the innocent" a *prescriptive*. We find a number of scholars attributing to Hobbes a view we find in punishment theory called "logical retributivism" whereby the proposition "the punishment of the innocent" is a contradiction or nonsensical, or, conversely, the proposition "punishment is for the guilty" is a tautology. As A.M. Quinton claims, "retributivism, properly understood, is not a moral but logical doctrine, and that it does not provide a moral justification of the infliction of punishment but an elucidation of the use of the word. Utilitarianism, on the other hand, embraces a number of possible moral attitudes towards punishment, none of which necessarily involves the objectionable consequences commonly adduced by retributivists provided that the word 'punishment' is understood in the way that the essential retributivist thesis lays down. […] In brief, the two theories answer different questions: retributivism the question 'when (logically) *can* we punish?'; utilitarianism the question 'when (morally) *may* we or *ought* we to punish?'" ("On Punishment," 134). Guilt, as such, is not a principled requirement for punishment but, rather, a logical requirement. As noted, a number of scholar attribute this view to Hobbes. See Howard Warrender, *The Political Philosophy of Hobbes: His Theory of Obligation*, 184: "Hobbes saw that by definition, punishment is retributive or penal. There can be no punishment properly called, where there has been no transgression of the law and such a description cannot therefore be applied to actions against the innocent." John Laird argues that Hobbes's claim that "there can be no punishment of the innocent" implies that any contrary claim must be *nonsensical*: "a profoundly simple consideration that makes *nonsense* of one of the usual objections to a utilitarian or deterrent theory of punishment, *i.e.* that such theories might justify *unjust* 'punishments'" (*Hobbes*, 221-222; additional emphasis added). Dieter Hüning argues that "Hobbes attaches to the principle of guilt [...] *the simple idea* that punishment *necessarily* presupposes guilt" ("Hobbes on the Right to Punish," 225; emphases added). Alan Ryan claims that "Hobbes's argument [that punishment is only for the guilty] was indeed simply re-invented three hundred years later [in] the 1950s attempt to deal with the issue of unjust 'punishment' by

Edward G. Andrew, a proponent of the view that the laws of nature ground the principle that the innocent ought not to be punished, notes that the

> Hobbesian sovereign cannot punish subjects without a public trial, based on precedent law: to do so is to wage war on subjects; it is an act of hostility, not of punishment, and reintroduces the state of war that sovereignty served to supercede. Punishment of the innocent is thus contrary to the law of nature.[6]

Andrew understands Hobbes's concern with the punishment of the innocent as relevant to the sovereign's duty, grounded in the laws of nature, to maintain peace; because the punishment of the innocent reintroduces the state of war, it is contrary to the laws of nature. Norberto Bobbio notes that, for Hobbes,

> If the sovereign violates a law of nature—for example, by sentencing an innocent person to death—he commits a wrong towards God, but not his subject […] Hobbes explains in another passage that the punishment of subjects who are innocent constitutes the violation of three laws of nature.[7]

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the definitional manoeuvre of pointing out that only a penalty inflicted on the guilty for a crime could *count* as 'punishment.' Here, Hobbes's Chapter 28 surely is three hundred years ahead of its time" ("Hobbes's Political Philosophy," 244, n. 71). And J.W.N. Watkins notes that "Hobbes's point has been developed independently by A.M. Quinton" (*Hobbes's System of Ideas: A Study in the Political Significance of Philosophical Theories*, 97). In response to the attribution of "logical retributivism" to Hobbes, we can note that he follows his claim that "there can be no punishment of the innocent" with three arguments, each appealing to a particular law of nature as providing reasons for the sovereign to only punish those who are found guilty. If the claim that "there can be no punishment of the innocent" is merely a logical or definitional one about punishment, then we must dismiss Hobbes's supportive arguments as confused or nonsensical. It would be akin to answering the question "why are no bachelors married?" that is a response to the logical or conceptual claim that "all bachelors are unmarried men" with an appeal, say, to the benefits of remaining single. Accordingly, we ought to read each appeal to a particular law of nature as Hobbes clearly intends, namely, as a prescription: one ought not to be cruel, ungrateful, and/or iniquitous with retribution. The laws of nature are prescriptions for establishing and maintaining domestic peace.

[6] Edward G. Andrew, "Hobbes on Conscience within the Law and without," 218.

[7] Norberto Bobbio, *Thomas Hobbes and the Natural Law Tradition*, 139.

The punishment of the innocent, according to Bobbio, constitutes the violation of three laws of nature; the appeal to the laws of nature fully encompasses the issue of the punishment of the innocent. Mario A. Cattaneo notes that, for Hobbes,

> [E]vil inflicted by the authority [the sovereign] without precedent public condemnation is not a true punishment but an act of hostility, and [Hobbes] makes the interesting and important observation that for this reason 'the safe custody of a man accused.... is not Punishment', [and] any hurt he may suffer in this case constituting a violation of the law of nature.[8]

In company with Andrew and Bobbio, Cattaneo reduces Hobbes's concern with the punishment of the innocent to the violation of the law of nature. S.A. Lloyd notes that, for Hobbes,

> Because no good can come to the commonwealth from punishing the innocent, the seventh Law of Nature forbids punishing the innocent, as does the fourth Law of Nature forbidding ingratitude or the returning of evil for good, and the eleventh requiring equity.[9]

Lloyd's view directly links the punishment of the innocent to the laws of nature, as the seventh law of nature itself (the law that prohibits cruelty) "forbids punishing the innocent." F.S. McNeilly claims that,

> Equity [for Hobbes] is the equal distribution of justice in criminal prosecutions, giving no special favour to the rich or powerful, and punishing only the guilty and not the innocent. The justification of this as a law of nature […] is that it is clearly a necessary mean to peace, since to treat men inequitably is to deprive them of the benefits of law and order and therefore invite them to war.[10]

Equity requires only punishing the guilty. The justification for not punishing the innocent, for McNeilly, is that such inequity is contrary to peace. Again, appeal to peace,

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[8] Mario A. Cattaneo, "Hobbes's Theory of Punishment," 286.

[9] S.A. Lloyd, *Morality in the Philosophy of Thomas Hobbes: Cases in the Law of Nature*, 37.

[10] F.S. McNeilly, *The Anatomy of Leviathan*, 246.

via the law of nature, is the governing norm for "punishing only the guilty and not the innocent." Lastly, D.D. Raphael notes that, for Hobbes,

> [I]f the sovereign orders a citizen to be arrested and executed, he does no injustice or injury since he has the full right to do it. But he may be acting inequitably. If the citizen has not broken any laws or, in breaking a law, has not done anything that merits so severe a penalty as death, the sovereign, in his capacity as supreme judge of the State, is not dealing equitably with that citizen as compared with others. The sovereign is bound by the laws of nature, which prescribe measures to avoid slipping back into the condition of war. He therefore has a natural duty of equity.[11]

In company with McNeilly, Raphael limits his considerations to the requirements of equity as grounding the principles of punishment, including the punishment of the innocent. And in company with McNeilly, Raphael thinks that the justification of the law of nature prohibiting inequity as grounding the principle that "there can be no punishment of the innocent," lies in the avoidance of "slipping back into the condition of war."

What we find in the above accounts, either implicitly or explicitly, is that cruelty, ingratitude, and/or inequity in punishment—the punishment of the innocent—is contrary to domestic peace. As Andrew and Cattaneo explicitly note, the sovereign's punishing of the innocent is an act of *hostility*. As Andrew, McNeilly, and Raphael explicitly note, the sovereign's punishing of the innocent *risks war*. Our commentators are correct that the punishing of the innocent is an act of *hostility* and *risks war*. But, as I argue in this paper, each account that we find in the literature attending to Hobbes's principled concern with the punishment of the innocent is incomplete.[12] The tradition cannot explain why cruelty,

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[11] D.D. Raphael, "Hobbes on Justice," 168.

[12] My view, as it will become clearer, is that the tradition's analysis of Hobbes's concern with the punishment of the innocent is incomplete due the tradition's failure to acknowledge that Hobbes holds that prospective subjects' granting the sovereign the authority to punish them is the basis by which the sovereign acquires the right to punish. That Hobbes holds this view is confirmed in the forthcoming analysis of his concern with the punishment of the innocent.

ingratitude, and inequity in punishment (manifested in the punishment of the innocent) is an act of hostility as opposed to punishment *proper* or properly explain why the habitual practice of cruelty, ingratitude, and inequity in punishment (manifested in the habitual practice of punishing the innocent) risks reintroducing the state of war.

In this paper, I argue that to understand the claim that cruelty, ingratitude, and inequity in punishment—punishing the innocent—introduces hostilities we must understand i) what it is about cruelty, ingratitude, and inequity in particular that, for Hobbes, captures the punishment of the innocent, ii) why Hobbes holds that cruelty, ingratitude, and inequity in punishment is an act of hostility, and iii) why Hobbes holds that the habitual practice of cruelty, ingratitude, and inequity in punishment—the habitual practice of punishing the innocent—risks reintroducing the state of war.

Commentators are correct to note that, for Hobbes, the laws of nature prohibiting cruelty, ingratitude, and inequity ground the principle that the innocent ought not to be punished. But, as I argue in this paper, it is through prospective subjects' authorizing the sovereign to punish them for (and only for) transgressing the law that the laws of nature prohibiting cruelty, ingratitude, and inequity are germane to the issue of punishment.[13] The sovereign is authorized to only punish those who transgress the law. In Chapter 18 of

[13] A passage from *De Cive* may be somewhat instructive here: according to Hobbes, "*Theft*, *Murther*, *Adultery*, *and all injuries* are forbid by the Lawes of nature; but what is to be called *Theft*, what *Murther*, what *Adultery*, what *injury* in a Citizen, this is not to be determined by the *naturall*, but by the *civill Law*: for not every taking away of the thing which another possesseth, but onely *another mans goods* is *theft*; but what is ours, and what anothers, is a question belonging to the *civill Law*. In like manner, not every killing of a man is *Murther*, but onely that which the *civill Law* forbids; neither is all encounter with women *Adultery*, but onely that which the *civill Law* prohibits." (*De Cive*, 6/16, 101). In a somewhat similar vein, we can acknowledge that the laws of nature prohibit cruelty, ingratitude, and inequity. But before prospective subjects authorize the sovereign to punish them for transgressing the law, there is no sense in which cruelty, ingratitude, or inequity is germane to the issues of punishment, particularly the issue of the punishment of the innocent.

Leviathan, "Of the Rights of Sovereigns by Institution," Hobbes contends that mutual authorization by prospective subjects is the means by which "all the *rights* and *faculties* of him, or them, on whom the sovereign power is conferred by the consent of the people assembled."[14] The right to punish is included in the catalogue of rights *conferred* upon the sovereign, a list of which Hobbes provides in the same chapter; as Hobbes claims, "to the sovereign is committed the power of rewarding with riches or honour; and of punishing with corporal or pecuniary punishment, or with ignominy, every subject *according to the law he hath formerly made*."[15]

There is, for Hobbes, no guilt or innocence before prospective subjects make themselves accountable to the law via the social covenant. For Hobbes, the concepts of guilt and innocence are inapplicable in the state of nature; as Hobbes attests, "it is lawful by the original right of nature to make war; wherein the sword judgeth not, nor doth the victor make distinction of nocent and innocent as to the time past."[16] Moreover, for Hobbes, there is no punishment before a political or public person is instituted to represent the multitude (the Commonwealth); as Hobbes maintains, "it is of *the nature of punishment* to be inflicted by public authority, which is the authority only of the representative itself."[17]

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[14] *Leviathan*, 18/2, 88.

[15] *Leviathan*, 18/14, 92; emphasis added.

[16] *Leviathan*, 28/23, 165.

[17] *Leviathan*, 28/12, 163; emphasis added. Unlike Hugo Grotius before him or John Locke after him, Hobbes does not hold the view that persons (including the person who holds the office of the sovereign) have a pre-political or natural right to punish. See my first article, "The Right to Punish in Thomas Hobbes's *Leviathan*," note 20 and 21 and corresponding text.

Answering the first question—what it is about cruelty, ingratitude, and inequity in particular that, for Hobbes, captures the punishment of the innocent—requires extending our analysis beyond the three arguments offered in the passage quoted at the beginning of this paper. We must attend to Hobbes's general understanding of cruelty, ingratitude, and inequity in order to address how these three particular laws of nature are germane to the punishment of the innocent. I argue that the law of nature prohibiting cruelty captures the punishment of the innocent because the act is contrary to the *purpose* for which subjects authorize the sovereign to punish them for transgressing the law. The law of nature prohibiting ingratitude captures the punishment of the innocent because the act is contrary to the *expectation* subjects have following their authorization of the sovereign to punish them for transgressing the law. The law of nature prohibiting inequity captures the punishment of the innocent because the act is contrary to the *trust* for which the sovereign is authorized to punish transgressors of the law.

I argue that the punishment of the innocent is an act of *hostility* because is it an unauthorized (illegitimate) exercise of sovereign authority; it is represented as an act of *hostility* because it is not to be attributed to the office of sovereignty but, rather and only, to the person (or persons) who holds the office of sovereignty. As I have argued elsewhere, prospective subjects' authorization of the sovereign to punish them for transgressing the law, for Hobbes, provides the distinction between acts of punishment and acts of hostility; violent acts that are not attributed to the public authority cannot be construed as punishment but, rather, are construed as acts of hostility.[18] The punishment of the innocent is an act of hostility because the person holding the office of sovereignty

[18] See my first article, "The Right to Punish in Thomas Hobbes's *Leviathan*."

acts beyond his commission to only punish the guilty. This is a conceptual claim based on Hobbes's theory of authorization.[19]

The habitual practice of cruelty, ingratitude, and inequity in punishment (the habitual practice of punishing the innocent) leads to war because, as an unauthorized (illegitimate) exercise of sovereign authority, it will likely be viewed as a declaration of war against the citizenry *en masse*. The claim that the habitual practice of cruelty, ingratitude, and inequity in punishment—the habitual practice of punishing the innocent—leads to (or reintroduces) the state of war is an empirical claim, but one that draws on the above conceptual claim. Subjects will most likely revolt due to the habitual practice of cruelty, ingratitude, and inequity in punishment when i) they recognize that their own accountability to law is absent when the *purpose* of the institution of punishment—i.e., maintaining the *in foro externo* obligation to the law—is negated; ii) they recognize that their *expectation* for granting the sovereign the right to punish—i.e., protection under the law—is habitually unmet; and iii) they recognize that the *trust* for which the sovereign is authorized to distribute retributive justice—i.e., proper ownership in punishment—is habitually breached.

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[19] Accordingly, we can appreciate that, for Hobbes, harm inflicted by the sovereign upon the innocent is not punishment *proper* but hostility. Yet to argue that the claim "punishment is inflicted upon the guilty" is a tautology or true by definition, as Hüning, Laird, Ryan, Warrender, and Watkins each attribute such a view to Hobbes, is to ignore the contractual grounds Hobbes provides for an account of punishment: the distinction between punishment and hostility draws on the distinction between the exercise of an artificial right as an act of political representation and the exercise of the right of nature as a private act. Hobbes's *definition* of punishment that he offers in Chapter 28 of *Leviathan*, "Of Punishments and Rewards," and all but one of the eleven *inferences* he draws from it—that to be neglected by public favour is not punishment—reiterate the norms of an institution that is politically constituted through each prospective subject authorizing the sovereign to punish him for transgressing the law. "A PUNISHMENT," according to Hobbes, "is an evil inflicted by public authority, on him that hath done, or omitted that which is judged by the same authority to be a transgression of the law" (*Leviathan*, 28/1, 161). Hobbes adds, "[f]rom the definition of punishment, I infer, first, that neither private revenges nor injuries of private men can properly be styled punishment, because they proceed not from public authority" (*Leviathan*, 28/3, 162).

Each of Hobbes's three arguments that appeal to a particular law of nature draws upon this concern for legitimacy in punishment. Hobbes's appeals to the three particular laws of nature as the means for maintaining domestic peace should be read as appeals to the maintaining legitimacy in punishment. The punishment of the innocent would be viewed as contrary to the norms of authorization or, what is the same, as an unauthorized exercise of sovereign power.

3.2 Inequity (Against the Eleventh Law of Nature)

Since Hobbes's appeal to maintaining legitimacy in punishment is, I believe, most apparent in the third argument in the passage quoted at the beginning of this paper, I will begin my account with it. According to Hobbes, "the law [of nature] that commandeth equity; that is to say, an equal distribution of justice, which in punishing the innocent is not observed."[20] The objective at hand is to understand how, for Hobbes, the law of nature prohibiting inequity captures the punishment of the innocent.

Each prospective subject grants the sovereign the right to punish him in order that each prospective subject establishes himself to be accountable to the law.[21] Put somewhat differently, prospective subjects contract that there be some actions the committing of which ought to be punished. Breaches of the laws of nature and the exercise of invasive natural rights that were renounced serve as the starting point for giving substantive content to crime. But granting the sovereign the right to punish transgressors does not, by itself, provide the scope of legitimacy in punishment. Without qualification, granting the

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[20] *Leviathan*, 28/22, 165

[21] For an extended analysis of this theme, see my second article, "Hobbes on the Rationale of Punishment."

right to punish simply makes one accountable *for* transgressing the law. Unqualified, the grant simply states that "if I commit a crime, then the sovereign has the right to punish me." The grant indicates nothing about a limiting condition on the right to punish. Thus, we must ask the following question: if a subject does not commit a crime, does Hobbes hold the view that the sovereign still has the right to punish him?

When we survey Hobbes's remarks regarding the biblical story of David and Uriah,[22] it seems that he intimates that the sovereign does have the right to punish the innocent. Hobbes notes:

> [N]othing the sovereign representative can do to a subject, on what pretence soever, can properly be called injustice or injury; because every subject is author of every act the sovereign doth [to him], so that he never wanteth right to any thing, otherwise than as he himself is the subject of God, and bound thereby to observe the laws of nature. And therefore it may and doth often happen in Commonwealths that a subject may be put to death by the command of the sovereign power, and yet neither do the other wrong […] *And the same holdeth also in a sovereign prince that putteth to death an innocent subject.* For though the action be against the law of nature, as being contrary to equity (as was the killing of Uriah by David); yet it was not an injury to Uriah, but to God. Not to Uriah, because the right to do what he pleased was given him by Uriah himself; and yet to God, because David was God's subject and prohibited all iniquity by the law of nature.[23]

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[22] For those unfamiliar with the biblical story, a brief account of the story from the 11th Chapter of the 2nd Book of Samuel in The Old Testament will be helpful: Upon seeing Bathsheba from the roof of his palace, and unaware that she was the Wife of Uriah, King David seduced her, resulting in a pregnancy. When David was informed that Bathsheba was Uriah's wife, he summoned Uriah from battle, suggesting that he go home and "attend" to his wife, with the hope that the pregnancy would appear legitimate. However, Uriah refused, claiming a code of honour to remain with his fellow warriors while they were in battle. After repeatedly refusing to see his wife, David sent Uriah to his commanding officer Joab with a letter, the content of which was unbeknownst to Uriah, that secretly ordered Joab to put Uriah at the head of the battle and then have the soldiers move away from him so that he would be the sole target. Uriah is killed in battle. Upon Uriah's death, David made Bathsheba his wife.

[23] *Leviathan*, 21/7, 109; emphasis added.

It seems that Hobbes holds that an innocent subject can rightfully be put to death by the sovereign. This claim appears incompatible with the claim I am attributing to Hobbes that the authority to punish a subject is granted the sovereign representative only so far as that subject is guilty of transgressing the sovereign's law. There is a way to reconcile the two claims, but this first requires us to answer our query set out above; that is, how, for Hobbes, does the law of nature prohibiting inequity capture the punishment of the innocent?

We must first appreciate that the grant of the right to punish is limited. Hobbes implies that each prospective subject, in authorizing punishment, "covenant[s] thus, *unless I do so, or so, kill me*."[24] Or, to be more precise, each prospective subject "covenant[s] thus, *unless I do so, or so,* [*the sovereign has the authority to*] *kill* [*imprison, or fine*] *me*." We can recognize that the sovereign is not merely granted the right to punish a subject *for* transgressing the law, but *only for* transgressing the law. The qualification adds to the grant "*only* if I commit a crime, then the sovereign has the right to punish me." The sovereign is given the authority to punish the prospective subject *unless* the subject is obedient to the law; i.e., *unless* the subject does not transgress the law. The authority to punish granted the sovereign has a very significant provision attached. The authority to punish is granted for only those cases for which the subject is *found guilty of committing a crime*. One is liable for punishment only so far as one has committed a crime. Here guilt is to be *uniquely* or *exclusively* determined by reference to the wrong act(s) that a person performed. Guilt and punishment are, thus, inexorably and exclusively linked. But it is important to appreciate that, for Hobbes, guilt and

[24] *Leviathan*, 14/29, 70.

punishment are linked by virtue of the above stipulation made by prospective subjects in granting the sovereign the authority to punish.

This limitation placed on sovereign authority to only punish the guilty—to only punish those who have transgressed the law—draws upon Hobbes's general treatment of authorization. Hobbes claims that a limitation may be placed on authorization in the following passage:

> [E]very man giving their common representer authority from himself in particular, and owning all the actions the representer doth, in case they give him authority without stint: *otherwise, when they limit him in what and how far he shall represent them, none of them owneth more than they gave him commission to act*.[25]

Prospective subjects do not give the sovereign the authority to punish without stint; rather, we see that liability for punishment is limited only to those who commit transgressions of the law. The punishment of the innocent is an act of hostility, although not because it breaches the law of nature requiring equity; the punishment of the innocent is an act of hostility because the sovereign fails to act within the scope of his commission or, what is the same, the scope of authorization. As we see below, Hobbes's argument against inequity in punishment is best understood as appealing to the limiting condition of authorization of the right to punish.

Regarding the eleventh law of nature, Hobbes claims that one who is commissioned or entrusted to judge between persons is required to "distribute to every man his *own*."[26] To this claim Hobbes adds, "this is indeed just distribution, and may be called, though improperly, distributive justice, but more properly equity, which also is a

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[25] *Leviathan*, 16/14, 82; emphasis added.

[26] *Leviathan*, 15/15, 75; emphasis added.

law of nature."[27] Elsewhere Hobbes remarks that equity requires "the equal distribution to each man of that which in reason belonged to him."[28] Accordingly, from these remarks we can infer the norm that governs equity or distributive justice is *ownership*: that each person is to be distributed "his own." To punish the innocent, then, is not to give that subject "his own." To put it another way, punishment does not "belong" to the innocent.

Hobbes, we should note, understands the act of punishment to be owned by the subject condemned. Hobbes claims that "he that attempteth," for example, "to depose his sovereign be killed or punished by him for such attempt, *he is author of his own punishment*, as being, by the institution, author of all his sovereign shall do."[29] And to be an author of an action is to own that action: Hobbes states, of "persons artificial, some have their words and actions *owned* by those whom they represent. And then the person is the *actor*, and he that owneth his words and actions is the AUTHOR, in which case the actor acteth by authority."[30] Ownership of punishment arises through the subject's authorization of the sovereign to punish him for transgressing the law.

We cannot understand the attribution of ownership in punishment without an appeal to authorization. Again, equity requires that the sovereign "distribute to every man his own" and, as we must understand Hobbes here to further intimate, to punish the innocent is not to give that subject his own. But we cannot understand the misattribution of ownership in punishment except by an appeal to the limiting scope or the limiting

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[27] *Leviathan*, 15/15, 75.

[28] *Leviathan*, 15/24, 77

[29] *Leviathan*, 18/3, 89; emphasis added.

[30] *Leviathan*, 16/4, 81.

condition of authorization. If we ask why an innocent subject does not own the punishment inflicted upon him, the only response available requires an appeal to the authorization of the right to punish or, more specifically, the limiting condition of the authorization of the right to punish.

As we have already noted above, Hobbes claims of those who authorize another to act upon their behalf, "none of them owneth more than they gave him commission to act."[31] No subject owns the punishment of a crime for which he is not guilty. If a subject is accused, found not guilty, but then punished by the sovereign despite the acquittal, the innocent subject does not own the punishment for the simple reason that the sovereign acts beyond his commission as representative of the people to punish *only* those who are guilty. The sovereign may have a *personal* vendetta with the subject condemned, but the sovereign does not act as the *public* representative when, after the acquittal, he harms the subject (or brings about harm to that subject through the pretence of authority). Not every action the sovereign performs is an act of *political* representation; as Hobbes claims, "every man or assembly that hath sovereignty representeth two persons, or, as the more common phrase is, has two capacities, one natural and another politic; as a monarch hath the person not only of the Commonwealth, but also of a man."[32] The case in which the sovereign inflicts harm on an innocent subject, the sovereign—not the subject—*owns* the action; that is to say, the sovereign acts in his capacity as a natural person, not in his

[31] *Leviathan*, 16/14, 82.

[32] *Leviathan*, 23/2, 123.

capacity as an artificial person. As such, the harm inflicted is not an act of punishment, but rather an act of hostility.[33]

Hobbes's appeal to the law of nature prohibiting inequity in arguing against the punishment of innocent is best understood when we appreciate that the appeal to equity involves an appeal to maintaining legitimacy in punishment, i.e., maintaining proper ownership in the distribution of justice. F.S. McNeilly argues that, for Hobbes, equity, particularly the equitable distribution of punishment, is necessary for domestic peace, as the iniquitous distribution of punishment invites war. McNeilly articulates this view in a passage that bears repeating:

> Equity is the equal distribution of justice in criminal prosecutions, giving no special favour to the rich or powerful, and punishing only the guilty and not the innocent. The justification of this as a law of nature, which also must be observed in the provisions and administration of civil law, is that it is clearly a necessary means to peace, since to treat men inequitably is to deprive them of the benefits of law and order and therefore invite them to war.[34]

McNeilly is by no means mistaken to claim that Hobbes appeals to the law of nature in prohibiting the punishment of the innocent as the means to domestic peace. Nevertheless, his analysis is incomplete in an important way. The fact that the sovereign breaches the law of nature—treats subjects inequitably— by depriving subjects of the benefits of law and order does not, by itself, capture Hobbes's explanation of why

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[33] Returning to a passage quoted above, Hobbes notes, "he that attempteth," for example, "to depose his sovereign be killed or punished by him for such attempt, he is author of his own punishment, as being, by the institution, author of all his sovereign shall do" (*Leviathan*, 18/3, 89). We can now understand Hobbes's claim that the subject is "author of *all* his *sovereign* shall do" refers to those actions that the person who holds the office of the sovereign performs as the *sovereign representative*. The subject is not author of, has not authorized, those actions that the person who holds the office of the sovereignty performs as representative of his own person. For extended analysis of Hobbes's account of representation, see my first article, "The Right to Punish in Thomas Hobbes's *Leviathan*."

[34] McNeilly, *The Anatomy of Leviathan*, 246.

inequitable punishment in particular invites subjects to war against the sovereign. In other words, the claim that persons, when deprived of the benefits of law and order, will war against the sovereign is certainly significant, but it is missing a crucial step in Hobbes's argument. To fully appreciate Hobbes's third argument—that inequitable punishment, in particular, invites war—we must appeal to the underlying *trust* that was breached with the punishment of the innocent.

The sovereign, according to Hobbes, is "*trusted* to judge between man and man, [and] it is a precept of the law of nature [requiring equity] that he deal equally between them."[35] Equity draws on this trust, not merely to judge impartially, but to ensure the determinations of retributive justice align with "that which in reason belonged to him [i.e., in this case, the accused]."[36] As Hobbes notes, the equitable distribution of justice is not observed with the punishment of the innocent. The inequitable treatment will be viewed as the breach of trust to distribute justice according to what "belonged to him," that is, to what the subject "owneth." As noted above, that which a subject owns follows from the actions he authorized the sovereign to perform as the representative of the people. Subjects do not authorize—subjects do not own—those harms that are not a retributive response to a transgression of the law. Those harms, as we also noted above, are owned by the sovereign as a natural or private person; accordingly, the punishment of the innocent is an act of hostility.

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[35] *Leviathan*, 15/23, 77; original emphasis omitted. We must not overlook the juridical context of this relationship. The trust is established by each prospective subject (the *trustors*) authorizing the sovereign (the *trustee*) to distribute retributive justice, in accord with equity, to the benefit of the people or the Commonwealth (the *beneficiary*). The sovereign owes a fiduciary duty to the Commonwealth, although we must recognize that even if the sovereign fails to discharge this duty, the fiduciary relationship is irrevocable through jurispolitical means. Of course, as we see in section 3.4 below, the want of a right to rebel does not preclude the possibility of rebellion.

[36] *Leviathan*, 15/24, 77.

Hobbes's specific concern with inequitable punishment is not, as McNeilly argues, simply that depriving subjects of the benefits of law and order is an invitation to war. We must draw out Hobbes's reasoning here, as his argument is more discerning: the sovereign is *entrusted* to distribute the benefits and burdens of law according to what one is owed, that is, according to "what in reason belonged to him," and to deprive subjects of the benefits of law and order by punishing them despite their innocence is to breach this trust.

Hobbes's reasoning why inequity in punishment in particular is an invitation to war is now available to us. Hobbes notes that "[h]e therefore that is partial in judgement, doth what in him lies to deter men from the use of judges and arbitrators, and consequently, against the fundamental law of nature, is the cause of war."[37] The judgment that one ought to be punished despite an acquittal displays not only a prejudice against the particular subject condemned but also a rejection of the principle that determines ownership in punishment. The acquittal is the judicial determination that punishment does not "belong to him," that is, punishment does not belong to the accused. To punish despite the judicial determination does not override the judgment of innocence; rather, it overrides the principle that governs the distribution of retributive justice—that guilt is a necessary requirement for punishment. The sovereign is entrusted as the sole arbiter of justice, including retributive justice. The practice of habitual inequity in punishment—the habitual punishment of the innocent—will be contrary to domestic peace because the distribution of retributive justice to whom it does not belong will be viewed as a breach of this trust. Such prejudice will "deter men from the use of judges and arbitrators," and

[37] *Leviathan*, 15/23, 77.

the punishment of the innocent in particular, as I think Hobbes further intimates, deters subjects from viewing the sovereign as the entrusted arbiter of justice.

Equity in punishment, as we have seen, concerns ownership in punishment, or "distribut[ing] to every man his own." And ownership in punishment follows from each subject's authorization of the sovereign to punish him for transgressing the law. An innocent subject, as we have noted, does not own the punishment. Hobbes's appeal to equity in punishment is an appeal to maintaining legitimacy in punishment, that is, maintaining proper ownership in punishment. Eschewing inequity in punishment as a means to domestic peace requires the sovereign to maintain legitimacy in punishment, that is, it requires the sovereign to only punish the guilty.

Returning to Hobbes's treatment of David and Uriah, we can now see that his position here is consistent with the above account; that is, it is consistent with his account that authorizing the sovereign the right to punish provides the limiting condition on legitimate punishment. When we scrutinize the passage in which David is said to put Uriah (an innocent subject) to death, we are told that such an act, although within David's right, is iniquitous. We have to ask the following: why does Hobbes think that the killing of Uriah by David is iniquitous? The first thing to note is that the putting to death of Uriah is not iniquitous because it is a case of punishing the innocent. Uriah's condemnation does not follow being publically accused and subsequently acquitted; Uriah's death is neither brought about before a public court nor after a public acquittal. Uriah death is brought about in a clandestine fashion, calculated to occur on the battlefield. Accordingly, Hobbes's does not say that David "punishes" Uriah, only that

Uriah, an innocent subject, is put to death.[38] But Uriah's death is not iniquitous because he was innocent of any wrongdoing. Rather, Uriah's death is iniquitous because he was singled out by David (and killed in order that David could marry Uriah's wife, Bathsheba). As we see, it is a particular case of *prosopolepsia* of which David is guilty:

> Also, if a man *be trusted to judge between man and man*, it is a precept of the law of nature *that he deal equally between them*.[…] The observance of this law, from the equal distribution to each man of that which in reason belonged to him, is called EQUITY, and (as I have said before) distributive justice: the violation, *acception of persons, prosopolepsia*.[39]

David, thus, treats Uriah inequitably by singling him out for death. David's singling out Uriah for death during battle is iniquitous because it has nothing to do with soldiery or the requirements of military success; it is only because of David's illicit affair with Bathsheba that Uriah is purposely placed in peril.[40] As we have seen, the punishment of the innocent is against equity. But the case of David bringing about the death of Uriah does not constitute the punishment of the innocent. Punishing the innocent is not a right the sovereign representative possesses.

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[38] David Dyzenhaus, "How Hobbes met the 'Hobbes Challenge,'" *The Modern Law Review* 72 (2009): 499, draws the same conclusion: "it is significant that Hobbes characterizes the story as one about putting to death an innocent. He does not and cannot say that it is about 'punishing' an innocent, since punishment for Hobbes is by definition an act that follows a proper finding of guilt for a crime that was set out in a public law before the act was done." In accordance with the biblical story, Hobbes does not say David punishes Uriah because the bringing about the death of Uriah fails to accord with the juridical rules of criminal procedure. As Hobbes states, "the evil inflicted by public authority, without precedent public condemnation, is not to be styled by the name of punishment, but of a hostile act, because the fact for which a man is punished ought first to be judged by public authority to be a transgression of the law" (*Leviathan*, 28/5,162).

[39] *Leviathan*, 15/23-24, 77.

[40] In this case, the distribution of military burdens—to be the sole target of the enemy—was unrelated to the burdens for which soldiers may expect to assume. A soldier may expect, say, to "stand in the breach" (a tactic employed to defend the incursion by the enemy of a breach in the fortress). If a commander singles out a particular soldier to perform this task, such a distribution of burdens is not iniquitous insofar as the particular soldier is singled out for military, and not personal, reasons.

3.3 Ingratitude (Against the Fourth Law of Nature)

Hobbes presents the second argument against the punishment of the innocent as follows: the punishment of the innocent "is a rendering of evil for good," thus in violation of the law of nature "which forbiddeth ingratitude."[41] For "seeing all sovereign power is originally given by the consent of every one of the subjects" and "as long as they are obedient" to the sovereign's law subjects should be "protected thereby."[42] The objective at hand is to understand how, for Hobbes, the law of nature prohibiting ingratitude captures the punishment of the innocent.

The punishment of the innocent is an act of ingratitude. Again, the claim commentators accurately attribute to Hobbes is that the laws of nature—in this case, the law of nature prohibiting ingratitude—ground the principle that guilt is a necessary requirement for punishment. Ingratitude in punishment, as a violation of the fourth law of nature, invites war. To understand the latter claim, however, we must understand what it is about the punishment of the innocent in particular that ingratitude captures. This analysis first requires a better understanding of the fourth law of nature.

Hobbes articulates the fourth law of nature—the law requiring gratitude—as follows:

> GRATITUDE depend[s] on antecedent grace; that is to say, antecedent free gift: and is the fourth law of nature, which may be conceived in this form; *that a man which receiveth benefit from another of mere grace, endeavour that he which giveth it, have no reasonable cause to repent him of his good will*. For no man giveth, but with intention of good to himself; because gift is voluntary; and of all voluntary acts, the object is to every man his own good.[43]

[41] *Leviathan*, 28/22, 165.

[42] *Leviathan*, 28/22, 165.

[43] *Leviathan*, 15/16, 75-76.

If I give you a sword to protect me—the good to myself that is behind the intention of the gift—and, without provocation, you use that sword against me, I will very much regret the gift as you act in a manner that exemplifies ingratitude. My regret exposes an *expectation* that you will not wantonly attack me with the gift. Your failure to exhibit gratitude follows from the failure to keep track of my expectation of good to follow from the gift. However, your use of the sword against me certainly does not exhibit ingratitude if I provoke the attack. If I attack you, I certainly cannot expect that you will not use the sword against me; put differently, I have "no *reasonable* cause" to regret the gift. We can appreciate that the mere use of the sword does not capture Hobbes's concern with gratitude; rather, Hobbes's concern with gratitude tracks whether the endeavour behind the employment of the gift—in this case, the use of the gifted sword—betrays the expectation of the good to the benefactor.

Prefacing his second argument against the punishment of the innocent, Hobbes claims that "*all* sovereign power is originally given by the consent of every one of the subjects."[44] The sovereign "receiveth" from all prospective subjects the "benefit of mere grace" in the authority to make law and the authority to punish transgressors of the law. Each prospective subject recognizes that it is "good to himself" that he (and everyone with whom he covenants) be subject to laws, the breaking of which necessitates penalties. As Hobbes claims, "it is necessary for all men that seek peace to lay down certain rights

[44] *Leviathan*, 28/22, 165; emphasis added. Hobbes is here re-iterating the position presented earlier in *Leviathan*. Hobbes contends that mutual authorization by prospective subjects is the means by which "all the *rights* and *faculties* of him, or them, on whom the sovereign power is conferred by the consent of the people assembled" (*Leviathan*, 18/2, 88), including the right to punish; as Hobbes maintains, "to the sovereign is *committed* the power of rewarding with riches or honour; and of punishing with corporal or pecuniary punishment, or with ignominy, every subject according to the law he hath formerly made" (*Leviathan*, 18/14, 92; emphasis added).

of nature; that is to say, not to have liberty to do all they list."[45] Each prospective subject authorizing the sovereign to punish him for exercising renounced rights establishes trust among the multitude. But no person recognizes any good to come from being subject to laws that do not require a breach for one to be liable for penalties; such a state of affairs too closely resembles the state of nature.

Just as it is necessary for peace for prospective subjects to renounce some natural rights, the exercising of which necessitates penalties, Hobbes adds "so is it necessary for man's life to retain some [natural rights]: as right to govern their own bodies; enjoy air, water, motion, ways to go from place to place; and all things else without which a man cannot live, or not live well."[46] The proper return for the gift of sovereignty, that is, the sovereign's proper expression of gratitude, is to maintain sufficient security—i.e., the authority of the law over renounced natural rights—while maximizing liberty—i.e., the free exercise of retained natural rights.[47] The proper expression of gratitude for the gift of the right to make law is to make good laws, that is, to maximize the liberty of each subject consistent with the liberty of all subjects.[48] The proper expression of gratitude for

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[45] *Leviathan*, 15/22, 77.

[46] *Leviathan*, 15/22, 77.

[47] As Hobbes claims in the dedication to Francis Godolphin in *Leviathan*, the aim of the treatise is to show how one could pass "unwounded" between those "that contend, on one side for too great liberty, and on the other side for too much authority."

[48] See *Leviathan*, 26/20-21, 181-182: "To the care of the sovereign belongeth the making of good laws. But what is a good law? [...] A good law is that which is *needful*, for the *good of the people*, and withal *perspicuous*. For the use of laws (which are but rules authorized) is not to bind the people from all voluntary actions, but to direct and keep them in such a motion as not to hurt themselves by their own impetuous desires, rashness, or indiscretion; as hedges are set, not to stop travellers, but to keep them in the way. And therefore a law that is not needful, having not the true end of a law, is not good."

the gift of the right to punish is to maintain the authority of law over the exercise of renounced natural rights.[49]

Ingratitude in punishment—the deprivation of a subject's right to govern his own body, his enjoyment of air, water or motion in the absence of a prior unlawful exercise of renounced rights—betrays the expectation of the good to follow from granting the sovereign the authority to punish him *for, and only for, transgressing the law*. The punishment of the innocent betrays the expectation of protection by the law "as long as they are obedient."[50] The infliction of punishment *per se* (or the use of what Hobbes calls "the sword of justice" *per se*) does not capture the concern of ingratitude in punishment.[51] Ingratitude in punishment concerns whether the punishment betrays the expectation of legitimacy in punishment—legitimacy grounded in prospective subjects' authorization of the sovereign to punish them for transgressing the law.

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[49] It would be wrong to complain that Hobbes argues in the second paragraph of Chapter 28, "Of Punishments and Rewards," that subjects do not "gift" the sovereign the right to punish as a reason to disregard the applicability of gratitude to punishment in particular. Hobbes does make this claim, but it is just as applicable to all the rights the sovereign representative possesses, as there is no pre-political right to make law or adjudicate legal controversies. Authorization of a sovereign provides the political context in which the natural right to violence is construed as a jurispolitical or artificial right. It is the grant of authority that we ought to regard as the benefit of grace bestowed upon the sovereign.

[50] *Leviathan*, 28/22, 165.

[51] The criminal, to be sure, will likely not take (nor is required to take) his punishment stoically. As Hobbes intimates below, the criminal is expected to resist punishment: "man by nature chooseth the lesser evil, which is danger of death in resisting, rather than the greater, which is certain and present death in not resisting. And this is granted to be true by all men, in that they lead criminals to execution, and prison, with armed men, notwithstanding that such criminals have consented to the law by which they are condemned" (*Leviathan*, 14/29, 70). Despite the expectation of resistance, the criminal should not be expected to resent the fact that breaches of the law necessitate punishment. That is to say, the criminal will have "no reasonable cause" to regret authorizing the sovereign the right to punish him for transgressing the law. To resent the fact that he is punished for transgressing the law is to resent the existence of the Commonwealth as an institution ruled by law or an institution that holds the authority of the law over renounced natural rights. As Hobbes recognizes, even though the criminal will be expected to resist, the criminal is the author of—has authorized—the laws by which he is condemned.

As noted above, the claim commentators attribute to Hobbes is that ingratitude in punishment, as a violation of the fourth law of nature, invites war. Also noted above, to understand this claim we have to attend to the mandate of gratitude and why exhibiting ingratitude in punishment by punishing the innocent invites war. We can now appeal to the preceding analysis: an explanation of ingratitude in punishment as an invitation to war requires appreciation of the fact that prospective subjects make themselves liable for punishment through authorizing the sovereign to punish them for transgressing the law, and there is a certain expectation—protection under the law as long as they do not transgress the law—that accompanies the wielding of the sword of justice. The habitual failure to meet this expectation—an expectation to which gratitude is prescribed to attend—introduces hostilities motivated by regret. The habitual punishment of the innocent as the exemplification of ingratitude in punishment "is a rendering of [the] evil [of punishment] for [the] good [of obedience]."[52] Nothing, for Hobbes, short of the sovereign's dissolution of the Commonwealth, is a more grievous cause of subjects' regret than such a rendering. Travis Smith, in the following passage, conveys Hobbes's concern with gratitude as keeping track of subjects' expectations:

> Gratitude, for Hobbes, requires substantially more than an expression of friendly fellow-feeling […] If the sovereign does not meet his subjects' *expectations* they may well attempt to withdraw their gift [of sovereignty], even if they have no right to do so.[53]

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[52] *Leviathan*, 28/22, 165.

[53] Travis Smith, "On the Fourth Law of Nature," 89; emphasis added. Despite his insightful analysis of the fourth law of nature as tracking *expectations* following from a gift, Smith fails to see that Hobbes's concern with ingratitude in punishment tracks the expectations following from the grant of the authority to punish. Although Smith contends that the "punishment of the innocent constitutes a grievous offense against the fourth law of nature" ("On the Fourth Law of Nature," 90), by denying that, for Hobbes, the right to punish is bestowed upon the sovereign ("On the Fourth Law of Nature," 88), Smith is unable to explain why the punishment of the innocent in particular constitutes a grievous offense against the fourth law of nature.

If ingratitude in punishment is contrary to domestic peace, that is, if ingratitude in punishment invites subjects to attempt to "withdraw their gift," again, it is because ungrateful acts of punishment fail to meet the expectations of the gift of sovereign's authority to punish, or what Hobbes calls the "antecedent grace."[54]

The sovereign's duty of gratitude is discharged by keeping track of subjects' expectation that they will not be punished "as long as they are obedient." Appeal to gratitude in punishment is an appeal to maintain legitimacy in punishment. Eschewing ingratitude in punishment as a means to domestic peace requires the sovereign to maintain legitimacy in punishment, that is, it requires the sovereign to only punish the guilty.

3.4 Cruelty (Against the Seventh Law of Nature)

The first argument in the passage quoted at the beginning of this paper is, admittedly, the most difficult to reconcile with a clear appeal to legitimacy in punishment. The problem lies in the vagueness of the argument: the law of nature that prohibits cruelty requires that good consequences follow punishment and, as Hobbes states, "there can arrive no good to the Commonwealth by punishing the innocent."[55] As it stands, the claim that "there can arrive no good to the Commonwealth by punishing the innocent" is unconvincing.

If what Hobbes means by punishing the innocent is simply the manufacturing of fraudulent evidence by the state, or scapegoating a subject, say, in order to appease the fears of the population, then, the above argument is dubious. There can arise some good to the Commonwealth by (fraudulently) punishing the innocent, granting that a

[54] *Leviathan*, 15/16, 75.

[55] *Leviathan*, 28/22, 165.

sufficiently large number of the citizenry is convinced of the condemned subject's guilt. However, it is doubtful that Hobbes had concealed state fraud in mind as a way in which the issue of the punishment of the innocent arises.

Hobbes explicitly addresses the way in which the punishment of an innocent subject arises, and this concerns the punishment of a subject who was acquitted by a judge: as Hobbes claims, "it is against the law of nature to punish the innocent; and *innocent is he that acquitteth himself judicially and is acknowledged for innocent by the judge*."[56] Again, Hobbes's claim is that no good to the Commonwealth can result from the punishment of the innocent. The concern must be that the infliction of punishment upon a person after a *public acquittal* cannot bring about any good consequences for the Commonwealth.

According to the first argument, the punishment of the innocent—he that acquitteth himself judicially—is "a violation, first, of that law of nature which forbiddeth all men, in their revenges, to look at anything but some future good: for there can arrive no good to the Commonwealth by punishing the innocent."[57] If we are to understand the claim that cruelty in punishment invites war, we must understand what it is about the punishment of the innocent in particular that cruelty captures. This analysis first requires a better understanding of the seventh law of nature. Hobbes's full statement of the law of nature prohibiting cruelty is as follows:

> A seventh [law of nature] is, *that in revenges* (that is, retribution of evil for evil), *men look not at the greatness of the evil past, but the greatness of the good to follow*. Whereby we are forbidden to inflict punishment with any other design than for correction of the offender, or direction of others. For this law is consequent to the next before it, that commandeth pardon upon

[56] *Leviathan*, 26/24, 144; emphasis added.

[57] *Leviathan*, 28/22, 165.

> security of the future time. Besides, revenge without respect to the example and profit to come is a triumph, or glorying in the hurt of another, tending to no end (for the end is always somewhat to come); and glorying to no end is vain-glory, and contrary to reason; and to hurt without reason tendeth to the introduction of war, which is against the law of nature, and is commonly styled by the name of *cruelty*.[58]

As Hobbes implies, cruelty leads to war because cruelty is the infliction of harm without reason; that is to say, cruelty invites war because cruelty does not have a *purpose* or tends to no end. Of course, the reason retribution inflicted without purpose "tendeth to the introduction of war" needs to be drawn out.

The sovereign, in punishing an innocent subject—"he that acquitteth himself judicially and is acknowledged for innocent by the judge"—cannot appeal to the correction of the subject condemned for the obvious reason: the subject, having been found not guilty of committing a transgression, does not require correction; the punishment does not address this reason.[59] Moreover, there is no profit or good to come from the punishment of the innocent, as the punishment does not provide "direction of others."[60] But failing to provide direction of others or precluding the attribution of correction to the harm inflicted, that is, failing to promote the good of the Commonwealth, does not yet capture the reason purposeless harm introduces war. Simply put, failing to promote the good of the Commonwealth—peace and security—does not explain why inflicting purposeless harm would be contrary to domestic peace and security by inviting war. To answer this question, I contend that we must appeal to

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[58] *Leviathan*, 15/19, 76.

[59] This is not to claim that, for Hobbes, the sovereign must justify his actions to his subjects. All I imply here is that subjects will not attribute to the sovereign's infliction of harm the correction of the accused offender.

[60] *Leviathan*, 15/19, 76.

the purpose for which subjects grant the sovereign the right to punish. As we see below, the sovereign's failure to promote this good does capture the reason purposeless harm—the punishment of the innocent—would be contrary to domestic peace and security.

As I have argued elsewhere, the good that authorizing the sovereign the right to punish transgressors of the law promotes is the establishment of the *in foro externo* obligatory status of the law.[61] That is to say, each prospective subject making himself accountable to the law via liability for punishment for transgressions, makes the law obligatory in one's action as opposed to merely obligatory in one's conscience (*in foro interno* obligatory).[62] Each prospective subject, making himself liable for punishment for transgressing the law, is a kind of *collateral* each person puts up in order to be party to the social covenant. That all persons are held accountable to the law gives each and every person a reason to conform to the law. Without general accountability to the law, conformity to law is unreasonable, thus the law does not oblige *in foro externo*. Authorizing the sovereign to punish transgressors of the law and the corresponding punishment of transgressions of the law provides for the assurance that the law holds authority over renounced natural rights, thus, gives each subject as reason to conform to the law.

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[61] See my second article, "Hobbes on the Rationale of Punishment."

[62] See *Leviathan*, 15/36, 79: "The laws of nature oblige *in foro interno*; that is to say, they bind to a desire they should take place: but *in foro externo*; that is, to the putting them in act, not always. For he that should be modest and tractable, and perform all he promises in such time and place where no man else should do so, should but make himself a prey to others, and procure his own certain ruin, contrary to the ground of all laws of nature which tend to nature's preservation. And again, he that having sufficient security that others shall observe the same laws towards him, observes them not himself, seeketh not peace, but war, and consequently the destruction of his nature by violence."

However, if each subject discerns that anyone is liable for punishment regardless of a judicial finding of innocence, then each subject no longer has reason to think that all others will be motivated to conform their actions to the law. Once liability for the infliction of punishment passes to the arbitrary or capricious determination of the sovereign, each subject no longer has any reason to believe that other subjects view themselves as accountable to the law. Accordingly, each subject no longer has a reason to view the law as *in foro externo* obligatory. The reason for not exercising those natural liberties that each subject renounced upon entering civil society no longer applies: the law no longer protects subjects. When the law fails to protect, the law fails to be obligatory; as Hobbes states, "for no man is obliged [to the law] (when the protection of the law faileth) not to protect himself by the best means he can."[63] But more than that, if a subject discerns that he is liable for punishment regardless of a judicial finding of innocence, then he no longer holds any political allegiance to the sovereign. As Hobbes states, "[t]he obligation of subjects to the sovereign is understood to last as long, and no longer, than the power lasteth by which he is able to protect them."[64] In the starkest terms, the sovereign's habitual practice of punishing the innocent exhibits to all those liable for punishment a breakdown of law and order.

The sovereign is not liable to be punished if he breaches the laws of nature. If the sovereign acts with cruelty in punishment—if the sovereign punishes the innocent—the

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[63] *Leviathan*, 27/22-24, 156.

[64] *Leviathan*, 21/21, 114. I take Hobbes here to imply that not only is "the obligation of subjects to the sovereign is understood to last as long, and no longer, than the power lasteth by which he is able to protect them," but also the obligation of subjects to the sovereign is understood to last as long as the sovereign has the will to protect them.

sovereign is, nevertheless, immune from being punished by his subjects.[65] Subjects do not have the right to punish the sovereign, nor do subjects have a right to rebel, regardless of how routinely the sovereign practices punishing the innocent. However, from Hobbes's following remarks, we can appreciate that the sovereign routinely punishing the innocent after public acquittal would "naturally" lead to rebellion: according to Hobbes, "seeing punishments are consequent to the breach of laws, natural punishments must be naturally consequent to the breach of the laws of nature, and therefore follow them as their natural, not arbitrary, effects."[66] Immediately preceding this passage Hobbes notes, "negligent government [is naturally punished] with rebellion."[67] Arguably, what makes punishing the innocent in particular negligent governance, thus, leads to rebellion, is that the sovereign fails to adhere to the *purpose* for each prospective subject authorizing the sovereign the right to punish him for transgressing the law.

According to the seventh law of nature, "to hurt without reason tendeth to the introduction of war, which is against the law of nature, and is commonly styled by the name of cruelty."[68] We cannot appreciate Hobbes's argument against cruelty in punishment as an appeal to domestic peace without appreciating why cruelty in punishment—punishing the innocent—will be contrary to domestic peace. Cruelty in punishment fails to keep track of the purpose of punishment, or the reason for introducing the practice of punishment. The punishment of the innocent "tendeth to the introduction

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[65] According to Hobbes, "hurt inflicted on the representative of the Commonwealth is not punishment, but an act of hostility: because it is of the nature of punishment to be inflicted by public authority, which is the authority only of the representative itself" (*Leviathan,* 28/12, 163).

[66] *Leviathan*, 31/40, 193.

[67] *Leviathan*, 31/40, 193.

[68] *Leviathan*, 15/19, 76.

of war" because subjects will no longer regard themselves as obliged to the sovereign's laws if they regard themselves to be liable for punishment regardless of the judicial finding of innocence. The prohibition on cruelty in punishment, as mandated by the seventh law of nature, requires the sovereign to keep track of the *purpose* of punishment.

As I have argued, the purpose for punishment is found in the purpose for each prospective subject authorizing the sovereign the right to punish him for transgressing the law. The purpose, as noted, is to establish and maintain the law *in foro externo* obligatory, and this requires that only the guilty be punished. Appeal to the prohibition on cruelty in punishment is an appeal to maintain legitimacy in punishment. Eschewing cruelty in punishment as a means to domestic peace requires the sovereign to maintain legitimacy in punishment, that is, it requires the sovereign to only punish the guilty.

3.5 Conclusion

With a rare exception,[69] Hobbes scholars reject the view that, for Hobbes, the sovereign's possession of the right to punish is based on its authorization by prospective subjects.[70] What I see as an oversight has consequences for understanding Hobbes's arguments against the punishment of the innocent. The authorization of the sovereign to punish transgressors of the law links punishment to wrongdoing. Prior to prospective subjects

[69] See Clifford Orwin, "On the Sovereign Authorization," *Political Theory* 3 (1975): 31, who notes that the "answer to the question of the right or authority by which the sovereign punishes is that the right by which he punishes is *not authority* but that he punishes *by authority* and by the authority of him whom he punishes. The subject has authorized his punishment."

[70] See my first article, "The Right to Punish in Thomas Hobbes's *Leviathan*," *infra* notes 11 and 12 and corresponding text.

making themselves accountable to the laws of nature—laws that become civil laws[71]—via the social covenant, there is no wrong-*doing*.[72] Prior to prospective subjects instituting a political representative, there is no *punishment*.[73] I have argued in this paper that we cannot appreciate why the laws of nature prohibiting inequity, ingratitude, and cruelty are germane to the issue of the punishment of the innocent without first appreciating that prospective subjects authorize the sovereign to punish them for transgressing the law. Without appreciating that prospective subjects authorize the sovereign to punish them for transgressing the law, we cannot appreciate why inequity, ingratitude, and cruelty in punishment is contrary to domestic peace or invites war. Accordingly, Hobbes's appeals to the laws of nature prohibiting inequity, ingratitude, and cruelty in punishment are best understood as appeals to maintaining legitimacy in punishment grounded in each subject authorizing the sovereign to punish him *for transgressing the law*.

As I argued in section 3.2, inequity, for Hobbes, is a breach of *trust* to distribute justice impartially and deters persons from the use of arbitrators, which sends them back to a state of war. Inequity in punishment—the punishment of the innocent—betrays the *trust* for which the sovereign is authorized to distribute punishment for transgressions of

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[71] See *Leviathan*, 26/8, 138: "The law of nature and the civil law contain each other and are of equal extent. For the laws of nature, which consist in equity, justice, gratitude, and other moral virtues on these depending, in the condition of mere nature (as I have said before in the end of the fifteenth Chapter), are not properly laws, but qualities that dispose men to peace and to obedience. When a Commonwealth is once settled, then are they actually laws, and not before; as being then the commands of the Commonwealth; and therefore also civil laws."

[72] See *Leviathan*, 27/3, 152: "the civil law ceasing, crime cease; for there being no other law remaining but that of nature, there is no place for accusation; every man being his own judge, and accused only by his own conscience."

[73] As mentioned earlier, according to Hobbes, "it is of the nature of punishment to be inflicted by public authority, which is the authority only of the [political] representative itself" (*Leviathan*, 28/12, 163).

the law and causes subjects to reject the sovereign as the arbiter of justice. As I argued in section 3.3, ingratitude, for Hobbes, is the failure to keep track of the *expectation* of benefit to be derived from a gift and causes one to repent one's good will. Ingratitude in punishment—the punishment of the innocent—is the failure to keep track of the *expectation* of protection under the law for which the sovereign is authorized to punish transgressors of the law and causes subjects to regret the gift of sovereign authority. As I argued in section 3.4, cruelty, for Hobbes, is the infliction of violence without reason or *purpose*, which is an invitation to war. Cruelty in punishment—the punishment of the innocent—fails to attend to the *purpose* for which the sovereign is authorized to punish transgressors of the law. The purpose of granting the sovereign the right to punish is to make the laws of nature *in foro externo* obligatory. The punishment of the innocent annuls the *in foro externo* obligatory status of the law and thus reintroduces a state of affair in which one's actions are not bound by law.

However, the fact that legitimate authority to punish is limited by the commission of the right to punish does not, for Hobbes, entail that the sovereign's duty to only punish the guilty arises by virtue of the limitation placed on the authority to punish. The sovereign is only *indirectly* obliged to maintain legitimacy in punishment. Routinely inflicting illegitimate punishment on subjects is, potentially, a cause of rebellion or an annulment of the obligatory status of the law. The fact that subjects do not have a right to rebel against the sovereign or a right to cast off political allegiance does not preclude the possibility of revolt or civil war, as Hobbes was intimately aware.

The instigation of rebellion or the annulment of the *in foro externo* obligatory status of the law is, obviously, contrary to domestic peace and the safety of the people—

an end to which the sovereign is obliged by virtue of his obligation, not to his subjects directly, but to the laws of nature. According to Hobbes, "[t]he office of the sovereign, be it a monarch or an assembly, consisteth in the end for which he was trusted with the sovereign power, namely the procuration of the safety of the people, to which he is obliged by the law of nature."[74] And as Hobbes adds, "[t]he safety of the people requireth further, from him or them that have the sovereign power, that justice be equally administered to all degrees of people."[75] Because the sovereign is directly obliged to maintain domestic peace, the sovereign is indirectly obliged to maintain legitimacy in punishment.

The sovereign cannot procure or facilitate the stability or internal security of the commonwealth without the general confidence of his subjects that the law is a refuge from the uncertainty of the state of nature. A society in which subjects are liable for punishment after having been found innocent of transgressing the law will, inevitably, cease to be viewed by its subjects as a society ruled by law. It would be the sovereign, not the people, who instigates war. Once this threshold is passed—once the citizenry no longer views its society as ruled by law—it is no longer a society but rather a reversion of the multitude back to the state of nature.

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[74] *Leviathan*, 30/1, 175.

[75] *Leviathan*, 30/15, 180.

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Concluding Remarks

When we survey the literature on Hobbes's political theory, we find three accounts of the source of the sovereign's right to punish: i) each subject authorizes (or is understood to have authorized) the sovereign to punish him for transgressing the law;[1] ii) each subject authorizes the sovereign to punish all others but not himself;[2] and, iii) the sovereign's right to punish is not based on authorization; rather, the right to punish is identified as the unsurrendered natural right of violence of the person who holds the office of the sovereign. As noted throughout this dissertation, the overwhelming majority of Hobbes scholars attribute the third view to Hobbes.[3] Hobbes's definitive view, on my account, is the first—i.e., each prospective subject authorizes the sovereign to punish him for transgressing the law. I argued for this view in the first article of my dissertation, "The Right to Punish in Thomas Hobbes's *Leviathan*." Significantly, the latter two accounts fail to attend to Hobbes's distinction between punishment and hostility, a distinction to which I have attended in my first article, and elaborated upon in my third article,

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[1] This is the account I attribute to Hobbes. As I mentioned in the first article of my dissertation, so far as I am aware, only Clifford Orwin, "On the Sovereign Authorization," 31, explicitly holds this view: see "The Right to Punish in Thomas Hobbes's *Leviathan*," section 1.5, note 65 and corresponding text.

[2] For the original development of this view, see David Gauthier, *The Logic of Leviathan*, 146-148. Andrew Cohen, "Retained Liberties and Absolute Hobbesian Authorization," 42, adopts this view. Gauthier, it should be noted, does not attribute this view to Hobbes. Rather, he recommends the view as a way to overcome the inconsistencies he finds in Hobbes's account of punishment and authorization—as no person has a right to harm himself, no person can transfer such a right to the sovereign. There is no such inconsistency in Hobbes's account, however. Authorization, for Hobbes, does not require the possession of the right that is authorized. Prospective subjects, for example, do not have a natural right to make law, but they authorize the sovereign to make law; the right to punish, like the right to make law, is an artificial right.

[3] See my first article, "The Right to Punish in Thomas Hobbes's *Leviathan*," section 1.2, *infra* notes 11 and 12 and corresponding text.

"Hobbes on the Punishment of the Innocent." As I have argued, the distinction between punishment and hostility, for Hobbes, draws on the distinction between acts of political representation and acts of what we can call natural representation. Political authorization—that is, commissioning a representative to act on behalf of the unified multitude or, what is the same, the Commonwealth—grounds legitimacy in punishment. The institution of punishment, for Hobbes, is not merely the product of a power vacuum; it has a normative foundation, which authorization provides. Failing to attend to the normative foundation of the sovereign representative's acquisition of the right to punish—acquisition through each subject authorizing the sovereign to punish him for (and only for) transgressing the law—entails failing to attend to Hobbes's explicit distinction between punishment and hostility. Accordingly, as I argue in this conclusion, failing to attend to Hobbes's view that each subject authorizes the sovereign to punish him for transgressing the law entails failing to attend to Hobbes's theory of punishment.

Hobbes conceives of *punishment* as comprised of a number of essential features. Firstly, for an act to be construed as punishment, it must have been inflicted by a recognized representative authority over a subordinate; as Hobbes claims, "it is of the nature of punishment to be inflicted by public authority, which is the authority only of the representative itself"[4] and "neither private revenges nor injuries of private men can properly be styled punishment, because they proceed not from public authority."[5] Secondly, punishment can only be a retributive response to a known law; as Hobbes claims, "[n]o law made after a fact done can make it a crime: because if the fact be

[4] *Leviathan*, 28/12, 163. References to *Leviathan* are by chapter and paragraph(s) in the G.C.A. Gaskin (1996) edition, followed by page number(s) in the original (1651) edition. All emphases are in the original work unless otherwise noted.

[5] *Leviathan*, 28/3, 162.

against the law of nature, the law was before the fact; and a positive law cannot be taken notice of before it be made, and therefore cannot be obligatory"[6] and "harm inflicted for a fact done before there was a law that forbade it is not punishment, but an act of hostility: for before the law, there is no transgression of the law."[7] Thirdly, punishment must be consistently applied and consistent with the declared penal law; as Hobbes states "when a penalty is either annexed to the crime in the law itself, or hath been usually inflicted in the like cases, there the delinquent is excused from a greater penalty"[8] and "if a punishment be determined and prescribed in the law itself, and after the crime committed there be a greater punishment inflicted, the excess is not punishment, but an act of hostility."[9] Lastly, punishment can only be inflicted after public trial and finding of guilt; as Hobbes states, "evil inflicted by public authority, without precedent public condemnation, is not to be styled by the name of punishment, but of a hostile act, because the fact for which a man is punished ought first to be judged by public authority to be a transgression of the law"[10] and "punishment supposeth a fact judged to have been a transgression of the law."[11]

Hobbes defines punishment as follows: "A PUNISHMENT is an evil inflicted by public authority on him that hath done or omitted that which is judged by the same

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[6] *Leviathan*, 27/9, 153.

[7] *Leviathan*, 28/11, 163.

[8] *Leviathan*, 27/8, 153.

[9] *Leviathan*, 28/10, 162.

[10] *Leviathan*, 28/5, 162.

[11] *Leviathan*, 28/11, 163.

authority to be a transgression of the law."[12] Contrary to the traditional view, Hobbes's theory of punishment is not independent of his political theory. His theory of punishment is, indeed, subordinate to his political theory. Accordingly, Hobbes's definition of punishment simply reiterates the features of a juridical institution that is politically constituted through authorization. Violence inflicted upon a subject is, for Hobbes, punishment *proper* when (and only when) the act conforms to the features noted above: that it follows the public finding of guilt of transgression of a known law; that it accords with penal law; and, most significantly, that it is performed by the person (or persons) who is granted the authority to punish. Each of these features reflects a core idea that runs through Hobbes's conception of *punishment*, namely, that it is governed through law. The distinction between punishment as necessarily governed through law and the capricious exercise of the natural right to violence draws on the distinction between violent acts of political representation and violent acts of what we can call natural representation. The sovereign is authorized as the artificial representative of the person of the Commonwealth, i.e., the unified multitude; as Hobbes states, "he that carryeth this person [of the Commonwealth] is called SOVEREIGN."[13] Prospective subjects transcend the state of nature through the institution of an artificial person, *a person whose will is necessarily tied to law*; as Hobbes states, "the sovereignty is an artificial soul, as giving life and motion to the whole body [of the Commonwealth]," and, as Hobbes adds, "[e]quity and laws [are] an artificial reason and will."[14]

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[12] *Leviathan*, 28/1, 161.

[13] *Leviathan*, 17/14, 88.

[14] *Leviathan*, Introduction/1, 1; original emphases omitted.

The second account of the source of the sovereign's right to punish—i.e., each prospective subject authorizes the punishment of all others but not himself—does not trace representation back to the person being punished. Although the sovereign is authorized to represent the person of the Commonwealth in punishing a subject, in order for the punishment to be an act of political representation, that very subject must have authorized the sovereign to punish him for transgressing the law. The act of authorization, for Hobbes, entails that one takes upon oneself—takes responsibility for—the actions of another. Authorization draws on authorship: as Hobbes states, "he that owneth his [the actor's or representative's] words and actions is the AUTHOR, in which case the actor acteth by authority."[15] The authorization of the punishment of another—and not oneself—entails that the act of punishment does not have as the author of the act the person upon whom harm is inflicted. But if this is the case, then the act is not punishment but, rather, an act of hostility; as Hobbes declares, "evil inflicted by usurped power [...] is not punishment, but an act of hostility, because the acts of power usurped *have not for author the person condemned*."[16] While the context of this quote is the issue of usurped power—perhaps, for example, through rebellion—the underlying principle of Hobbes's claim is clear: without prior authorization by the would-be condemned, the evil inflicted upon that person does not count as punishment. Thus, one may, perhaps as an act of treachery, purport to "authorize" the rebellion leader(s) to "punish" other subjects who, holding their allegiance to their exiled sovereign, have not submitted to the usurped power. The acquisition of sovereignty by treachery notwithstanding, any subsequent infliction of harm by the so-called "authorized" usurped power on one that did not submit

[15] *Leviathan*, 16/4, 81.

[16] *Leviathan*, 28/6, 162; emphasis added.

does not count as punishment.[17] The power to punish, we see here, is not a sufficient condition for legitimacy in punishment. Vicarious authorization,[18] in attempting to account for the basis of the sovereign's possession of the right to punish, fails to attend to Hobbes's distinction between punishment and hostility. As such, this second account fails to attend to the basis of legitimacy in Hobbes's theory of punishment. This second account, despite its alleged appeal to authorization, does not attend to Hobbes's important claim that the person condemned is "author of *his own* punishment."[19]

The tradition almost unanimously holds Hobbes to the third account of the source of the sovereign's right to punish: the right to punish is identified with the unsurrendered natural right to violence. As we have seen, the tradition holds that it is only through the natural right to violence, which all persons naturally enjoy but only the person who holds the office of sovereignty retains, that the sovereign possesses the authority to enforce the law. On this account, insofar as a person possesses the power to enforce the law, the authority to punish is *legitimate*; *de jure* authority to punish, on this account, is reduced to *de facto* power to enforce the law—power that is understood by the traditional view to be the product of a mass relinquishment of natural rights. This reduction of *de jure* authority to punish to *de facto* power to enforce the law is the natural consequence of the view that the source of the sovereign's right to punish is simply the product of the power vacuum created by the mass relinquishment of natural rights. The authority to punish, on

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[17] We should note that an unjustly acquired sovereignty, for Hobbes, does not *disqualify* the victor of the rebellion from becoming sovereign. But, as we see below, the victor is sovereign over the subjects of the deposed sovereign only when the victor is authorized by the subjects of the deposed sovereign.

[18] Thomas S. Schrock, in "The Right to Punish and the Right to Resist Punishment in Hobbes's Leviathan," 873-877, uses this term in describing Gauthier's view.

[19] *Leviathan*, 18/3, 89; emphasis added.

the traditional view, is legitimate when the practice of punishment is sufficiently effective in coercing conformity to the law. That is to say, the authority to punish, on the traditional view, is grounded in the realities of power which enable the threat and/or the infliction of violence to effectively discourage potential acts of non-conformity. However, as I will emphasize below, for Hobbes, simply possessing the monopoly on power to enforce the law is insufficient for legitimacy in punishment.

Dominion over subjects, according to Hobbes, can be acquired in two ways: the first, which Hobbes takes to be the paradigmatic way, is sovereignty by institution; the second is sovereignty acquired by force. I have noted a number of times in this dissertation that, for Hobbes, included in the list of rights *conferred* upon the sovereign by *institution* is the right to punish: once more, according to Hobbes, mutual authorization by prospective subjects is the means by which "all the *rights* and *faculties* of him, or them, on whom the sovereign power is conferred by the consent of the people assembled."[20] The right to punish is included in the catalogue of rights *conferred* upon the sovereign; as Hobbes maintains, "to the sovereign is *committed* the power of rewarding with riches or honour; and of punishing with corporal or pecuniary punishment, or with ignominy, every subject according to the law he hath formerly made."[21] The other source of dominion—sovereignty by force—may be thought to give credence to the traditional view of the sovereign's right to punish, as the traditional view reduces the authority to punish to the possession of the monopoly on power to enforce the law, a monopoly which a successful acquisition surely gains. However, the traditional view of the right to punish identified as the right of war does not find support in Hobbes's

[20] *Leviathan*, 18/2, 88.

[21] *Leviathan*, 18/14, 92; emphasis added.

considerations of sovereignty by acquisition. Sovereignty by force, as with sovereignty by institution, fails to exercise *de jure* authority over subjects absent the authorization of that force. Appeal to the mere possession of the power to unilaterally enforce conformity to the law, absent the authorization of the sovereign by each prospective subject, fails to attend to Hobbes's distinction between punishment and hostility.

Regarding sovereignty by acquisition or conquest, Hobbes claims that those who are captive—and, in the case of sovereignty by rebellion, we can also characterize those who sided with the deposed sovereign as captives—in order to be subject to the law, must be understood to have authorized the new sovereign. According to Hobbes,

> A COMMONWEALTH by *acquisition* is that where the sovereign power is acquired by force; and it is acquired by force when men singly, or many together by plurality of voices, for fear of death, or bonds, do *authorize* all the actions of that man, or assembly, that hath their lives and liberty in his power.[22]

Hobbes's distinction between those who authorize the victor and those who do not draws on the distinction between servants and slaves. The victorious sovereign does not hold dominion over the slave. Dominion, according to Hobbes,

> is acquired to the victor when the vanquished, to avoid the present stroke of death, covenanteth, either in express words or by other sufficient signs of the will, that so long as his life and the liberty of his body is allowed him, the victor shall have the use thereof at his pleasure. And after such covenant made, the vanquished is a SERVANT, and not before.[23]

The vanquished "covenanteth" with the victor; that is, the vanquished "authorize all the actions" of the victor. The victor does not hold dominion or authority over the vanquished until "after such covenant made," and, as Hobbes attests, "not before" such authorization. Thus, whether prospective subjects covenant to relinquish their natural

[22] *Leviathan*, 20/1, 103; latter emphasis added.

[23] *Leviathan*, 20/10, 103-104.

right to everything to one another or surrender their natural right to everything to the conquering sovereign, the sovereign's possession of the authority to punish has a normative foundation in authorization. The monopoly on force through the *relinquishment* or *surrender* of the right to violence is enveloped in a process of legitimation. Absent the requisite legitimation through authorization, the vanquished are not servants of the Commonwealth but, rather, slaves held by the Commonwealth. And any infliction of harm on the slave does not count as punishment.

As I mentioned above, the distinction between servants and slaves draws on the distinction between those who authorize the sovereign and those who do not; i.e., those who take upon themselves accountability or obligation to the law and those who do not. As Hobbes states,

> for by the word *servant* […] is not meant a captive, which is kept in prison, or bonds, till the owner of him that took him, or bought him of one that did, shall consider what to do with him: for such men, commonly called slaves, have no obligation at all; but may break their bonds, or the prison; and kill, or carry away captive their master, justly.[24]

Detainment of captives—those captives "kept in prison, or bonds"—is not punishment *proper*. Imprisonment of those who are not subjects—those who, for example, still consider themselves bound to, or have allegiance to, the vanquished sovereign—is not punishment. For Hobbes, punishment, by definition, has for its "end that the will of men may thereby the *better* be disposed to obedience."[25] I argued in my second article, "Hobbes on the Rationale of Punishment," that the harm (or threat of harm) inflicted upon enemies cannot be understood to endeavour *better* obedience to those who are not disposed to obedience. Likewise, any harm inflicted upon captives is not intended to

[24] *Leviathan*, 20/10, 104.

[25] *Leviathan*, 28/1, 161; emphasis added.

dispose *better* obedience to the law, as captives have no obligations to obey the victor before authorization; thus, any harm inflicted is not to be construed as *punishment* but, rather, *hostility*. As Hobbes states, "all evil which is inflicted without intention or possibility of disposing the delinquent or, by his example, other men to obey the laws is not punishment, but an act of hostility, because without such an end no hurt done is contained under that name."[26] Whipping a captive, for example, does not dispose that captive to obey laws that he is not obliged to obey. And the infliction of such harm does not, by example, dispose those who are already obliged to obey, as the infliction of evil on a captive does not maintain the authority of law over relinquished natural rights. Captives do not relinquish (or have yet to relinquish) any natural rights; as such, the harm inflicted upon captives does not reaffirm the authority of the law over renounced natural rights.

I argued in my second article, "Hobbes on the Rationale of Punishment," that, for Hobbes, the threat of punishment does not generate the obligation to the law; the threat may generate an obligation to act in conformity with a particular law insofar as the threat is taken to be genuine but, again, the threat does not generate an obligation to the law as such. Akin to the view that the threat of punishment does not generate the obligation to the law, we can appreciate that it is not because the vanquished is under the sword that he is obliged to obey the law. As Hobbes states, "[i]t is not therefore the victory that giveth the right of dominion over the vanquished, but his own covenant. Nor is he obliged because he is conquered; that is to say, beaten, and taken, or put to flight; but because he

[26] *Leviathan*, 28/7, 162.

cometh in and submitteth to the victor."[27] The threat of harm for transgressing the law maintains obedience because one is already obliged to obey the law through "his own covenant" or his own grant of authority.[28] The victorious leader of the rebellion or the conquest, absent subsequent authorization by each captive, does not have the authority to punish. Once more, as Hobbes states, "evil inflicted by usurped power [...] is not punishment, but an act of hostility, because [without authorization] the acts of power usurped have not for author the person condemned."[29]

We must not acquiesce to the traditional view that Hobbes's theory of punishment is independent of his theory of political authority. The concern regarding the power to enforce the law through the threat of punishment is not independent of the concern regarding the political lineage of the force that possesses the power to enforce the law; to establish *de jure* authority to punish, the lineage of the force that possesses the power to enforce the law must be traced back to authorization. Without the proper lineage, *de facto* power to enforce one's imposed laws is not *de facto* power to punish, as any such enforcement is not punishment but, rather, acts of hostility. Indeed, as I stated above, Hobbes's theory of punishment is subordinate to his political theory. Hobbes's definition of punishment simply reiterates the norms of an institution that is politically constituted through the authorization by each subject the sovereign to punish him for transgressing the law. The sovereign is authorized to punish according to law; again, as Hobbes maintains, "to the sovereign is committed the power of rewarding with riches or honour;

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[27] *Leviathan*, 20/11, 104.

[28] As I have argued in my second article, "Hobbes on the Rationale of Punishment," the general threat maintains obedience by assuring that conformity to the law will not procure one's ruin.

[29] *Leviathan*, 28/6, 162.

and of punishing with corporal or pecuniary punishment, or with ignominy, every subject *according to the law he hath formerly made*."[30] This authorization of a representative duty-bound to law follows from the general view of sovereignty as the artificial person who wills through law. Neither the sovereign nor any of its agents, *as representative of the Commonwealth*, have the freedom to act outside of the law. Those who are commissioned by the sovereign to execute punishment only have the authority to punish in accordance with the law. "Public ministers," according to Hobbes, "are also all those that have authority from the sovereign to […] apprehend and imprison malefactors; and other acts tending to the conservation of the peace. For every act they do by such authority is the act of the Commonwealth."[31] Commissioned ministers of the executive do not have the authority to exercise the unrestrained right of nature. Public ministers are bound to inflict only those punishments that the penal law determines *shall* be inflicted for the particular transgression; as Hobbes claims, "*Penal* [*laws*] are those which declare what penalty *shall* be inflicted on those that violate the law; and speak to the ministers and officers ordained for execution."[32]

If we subscribe to the traditional view of Hobbes's account of punishment as an act of war or the exercise of the right of nature, we cannot account for the essential features that Hobbes assigns to punishment. Advocates of the traditional account of Hobbes's treatment of punishment deny that punishment is inflicted by an authority over a subordinate. As one commentator notes, "[o]nce a subject has disobeyed the sovereign, he and the sovereign are in the state of nature vis-à-vis each other. […T]he criminal has

[30] *Leviathan*, 18/14, 92; emphasis added.

[31] *Leviathan*, 23/10, 126.

[32] *Leviathan*, 26/38, 148; latter emphasis added.

put himself and the sovereign into a conflict with no mutually recognized third-party adjudicator."[33] This view is in contrast to Hobbes's claim that punishment is "an evil inflicted by public authority."[34] Advocates of the traditional account of Hobbes's treatment of punishment deny that the infliction of punishment is bound by penal law; as one commentator notes, "[Hobbes] thus made the right of domestic punishment the same kind of thing as the right to wage foreign war."[35] The right of nature or the right of war, for Hobbes, is the right of "doing anything which, in his own judgement and reason, he shall conceive to be the aptest means thereunto [his own preservation]."[36] This view is in contrast to Hobbes's claim that "to the sovereign is committed the power […] of punishing with corporal or pecuniary punishment, or with ignominy, every subject *according to the* [*penal*] *law he hath formerly made*."[37] These significant points of contrast are the consequence of the view that Hobbes denies a normative foundation for the institution of punishment, specifically, that Hobbes rejects authorization as the basis of the sovereign representative's possession of the right to punish; as one commentator notes, "[Hobbes] gives a separate explanation for the sovereign's right to punish; it is part of his right of nature and thus independent of the rights transferred to him in the social contract."[38]

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[33] Alice Ristroph, "Respect and Resistance in Punishment Theory," 615.

[34] *Leviathan*, 28/1, 161.

[35] Richard Tuck, *Natural Rights Theories: Their Origin and Development*, 125.

[36] *Leviathan*, 14/1, 64.

[37] *Leviathan*, 18/14, 92; emphasis added.

[38] Susanne Sreedhar, *Hobbes on Resistance: Defying the Leviathan*, 16.

The sovereign exercises the right of war only against an enemy, not against a subject. While the sovereign is certainly bound *by* the laws of nature, whether in punishing or exercising his right of war, in punishing that the sovereign is also bound *to* the civil or penal law. The sovereign is required to punish by law, not by caprice; not all infliction of evil on a subject is lawful. On the traditional interpretation, the clear distinction Hobbes draws between the harm inflicted upon a subject and the harm inflicted upon an enemy cannot be accounted for; nor, for that matter, can the juridical constraint on the harm inflicted upon subjects be accounted for.

It can be the case that the sovereign commits acts of cruelty against subjects as well as against enemies; in doing so, the sovereign does not do injury to either (does not commit injustice) but, rather, offends against his own conscience (or sins against God). With regard to punishment in particular, it may be the case that the sovereign acts with cruelty against or acts inequitably towards a subject, for example, with the imposition of a prison term longer than the penal law calls for or, the concern that I address in the third article, "Hobbes on the Punishment of the Innocent," continuing to imprison a subject who has been acquitted by a judge. However, only in acting with cruelty against or acting inequitably towards a subject can we say that *something more than a moral wrong occurs*. The sovereign offends against the office of sovereignty. According to Hobbes, the iniquitous imprisonment, as a kind of offence against the office of sovereignty, is attributed to the sovereign as a private individual (or as a natural, as opposed to artificial, person). In addition to the moral wrong, there is a certain mien of illegitimacy that Hobbes recognizes to be involved in iniquitous prison terms, punishments harsher than the law prescribes, or the punishment of the innocent. Only when we understand and

appreciate the central role authorization plays in Hobbes's theory of punishment are we able to fully understand and appreciate Hobbes's concern with legitimacy in punishment.

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